

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 Response to NRDC'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

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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)

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RESPONSE TO NRDC's MOTION FOR SUMMARY JUDGMENT

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, responds in opposition to intervenors NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB's (collectively, "NRDC") August 17, 2012 motion for summary judgment.

INTRODUCTION

On April 21, 2011, the Board granted NRDC's motion for leave to intervene in this matter. The Board did establish limitations on NRDC's participation in the appeal. Most notably, the Board clearly prohibited NRDC from raising issues not included in Chicago Coke's petition for review. Despite that clear prohibition, most of the argument raised by NRDC in its motion for summary judgment is based on issues beyond the scope of the appeal. NRDC also improperly raises issues beyond the reasons given by IEPA for its decision.

Chicago Coke has contemporaneously filed a motion to strike the portions of NRDC's motion which are beyond the scope of the appeal, and those which raise issues beyond the reasons given by IEPA for its decision. Pending a ruling on that motion to strike, Chicago Coke has not responded to the portions of NRDC's arguments at issue in the motion to strike.¹ Chicago Coke reserves the right to respond to those claims, consistent with the ruling on the motion to strike.

ARGUMENT

Chicago Coke has moved to strike the majority of the arguments made by NRDC, leaving little to respond to at this time.

Initially, NRDC misstates the record when it claims IEPA determined, in February 2010, that the facility was permanently shutdown in February 2002. IEPA's February 22, 2010 final decision does not mention the date on which IEPA believed the facility was permanently shutdown. Nowhere in that decision does IEPA opine that the facility was permanently shutdown in February 2002, nor does the decision give any date of an alleged permanent shutdown. (February 22, 2010 decision, IEPA 1593, also attached to Chicago Coke's petition for review as Exhibit D.) It is true that IEPA has subsequently, during this appeal, taken the position the Chicago Coke facility was shutdown in February 2002. That date is not, however, contained in IEPA's final decision. Therefore, under Illinois Supreme Court case law, there is serious question whether NRDC or IEPA can raise the February 2002 date in support of IEPA's decision.

IEPA v. IPCB, 86 Ill.2d 390, 405-406, 427 N.E.2d 162, 169-170, 56 Ill. Dec. 82, 89-90

¹ Chicago Coke has moved to strike the following portions of NRDC's motion: a) arguments on pages 13-16 under subheading "A(2)"; b) arguments in the second full paragraph on page 12 and on pages 16-18 under subheading "B"; c) the argument on pages 19-20 under subheading "D"; and d) all references to and arguments regarding 35 Ill. Adm. Code 203.303, including references on pages 3-4 under "background," arguments on pages 11-12 under subheading "A," and the arguments made on pages 20-21 under subheading "E."

(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).

As explained in detail in Chicago Coke's response in opposition to IEPA's motion for summary judgment, IEPA cannot erase its prior determination that the Chicago Coke facility was not permanently shutdown as of April 2005. IEPA cannot magically change that April 2005 decision to now claim that the facility was permanently shutdown in February 2002. At worst, if the Chicago Coke facility subsequently became permanently shutdown by virtue of Chicago Coke's decisions (which Chicago Coke does not admit) to sell the facility, the date of permanent closure could not have been any earlier than October 28, 2006, when Chicago Coke's construction permit expired. Chicago Coke incorporates its arguments made in its response to IEPA's motion for summary judgment, as if those arguments were fully set forth here. (Chicago Coke Response to IEPA's Motion for Summary Judgment, pp. 7-9.)

NRDC also misses the point when it claims IEPA's five-year guideline for the expiration of ERCs from permanently shutdown facilities is supported by federal policy. As Chicago Coke explains in its response to IEPA's motion for summary judgment, IEPA's five-year guideline is unpromulgated, and IEPA cannot even point to a document setting forth this guideline. There is serious doubt as to the validity of the five-year guideline because IEPA lacks authority to make decisions using a self-created guideline. However, putting aside questions on IEPA's authority, IEPA's own five-year guideline does not bar Chicago Coke's use of its ERCs. The Chicago Coke facility could not have been permanently shutdown at any time prior to April 2005, when IEPA specifically found the Chicago Coke facility was not permanently shutdown. Therefore, the Chicago Coke facility had not been permanently shutdown for five years when IEPA

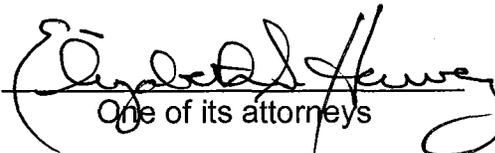
made its February 2010 decision. IEPA's unpromulgated guideline does not bar the use of Chicago Coke's ERCs. Chicago Coke incorporates its arguments made in response to IEPA's motion for summary judgment, as if those arguments were fully set forth here. (Chicago Coke Response to IEPA's Motion for Summary Judgment, pp. 9-11.)

CONCLUSION

NRDC has not raised any applicable argument which demonstrates it is entitled to judgment as a matter of law. The Chicago Coke facility could not have been permanently shutdown as of February 2002, as NRDC claims. Further, even applying IEPA's unpromulgated five-year guideline, and even assuming Chicago Coke's facility became permanently shutdown sometime after April 2005, Chicago Coke's ERCs remained viable and available when IEPA made its final decision in February 2010.

The Board should deny NRDC's motion for summary judgment. Further, Chicago Coke asks the Board to grant Chicago Coke's August 17, 2012 motion for summary judgment.

CHICAGO COKE CO., INC.

By: 
One of its attorneys

Dated: September 19, 2012

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