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.	)	

NOTICE OF FILING

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

PLEASE TAKE NOTICE that on this 1st day of February 2011, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Response in Opposition to Movant's Motion for Leave to Intervene**, 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 non-attorney, state that I served a copy of the foregoing to counsel of record via U.S. Mail at 330 North Wabash Avenue, Chicago, IL 60611, at or before 5:00 p.m. on February 1, 2011.

Jeanette Podlin

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

7012-002

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THE ILLINOIS ENVIROMENTAL PROTECTION AGENCY,	)	
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CHICAGO COKE CO., INC.'S RESPONSE IN OPPOSITION TO MOVANT'S MOTION FOR LEAVE TO INTERVENE

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke") responds in opposition to the motion to intervene, filed by NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB (collectively, "NRDC" or "movants").

INTRODUCTION & BACKGROUND

The issue presented in this proceeding is straightforward and limited: whether Chicago Coke is able to use its emission reduction credits ("ERCs") as emission offsets. Movants misconstrue this limited issue and have raised claims in support of intervention that are outside the scope of this proceeding. The NRDC's arguments in favor of intervention are not relevant to the issue presented to the Board.

This matter began with Chicago Coke's request that IEPA recognize that Chicago Coke's ERCs are available for sale as emission offsets. In its "final decision," IEPA denied that request. IEPA's decision was based on an unpromulgated fictitious regulation, where -- according to IEPA -- a facility that is permanently shut down cannot use or sell its ERCs for use as emission offsets. (Of course, IEPA's position ignores

Board regulations which specifically provide for use of ERCs following a permanent shutdown.) In this appeal, Chicago Coke asks the Board to recognize that IEPA exceeded the scope of its authority when it applied a fictitious regulation, which has not been promulgated by the Board, to block the sale of Chicago Coke's ERCs. (Petition, p. 2.)

None of the NRDC's bases for intervention are relevant to the issue presented by Chicago Coke. The NRDC asserts that its members in Cook County will be adversely affected. The NRDC further alleges it will raise claims contrary to the positions previously taken by IEPA, with regard to the use of offsets for particulate matter. However, this case does not involve these issues. The issue is not whether Chicago Coke's ERCs can be applied by a specific buyer to offset specific types of emissions at a specific location. The sole issue in this appeal is whether IEPA has improperly applied a fictitious unpromulgated regulation. Movants' claimed bases for intervention are irrelevant to that issue.

The motion to intervene should be denied, because movants will not be prejudiced or adversely affected by the Board's review of IEPA's decision. 35 Ill.Adm.Code 101.402(d). Further, allowing movants to intervene would unduly delay, materially prejudice, and otherwise interfere with an orderly and efficient proceeding. 35 Ill.Adm.Code 101.402(b).

ARGUMENT

The standard for permissive intervention is set forth in Section 101.402(d) of the Board's procedural rules. The Board may grant intervention if the intervening party "may be materially prejudiced absent intervention," or when the intervening party may

be "adversely affected by a final Board order." [1] 35 Ill.Adm.Code 101.402(d)(2),(3). The Board's decision to grant or deny intervention is discretionary. 35 Ill. Adm. Code § 101.402(b),(d); *People v. Alloy Engineering & Casting Co.*, PCB 01-156, 2001 WL 1077836, *2, (Sept. 6, 2001). In this case, the movants have not shown, nor can they show, that they will be materially prejudiced if they are not permitted to intervene in this proceeding. Movants have also failed to demonstrate that their interests may be adversely affected by the Board's final order in this proceeding. The sole issue on appeal is whether the "rule" applied by IEPA has been properly promulgated, or even exists. All of movants' arguments are irrelevant because the purpose for which the ERCs will be used and the effect of using the ERCs are not at issue.

A. Movants have not shown that they will suffer a material prejudice if intervention is denied.

Movants assert they will be materially prejudiced, absent intervention, because movants will make different legal arguments than will be made by IEPA. Movants make two assertions: 1) movants will take a different position on whether Chicago Coke's PM_{10} ERCs may be used as a surrogate for $PM_{2.5;}$ and 2) movants are better suited than IEPA to assert that ERCs from a permanently shut down source cannot be used. Neither of these claims support a finding of material prejudice.

First, the issue of whether PM_{10} ERCs can be used as a surrogate for $PM_{2.5}$ is not at issue in this case. The question before the Board is whether IEPA applied a fictitious regulation to Chicago Coke. Chicago Coke has not applied for a permit to use its ERCs to offset any specific emission, nor did Chicago Coke ask IEPA to make such a

[1] Movants do not contend they are entitled to intervention as of right, 35 Ill.Adm.Code 101.402(c), nor do they claim they have a conditional statutory right to intervene, 35 Ill.Adm.Code 101.402(d)(1).

determination. Chicago Coke asked IEPA to recognize that "certain ERCs held by Chicago Coke are available for use as emission offsets for the permitting of major new sources and/or major modifications in the Chicago area." (Petition, Ex. C, p. 2.) IEPA denied that request, stating it "does not find that the ERCs claimed are available as offsets, since it is our position that the Chicago Coke facility is permanently shut down." (Petition, Ex. D, p. 1.) Chicago Coke then appealed to the Board, asking the Board to overturn IEPA's "denial of Chicago Coke's ERCs as emission offsets." (Petition, p. 2.)

To render its decision, the Board will analyze the IEPA's scope of authority and the basis for its decision. The surrogacy between PM_{10} and $PM_{2.5}$, or the application of specific ERCs to any specific emission, is beyond the scope of this appeal. Thus, movants cannot show material prejudice by claiming they would take a different position than IEPA on an issue that is not even before the Board.

Second, the NRDC claims it may be better suited to argue that IEPA's determination was appropriate because Chicago Coke has argued that IEPA has not strictly adhered to the policy that ERCs become unavailable following a permanent shutdown. However, the NRDC does not provide any evidence that IEPA will be any less tenacious in defending its decision than the NRDC. In fact, the history of this proceeding, and of the corresponding circuit court case, shows that IEPA will resolutely defend its decision.[2] There is no reason to believe IEPA "will proceed here with anything other than its usual competence and zeal." *Kibler Development Corporation v.*

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[2] IEPA previously moved to dismiss this appeal. After the Board denied the motion to dismiss, IEPA filed a motion to reconsider that denial. *See Chicago Coke Co. v. IEPA*, PCB 10-75 (October 21, 2010). IEPA also moved to dismiss Chicago Coke's petition in the circuit court. That motion to dismiss was successful, based upon a finding that Chicago Coke had not exhausted its administrative remedies. See attached Exhibit A.

IEPA, PCB 05-35, 2006 WL 1353961 *5 (May 4, 2006)(denying municipalities leave to intervene). The NRDC has not provided any evidence to rebut the presumption IEPA will vigorously defend its position.

Movants have not demonstrated they will suffer material prejudice absent intervention.

B. Movants have not shown that they will be adversely affected by a final Board order.

Movants have not argued they will be adversely affected by the Board entering a final order which finds that IEPA exceeded its authority. Instead, movants, again, confuse the issue of Chicago Coke's ability to use its ERCs as offsets with the purpose for which those credits will later be used.

The public interest alleged by the NRDC is speculative, hypothetical, and irrelevant to this appeal. The NRDC's vague claim of an adverse impact by undetermined future emissions is neither relevant to, nor admissible in, this proceeding. The issue presented is whether IEPA's decision exceeded the scope of IEPA's authority. The NRDC has not asserted any concrete adverse effect from the Board's review and determination on whether IEPA's decision constituted the exercise of a fictitious regulation.

Additionally, movants cannot prove injury to its members that is more specific than that applicable to any citizen of the State of Illinois. Movants have failed to show that IEPA will not adequately represent movants' interests, since the state agency has a vested interest in fairly applying Illinois administrative law and protecting the interests of Illinois citizens. All of the movants' members are represented by the Illinois Attorney General because they fall within the ambit of the "People of Illinois." *See Midwest*

Generation EME, L.L.C. v. Illinois EPA, PCB 04-216, 2005 WL 2115274, *11(Aug. 15, 2005); *see also Alloy Engineering & Casting Co.*, 2001 WL 1077836, *3 (Illinois Attorney General represents all of the people in the state of Illinois). The Board has "no reason to believe that the Agency will proceed here with anything other than its usual 'competence and zeal.'" *U.S. Steel Corp. v. Illinois EPA* ,PCB 10-23, 2009 WL 6506858, *5, (Dec. 3, 2009) (citing *Kibler Dev. Corp.,* 2006 WL 1353961, *5).

The NRDC has not demonstrated its members will be adversely affected by a final Board order on the issue presented by this appeal.

C. Intervention will cause undue delay, will materially prejudice this proceeding, and will otherwise interfere with an orderly and efficient proceeding.

Even when discretionary intervention is permissible, the Board must consider "whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Adm. Code 101.402(b); *see also Midwest Generation*, 2005 WL 2115274, *11.

Intervention would interfere with an orderly and efficient proceeding because movants would interject the above-stated arguments which have no bearing on the issue before the Board. If movants are permitted to intervene, this proceeding will become significantly more complex because Chicago Coke would have to argue its appeal against IEPA, as well as defend against movants' speculation as to the future use of the ERCs as offsets. This would be a burden not only on Chicago Coke, but on the Board and its employees. The Board has previously denied intervention in a case where the proposed intervener (the Sierra Club) sought to "make a record that is

unrelated to the lone issue of [the] appeal." *Midwest Generation*, 2205 WL 2115274, *12. The Board should do the same here, and deny intervention.

In addition, allowing intervention could cause this appeal to become inefficient and disorderly due to opposing positions taken by IEPA and the NRDC. Instead of being limited to conflicting positions between Chicago Coke and IEPA, the appeal would also include conflicting positions between IEPA and the NRDC. By its own admission, the NRDC seeks to take positions directly in conflict with IEPA's positions. These conflicting positions are neither relevant or necessary to a full decision on the appeal. Neither the Board nor Chicago Coke has an interest in prolonging the appeal while IEPA defends itself against the NRDC's contrary positions on the use of ERCs as offsets. The NRDC's superfluous arguments will interfere with an orderly and efficient proceeding.

D. Movants may adequately protect any interest they assert through other methods of public participation.

The Board should deny movants leave to intervene, and thereby deny conferring party status on the movants. However, movants will not be prevented from participating in this proceeding because they will still be able to make oral or written statements at hearings. *See* 35 Ill.Adm.Code 101.110(c); *see also Midwest Generation.*, 2005 WL 2115274, *12. Thus, movants will have a sufficient opportunity to participate, and thus will not be materially prejudiced if leave is denied.

E. In the alternative, if movants are permitted to intervene, their participation should be limited.

The NRDC has not demonstrated it would be materially prejudiced absent intervention, nor has it adequately demonstrated that it or its members would be

adversely affected by a final Board order. Further, allowing the NRDC to intervene would materially prejudice the proceeding, and would interfere with an orderly and efficient proceeding. Thus, the Board should deny the motion to intervene. However, if the Board disagrees and permits intervention, the NRDC's participation in this proceeding should be limited. Such limitation is authorized pursuant to Section 101.402(e) of the Board's procedural rules. 35 Ill.Adm.Code 101.402(e), *see also U.S. Steel, 2009 WL 6506858, *8.* It the NRDC is permitted to intervene, its participation should be subject to the following conditions, and any other conditions deemed appropriate by the Board:

1) NRDC cannot participate in discovery, including serving interrogatories, requests for production of documents, or requests to admit or conducting depositions;

2) NRDC does not control the statutory decision deadline;

3) NRDC cannot raise any issues outside the scope of the matters set forth in Chicago Coke's petition for review;

4) NRDC cannot introduce evidence that it is not part of the record; and

5) NRDC must comply with all Board or hearing officer orders, including those issued to date.

The NRDC's interests will be adequately represented by Illinois EPA and the Attorney General, and intervention should be denied. However, if the NRDC is permitted to intervene, justice and efficiency require its participation be limited as set forth above.

CONCLUSION

The NRDC has failed to demonstrate that it will be materially prejudiced without intervention, and further cannot show it will be adversely affected by a final Board order. Further, allowing movants to intervene would unduly delay, materially prejudice, and otherwise interfere with an orderly and efficient proceeding. Therefore, the NRDC's motion to intervene should be denied. In the alternative, if the Board permits the NRDC to intervene, the Board should limit the NRDC's participation in this proceeding.

Respectfully submitted,

CHICAGO COKE, CO., INC.

By: _____
One of Its Attorneys

Dated: February 1, 2011

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Exhibit A

Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Chicago Coke Co., Inc.

v.

Scott, et al.

No. 10 CH 12662

ORDER

THIS CAUSE BEFORE THE COURT on Defendants' [redacted] Section 2-619.1 Combined Motion to Dismiss Complaint Pursuant to Sections 2-615 and 2-619,

IT IS HEREBY ORDERED THAT:

(1) Defendants' motion is granted, and Plaintiff's Complaint is dismissed for failure to exhaust administrative remedies.

Atty. No.: 99000
Name: AAG Andrew Armstrong
Atty. for: Plaintiff
Address: 69 W Washington, 18th Floor
City/State/Zip: Chicago, IL 60602
Telephone: 312-814-0660

ENTERED:

Dated:

ENTERED
JUDGE CAROLYN QUINN-1880
JAN - 7 2011
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS