BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
Petitioner,	)	
v.	)	
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 10-75 (Permit Appeal)
Respondent,	)	
NATURAL RESOURCES DEFENSE COUNCIL, INC., and SIERRA CLUB,	)	
Intervenors.	)	

NOTICE OF FILING

TO:

Michael J. Maher
Elizabeth Harvey
Swanson, Martin & Bell, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611
eharvey@smbtrials.com

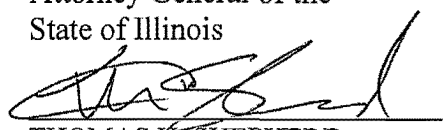
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601
hallorab@ipcb.state.org

Ann Alexander, Senior Attorney
Shannon Fisk, Senior Attorney
Natural Resources Defense Council
2 North Riverside Plaza, Suite 2250
Chicago Illinois 60606
aalexander@nrdc.org

PLEASE TAKE NOTICE that on the 17th day of August, 2012, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached Respondent's Motion for Summary Judgment a copy of which is hereby served upon you.

Respectfully submitted,

LISA MADIGAN,
Attorney General of the
State of Illinois

By: 

THOMAS H. SHEPHERD
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-5361

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
Petitioner,	)	
v.	)	
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 10-75 (Permit Appeal)
Respondent,	)	
NATURAL RESOURCES DEFENSE COUNCIL, INC., and SIERRA CLUB,	)	
Intervenors.	)	

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Respondent"), by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508, and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, CHICAGO COKE CO., INC. ("Chicago Coke" or "Petitioner"), in that there exists no genuine issues of material fact and that the Illinois EPA is entitled to judgment as a matter of law. In support of its motion, the Illinois EPA states as follows:

I. INTRODUCTION

Chicago Coke filed its Petition with the Illinois Pollution Control Board ("Board") on March 29, 2010, seeking review of the Illinois EPA's decision that emissions reductions claimed by Chicago Coke are not available for use as emission offsets for the permitting of major new emissions sources and/or major modifications to sources in the Greater Chicagoland ozone and

fine particulate matter ("$PM_{2.5}$") nonattainment areas ("Emission Offsets" or "Emission Reduction Credits" ("ERCs")). A copy of the Petition is attached as Exh. 1 to Respondent's Exhibits in Support of Respondent's Motion for Summary Judgment.[1] For almost three years, the Illinois EPA and Chicago Coke had discussions regarding the creditability of the emission reductions at Chicago Coke's coke production facility located at 11400 South Burley Avenue, Chicago, Illinois ("Facility"). In its decision letter, dated February 22, 2010, the Illinois EPA reiterated its decision conveyed to Chicago Coke denying the availability of the emission reductions for use as offsets on the basis that, pursuant to federal guidance, the Facility is permanently shut down and the emission reductions accompanying the shutdown are no longer creditable. A copy of the Illinois EPA's decision is attached as Exhibit D to the Petition. (*See also* the Affidavit of Laurel Kroack Submitted in Support of Respondent's Motion for Summary Judgment, which is incorporated by reference into this Motion ("Kroack Affd.") ¶¶ 10-21.)

The issues before the Board are simple. First, the Facility was permanently shutdown in 2002 because Chicago Coke did not demonstrate a continuous intent to reopen the Facility as required under applicable federal guidance. Second, the emission reductions from the shutdown Facility were no longer creditable for use as Emission Offsets. At the time of the Respondent's decision:

(i) The Facility had been shutdown and physically unable to produce coke since at least February 2002, when its then-owner placed the Facility in cold-idle status;

(ii) Chicago Coke had never operated the Facility since taking ownership in 2002;

(iii) Since 2003, Chicago Coke reported zero emissions of regulated air pollutants from coking operations at the Facility;

[1] The Illinois EPA incorporates by reference into this motion the separately filed Respondent's Exhibits in Support of Respondent's Motion for Summary Judgment ("Respondent's Exh. __".)

(iv) In 2004, necessary repairs to restart the Facility were estimated to cost between $88 million and $1.2 billion;

(v) Chicago Coke did not make the necessary repairs to the Facility under a construction permit issued in 2005 allowing Chicago Coke to restart coking operations;

(vi) In 2007, Chicago Coke informed the Illinois EPA that it no longer intended to reoperate the Facility, but rather it intended to sell the real property and any claimed ERCs for redevelopment as a different type of facility;

(vii) The Facility was removed as a source in the State of Illinois's ("State") emissions inventory in 2008;

(viii) Chicago Coke ceased paying the required operating fees in 2008 and stopped submitting the annual emissions reports ("AERs") to the Illinois EPA in 2009; and

(ix) As emissions from the Facility's coke ovens, by-products plant, boilers, and related operations were not included in the State's emissions inventory, they were "counted" as zero for purposes of the State's demonstration of continued attainment of the 1997 8-Hour Ozone National Ambient Air Quality ("NAAQS") Standard for the Chicago nonattainment area, submitted to the United States Environmental Protection Agency ("USEPA") in 2009.

Accordingly, a grant of Chicago Coke's request for a finding that emission reductions are available to use as Emission Offsets for new projects would be contrary to federal and state law and regulations, and the Illinois EPA's denial was lawful, sufficient, and proper. Chicago Coke's Petition, the administrative record filed by the Illinois EPA ("Administrative Record"), and the arguments and the affidavits presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the decision set forth in Illinois EPA's February 22, 2010 decision letter.

II. STANDARD FOR REVIEW AND ISSUANCE

A motion for summary judgment should be granted where the record, pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b); *see also Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 483 (1998); *McDonald's Corp. v. Illinois EPA*, PCB 04-14, slip op. at 2 (Jan. 22, 2004). A party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which could arguably entitle [it] to a judgment." *Gauthier v. Westfall*, 266 Ill.App.3d. 213, 219 (2d Dist. 1994).

Chicago Coke appeals pursuant to Section 40 of the Illinois Environmental Protection Act ("Act") and Parts 101 and 105 of the Board's procedural rules, 35 Ill. Adm. Code Parts 101 and 105. (*See* Pet. at p. 1. (Exh. 1)) The Board has asserted jurisdiction over this matter pursuant to Section 5(d) of the Act, 415 ILCS 5/5(d) (2010). *Chicago Coke v. IEPA*, PCB 10-75, slip op. at 8 (Sept. 2, 2010). Part 105 of the Board's procedural rules shall apply to any appeal to the Board of final decisions of the Illinois EPA. 35 Ill. Adm. Code 105.200. Section 105.214(a) of the Board's procedural rules, 35 Ill. Adm. Code 105.214(a), provides that Board hearings will be based exclusively on the record before the Illinois EPA at the time the agency issued its determination. *See also* 415 ILCS 5/40(d) (2010). Accordingly, information developed after the Illinois EPA's decision typically is not admitted at hearing or considered by the Board. *See e.g.*, *Alton Packaging Corp, v. PCB*, 162 Ill. App. 3d 731, 738 (5th Dist. 1987); *Community Landfill Co. v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. v. PCB*, 331 Ill. App. 3d 1056 (3rd Dist. 2002). "If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact." 35 Ill. Adm. Code 105.214(a). Therefore, in

reviewing the Illinois EPA's decision under appeal here, the Board must look to the documents within the Administrative Record.

Although Chicago Coke's request for a determination from the Illinois EPA regarding the claimed ERCs does not literally constitute a permit appeal, Chicago Coke appeals under Section 40 of the Act. (*See* Pet. at p. 1. (Exh. A)) The general scope of review of a permit appeal under Section 40 is whether or not there would be a violation of the Act or regulations if the permit is issued. *Alton Pkg. Corp. v. IEPA*, PCB 85-145, 64 PCB 234, 236 (Apr. 24, 1986) *aff'd sub nom. Alton Packaging Corp. v. PCB*, 162 Ill.App.3d 731 (5th Dist. 1987); *Joliet Sand & Gravel Co. v. PCB*, 163 Ill.App.3d 830, 833 (3d Dist. 1987); *Wells Mfg. Co. v. IEPA*, PCB 86-48, 76 PCB 324, 334-335 (Mar. 19, 1987); *EPA v. PCB*, 118 Ill. App.3d 722, 780 (1st Dist. 1983); *Oscar Mayer & Co. v. IEPA*, PCB 78-14, 30 PCB 297, 398 (June 8, 1978). In analyzing an Illinois EPA decision, the Board reviews the information that the Illinois EPA relied on in making its decision. Thereafter, "the Board places the burden on the petitioner to prove that it is entitled to a permit and that the [Illinois EPA's] reasons for denial are either insufficient or improper." *See In Matter of: Emissions Reductions Market System Adoption of 35 Ill. Adm. Code 205 and Amendment to 35 Ill. Adm. Code 106*, PCB R97-13, slip op. at 27 (July 10, 1997) *citing Alton Packaging Corp*, 162 Ill. App.3d 731 and *ESG Watts, Inc. v. IEPA*, PCB 94-243 (Mar. 21, 1996).

As will be argued below, the relevant facts in this case are undisputed and clearly demonstrate that granting Chicago Coke's request that its emission reductions be deemed available for use as Emission Offsets would be contrary to the law and that the Illinois EPA's reasons for denying the request were lawful, sufficient, and proper.

III. BURDEN OF PROOF

In appeals of final agency decisions, pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. Thus, under Section 40 of the Act, when reviewing the Illinois EPA's determination of availability of emission reductions for use as emission offsets, the Board must decide whether the Petitioner has demonstrated that it was entitled to ERCs and whether the Illinois EPA's reasons for denial are either insufficient or improper. *See Emissions Reductions Market System Adoption*, PCB R97-13.

IV. STATEMENT OF FACTS

The facts in the Administrative Record supporting this motion are as follows:

1. The Facility consisted of sixty coke ovens, joined together in an arrangement known as a battery ("Coke Oven Battery"), and an accompanying by-products recovery plant. (*See* Tier II Insp. Rpt. (May 7, 2004), at p. 1 (Respondent's Exh. 2))

2. Prior to November 2002, the Facility was owned by LTV Steel, Inc. ("LTV"). (*See* Sale and Purchase Agmt. (Nov. 15, 2002) (Respondent's Exh. 3))

3. On December 29, 2001, LTV ceased operation of the Coke Oven Battery and placed the Facility into "hot-idle," wherein LTV maintained the Coke Oven Battery at a minimum temperature using natural gas to prevent contraction of the refractory brickwork in the coke ovens and to maintain the ability to readily resume operation of the Coke Oven Battery. (*See* Affd. of Michael A. Gratson (May 3, 2004) ("Gratson Affd."), ¶ 4 (Respondent's Exh. 4)) The Coke Oven Battery was constructed primarily of silica brick, which must be kept hot to maintain its structural integrity. (*Id.* ¶ 6.)

4. In February 2002, LTV stopped natural gas firing for the Coke Oven Battery at

the Facility, placing the Coke Oven Battery into "cold-idle." (*See* Affd. of Keith G. Nay (May 3, 2004) ("Nay Affd."), ¶¶ 1-2 (Respondent's Exh. 5); *see also* Gratson Affd. ¶ 6. (Exh. 4)) To remove the Coke Oven Battery from cold-idle and enable the long-term operation of the battery, refractory brick in the battery that has been contracted from cool temperatures would have to be replaced through a "pad-up rebuild." (*See* Gratson Affd. ¶ 6. (Exh. 4))

5. On December 30, 2002, Calumet Transfer, LLC ("Calumet"), finalized the purchase of the Facility from the bankruptcy estate of LTV and Calumet organized Chicago Coke to operate the Facility. (*See* Ltr. from Simon A. Beemsterboer, President of Chicago Coke, to the Illinois EPA (May 3, 2004) ("Beemsterboer Ltr"), at p. 7 (Respondent's Exh.6)) At the time of the purchase, the Facility was not in operation. (*Id.* at p. 3.)

6. On July 14, 2003, the Illinois EPA transferred the existing Clean Air Act Permit Program ("CAAPP") permit for the Facility ("CAAPP Permit") from LTV to Chicago Coke. (*Id.* at p. 7.)

7. On May 3, 2004, Chicago Coke applied to the Illinois EPA for a construction permit authorizing a pad-up rebuild of the Coke Oven Battery. At the time of its permit application, Chicago Coke admitted to the Illinois EPA that the battery had been "shutdown" and placed into "cold idle-mode" in February 2002. (*Id.* at pp. 2-3.) Chicago Coke estimated that the pad-up rebuild necessary to restart operation of the Coke Oven Battery would cost $88 million. Moreover, the cost of constructing a new battery was estimated at $600 million, and construction of a new Coke Oven Battery, byproducts plant, and auxiliary equipment was estimated to cost greater than $1.2 billion. (*See* Nay Affd. ¶ 5 (Exh.5)); Beemsterboer Ltr. at p. 17. (Exh. 6))

8. In September 2004, Chicago Coke submitted to the Illinois EPA a renewal

application for the Facility's CAAPP Permit. (*See* Kroack Affd. ¶ 8.)

9. On January 25, 2005, the Illinois EPA conducted a public hearing regarding Chicago Coke's draft construction permit for the pad-up rebuild of the Coke Oven Battery. (*See* Rpt. of Proceedings In the Matter of: Proposed Issuance of a Construction Permit to Chicago Coke Company ("Public Hearing"), at p. 1, lines 9-16 (Respondent's Exh. 7) (referenced portions attached hereto))[2] At the Public Hearing, the Illinois EPA acknowledged that the Facility was shutdown. However, for purposes of issuing the construction permit, the Illinois EPA determined that, based on the facts before the Agency and applicable federal guidance, discussed *supra*., the Facility was not permanently shut down and was an existing emissions source, as opposed to a new source. (*Id*., testimony of Jason Schnepp of the Illinois EPA, Bureau of Air, at p. 8, lines 7-19.) This determination was based in part upon Chicago Coke's represented "goal...to resume operations at [the Facility] as soon as possible, since the market of coke has improved." (*Id*.) In this regard, Chicago Coke testified at the Public Hearing that the proposed construction permit would be "the final permit in getting [the Facility] reopened, and "[would] allow [Chicago Coke] to build a state-of-the-world coke-making facility." (*Id*., testimonies of Simon and Steven Beemsterboer, at p. 12, lines 8-9, and p. 14, lines 4-6.)

10. The Illinois EPA determined that the Facility was not permanently shutdown at the time of Chicago Coke's permit application based largely on information submitted by Chicago Coke, including information regarding: (i) the company's ongoing inspections and maintenance of equipment at the Facility; (ii) procedures followed by the Facility during the hot and cold shutdowns; (iii) the Facility's continued payment of operating fees and continued submittal of required reports; (iv) the Facility's maintenance of necessary permits; (v) the

[2] A copy of the Public Hearing was inadvertently not included in the Administrative Record. Respondent will file a copy of the Public Hearing with the Board to complete the Administrative Record.

Facility's continued presence in the State's Emissions Inventory; (vi) the fact that no demolition of any buildings or process facilities that would be used to resume operations had been conducted; and (vii) the stated intent of the owners of Chicago Coke that they intended to restart the Facility. (*See* Beemsterboer Ltr. at p. 4-19 (Exh.6); s*ee also* the Illinois EPA's Responsiveness Summary for Public Questions and Comments on the Construction Permit Application from Chicago Coke Company ("Response to Public Comments"), Nos. 4 and 63, at pp. 5 and 24 (Respondent's as Exh. 8)) At this point, the Facility had only been shut down approximately three years.

11. On April 28, 2005, the Illinois EPA issued construction permit number 04010037 to Chicago Coke ("Construction Permit") authorizing the pad-up rebuild of the Coke Oven Battery necessary to restart coking operations. (*See* Ltr. from Katherine D. Hodge to the Illinois EPA (Aug. 3, 2007) ("8/3/07 Hodge Ltr."), at p. 1 (Pet. at Exh. A))

12. In mid-2006, Chicago Coke began negotiating with Chicago Clean Energy, LLC ("CCE") for the sale of the real property and the claimed ERCs for redevelopment as a coal gasification plant. (*Id.*) Specifically, Chicago Coke entered into a Letter of Intent with CCE for the purchase of certain claimed ERCs. (*Id.*)

13. On October 28, 2006, the Construction Permit expired. (*Id.*) Chicago Coke never constructed the pad-up rebuild of the Coke Oven Battery as authorized under the permit. (*See* Chicago Coke's Responses to IEPA's First Requests for Admission of Facts to Petitioner ("Petitioner's Resp. to RFAs"), No. 19 (Respondent's Exh. 9))

14. From June 2007 through February 2010, the Illinois EPA and Chicago Coke had several meetings and communications regarding the creditability of the Facilities emission reductions for use as Emission Offsets in future permitting transactions. (See Kroack Affd. ¶

11.)

15. On July 11, 2007, representatives of Chicago Coke met with the Illinois EPA regarding Chicago Coke's intent to sell the Facility and the claimed ERCs to the purchaser CCE. (*See* 8/3/07 Hodge Ltr. at p. 1 (Pet. at Exh. A.) At the meeting, the Illinois EPA expressed its concerns with the availability of Chicago Coke's emission reductions for use as Emission Offsets under Section 203.303 of the Board's regulations, 35 Ill. Adm. Code 203.303, and under federal law, regulations, and guidance. (*Id.*; *see also* Kroack Affd. ¶ 10.) Chicago Coke sent the 8/3/07 Hodge Ltr. to the Illinois EPA to address the Agency's concerns. (*See* 8/3/07 Hodge Ltr. at p. 1 (Pet. at Exh. A))

16. Beginning in the year 2008, Chicago Coke ceased paying the Illinois EPA operating fees under the CAAPP program for the Facility. (*See* Petitioner's Resp. to RFAs, Nos. 20-21. (Exh.9))

17. In 2008, the Facility was removed from the State's emissions inventory, maintained by the Illinois EPA. ("Emissions Inventory"). (*See* Illinois EPA notation (Respondent's Exh.10); *see also* Respondent's Responses to Intervenors' Requests to Admit to Respondent ("Respondent's Resp. to Intervenors' RFAs"), Request 4 (Respondent's Exh. 11.); Kroack Affd. ¶ 17.) From 2008 through the date of the Illinois EPA's decision currently on appeal, neither the Facility nor its emissions were included in the State's Emission Inventory. (*See* Respondent's Resp. to Intervenors' RFAs, Request 4. (Exh. 11))

18. In a letter dated July 18, 2008, sent to the Illinois EPA, Chicago Coke reiterated its request that its emission reductions be available for use as Emission Offsets in light of the company's intent to sell the Facility and the claimed ERCs. (*See* Ltr. from Katherine D. Hodge to the Illinois EPA ("7/18/08 Hodge Ltr.") (Pet. at Exh. B)).

19. In 2009, the State submitted to the USEPA a request for redesignation of the Chicago, Illinois, nonattainment area in regard to the 8-hour Ozone NAAQS promulgated in 1997. (*See* Kroack Affd. ¶ 17.)

20. As the Facility was removed from the State's Emissions Inventory in 2008, the emissions projections contained in the Illinois EPA's April 5, 2009 Maintenance Plan for the Chicago Portion of the Chicago Ozone Nonattainment Area for the 1997 8-Hour Ozone Standard ("Maintenance Plan"), submitted to the USEPA in support of the State's request for redesignation, did not take into account emissions from the Facility. (*See* Maintenance Plan (attaching Emissions Inventory) (Respondent's Exh. 12); *see also* Kroack Affd. ¶ 17.)

21. In a letter dated January 15, 2010, sent to the Illinois EPA, Chicago Coke requested a written final decision regarding the availability of the ERCs. (*See* Ltr. from Katherine D. Hodge to the Illinois EPA ("1/15/10 Hodge Ltr.") (Pet. as Exh. C))

22. In a letter dated February 22, 2010, sent to counsel for Chicago Coke, the Illinois EPA reiterated its decision previously discussed with Chicago Coke. The Illinois EPA specifically stated as follows:

> ... the Illinois EPA's final decision on this issue remains the same as was previously conveyed to you. That is, the Illinois EPA does not find that the ERCs claimed are available as offsets, since it is our position that the Chicago Coke facility is permanently shutdown. Pursuant to applicable federal guidance, the ERCs are thus not available for use as you described.

(*See* 2/22/10 Illinois EPA decision Ltr. (Pet. at Exh. D))

23. By the time of the Illinois EPA's decision in 2010, Chicago Coke had never placed the Coke Oven Battery, the coke oven by-products plant, or the boilers at the Facility into operation during the almost eight years the company owned the Facility. (*See* Petitioner's Resp. to RFAs, Nos. 16 – 18 (Exh. 9)) Chicago Coke never produced coke at the Facility, and never

used the Facility for any industrial purpose other than a location for the trans-loading operations of Calumet Transload Railroad, LLC ("CTR").[3] (*See Id.*, Nos. 1 and 2; *see also* Kroack Affd. ¶ 14.) From November 2002, through February 22, 2010, the Facility was never in a physical condition that it was able to produce coke. (*See* Petitioner's Resp. to RFAs, Nos. 3-5 (Exh. 9))

24. Moreover, since 2003, Chicago Coke had reported to the Illinois EPA zero emissions of regulated air pollutants from the coking operations of the Facility. (*See* Cover Ltrs. accompanying Chicago Coke's Annual Emissions Reports ("AERs") for the years 2003, 2005, 2006, and 2007, and the Facility's 2004 and 2008 AERs (Respondent's Exh. 13)[4]; *see also* Petitioner's Resp. to RFAs, Nos. 6-15, and 22. (Exh. 9)) Indeed, the AERs submitted by Chicago Coke for the years 2003, 2006, 2007, and 2008 identify zero emissions of regulated air pollutants from the Facility. (*See* AERs (Exh. 13); *see also* Petitioner's Resp. to RFAs No. 22 (Exh. 9)) Only the AERs submitted for the years 2004 and 2005 identify minimal emissions of regulated air pollutants from CTR's trans-loading operations near the location of the Facility that were independent from the coking operations that had been shutdown.[5] (*See* AERs (Exh. 13); *see also* Petitioner's Resp. to RFAs, Nos. 8-11 (Exh. 9))

25. Chicago Coke did not submit AERs under the CAAPP Permit for the Facility for

---

[3] After Chicago Coke purchased the Facility, CTR began trans-loading operations near the site of the Facility owned by Chicago Coke. The trans-loading operations consisted of the loading, unloading, and transferring of materials between railcars, tracks, ships, and barges and storage piles on site. CTR's trans-loading operations were not a part of the original operations of the adjacent Facility. Thus, CTR's trans-loading operations were independent of Chicago Coke's permitted, non-operational coking operations at Facility. (*See* Kroack Affd. ¶ 14.)

[4] Due to volume of the AERs, copies of the actual documents are not attached to Respondent's Exhibits in Support of Respondent's Motion for Summary Judgment. However, true and correct copies of the AERs were filed in the Administrative Record at pp. 0471-0806 and 1322-1435. The attached cover letters for the reporting years 2003, 2005, 2006, and 2007 include statements summarizing the reported emissions from the Facility. Cover letters for the reporting years 2004 and 2008 are not in the Administrative Record. Therefore, relevant portions of the 2004 AER and the complete 2008 AER are attached as Respondent's Exhibits.

[5] In 2006, the Illinois EPA issued a permit to CTR that addressed the new trans-loading operation near the Facility as a separate source from the Facility. (*See* Kroack Affd. ¶ 14.)

2009 forward. (*See* Kroack Affd. ¶ 16.)

V. ARGUMENT

THE FACILITY WAS PERMANENTLY SHUT DOWN AND CHICAGO COKE WAS NOT ENTITLED TO CLAIMED ERCS

26. Section 173 of Part D of the Clean Air Act ("CAA") sets forth the permitting requirements for new stationary major sources seeking to construct in nonattainment areas and for major sources seeking to perform major modifications in such areas. These requirements include the offsetting of new emissions with creditable emission reductions within the nonattainment areas. 42 U.S.C. § 7503(c). The emission offsetting requirement compliments the broader mandate in Section 172 of the CAA that states' nonattainment area planning must require "reasonable further progress" toward attainment. 42 U.S.C. § 7502(c).

27. Part 203 of the Board Air Pollution regulations, 35 Ill. Adm. Code Part 203, sets forth the requirements for the construction and modification of major stationary sources in nonattainment areas in the State. Section 203.303 generally requires a proposed major new source or major source seeking a major modification in a nonattainment area to obtain Emission Offsets from a source in operation. 35 Ill. Adm. Code 203.303.

28. Specifically, Section 203.303 provides in pertinent part as follows:

> a) An emission offset must be obtained from a source in operation prior to the permit application for the new or modified source. Emission offsets must be effective prior to start-up of the new or modified source.
>
> b) The emission offsets provided:
>
> * * *
>
> 3) Must, in the case of a past shutdown of a source or permanent curtailment of production or operating hours, have occurred since April 24, 1979, or the date of area is designated a nonattainment area for the pollutant, whichever is more recent, and, until the United States

> Environmental Protection Agency has approved the attainment demonstration and state trading or marketing rules for the relevant pollutant, the proposed new or modified source must be a replacement for the shutdown or curtailment;
>
> * * *

35 Ill. Adm. Code 203.303(a) and (b)(3).

29. In interpreting and applying Section 203.303, the Illinois EPA, in the exercise of its discretion in overseeing the use of ERCs, examines several factors in determining the creditability of emission reductions from facilities that have permanently shutdown, including the timing or age of the reductions. (*See* Kroack Affd. ¶ 19.)

30. In making its February 22, 2010 decision, the Illinois EPA made two determinations. First, the Facility was permanently shut down as of February 2002. Second, the emission reductions from the shutdown of the Facility were not creditable. (*Id.* ¶ 12)

1. The Facility was permanently shut down in February 2002.

31. The term "permanent shutdown" is not defined under applicable federal law, the Act, or the Board Air Pollution regulations. However, the USEPA has issued a significant amount of guidance as to what constitutes a "permanent shutdown" of a facility.

32. The well-established, general policy of the USEPA is that a permanent shutdown

> depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State.

(*See* Memo. from Edward E. Reich, Director, USEPA Div. of Sanitary Source Enf. ("DSSE"), to Stephen A. Dvorkin, Chief, General Enf. Branch, USEPA Region II (Sept. 6, 1978) ("9/6/78 Reich Memo.") (Respondent's Exh. 14); *see also* Memo. from Edward E. Reich, Director, DSSE, to William K. Sawyer, Attorney, General Enf. Branch, USEPA Region II. (Aug. 8, 1980) ("8/8/80 Reich Memo.") (Respondent's Exh. 15); Memo. from John S. Seitz, Director, Stationary

Source Compliance Div., Office of Air Quality Planning Standards ("OAQPS"), to David P. Howekamp, Director Air Mgt. Div., USEPA Region IX (May 27, 1987) (5/27/87 Seitz Memo.") (Respondent's Exh. 16), at p. 1; Memo. from John B. Rasnic, Director, OAQPS, to Douglas M. Skie, Chief, Air Programs Branch (Nov. 19, 1991) ("11/19/91 Rasnic Memo.") at p. 1 (Respondent's Exh. 17))

33. In determining the intent behind a shutdown, several factors are to be examined on a case-by-case basis, with no single factor being determinative. (*See In re Monroe Elec. Gen. Plant Entergy Louisiana, Inc. Proposed Op. Permit, Pet. No. 6-99-2,* slip op. at 8-9 ("Monroe Elec. Or."), (Respondent's Exh. 18.) (USEPA Administrator determining whether a facility shutdown was permanent in the related new source review context of Prevention of Significant Deterioration ("PSD") permitting.) The factors include:

1. The reason for the shutdown;
2. Statements by the owner or operator regarding intent;
3. Duration of time the facility has been out of operation;
4. The costs and time required to reactivate the facility;
5. Status of permits;
6. Ongoing maintenance and inspections that have been conducted during shutdown; and
7. The handling of the shutdown by the State.

(*Id.* at p. 9; *see also* 9/6/78 Reich Memo. (Exh. 14) (source shut down approximately four years because of an industrial accident would be presumed to have been permanently shut down due to length of inoperation); 8/8/80 Reich Memo (Exh. 15) (shutdown presumed permanent because it lasted for five years and the state removed the source from its emissions inventory); 5/27/87 Seitz Memo. (Exh. 16) (facility permanently shut down when it did not operate for over two

years and was removed from the emissions inventory, despite evidence of custodial maintenance and statements of intent for long-term operation); 11/19/91 Rasnic Memo. (Exh. 17) (reactivation of source not subject to PSD permitting in the "unique situation" where continued maintenance allowed reoperation within a "few weeks of work" and the owners' statements of intent to reactivate at time of shutdown and in subsequent years))

34. Particularly, a determination of whether a facility has been permanently shutdown will often involve a judgment as to "whether the owner's or operator's actions at the facility during shutdown support or refute any express statements regarding the owner's or operator's intentions." (*See* Monroe Elec. Or. at pp. 8-9 (Exh. 18) *citing* 5/27/87 Seitz Memo. (Exh. 16) (finding shutdown of a facility to be permanent despite express statements from the owners that shutdown was temporary, and evidence that the plant was maintained during shutdown))

35. "A shutdown lasting two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent." (*See* 9/6/78 Reich Memo. at p. 1 (Exh. 14); *see also e.g.*, 5/27/87 Seitz Memo. at p. 1 (Exh. 16)) In that situation, "[t]he owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent, and of overcoming any presumption that it was." (*See e.g.*, 9/6/78 Reich Memo. at p. 1 (Exh. 14); *see also* 5/27/87 Seitz Memo. at p. 1-2 (Exh. 16))

36. After the passage of two years, statements by the owner or operator of original intent to reoperate a facility are not to be considered determinative. (*See* Monroe Elec. Or. at p. 9 (Exh. 18)) Rather, the government must make an assessment as to "whether the owner or operator has demonstrated a continuous intent to reopen." (*Id.* e*mphasis added.*) In making such a determination, the government must examine the "activities during the time of shutdown that evidence the continuing validity of the original intent not to permanently shut down." (*Id.*) It is

the USEPA's policy that "owners and operators of shutdown facilities must continuously demonstrate concrete plans to restart the facility sometime in the reasonable foreseeable future." (*Id. emphasis added.*) If an owner or operator fails to make such a demonstration, "it suggests that for at least some period of this shutdown, the shutdown was intended to be permanent." (*Id.*; *see also Communities for a Better Env't v. CENCO Refining Co.*, 179 F.Supp.2d 1128, 1146 (C.D. Cal. 2001) (Opinion in Admin. Record p. 1440, 1459) (Respondent's Exh. 19) (granting summary judgment on basis that facility was permanently shut down because "there was at least one period" of time where the shutdown was intended to be permanent when the facility "informed a state agency that it was negotiating with a buyer who sought to potentially resume refining operations.")

37. "This approach for assessing the intent of the owner or operator is consistent with the general notion that a company cannot sit indefinitely on a governmental permission to emit air pollution without showing some definite intention of using it." (Monroe Elec. Or. at p. 10, n. 11, (*emphasis added*) (Exh. 18) *citing* 40 C.F.R. 52.21(r) (construction must be commenced within 18 months of receiving a permit), L.A.C. 33:III.509(R), and *In re West Suburban Recycling and Energy Ctr., L.P.*, PSD Appeal No. 97-12, slip op. at 8 (EAB, Mar. 10, 1999) (finding PSD permit should be denied because "there is no realistic prospect that the resource recovery facility described in WSREC's permit application will be completed.")

38. Here, the Illinois EPA considered the above-factors set forth in the federal guidance in determining that the Facility was permanently shut down. (*See* Kroack Affd. ¶¶ 6,13.) It is indisputable that the Facility shut down in February 2002, when the Facility ceased operations, went into cold-idle, and could not promptly restart coking operations without significant repairs, the cost of which would be in the tens of millions of dollars. (*See* Nay Affd.

¶¶ 1-2 (Exh. 5); Gratson Affd. ¶ 6 (Exh. 4)) After going into cold-idle, the Facility never restarted, it never emitted any regulated air pollutants from coking operations, and in fact was never in a physical condition that would make long-term coke production a possibility. (*See* Petitioner's Resp. to RFAs, Nos. 1-5, 16-18 (Exh. 9)) At the time of the Illinois EPA's decision on February 22, 2010, the Facility had not operated in eight years. Since the Facility was non-operational for longer than two years, it was presumed to have been shut down permanently. (*See e.g.*, Monroe Elec. Or. at pp. 8-9 (Exh. 18)) As demonstrated below, Chicago Coke fell far short of adequately rebutting this presumption.

39. Chicago Coke's actions reveal that it did not demonstrate "a continuous intent to reopen" the Facility. Even though Chicago Coke obtained the Construction Permit for a pad-up rebuild of the Coke Oven Battery in 2005 based upon the company's representations that it intended to undertake such a repair and restart the Facility, Chicago Coke did not in fact perform the necessary pad-up rebuild. On the contrary, before the Construction Permit expired, Chicago Coke negotiated the potential sale of the Facility and the claimed ERCs for redevelopment as a different type of facility. (*See* 8/3/07 Hodge Ltr. at p. 1 (Pet. at Exh. A)) Moreover, Chicago Coke's intent to sell the Facility rather than restart it was confirmed in June 2007, when Chicago Coke met with the Illinois EPA and disclosed the Letter of Intent negotiated with CCE. (*Id.*)

40. While Chicago Coke possessed a CAAPP Permit to operate the Facility at the time of the Illinois EPA's decision, it let the necessary Construction Permit lapse in October 2006 that would make reoperation possible. By not undertaking a pad-up rebuild of the Coke Oven Battery, Chicago Coke in essence rendered the CAAPP Permit moot for operating purposes. The Facility was never physically able to operate after February 2002. (*See* Petitioner's Resp. to RFAs, Nos. 3-5 (Exh. 9)) In addition, Chicago Coke stopped paying annual

operating fees required under the CAAPP program in 2008 and stopped submitting AERs for 2009 forward. (*Id.*, Nos. 20-21; Kroack Affd. ¶ 16.)

41. In addition to Chicago Coke's admissions that it did not intend to restart the Facility, the substantial cost and time necessary to perform the pad-up rebuild evidenced that the Facility would not reopen in the reasonably foreseeable future. In 2004, the estimated cost of restarting the Facility ranged from $88 million to greater than 1.2 billion; by the time of the Illinois EPA's decision in 2010, the costs were likely even greater, making a future restart of the coking operation highly unlikely – if not practically impossible.[6]

42. In regard to the State's handling of the shutdown, the Illinois EPA removed the Facility from the Emissions Inventory in 2008, and did not take into account emissions from the Facility in the Maintenance Plan submitted to the USEPA in 2009 in support of the State' request for redesignation of the nonattainment area. (*See* Kroack Affd. ¶ 17.)

43. Chicago Coke claimed in its August 3, 2007, letter to the Illinois EPA that Chicago Coke did not "shut down" in 2002, since Illinois EPA determined during the 2005 Construction Permit process that the Facility had not permanently shut down. (*See* 8/3/07 Hodge Ltr., p. 3). As previously stated, it is undisputed that the Facility went into cold-idle in February 2002. Therefore, absent Chicago Coke performing the pad-up rebuild and beginning operation of the Facility, the date of "shutdown" is and will continue to be February 2002; no subsequent determination by the Illinois EPA could or did alter that. The issue is whether such shutdown was a permanent shutdown. When the Illinois EPA issued the Construction Permit in 2005, it based its determination that Chicago Coke had overcome the presumption that the Facility had permanently shut down on the facts and circumstances that existed in 2005 (including numerous

[6] Indeed, Chicago Coke's cost estimates were made in 2004, approximately six years before the Illinois EPA's decision. (*See* Nay Affd. ¶ 5 (Exh. 5); Beemsterboer Ltr. at p. 17 (Exh. 6)) The cost of the repairs were likely greater in 2010.

representations by Chicago Coke that it intended to restart the facility, evidence of maintenance and inspection of the Facility, inclusion of the Facility in the State's Emissions Inventory, etc.). (*See* Kroack Affd. ¶¶ 6-8.) When making its determination regarding permanent shutdown as it related to Chicago Coke's claimed ERCs in February 2010, the Illinois EPA was required by federal guidance to examine the current facts and circumstances, which, as outlined above, were very different from those that existed in 2005 (including that the Facility had been shut down for eight years, Chicago Coke failed to perform the pad-up rebuild and restart the Facility when given the opportunity to do so in 2005, Chicago Coke admitted that it did not intend to restart the Facility, the Facility was no longer part of the emissions inventory, etc.). (*Id.* ¶¶ 9-18.) In 2010, Chicago Coke could not demonstrate a "continuous intent to reopen" the Facility. (*See* Monroe Elec. Or. at p. 9 (Exh 19)) To find otherwise would allow any facility to escape a permanent shutdown designation, and thereby escape New Source Review, by merely stating an intent to re-open in connection with a construction permit application.

44. Accordingly, the facts before the Illinois EPA at the time it made its decision demonstrated Chicago Coke's clear intent to not restart coking operations at the Facility. As such, relative to the creditability of emission reductions from the shutdown of the Facility, and based on the applicable federal guidance, the Facility was permanently shut down as of February 2002.

2. The emission reductions were no longer creditable at the time of the Illinois EPA's decision.

45. In regulating the creditability of emission reductions for use as Emission Offsets, the federal regulations under the CAA provide, in part, that:

> (C)(1) Emissions reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs

> (a)(3)(ii)(C)(1)(i) through (ii) of this section.
>
> (i) Such reductions are surplus, permanent, quantifiable, and federally enforceable.
>
> (ii) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units.

40 C.F.R. § 51.165 (a)(3)(ii)(C)(1).

46. The USEPA has also provided significant guidance to states regarding the use of emission reductions as Emission Offsets. Specifically, it is the position of both the USEPA and the Illinois EPA that ERCs "are not and never have been an absolute property right" held by owners of facilities. (*See* Ltr., from John S. Seitz, Director, OAQPS to Peter F. Hess, the President of the Joint Comm. of Regulators & Business (July 8, 1996) ("7/8/96 Seitz Ltr.") at p. 2 (Respondent's Exh. 20)) Holding otherwise would significantly impair a state's efforts in regulating air emissions in nonattainment areas. States need "the ability to discount banked ERCs as needed for attainment purposes" if the states "are to effectively manage the air resources in their community." (*Id.* at p. 2.)

47. In determining if emission reductions are available for use as Emissions Offsets, the Illinois EPA reviews several factors contained in 40 C.F.R. 51.165, 35 Ill. Adm. Code 203.303, and federal guidance. The factors include:

a. The location of the source of the emission reductions;

b. An examination of applicable regulations or consent orders to determine if the emission reductions to be used as offsets are in fact surplus, permanent, quantifiable, and enforceable;

c. The timing of the emission reductions; and

d. Whether the emission reductions have been relied upon in a permit or for demonstrating attainment or reasonable further progress.

(*See* Kroack Affd. ¶ 19.)

48. To achieve the express purpose of Emission Offsets under the CAA, which is to ensure that emissions from new sources impede an area's movement toward attainment of the NAAQS or impede reasonable further progress toward attainment, the Illinois EPA generally uses five years as a "guideline" with regard to the availability of emission reductions for use as offsets following the permanent shutdown of a facility ("Five-Year Guideline"). This practice is consistent with the State's responsibility for and authority over attainment planning. Emission reductions that are over five years old are generally deemed to have "expired." The five-year lifespan of the emission reductions begins to run from the date the facility is deemed to have permanently shut down. This guideline provides finality to the availability of emission reductions for use as offsets, both for attainment planning purposes and, generally, to serve the overarching goal of improving air quality. Further, the Illinois EPA bases this practice on the five-year time frame allowed for "netting" contemporaneous emission increases and decreases at a source when determining whether a source modification rises to the level of a major modification under New Source Review. *See* 35 Ill. Adm. Code 203.207 and 208 (providing that, in determining whether a net emissions increase will result from the modification, a source must take into account any other increases and decreases in actual emissions at the source that are "contemporaneous" with the modification, meaning increases and decreases that occurred within five years prior to the application for modification). As the concepts of netting and offsetting are similar, the Illinois EPA uses this same five-year time period in evaluating the creditability of emission reductions. (*See* Kroack Affd. ¶ 20.)

49. In this case, as described in more detail above, the Illinois EPA analyzed the factors set forth in the pertinent federal guidance and determined that the February 2002 shutdown of the Facility constituted a permanent shutdown.[7] At the time of the Illinois EPA's decision in 2010, the age of the emission reductions from the shutdown was well-past the Five-Year Guideline,[8] and in fact the emission reductions were used by the State to demonstrate continued attainment, and as such they were unavailable for use as Emission Offsets in any future permitting transactions. (*Id.* ¶ 21.)

50. In its correspondence to the Illinois EPA requesting a decision regarding the ERCs, Chicago Coke presented federal guidance that stated that "in general" ERCs can continue to exist as long as they are in each subsequent Emissions Inventory and that ERCs expire if they are used or relied upon in issuing a permit or are used in a demonstration of reasonable further progress. (*See* 8/3/07 Hodge Ltr., at pp. 6-7 (Pet. at Exh. A) *quoting* Ltr. from Stanley Meiburg, Director, USEPA, Air, Pesticides and Toxics Div., to William R. Campbell, Exec. Director, Texas Air Control Bd. (11/19/1992) ("11/19/92 Meiburg Ltr.") at p. 7.) In addition, Chicago Coke quotes the 11/19/92 Meiburg Ltr. where it clarifies that states "may" include expiration dates in their respective State Implementation Plans ("SIPs") to "ensure effective management of the offsets." (*Id. quoting* 11/19/92 Meiburg Ltr. at p. 7.)

51. Chicago Coke's argument appears to suggest that emission reductions may only expire through the methods expressly identified in the 11/19/92 Meiburg Ltr. Taking Chicago Coke's argument to its logical conclusion, the company argues that ERCs are the property of the

---

[7] Based upon the federal guidance regarding the availability of emission reductions for use as Emission Offsets, the Illinois EPA believes that the USEPA would object to any future construction permit for a project that would rely on the emission reductions from the shutdown of the Facility as the source of Emission Offsets.

[8] The February 2002 shutdown of the Facility also occurred more than five years before Chicago Coke first sought a determination from the Illinois EPA in 2007.

owner or operator of the shutdown facility and exist forever unless they are removed from the state's emissions inventory, used in a permit, used by the state to demonstrate reasonable further progress toward attainment, or were expressly limited in the state's SIP. Here, the Facility's emissions were removed from the Emissions Inventory and thus, under the federal guidance relied upon by Chicago Coke, the emission reductions cannot be available for use as offsets. However, examining Chicago Coke's argument in further detail, nothing stated in the 11/19/92 Meiburg Ltr. prevents a state from addressing the creditability of emission reductions in a manner different than placing expiration dates in SIPs or through the establishment of an ERC registry system. (*See* 11/19/92 Meiburg Ltr. at p. 7 (Respondent's Exh. 21)) Rather, the 11/19/92 Meiburg Ltr. simply states the general rule as to the creditability of emission reductions prior to state regulation regarding expiration, confirms that Texas "may" place expiration dates in its SIP "to ensure effective management of the offsets," and then approves the Texas Air Pollution Control Board's proposed banking rule to limit the lifetime of the offsets and to allow for annual depreciation. (*Id.*)

52. Indeed, Region 5 of the USEPA has made it clear that the State is not required to establish a registry system for ERCs, as essentially proposed by Petitioner in this case. (*See* 8/3/07 Hodge Ltr. at p. 6 (Pet. at Exh. A); 7/18/08 Hodge Ltr. at p. 2. (Pet. at Exh. B)) Rather, the USEPA "offer[s] states considerable flexibility, not just in designing such systems, but in deciding even whether to adopt such a system" at all. (*See* Ltr. from Bharat Mathur, Director, Air and Radiation Div., USEPA, Region 5, to Jeffrey C. Muffat at 3M Envl. Tech. Services (April 2, 2002) ("4/2/02 Mathur Ltr."), at p. 1 (Respondent's Exh. 22)) In confirming the State's authority to oversee emission reductions and ERCs within its jurisdiction, the USEPA expressly declined creating a registry system for ERCs in Illinois and allowed the State discretion in the

"management of new source offsets." (*Id.*)

53. Chicago Coke also argued to the Illinois EPA that the Agency, in fact, did not have a Five-year Guideline the creditability of emission reductions from facilities that had been permanently shut down for five years or longer. (*See* 7/18/08 Hodge Ltr. at p. 2 (Pet. at Exh. B)) Chicago Coke claimed the Illinois EPA had in the past recognized ERCs from shutdowns in permits issued more than five years beyond the date of shutdown. (*Id.*) As such, Chicago Coke argued that the Illinois EPA's decision in regard to the ERCs was "arbitrary, capricious, and without authority." (*Id.*)

54. The Illinois EPA denies Chicago Coke's allegations that the Five-Year Guideline has been inconsistently applied by the Agency. Chicago Coke mistakenly confuses the Illinois EPA's analysis into the creditability of emission reductions as only involving an examination into the timing/age of the emission reductions. As discussed above, other factors are reviewed on a case-by-case basis. The age of the emission reductions is just one factor to be reviewed, and is not necessarily determinative. Chicago Coke wants to "litigate" numerous prior decisions by the Illinois EPA in an effort to determine if the Illinois EPA has treated any other facility differently than Petitioner. The other decisions involve unrelated facilities that are unconnected to the underlying facts presented in this matter. The issue properly on appeal is limited to whether Chicago Coke can demonstrate that it did not permanently shut down the Facility and that allowing the use of Chicago Coke's emission reductions as Emission Offsets will not cause a violation of the Act or applicable regulations based on the particular facts underlying the Illinois EPA's decision as to Chicago Coke's Facility. Any other Illinois EPA decisions involving different facilities and underlying facts are unrelated to the fact-based determination of the Board in this proceeding and are not part of the Administrative Record upon which the Agency based

its decision.

55. While Chicago Coke's Petition is not literally an appeal of a permit denial, the Board's decisions on the scope of review in permit appeal proceedings under Section 40 of the Act are guiding. A Section 40 hearing is not "available... as a review of agency policy and procedure in the exercise of its permit authority under Sections 4 and 39 of the Act." *Oscar Meyer & Co. v. EPA*, PCB 78-14, slip op. at 2 (June 8, 1978). The Board only needs to know the underlying facts before the Illinois EPA in deciding the ultimate question at issue. *Id.* at 4. "How or why the Agency arrived at a different conclusion on the same facts is simply not relevant to the Board determination." *Id.*; *see also*, *EPA v. Allaert Rendering, Inc.*, PCB 76-80 slip op. at 3 (Sept. 6, 1979) (finding that "[t]he action of the Agency in the denial of the permit is not the issue; the issue is simply whether or not in the sole judgment of the Board, the applicant has submitted proof that if the permit is issued, no violation of the Act or regulations will result.")

56. Accordingly, under the facts at issue in this case, the emission reductions are no longer creditable and are not available for use as Emission Offsets.

RULING THAT CHICAGO COKE'S EMISSION REDUCTIONS ARE CREDITABLE AS EMISSION OFFSETS WOULD BE CONTRARY TO APPLICABLE FEDERAL LAW AND THE BOARD'S REGULATIONS

1. As discussed above, the CAA requires that sources obtain offsets for new emissions in a nonattainment area to aid such areas in moving toward attainment of the NAAQS while still allowing industrial growth. 42 U.S.C. § 7503. Section 172 of the CAA requires that states maintain "a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area." 42 U.S.C. § 7502(c). The emissions inventory is relied upon by states and the USEPA to determine the nature and extent of the

specific control strategy necessary to help bring an area into attainment of the NAAQS.

2. The Board's Air Pollution Regulations prevent the credit of emission reductions for use as Emission Offsets when the offsets have been relied on for demonstrating attainment. Section 203.303(b)(5) of the Board's Air Pollution regulations, 35 Ill. Adm. Code 203.303(b)(5), provides as follows:

> b) The emission offsets provided:
>
> * * *
>
> 5) Must not have been previously relied on, as demonstrated by the Agency, in issuing any permit pursuant to 35 Ill. Adm. Code 201.142 or 201.143 of this Part, or for demonstrating attainment or reasonable further progress. (*Emphasis added.*)

3. Under Section 107 of the CAA, a maintenance plan must be submitted by a state before an area that is designated nonattainment can be redesignated to attainment. The maintenance plan must accompany a state's redesignation request. 42 U.S.C. 7407(d)(3)(E)(iv).

4. In 2009, the State of Illinois submitted to the USEPA its Maintenance Plan in support of a redesignation request for the Chicago nonattainment area with regard to the 1997 8-hour Ozone NAAQS. (*See* Maintenance Plan at p. 5 (Exh. 12)) The Maintenance Plan provides for continued attainment of the 1997 8-hour ozone air quality standard for the Chicago nonattainment area for a period of ten years after the USEPA has formally redesignated the area to attainment. (*Id.*)

5. As the Facility and its emissions were removed from the Emission Inventory in 2008, the Illinois EPA's subsequent Maintenance Plan essentially "counted out" Chicago Coke's emissions as zero for the purpose of demonstrating continued attainment to the USEPA of the 1997 8-hour Ozone NAAQS. (*See* Illinois EPA's notation (Exh. 10); Respondent's Resp. to Intervenors' RFAs, Request 4 (Exh. 11); Kroack Affd. ¶ 17.)

6. On August 13, 2012, the USEPA approved the State's request that the Chicago area be redesignated from nonattainment to attainment of the 1997 ozone standard, and likewise approved a version of the Maintenance Plan as a revision to the State's SIP.[9] (*See* Approval and Promulgation of Implementation Plans and designation of Areas for Air Quality Planning Purposes; Illinois; Ozone: Final Rule, 77 Fed Reg. 48062 (Aug. 13, 2012) (Respondent's Exh. 23))

7. Accordingly, under Section 203.303(b)(5), Chicago Coke's emission reductions from the shutdown of the Facility are no longer creditable as Emission Offsets because the emission reductions were previously relied upon by the Illinois EPA in "demonstrating attainment." 35 Ill. Adm. Code 203.303(b)(5).

VI. SUMMARY

On February 22, 2010, the Illinois EPA issued a determination letter deciding that the emission reductions claimed by Chicago Coke are not available for use as emission offsets. This decision was correct under current law.

VII. CONCLUSION

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board grant summary judgment in favor of the Illinois EPA and affirm the Illinois EPA's February 22, 2010, decision.

[9] The USEPA approved of a version of the Maintenance Plan that had been revised from its original submission, but that still counted-out the Facility's emissions.

THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY, by

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____

THOMAS H. SHEPHERD
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602
Tel: (312) 814-5361

CERTIFICATE OF SERVICE

I, THOMAS H. SHEPHERD, do certify that I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the foregoing Notice of Filing and Respondent's Motion for Summary Judgment and caused them to be served this 17th day of August, 2012, upon the persons listed on the foregoing Notice of Filing by electronic mail as per the agreement between the parties to the litigation at or before the hour of 5:00 p.m.

THOMAS H. SHEPHERD