BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|---|---|---|
| CHICAGO COKE CO., INC., an Illinois corporation, | ) | |
| Petitioner, | ) | |
| v. | ) | PCB 10-75<br>(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 17th 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 IEPA**, which is attached and herewith served upon you.

CHICAGO COKE CO., INC.

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

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**CERTIFICATE OF SERVICE**

I, the undersigned, state that a copy of the above-described document was served electronically upon all counsel of record on 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)**

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

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 respondent the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA") motion for summary judgment.

1. On September 19, 2012, Chicago Coke filed its motion to strike portions of IEPA's motion for summary judgment. Chicago Coke's motion seeks to strike portions of IEPA's motion which impermissibly seek to expand the scope of the appeal by raising issues not identified in IEPA's final decision.
2. IEPA 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. IEPA's response contains arguments inconsistent with positions previously taken by IEPA, in this same appeal. Chicago Coke should be allowed to identify and address those inconsistencies.
5. Additionally, IEPA has raised a new argument, to which Chicago Coke has not had an opportunity to respond. IEPA claims it should be allowed to argue that events which occurred after the decision at issue preclude the relief sought by Chicago Coke. This argument, if accepted by the Board, would undermine the environmental regulatory system, by giving those subject to permitting and regulation a "moving target" in seeking approvals by IEPA. There would be little certainty, or finality, to IEPA decisions.
6. Chicago Coke will suffer material prejudice if not allowed to file a reply, to allow it to address IEPA'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
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# Exhibit 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**REPLY IN SUPPORT OF CHICAGO COKE'S MOTION TO STRIKE PORTIONS OF IEPA'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 respondent the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA) motion for summary judgment.

ARGUMENT

Chicago Coke moved to strike portions of IEPA's motion for summary judgment based on a simple proposition: IEPA is wrongly attempting to add new reasons for its final agency action. However, these reasons were not included in IEPA's original letter and cannot be added after the fact to justify IEPA's actions. It is fundamental that IEPA is limited to the reasons for denial articulated in IEPA's written decision. This fundamental limitation comes from the statute governing IEPA permits (415 ILCS 5/39(a)), and has been articulated many times by courts and this Board. If IEPA does

not specify a particular reason, that reason may not be raised on appeal in support of the denial. *IEPA v. IPCB*, 86 Ill.2d 390, 405-406, 427 N.E.2d 162, 169-170, 56 Ill.Dec. 82, 89-90 (1981). Therefore, Chicago Coke moved to strike specific issues wrongly raised by IEPA in its response to Chicago Coke's motion for summary judgment, because these issues were not included in IEPA's February 22, 2010 written decision.

Despite Section 39(a)'s requiring IEPA to provide "specific, detailed statements as to the reasons" for the denial of a permit, IEPA believes it should have the unfettered ability to raise any after-the-fact issue in support of its decision, even where the events occurred after IEPA's final decision. Allowing IEPA to argue after-the-fact bases raises grave constitutional issues and would make a mockery of any applicant's right to appeal an IEPA final decision. The Board should not tolerate IEPA's wrongful attempt.

Section 39(a) should be applied to IEPA's decision in this case.

Chicago Coke agrees that this case is procedurally unique, but that does not mean IEPA may ignore years of Board jurisprudence. There is no established mechanism for an entity to obtain a decision from IEPA on the viability of that entity's emission reduction credits ("ERCs"). Because of this, Chicago Coke approached the primary agency responsible for ERCs: IEPA. Although IEPA has not bothered to propose regulations which would govern appeals regarding the viability of ERCs, IEPA undertook final agency action in making a final determination regarding Chicago Coke's ERCs. That final action is the subject of this appeal. The Board has already held that IEPA's decision in this case was clearly "final," and that Chicago Coke can appeal that decision. (Board Order, September 2, 2010 at p. 8.)

IEPA now claims that the restriction of Section 39(a) – establishing the condition that IEPA's reasons for denial must be contained in IEPA's written decision – is not applicable here because the Board asserted jurisdiction over this appeal under Section 5(d) of the Environmental Protection Act ("Act"). IEPA asserts that because there are no provisions in Section 5(d) or in Part 105 of the Board's procedural rules which limit the appeal to issues identified in IEPA's written decision, IEPA should now be allowed to raise after-the-fact issues in support of its February 2010 decision.

IEPA's position is inconsistent with IEPA's position in this same appeal. IEPA argues that it is not limited by Section 39(a) because this appeal is not a traditional permit appeal. This position is inconsistent with IEPA's contention, in this very matter, that the appropriate standard of review is the standard applied to permit appeals. IEPA also argues that information developed after IEPA's decision should not be considered by the Board. (IEPA Motion for Summary Judgment, filed August 17, 2012, at p. 5.) This disingenuous flip-flopping is an example of IEPA's attempts to block Chicago Coke at every turn. IEPA cannot have it both ways. If the appropriate standard is the standard governing permit appeals, and if the Board cannot consider information developed after IEPA made its decision, IEPA cannot now invent new reasons for denial after IEPA renders its final decision on a "permit."

The Board has already found that this appeal is in the nature of a permit appeal under the Clean Air Act. (Board Order, April 21, 2011, at pp. 9-10.) It would be unfair and prejudicial to Chicago Coke for the Board to find this case to be in the nature of a permit appeal when allowing the NRDC to intervene, but to completely change the rules regarding IEPA's attempt to invent new issues.

Limiting IEPA to the denial reasons in its written decision is essential because this appeal is Chicago Coke's opportunity to challenge IEPA's final decision. *See, e.g., Emerald Performance Materials LLC v. IEPA,* 2009 WL 6506756, *4 (PCB 04-12, October 15, 2009), *citing Alton Packaging Corporation v. IPCB, 162 Ill.App.3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); West Suburban Recycling and Energy Center L.P. v. IEPA,* 1996 WL 633368, *3 (PCB 95-119 and 95-125, October 17, 1996). Chicago Coke's appeal would be meaningless if IEPA is allowed to add denial reasons that were not included in IEPA's written decision. The Illinois Environmental Protection Act clearly confers certain rights on applicants. One such right is to be free of a continually moving target of agency justifications. IEPA believes Chicago Coke cannot raise information developed after IEPA's decision, but conversely IEPA claims that IEPA can raise new issues after the fact.

IEPA should be limited to arguing only the denial reasons given in its February 2010 denial letter. *IEPA v. IPCB*, 86 Ill.2d at 405-406.

IEPA cannot argue events which occurred after its decision.

IEPA makes the unjustifiable claim that IEPA should be allowed to raise events which occurred after IEPA's February 2010 decision, to support IEPA's February 2010 decision. This claim is nonsensical.

As explained above, IEPA has argued, in this very matter, that information developed after IEPA's decision should not be considered by the Board. (IEPA's Motion for Summary Judgment, filed August 17, 2012, at p. 5.) Nonetheless, in a complete denial of fundamental fairness, IEPA claims IEPA should be allowed to argue events after IEPA's final decision. IEPA seeks to use USEPA's August 13, 2012 approval of the Illinois State Implementation Plan ("SIP") as a reason supporting IEPA's

February 22, 2010 denial.[1] Allowing IEPA to argue events which occurred two and a half years after IEPA's decision would make a mockery of Chicago Coke's right to appeal the decision – a right that the Board has found Chicago Coke has – and present regulated entities, as well as the Board, with a shifting set of denial reasons. Such a process would violate every notion of procedural due process.

IEPA's attempt to use an event which happened two and a half years after IEPA's decision is especially egregious. The Board has found this matter is in the nature of a permit appeal. A permit appeal presents a "snapshot in time" – whether the information before IEPA, when IEPA made its decision, supports IEPA's decision. Allowing IEPA to discover new reasons for its decision, including events which occurred long after the decision, would eviscerate the permitting and appeal process. IEPA's proposal violates well-established law that a permit appeal is to be based on information contained in the record before IEPA at the time of its decision.

The Board should find that IEPA is limited to information before it when it made its February 2010 decision, and that IEPA cannot raise events which occurred after its decision. The Board should strike all references to events which occurred after February 22, 2010.

The Board should strike all matters not articulated in IEPA's denial letter.

Chicago Coke's motion to strike references particular arguments which were not included in IEPA's written decision. Specifically, Chicago Coke seeks to strike the following portions of IEPA's motion for summary judgment: a) all references to and

[1] IEPA inappropriately argues the substance of its claims in the response to the motion to strike, including a statement that federal guidance provides that ERCs are not absolute property rights. Chicago Coke has not raised any argument, one way or the other, on whether ERCs are property rights. However, Chicago Coke notes that just because USEPA contends ERCs are not property rights does not make it so.

arguments regarding Section 203.303, including at pages 13-14, page 21, and pages 26-28; and b) all claims that the ERCs were not creditable because IEPA had used the emission reductions to demonstrate compliance, including much of Section V(2) at pages 20-26, and the arguments at pages 26-28. IEPA responds by claiming that Chicago Coke is responsible for reading IEPA's mind and that Chicago Coke should know that IEPA relied on those issues.

For due process reasons, the legal question is not whether IEPA "considers" an issue: The question is whether IEPA relied upon and identified an issue in rendering a final decision.

For example, IEPA contends Chicago Coke was well aware that IEPA considered Section 203.303 of the Board's rules. Whether IEPA "considered" the issue is not the question. Chicago Coke and IEPA engaged in extensive dialogue on many issues during the course of Chicago Coke's three-year trek to obtain a final decision.[2] When IEPA failed to identify Section 203.303 as a basis for its denial, Chicago Coke believed IEPA had accepted the arguments that Section 203.303 did not prohibit the use of Chicago Coke's ERCs. IEPA failed to identify or reference Section 203.303 as a basis for IEPA's final decision. That failure is a direct violation of Section 39(a)'s requirement that a denial letter must identify the specific regulations which may be violated if the "permit" were granted. It would violate the Act and due process to allow IEPA to include what IEPA claims to have been thinking – so many years after the final agency action.

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[2] Chicago Coke began seeking a decision from IEPA no later than July 2007. IEPA issued its written decision on February 22, 2010.

Likewise, IEPA's decision does not reference IEPA's use of Chicago Coke's emission reductions to demonstrate compliance. IEPA now says that federal guidance documents address whether ERCs expire. IEPA still misses the point. If the use of Chicago Coke's emission reductions to demonstrate compliance were a basis for IEPA's denial of the use of Chicago Coke's ERCs, Illinois law required IEPA to include that reason in IEPA's written decision. IEPA's written decision states only that "applicable federal guidance" prohibits the use of ERCs from "permanently shutdown" facilities. (IEPA 1593, also attached to Chicago Coke's petition for review as Exhibit D.) There is no mention of IEPA's use of Chicago Coke's emission reductions to demonstrate compliance. Whether the ERCs are unavailable because the facility was "permanently shutdown" is not the same as whether the ERCs are unavailable because IEPA had used the emission reductions. IEPA's actions are slippery and should not be allowed by this Board.

It is fairly simple for IEPA to identify the basis for its decision. It is not a heavy burden on IEPA to require that IEPA include all denial reasons in its written decision. Illinois law requires it.

## CONCLUSION

IEPA has made inconsistent arguments in this appeal, depending upon what suits it at the moment. In its pending motion for summary judgment against Chicago Coke, IEPA contends the appropriate standard of review is the standard applied to permit appeals, and that the Board cannot consider information developed after IEPA's decision. However, in objecting to Chicago Coke's motion to strike, IEPA does a 180 degree turn. IEPA claims it is not limited to denial reasons contained in its decision – a clear statutory requirement for permit decisions. IEPA cannot have it both ways. If the

appropriate standard of review is the standard applied to permit appeals, then IEPA should be subject to the Section 39(a) permit requirement that IEPA articulate all of its reasons for denial. IEPA's inconsistency is even more breathtaking when it now claims it should be allowed to argue events which occurred two and a half years after its written decision – although IEPA earlier argued that the Board cannot consider information developed after IEPA's decision.

IEPA is limited to the denial reasons contained in its February 2010 written decision. IEPA does not contend that any of the arguments Chicago Coke moves to strike are contained in that February 2010 decision. Therefore, the Board should strike the identified portions of Chicago Coke's motion for summary judgment: a) all references to and arguments regarding Section 203.303, including at pages 13-14, page 21, and pages 26-28; and b) all claims that the ERCs were not creditable because IEPA had used the emission reductions to demonstrate compliance, including much of Section V(2) at pages 20-26, and the arguments at pages 26-28.

Respectfully submitted,

CHICAGO COKE CO., INC.

By: _____
One of its attorneys

Dated: October 17, 2012

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