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.	)	

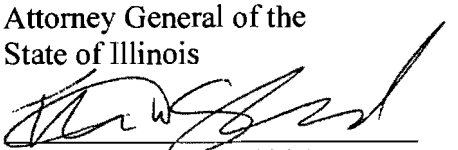
NOTICE OF FILING

TO: See Attached List

PLEASE TAKE NOTICE that on the 3rd day of October, 2012, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached Respondent's Motion for Leave to Reply, a copy of which is hereby served upon you.

Respectfully submitted,

LISA MADIGAN,
Attorney General of the
State of Illinois

By: 

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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RESPONDENT'S MOTION FOR LEAVE TO REPLY

Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, hereby respectfully seeks leave to file a reply to Petitioner's Response to IEPA's Motion for Summary Judgment ("Response").

In support of its Motion, Respondent states as follows:

Section 101.500(e) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.500(e), allows for a reply by a movant in order to avoid prejudice. Petitioner's Response contains multiple mischaracterizations of the information reviewed and analyzed by the Illinois EPA in making its 2010 decision that the Petitioner's facility was permanently shutdown. As one example of several, Petitioner states that Respondent "does not explain why it reached a different conclusion, in 2010, using the same information it had in 2005." (Resp. at p. 8). Petitioner further argues that "[i]n reality, IEPA has used the same facts to reach opposite conclusions." (*Id.*) However, the facts

demonstrate otherwise. There were significant changes in facts between 2005 and 2010 that were the basis for the Respondent's decision in 2010. (Mtn. ¶¶ 12, 13, 16, 17, 19, 20, 23-25, and 38-43).

Also, Chicago Coke incorrectly states that "the guidance used by IEPA does not address the use of ERCs" and that "[n]one of the cited guidance even mentions ERCs." (Resp. at pp. 4 and 6). Petitioner fails to identify and address the federal guidance reviewed and analyzed by Respondent authorizing the State's management over ERCs and its reliance on a facility's emission reductions to demonstrate attainment or reasonable further progress towards attainment. (Mtn. ¶¶ 46, 50-52).

Petitioner also proffers an affidavit of the President of Chicago Coke regarding operations at the facility between 2005 and 2010 in support of Petitioner's incorrect argument that there were no changes in conditions to support the Illinois EPA's decision in 2010. (Resp. at pp. 8-9). Respondent did not have an opportunity to address this in its motion.

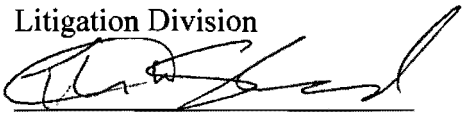
WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully seeks leave to file the Respondent's Reply to Petitioner's Response to IEPA's Motion for Summary Judgment, attached hereto as Exhibit A.

Respectfully Submitted,

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: 

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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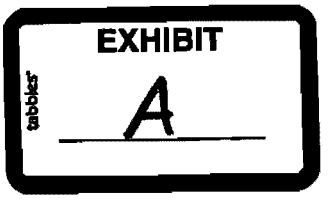
RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO IEPA'S MOTION FOR SUMMARY JUDGMENT

Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, hereby respectfully replies to Petitioner's Response to IEPA's Motion for Summary Judgment ("Response") and states as follows:

Respondent submits this reply to address inaccuracies and mischaracterizations contained in Petitioner's Response regarding: (i) the Agency's decision in 2010 that Chicago Coke's facility ("Facility") was permanently shutdown; and (ii) the federal guidance relied upon by the Agency in coming to that conclusion and in determining that the Facility's emission reductions were not creditable for use as emission offsets.

I. The Illinois EPA's 2010 Decision.

Chicago Coke incorrectly claims that the Illinois EPA "flip flop[ped]" and reached a different conclusion in 2010 regarding the permanent shutdown of the Facility using the same information the Agency had in 2005 when the Agency issued a



construction permit to Chicago Coke ("Construction Permit") to perform the repairs necessary to make the Facility operational. (Resp. at pp. 2, 8). Chicago Coke further claims that the Agency "used the same facts to reach opposite conclusions" and that the "IEPA does not explain why it reached a different conclusion" in 2010. (*Id.* at p. 8).

As set forth in detail in Respondent's Motion for Summary Judgment, the facts demonstrate otherwise. When the Agency determined in 2005 that Chicago Coke had overcome the presumption that the 2002 shutdown of the Facility was permanent, the facts before the Agency included the following:

1) The Facility had been shut down for approximately three years;

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

3) The Facility was current regarding its submittal of Annual Emission Reports ("AERs");

4) The Facility was still present in the State's emission inventory;

5) The owners of Chicago Coke stated that they intended to restart the Facility; and

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

(Mtn. at ¶¶ 7,9,10, and 43).

Conversely, when the Agency determined in 2010 that Chicago Coke could no longer overcome the presumption that the 2002 shutdown of the Facility was permanent, the facts before the Agency included the following:

1) The Facility had been shut down for approximately eight years;

2) The Facility had stopped paying operating fees;

3) The Facility had stopped submitting AERs;

4) The Facility was removed from the State's emissions inventory;

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;

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;

8) 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; and

9) 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.

(Mtn. at ¶¶ 12, 13, 16, 17, 19, 20, 23-25, and 38-43).

These significant changes in facts between 2005 and 2010, all of which relate to one or more factors that must be considered in the federal guidance's permanent shutdown analysis, strongly support the Illinois EPA's 2010 determination. In support of its contention that the Illinois EPA relied on the same information in 2005 and 2010, Chicago Coke ignores the above facts and instead proffers the concise statement of Simon Beemsterboer that there were no "significant changes in operation at the facility between April 2005 and February 2010." (Resp. at pp. 8-9). Mr. Beemsterboer's statement is a red herring. It is undisputed that the Facility never operated during that time. (Mtn. ¶ 23).

II. Applicable Federal Guidance.

Chicago Coke also incorrectly argues that the federal guidance reviewed and analyzed by the Illinois EPA in making its 2010 decision regarding the claimed ERCs

cannot apply to the availability of emission reductions for use as emission offsets. (Resp. at p. 6.) In doing so, Chicago Coke states that "the guidance used by the IEPA does not address the use of ERCs" and that "[n]one of the cited guidance even mentions ERCs." (*Id.* at pp. 4 and 6). First, the federal guidance examined by the Illinois EPA as to what constitutes a "permanent shutdown" of a facility is in the context of Prevention of Significant Deterioration ("PSD") permitting, also known as attainment New Source Review ("NSR"). It is also applicable, however, in the context of nonattainment NSR issues, including the creditability of emission reductions for use as emission offsets. Timing of emission reductions, including when the emission reductions occurred and whether they are permanent, is a key factor, not only under the Agency's guideline that emission reductions older than five years are generally deemed to have "expired" ("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.

Moreover, Chicago Coke fails to address the federal guidance set forth in the Illinois EPA's Motion allowing states to manage ERCs in a manner consistent with the Agency's Five-Year Guideline. Under applicable federal guidance, ERCs "are not and never have been an absolute property right" held by owners of facilities. (Mtn. ¶ 46 *citing* federal guidance in Admin. Record at p. 0037). States must have "the ability to discount banked ERCs as needed for attainment purposes" if the states "are to effectively manage the air resources in their community." (*Id.*)

In general, ERCs "can continue to exist as long as they are in each subsequent emissions inventory," but expire "if they are used or relied upon... demonstration of

reasonable further progress." (Mtn. ¶ 50 *citing* federal guidance in Admin. Record at p. 0031). States "may" include expiration dates in their respective State Implementation Plans ("SIPs") to "ensure effective management of the offsets." (*Id.*) However, nothing in the federal guidance restricts other options available to a state in its management of ERCs. Indeed, Region 5 of the USEPA declined creating a registry system for ERCs in Illinois and allowed the State discretion in the "management of new source offsets." (Mtn. ¶ 52 *citing* federal guidance in Admin. Record at p. 0067). Under the Agency's discretion confirmed in the above-federal guidance, the Illinois EPA determined that the Facility's emission reductions are not creditable for use as emission offsets pursuant to the Agency's Five-year Guideline.

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

Respectfully Submitted,

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
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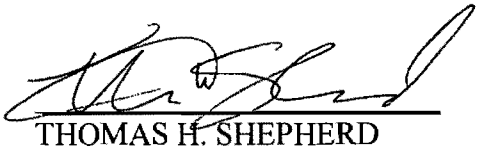
CERTIFICATE OF SERVICE

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 Respondent's Motion for Leave to Reply and caused them to be served this 3rd day of October, 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