

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: Counsel of Record
(See attached Service List.)

PLEASE TAKE NOTICE that on this 19th day of September 2012, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Motion to Strike, Directed to IEPA's Motion for Summary Judgment**, which is attached and herewith served upon you.

CHICAGO COKE CO., INC.

By: s/Elizabeth S. Harvey
One of its attorneys

Michael J. Maher
Elizabeth Harvey
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
Telephone: (312) 321-9100

CERTIFICATE OF SERVICE

I, the undersigned, state that a copy of the above-described document was served electronically upon all counsel of record on September 19, 2012.

s/Elizabeth S. Harvey

7012-002

SERVICE LIST

Chicago Coke Co., Inc. v. Illinois Environmental Protection Agency

PCB 10-75

(Permit Appeal -- Air)

Thomas H. Shepherd
Assistant Attorney General
Environmental Bureau
69 West Washington Street
18th Floor
Chicago, Illinois 60602

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

Ann Alexander, Senior Attorney
Shannon Fisk, Senior Attorney
Meleah Geertsma
Natural Resources Defense Council
2 North Riverside Plaza, Suite 2250
Chicago, Illinois 60606

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION TO STRIKE, DIRECTED TO IEPA'S MOTION FOR SUMMARY JUDGMENT

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, moves the Board or the hearing officer to strike portions of respondent the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA") motion for summary judgment. IEPA improperly seeks to expand the scope of this appeal by raising issues not identified in IEPA's February 22, 2012 final decision.

ARGUMENT

The only issues properly before the Board are the reasons for denial contained in IEPA's February 22, 2010 denial letter.

1. IEPA raises arguments beyond the reasons given by IEPA, in its own February 22, 2010 written decision. Although Chicago Coke's request to IEPA is not a typical permit application, the Board has found the appeal should be treated as a permit appeal. Board Order, April 21, 2011, pp 9-10. IEPA recognizes that this

appeal is to be treated as a permit appeal. IEPA Motion for Summary Judgment, pp. 4-5.

2. It is well-settled that bases not given by IEPA as a reason for a permit denial cannot be raised on appeal. Section 39(a) of the Environmental Protection Act ("Act") requires IEPA to provide "specific, detailed statements as to the reasons" for the denial of a permit. Those statements "shall" include the sections of the Act and the specific regulations which may be violated if the permit were granted. 415 ILCS 5/39(a).
3. The Illinois Supreme Court has held that Section 39 requires IEPA to specify the reasons for a permit denial. If IEPA does not specify a particular reason, that reason may not be raised on appeal in support of the denial. *IEPA v. IPCB*, 86 Ill.2d 390, 405-406, 427 N.E.2d 162, 169-170, 56 Ill.Dec. 82, 89-90 (1981)(prohibiting IEPA from raising, on appeal, a regulation as a basis for its permit denial, where IEPA's written decision did not reference that regulation).
4. The appeal to the Board is a permit applicant's opportunity to challenge the reasons given by IEPA for denying a permit. See, e.g., *Emerald Performance Materials LLC v. IEPA*, 2009 WL 6506756, *4 (PCB 04-12, October 15, 2009), citing *Alton Packaging Corporation v. IPCB*, 162 Ill.App.3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *West Suburban Recycling and Energy Center L.P. v. IEPA*, 1996 WL 633368, *3 (PCB 95-119 and 95-125, October 17, 1996).
5. Chicago Coke recognizes that the Board has opined that this appeal is in the nature of an appeal of a Clean Air Act permit under Sections 39.5 and 40.2(a) of the Act. However, the appeal framework established by case law under Section

39 is equally applicable to this appeal. This appeal is Chicago Coke's opportunity to challenge the reasons given by IEPA for finding Chicago Coke's ERCs "unavailable." That opportunity is meaningless if IEPA is allowed to raise issues beyond those given by IEPA in its February 22, 2010 decision. Chicago Coke, and petitioners in other permit appeals, would be left with a "moving target," where IEPA would be able to raise a potentially endless parade of new reasons for denying a permit---beyond the reasons given by IEPA in its written decision.

6. IEPA's only stated reason for its decision is:

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.

February 22, 2010 decision. (IEPA 1593, also attached to Chicago Coke's petition for review as Exhibit D.)

IEPA's decision was based on its view that "applicable federal guidance" prohibited the use of ERCs from facilities which are "permanently shutdown." Thus, the only issue on appeal is whether "applicable federal guidance" prohibits the use of ERCs from facilities deemed to be "permanently shutdown."

IEPA improperly raises claims which were not articulated in its denial letter.

7. IEPA's motion for summary judgment includes references to, and reliance on, Section 203.303 of the Board's rules. However, IEPA's decision does not refer to Section 203.303: in fact, the decision relies only on "applicable federal guidance." IEPA did not refer to Section 203.202, or any state statute or regulation.

8. Chicago Coke thus moves to strike IEPA's references to, and arguments regarding, Section 203.303:
 - a. Pages 13-14.
 - b. Page 21 (par. 47).
 - c. Pages 26-28 (arguing that under Section 203.303(b)(5), Chicago Coke's ERCs are not creditable because the emission reductions were previously relied upon by IEPA).
9. IEPA also improperly argues that Chicago Coke's ERCs are no longer creditable when IEPA made its decision because IEPA had already used the emission reductions to demonstrate state compliance. IEPA makes this claim several places in its motion, including much of Section V(2) (at pages 20-26) and in the arguments at pages 26-28.
10. IEPA's arguments on these identified issues are beyond the scope of this appeal. Those arguments are improper, and Chicago Coke should not be forced to respond to arguments outside the scope of the appeal.

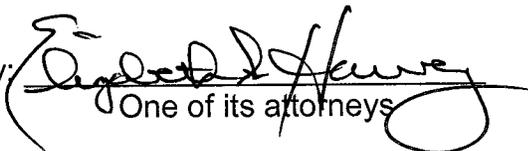
CONCLUSION

11. Chicago Coke moves to strike the portions of IEPA's motion for summary judgment identified above: a) all references to and arguments regarding Section 203.303, including at pages 13-14, page 21, and pages 26-28; and b) all claims that the ERCs were not creditable because IEPA had used the emission reductions to demonstrate compliance, including much of Section V(2) at pages 20-26, and the arguments at pages 26-28.
12. In the alternative, if the Board or hearing officer denies all or part of this motion to

strike, Chicago Coke requests 14 days from the date of the order to respond to the challenged arguments.

WHEREFORE, Chicago Coke moves to strike the identified portions of IEPA's Motion for Summary Judgment; in the alternative, for 14 days from the date of an order denying this motion to respond to the challenged arguments; and for such other relief as the Board or hearing officer deem appropriate.

CHICAGO COKE CO., INC.

By: 
One of its attorneys

Dated: September 19, 2012

Michael J. Maher
Elizabeth S. Harvey
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
Telephone: (312) 321-9100