

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**NOTICE OF FILING**

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

PLEASE TAKE NOTICE that on this 17<sup>th</sup> day of October 2012, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Motion for Leave to File a Reply, Applicable to NRDC**, which is attached and herewith served upon you.

CHICAGO COKE CO., INC.

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

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

**CERTIFICATE OF SERVICE**

I, the undersigned, state that a copy of the above-described document was served electronically upon all counsel of record on October 17, 2012.

s/Elizabeth S. Harvey

7012-002

**SERVICE LIST**

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

**PCB 10-75**

**(Permit Appeal -- Air)**

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

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

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

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Intervenors.	)	

**MOTION FOR LEAVE TO FILE A REPLY, APPLICABLE TO NRDC**

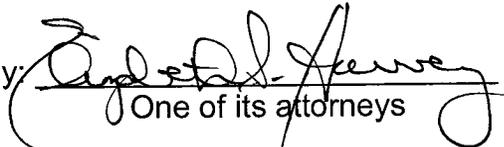
Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, moves the Board or the hearing officer for leave to file a reply in support of Chicago Coke's motion to strike portions of intervenors NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB'S (collectively, "NRDC") motion for summary judgment.

1. On September 19, 2012, Chicago Coke filed its motion to strike portions of NRDC's motion for summary judgment. Chicago Coke's motion seeks to strike portions of NRDC's motion which impermissibly seek to expand the scope of the appeal by raising issues beyond those raised in the petition for review.
2. NRDC filed its response to the motion to strike on October 3, 2012.

3. Section 101.500(e) of the Board's procedural rules allow a movant to seek leave to reply, where a reply is necessary to prevent material prejudice. 35 Ill.Admin.Code 101.500(e).
4. NRDC's response misunderstands or misstates the basis for Chicago Coke's motion to strike. Chicago Coke has not had any opportunity to respond to NRDC's mischaracterizations and misunderstandings.
5. Chicago Coke will suffer material prejudice if not allowed to file a reply, to allow it to address NRDC's claims. Therefore, Chicago Coke seeks leave to file its reply, attached to this motion as Exhibit 1.

WHEREFORE, Chicago Coke moves the Board or the hearing officer for leave to file the attached reply in support of Chicago Coke's motion to strike, and for such other relief as the Board or hearing officer deem appropriate.

CHICAGO COKE CO., INC.

By:   
One of its attorneys

Dated: October 17, 2012

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

# **Exhibit 1**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB,	)	
	)	
	)	
Intervenors.	)	

**REPLY IN SUPPORT OF CHICAGO COKE'S MOTION TO STRIKE,  
DIRECTED TO NRDC'S MOTION FOR SUMMARY JUDGMENT**

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, replies in support of its motion to strike portions of intervenors NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB's (collectively, "NRDC") motion for summary judgment.

**ARGUMENT**

1. Chicago Coke has moved to strike portions of NRDC's motion for summary judgment, on the grounds that those portions are beyond the scope of the appeal. Therefore, those portions of NRDC's motion violate the Board's limitation on NRDC's participation as an intervenor.
2. In response to Chicago Coke's seven page motion, NRDC filed a 14-page response. NRDC's response misstates and misunderstands the arguments made in Chicago Coke's motion to strike. Despite NRDC's attempts to muddy

the waters by attempting to cast aspersions on Chicago Coke's intentions and arguments, NRDC succeeds only in proving Chicago Coke's point: that NRDC has raised issues outside the scope of the appeal.

Chicago Coke has maintained a consistent position.

3. NRDC asserts that Chicago Coke is playing a game of "gotcha" with IEPA, by "avoiding" a permit application process but then seeking to impose the requirements of a permit decision. This characterization is false.
4. Chicago Coke did not "avoid" a formal process in favor of an informal process. Instead, as has been previously argued in this case, Chicago Coke took the only road available to obtain a determination on the viability of its emission reduction credits ("ERCs"). IEPA has not bothered to propose any regulations establishing a formal process to obtain such a determination, but felt it within its authority to make a "final decision" on the viability of the ERCs. Despite NRDC's characterization, Chicago Coke did not "avoid" an available process; there simply was no other procedure available to it.
5. When IEPA undertakes to make a final decision – and the Board has already determined IEPA's decision is final (Board Order, September 2, 2010 at p. 8) – it must be bound by some restrictions. In its Motion to Strike Portions of IEPA's Motion for Summary Judgment, and in its Reply in Support of Motion to Strike Portions of IEPA's Motion for Summary Judgment, Chicago Coke demonstrates that the Section 39(a) requirement that IEPA's written decision identify all reasons for a denial applies to this case. Chicago Coke incorporates those arguments as if fully set forth in this reply.

NRDC mischaracterizes Chicago Coke's arguments.

6. NRDC mischaracterizes Chicago Coke's position on several issues, and has missed the point on other issues.
7. For example, NRDC claims that Chicago Coke's contention that IEPA must spell out the reasons for its denial equates to a claim that Chicago Coke is "automatically exempt from restrictive covenants in laws governing ERCs". (NRDC Response, at p. 2.) This characterization is simply wrong. Chicago Coke does not contend that it is exempt from any law governing ERCs. What Chicago Coke argues is that unless a particular reason is cited in IEPA's denial letter, that reason cannot be raised by IEPA or by NRDC in the appeal. In other words, Chicago Coke does not claim it "wins" because of IEPA's failure to include a particular reason: for argument only, it is possible the Board will find that the reason given in IEPA's denial letter supports IEPA's decision.
8. Additionally, NRDC's claims that Section 203.303 should not be stricken misses the point of Chicago Coke's motion to strike references to Section 203.303. Chicago Coke does not attempt to "banish Section 203.303 from existence": rather, Chicago Coke argues that neither IEPA nor NRDC can use that section as a basis for upholding IEPA's decision. Quite simply, IEPA should have included all grounds for its decision in its February 2010 decision. It did not include Section 203.303, and so IEPA cannot raise Section 203.303 in the appeal. Likewise, because NRDC cannot raise grounds outside the scope of the appeal, NRDC cannot raise that section.
9. The same holds true for the other issues Chicago Coke seeks to strike. Quite simply, those reasons are not included in IEPA's February 2010 decision. That

written decision, and the petition for review, define the scope of the appeal.<sup>1</sup> (See Board Order, April 21, 2011, at pp 10-11.) Whether or not NRDC has exceeded the scope of the petition as that petition "is understood by IEPA" (NRDC response, p. 7) is not the question. IEPA's "understanding" of the scope of the petition is not dispositive, and is in fact irrelevant.

#### CONCLUSION

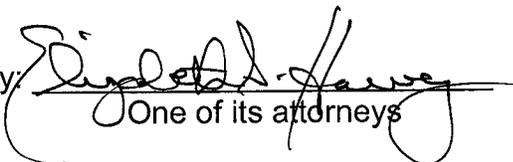
10. NRDC's lengthy response merely demonstrates that it misunderstands or mischaracterizes Chicago Coke's motion to strike portions of NRDC's motion for summary judgment. Chicago Coke used the only method available to it, to obtain a determination on the viability of its ERCs. When IEPA undertook to make a final decision on that issue, IEPA was required to give, in its written decision, the reasons for that decision. Both IEPA and NRDC are prohibited from raising issues not included in that written decision.
11. The only issue on appeal is whether IEPA correctly determined Chicago Coke's ERCs are not available because the Chicago Coke facility is "permanently shutdown." As an intervenor, NRDC is limited to that issue, and cannot enlarge the scope of the appeal.
12. Therefore, Chicago Coke asks the Board or the hearing officer to grant Chicago Coke's motion to strike portions of NRDC's motion for summary judgment.

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<sup>1</sup> NRDC continues to harbor the false impression that all matters in the attachments to Chicago Coke's petition for review are at issue in this appeal. In the course of any proceeding with IEPA, many issues are raised which do not become the basis for a decision. Simply because an issue was discussed in correspondence with IEPA, and that correspondence was attached to the petition for review, does not expand the scope of a subsequent appeal to include issues discussed in that correspondence but not included by IEPA in its written decision. This logic can be seen by considering what would happen if Chicago Coke would have been the one to raise an issue not included in IEPA's written decision. Both IEPA and NRDC would almost certainly have objected.

Respectfully submitted,

CHICAGO COKE CO., INC.

By:   
One of its attorneys

Dated: October 17, 2012

Michael J. Maher  
Elizabeth S. Harvey  
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