

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|-------------------------------------|---|----------------------|
| CHICAGO COKE CO., INC., an Illinois |) | |
| corporation, |) | |
| |) | |
| Petitioner, |) | |
| |) | PCB 10-75 |
| v. |) | (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 19th day of September 2012, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Motion to Strike, Directed to NRDC's Motion for Summary Judgment**, which is attached and herewith served upon you.

CHICAGO COKE CO., INC.

By: s/Elizabeth S. Harvey
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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 September 19, 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 TO STRIKE, DIRECTED TO NRDC'S
MOTION FOR SUMMARY JUDGMENT

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

1. Despite prior Board limitation that NRDC cannot argue any matters beyond those in Chicago Coke's petition for review, NRDC's motion for summary judgment raises a number of issues beyond the scope of the appeal.

BACKGROUND

2. NRDC was allowed to intervene, over Chicago Coke's objection. One of the bases for Chicago Coke's objection was that NRDC improperly sought to expand the scope of the appeal. Chicago Coke pointed out that NRDC continued to

claim that this appeal involves matters which are not, in fact, at issue. For example, despite NRDC's claims, whether emission reduction credits ("ERCs") for PM₁₀ can be used as surrogates for PM_{2.5} is not at issue on this appeal. The only issue on appeal is whether the respondent Illinois Environmental Protection Agency ("IEPA") correctly determined Chicago Coke's ERCs are not available as offsets because the Chicago Coke facility is allegedly permanently shutdown. See Chicago Coke's Response In Opposition to NRDC's Motion to Intervene, at p.1; Chicago Coke's Surreply In Opposition to Motion to Intervene, at pp. 1-3.

3. IEPA, in its response to the motion to intervene, also objected to NRDC raising issues outside the scope of this appeal. IEPA asked the Board to limit its review to the issues set out in Chicago Coke's petition for review. IEPA Response to Motion to Intervene, pp 1-2.
4. The Board granted NRDC's motion to intervene, over two dissenting votes. However, the Board specifically limited NRDC's intervention. The Board ordered that "no matters beyond those set forth in Chicago Coke's petition are at issue in this appeal" and stated "justice requires that NRDC/Sierra Club not be permitted to raise other issues." Board Order, April 21, 2011, at p. 10. The Board's limitation is consistent with its prior decisions that allowing intervenor status does not enlarge the scope of review. See, e.g., *Land and Lakes Co. v. Village of Romeoville*, PCB 91-7, pp. 2-3 (April 11, 1991). For good measure, the Board then restated its limitation on NRDC's participation:

NRDC/Sierra Club may not raise new issues as intervenors that were not raised by Chicago Coke in this appeal.

Board Order, April 21, 2011, at p. 11 (emphasis added).

ARGUMENT

5. Despite the Board's specific limitation, NRDC has raised a number of issues in its motion for summary judgment which were not raised by Chicago Coke's petition for review.

6. NRDC also improperly raises issues beyond those given by IEPA for its decision.

NRDC has improperly raised issues beyond those set forth in Chicago Coke's petition for review.

7. NRDC recognizes the limitation on its participation, but recycles its prior claim that matters in the exhibits to the petition for review are at issue. (NRDC Motion for Summary Judgment, p. 3.)

8. NRDC made the same claim in its reply in support of intervention. The Board by implication rejected that claim, when it specifically limited NRDC's participation to matters set forth in Chicago Coke's petition for review. The Board did not say "petition for review and all attachments."

9. NRDC's contention---that matters in the attachments to the petition for review are also at issue---violates the Board's specific limitation on the NRDC's participation. NRDC's contention is also illogical. NRDC claims that because correspondence mentioning the particulate matter surrogacy was attached to Chicago Coke's petition, any issue raised in that correspondence is somehow at issue. However, in the course of a proceeding before IEPA, many issues are raised which do not become a basis for an appealed decision. As Chicago Coke argued in its surreply, it would wreak havoc on the permitting and appeal process to allow a non-party to intervene in order to challenge an issue that was not the basis for IEPA's decision, and was not raised by the petitioner.

10. This is exactly what NRDC attempts to do, however. Despite the Board's specific order that NRDC is limited to issues raised by Chicago Coke in this appeal, NRDC's motion for summary judgment is replete with arguments outside the scope of Chicago Coke's petition for review.

NRDC has improperly raised issues not given by IEPA as the basis for its decision.

11. In addition to violating the Board's express limitation on NRDC's participation, NRDC raises arguments beyond the reasons given by IEPA for its decision. Although Chicago Coke's request to IEPA is not a typical permit application, the Board has found the appeal should be treated as a permit appeal. Board Order, April 21, 2011, pp 9-10. NRDC recognizes that this appeal is to be treated as a permit appeal. NRDC Motion for Summary Judgment, p. 10.

12. It is well-settled that bases not given by IEPA as a reason for a permit denial cannot be raised on appeal. Section 39(a) of the Environmental Protection Act ("Act") requires IEPA to provide "specific, detailed statements as to the reasons" for the denial of a permit. Those statements "shall" include the sections of the Act and the specific regulations which may be violated if the permit were granted. 415 ILCS 5/39(a).

13. The Illinois Supreme Court has held that Section 39 requires IEPA to specify the reasons for a permit denial. 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) (prohibiting IEPA from raising, on appeal, a regulation as a basis for its permit denial, where IEPA's written decision did not reference that regulation).

14. The appeal to the Board is a permit applicant's opportunity to challenge the

reasons given by IEPA for denying a permit. 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).

15. Chicago Coke recognizes the Board has opined that this appeal is in the nature of an appeal of a Clean Air Act permit under Sections 39.5 and 40.2(a) of the Act. However, the appeal framework established by case law under Section 39 is equally applicable to this appeal. This appeal is Chicago Coke's opportunity to challenge the reasons given by IEPA for finding Chicago Coke's ERCs "unavailable." That opportunity is meaningless if NRDC is allowed to raise issues beyond those given by IEPA in its February 22, 2010 decision.

16. IEPA's only stated reason for its decision is:

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.

February 22, 2010 decision. (IEPA 1593, also attached to Chicago Coke's petition for review as Exhibit D.)

IEPA's decision was based on its view that "applicable federal guidance" prohibited the use of ERCs from facilities which are "permanently shutdown." The decision was not based on whether the ERCs are only valid for replacement projects, the surrogacy of PM₁₀ credits, the removal of Chicago Coke's emissions from the state emissions inventory, or on Section 203.303 of the Board's rules. NRDC is barred from raising any argument beyond IEPA's stated reason: that federal guidance prohibits the use of Chicago Coke's ERCs because the facility

is permanently shutdown.

The Board or hearing officer should strike NRDC's improper arguments.

17. Because NRDC has violated the Board's express limitation on participation, by raising issues beyond the scope of Chicago Coke's petition for review and beyond the reasons given by IEPA for its decision, Chicago Coke moves to strike the following portions of NRDC's motion for summary judgment.

- a. The argument on pages 13-16 under subheading "A(2)," asserting that ERCs would only be valid for a replacement source, not the proposed project. This argument also includes claims regarding the surrogacy of PM₁₀ and PM_{2.5}. IEPA did not find that Chicago Coke's ERCs are not valid towards a specific project: it found that the ERCs are not valid in any situation because the Chicago Coke facility was allegedly permanently shutdown. Further, Chicago Coke did not raise, in its petition for review, issues regarding the use of ERCs for replacement projects or the relationship between credits for PM₁₀ and for PM_{2.5}.
- b. Arguments that the ERCs are not valid because Chicago Coke's emissions were not in the Illinois emissions inventory. These claims are on page 12, and on pages 16-18 under subheading "B." Chicago Coke's petition does not raise issues regarding the Illinois emissions inventory or attainment planning, and IEPA's decision letter does not identify these are reasons for IEPA's decision. NRDC essentially admits this argument is beyond the scope of this appeal, by asserting Chicago Coke's ERCs cannot be used "regardless of the date of permanent shutdown." (NRDC Motion for Summary Judgment, p. 18.)

- c. The argument on pages 19-20 under subheading "D" that IEPA's decision is consistent with federal regulations regarding state implementation plans ("SIP"). IEPA did not cite any federal regulations regarding SIPs as a basis for its decision, and Chicago Coke did not raise this issue.
 - d. All arguments and references regarding the application of 35 Ill.Adm.Code 203.303, including references on pages 3-4 under "background," arguments on pages 11-12 under subheading "A" and the arguments made on pages 20-21 under subheading "E." IEPA's February 22, 2010 decision does not cite Section 203.303 (or any state regulation or "policy") as a basis for its decision. Further, Chicago Coke's petition for review does not raise any state regulation.
18. NRDC's arguments on these identified issues are beyond the scope of this appeal, and thus violate the Board's limitation on NRDC's participation as an intervenor. Chicago Coke should not be forced to respond to arguments outside the scope of the appeal, especially where the Board has previously informed NRDC of the limits on its participation. NRDC has boldly attempted to improperly expand the scope of the appeal---exactly why Chicago Coke opposed intervention. IEPA also opposed any attempt to expand the scope of the appeal.

Conclusion

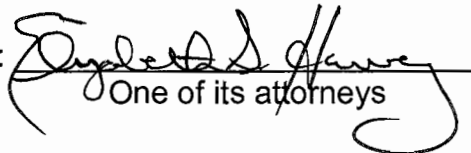
19. Chicago Coke moves to strike the portions of NRDC's motion for summary judgment identified above: a) arguments on pages 13-16 under subheading "A(2)"; b) arguments in the second full paragraph on page 12 and on pages 16-18 under subheading "B"; c) the argument on pages 19-20 under subheading "D"; and d) all references to and arguments regarding 35 Ill.Adm.Code 203.303,

including references on pages 3-4 under "background," arguments on pages 11-12 under subheading "A," and the arguments made on pages 20-21 under subheading "E."

20. In the alternative, if the Board or hearing officer denies all or part of this motion to strike, Chicago Coke requests 14 days from the date of the order to respond to the challenged arguments.

WHEREFORE, Chicago Coke moves to strike the identified portions of NRDC's Motion for Summary Judgment; in the alternative, for 14 days from the date of an order denying this motion to respond to the challenged arguments; and for such other relief as the Board or hearing officer deem appropriate.

CHICAGO COKE CO., INC.

By: 
One of its attorneys

Dated: September 19, 2012

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