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: See Attached List

PLEASE TAKE NOTICE that on the 19th day of September, 2012, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached The Illinois Environmental Protection Agency's Response to Petitioner's Motion for Summary Judgment, a copy of which is hereby served upon you.

Respectfully submitted,

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, and in Response to the Motion for Summary Judgment ("Motion") filed by Petitioner CHICAGO COKE CO., INC. ("Chicago Coke" or "Petitioner"), states as follows:

I. INTRODUCTION

The issue on appeal is whether Chicago Coke's emission reductions may be relied upon as emission offsets ("Emission Offsets" or "Emission Reduction Credits" ("ERCs")) by future permittees seeking to counter new emissions in the Chicago nonattainment area, as required under New Source Review ("NSR"). Chicago Coke asks the Board to restrict the ability of the State of Illinois ("State") to oversee attainment planning in nonattainment areas, specifically the ability of the State to manage Emission Offsets in such areas. Not only does Chicago Coke fail

to provide any legal support for such restrictions, but the Clean Air Act ("CAA") and federal guidance confirm the State's authority in this area.

The purpose of Emission Offsets, and of NSR in general, is to ensure that emissions from new sources do not impede an area's movement toward attainment of the National Ambient Air Quality Standards ("NAAQS") or impede reasonable further progress toward attainment. To further that purpose, and in compliance with federal guidance, 35 Ill. Adm. Code 203.303, and 40 C.F.R. 51.165, the Illinois EPA examines the timing of the emission reductions new sources propose to rely upon as Emission Offsets. Once a source has permanently shut down, the Agency follows a "Five-Year Guideline," under which emission reductions that are more than five years old from the date of a source's permanent shutdown can no longer be used by new sources to offset new emissions in nonattainment areas ("Five-Year Guideline"). Despite Chicago Coke's assertion that there is no federal guidance "prohibiting the use of ERCs from a 'permanently shutdown' facility," which has been shut down for more than five years (Mtn. at p. 3), federal guidance clearly allows such management of Emission Offsets for attainment purposes by the State.

Chicago Coke is incorrect in stating that the Illinois EPA "completely reversed" its position regarding permanent shutdown between 2005 and 2010, with "no change in facts" in between. (Mtn. at p. 1.) Omitted from Chicago Coke's motion are the following "changes in facts" that occurred between 2005 and 2010: (i) the length of time the Facility had been shut down increased from three years to eight years; (ii) Chicago Coke, which obtained a construction permit in 2005 to repair and operate the Facility, allowed the permit to expire without performing any such repairs; (iii) Chicago Coke, which had repeatedly assured the Agency that it intended to restart the Facility, admitted it intended to sell the real estate for redevelopment; (iv) Chicago

Coke stopped paying operating fees and submitting annual emission reports ("AERs") for the Facility; (v) the Facility was removed from the State's emissions inventory ("Emissions Inventory"); and (vi) the Illinois EPA relied upon the emission reductions at issue in the course of its attainment planning. Each of these changed facts touches upon one or more factors that must be considered when determining whether a shutdown is permanent, as set forth in applicable federal guidance.

The overwhelming facts before the Agency in 2010, however, establish that Chicago Coke did not intent to restart the Facility and that the shutdown was permanent. At that point, the emission reductions were eight years old and therefore, under the Five-Year Guideline, were no longer available to new sources for use as Emission Offsets. Contrary to Chicago Coke's assertion that it has had "to guess the specific basis for IEPA's decision" (Mtn. at p. 6), the Illinois EPA promptly informed Chicago Coke of the Agency's position on multiple occasions during the almost three years parties discussed the issue.

Under the applicable federal guidance discussed below, the Facility was permanently shutdown and the Facility's emission reductions were no longer creditable for use as Emission Offsets. Accordingly, Chicago Coke's motion for summary judgment should be denied.

II. FACTS

The Illinois EPA incorporates by referenced into this response the facts identified in the Respondent's Motion for Summary Judgment ("Respondent's Motion.") and the Respondent's Exhibits Submitted in Support of Respondent's Motion for Summary Judgment ("Respondent's Exhibits"), filed with the Board on August 17, 2012. (Respondent's Motion at pp. 6-13.) Additionally, the Illinois EPA identifies the following facts in the Administrative Record supporting its response to Chicago Coke's Motion:

1. On July 11, 2007, representatives of Chicago Coke met with the Illinois EPA regarding Chicago Coke's intent to sell the real property on which the Facility was located and the claimed ERCs to a third-party for redevelopment into a coal-gasification plant. (*See* Ltr. from Katherine D. Hodge to The Illinois EPA (Aug. 3, 2007) ("8/3/07 Hodge Ltr.") at pp. 1-2 (Mtn. at Exh. 7)) 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.*at p. 1; *see also* affidavit of Laurel Kroack ("Kroack Affd.") ¶ 10 (attached as Exh. A))

2. On August 3, 2007, Chicago Coke sent a letter to the Illinois EPA to address the Agency's concerns regarding the claimed ERCs. (*See* 8/3/07 Hodge Ltr. at p. 1 (Mtn. at Exh. 7))

3. In response to the August 3, 2007 correspondence, the Illinois EPA called Chicago Coke and advised that its concerns regarding the claimed ERCs had not changed. (*See* Ltr. from Katherine D. Hodge to the Illinois EPA (July 18, 2008) ("7/18/08 Hodge Ltr.") at p. 2 (Mtn. at Exh. 7))

4. On January 17, 2008, Chicago Coke and the Illinois EPA met again regarding the claimed ERCs. At the meeting, the Illinois EPA conveyed to Chicago Coke its determination that the Facility was permanently shutdown and the Facility's emission reductions were no longer available for use as Emission Offsets under the Agency's Five-Year Guideline. (*Id.*)

5. In a letter dated July 18, 2008, sent to the Illinois EPA, Chicago Coke again requested that its emission reductions be available for use as Emission Offsets in light of the company's intent to sell the real estate and the claimed ERCs. In its letter, Chicago Coke provided additional information for the Illinois EPA's review. (*Id.* at pp. 1-3.)

6. On or about July 25, 2008, the Illinois EPA responded to the 7/18/08 Hodge Ltr. with a telephone call to Chicago Coke's counsel, Katherine Hodge. The Illinois EPA advised Chicago Coke that its position on the claimed ERCs had not changed from previous communications. (*See* affidavit of John J. Kim ("Kim Affd.") ¶¶ 4-5 (attached as Exh. B))

7. In a letter dated January 15, 2010, sent to the Illinois EPA, Chicago Coke requested a written final decision regarding the availability of the claimed ERCs. (*See* Ltr. from Katherine D. Hodge to the Illinois EPA (Jan. 15, 2010) ("1/15/10 Hodge Ltr.") (Mtn. at Exh. 7))

8. In a letter dated February 22, 2010, sent to counsel for Chicago Coke, the Illinois EPA reiterated its decision previously discussed with Chicago Coke ("2010 Decision Ltr."). 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* 2010 Decision Ltr. (Admin. Record at p. 1593 and attached as Exh. C))

9. 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* Chicago Coke's Responses to IEPA's First Requests for Admission of Facts to Petitioner ("Petitioner's Resp. to RFAs"), Nos. 16-18 (attached as Exh. D)) Chicago Coke never produced coke at the Facility. (*See Id.*, Nos. 1 and 2; *see also* Kroack Affd. ¶ 14. (Exh. A)) 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. B))

III. ARGUMENT

A. Federal Guidance supports the Illinois EPA's decision.

Chicago Coke asserts that the Illinois EPA's February 22, 2010 decision was based on the Agency's position "that 'applicable federal guidance' prohibits the use of ERCs from sources which are 'permanently shutdown.[']" (Mtn. at pp. 5-6.) Chicago Coke argues that it is entitled to summary judgment because no federal guidance expressly addresses the creditability of emission reductions from permanently shutdown facilities. (*Id.* at p. 6.)

First, Chicago Coke's argument mischaracterizes the Illinois EPA's decision. The Illinois EPA's 2010 Decision Letter does not claim that federal guidance expressly prohibits such use of emission reductions. Rather, pursuant to the Illinois EPA's review and analysis of the applicable federal guidance identified below, the Agency determined that (i) the Facility was permanently shutdown, and (ii) the emission reductions from the permanently shutdown Facility were no longer creditable. (*See* 2010 Decision Ltr. (Exh. C); *see also* 8/3/07 Hodge Ltr. at pp. 1-3, 6-7 and 7/18/08 Hodge Ltr. at p. 2 (Mtn. at Exh. 7)) This determination was based, not on

a blanket prohibition contained in federal guidance, but rather on the Agency's application of federal guidance to the facts and circumstances surrounding Chicago Coke's claimed ERCs.

Second, federal guidance supports the Agency's decision that Chicago Coke's emission reductions were no longer available for use as Emission Offsets. The USEPA has provided significant guidance to states regarding the use of emission reductions as Emission Offsets. Specifically, it is the position of both the United States Environmental Protection Agency ("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 (Admin. Record at p. 0037 and attached as Exh. E)) Holding otherwise would significantly impair a state's efforts in regulating air emissions in nonattainment areas and meeting the CAA's requirement of "reasonable further progress" ("RFP") towards attainment. (*Id.* at p.2; 42 U.S.C. § 7502(c)) The USEPA clarified that 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." (7/8/96 Seitz Ltr. at p. 2 (Exh. E))

Chicago Coke relies on a federal guidance document that provides 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 RFP. (*See* 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 (Admin. Record at p. 0031 and attached in Mtn. at Exh. 3)) The USEPA expressly acknowledged that states "may" include expiration dates in their respective State Implementation Plans ("SIPs") to "ensure effective management of the offsets." (*Id.* at p. 7.) However, nothing

in the federal guidance requires a state to manage ERCs in such a manner, or restricts other options available to a state in its management of ERCs.[1]

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. 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 (Admin. Record at p. 0067 and attached as Exh. F)) 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."[2] (*Id.*)

Interpreting the above-guidance, and based on the requirements set forth in 35 Ill. Adm. Code 203.303 and 40 CFR 51.165, the Illinois EPA reviews several factors in determining if emission reductions are available for use as Emissions Offsets. The factors include: (i) the location of the source of the emission reductions; (ii) 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; (iii) the timing of the emission reductions; and (iv) whether the emission reductions have been relied upon in a permit or for demonstrating

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[1] As the Facility and its emissions were removed from the State's Emissions Inventory in January 2008, have not been in any Emissions Inventory since that time, and were relied upon by the Agency in demonstrating continued attainment (*see e.g.*, Kroack Affd. ¶ 17 (Exh. A)), the emission reductions from the Facility are not creditable for use as Emission Offsets under the federal guidance relied upon by Chicago Coke.

[2] From a practical standpoint, allowing emission reductions to remain viable indefinitely is problematic for attainment planning purposes. If offsets have an indefinite lifetime, they would need to be continuously "tracked" in the emissions inventory, and included in each subsequent Maintenance Plan projection. These emissions would need to be "counted" in each RFP calculation, meaning that under certain circumstances, existing sources may be required to over-control to make up deficiencies (essentially providing shutdown sources a windfall at the expense of operating ones).

attainment or reasonable further progress. (*See* Kroack Affd. ¶ 19 (Exh. A))

Regarding the timing of emission reductions, 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. Emission reductions that are over five years old are generally deemed to have "expired." (*Id.* ¶ 20.) This practice is consistent with the State's responsibility for and authority over attainment planning under the CAA (*see* 42 U.S.C. §§ 7502(c) and 7503(c)), and the discretion recognized in the federal guidance, needed by states "to effectively manage the air resources in their community." (*See* 7/8/1996 Seitz Ltr. at p.2 (Exh. E)) The Five-Year Guideline is also consistent with the federal guidance allowing states to place expiration dates on emission reductions "to ensure effective management of the offsets." (*See* 11/19/92 Meiburg Ltr. at p. 7 (Mtn. at Exh. 3) (allowing states to set expiration dates in SIPs))

The Illinois EPA's Five-year Guideline furthers the objectives of Emission Offsets and NSR to ensure that emissions from new sources do not impede an area's movement towards attainment of the NAAQS or impede reasonable further progress toward attainment. The 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. (*See* Kroack Affd. ¶ 20 (Exh. A)) 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 NSR. *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 NSR 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 (Exh. A))

In this case, as described in more detail below, the Illinois EPA analyzed the factors set forth in the pertinent federal guidance and determined that the shutdown of the Facility in February 2002 constituted a permanent shutdown.[3] 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,[4] and as such they were unavailable for use as Emission Offsets in any future permitting transactions. (*Id.* ¶ 21.)

Chicago Coke claims there was a "lengthy delay in obtaining a final decision from IEPA," such that the period of delay should be excluded from the five year calculation. (Mtn. p. 11). There was no such delay. The Illinois EPA and Chicago Coke engaged in ongoing discussions regarding the creditability of Chicago Coke's emission reductions over the course of three years. Prior to July 2008, Chicago Coke and the Illinois EPA met at least two times and had one telephone conversation wherein the Agency either expressed its concerns with the creditability of the emission reductions, or specifically advised that the emission reductions from the Facility were not creditable for use as Emission Offsets because the Facility was permanently shutdown and the emission reductions were in excess of the Agency's Five-Year Guideline. (*See* 7/18/08 Hodge Ltr. at pp. 1-2 (Mtn. at Exh. 7)) Chicago Coke was well aware of the Agency's determination, evidenced by Chicago Coke's July 18, 2008 correspondence, in which Chicago

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[3] 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.

[4] 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.

Coke's counsel admitted that "on January 17, 2008, Bureau Chief Laurel Kroack stated that the Illinois EPA would not recognize the ERCs" based on the Agency's Five-Year Guideline. (*See* 7/18/08 Hodge Ltr. at p. 2. (Mtn. at Exh. 7))

Chicago Coke then revived the issue with a request that the Agency consider additional information, submitted to the Agency on July 18, 2008. (*Id.* at pp. 2-3.) Within a week of receiving and reviewing such information, the Illinois EPA advised Chicago Coke's counsel that the Agency's determination had not changed from previous communications. (*See* Kim Affd. ¶¶ 4-5 (Exh. B)) A year and a half later, Chicago Coke requested a "final decision, in writing." (1/15/10 Hodge Ltr.at. p. 2 (Mtn. at Exh. 7)) The Agency once again analyzed the facts before it and, approximately a month after receipt of Chicago Coke's request, provided a written decision summarizing the Agency's position as previously conveyed to Chicago Coke on at least four occasions. (*See* 2010 Decision Ltr. (Exh. C)) It is this decision that is currently on appeal.

Based on the foregoing, Chicago Coke's claim that the Agency in any way delayed its decision is misleading and empty, and likewise any assertion that the Board should not review the full period of time in review of the Agency's 2010 decision is meritless.

B. The Facility was permanently shut down as of February 2002.

Chicago Coke argues in its Motion that the Facility was not permanently shutdown at the time of the Illinois EPA's decision. (Mtn. at pp. 5, 9-12.) In support of its argument, Chicago Coke claims that the Illinois EPA determined that the Facility was not permanently shutdown in 2005 and that "[n]one of the conditions at the facility changed between April 2005 and February 22, 2010." (*Id.* at p. 10) Therefore, Chicago Coke maintains "there is no basis for IEPA's reversal of its own [2005] decision that Chicago Coke was not permanently shutdown" and that "it is impossible for Chicago Coke to have been permanently shutdown for five years." (*Id.* at

pp. 9, 11.) However, Chicago Coke summarily dismisses the relevant federal guidance defining "permanent shutdown" and omits the relevant facts and circumstances that changed significantly between the Illinois EPA's decision in 2005 to issue Chicago Coke a construction permit and its decision in 2010 regarding the claimed ERCs. Chicago Coke further fails to recognize that the date of the permanent shutdown of the Facility must relate back to February 2002, when the Facility's coke oven battery ceased operation and the Facility became physically unable to produce coke.

Federal Guidance Regarding Permanent Shutdown

In making its decision that the February 2002 shutdown of the Facility was a permanent shutdown, the Illinois EPA examined the well-established, general policy of the USEPA that whether a facility has been permanently 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 e.g.*, 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.") (Admin. Record at p. 0007 and attached in Mtn. at Exh. 2); 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.") (Admin. Record at p. 0013 and in Mtn. at Exh. 2); *see also* Respondent's Motion at pp. 15-14 citing federal guidance contained in Admin. Record at pp. 0005 and 0016.)

Furthermore, federal guidance provides that "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 (Mtn. at Exh. 2) *emphasis added*; *see also e.g.*, 5/27/87 Seitz Memo. at p. 1 (Mtn. at Exh. 2)) 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 (Mtn. at Exh. 2); *see also* 5/27/87 Seitz Memo. at p. 1-2 (Mtn. at Exh. 2)) After the passage of two years, statements by the owner or operator of original intent to reoperate a facility are not considered determinative. Rather, the government must make an assessment as to "whether the owner or operator has demonstrated a continuous intent to reopen." (*See In re Monroe Elec. Gen. Plant Entergy Louisiana, Inc. Proposed Op. Permit*, Pet. No. 6-99-2, slip op. at 9 ("Monroe Elec. Or.") *emphasis added*, (Admin. Record at p. 0039 and attached as Exh. G)) 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.*)

Federal guidance provides further insight as to determining the intent behind a shutdown. Specifically, several factors are to be examined on a case-by-case basis, with no single factor being determinative, including: (i) the reason for the shutdown; (ii) statements by the owner or operator regarding intent; (iii) duration of time the facility has been out of operation; (iv) the costs and time required to reactivate the facility; (v) status of permits; (vi) ongoing maintenance and inspections that have been conducted during shutdown; and (vii) the handling of the

shutdown by the State. (*Id.* at 8-9; *see also e.g.*, 9/6/78 Reich Memo. (Mtn. at Exh. 2) (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); 5/27/87 Seitz Memo. (Mtn. at Exh. 2) (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).

Chicago Coke argues that the federal guidance discussed above, and the permanent shutdown analysis in general, is irrelevant to the question of whether "Chicago Coke can transfer its ERCs?" As outlined above, however, such an analysis is central to determining, not whether Chicago Coke can "transfer" its emission reductions, but whether such emission reductions can be relied upon by new sources to meet NSR offsetting requirements. As previously discussed, timing of the emission reductions, including when the emission reductions occurred and whether they are permanent, is a key factor, not only under the Agency's Five-Year Guideline, but also pursuant to timing restrictions set forth in 35 Ill. Adm. Code 203.303 and 40 C.F.R. 51.165. Federal guidance regarding permanent shutdown is therefore instructive in determining the timing of the emission reductions at issue.

Agency's 2005 Determination vs. Agency's 2010 Determination.

Chicago Coke claims that there is no basis for the Illinois EPA's "inexplicable" reversal of its 2005 determination regarding permanent shutdown of the Facility.[5] (Mtn. at p. 10) The facts demonstrate otherwise. In 2005, the Agency issued a construction permit to Chicago Coke to perform the repairs necessary to make the Facility operational ("Construction Permit"). (*See*

[5] In support of its contention that there was no basis for the Illinois EPA to determine in 2010 that the Facility was permanently shutdown, Chicago Coke proffers the statement of Simon Beemsterboer that there were no "significant changes in operation at the facility between April 2005 and February 2010." (Mtn. at p. 10; Beemsterboer Affd. ¶ 5, (Mtn. at Exh. 6)) Indeed, it is undisputed that the Facility never operated during that time. (*See* Petitioner's Resp. to RFAs, Nos. 9, 11, 16-18, 21 (Exh. D))

Construction Permit (Admin. Record at p. 0807 and relevant portions attached in Mtn. at Exh. 5)) In finding that NSR was not implicated, the Illinois EPA determined that Chicago Coke had overcome the presumption that the 2002 shutdown of the Facility was permanent. (*See* Kroack Affd. ¶ 8 (Exh. A)) The facts before the Agency at that time included the following:

1) The Facility had been shut down for approximately three years (*see* Ltr. from Simon Beemsterboer to the Illinois EPA (May 3, 2004) ("Beemsertboer Ltr.") at pp. 2-3 (Admin. Record at p. 1598 and attached as Exh. H));

2) The Facility was current regarding payment of its operating fees;

3) The Facility was current regarding its submittal of AERs;

4) The Facility was still present in the State's Emission Inventory (*see* Kroack Affd. ¶ 8 (Exh. A));

5) The owners of Chicago Coke stated that they intended to restart the Facility (*see* Beemsterboer Ltr. at pp. 4-19); and

6) The owners of Chicago Coke were in fact seeking a construction permit to perform the repairs necessary to restart the Facility (*id.*).

In 2010, the Agency determined that, in the context of the creditability of Chicago Coke's emission reductions, Chicago Coke failed to overcome the presumption that the 2002 shutdown of the Facility was permanent. (Kroack Affd. ¶¶ 12-18 (Exh. A)) By that time, the facts before the Agency included the following, all of which are inexplicably omitted from Chicago Coke's motion:

1) The Facility had been shut down for approximately eight years (*see* Beemsterboer Ltr. at 2-3 (Exh. H));

2) The Facility had stopped paying operating fees (*see* Petitioner's Resp. to RFAs, Nos. 20-21 (Exh. D));

3) The Facility had stopped submitted AERs (*see* Kroack Affd. ¶ 16 (Exh. A));

4) The Facility was removed from the State's Emissions Inventory (*see* Respondent's Responses to Intervenors' Request to Admit to Respondent ("Respondent's Resp. to Intervenors' RFAs"), Request 4 (attached as Exh. I);

Kroack Affd. ¶ 17 (Exh. A));

5) The owners of Chicago Coke never performed a pad-up rebuild pursuant to the 2005 Construction Permit and in fact never operated the Facility as a coke-production facility (*see* Petitioner's Responses to RFAs, Nos.1, 2, 3, 4, 5, 16-18, and 19 (Exh. D));

6) By not undertaking a pad-up rebuild to repair the Facility, Chicago Coke in essence rendered its operating permit moot;

7) Chicago Coke negotiated the potential sale of the real property and the claimed ERCs to a third-party for redevelopment into a coke gasification plant (*see* 8/3/07 Hodge Ltr. at pp. 1-2 (Mtn. at Exh. 7));

8) In June 2007, the owners of Chicago Coke admitted they did not intend to operate the Facility when they disclosed to the Illinois EPA the negotiated potential sale for redevelopment (*id.*);

8) The Illinois EPA relied upon Chicago Coke's emissions reductions in its Maintenance Plan, submitted to the USEPA in 2009 as part of Illinois' redesignation request (*see* Kroack Affd. ¶ 17 (Exh. A)).

There is nothing inexplicable about Illinois EPA's 2010 determination. The facts and circumstances before the Illinois EPA in 2010 were significantly different than those that existed in 2005, and clearly supported the Illinois EPA's finding of permanent shutdown. Under the factors set forth in the above-federal guidance, Chicago Coke's actions plainly reveal that it did not demonstrate "a continuous intent to reopen" the Facility.

The Date of Permanent Shutdown is the Date Operations Ceased.

Chicago Coke argues that, due to the Illinois EPA's 2005 determination, "[t]he earliest any five-year expiration period could have run would have been no earlier than April 2010." (Mtn., p. 11). This argument is based on the mistaken premise that the 2005 determination changed the date of the shutdown of the Facility. It is undisputed that the Facility went into cold-idle in February 2002 and that the Facility was never physically able to operate after that date. (*See* Beemsterboer Ltr. at pp. 2-3 (Exh. H); Petitioner's Resp. to RFAs, Nos. 3-5 (Exh. D))

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 question before the Agency in February 2010 was whether the 2002 shutdown was a permanent shutdown. As demonstrated above, the Illinois EPA's determination that the shutdown was permanent is strongly supported by the facts and is consistent with federal guidance. The emission reductions at issue were created by this shutdown, and were eight years old at the time of the Agency's decision.

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 2002 shutdown of the Facility was a permanent shutdown.

IV. CONCLUSION

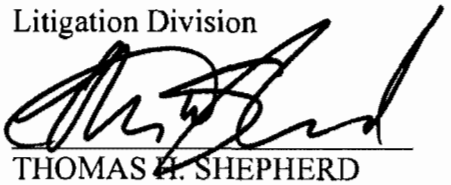
The record, pleadings, depositions, admissions on file, and affidavits in this matter disclose no genuine issue as to any material fact. For the reasons discussed above, Chicago Coke's motion should be denied, and the Illinois EPA is entitled to judgment as a matter of law.

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board issue an order denying Petitioner's motion for summary judgment; granting summary judgment in favor of the Illinois EPA pursuant to its August 17, 2012 motion for summary judgment; and any relief the Board deems just and proper.

THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY, by

LISA MADIGAN,
Attorney General of the
State of Illinois

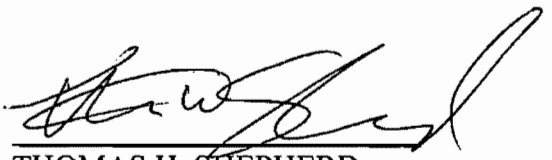
MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

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 a Notice of Filing and The Illinois Environmental Protection Agency's Response to Petitioner's Motion for Summary Judgment and caused them to be served this 19th day of September, 2012, by emailing true and correct copies of same upon the persons and e-mail addresses listed on the foregoing Notice of Filing at of before the hour of 5:00 p.m.



THOMAS H. SHEPHERD

RESPONDENT'S EXHIBITS

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AFFIDAVIT OF LAUREL KROACK IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I, LAUREL KROACK, being duly sworn on oath, depose and state that I am over 21 years of age, have personal knowledge of the facts stated herein, and, if called as a witness, could competently testify to facts as set forth herein as follows:

1. I am currently employed by the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") as Chief of the Bureau of Air ("BOA") at the Illinois EPA, located at 1021 North Grand Avenue East, Springfield Illinois. I have held this position since March 2005.

2. As Bureau Chief, my duties and responsibilities include, in part, administering all of the Bureau programs, with a program staff of approximately 275 people.

EXHIBIT tabbies A

3. From May 2003 to March 2005, I was employed by the Illinois EPA as Division Manager for Air Pollution Control with direct supervisory responsibility for its programs, including air quality planning, compliance and enforcement, air monitoring, permitting, and inspections.

4. In 2005, I assisted the Agency in its decision regarding whether the coke plant owned by Chicago Coke Co., Inc. ("Chicago Coke"), located at 11400 South Burley Avenue, Chicago, Illinois ("Facility"), was permanently shut down for purposes of the issuance of a construction permit authorizing the performance of a pad-up rebuild project to restart operations at the Facility ("Construction Permit").

5. From 2007 through 2010, I also assisted the Agency in its decision regarding whether the Facility was permanently shut down in response to Chicago Coke's request that emission reductions from the Facility be available for use as emissions offsets for the permitting of future major new emissions sources in the Greater Chicagoland ozone and fine particulate matter ($PM_{2.5}$) nonattainment areas ("Emission Offsets" or "Emission Reduction Credits" ("ERCs")).

6. In determining if a source has permanently shut down for purposes of determining the creditability of a source's emission reductions, the Illinois EPA examines the intent of the owner or operator to restart the source. In doing so, the Agency considers several factors on a case-by-case basis, with no factor being determinative. The factors are set forth in the applicable federal guidance and include: (i) the reason for the shutdown; (ii) statements by the owner or operator regarding intent; (iii) duration of time the facility or source has been out of operation; (iv) the costs and time required to reactivate the

facility or source; (v) status of permits; (vi) ongoing maintenance and inspections that have been conducted during the shutdown; and (vii) the handling of the shutdown by the State of Illinois ("State").

7. Pursuant to federal guidance, a source that has been shutdown for longer than two years is presumed to be permanently shutdown. A source may rebut this presumption with a demonstration of intent to restart operation in light of the above-factors.

8. In 2005, the Illinois EPA considered the above-factors in determining that the 2002 shutdown of the Facility was not a permanent shutdown for purposes of Chicago Coke's application for the Construction Permit authorizing the necessary repairs to restart coking operations at the Facility. The Agency's decision was based on numerous representations by representatives of Chicago Coke that the company intended to restart the Facility in the near future. The Agency also considered the following information: evidence of maintenance and inspections of the Facility; inclusion of the Facility in the State's emissions inventory maintained by the Agency ("Emission Inventory"); Chicago Coke's renewal of the Facility's permit under the Clean Air Act Permit Program ("CAAPP") in September 2004; the Facility's continued payment of operating fees and its continued submittal of required Annual Emissions Reports ("AERs"); and Chicago Coke's non-demolition of any buildings or process facilities that would be used to resume operations.

9. The Construction Permit expired in October 2006. Chicago Coke never performed a pad-up rebuild of the coke oven battery.

10. On July 11, 2007, representatives of Chicago Coke met with the Illinois EPA. At the meeting, Chicago Coke admitted to the Illinois EPA that the company no longer intended to operate the Facility, but rather had negotiated a possible sale of the real property and claimed ERCs to a third-party. The Agency expressed its concerns with the availability of the Facility's emission reductions for use as Emission Offsets under the Illinois Pollution Control Board's Air Pollution regulations and under federal law, regulations, and guidance.

11. From June 2007 through February 2010, the Illinois EPA met and communicated with Chicago Coke several times regarding Chicago Coke's emission reductions, the Illinois EPA's concerns regarding the creditability of the emission reductions, and the bases for the Illinois EPA's concerns.

12. In a letter dated February 22, 2010, the Illinois EPA advised Chicago Coke that the Facility was considered permanently shut down and that the Facility's emission reductions were no longer creditable for use as Emission Offsets. A true and correct copy of the February 22, 2010 decision letter was previously filed in this action and certified by the Illinois EPA in the Administrative Record at p. 1593.

13. The Illinois EPA based its decision on the above-factors identified in the federal guidance and on the facts and circumstances before the Agency in 2010. At the time of the Agency's decision, the Facility had not been in operation for eight years, Chicago Coke failed to perform the repairs necessary to reopen the Facility when given the opportunity to do so under the Construction Permit issued in 2005, and Chicago Coke admitted in 2007 that it did not intend to restart the Facility.

14. From 2003 through 2008, Chicago Coke reported to the Illinois EPA zero emissions of regulated air pollutants from coking operations at the Facility. True and correct copies of the Facility's Annual Emissions Reports for the reporting years 2003 through 2008 were previously filed in this action and certified by the Illinois EPA in the Administrative Record at pp. 0471-0806 and 1201-1435. In fact, the only minimal emissions reported by Chicago Coke for the years 2004 and 2005 were from the trans-loading operations of Calumet Transload Railroad, LLC ("CTR") that were moved adjacent to the Facility after Chicago Coke's purchase of the coke plant. (*See* AERs, Admin. Record at pp. 0471-0582 and 1322-1435.) CTR's trans-loading operation consisted of the loading, unloading, and transferring of materials between railcars, trucks, ships, barges and storage piles on site. CTR's trans-loading operations were not part of the original operations at the Facility and were independent of Chicago Coke's permitted, non-operational coking operations. The Illinois EPA issued a permit to CTR in 2006 that addressed the new trans-loading operations near the Facility.

15. Additionally, the cost of the repairs necessary to restart the coking operations at the Facility was estimated in 2004 to be between $88 million and greater than $1.2 billion. By 2010, the cost to repair the Facility was likely much greater, making future restart of the Facility unlikely.

16. Chicago Coke stopped paying operating fees in 2008 and the company did not submit AERs for 2009 forward.

17. Emissions from the Facility were removed from the State's Emission Inventory in 2008. A true and correct copy of a notation by the Illinois EPA identifying

that the Facility was removed from the State's Emission Inventory was previously filed in this action and certified by the Illinois EPA in the Administrative Record at p. 2285. As a result, the State's Maintenance Plan, submitted to the United States Environmental Protection Agency ("USEPA") in 2009 in conjunction with a request for redesignation of the Chicago nonattainment area with regard to the 1997 8-hour ozone National Ambient Air Quality Standard ("NAAQS"), "counted-out" the Facility's emissions as zero for the purpose of demonstrating continued attainment of the NAAQS. A true and correct copy of the Maintenance Plan was previously filed in this action and certified by the Illinois EPA in the Administrative Record at p. 2286.

18. The Agency analyzed the facts set forth above in light of the applicable federal guidance and determined that the February 2002 shutdown of the Facility was a permanent shutdown.

19. The Illinois EPA examines several factors contained in 40 C.F.R. § 51.165, 35 Ill. Adm. Code 203.303, and federal guidance in determining the creditability of emission reductions from facilities or sources that have been permanently shut down. The factors include: (i) the location of the source of the emission reductions; (ii) 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; (iii) the timing of the emission reductions; and (iv) whether the emission reductions have been relied upon in a permit or for demonstrating attainment or reasonable further progress.

20. To achieve the express purpose of Emission Offsets under the Clean Air Act, which is to ensure that emissions from new sources do not 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 and discretion 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 shutdown. 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. 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. 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.

21. In regard to the Facility, 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. 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, 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.

FURTHER, AFFIANT SAYETH NOT.

LAUREL L. KROACK

SUBSCRIBED and SWORN to
before me this 16th day
of August, 2012.

OFFICIAL SEAL
CYNTHIA L. WOLFE
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-17-2015

NOTARY PUBLIC

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.	)	

AFFIDAVIT OF JOHN J. KIM

I, JOHN J. KIM, being duly sworn on oath, depose and state that I am over 21 years of age, have personal knowledge of the facts stated herein, and, if called as a witness, could competently testify to facts as set forth herein as follows:

1. I am currently employed by the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") as Interim Director at the Illinois EPA, located at 1021 North Grand Avenue East, Springfield Illinois. I have held this position since late October 2011.

2. As Interim Director, my duties and responsibilities include, in part, overseeing policy and administrative issues associated with the Agency, interacting with members of the public, regulated community, and elected officials, and working with the Governor's Office.

3. In 2008, I was employed by the Illinois EPA as an Associate Counsel/Manager of the Air Regulatory Unit in the Division of Legal Counsel. As Manager, my duties and responsibilities included, in part, assigning and reviewing work to attorneys within the Unit, working with members of the Agency's Bureau of Air, and interacting with private counsel, the public, and regulated community.

4. On or about July 25, 2008, I had a telephone conversation with Katherine D. Hodge, who was representing Chicago Coke Co. Inc., regarding the availability of emission reductions from the company's coke production facility ("Facility") 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 nonattainment areas ("Emission Offsets").

5. During the telephone conversation, I advised Kathy Hodge that the Illinois EPA's position had not changed from what was previously communicated to her: that the emission reductions from the Facility were not creditable for use as Emission Offsets. My recollection is that the reasons that had been previously conveyed were that the Facility was permanently shut down and the emission reductions exceeded the Illinois EPA's guideline that emission reductions from such facilities that are over five years old from the date of permanent shutdown are generally deemed to have expired.

FURTHER, AFFIANT SAYETH NOT.

JOHN J. KIM

SUBSCRIBED and SWORN to
before me this 11th day
of September, 2012.

NOTARY PUBLIC

OFFICIAL SEAL
CYNTHIA L. WOLFE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-17-2015

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

(217) 782-5544
(217) 782-9143 (TDD)

February 22, 2010

Katherine D. Hodge
Hodge Dwyer & Driver
3150 Roland Avenue
P.O. Box 5776
Springfield, Illinois 62705

Re: Chicago Coke Co., Inc.
Emission Reduction Credits

Dear Kathy:

Thank you for your letter dated January 15, 2010. You asked that the Illinois Environmental Protection Agency ("Illinois EPA") respond as to our final decision on whether certain Emission Reduction Credits ("ERCs") claimed by Chicago Coke Co., Inc. ("Chicago Coke"), are available for use as emission offsets for the permitting of major new sources and/or major modifications in the Chicago area.

Based on a discussion I had with Laurel Kroack, Bureau Chief for the Illinois EPA's Bureau of Air, I can confirm for you that 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.

I hope this makes clear the Illinois EPA's position on this issue. If not, or if you have any further questions, please do not hesitate to contact me. Thank you.

Sincerely,

John J. Kim
Chief Legal Counsel

Rockford • 4302 N. Main St., Rockford, IL 61103 • (815) 987-7760
Elgin • 595 S. State, Elgin, IL 60123 • (847) 608-3131
Bureau of Land – Peoria • 7620 N. University St., Peoria, IL 61614 • (309) 693-5462
Collinsville • 2009 Mall Street, Collinsville, IL 62234 • (618) 346-5120
Des Plaines • 9511 W. Harrison St., Des Plaines, IL 60016 • (847) 294-4000
Peoria • 5415 N. University St., Peoria, IL 61614 • (309) 693-5463
Champaign • 2125 S. First St., Champaign, IL 61820 • (217) 278-5800
Marion • 2309 W. Main St., Suite 116, Marion, IL 62959 • (618) 993-7200

EXHIBIT C

7012-002

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

CHICAGO COKE'S RESPONSES TO IEPA'S FIRST REQUESTS FOR ADMISSION OF FACTS TO PETITIONER

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by and through its attorneys SWANSON, MARTIN & BELL, LLP, responds to respondent THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA") First Requests for Admission of Facts.

GENERAL STATEMENTS and OBJECTIONS

A. Chicago Coke's responses are based upon non-privileged information currently known by it, and its investigation is ongoing. Chicago Coke reserves the right to supplement, amend, or correct these responses in accordance with the Board's procedural rules and the Illinois Code of Civil Procedure.

B. Chicago Coke will not provide privileged or protected information, if any, responsive to a particular request. If any privileged or protected information is

inadvertently provided, the provision of such information is not to be construed as a waiver of the attorney-client privilege, attorney work-product doctrine, common interest or joint defense privilege, the self-critical analysis privilege, or the privilege applicable to information prepared in anticipation of litigation.

C. Chicago Coke further objects to IEPA's requests to the extent they seek information that is not presently in Chicago Coke's possession, custody or control, or is not now or has never been in the control of Chicago Coke.

D. Chicago Coke reserves the right to supplement or amend its responses at any time prior to trial.

E. Any response given or document produced by Chicago Coke is subject to any objections regarding relevance, materiality, admissibility and all other objections on any other grounds that would require excluding the statement or document if offered at deposition, hearing, trial or other proceeding, or in any pleading or submission. All such objections are hereby expressly reserved and may be interposed at the time of attempted use.

F. Chicago Coke objects to the requests to admit as unduly burdensome to the extent they seek information already within IEPA's possession, information that is equally available to IEPA, or information that is in the public domain.

G. Chicago Coke objects to the form of the requests to admit, as violating 35 Ill.Adm.Code 101.618(c) and Supreme Court Rule 216(g).

H. Chicago Coke objects to the relevance of certain requests for admission of fact. The facts asked to be admitted are not relevant to the issues raised in this appeal, and Chicago Coke will object to any attempt to use the facts in this proceeding.

REQUESTS

1. As of February 22, 2010, Petitioner had never produced coke at the Facility.

   RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

2. As of February 22, 2010, Petitioner had never used the Facility for any industrial purpose other than transloading.

   RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

3. In its condition as of February 22, 2010, the Facility was not capable of producing coke.

   RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

4. In its condition as of November 15, 2002, the Facility was not capable of producing coke.

   RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

5. From November 15, 2002 to February 22, 2010, continuously, the Facility has never been in such a condition that it was able to produce coke.

   RESPONSE: See General Objection H. Without waiving objection, and

reserving all rights: Admitted.

6. For the year 2003, Petitioner's operations at the Facility did not emit any NO_x, PM or VOM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

7. For the year 2004, Petitioner's operations at the Facility did not emit any NO_x or VOM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

8. For the year 2004, Petitioner's operations at the Facility emitted only 4.3 tons of PM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

9. All emissions of PM from operations at the Facility that Petitioner reported to the Illinois EPA for the year 2004 were attributable to transloading operations.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

10. For the year 2005, Petitioner's operations at the Facility did not emit any NO_x or

VOM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

11. For the year 2005, petitioner's operations at the Facility emitted only 11.34 tons of PM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

12. All emissions of PM from operations at the Facility that Petitioner reported to the Illinois EPA for the year 2005 were attributable to transloading operations.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

13. For the year 2006, Petitioner's operations at the Facility did not emit any NO_x, PM or VOM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

14. For the year 2007, Petitioner's operations at the Facility did not emit any NO_x, PM or VOM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

15. For the year 2008, Petitioner's operations at the Facility did not emit any NO_x, PM or VOM.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

16. As of February 22, 2010, Petitioner had never placed the coke oven battery at the Facility into operation.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

17. As of February 22, 2010, Petitioner had never placed the coke oven by-products plant at the Facility into operation.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

18. As of February 22, 2010, Petitioner had never placed the boilers at the Facility into operation.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

19. As of February 22, 2010, Petitioner had never completed a pad-up rebuild of the coke oven battery at the Facility.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

20. Petitioner did not pay any fees to the Illinois EPA related to a CAAPP permit for the Facility for the year 2008.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

21. Petitioner did not pay any fees to the Illinois EPA related to a CAAPP permit for the Facility for the year 2009.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

22. For the years 2003, 2006, 2007, and 2008, Petitioner's operations at the Facility emitted no regulated air pollutants.

RESPONSE: See General Objection H. Without waiving objection, and reserving all rights: Admitted.

Respectfully submitted,

CHICAGO COKE CO., INC.

By: _____
One of its attorneys
(as to form and objections only)

Dated: September 7, 2011.

Michael J. Maher
Elizabeth S. Harvey
Swanson, Martin & Bell LLP
330 N. Wabash Avenue, Suite 3300
Chicago, IL 60611
312/321-9100

VERIFICATION

Simon Beemsterboer, being first duly sworn on oath, states that he is a representative of Chicago Coke Co., Inc.; that he has read Chicago Coke Co., Inc.'s responses to IEPA's first request for admission of facts; and that the admissions contained in the answers are true to the best of his knowledge and belief.

Simon Beemsterboer

DEBRA ALLEN
Notary Public
SEAL
State of Indiana
My Commission Expires June 26, 2018

SUBSCRIBED & SWORN to before me,
a Notary Public, this 1st day of
September, 2011.

JUL 8 1996

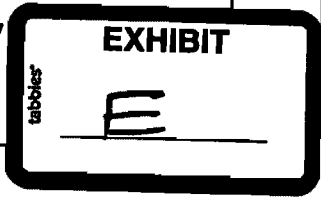
Mr. Peter F. Hess
President, Joint Commission
of Regulators & Business
3232 Western Drive
Cameron Park, California 95682

Dear Mr. Hess:

This is in response to your letter of May 14, 1996,, in which you present the California Air Pollution Control Officers Association Joint Committee of Regulators and Business (CAPCOA) concerns about a policy memorandum I sent to David Howekamp on August 26, 1994. In the August 1994 memorandum, the Environmental Protection Agency (EPA) requires that banked emission reduction credits (ERC's) be adjusted to reflect current State implementation plan requirements at the time of use.

In your letter, CAPCOA states that reasonably available control technology (RACT) adjusting of ERC's at time of use provides too much uncertainty for sources to voluntarily do early reductions through innovative technology, because EPA may eventually define RACT to be equal to the innovative technology. In the past, EPA has issued guidelines on what could be considered RACT, but, in recent years EPA has been, for the most part, leaving the determination of RACT to States' discretion. Therefore, EPA believes that if RACT is set in a way to discourage early reductions, the State is likely to be responding to particular air pollution problems present in its community.

The CAPCOA letter suggests that discounting for RACT at time of use is unfair to sources that voluntarily shut down or have otherwise reduced emissions because they did not know when the reduction occurred that it would be adjusted for RACT. Since existing sources need to reduce their emissions when new emission reduction requirements are adopted by a State, it seems equitable that emissions in a bank also be subject to emission reduction strategies. Air quality management is an iterative process. A State reduces some emissions and determines the effect on air quality. If the area continues to experience air quality problems, then the State must refine its attainment strategy to further reduce emissions. Therefore,. the use of ERC's that would either increase emissions above the current levels or lead to a shortfall in expected reductions could greatly reduce the effectiveness of a given attainment demonstration.



Finally, your letter states that it is unfair for owners of banked ERC's not to be able to sell or use them. However, please note that although ERCs are a limited authorization to emit, they are not and never have been an absolute property right. States have always had the ability to discount banked ERC's as needed for attainment purposes. Recent examples of this have occurred in the Los Angeles area. States must continue to retain this ability if they are to effectively manage the air resources in their community.

My August 26, 1994 policy memorandum recognized many of the concerns you and Region IX raised regarding this issue by offering several options in lieu of direct discounting of a particular project's ERC's at time of use. I encourage you to work creatively with EPA and State and local officials to explore any option which would address the concerns raised in your letter and the basic test which is outlined here and was explained more fully in the August 26, 1994 memorandum.

I appreciate this opportunity to be of service and trust that this information is helpful.

Sincerely,

(Original signed by Seitz)

John S. Seitz
Director
Office of Air Quality Planning
and Standards

OAQPS:AQSSD:ISEG:REVANS:541-5488:sjoumnigan:MD-15:6/13/96
Control No. AQPS-96-0280 Due Date: 6/6/96
Revised 6/27/96:WEIGOLD:spc:a:HESS.LTR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR 02 2002

REPLY TO THE ATTENTION OF:

(AR-18J)

Jeffry C. Muffat
3M Environmental Technology and Services
P.O. Box 33331
St. Paul, Minnesota 55133-3331

Dear Mr. Muffat:

Thank you for your letter of January 16, 2002, discussing a possible registry system for emission reduction credits in Illinois. I also appreciate the time you spent in my office discussing this topic.

Your letter highlights the key role that the State of Illinois would play if there is to be a registry system as you propose. We offer states considerable flexibility, not just in designing such systems but in deciding even whether to adopt such a system. I am pleased that you have met with the State to discuss this proposal. This program would be more possible with the State working with us to design and adopt it.

You ask several specific questions regarding the registry system you propose. We have policy that addresses some of these questions. For example, our prevention of significant deterioration rules define applicability criteria that do not consider emission reductions at other facilities. Other questions you ask are still under debate. For example, we are still formulating our policy on implementation of the 8-hour ozone and the fine particle ("$PM_{2.5}$") standards. Therefore, we are not able to answer these questions at this time. Finally, some of your questions are best answered in the context of a specific program design. For example, application of the policy on credit life given in our economic incentive policy (available at http://www.epa.gov/ttn/oarpg/t1/memoranda/eipfin.pdf, published January 2001 (see especially section 16.15)) is best discussed in the context of specific proposed characteristics and uses of credits.

For these reasons, we suggest that a better approach is for you to propose a specific program design to the State. If the State concludes that your proposed system would improve management of new source offsets or otherwise improve air quality management in the State, then we would be in a better position to develop

specific answers to more of your questions. In that case, we would work with you and the State toward defining answers to your questions that address the particular program under discussion.

Your letter also explains the relationship between a registry system and the existing Emissions Reduction Market System. I appreciate this explanation.

Thank you again for your interest in these issues. We encourage innovative programs that improve environmental management. If you and the State decide that this would be a useful program, I would be pleased to work with you on its design and implementation. If you have further questions, please feel free to contact John Summerhays of my staff at (312) 886-6067.

Sincerely yours,

Bharat Mathur, Director
Air and Radiation Division

cc: David Kolaz, Director
Bureau of Air
Illinois Environmental Protection Agency

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF MONROE ELECTRIC GENERATING PLANT ENTERGY LOUISIANA, INC. PROPOSED OPERATING PERMIT Proposed by the Louisiana Department of Environmental Quality	PETITION NO. 6-99-2 ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PETITION FOR OBJECTION TO PERMIT

On February 9, 1999, Ms. Merrijane Yerger, Managing Director of the Citizens for Clean Air & Water ("CCAW" or "Petitioner"), petitioned the Environmental Protection Agency ("EPA"), pursuant to section 505(b) of the Clean Air Act ("CAA" or "the Act"), to object to issuance of a proposed State operating permit to Entergy Louisiana, Inc.'s Monroe Electric Generating Plant in Monroe, Louisiana ("Monroe plant"). The proposed operating permit for the Monroe plant was proposed for issuance by the Louisiana Department of Environmental Quality ("LDEQ") pursuant to title V of the Act, CAA §§ 501 - 507, the federal implementing regulations, 40 CFR Part 70, and the State of Louisiana regulations, Louisiana Administrative Code ("L.A.C."), Title 33, Part III, Chapter 5, sections 507 et seq.

Petitioner has requested that EPA review, investigate, and make an administrative determination on the entire matter of the proposed operating permit and planned restart of the Monroe plant, pursuant to section 505(b) of the Act and 40 CFR § 70.8(c). Petitioner alleges that the proposed operating permit is not in compliance with applicable requirements of the Act including Prevention of Significant Deterioration ("PSD") permitting requirements and New Source Performance Standards ("NSPS"). Petitioner also alleges that Entergy's operating permit application fails to adequately demonstrate compliance with hazardous waste disposal requirements under the Resource Conservation and Recovery Act ("RCRA").

For the reasons set forth below, I find that the proposed title V permit does not assure compliance with applicable PSD requirements as set forth in the Louisiana State Implementation Plan ("SIP"). I therefore grant the Petitioner's request in part and object to issuance of the proposed title V permit unless the

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permit is revised in accordance with this Order. I deny the Petitioner's remaining claims.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. The State of Louisiana submitted a title V program governing the issuance of operating permits on November 15, 1993, and subsequently revised this program on November 10, 1994. 40 CFR Part 70, Appendix A. In September of 1995, EPA granted full approval of the Louisiana title V operating permits program, which became effective on October 12, 1995. 60 Fed. Reg. 47296 (Sept. 12, 1995); 40 CFR Part 70, Appendix A. This program is codified in L.A.C. Title 33, Part III, Chapter 5, sections 507 et seq. Major stationary sources of air pollution and other sources covered by title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA §§ 502(a) and 504(a).

The title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these applicable requirements is assured. See Order In re Roosevelt Regional Landfill, at 2 (May 4, 1999). Such applicable requirements include the requirement to obtain preconstruction permits that comply with applicable new source review requirements. Id. at 8.[1]

Under section 505(b) of the Act and 40 CFR § 70.8(c), states are required to submit all operating permits proposed pursuant to title V to EPA for review and EPA will object to permits

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[1] Louisiana defines "federally applicable requirement" in relevant part to include "any standard or other requirement provided for in the Louisiana State Implementation Plan ("SIP") approved or promulgated by EPA through rulemaking under title I of the Clean Air Act that implements the relevant requirements of the Clean Air Act, including any revisions to that plan promulgated in 40 CFR part 52, subpart T." L.A.C. 33:III.502. EPA approved a PSD program in the State of Louisiana's SIP on April 24, 1987. 52 Fed. Reg. 13671; 40 CFR § 52.986. Thus, the applicable requirements of the Act respecting the Monroe plant permit include the requirement to comply with the applicable PSD requirements under the Louisiana SIP.

determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR Part 70. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit.

To justify exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of Part 70. Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period. A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has not been issued, the permitting authority shall not issue the permit until EPA's objection has been resolved. 40 CFR § 70.8(d).

II. BACKGROUND

The Monroe plant, located in Monroe, Louisiana,[2] currently consists of three units (Units 10, 11 and 12), each with a boiler and ancillary equipment, which were installed in 1961, 1963, and 1968, respectively.[3] Each boiler is fired primarily with natural gas, but is also capable of being fired with diesel fuel oil.[4]

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[2] The Monroe area is currently designated as attainment for all National Ambient Air Quality Standards ("NAAQS") established by EPA.

[3] The City of Monroe built the plant in approximately 1895, and owned and operated the plant until 1978, when Louisiana Power & Light became the operator and subsequently the owner of the plant. Louisiana Power & Light changed its name to Entergy Louisiana, Inc. in 1996.

Units 10, 11 and 12 are the most recent additions Units 1 through 9 at the Monroe plant have been permanently decommissioned. The last of these, Unit 9, was permanently retired effective December 31, 1987. See Memo from D.L. Aswell, LP&L, to William Phillips, SSI (Dec. 18, 1987). This memo and other documents referred to in this Order are on file with EPA.

[4] The proposed title V permit would allow up to 15 percent of the facility's fuel use to be diesel fuel oil.

The rated capacities of the units are 23 megawatts ("MW"), 41 MW, and 74 MW, respectively. The total heat input for the units is 1,961 million British thermal units ("MMBtu"). Installation of these boilers was not subject to PSD review because it predated the PSD program.

On July 1, 1988, Louisiana Power & Light ("LP&L"), predecessor to Entergy Louisiana, Inc. ("Entergy"), placed the plant's three units in extended reserve shutdown ("ERS").[5] According to Entergy, these units were placed in extended reserve shutdown because of the addition of new electric generating capacity in the area. Memo from Entergy to EPA, "Actions Taken By Entergy At Monroe Generating Station." At the time of shutdown, LP&L projected that Units 10, 11 and 12 would not be needed for three to five years. Id. That period grew to eleven years as a result of "many factors," according to Entergy, including increased competition and demand-side management. Id.

Some time around September, 1988, LP&L initiated a number of activities at the Monroe plant to prepare the plant for extended shutdown, including draining, disconnecting and covering equipment, and installing and operating dehumidification equipment to prevent corrosion of the units. During shutdown, LP&L/Entergy conducted some inspection and maintenance activities, primarily in response to problems with the

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[5] Memo from E.M. Ormond, LP&L, to Glenn F. Phillips (June 28, 1988). Extended reserve shutdown is a program implemented by the Entergy Operating Companies (of which Entergy Louisiana is a member) in the mid-1980's to save money by placing units in inactive status and reducing operating staff, maintenance costs, and deferring the cost of repairing units. See Louisiana Public Service Commission, Order No. U-20925-G at 8-9 (Nov. 18, 1998).

The record further reflects that the units were not in regular operation for several years prior to placing the units in extended reserve shutdown. See Letter from Entergy to Jayne Fontenot, Chief, Permits Issuance Section, EPA, Region VI (July 18, 1994) (noting that Monroe plant has not operated on a routine basis since 1981). Internal LDEQ memoranda further suggest that the Monroe plant ceased operating around January 1988. See Memo from Paul Laird, LDEQ Northeast Regional Office, to John R. Newton, LDEQ, Air Quality Div. (Feb. 8, 1989); Memo from Paul Laird, LDEQ Northeast Regional Office, to John R. Newton, LDEQ, Air Quality Div. (Feb. 24, 1988).

dehumidification system.[6] During this period, LP&L/Entergy also maintained relevant environmental permits for the Monroe plant, including payment of air quality maintenance fees to LDEQ (between $1,100 and $1,300 per year), maintenance of water permits, and applications for an acid rain permit (received October 23, 1996) and a title V operating permit.

Entergy now proposes to restart Units 10, 11 and 12 at the Monroe plant beginning this summer. On September 16, 1996, Entergy submitted a title V permit application to LDEQ. The total estimated annual emissions of air pollutants associated with the plant, in tons per year ("tpy"), are as follows: nitrogen oxides ("NO_x"), 4,972.65 tpy; sulfur dioxide ("SO_2"), 679.84 tpy; carbon monoxide ("CO"), 361.65 tpy; particulate matter ("PM_{10}"), 32.46 tpy; and volatile organic compounds ("VOCs"), 12.74 tpy. These projected annual emission rates are incorporated as annual emission limits in the proposed title V permit. The requested operating permit includes no limitations on the hours of operation or the capacities at which the units would operate. Most relevant for purposes of this Order, neither the permit application nor the proposed permit provides for obtaining a PSD permit for the units prior to restart, under the Louisiana PSD program.

LDEQ submitted a proposed title V permit to EPA Region VI for review on November 16, 1998. The permit went out for public comment on November 25, 1998. Public commenters requested a public hearing. Notice of a public hearing was published on January 16, 1999. A public hearing was held by LDEQ on February 18, 1999. The public comment period ended April 20, 1999. EPA's 45-day review period expired on December 31, 1998. On February 9, 1999, Citizens for Clean Air & Water filed a timely petition with EPA pursuant to section 505(b)(2) of the Clean Air Act requesting that EPA object to issuance of the proposed permit for the Entergy Monroe plant. As of this date, no final permit has been issued.

III. ISSUES RAISED BY PETITIONER

Petitioner objects to issuance of the proposed permit on five grounds: (1) LDEQ failed to subject the Monroe plant to PSD review; (2) the maximum capacity of the Monroe plant may have been increased by some unknown method at some time between 1976

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[6] Other activities included stack inspections in 1992, installation of an oil/water separator for the stormwater system in 1996, and cleaning of the diesel fuel oil tank system in 1996.

and the time of the title V application without being subject to PSD review or NSPS; (3) the proposed permit fails to incorporate enforceable one-hour maximum emission rate limitations for sulfur dioxide and other criteria pollutants; (4) the proposed permit includes apparent annual emissions increases that suggest PSD review should be conducted for the sulfur dioxide emissions; and (5) sufficient information has not been provided in Entergy's permit application to ensure compliance with RCRA disposal requirements.[7]

In addition, the Petitioner requests the following: (1) that EPA issue an information request letter to Entergy and the City of Monroe under section 114 of the Act, requiring them to disclose all matters raised by this petition; and (2) that EPA conduct an on-site inspection of the Monroe plant to determine whether PSD and NSPS have been triggered.

Items (1), (3) and (4) are either addressed in the PSD applicability analysis or rendered moot by EPA's conclusion that the proposed title V permit must be revised to ensure compliance with applicable PSD requirements. Section V addresses Item (2); Section VI addresses Item (5). In response to Petitioner's request for an inspection, on May 17, 1999, EPA conducted an inspection of the Monroe plant to verify the activities being conducted at the plant and to confirm that the plant is not operating. Finally, in response to Petitioner's request that EPA issue an information request letter, EPA believes it has sufficient information to respond to the Petition and that there is no need at this time for such a letter.

IV. PSD APPLICABILITY ANALYSIS

The following sections describe EPA's analytical tests for determining PSD applicability and apply these tests to the proposed restart of the Monroe plant. EPA concludes that the proposed restart of the Monroe plant should be subject to PSD requirements and thus, that the title V permit does not assure compliance with the applicable PSD requirements set forth in the Louisiana SIP. The analysis in this Order, however, does not

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[7] These objections were also raised during the public hearing and in correspondence to LDEQ and Region VI from Mr. Alexander J. Sagady, Environmental Consultant, on behalf of CCAW, dated February 18, 1999. Accordingly, Petitioner has met her obligation to base the petition on objections to the permit raised with reasonable specificity during the public comment period.

purport to dictate the specific PSD permit terms that the State should adopt in revising the title V permit.

A. Analytical Approach

Part C of title I of the Clean Air Act establishes the statutory framework for protecting public health and welfare from adverse effects of air pollution, notwithstanding attainment and maintenance of all NAAQS. Congress specified that the PSD program is intended to:

> (1) "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources"; and
> (2) "assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process."

CAA § 160.

To accomplish these purposes, the Act relies primarily on a permitting program as the mechanism for reviewing proposals to increase air pollution in areas meeting the NAAQS. The Act generally requires PSD permits prior to construction and/or operation of new major stationary sources and major modifications to stationary sources in areas designated attainment or unclassified for the pollutants to be emitted by the sources. See CAA §§ 165(a) and 169(2)(C). "Modification" is defined to include, "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." CAA § 111(a)(4). By regulation, EPA has limited the facially broad sweep of the PSD provisions to only "major" modifications. 40 CFR § 51.166(i); see also L.A.C. 33:III.509(I).

As described in the following sections, reactivation of facilities that have been in an extended condition of inoperation may trigger PSD requirements as "construction" of either a new major stationary source or a major modification of an existing stationary source. Where facilities are reactivated after having been permanently shutdown, operation of the facility will be treated as operation of a new source. Alternatively, shutdown and subsequent reactivation of a long-dormant facility may trigger PSD review by qualifying as a major modification. This section describes EPA's approach for analyzing whether restart of

a facility triggers PSD review as: (1) a new major source under EPA's Reactivation Policy; (2) a major modification by virtue of a physical change resulting in a significant net emissions increase; or (3) a major modification by virtue of a change in the method of operation resulting in a significant net increase in emissions.[8]

1. Restart Treated as New Source -- EPA's Reactivation Policy

EPA has a well-established policy that reactivation of a permanently shutdown facility will be treated as operation of a new source for purposes of PSD review.[9] The key determination to be made under this policy is whether the facility to be reactivated was "permanently shutdown." In general, EPA has explained that whether or not a shutdown should be treated as permanent depends on the intention of the owner or operator at the time of shutdown based on all facts and circumstances. Shutdowns of more than two years, or that have resulted in the removal of the source from the State's emissions inventory, are presumed to be permanent. In such cases it is up to the facility owner or operator to rebut the presumption.

To determine the intent of the owner or operator, EPA has

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[8] Whether a source is subject to preconstruction review as a new source or as a major modification may be significant in particular cases for determining the appropriate analysis of control technology options and other PSD requirements. For example, analysis of control technology for major modifications might consider the age or configuration of the source where review for new sources might not. Likewise, analysis of alternatives for new sources might consider alternative locations where the same analysis for major modifications might not.

[9] See Memo from Edward E. Reich, Director, Div. of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief, General Enforcement Branch, Region II (Sept. 6, 1978); Memo from Edward E. Reich, Director, Stationary Source Enforcement Div., to William K. Sawyer, General Enforcement Branch, Region II (Aug. 8, 1980); Memo from John S. Seitz, Director, Stationary Source Compliance Div., OAQPS, to David P. Howekamp, Director, Air Mgt. Div., Region IX (May 27, 1987); Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987); Memo from John B. Rasnic, Director, Stationary Source Compliance Div., OAQPS, to Douglas M. Skie, Director, Air Programs Branch (Nov. 9, 1991).

examined factors such as the amount of time the facility has been out of operation, the reason for the shutdown, statements by the owner or operator regarding intent, cost and time required to reactivate the facility, status of permits, and ongoing maintenance and inspections that have been conducted during shutdown. No single factor is likely to be conclusive in the Agency's assessment of these factors, and the final determination 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.[10]

While the policy suggests that the key determination is whether, at the time of shutdown, the owner or operator intended shutdown to be permanent, in practice, after two years, statements of original intent are not considered determinative. Instead, EPA assesses whether the owner or operator has demonstrated a continuous intent to reopen. To make this assessment, EPA looks at activities during time of shutdown that evidence the continuing validity of the original intent not to permanently shut down.

Thus, to preserve their ability to reopen without a new source permit, EPA believes owners and operators of shutdown facilities must continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future. If they cannot make such a demonstration, it suggests that for at least some period of the shutdown, the shutdown was intended to be permanent. Once it is found that an owner or operator has no real plan to restart a particular facility, such owner or operator cannot overcome this suggestion that the shutdown was intended to be permanent by later pointing to the

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[10] See Memo from John S. Seitz, Director, Stationary Source Compliance Div., OAQPS, to David P. Howekamp, Director, Air Mgt. Div., Region IX (May 27, 1987) (finding shutdown of Noranda Lakeshore Mines' roaster leach plant to be permanent despite express statements from the facility owners that shutdown was temporary, and evidence that the plant was maintained during shutdown); but cf. Memo from John B. Rasnic, Director, Stationary Source Compliance Div., OAQPS, to Douglas M. Skie, Chief, Air Programs Branch (Nov. 19, 1991) (finding reactivation of Watertown Power Plant did not trigger PSD based on the fact that the statements of intent by the owners were supported by documentation regarding maintenance of the facility during shutdown and, as a result, the ability to reactivate the plant easily).

most recent efforts to reopen the facility.[11]

2. Restart as a Major Modification -- Physical Change

In addition to possibly triggering PSD requirements as a new source, restart of an idle facility may also trigger PSD review if it meets the definition of a major modification. EPA's PSD regulations define "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 CFR § 51.166(b)(2)(i); see also L.A.C. 33:III.509(B).[12]

"Physical change" is not defined in the Clean Air Act or in EPA's PSD regulations. Instead, EPA's regulations describe those activities that are not considered physical changes; most notably, the regulations exclude routine maintenance, repair and replacement. Outside these exceptions, the Agency and courts have interpreted "physical change" broadly. See, e.g., Wisconsin Elec. Power Co. v. Reilly ("WEPCO"), 893 F.2d 901, 908 (7th Cir. 1990) (noting that "courts considering the modification provisions of NSPS and PSD have assumed that 'any physical change' means precisely that").

As a result of this broad statutory definition, most analysis of whether PSD review is triggered under this provision will focus on whether the activities at the facility fit within

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[11] 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 to use it. See 40 CFR § 52.21(r) (construction must be commenced within 18 months of receiving a permit); L.A.C. 33:III.509(R); see also In re West Suburban Recycling and Energy Center, 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").

[12] Net emissions increases are calculated by combining any increase in actual emissions from a particular physical change or change in the method of operations, with any increase or decrease in actual emissions at the source that are contemporaneous with the particular change and otherwise creditable. 40 CFR § 51.166(b)(3); see also L.A.C. 33:III.509(B). See infra at V.A.4.

one of the regulatory exceptions, in particular the routine maintenance, repair and replacement exception provided in 40 CFR § 50.21(b)(2)(iii)(a). To distinguish between physical changes and work that is routine, "EPA makes case-by-case determinations by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding." WEPCO, 893 F.2d at 910 (quoting Memo from Don R. Clay, Acting Assistant Admin. for Air and Radiation, to David A. Kee, Director, Air and Radiation Div., Region V (Sept. 9, 1988)); see also Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart ("Cyprus Casa Grande Letter") (Nov. 6, 1987) (concluding work conducted at facility was not routine "when viewed as a whole").

3. Restart as a Major Modification -- Change in the Method of Operation

Restart of a long-dormant facility may also be treated as a major modification subject to PSD review if it represents a "change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 CFR § 51.166(b)(2)(i); see also L.A.C. 33:III.509(B). As with the term "physical change," the regulations do not define the meaning of "change in the method of operation" except by listing those activities that do not constitute such changes. 40 CFR § 51.166(b)(2)(iii); see also L.A.C. 33:III.509(B). The most relevant exception for analyzing whether restart of a shutdown facility might be treated as a change in the method of operation is 40 CFR § 51.166(b)(2)(iii)(f); see also L.A.C. 33:III.509(B). This provision exempts from PSD review "[a]n increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166." 40 CFR § 51.166(b)(2)(iii)(f); see also L.A.C. 33:III.509(B).

The purpose of this "increase in hours" exception was to avoid undue disruption by allowing routine increases in production during the normal course of business in order to respond to market conditions. In the preamble to the PSD rulemaking, EPA explained:

> While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to

> get an NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions.

45 Fed. Reg. 52676, 52704 (Aug. 7, 1980). The court in WEPCO explained further, "This exclusion . . . was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification." 893 F.2d at 916 n.11.

Analysis of whether restart of a facility constitutes a mere increase in the hours of operation or production rate must consider whether the proposed activity is of the kind intended to be covered by the provision. Specifically, EPA will look at whether the proposed change requires enhanced flexibility to avoid hampering a company's ability to respond to market fluctuations. In general, reactivation after long periods of shutdown, though obviously motivated by long-term changes in the market, is not a response to the same type of market fluctuations and does not merit the same permitting flexibility envisioned by the regulations.

Restart of a long-dormant facility also may not be entitled to coverage under the "increase in hours" exemption if it would disturb a prior assessment of the environmental impact of the source. In the preamble for the 1980 PSD rulemaking, after expressing its belief that Congress intended to allow certain facilities flexibility to respond to market fluctuations, EPA explained, "At the same time any change in hours or rate of operation that would disturb a prior assessment of a source's environmental impact should have to undergo scrutiny." 45 Fed. Reg. 52676, 52704 (Aug. 7, 1980). As a result, EPA will not exempt increases in the hours of operation in situations where the increase in hours would be prohibited by a permit condition or where the increase would "interfere with a state's efforts in air quality planning . . . ." Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987).

In the Cyprus Casa Grande PSD applicability determination, EPA concluded that restart of a roaster/leach/acid ("RLA") plant after 10 years of shutdown constituted a change in the method of operation. EPA distinguished restart of the plant from a mere increase in the hours of operation, explaining that the exemption was not intended to cover restart of facilities after long periods of shutdown. The letter explained:

> EPA's original intention to disallow the [increase in hours]

> exclusion where it would "disturb a prior assessment of a source's environmental impact" leads me to conclude that the exclusion should not be applied here. This is so because our present assessment as well as that of the State of Arizona, is that the RLA plant in its current non-operating condition has no environmental impact. This is evidenced in part by the removal of the plant from the state's emission inventory and the surrender of operating permits. An additional factor is the simple physical fact that the RLA plant has had zero emissions for ten years.

Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987).

4. Restart as a Major Modification -- Emissions Netting Baseline

Once restart is found to be involve either a physical change or a change in the method of operation, the Agency must determine if the change results in a significant net emissions increase of a pollutant subject to regulation under the Act. 40 CFR § 51.166(b)(2)(i); see also L.A.C. 33:III.509(B). The first step in calculating the net emissions increase is to determine whether the particular physical or operational change in question would itself result in a significant increase in "actual emissions." See 40 CFR § 51.166(b)(3)(i)(a) and (b)(21); see also L.A.C. 33:III.509(B). If so, the second step is to identify and quantify any other prior increases and decreases in "actual emissions" that would be "contemporaneous" with the particular change and otherwise creditable. See 40 CFR § 51.166(b)(3)(i)(b); L.A.C. 33:III.509(B). The third step is to total the increase from the particular change with the other contemporaneous increases and decreases. See 40 CFR § 51.166(b)(3)(i)(b); L.A.C. 33:III.509(B). If the total would exceed zero, then a "net emissions increase" would result from the change. Whether this net emissions increase of a regulated pollutant is "significant" is determined in accordance with the annual tonnage thresholds set forth in 40 CFR § 51.166(b)(23) and L.A.C. 33:III.509(B).

The primary issue in calculating the net emissions increase associated with the restart of a shutdown facility is usually calculation of the actual emissions increase. To calculate the actual emissions increase associated with the change, the emissions from the source after the change is made must be compared to the "baseline emissions" of the source, which are the actual emissions of the source as of a "particular date" (i.e., immediately prior to the physical or operational change in

question). The regulations provide, "In general, actual emission as of a particular date shall equal the average rate . . . at which the unit actually emitted the pollutant during a two-year period which precedes the particular date [the date of the change] and which is representative of normal source operations." 40 CFR § 51.166(b)(21)(ii); see also L.A.C. 33:III.509(B).

The regulations give EPA (or the permitting authority) discretion to set a different period for determining baseline emissions if such a period is more representative of normal source operations. 40 CFR § 51.166(b)(21)(ii); see also L.A.C. 33:III.509(B). EPA, however, has applied its discretion narrowly in assigning representative periods other than the two years immediately preceding the physical or operational change. One exception was provided in the preamble to the 1992 "WEPCO rulemaking." 57 Fed. Reg. 32314, 32325 (July 21, 1992). There EPA said that for utilities it would consider as "representative," actual emission levels from any two years within the five years preceding the physical or operational change.[13] In that same preamble, however, EPA specifically rejected one commenter's argument that EPA should consider a two-year period within the last five years of a plant's operation as the representative period for plants that have been shut down for more than five years. See 57 Fed. Reg. 32314, 32325 (July 21, 1992).

On more than one occasion, EPA has made clear that in calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline. In both the Cyprus Casa Grande applicability determination and the Cyprus Minnesota applicability determination, EPA set the baseline emissions level at zero for facilities that had been shut down or idle for 10 years. See Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987); Memo from John Calcagni, Director, Air Quality Mgt. Div., to David Kee, Director, Air and Radiation Div., Region V ("Cyprus Minnesota") (Aug. 11, 1992). In the Cyprus Minnesota applicability determination, after noting EPA's policy announcement in the WEPCO rulemaking, EPA explained that it has

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[13] See also Memo from John Calcagni, Director, EPA Air Quality Management Div., to David Kee, Director, Air and Radiation Div., EPA Region V (Aug. 11, 1992) (noting that representative period other than previous two years generally limited to catastrophic occurrences); EPA, Draft New Source Review workshop Manual at A.39 (Oct. 1990).

limited flexibility to adjust the "representative period."

For many reactivations of long-shutdown facilities that fall within the definition of a physical or operational change, the only step in calculating "significant net emissions increase" will be a determination of whether the increase in emissions resulting from the change is significant under 40 CFR § 51.166(b)(23)[14] because the baseline for actual emissions will be zero, and there will be no other emissions increases or decreases that are contemporaneous with the change.[15]

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[14] For Louisiana, the thresholds are provided at L.A.C. 33:III.509(B) in the definition of "significant" and are the same as the federal thresholds relevant here.

[15] As discussed above, the PSD regulations provide that the increase in emissions is determined by subtracting the affected units' pre-change "actual emissions" (referred to above as the "baseline") from their post-change "actual emissions." For units that have not "begun normal operations," the regulations generally provide that actual emissions are equal to the units' "potential to emit." 40 CFR § 51.166(b)(21)(iv). EPA interprets this provision to mean that units which have undertaken a non-routine physical or operational change have not "begun normal operations" within the meaning of the PSD regulations, since pre-change emissions may not be indicative of how the units will be operated following the non-routine change. See 57 Fed. Reg. 32314, 32326 (amending rules only for certain modifications at electric utility steam generating units and reserving "begun normal operations" language for other modifications); 63 Fed. Reg. 39857, 39859 n.4 (July 24, 1998) (post-change emissions of unit following non-routine change is potential to emit). In practice, this provision merely establishes a regulatory presumption that the units will operate at their maximum design capacity following the change. Sources can and frequently do rebut this presumption and avoid PSD applicability. They do so by agreeing to add pollution controls and/or accepting operational restrictions in a "minor NSR" permit or similar instrument that limits their emissions following the change to levels that are not significantly greater than pre-change actual emissions. See 40 CFR § 51.166(b)(4).

Since 1992, EPA regulations have allowed states to adopt a somewhat different approach to determining emissions increases for electric utility steam generating units. See 40 CFR § 51.166(b)(21)(iv), (v). Such units' post-change emissions may be established by a source estimating the future emissions of the unit and submitting to the state information to confirm the

B. Applicability of PSD to Restart of Monroe Plant

1. PSD Applicability Under EPA's Reactivation Policy

Entergy is proposing to restart three units at its Monroe plant that have been placed in "extended reserve shutdown" since July 1, 1988. At the outset, under EPA's Reactivation Policy, because these units have been shut down for more than two years, shutdown of these units is presumed to be permanent. Unless Entergy provides adequate support to rebut this presumption, restart of these units will be treated as activation of a new source subject to PSD. The remainder of this section discusses whether Entergy has adequately demonstrated that the units were never intended to be permanently shut down.[16]

Before formally placing the Monroe plant into extended reserve shutdown, then-owner LP&L prepared an Extended Reserve Shutdown Plan dated October 27, 1987, which described plans to maintain the plant in a reserved status to be available when the

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accuracy of those estimates. See 40 CFR §§ 51.166(b)(21)(v), (b)(32). However, states and localities are not required to include these special provisions for electric utility steam generating units in their PSD programs. See 40 CFR § 51.166(b) (allowing variations from federal rules when local rules are more stringent). Louisiana has not adopted the special provisions; accordingly, Entergy's post-change emissions will in this case be determined by its potential to emit, rather than by its projections of future emissions. In this case, however, even if Louisiana had adopted the special provisions for utilities, it would not change the outcome. This is so because Entergy has projected, and its proposed title V permit reflects, that it will operate at its full, unrestricted maximum capacity of 8760 hours per year. See Proposed Operating Permit, Monroe Electric Generating Plant, at 15 (General Condition III) (incorporating projected annual and hourly emissions rates).

[16] Entergy has submitted its own self-determination on PSD applicability. Letter from Frank Harbison, Sr. Lead Environmental Analyst, Entergy, to Larry Devillier, Asst. Administrator, LDEQ (Jan. 28, 1999). In addition, Entergy has provided various materials regarding maintenance activities, work needed to bring the plant back on line, permitting activities, and ERS decisionmaking. Letter from Gerald G. McGlamery, Louisiana Enviro. Admin., Entergy, to Hilry Lantz, Air Quality Div., LDEQ (Feb. 3, 1999); Memo from Entergy to EPA, "Actions Taken By Entergy At Monroe Generating Station" (w/ attachments).

demand for electricity increased. This plan included the installation of dehumidification systems, which were subsequently installed, to preserve the electric generation units. At the time of shutdown, at least, it appears that LP&L did not envision a permanent shutdown, but rather a temporary shutdown to respond to market conditions at the time. See Memo from Entergy to EPA, "Actions Taken By Entergy At Monroe Generating Station."

During shutdown, LP&L/Entergy continued to conduct minimum maintenance at the plant. These activities primarily involved responding to problems with the dehumidification system. Entergy has provided maintenance records dating back to May 9, 1988 showing maintenance undertaken at the plant each year throughout the shutdown period and indicating that LP&L/Entergy staff made multiple inspection or maintenance visits to the facility.

During the period of shutdown, LP&L/Entergy also continued to pay annual state air quality maintenance fees. Entergy has provided receipts for these payments for the period October 7, 1988 through August 18, 1998. On December 14, 1995, Entergy applied for a title IV Acid Rain permit, which it received October 23, 1996.

Based on this record it would appear that Entergy did not intend at the time of shutdown, and has never intended, to permanently shut down the Monroe plant. On the other hand, it appears that Entergy has not, until very recently, had definite plans to restart these units.

The Louisiana Public Service Commission ("LPSC"), in a review of whether Entergy had properly included ERS facilities, including the Monroe plant, in its list of "available" facilities,[17] found that Entergy had not adequately demonstrated that these ERS facilities would be returned to service. LPSC, Order No. U-020925-G (Nov. 18, 1998). Specifically, LPSC found that Entergy had not analyzed the costs of returning the ERS units to service, could not give a time frame for returning any

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[17] The dispute before the LPSC centered around a tariff agreement between Entergy companies whereby each company had to identify its available capacity and pay or receive compensation according to whether it produced power below or in excess of its listed available capacity. LPSC. Order No. U-020925 at 8-10. The agreement defined a unit as "available" if it was under the control of the system operator, was down for maintenance, or was in extended reserve shutdown with the intent of returning the unit to service at a future date. Id. at 10.

of the units to service beyond saying that they would be needed some time in the next 10 years, and had not made any efforts to confirm that they would be needed in the next 10 years. LPSC concluded that the fees resulting from Entergy's inclusion of the capacity of these ERS facilities could not be justified because Entergy had not made efforts to reach a decision "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service."

The record before the EPA includes significant circumstantial evidence suggesting that Entergy has never intended the shutdown of the Monroe plant to be permanent. Despite this evidence, however, EPA continues to have serious doubts as to whether Entergy truly intended during much of the 11-year shutdown to expect to use the Monroe plant in the foreseeable future.[18] Because restart of the plant more clearly triggers PSD as a major modification involving a change in the method of operation, EPA does not need to make a final conclusion regarding Entergy's regulatory status under the Reactivation Policy at this time.

2. Physical Changes Triggering PSD

As described previously, changes at a facility may be treated as a major modification subject to PSD review in one of two ways -- changes involving a physical change of the source and changes involving a change in the method of operation at the source. Entergy has submitted a description of the work, and associated costs, being conducted in order to restart the three units at the Monroe plant. The total projected cost is approximately $5.3 million. Of that, Entergy states that $1.4 million will be spent on capital improvements. These include replacement of PCB-contaminated transformers, replacement of controls using mercury, and installation of continuous emissions monitoring equipment. The remaining work includes inspection and

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[18] The disparity between the company's efforts to maintain the plant to avoid the appearance of permanent shutdown, and its failure to adequately demonstrate to the LPSC its plans to use the plant in the future, highlight one of the weaknesses of EPA's Reactivation Policy in determining the appropriate regulatory treatment of the restart of facilities after a lengthy shutdown. As a result, I have directed my staff to reevaluate EPA's Reactivation Policy to determine if steps can be taken to clarify the circumstances under which restart of a long-dormant source should be subject to new source review as a new source.

cleaning of equipment, some minor repairs of valves and piping, and replacement of auxiliary equipment such as batteries and lab equipment.

Analysis of whether these changes trigger PSD applicability must consider whether, "as a whole," the changes are exempt as routine maintenance, repair and replacement. See 40 CFR § 51.166(b)(2)(iii); L.A.C. 33:III.509(B). In our review of the proposed reactivation of the Cyprus Casa Grande RLA plant EPA explained:

> Although the [contractor's] report notes the good condition of the acid plant and characterizes some of the needed work as "minor" or "moderate," viewed as a whole, the minimum necessary rehabilitation effort is extensive, involving replacement of key pieces of equipment . . . and substantial time and cost [(four months and $905,000)]. In an operating plant some of the individual items of the planned rehabilitation, e.g. painting, if performed regularly as part of a standard maintenance procedure while the plant was functioning or in full working order, could be considered routine. Here, however, this and other numerous items of repair, as well as replacement and installation of new equipment, are needed in order for the RLA plant to begin operation. The fact that the plant requires four months of extensive rehabilitation work despite the adequate maintenance Noranda claims to have undertaken during the shutdown underscores the non-routine nature of the physical change that will occur at the plant.

Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987).

While the activities necessary to restart the Monroe plant might, collectively, appear to be part of a large, non-routine effort, EPA is not, at this time, making a finding as to whether this effort amounts to a physical change of the source. Because restart of the plant most clearly amounts to a change in the method of operation, as described below, EPA need not reach a final conclusion on whether such concentrated efforts without repair or replacement of key pieces of equipment or key components should be considered routine.[19]

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[19] It is worth noting that while the Cyprus rehabilitation effort included replacement of key pieces of equipment, the rationale for our conclusion in Cyprus Casa Grande turned on the non-routine collection of activities, and not on whether

3. Change in the Method of Operation of the Monroe Plant

For the last eleven years the Monroe plant has been inoperative. To operate the plant now after such a long shutdown constitutes a change in the method of operation within the meaning of the PSD regulations. The mere fact that the plant is changing from a lengthy "non-operational" and "unmanned" condition,[20] to one in which the plant is fully operational, fits the common sense meaning of a "change in the method of operation."

The proposed changes in the operation of the plant do not qualify as exempt increases in either the hours of operation or the rate of production, see 40 CFR § 51.166(b)(2)(iii)(f), and L.A.C. 33:III.509(B), because they are not the type of changes intended to be covered by the regulatory exemption. As discussed above, the purpose of the "increase in hours" exception was to provide flexibility to allow sources to adjust their operations to take advantage of currently favorable or changing market conditions without requiring a PSD permit. Restart of the Monroe plant neither calls for the same type of permitting flexibility nor can be considered a response to the kind of short-term, real-time market fluctuations envisioned by EPA in adopting the exemption.

This is not a situation where the sources's ability to plan ahead for permitting is constrained by the need for quick responses to short-term changes in the market. In its own analysis of PSD applicability, Entergy notes that unlike normal work outages where overtime is required to get the plants operational again, repairs at the Monroe plant will be conducted using "straight time" because "there will be no need to have the units available for dispatch in a short time frame." Memo from Mark G. Adams, Entergy to Myra Costello, Entergy (Aug. 3, 1998). Further, unlike the situations envisioned by the exemption, restart of a long-dormant facility involves permits for more than

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individual activities were themselves routine or non-routine.

[20] In a 1994 letter to LDEQ, Entergy states that as a result of placing the plant in ERS status in 1988, "[the] plant is non-operational and unmanned." Letter from Entergy to Cheryl LeJeune, Office of Water Resources, LDEQ (July 18, 1994). Entergy also noted that, "It has not generated electricity for six years and has not operated on a routine basis since 1981." Letter from Entergy to Jayne Fontenot, Chief, Permits Issuance Section, EPA, Region VI (July 18, 1994).

just air releases. Entergy has budgeted over $175,000 to obtain all of the necessary permits including a new water discharge permit to reflect the change from inoperation. Where a facility requires numerous permits to once again operate, PSD permit review is no longer the solitary hindrance that the exemption was designed to avoid.

EPA also believes the decision to operate after eleven years of shutdown, while certainly motivated by changes in the marketplace, is not the kind of quick decision to respond to quick market fluctuations that EPA intended to allow without the burden of the PSD permitting process. In the WEPCO rulemaking, EPA discussed its view of the time period in which one would expect to see the effect of market fluctuations for the utility sector:[21]

> By presumably allowing a utility to use any 2 consecutive years within the past 5, the rule better takes into consideration that electricity demand and resultant utility operations fluctuate in response to various factors such as annual variability in climatic or economic conditions that affect demand, or changes at other plants in the utility system that affect the dispatch of a particular plant. By expanding a baseline for a utility to any consecutive 2 in the last 5 years, these types of fluctuations in operations can be more realistically considered, with the result being a presumptive baseline more closely representative of normal source operation.

57 Fed. Reg. 32314, 32325 (July 21, 1992). The eleven-year shutdown of the Monroe plant is well beyond the period in which one would expect to see changes in operation in response to the kind of market fluctuations addressed by the "increase in hours" exception. The decision to restart the plant after such a long period is a more fundamental change in the way the company has done and plans to do business. Entergy's decision to restart the Monroe plant looks less like a quick decision to take advantage of market conditions at an already-operational plant and more like a decision to begin operation of a source that has not previously participated in the market.

EPA has also made clear that the "increase in hours"

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[21] EPA's comments were made in the context of describing the representative period for determining baseline emissions from utilities, but the analysis of what constitutes normal operations is equally relevant to the discussion here.

exemption is not available where it would "disturb a prior assessment of a source's environmental impact." For the last eleven years, the State has carried the Monroe plant in its emissions inventory with zero actual emissions. From all accounts, the State has treated the plant as having no environmental impact. Restart of the plant would disturb this assessment and is not, therefore, entitled to the "increase in hours exemption."

The State's assessment of the plant's environmental impact is further demonstrated by the State's submittal for the Ozone Transport Assessment Group ("OTAG") modeling effort to assess interstate NOx transport contributions to ozone nonattainment in downwind States. In late 1995, 37 States including Louisiana, provided their emissions inventories to EPA for modeling and analysis. Fifteen of those 37 States (including Louisiana) claimed that actual emissions from sources in their State had no impact on downwind ozone nonattainment. In 1995, the Monroe plant was included in the State's emissions inventory and was still included in that inventory as having zero emissions when the ultimate transport analysis was concluded in 1997. OTAG used this inventory data to project emissions contributions and nonattainment problems throughout the 37-State region through 2007. During this modeled period, emissions from the Monroe plant were assumed to be zero. Based in large part upon OTAG's modeling results, EPA declined to require Louisiana to revise its SIP as part of the recent "NOx SIP Call."[22] EPA concluded that the weight of evidence did not support a finding that Louisiana made a significant contribution to downwind nonattainment. See, 62 Fed. Reg. 60318, 60340 (Nov. 7, 1997), 63 Fed. Reg. 57356, 57398 (Oct. 27, 1998).[23]

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[22] The Court of Appeals for the D.C. Circuit has stayed the SIP Call pending further order by the court. State of Michigan v. EPA, No. 98-1497 (D.C. Cir. Order filed May 25, 1999).

[23] EPA conducted subsequent modeling efforts to evaluate the costs and air quality impacts associated with the proposed NOx SIP Call controls. This modeling did not rely on state inventory data. Instead, the approach looked at Energy Information Administration data regarding available power plants, and projected emissions based on future demand and likely order of dispatch (considering factors such as the plant's age and fuel type). This approach predicted future NOx emissions from Unit 12 of the Monroe plant of 148 tons per year. This amount of emissions corresponds to approximately 550 hours of full-load operation per year at Unit 12. Such minimal operations do not

EPA believes restart of the Monroe plant will constitute a change in the method of operation that is not otherwise exempted by the PSD regulations. The only possible exemption, the "increase in hours" exemption, simply was not intended to cover this kind of change. As a result, EPA must next consider whether the change in the method of operation will result in a significant net emissions increase, thereby triggering PSD applicability as a major modification.

4. Calculating Net Emissions Increase

Restart of the Monroe plant will result in emissions of NOx, SO2, CO, PM10 and VOC. As discussed previously, the emissions baseline for long-dormant sources such as the Monroe plant are generally considered to be zero. EPA believes the zero emissions baseline is representative of normal source operations at the Monroe plant, which has had no emissions for the last eleven years.

The following table lists the significance levels, see 40 CFR § 51.166(b)(23)(i) and L.A.C. 33:III.509(B), in tons per year for each of the pollutants that could be emitted upon restart of the Monroe plant. In addition, the table lists Entergy's potential to emit (assuming full-time operation, as is reflected in the proposed operating permit) for these same pollutants. The potential to emit is assumed to be the source's "actual emissions" following the change in the method of operation. See note 16, supra.

POLLUTANT	SIGNIFICANCE LEVEL (TPY)	POTENTIAL TO EMIT (TPY)
NOx	40	4,972.65
SO2	40	679.84
CO	100	361.65
PM10	15	32.46
VOC	40	12.74

With the exception of VOC, restart of the Monroe plant will result in a significant emissions increase over its current zero emissions baseline for each of the listed pollutants.

The regulations define the contemporaneous period as ex-

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alter EPA's conclusions. No emissions were projected for any of the other units at the plant.

tending back five years from the physical or operational change. No changes in emissions at the Monroe plant have been made during last 5 years because it has been shut down during this entire period. As a result there have been no increases or decreases in emissions that are contemporaneous with the change. See 40 CFR § 51.166(b)(3)(ii); L.A.C. 33:III.509(B). Therefore, the net emissions increases from start-up of the Monroe plant would be approximately those stated in the chart above. Hence, EPA agrees with Petitioner that the title V permit for the Monroe plant should be revised to assure compliance with the Louisiana SIP PSD requirements because start-up of the plant would be subject to PSD as a major modification under the Clean Air Act, 40 CFR § 51.166, and L.A.C. 33:III.509(B).

V. NSPS APPLICABILITY

Petitioner claims that the maximum capacity of the affected facilities at the Monroe plant may have been increased by some unknown method at some time between 1976 and the time of the title V application without being subject to NSPS review. Petitioner points to differences in reported emission capacities that suggest a modification has occurred at the Monroe plant. In the April 27, 1976 compliance report from the City of Monroe to the Louisiana Air Control Commission, the total capacity of the Monroe plant was reported as 1365 MMBtu/hr. In the September 18, 1996 title V permit application, however, Entergy reports the Monroe plant's capacity as 1961 MMBtu/hr. While EPA believes that Entergy has adequately explained this discrepancy in reported capacities (see below), EPA nonetheless evaluates in this section whether the changes to the Monroe plant might otherwise be subject to NSPS.

Section 111 of the Clean Air Act requires EPA to adopt standards of performance for stationary sources constructed or modified after the date the standards are proposed. CAA §§ 111(a)(2),(3) and (b)(1); see also 40 CFR § 60.1.[24] Unlike the PSD program, reactivation of long-dormant facilities is not considered construction of a new source. See Memo from Edward E. Reich, Dir., Div. Of Stationary Source Enf., to Sandra S. Gardebring, Dir., Region V Enf. Div. (Oct. 30, 1980). Installation of Units 10, 11 and 12 occurred prior to adoption of

[24] Louisiana has adopted the federal NSPS regulations by reference. See L.A.C. 33:III.3003(A). For purposes of this section, only the federal regulations are cited.

maximum heat input values and appeared to be less than those stated in the permit application. Entergy's explanation appears to be confirmed by reference to specification sheets for the boilers. Because the manufacturer's specification sheets for the boilers reflect the same heat input values as represented in the permit application, EPA concludes that, standing alone, the differences in the reported emissions capacities, do not demonstrate a change in the emissions capacity of the affected facilities.

NSPS may also be triggered, irrespective of changes in emission capacities, if the changes to the affected facility amount to reconstruction of the facility. 40 CFR § 60.15(b). A facility is considered to be reconstructed when the represented fixed capital costs of new replacement components to reactivate the facility exceed 50% of the fixed capital costs required to construct a comparable new facility. 40 CFR § 60.15(b). Here, Entergy has projected the <u>total</u> cost (capital and O&M) to restart all affected facilities at the Monroe plant will be approximately $5.3 million. Entergy estimates approximately $1.4 million of these costs will be capital expenditures. Of these capital expenditures, it appears that at least half relate to replacement of PCB-containing transformers and thus do not relate to changes to the affected facilities. Given the small capital costs associated with reactivation of the affected facilities, it does not appear that the restart activities at the Monroe plant would trigger NSPS based upon a reconstruction analysis.

VI. RCRA DISPOSAL REQUIREMENTS

Entergy's permit application contains reference to two different procedures to remove iron oxide and copper from the boilers. One procedure involves using up to 30,000 pounds of ethylenediaminetetraacetic acid ("EDTA"). Spent boiler cleaning solutions containing this chemical and scavenged metals are injected into the boiler for combustion. The Petitioner claims that Entergy's permit application does not contain sufficient information concerning the analysis of typical spent boiler cleaning solutions nor citation to any regulatory provision that would exempt boiler cleaning solutions from RCRA disposal regulations. The Petitioner further asserts that if the spent boiler cleaning solutions exhibit RCRA hazardous waste characteristics, disposal would be prohibited unless the facility obtains a RCRA permit, became regulated under EPA's Boiler and Industrial Furnace regulations, or otherwise demonstrated that the spent boiler cleaning solution complied with EPA's "comparable fuels" specification.

To justify exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2) of the Act, the Petitioner must demonstrate that the permit is not in compliance with the requirements of the Clean Air Act, including the requirements of the Louisiana SIP. RCRA requirements are not applicable requirements of the Act. See 40 CFR § 70.2. Therefore, this issue cannot be addressed as part of the petition process. However, the emissions themselves would be regulated under Louisiana's Air Quality regulations and federal/state hazardous waste requirements.

Under Louisiana Air Permit General Condition XVII, Entergy must submit any small emissions (generally less than 5 tpy in total) resulting from routine operations that are predictable, expected, periodic, and quantifiable to the Louisiana Air Quality Division for approval as authorized emissions. If the emissions are considered non-routine, Entergy must apply for a variance under L.A.C. 33.III.917. Thus, the emissions from the combustion of the spent boiler cleaning solutions are regulated under Louisiana's air quality regulations. In addition, if the spent boiler cleaning solution were to exhibit RCRA hazardous waste characteristics, Entergy would be required to comply with all applicable federal and state hazardous waste management requirements.

VII. CONCLUSION

For the reasons set forth above, I find that the proposed title V permit fails to assure compliance with applicable PSD requirements set forth in the Louisiana SIP. As a result, I partially grant the February 9, 1999 petition requesting that the Agency object to the proposed Entergy permit, and I hereby object to issuance of the proposed Entergy Permit. I deny the remainder of the February 9, 1999 petition. Pursuant to section 505(b) of the Act and 40 CFR § 70.8(d), LDEQ shall not issue the permit unless it is revised in accordance with this Order.

Date:

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Carol M. Browner
Administrator

all NSPS regulations.[25] Thus, to determine NSPS applicability for restart of the Monroe plant, EPA need only consider whether the affected facilities have been modified or reconstructed. See 40 CFR §§ 60.14 and 60.15.

A "modification" for purposes of NSPS applicability is defined as:

> [A]ny physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

40 CFR § 60.1. As with PSD, the analysis of whether an activity constitutes a modification is a two-part test. The first step -- identifying a physical or operation change -- is similar to the first step for finding a PSD modification. The second step of the NSPS analysis -- finding an emissions increase -- differs from the emission netting step of PSD.

To find an increase in emissions, EPA compares the hourly emissions capacity of an affected facility before and after the change. See 40 CFR § 60.14; see also WEPCO, 893 F.2d at 913. The changes at the Monroe plant do not appear to be of the type that would increase the hourly emissions capacity of the affected facilities. As described above, the major work being performed at the Monroe plant appears to involve upgrading certain controls, replacing PCB-containing transformers and some repairs and maintenance of the boilers and associated auxiliary equipment. Based on the information currently before it, EPA believes the affected facilities could operate at the projected capacities with or without the changes that have occurred at the source. If, after further investigation, EPA finds that changes to the facility in fact will increase the emissions capacity of the affected facilities, EPA will revisit the question of NSPS applicability.

In response to Petitioner's claims that reported emissions capacities had increased, Entergy explained that values derived from fuel consumption in 1975 were erroneously reported as

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[25] The first NSPS for fossil-fuel-fired steam generators applied to sources for which construction was commenced after August 17, 1971. 40 CFR, Part 60, subpart D.

CHICAGO COKE COMPANY, INC.

OFFICE: 16807 SOUTH PARK AVENUE, SOUTH HOLLAND, IL 60473
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May 3, 2004

VIA HAND DELIVERY

Mr. Donald E. Sutton
Manager, Air Permits Section
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

RE: Follow-up to Construction Permit Application for Chicago Coke Company
Source ID No: 031600 AMC

Dear Mr. Sutton:

This letter is written to follow up on our meeting of April 26, 2004, wherein we discussed the Illinois Environmental Protection Agency's ("Illinois EPA") questions and concerns regarding the construction permit application that was filed for the PROven System. The Illinois EPA initially denied the construction permit application, due to the expiration of the Illinois EPA's review period and your staff apparently being unaware that our consultants had issued an extension of that review period on our behalf.

As we discussed at the meeting, it is unfortunate that the permit denial was issued, for several reasons. First, we have always been ready to provide any information needed by Illinois EPA to process the permit application. In fact, we met with some of your staff members as early as last Fall to discuss this project and did not receive any indication that Illinois EPA had any questions about this project until January. We, in turn, provided additional information in February to answer those questions. Then, again, we did not have any indication of further concerns on your staff's part until just before the permit denial was issued in late April. As you will see from the enclosed documentation, even the issues that have just now been raised regarding the permit application are easily answered. Unfortunately, the Illinois EPA's denial of our permit application has thrust this entire project into jeopardy. As we discussed at our meeting, a transaction was scheduled to close last Thursday with a company that would resume operations at this facility. The transaction was postponed, due solely to the concerns raised by the Illinois EPA's denial of the permit application. We only have a few days left to save this transaction and this facility.

Therefore, I would again ask that you consider the information in this submittal to supplement the construction permit application that was previously filed, for which we granted an extension of the Illinois EPA's review period. If you decide not to proceed in that fashion, I request that this submittal be deemed a reapplication, incorporating all of the information in the previous construction permit application. Again, I cannot overstate how important it is that you act upon this submittal within the next few days.

The discussion below answers the concerns raised in the Illinois EPA's permit denial. Several attachments are included to provide additional information and documentation of the points made in this letter.

I. GENERAL INFORMATION DESCRIBING THE COKE PLANT

This item requests a description of the principal pieces of equipment at the coke plant, including the coke oven battery, coal preparation, coke quenching and handling, and coke byproduct recovery facility. Details regarding this equipment are found in the facility's Clean Air Act Permit Program ("CAAPP") permit application and CAAPP permit. We have included, as Attachment 1, some information from the CAAPP permit application regarding these units. First, we have included a process flow diagram for the coke plant, which depicts the items of equipment referenced by Illinois EPA. Next, Attachment 1 contains process descriptions for the coke oven battery, including coal charging, coke pushing and coke quenching. The various methods of emission control during these processes are also discussed. The process description also contains information regarding the byproducts plant, utilities and material handling operations. Finally, Attachment 1 includes a listing of all of the significant emission units and control equipment at the facility.

II. PLANT SHUTDOWN AND MAINTENANCE FOR RESTART

Illinois EPA has requested information regarding the activities prior to shutdown, including draining equipment, disconnecting equipment, sealing or covering equipment, and other protective measures to prevent physical deterioration of equipment, with an explanation of the significance of these activities related to future operability of the plant. First, some background is in order to describe how and why the shutdown occurred. The facility and site were previously owned and operated by LTV Steel, Inc. ("LTV"). LTV filed for Chapter 11 bankruptcy in December 2000.[1] As a result of this filing, LTV's assets, including the coke facility, were controlled by the bankruptcy court. An asset protection plan was approved to idle

[1] Affidavit of William L. West, Attachment 2, at paragraph 2.

and sell LTV's facilities, including the site at issue.[2] As part of this plan, the facility was to be placed in hot-idle mode.[3]

In December 2001, the subject coke facility discontinued coke production and was put into hot-idle mode.[4] We have included, as Attachment 5, the narrative portion of the facility's plan for the hot-idle mode, which was prepared for the facility by Thyssen Krupp Encoke in November of 1999. This plan describes the extensive measures that were taken to purposely idle the plant in such a way that would minimize the effort and costs associated with restart of the facility.[5]

Illinois EPA has requested information regarding the activities undertaken to maintain equipment in anticipation for future operation. After the hot-idle plan was instituted, the facility maintained documentation that the hot-idle plan was being followed properly. A sample of this documentation is included as Attachment 6. The first document in Attachment 6 is a checksheet for the coke oven battery. This checksheet was required to be completed on every shift, i.e., three times per day. The checksheet lists the activities to be conducted, such as exercising certain pieces of equipment, or monitoring readings on certain pieces of equipment. The checksheet also lists the personnel that conducted the activities and their indication that the activities were completed. The second document in Attachment 6 is a weekly report summarizing all of the documentation in the checksheets for the prior week. As you can see, the documentation monitored activities conducted not only with the coke oven battery, but also with the byproducts plant, utilities and material handling. The entirety of these records is voluminous, spanning the entire period of the hot-idle mode.

As the time period for sale of the property stretched out, the facility was placed into cold idle-mode on February 5, 2002.[6] Attachment 7 contains a list of activities that were undertaken for the cold shutdown of the coke oven battery, utilities, byproducts plant, material handling, and other general items. Attachment 7 also contains the procedure that was followed for the cold shutdown of the coke oven battery. The facility, along with URS and Clean Harbors, carefully

[2] Affidavit of William L. West, Attachment 2, at paragraph 3.

[3] Affidavit of William L. West, Attachment 2, at paragraph 4; Affidavit of Michael A. Gratson, Attachment 3, at paragraph 2.

[4] Affidavit of Keith G. Nay, Attachment 4, at paragraph 2.

[5] Affidavit of William L. West, Attachment 2, at paragraph 5; Affidavit of Michael A. Gratson, Attachment 3, at paragraph 5.

[6] Affidavit of Keith G. Nay, Attachment 4, at paragraph 2.

cleaned almost 200 tanks, vessels, heat exchangers and sumps, along with associated piping and lines, pads and containment areas.[7]

Thyssen Krupp Encoke ("TKE") conducted an inspection of the facility in May of 2003. (See discussion at page 7 as well.) The purpose of the inspection was to determine the condition of the facility with respect to resuming long-term operations. A report of this inspection, with respect to the tasks needed for the coke oven battery, is included as Attachment 8. Page 2 of this report states that the plant was properly "mothballed" when it was idled and "extensive effort was made to protect the structure, equipment and the piping." The report also stated on page 2 that "except for the refractory, a majority of the rest of the facility can be refurbished and reused." This report documents that the facility followed the cold-idle procedures and did everything it could to maintain the facility's ability for resumed operation.

The inspection report notes on page 5 that the cold shutdown of the coke oven battery requires replacement of the refractory in the coke oven. Termination of natural gas to the coke facility was a bankruptcy trustee decision, precipitated by the desire to conserve natural gas costs.[8] This type of repair and startup is referred to in the industry as a padup rebuild.[9] The other portions of the facility will require only minimal repairs and maintenance to resume operations.[10]

III. INTENT FOR RESTART

Illinois EPA has requested information regarding the intent of LTV and successor owners regarding the permanency of the facility shutdown and any plans to reopen the facility. First, the facility would never have gone through the extensive hot-idle procedures had it intended to permanently cease operations. During the hot-idle mode, the coke oven battery was maintained at a minimum temperature, using natural gas, to prevent contraction of the refractory materials and facilitate prompt coke production once the facility was sold.[11] The facility spent significant resources conducting the shift-by-shift activities that were documented in the checksheets, as well as the weekly reports summarizing the same, examples of which are contained in Attachment 6. These steps were developed as part of specific idling plans prepared for the facility. These actions would only be needed if the plant were intended to be restarted. The

[7] Affidavit of Michael A. Gratson, Attachment 3, at paragraph 5; Affidavit of Keith G. Nay, Attachment 4, at paragraph 2.

[8] Affidavit of Michael A. Gratson, Attachment 3, at paragraph 6.

[9] Affidavit of Keith G. Nay, Attachment 4, at paragraph 3.

[10] Affidavit of Keith G. Nay, Attachment 4, at paragraph 3.

[11] Affidavit of Michael A. Gratson, Attachment 3, at paragraph 4.

commitment of time, effort and money to follow these procedures demonstrates the intent of the facility to be restarted at some time in the future.

The Illinois EPA Bureau of Air was notified of the hot-idle mode, by LTV, in a letter dated January 11, 2002. A copy of that letter is included as Attachment 9. LTV notified the Metropolitan Water Reclamation District of Greater Chicago ("MWRDGC") of the hot-idle status in a letter dated December 28, 2001, which is included in Attachment 10. LTV's letter stated that it intended that operations would restart no earlier than March of 2002. MWRDGC's response acknowledging LTV's letter is also included in Attachment 10. These communications clearly demonstrate an intent to keep the facility viable for future operations.

The facility also expended great effort in methodically conducting the cold shutdown procedures. If there were no intent to restart the facility, the equipment would not have been handled as it was in an effort to preserve it for future use. For example, relevant portions of the cold shutdown work were performed with high-pressure water, in lieu of torches, so that the equipment would not be damaged and could be readily used when operations resumed.[12] The facility could have demolished the equipment and sold it or removed it for disposal. However, the facility went to great lengths to preserve the equipment for future operations.

No demolition of any buildings or process facilities that are needed for resumed operations has been conducted.[13] Therefore, all necessary equipment remains in place for use when operations resume. In fact, containers of certain materials needed to operate equipment remain on-site for use and are properly stored on spill-containment pallets in the drum storage shed.[14] In addition, full-time security has been maintained at the facility, along with a full-time electrical supervisor to continuously inspect and maintain systems throughout the plant.[15] Further, the facility has maintained winterizing activities. These activities include freeze protection on the potable water pump station, through the use of electric heaters, as well as draining of all water lines in facilities without heat.[16] All of these actions show that all possible efforts were undertaken to allow the facility to resume operations in the future with the minimal amount of activity necessary.

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[12] Affidavit of Keith G. Nay, Attachment 4, at paragraph 2; Affidavit of Michael A. Gratson, Attachment 3, at paragraph 5.

[13] Affidavit of Keith G. Nay, Attachment 4, at paragraph 2.

[14] Affidavit of Keith G. Nay, Attachment 4, at paragraph 2.

[15] Affidavit of Keith G. Nay, Attachment 4, at paragraph 4.

[16] Affidavit of William L. West, Attachment 2, at paragraph 6.

On June 27, 2002, LTV applied to MWRDGC for renewal of its Discharge Authorization ("DA"). This request is included as Attachment 11. This request notes that cold-idle activities were still being conducted. Furthermore, the facility was requesting that discharge limits be maintained for full operation of the plant. Also included in Attachment 11 is MWRDGC's issuance of the DA renewal, dated September 4, 2002, wherein MWRDGC acknowledged the facility's intent to resume full-scale operations. These communications demonstrate a clear intent to preserve the facility's ability to resume operation.

The facility also maintained its CAAPP permit. LTV paid the annual permit fee until the time that the facility was sold.[17] On April 3, 2002, LTV notified Illinois EPA that it was pursuing the sale of the facility. LTV stated, however, that it "intends to preserve the full operating flexibility contained in the existing Title V permit." According to a recommendation from Jim Ross, LTV filed a minor modification application for its CAAPP permit, to reduce the permit fee pending sale of the facility. A copy of this submittal is included as Attachment 12. Importantly, the letter accompanying the request stated as follows:

> LTV also understands that such a reduction of the fee, however, does not prohibit it or a subsequent owner from resuming operations under permits which remain in effect so long as an additional air emission fee, corresponding to the increase in emissions from the resumed operations, is paid. Further in this connection, it is LTV Steel's understanding that operations may be resumed, upon the payment of whatever emission fee is required, without triggering regulations related to new source review or the prevention of significant deterioration. Stated otherwise, it is LTV Steel's understanding that in the event operations are resumed, the currently permitted sources will be treated as existing sources.
>
> LTV Steel submits this fee reduction request based on the understandings set forth in the preceding paragraph which, in turn, are based on information provided by Mr. Ross during telephone conversations with Mr. Rich Zavoda of LTV Steel on March 26 and April 2, 2002. In the event IL EPA, in considering LTV Steel's request for a fee reduction, determines that LTV Steel's understandings are incorrect, LTV Steel asks that it be informed of that determination so that it may withdraw its request if it wishes.

This submittal demonstrates LTV Steel's clear intent to preserve the full permitted capacity of its operations. The submittal further shows LTV Steel's agreement with Illinois EPA that the temporary reduction in permit fee would not affect the facility's ability to resume full operations, without implications of New Source Review.

[17] Affidavit of William L. West, Attachment 2, at paragraph 7.

On December 30, 2002, the facility was sold to Calumet Transfer Company, LLC ("Calumet Transfer").[18] Chicago Coke Company, Inc. ("Chicago Coke") is designated to operate the facility on Calumet Transfer's behalf.[19] Chicago Coke immediately began plans to restart the facility and add a separate trans-loading operation at the site.[20] These plans included developing financing, negotiating tax packages, developing local political and community support, preparing applications for building and environmental permits, and determining facility maintenance and repair needs.[21] While Chicago Coke always intended to resume full operations at the facility, and could have done so without a pad-up rebuild, it deemed the cold-idle condition an opportune time to conduct maintenance and repair activities consistent with its intent for long-term operations.[22] Chicago Coke retained TKE to conduct an inspection of the facility for the specific purpose of determining the condition of the facility with respect to resuming long-term operations.[23] A report of this inspection, conducted in May, 2003, is included as Attachment 8.

On July 14, 2003, Illinois EPA issued a letter to Chicago Coke stating that the facility's CAAPP permit had been changed to reflect the change in ownership to Chicago Coke. This letter is included as Attachment 14. On October 17, 2003, Chicago Coke formally notified the Illinois EPA that it intended to restart the coke plant and filed the current construction permit application. Chicago Coke continued to pay the annual permit fee.[24] As part of its restart plans, in early April, 2003, Chicago Coke purchased, at additional expense, the facility's allotment trading units ("ATUs") for purposes of the Emission Reduction Marketing System ("ERMS") program.[25] Chicago Coke would not have purchased the facility's ERMS ATUs unless it intended to resume full operations at the plant. Further, LTV could have sold the ERMS ATUs before the sale of the facility. LTV would have had no use for the ERMS ATUs if the facility was permanently shut down. The fact that LTV did not sell the ERMS ATUs or VOM emission reduction credits, even under the pressure to generate revenue during the bankruptcy proceeding, is but another demonstration of intent to restart the facility.

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[18] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 3.

[19] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 3.

[20] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 4.

[21] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 4.

[22] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 5.

[23] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 5.

[24] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 6.

[25] Affidavit of William L. West, Attachment 2, at paragraph 7; Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 6.

On January 10, 2003, LTV notified Illinois EPA that the facility was sold to Calumet Transfer and submitted the required documentation for transfer of the NPDES permit. This letter is included in Attachment 15. On December 15, 2003, Chicago Coke applied to MWRDGC for a determination that restart of the facility, and replacement of the refractory in the coke oven, would still qualify the facility as an existing source for purposes of the federal pretreatment regulations. This request is included in Attachment 15. The application contains a detailed discussion of the facility, as well as the activities that would be conducted to resume operations. In particular, Table 2 includes the actions needed for the coke oven battery and Table 3 includes the actions needed for the byproduct plant. MWRDGC issued its determination, that the facility would be considered an existing source, on February 9, 2004. This determination is also included in Attachment 15.

Illinois EPA has requested information on the activities that will be needed to restart the plant. As stated above, Tables 2 and 3 of the application in Attachment 15 contain an itemization of the activities that were initially determined to be needed to restart the coke oven battery and the byproducts plant. Evaluations and minor modifications to the activities are ongoing and are subject to contractual negotiations. Costs associated with these activities and installation of the PROven System, are estimated at $88MM.[26]

IV. FACILITY RESTART AND PADUP REBUILD DO NOT REQUIRE PERMITTING AS A NEW SOURCE OR A MODIFICATION

The following discussion supports the conclusion that the Chicago Coke cold-idled coke battery is an existing source, and that the padup rebuild, as proposed by Chicago Coke, does not constitute a new source or a major modification requiring a construction permit and evaluation of New Source Review.

The clearest guidance pertaining to this issue can be found in the definitions themselves for the applicable National Emission Standards for Hazardous Air Pollutants ("NESHAP") for Coke Oven Batteries. 40 C.F.R. Part 63, Subparts L and CCCCC. This NESHAP defines a "cold-idle coke oven battery" as "an existing coke oven battery that has been shut down, but is not dismantled." 40 C.F.R. § 63.301. (Emphasis added.) Further, "padup rebuild" is defined as:

> a coke oven battery that is a complete reconstruction of an existing coke oven battery on the same site and pad without an increase in the design capacity of the coke plant as of November 15, 1990, and the capacity of any coke oven battery subject to a construction permit on November 15, 1990, which commenced operation before October 27, 1993. The Administrator may determine that a project is a padup rebuild if it effectively constitutes a replacement of the battery above the pad, even if some portion of the brickwork above the pad is retained.

[26] Affidavit of Keith G. Nay, Attachment 4, at paragraph 5.

40 C.F.R. § 63.301.

As stated on page 3 of the TKE Report in Attachment 8, the pad-up rebuild will occur on the existing deck slab. While the current plans are to slightly change the specifications of the rebuilt coke oven battery, as compared to the existing battery, neither the battery footprint, the coal throughput, or the amount of coke to be produced will change. Thus, under these regulations, Chicago Coke's facility would be considered an existing facility as the regulation specifically applies existing facility requirements to cold-idle coke oven batteries and padup rebuild. This regulation is applicable specifically to coke operations and was written by regulators who appreciate the issues associated with coke operations. USEPA, in writing this regulation, had a clear choice between regulating these types of sources as existing or new facilities and chose to both define and regulate them as existing facilities.[27]

USEPA has a well-established policy regarding restart of facilities that dates back to 1978. According to that policy, reactivation of a "permanently shutdown facility" is treated as a new source for purposes of Prevention of Significant Deterioration ("PSD") review. September 6, 1978, Memo from Director of the Division of Stationary Source Enforcement to Stephen A. Dvorkin. USEPA provided in relevant part as follows:

> A source, which had been shut down, would be a new source for PSD purposes upon reopening if the shutdown was permanent. Conversely, it would not be a new source if the shutdown was not permanent. Whether a shutdown was permanent 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.

September 6, 1978, Memo from Director of the Division of Stationary Source Enforcement to Stephen A. Dvorkin. (Emphasis added.)

Over the years, USEPA has restated this same position and developed a set of factors to use when making a determination as to when a source was "permanently shutdown." In an

[27] Illinois EPA has requested information as to compliance with the MACT rule for coke oven pushing, quenching and battery stacks at 40 C.F.R. Part 63, Subpart CCCCC. This new standard was issued in 2001 and was not in effect at the time of the shutdown. Chicago Coke submitted its initial notification of applicability to this rule. The compliance demonstration date for an existing facility is not required until 2006. However, the levels of actual emissions prior to idling are expected to meet the new regulatory levels. Work practice standards to minimize emissions have been in place prior to the idling of the plant and will continue after the restart at the degree required by the regulation. Illinois EPA has also requested information as to whether the coke oven battery would constitute an existing battery or a new reconstructed battery for purposes of Subpart CCCCC. According to the rule, an affected existing source is a source which commenced construction or reconstruction before July 3, 2001. The coke plant was constructed before July 3, 2001, so it is an existing source. Furthermore, according to the other applicable NESHAP standard, Subpart L, pad-up restarts are defined as existing facilities.

October 9, 1979 letter from the Region VII Chief Air Support Branch, to Shell Engineering and Associates, USEPA clarifies that the interpretation of temporary and permanent shutdown is based on PSD regulations related to the definition of temporary emissions and the use of creditable offsets. This discussion "establish[ed] EPA policy that temporary emissions and temporary shutdowns are considered to be of two-year duration or less." The USEPA letter also goes on to say "the owner or operator may rebut the presumption of permanent shutdown by demonstrating that the source was never intended to be a permanent shutdown. This could include such things as procedures which were taken to maintain the source in operating condition, maintaining an emissions inventory in the state inventory file, or actively pursuing the repair or reconstruction of the source." Also making the same points is the guidance "Order Partially Granting and Partially Denying Petition for Objection to Permit, In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc. Proposed Operating Permit, Petition No. 6-99-2 (USEPA 1999).

In general, USEPA considers the owner/operators' intention at the time of shutdown based on all facts and circumstances. To determine the intent of the owner/operator, USEPA considers:

- Intent of owner to restart and reason for the shutdown;
- Status of operating permit;
- Status of emissions in state inventories, emission credits, and allowances;
- Time frame between idle and restart;
- Ongoing maintenance and inspections during shutdown;
- Whether dismantling has occurred;
- Type of modification made during start-up if any; and
- Costs associated with the restart activities.

Id.

1. **Intent to Restart and Reason for the Shutdown**

As demonstrated above, it was LTV's intent at the time of, and during the shutdown, and it has always been Chicago Coke's intent, to restart operations at the coke plant. The facility would never have gone through the extensive hot-idle procedures had it intended to permanently cease operations.[28] The facility spent significant resources conducting the shift-by-shift activities that were documented in the checksheets, as well as the weekly reports summarizing the same, examples of which are contained in Attachment 6. These steps were developed as part of specific idling plans prepared for the facility. These actions would only be needed if the plant

[28] See hot-idle procedures at Attachment 5; Affidavit of William L. West, Attachment 2, at paragraph 5; Affidavit of Michael A. Gratson, Attachment 3, at paragraph 5.

were intended to be restarted. The commitment of time, effort and money to follow these procedures demonstrates the intent of the facility to be restarted at some time in the future.

LTV was forced by an outside influence to place the plant in cold-idle mode due to its pending bankruptcy. It was in LTV's interest, however, to preserve the value of its assets by taking steps to ensure the plant could be efficiently restarted and thus it took appropriate steps to do so. The facility expended great effort in methodically conducting the cold shutdown procedures.[29] If there were no intent to restart the facility, the equipment would not have been handled as it was in an effort to preserve it for future use. The facility could have demolished the equipment and sold it or removed it for disposal. However, the facility went to great lengths to preserve the equipment for future operations.

Also, as stated above, upon acquisition, Chicago Coke immediately began plans to restart the facility. This effort included the commissioning of the TKE investigation and report (included as Attachment 8) outlining the activities that would be needed to restart the facility (See also Attachment 15). Both LTV and Chicago Coke have been diligent in communicating with the entities regulating the facility, maintaining permits and submitting appropriate fees and reports. (See Attachments 9, 10, 11, 12,14, 15 and 16.) This signals a clear intent to restart the facility, whose cold-idle status was destined not by the intent of the owners/operators of the facility, but by a bankruptcy proceeding.

2. **Status of Current Operating Permits**

USEPA also considers the status of current operating permits in determining whether a shutdown is permanent or temporary. As demonstrated above and in Attachments 9, 10, 11, 12, 14 and 15, LTV and Chicago Coke have continually sought to preserve the facility's CAAPP permit and MWRDGC Discharge Authorization. Neither Chicago Coke, nor LTV before it, has requested that the permits be discontinued. These permits have been in full force and effect during the hot-idle mode, cold-idle mode and the facility's current plans for restart. As shown in Attachments 11 and 15, MWRDGC recognized the facility's intent to restart at full operation and even determined that upon restart, the facility would be regulated as an existing source. While the CAAPP permit fee was reduced during the term of the cold-idle status, LTV made it clear in the reduction request at Attachment 12 that the reduction was premised on the understanding that when the facility would resume operations, full permitted capacity, without applicability of New Source Review, would apply with payment of the full permit fee, and Chicago Coke has indicated its intent to pay the full permit fees.

Illinois EPA has requested information regarding reports and notifications required under the Clean Air Act for operation of the facility. Cover letters for the following submittals are included as Attachment 16:

[29] Affidavit of Keith G. Nay, Attachment 4, at paragraph 2; Affidavit of Michael A. Gratson, Attachment 3, at paragraph 5.

- Annual emission report for 2003;
- Annual compliance certification for 2003;
- Annual seasonal ERMS report for 2003; and
- Initial notification of applicability for NESHAP.

LTV and Chicago Coke have been diligent in filing all required reports, notifications, certifications and payment of permit fees during the hot-idle mode and cold-idle mode. If Illinois EPA would like to review additional reports from that time period, the reports can be found in the Illinois EPA's file or reports may be retrieved from company files on request. Clearly, the facility has maintained its permits and fulfilled its obligations for submittals under those permits.

3. **Status of Emissions in State Emissions Inventory, Emission Credits and Allowances**

Third, USEPA also looks at the status of current emissions inventory emission credits and allowances. As part of its restart plans, Chicago Coke purchased, at additional expense, the facility's ATUs for purposes of the ERMS program.[30] Chicago Coke would not have purchased the facility's ERMS ATUs unless it intended to resume full operations at the plant. Further, LTV could have sold the ERMS ATUs before the sale of the facility. LTV would have had no use for the ERMS ATUs if the facility was permanently shut down. The fact that LTV did not sell the ERMS ATUs or VOM emission reduction credits, even under the pressure to generate revenue during the bankruptcy proceeding, is but another demonstration of intent to restart the facility. It is also our understanding that the potential emissions from the facility are still incorporated into the state emissions inventory and have never been, nor were they planned to be, removed during the idle status of the facility.

4. **Time Frame Between Idle of Operations and Restart**

As mentioned above, USEPA has typically presumed, absent evidence to the contrary from the facility, that a shutdown is permanent if it lasts more than two years. The Chicago Coke coking operations were placed in hot-idle mode in December 2001 and cold-idle mode in February 2002. Thus, the facility was shut down less than two years to the time of our restart notification (October 17, 2003).

[30] Affidavit of William L. West, Attachment 2, at paragraph 7; Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 6.

Illinois EPA has requested information as to why the facility shutdown should not be considered to be permanent when it extended past March of 2002 or 2004. The March 2002 date has no special significance, other than a reference LTV made to MWRDGC as to its expectations regarding hot-idle status (See Attachment 10). However, the intervening decision by the bankruptcy court to put the facility in cold-idle status in February of 2002 changed the facility's expectations as to the timeline for restart. As to the March 2004 date, again, the federal guidance provides a presumption of permanent shutdown after two years; however, evidence to the contrary, like that contained herein, may be used to rebut and/or overcome the presumption.

Illinois EPA has asked for further information about the impact of the cessation of natural gas firing to the coke oven battery. It is true that the reason that the refractory now must be largely replaced is that the natural gas was no longer allowed to be fired to the coke oven battery. However, the damage to the brickwork was not unusual for this type of operation.[31] As shown by the MACT rule discussion above, pad-up rebuilds are normal and necessary procedures for coke oven batteries. Nevertheless, the facility took great care to minimize this consequence through the hot-idling and cold-idling procedures outlined in Attachments 5 and 7.

Further, as shown by the careful documentation of the facility in Attachment 6 and the TKE study in 2003 (Attachment 8), the facility was largely successful in maintaining its operability during the idling process. Page 2 of this report states that the plant was properly "mothballed" when it was idled and "extensive effort was made to protect the structure, equipment and the piping." The report also stated on page 2 that "except for the refractory, a majority of the rest of the facility can be refurbished and reused." This report documents that the facility followed the cold-idle procedures and did everything it could to maintain the facility's ability for resumed operation. The extensive actions taken by the facility in the idling process would not have occurred but for the plant's intent for restarting operations.

As we discussed at our meeting last week, operations could be resumed at the facility without a pad-up rebuild. However, this type of startup would be based on repairs that would not be consistent with long-term plans to operate the facility. Long-term maintenance costs would be increased by such an approach and additional production interruptions would have to occur to re-repair the ovens over time. Consequently, the most efficient approach is to commence the pad-up rebuild now. We note, however, that if the facility did choose to commence operations without a pad-up rebuild at this time, the facility could resume operations with comparatively minimal effort and expense, which would presumably allay Illinois EPA's concerns about the permitting implications of the overall restart effort. It seems inappropriate to discourage the implementation of means to insure the most efficient operation of a facility, both from a production and an environmental standpoint. The timing of actual restart operations depend upon issuance by Illinois EPA of the construction permit for the PROven System. But for the

[31] Affidavit of Keith G. Nay, Attachment 4, at paragraph 3.

Illinois EPA's recent request for information regarding restart activities, we could have already started restart activities.

5. Ongoing Maintenance and Inspections During Shutdown

After the hot-idle plan was instituted, the facility maintained documentation that the hot-idle plan was being followed properly. A sample of this documentation is included as Attachment 6, which includes a sample checksheet for the coke oven battery. This checksheet was required to be completed on every shift, i.e., three times per day. The checksheet lists the activities to be conducted, such as exercising certain pieces of equipment, or monitoring readings on certain pieces of equipment. The checksheet also lists the personnel that conducted the activities and their indication that the activities were completed. The second document in Attachment 6 is a weekly report summarizing all of the documentation in the checksheets for the prior week. The documentation monitored activities conducted not only with the coke oven battery, but also with the byproducts plant, utilities and material handling.

Attachment 7 contains a list of activities that were undertaken for the cold shutdown of the coke oven battery, utilities, byproducts plant, material handling, and other general items. Attachment 7 also contains the procedure that was followed for the cold shutdown of the coke oven battery. The facility, along with URS and Clean Harbors, carefully cleaned almost 200 tanks, vessels, heat exchangers and sumps, along with associated piping and lines, pads and containment areas.[32]

TKE conducted an inspection of the facility in May of 2003. The purpose of the inspection was to determine the condition of the facility with respect to resuming long-term operations. A report of this inspection, with respect to the tasks needed for the coke oven battery, is included as Attachment 8. This report documents that the facility followed the cold-idle procedures and did everything it could to maintain the facility's ability for resumed operation.

Full-time security has been maintained at the facility, along with a full-time electrical supervisor to continuously inspect and maintain systems throughout the plant.[33] Further, the facility has maintained winterizing activities. These activities include freeze protection on the potable water pump station, through the use of electric heaters, as well as draining of all water lines in facilities without heat.[34] Accordingly, both LTV and Chicago Coke have acted diligently to maintain and inspect the facility with a view toward resumed operation.

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[32] Affidavit of Michael A. Gratson, Attachment 3, at paragraph 5; Affidavit of Keith G. Nay, Attachment 4, at paragraph 2.

[33] Affidavit of William L. West, Attachment 2, at paragraph 6; Affidavit of Keith G. Nay, Attachment 4, at paragraph 4.

[34] Affidavit of William L. West, Attachment 2, at paragraph 6.

6. **Whether Dismantling Has Occurred**

No demolition of any buildings or process facilities that will be used in resumed operations has been conducted.[35] Therefore, all necessary equipment remains in place for use when operations resume.

7. **Type of Modification Made During Startup, if Any**

It has always been the intent to restart the facility at the same capacity as existed prior to idling. As stated on page 3 of the TKE Report in Attachment 8, the pad-up rebuild will be conducted on the existing deck slab. While the current plans are to slightly change the specifications of the rebuilt coke oven battery, as compared to the existing battery, neither the battery footprint, the coal throughput, or the amount of coke to be produced will change.

We note that in July of 2003, USEPA issued a determination to Illinois EPA regarding the PPG Industries glass manufacturing facility in Mount Zion, Illinois. A copy of this determination is included as Attachment 17. In that determination, USEPA concluded that rebricking the glass furnace would not be subject to PSD. USEPA stated that replacing the refractory brick would not result in an emissions increase either for annual or short-term emissions, due to there being no change in the footprint or capacity of the furnace. The same principle applies here as well as there will be no change to furnace footprint or capacity. Therefore, replacement of the refractory brick does not trigger New Source Review applicability.

Illinois EPA has requested information addressing the annual capacity of the plant with respect to any potential increase in capacity as compared to historical capacity in 1980. Current operational and production limits of 2800 tons of coal charged to the coke ovens per day are included in the facility's CAAPP permit at Condition 7.1.5(c). Chicago Coke has no intention of changing or exceeding this limit.[36] Again, as stated in the preceding paragraph, the pad-up rebuild will constitute the same coke oven battery as has always existed at the facility.

Potential emissions from the coke oven battery are detailed in the instant construction permit application at Exhibit 220-C, Battery Process Emission Information. These potential emissions, and the corresponding throughputs, are not restricted by any applicable regulation (except as specifically noted for PM and PM10 emissions from the underfire stack). The

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[35] Affidavit of Keith G. Nay, Attachment 4, at paragraph 2; Affidavit of Michael A. Gratson, Attachment 3, at paragraph 5.

[36] Affidavit of Simon A. Beemsterboer, Attachment 13, at paragraph 7.

potential emissions and corresponding throughputs are consistent with the emissions represented in the facility's 1980 construction permit. Therefore, the pad-up rebuild and the restart of the facility will result in no increase in capacity of the facility, particularly as compared to historical capacity in 1980.

Illinois EPA has requested information addressing the change in emissions that would accompany the restart of the facility. As discussed above, there will be no change in the maximum throughput of the coke oven battery after the pad-up rebuild. There will be no change in potential to emit ("PTE"). There will also be no change to the potential or actual point source emissions rates, either in pounds of emissions per hour or ton of coal processed.[37] The same emission factors used prior to idling will be used after the restart. Actual fugitive emissions are likely to decrease as is usual for a pad-up rebuild.[38] The subject permit application for the PROven System, although expected to further reduce the emissions from the coke oven battery, did not even request additional reductions of allowable emissions. It is also our understanding that all current and future applicable requirements can be met with or without the PROven System.

Accordingly, the proposed restart of coke operations will not meet the definition of a major modification to the existing operation. The repair and maintenance activities required for the pad-up rebuild will not increase production or lead to a significant net increase in emissions. In fact, emissions from the coke batteries will remain unchanged. Throughputs through the coke batteries will remain the same as before the facility was put into cold-idle, and as originally permitted in the 1980 construction permit and the CAAPP permit. No modification to the current CAAPP permit production or emission limits is required or requested. Upon renewal, the CAAPP will incorporate newly applicable requirements, e.g. MACT standards, which will change some emission-related conditions. However, none of these changes will be the result of a physical modification or change in the method of operation. Accordingly, as with the PPG determination, the contemplated activities at the facility will not implicate New Source Review.

Chicago Coke is seeking to establish a new transloading material handling operations area at the site. This operation is unrelated to the coke plant operations. A minor modification

[37] Illinois EPA has requested information regarding the emissions from the pushing operation, particularly as to compliance with applicable limits in the CAAPP permit or any proposed changes thereto. As demonstrated by the compliance certifications filed for the facility (See Attachment 16), the emissions from the pushing operation have been in compliance with the CAAPP permit requirements. The restart of the facility will not modify these emission rates, except to possibly reduce them, as discussed further above.

[38] Affidavit of Keith G. Nay, Attachment 4, at paragraph 3.

permit was recently issued (January 28, 2004) by the IEPA for this operation. The only regulated pollutant that will be affected by this change in material handling is Particulate Matter ("PM"), and this project only results in a potential to emit increase of 6.8 tons per year of particulate matter less than 10 microns in diameter ("PM_{10}") and a potential increase of 16.9 tons per year of PM.

8. **Costs Associated with Restart Activities**

The costs associated with repair and maintenance have sometimes been used by USEPA in determining whether to consider an activity to be a modification or a routine maintenance. USEPA has also recently clarified its interpretations relate to costs in recent rule promulgation. 68 FR 61248. The final estimate for the costs of the pad-up rebuild and the installation of the PROven System is approximately $88MM.[39] A large portion of these costs is for actual cost of brick, approximately $18 MM.[40] While these costs are significant, they are not large as compared to the costs associated with the construction of a new coke oven battery (approximately $600MM) or new coke battery with a products recovery facility (>$1.2 billion).[41] The repair costs easily meet the 20% criteria of USEPA new NSR reform guidelines.

More importantly, however, is the fact that these relative costs are expected and assumed with cold-idle padup rebuild. Large costs are often associated with required routine maintenance at large and complex facilities. A good example of this is refinery turnarounds. In those cases, certain important maintenance activities cannot be done while the refinery is in active service. The refinery turnarounds are scheduled and necessary. Once the refinery is idled, the repairs and maintenance are conducted on several systems. These operations can costs millions of dollars and require months to complete, yet they have never required major modification or new source permits, as long as they do not result in increased production or emissions.

In the case of the instant facility, the repairs associated with the pad-up rebuild and maintenance pertinent to the restart cannot be performed while the coke oven battery is in service.[42] It is, therefore, a very opportune time to conduct this type of service to the coke oven battery now, while the battery is idled, as opposed to shutting the battery down in the future to

[39] Affidavit of Keith G. Nay, Attachment 4, at paragraph 5.

[40] Affidavit of Keith G. Nay, Attachment 4, at paragraph 5.

[41] Affidavit of Keith G. Nay, Attachment 4, at paragraph 5.

[42] Affidavit of Keith G. Nay, Attachment 4, at paragraph 3.

conduct the pad-up rebuild. These repairs with the pad-up rebuild, while not increasing production throughput or the maximum emission rate, will result in actual emissions reductions as compared to the emissions that would occur with restarting the facility without the pad-up rebuild.[43]

Moreover, all of LTV's other facilities that had been idled during the asset protection plan, including those that had been cold-idled, have resumed production, without New Source Review permits, including the Indiana Harbor Works, the Cleveland-East Works, the Hennepin Works and the Warren Coke plant.[44] Idling can be contrasted with permanent shutdowns where the production equipment is dismantled, demolished or abandoned. LTV's Tin Mill at the Aliquippa Works is an example of a permanent shutdown as all equipment at Alquippa was either removed from the facility or demolished at the site and disposed.[45]

V. CONCLUSION

It is our determination that NSR is not required by Illinois EPA for Chicago Coke to resume its coke plant operations, even with the pad-up rebuild. As a final discussion point to this determination, Chicago Coke would like to point out that no resulting additional controls or reduction in pollutants would be accomplished by the NSR process in this case. There would be no net increase of emissions compared to emissions prior to shutdown. As a result, there would be no net increase in ambient impacts from emissions to the areas surrounding the facility. The review would show that no additional controls therefore would be required.

Controls used at sources at the Chicago Coke facility prior to cold-idle were representative of highest level of controls currently used at coke facilities. A brief review of USEPA's RACT BACT LAER Clearinghouse showed that the current controls were equivalent to BACT and LAER proposed for new or modified sources. (Technology Transfer Network Clean Air Technology Center RACT/BACT/LAER Clearinghouse http//cfpub.epa.gov/rblc/ accessed 2/5/04). The coke operations, on restart, will be subject to the applicable NESHAP requirements for coke ovens (40 CFR 60 Subparts L and CCCCC), which have the most restrictive emission limits to date for these types of operations. Therefore, even if emissions control review was required under NSR, the resulting analysis would show that the current or NESHAP-required controls meet or exceed the review requirements.

Chicago Coke has applied for a construction permit for the installation of an improved emissions control system for the coke ovens. See, October 17, 2003, Construction Permit Application. While that permit application also requested a change in emission factors, we are

[43] Affidavit of Keith G. Nay, Attachment 4, at paragraph 3.

[44] Affidavit of William L. West, Attachment 2, at paragraph 8.

[45] Affidavit of William L. West, Attachment 2, at paragraph 8.

willing to withdraw that request at this time in order to expedite the Illinois EPA's consideration of the more important issue at hand, i.e., our ability to resume operations at this facility. We will be happy to recommence discussions on the emission factor issue at a later date, such as when the CAAPP permit renewal is being processed.

We would appreciate your diligent review and approval of this submittal. The restart of operations at this facility will have a very positive economic impact on Chicago and Illinois, including the generation of additional tax revenue. Approximately 200 high-paying jobs will be reinstituted by resuming operations. In addition, the pad-up rebuild will result in more than 500 skilled construction jobs. The area surrounding the facility will also enjoy a redevelopment as money is spent in the local area. As we have discussed, the timing of your consideration of this request is critical. We must have a determination from you in just a few days. I am ready and willing to provide any information I can at your earliest convenience. Please contact me as soon as possible if I can help in any way in that regard. I thank you again for your assistance to us in this project.

Sincerely,

Simon A. Beemsterboer

Simon A. Beemsterboer
President, Chicago Coke Company, Inc.

Attachments
pc: Mr. Bruce E. Dumdei, PhD
Mr. Keith G. Nay
Mr. William L. West
Mr. Michael A. Gratson
Mr. Alan Beemsterboer
Mr. Steve Beemsterboer
Mr. Larry Szuhay
Mr. Von L. Baum
Mr. Keith A. Nagel

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.	)	

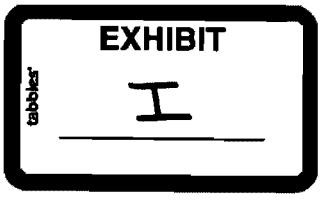
RESPONDENT'S RESPONSES TO INTERVENORS' REQUESTS TO ADMIT TO RESPONDENT

Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the Requests to Admit propounded by Intervenors, NATURAL RESOURCES DEFENSE COUNCIL, INC. and SIERRA CLUB, as follows:

GENERAL OBJECTIONS

Respondent states these general objections and hereby incorporates them as objections to each and every one of the Requests to Admit propounded by Intervenors.

1. Respondent has not completed its investigation and discovery in this proceeding, nor its preparation for a hearing. Accordingly, all responses below are based only upon such information and documents that are presently available and specifically known to Respondent. As discovery progresses, Respondent reserves the right to supplement its responses to Intervenors' Requests to Admit ("Requests"), as appropriate.



2. Respondent objects to the Requests to the extent that Intervenors seek information that is not relevant to the subject matter involved in the pending proceeding. Respondent does not concede the relevancy of any information sought or discovered in responding to the Requests.

3. Respondent objects to the Requests to the extent that they are oppressive, vague, ambiguous, unduly broad and burdensome, or seek information not in the possession, custody, or control of Respondent, and expressly notes that several of the following responses may be based on incomplete information.

4. Respondent objects to the Requests to the extent that they require the drawing of legal conclusions or the acceptance of factual premises.

5. Respondent objects to the Requests to the extent that they are not reasonably limited in time and scope and not reasonably calculated to lead to relevant information.

6. Respondent objects to the Requests to the extent that they purport to impose upon Respondent any obligations greater than those required by the Illinois Rules of Civil Procedure, Illinois Pollution Control Board regulations, and/or other applicable law.

7. Respondent objects to the Requests to the extent that they call for disclosure or production of information or material protected from disclosure by the attorney-client privilege, attorney work-product doctrine, the deliberative due process privilege, or any other privilege, immunity, or grounds that protect information from disclosure. Any inadvertent disclosure of any such information or material is not to be deemed a waiver of any such privilege or protection.

* * *

Subject to these General Objections, Respondent further responds as follows:

REQUESTS TO ADMIT

Request 1:

Admit that the chart attached as Exhibit 1 reflects the emissions from the Facility included in the IEPA 2002 Base Year Inventory for the Chicago Nonattainment area.

ANSWER:

Admit.

Request 2:

Admit that the chart attached as Exhibit 2 reflects emissions from the Facility included in the IEPA 2002 Emission Inventory.

ANSWER:

Admit.

Request 3:

Admit that the chart attached as Exhibit 3 reflects emissions from the Facility included in the IEPA 2005 Emission Inventory.

ANSWER:

Admit.

Request 4:

Admit that the chart attached as Exhibit 4 reflects the last date on which emissions from various emission units at the Facility were included in IEPA's Emission Inventory.

ANSWER:

Admit.

Request 5:

Admit the 2002 and 2005 Base Year Inventories, and the 2002, 2005, and 2008 Emission Inventories, do not contain any accounting for, or listing of, PM2.5 emissions from the Facility (non-surrogate per the definition above).

ANSWER:

Respondent objects to this Request as being ambiguous. Subject to that objection, Respondent admits that the 2002 and 2005 Base Year Inventories, and the 2002, 2005, and 2008 Emission Inventories do not contain any accounting for, or listing of, surrogate PM2.5 emissions from the Facility.

Request 6:

Admit that IEPA has not included emissions of PM, PM10, PM2.5, VOM, or NO_x from the Facility in its projected Emissions Inventory used to develop an Attainment Demonstration for the Chicago Nonattainment Area.

ANSWER:

Admit.

Request 7:

Admit that 2002 is the base year for the PM2.5 attainment planning process, and that 2002 and 2005 are the base years for the 8-hour ozone attainment planning process.

ANSWER:

Admit.

THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY, by

LISA MADIGAN,
Attorney General of the
State of Illinois

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

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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 and SIERRA CLUB,	)	
Intervenors.	)	

AFFIDAVIT

In accordance with Supreme Court Rule 216, I, Laurel Kroack, being first duly sworn upon oath, depose and state as follows:

1. I am employed by the Illinois Environmental Protection Agency ("Illinois EPA") as Bureau Chief of the Bureau of Air.

2. To the best of my knowledge, the attached answers to Intervenor-Defendant's Requests to Admit to Illinois Environmental Protection Agency are true and accurate.

FURTHER AFFIANT SAYETH NOT.

LAUREL KROACK

Subscribed and Sworn to before me
this 2nd day of September, 2011.

Vicky VonLanken
Notary Public

OFFICIAL SEAL
VICKY VonLANKEN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 5-5-2012