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 31st day of January 2013, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Supplemental Response to IEPA's Motion for Summary Judgment**, which is attached and herewith served upon you.

CHICAGO COKE CO., INC.

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

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CERTIFICATE OF SERVICE

I, the undersigned, state that a copy of the above-described document was served electronically upon all counsel of record on January 31, 2013.

s/Elizabeth S. Harvey

7012-002

SERVICE LIST

Chicago Coke Co., Inc. v. Illinois Environmental Protection Agency and Natural Resources Defense Council and Sierra Club
PCB 10-75
(Permit Appeal -- Air)

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7012-002

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Intervenors.	)	

CHICAGO COKE'S SUPPLEMENTAL RESPONSE TO IEPA'S MOTION FOR SUMMARY JUDGMENT

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, submits its supplemental response in opposition to respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S ("IEPA") August 17, 2012 motion for summary judgment.

INTRODUCTION

This supplemental response is submitted in accordance with the Board's December 20, 2012 order. In that order, the Board denied Chicago Coke's motion to strike portions of IEPA's motion for summary judgment. The Board allowed Chicago Coke to supplement its response, to address the arguments which were the subject of the motion to strike. This supplemental response addresses only those arguments. Chicago Coke refers the Board to Chicago Coke's September 19, 2012 response, for

responses to the other arguments made by IEPA. Chicago Coke incorporates its September 19, 2012 response as if set forth fully.

ARGUMENT

IEPA asserts that it relied on emissions reductions from the "shutdown" of the Chicago Coke facility in demonstrating compliance with federal ozone standards. Thus, according to IEPA, Chicago Coke's ERCs are no longer available pursuant to 35 Ill.Adm.Code 203.303(b)(5). That regulation provides that emission offsets "must not have been previously relied on...for demonstrating attainment." However, IEPA's attempt to prevent use of Chicago Coke's ERCs by including the Chicago Coke emission reductions in Illinois's compliance demonstration—while Chicago Coke was seeking a determination from IEPA that the ERCs were available—should not be countenanced.

Chicago Coke began asking IEPA to recognize Chicago Coke's ERCs in 2007. Chicago Coke met with IEPA in June 2007 and July 2007, and again on January 17, 2008. (IEPA 1580-IEPA 1581.) Chicago Coke also submitted three written requests to IEPA. Those written requests are dated August 3, 2007, July 18, 2008, and January 15, 2010. (IEPA 1584-IEPA 1592; IEPA 1580- IEPA 1583; IEPA 1578-IEPA 1579.)[1] During that long period when Chicago Coke was trying to obtain a determination from IEPA, IEPA removed the Chicago Coke facility from the state's emissions inventory. In fact, IEPA removed the facility from the emissions inventory on January 10, 2008—one week before the January 17, 2008 meeting between IEPA and Chicago Coke. (IEPA 2285, attached as Exhibit 10 to IEPA's motion for summary judgment.) In 2009 IEPA

[1] In addition to being part of IEPA's administrative record, these documents are included as Group Exhibit 7 in support of Chicago Coke's August 17, 2012 motion for summary judgment.

submitted, to USEPA, a request to redesignate the Chicago area as "attainment" for ozone. IEPA asserts that because Chicago Coke was removed from the emissions inventory in 2008, the 2009 submission of the redesignation request "counted out" Chicago Coke's emissions as zero for purposes of demonstrating attainment.[2] Although these actions by IEPA occurred in 2008 and 2009, while Chicago Coke tried to obtain a decision from IEPA, IEPA's February 22, 2010 decision does not include the use of Chicago Coke's emissions to demonstrate compliance with the ozone standard as a basis for the denial.

Whether purposefully or not, IEPA manipulated the regulatory system by removing Chicago Coke from the emissions inventory, and subsequently using that removal to demonstrate compliance with the ozone standard, while at the same time discussing the availability of the ERCs with Chicago Coke. IEPA now contends that the ERCs are not available, because Section 203.303(b)(5) prohibits the use of offsets which have been relied upon by IEPA in demonstrating attainment or reasonable further progress. That is a very convenient result. In 2007 Chicago Coke sought a determination on the availability of its ERCs; in 2008 IEPA removed the emissions from the state inventory; in 2009 IEPA used the removal in seeking to demonstrate attainment; and in 2010 IEPA decided that Chicago Coke's ERCs are not available. All the while, Chicago Coke was attempting to obtain a determination from IEPA, a process

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[2] IEPA notes that in August 2012, USEPA approved the redesignation of the Chicago area as an attainment area for ozone. USEPA's approval occurred more than two and a half years after IEPA's denial in this case, and is irrelevant to this appeal. Whether USEPA subsequently approved the redesignation is not relevant to IEPA's use of the Chicago Coke emission reduction to demonstrate compliance. As the Board noted in its December 20, 2012 order, "arguments regarding events that occurred after the February 22, 2010 letter will only be considered to the extent that those arguments are relevant to the events occurring prior to February 22, 2010." (December 20, 2012 order at p. 10.) The Board should ignore USEPA's August 2012 action.

that began months before IEPA removed the Chicago Coke emissions from the emissions inventory.

Allowing IEPA to use Section 203.303(b)(5) to prevent the use of Chicago Coke's ERCs would allow IEPA to manipulate the emissions inventory in order to block the use of otherwise valid ERCs. While Chicago Coke does not know whether IEPA's actions were taken purposely to allow denial of the ERCs, the impact is the same, regardless of IEPA's motivations. IEPA removed the Chicago Coke facility from the emissions inventory, and then used that removal as part of its demonstration of attainment, after Chicago Coke began asking IEPA for a determination on the validity of the ERCs. IEPA now argues that because of IEPA's own actions, Section 203.303(b)(5) prohibits the use of Chicago Coke's ERCs. The Board should not tolerate IEPA's attempt to use Section 203.303(b)(5) as a basis for the denial.

Further, the plain language of Section 203.303(b)(5) demonstrates that it is inapplicable to Chicago Coke. The regulation provides that emission offsets "must not have been previously relied on...to demonstrate attainment." (35 Ill.Adm.Code 203.303(b)(5)(emphasis added).) When Chicago Coke began its quest for a determination by IEPA, its emissions were included in the state emissions inventory and, therefore, could not have been relied on to demonstrate attainment. Indeed, it was not until two years into IEPA's consideration of Chicago Coke's request that IEPA submitted its attainment demonstration. If IEPA had acted on Chicago Coke's request more quickly, before two years had passed, Section 203.303(b)(5) clearly would not have applied because there would not have been any purported use of those offsets to demonstrate attainment. There would not have been any "previous" use of the offsets

to demonstrate compliance. Instead, IEPA's delay, coupled with its own actions, artificially created the situation to now allow IEPA to assert Section 203.303(b)(5) bars the use of the ERCs. The Board should reject IEPA's contention that Section 203.303(b)(5) applies to bar the use of Chicago Coke's ERCs.

CONCLUSION

As demonstrated in Chicago Coke's own motion for summary judgment, and again in Chicago Coke's response to IEPA's motion for summary judgment, IEPA has failed to identify any applicable federal guidance which prohibits the use of ERCs from "permanently shutdown" facilities. Further, IEPA relied on a self-created guideline that emission reductions more than five years old are deemed to be expired. IEPA has not attempted to explain its authority to apply guidelines IEPA itself created. The Board, not IEPA, is the rulemaking authority in the State of Illinois. The proper procedure is to propose an appropriate regulation for consideration and adoption by the Board---but IEPA has not bothered to do so.

IEPA's attempt to apply Section 203.303(b)(5) to prohibit the use of Chicago Coke's ERCs is another example of IEPA's apparent belief it can manipulate the regulatory system. IEPA removed Chicago Coke's emissions from the emissions inventory, months after Chicago Coke initiated its quest to obtain an IEPA decision. Two years into Chicago Coke's attempt to obtain a decision, IEPA then relied upon the removal of the Chicago Coke emissions as part of its demonstration of attainment of the ozone standard. Allowing IEPA to use its own actions, taken while a request for a determination of the availability of ERCs was pending, would give IEPA the ability to unilaterally take actions to destroy the viability of otherwise valid ERCs.

The appellate court has previously expressed concern that IEPA views itself as the only authority which can be trusted to protect the environment, even if it means violating normal legal rules and procedures. *Grigoleit Company v. Pollution Control Board*, 245 Ill.App.3d 337, 348, 613 N.E.2d 371, 378, 184 Ill. Dec. 344, 351 (4th Dist. 1993)(Steigmann specially concurring). The Board should not tolerate IEPA's use of self-created guidelines or manipulation of Section 203.303(b)(5). Chicago Coke asks that the Board deny IEPA's motion for summary judgment. Further, the Board should grant summary judgment in Chicago Coke's favor, as requested in Chicago Coke's August 17, 2012 Motion for Summary Judgment.

CHICAGO COKE CO., INC.

By: _____
One of its attorneys

Dated: January 31, 2013

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