ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondents. and NATURAL RESOURCES DEFENSE COUNCIL, INC., and SIERRA CLUB Intervenor-Defendants.	)	PCB 10-75 (Permit Appeal - Air)

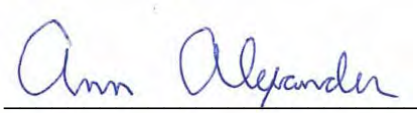
To:

John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, IL 60601

Persons on the attached service list

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, IL 60601

Please take notice that today I filed with the office of the Clerk of the Pollution Control Board my Intervenor-Defendants' Response to Chicago Coke Co., Inc.'s Motion for Summary Judgment on behalf of the Natural Resources Defense Council, a copy of which is hereby served on you.

By: 
Ann Alexander, Natural Resources Defense Council

Dated: September 19, 2012

Ann Alexander
Natural Resources Defense Council
2 North Riverside Plaza, Suite 2250
Chicago, Illinois 60606
312-651-7905
312-234-9633 (fax)

SERVICE LIST

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Elizabeth S. Harvey
Swanson, Martin & Bell
One IBM Plaza
330 N. Wabash, Suite 3300
Chicago, IL 60611

Erin E. Wright
Swanson, Martin & Bell
One IBM Plaza
330 N. Wabash, Suite 3300
Chicago, IL 60611

Thomas H. Shepherd
Assistant Attorney General
Office of the Attorney General
Environmental Bureau
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602

Michael J. Maher
Swanson, Martin & Bell
One IBM Plaza
330 N. Wabash, Suite 3300
Chicago, IL 60611

ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondents. and NATURAL RESOURCES DEFENSE COUNCIL, INC., and SIERRA CLUB Intervenor-Defendants.	)	PCB 10-75 (Permit Appeal - Air)

INTERVENOR-DEFENDANTS' RESPONSE TO CHICAGO COKE CO., INC.'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Intervenor-Defendants NRDC and Sierra Club[1] submit this response to the separate Motions for Summary Judgment filed by Petitioner Chicago Coke ("CC Motion") and Respondent IEPA ("IEPA Motion"). Intervenor-Defendants support and concur with the facts and reasoning set forth in the IEPA Motion, which together with Intervenor-Defendants' Motion conclusively demonstrate that IEPA's determination concerning Chicago Coke's ERCs was the only correct and legally supportable one. Chicago Coke's exceedingly thin oppositional motion presents no material facts to support its facially untenable position that the long-dormant Facility

[1] Abbreviations used in this response are defined in Intervenor-Defendants' Motion for Summary Judgment dated August 17, 2012 ("Intervenor-Defendants' Motion"), unless otherwise specified.

has never actually shut down. It moreover fails to address the applicable federal in any meaningful way, and fails to even acknowledge the existence of the governing state law.

Chicago Coke's motion appears to be grounded in two main arguments: first, that no permanent shutdown has yet occurred because IEPA declared the shutdown to be temporary in a 2005 PSD determination, and purportedly nothing of consequence has changed since then; and second, that IEPA improperly relied on federal guidance concerning shutdowns from the PSD context.

Not only are these arguments based on an extremely narrow and reductive reading of both IEPA's determination and the federal guidance, but they ignore several elephants in the room. They ignore the very significant changes that have occurred in the status of the Facility since 2005 – indeed, changes in virtually every factor that IEPA considered at that time in its PSD decision. They ignore the very existence of the governing Illinois SIP provision, which – as Intervenor-Defendants demonstrated in their motion – prohibits use of the credits *regardless* of the date of shutdown. And they ignore the CAA provision underpinning the entire ERC program, which necessitates that the emissions proposed for use as ERCs must be included in the emission inventory and attainment demonstrations.

Regardless of Chicago Coke's selective attention to legal requirements, it is clear that both the Illinois SIP and federal law define specific limitations on the use of ERCs, related to the timing of shutdown and agency accounting for the emissions. What Chicago Coke is proposing, essentially, is that shutdown sources be allowed to elude these limitations simply by declaring early on an intention to restart someday, and then doing nothing. That position is unsupportable as a matter of law, not to mention bad policy that would perpetuate unhealthy air and thus

threaten the CAA's attainment goals. Since no material facts are in dispute, the Board should deny Chicago Coke's motion and grant the motions of IEPA and Intervenor-Defendants.

Point I

CHICAGO COKE PRESENTS NO FACTS GENUINELY SUPPORTING ITS CONTENTION THAT THE FACILITY DID NOT SHUT DOWN IN 2002

As discussed in Intervenor-Defendants' motion for summary judgment, the applicable Illinois SIP provision governing ERCs states that the emission reductions giving rise to them "[m]ust, 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 the area is designated a nonattainment area for the pollutant, whichever is more recent." Thus, unless Chicago Coke can show that shutdown occurred after the date of the nonattainment designations for NO_x (April 15, 2004) and $PM_{2.5}$ (April 4, 2005), the ERCs associated with that shutdown are *per se* invalid.

Chicago Coke has not come close to making such a showing. Indeed, it presents nothing to meaningfully counter the overwhelming array of undisputed facts set forth in IEPA's and Intervenor-Defendants' motions demonstrating that the facility was permanently shut down in 2002. *See* IEPA Motion for Summary Judgment at 2-3, 14-20; Intervenor-Defendants' Motion for Summary Judgment at 12-13. In short, the Facility has produced no coke since 2002, has stopped paying its CAAPP permit fees, and has been removed from the emission inventory.

Chicago Coke's motion is grounded in the remarkable assertion that this long-dead Facility, exhibiting not a single sign of life for an entire decade, has actually "not been permanently shutdown." CC Motion at 3. The sole slender thread on which Chicago Coke hangs this claim is that IEPA accepted its representations of intent to re-open the facility in granting a 2005 PSD permit, and that there was, according to Chicago Coke, "no change of facts" prior to IEPA's 2010 decision. CC Motion at 1; *see also* CC Motion at 10 ("None of the

conditions at the facility changed between April 2005 and February 22, 2010"). In the alternative, Chicago Coke claims that the facility could not have been shut down earlier than the date of the 2005 permit. *Id.* at 11-12.

As is clear upon any review of the record, there was a veritable sea change of key facts between the 2005 permit issuance and the 2010 IEPA denial of the permit. IEPA lists in its motion seven factors used in the PSD context to determine whether shutdown has occurred (IEPA Motion at 15) – and most of these factors have shifted 180 degrees toward supporting a conclusion of permanent shutdown. Chicago Coke stated in 2005 an intent to rebuild and operate the Facility, but did not use the PSD permit, and it declared in 2007 an intent to sell the Facility to an IGCC developer along with its shutdown credits. August 3 Letter at 1-2.[2] Chicago Coke was paying its CAAPP permit fees as of 2005 – and ceased paying them in 2008. Chicago Coke RTA Response to IEPA at 7. The Facility (although no emissions associated with its coke production) was listed in the state's emission inventory in 2005, but was permanently removed from the inventory in 2008. IEPA RTA Response at 3; AR 2285.

More to the point, however, Chicago Coke is effectively asserting that IEPA's acceptance of its long-ago statement of intent to re-open the Facility – although it unequivocally reversed that stated intent two years later – should be given the legal effect of indefinitely forestalling shutdown. In the alternative, it asserts that this statement should be interpreted to delay the actual date of shutdown – 2002, when the Facility ceased to operate – during the period when the company was declaring an intent to re-open, even though that re-opening never occurred. CC Motion at 11-12.

[2] Intervenor-Defendants inadvertently referenced Exhibit A to the Petition, the letter dated August 3, 2007 to John J. Kim, IEPA, from Katherine D. Hodge as the "August 8 Letter." That definition has been corrected to "August 3 Letter" in this Response.

Neither of these theories is supportable. In the first instance, the notion that the Facility is not now permanently shut down, besides being utterly without factual support, is incoherent in context. If the Facility has not permanently shut down – *i.e.*, if there were somehow still an actual possibility that it may start producing coke again – then there are no credits to sell. Chicago Coke would have to make a final decision as to whether to shut down the Facility (as it obviously has) before transferring the credits.

More broadly speaking, however, Chicago Coke is attempting to create a loophole that is obvious, problematic, and wholly incompatible with governing law. It is effectively asking for a temporary or permanent tolling of the date of shutdown based on statements of intent. The Illinois SIP – as with federal CAA regulations – makes very clear that the date of shutdown is critical to determining the validity of ERCs. 35 Ill.Admin.Code § 203.303 (shutdown must have occurred since April 24, 1979 or the date of a non-attainment designation, whichever is more recent); *see* 40 C.F.R. § 51.165 (a)(3)(ii)(C)(1) (shutdown must have occurred after the last day of the base year of the SIP planning process). These date restrictions, as explained in Intervenor-Defendants' motion, exist for a good reason: to ensure that the attainment planning process is not hindered by the re-emergence of emissions that were eliminated prior to the nonattainment designation, and hence not accounted for in the inventory or attainment planning. Intervenor-Defendants' Motion at 3, 16-18. Allowing facility owners to sidestep these restrictions by merely declaring an intention to re-open – even where, as here, the reopening never occurred and the Facility has been functionally dead as a doornail since closure – would gut an essential safeguard built into the CAA nonattainment permitting program. It is for this reason that the Environmental Appeals Board clearly stated in response to the Monroe Generating Company Title V petition that a shutdown can be found non-permanent only where the owner "has

demonstrated a *continuous* intent to reopen." *In the Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc. Proposed Operating Permit*, Petition No. 6-99-2, Order Responding to Petitioner's Request that the Administrator Object to Issuance of a State Operating Permit (AR 0039-65, at 0047).

In addition, the specific language of 35 Ill.Admin.Code § 203.303 does not even support the premise of Chicago Coke's argument that a shutdown must be unequivocally deemed "permanent" before a determination can be made as to the timing of the shutdown for purposes of ERC eligibility. Obviously, a shutdown must occur before any credits can be transferred; and a shutdown that is unambiguously permanent gives more clarity regarding the date on which that shutdown occurred. But § 203.303 merely states that in order to be eligible to generate ERCs, a shutdown "[m]ust, in the case of a past shutdown of a source *or* permanent curtailment of production or operating hours," have occurred after the nonattainment designation. In other words, *either* a "past shutdown" *or* a "permanent curtailment of production" represents the relevant date for determining whether a cessation of emissions generated credits. The concept of permanence of the shutdown and the date such permanence was decided upon, borrowed from PSD permitting guidance and persuasive in assessing whether a shutdown has occurred, is not strictly necessary for purposes of applying the requirements of § 203.303.

The critical fact is that the Facility stopped operating, stopped producing coke, and stopped generating emissions associated with coke productions in 2002. Whatever intention Chicago Coke may have entertained 7 years ago to resurrect the Facility has been expressly abandoned. This perpetual absence of production activity qualifies as a "past shutdown" and/or a "permanent curtailment of production" under the plain language of § 203.303. The shutdown date for purposes of 35 Ill.Admin.Code § 203.303 was therefore 2002, well prior to the NO_x and

$PM_{2.5}$ nonattainment designations and hence ineligible to generate ERCs. Chicago Coke has provided not a gram of evidence to the contrary – never mind evidence sufficient to support a decision in its favor as a matter of law.

Point II

APPLICABLE FEDERAL GUIDANCE FULLY SUPPORTS IEPA'S DETERMINATION THAT THE FACILITY WAS PERMANENTY SHUT DOWN IN 2002

In its February 2010 final decision letter, IEPA cited "applicable federal guidance" as a basis for its decision that the facility was shut down and that "the ERCs are . . . not available for use as you described." IEPA included in the Administrative Record more than a dozen federal guidance documents concerning matters related to its decision. The IEPA Motion explains in further detail how these guidance documents were applied. IEPA Motion at 14-18. *See also* Intervenor-Defendants' Motion at 13, 16-20.

Chicago Coke dismisses the federal guidance wholesale as irrelevant, on the apparent ground that it does not address the specific set of facts at issue in this case. Seemingly oblivious to the concept of persuasive authority from a comparable context, Chicago Coke makes the blanket assertion that the federal guidance concerning whether and when a permanent shutdown has occurred is from the PSD permitting context, and concludes that "a PSD determination is a red herring, and has no application to the question here: can Chicago Coke transfer its ERCs?" CC Motion at 6-7.

This assertion is remarkable in the first instance given that the lynchpin of Chicago Coke's argument that shutdown did not occur in 2002 is *a PSD determination* by IEPA that the Facility was not permanently shut down as of 2005. Setting aside this internal inconsistency, Chicago Coke is incorrect that PSD determinations are irrelevant to the ERC issue presented

here. Indeed, permanent shutdown has similar significance for emissions in both the PSD and ERC contexts, and hence any guidance concerning shutdown is relevant and persuasive in both. In the PSD context, as explained in the federal guidance provided by IEPA, a source that has been permanently shut down requires a new permit. *See* AR 0001-36. That is, its shutdown status determines whether past emissions from the source will be allowed to continue. In the ERC context, shutdown status (in particular the timing of the shutdown) likewise determines whether past emissions will be allowed to continue -- albeit not from the shutdown source itself, but rather from another source that purchases the ERCs.

Thus, the underlying question for air quality purposes is the same in either context: based on the totality of circumstances surrounding a cessation of operations and associated emissions, should those emissions be treated as continuing or as having been permanently eliminated? And in both cases and for similar reasons, federal guidance and regulations treat the presence (or in this case absence) of the emissions in the inventory as critical to determining whether those emissions should be allowed to continue. *See* Intervenor-Defendants Motion at 16-18, citing Meiburg Memo and Seitz Memo (concerning ERCs); AR 7-10, 13-15 (multiple PSD guidance memos referencing absence of emissions from the inventory as a basis for a permanent shutdown determination requiring a new permit).

Additionally, at least some of the guidance IEPA relied upon, most notably the Meiburg letter and the Seitz memo, expressly concerns ERCs, not PSD permitting. *See* Intervenor-Defendants' Motion at 17-18; *see also* August 3 Letter at 5. The counterpart federal regulation, 40 C.F.R. 51.165(a)(3)(ii)(C)(1), likewise concerns ERCs specifically, and hence was appropriately relied on by IEPA. *See* Affidavit of Laurel Kroak Submitted in Support of Respondent's Motion for Summary Judgment ("Kroak Affidavit") ¶ 19. As discussed in

Intervenor-Defendants' Motion, this regulation would invalidate Chicago Coke's ERCs for reasons different from but related to 35 Ill.Admin.Code § 203.303. Intervenor-Defendants' Motion at 19-20.

Chicago Coke does not dispute that the substance of the federal guidance supports IEPA's determination, and it cannot. *See* Intervenor-Defendants' Motion at 18-19; IEPA Motion at 15-18. Indeed, its motion recites U.S. EPA's conclusion in the Meiburg Letter that "in general, offsets continue to exist *as long as those offsets are accounted for in the state's emissions inventory."* CC Motion at 8 (emphasis added). As discussed above, there were no emissions from coking in the Illinois emission inventory after 2002, and the remaining emissions associated with the Facility were permanently removed from the inventory in 2008. *See* Intervenor-Defendant's Motion at 8-9, 13. The reason federal guidance is clear that removal of shutdown emissions in the state inventory precludes their use as ERCs is that adding them back in through use of the credits would skew the attainment planning process and potentially interfere with attainment. *Id.* at 16-18.[3]

Given that the federal guidance provided by IEPA so clearly supports its determination in substance, Chicago Coke's only real complaint appears to be that IEPA exercised its discretion at all to apply it to Chicago Coke's situation, which it claims is not precisely akin to the circumstances addressed in the guidance. However, even if the federal guidance were not directly on point (which it is, for reasons discussed above), there is nothing remarkable, out of

[3] The August 3 letter makes reference to a Region 5 guidance letter in which passing reference is made to shutdown emissions having been removed from the emission inventory. However, unlike the multiple guidance documents relied upon by IEPA, the referenced one-page guidance letter did not address, one way or the other, the question of whether the removal impacted the validity of the ERCs. More importantly, the shutdown in question had occurred a year or less prior to the date of the letter, such that the nonattainment planning process would not plausibly have been impacted in such a short time window. *See* Letter from Stephen Rothblatt, USEPA, to Paul Dubenetzky, Indiana Department of Environmental Management, dated February 14, 2006, *available at* http://yosemite.epa.gov/r5/r5ard.nsf/6d8f19756f69f6168625745800533fc9/0a253456abcb3cb2862574c8006fd1d4!OpenDocument..

the ordinary, or improper about an agency using its discretion to interpret and reasonably apply the persuasive guidance from a similar context. Exercising this type of discretion is what agencies do every day, and this situation was no different.

Point III

IEPA'S DETERMINATION THAT CHICAGO COKES CREDITS WERE NOT VALID AND TRANSFERABLE WAS REQUIRED BY ILLINOIS LAW

As discussed in Intervenor-Defendants' Motion and confirmed in Chicago Coke's motion, Chicago Coke characterizes the basis of IEPA's decision as a position that use of ERCs from a facility that has been permanently shut down is prohibited by law. CC Motion at 3; *see* Intervenor-Defendants' Motion at 20-21. However, as explained in Intervenor-Defendants'Motion, this interpretation makes no rational sense, as the applicable SIP provision addressing the validity of ERCs expressly applies to facilities that have been permanently shut down, in proper circumstances *allowing* use of such credits. 35 Ill.Admin.Code § 203.303; *see* Intervenor-Defendants' Motion at 20-21.

Thus, to a large degree, Chicago Coke's motion amounts to an effort to find a reductive and irrational interpretation of IEPA's decision, and then complain that IEPA's decision was reductive and irrational. More reasonably interpreted, IEPA's decision was wholly within the bounds of law and IEPA's discretion. *See* Kroak Affidavit ¶¶ 6-8, 19-21 (describing how IEPA considered all of the applicable law and guidance in order to develop a set of factors to consider in assessing the validity of ERCs). Indeed, no other outcome was possible under the directly applicable SIP provision governing ERCs that Chicago Coke, astoundingly, failed to cite at all.[4]

[4] In contrast, the August 3 Letter discusses and applies § 203.303 at length.

As explained in Intervenor-Defendants' Motion, IEPA's decision was expressly framed in reference to the Agency's prior communications with Chicago Coke. Intervenor-Defendants' Motion at 20-21. Understood in that context, it is clear that IEPA was making a summary reference in the decision letter to the range of relevant factors, grounded in law and guidance, that it properly considered. *See* Intervenor-Defendants' Motion at 20-21. Chief among these factors, appropriately, was 35 Ill.Admin.Code § 203.303, the Illinois SIP provision directly governing determinations of the validity of ERCs. *See* Kroak Affidavit ¶ 19. This directly applicable provision, while *never once mentioned* in Chicago Coke's argument, rules out entirely the use of its ERCs for the Proposed Project. As explained above, that provision automatically invalidated the ERCs given that the Facility was shut down in 2002, before the relevant nonattainment designations. Moreover, as explained in Intervenor-Defendants' Motion, even if the facts could be construed such that the Facility shut down sometime after Chicago Coke was issued a PSD permit in 2005, pursuant to § 203.303 the ERCs could only have been used for a "replacement" facility, which the Proposed Project unarguably was not. Intervenor-Defendants' Motion at 13-17. Thus, regardless of how Chicago Coke may choose to characterize the basis for IEPA's decision, applicable law prohibited any other outcome.

Additionally, notwithstanding its more narrow characterization in places of IEPA's decision, Chicago Coke assumes for purposes of its motion, based on the pre-decisional exchanges, that IEPA relied on its five-year guideline for expiration of ERCs, even though IEPA's decision did not expressly reference that deadline. CC Motion at 5, 11-12. As explained in the Kroak Affidavit, the five-year expiration guideline is a valid exercise of IEPA's authority to manage offsets and ensure that they do not interfere with attainment planning; and one of

many appropriate factors considered, including but not limited to federal guidance. Kroak Aff. ¶¶ 6-8, 19-21; *see also* Intervenor-Defendants' Motion at 18-19.

Conclusion

For the foregoing reasons, Intervenor-Defendants respectfully request that the Board deny Chicago Coke's motion for summary judgment.

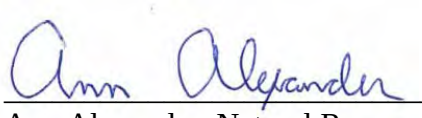
Respectfully submitted this 19th day of September, 2012 by:

Ann Alexander, IL Bar # 6278919
Meleah Geertsma, IL Bar # 6298389
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
Tel: (312) 651-7905

Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached Intervenor-Defendants' Response to Chicago Coke Co., Inc.'s Motion for Summary Judgment upon the persons listed in the foregoing Notice of Filing pursuant to mutual agreement of the parties, on this 19th day of September, 2012.



Ann Alexander, Natural Resources Defense Council