BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-75
	)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondents.	)	

NOTICE OF FILING

To:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randoph, Suite 11-500
Chicago, IL 60601-7447

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randoph, Suite 11-500
Chicago, IL 60601

Persons on the attached service list

Please take notice that on the 7th Day of February, 2011, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **Motion for Leave to File Reply**, a copy of which is hereby served upon you.

By: _____
Ann Alexander, Natural Resources Defense Council

Dated: February 7th, 2011

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CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached **Motion for Leave to File Reply** on all parties of record (Service List attached), by depositing said documents in the United States Mail, postage prepaid, from 227 W. Monroe, Chicago, IL 60606, before the hour of 5:00 p.m., on this 7th Day of February, 2011.

_____

Ann Alexander, Natural Resources Defense Council

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Jan. 11, 2011

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ILLINOIS POLLUTION CONTROL BOARD

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MOTION FOR LEAVE TO FILE REPLY

Natural Resources Defense Council and Sierra Club ("Movants"), by their attorneys, hereby move the Board for an order granting them leave to file the attached Reply to Chicago Coke Co., Inc's and Respondent's Responses To Motion For Leave To Intervene ("Reply"). In support of this motion , Movant states as follows:

1. On January 14, 2011, Movants filed a Motion to Intervene in the captioned proceeding.

2. On February 1, both Petitioner Chicago Coke Company ("Chicago Coke") and Respondent Illinois Environmental Protection Agency ("IEPA") filed their separate responses to the Motion to Intervene. Chicago Coke's response alleged that the issues the Movants proposed to raise as intervenors are outside the scope of this proceeding. IEPA's response, while not objecting to intervention, also suggested that "some" of Movants' proposed issues are outside the proceeding's scope. Chicago Coke's response set forth further arguments in opposition to intervention.

3. The contention that Movants' proposed issues are outside the scope of this proceeding, as well as Chicago Coke's additional arguments, rest on both faulty factual

assumptions and a failure to consider relevant law. In particular, the responses fail to address either the fact that Movants' proposed issues are raised in the Petition and its accompanying documents, or the underlying law that renders Movants' issues inseparable from Petitioners' claims.

4. Movants would therefore be materially prejudiced if denied leave to file the attached Reply.

WHEREFORE, Movants respectfully request that the Board grant this motion for leave to file the attached Reply.

Respectfully submitted this 7th day of February, 2011 by:

_____

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Attorneys for Proposed Intervenor-Defendants NRDC and Sierra Club

ILLINOIS POLLUTION CONTROL BOARD

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REPLY TO CHICAGO COKE CO., INC'S AND RESPONDENT'S RESPONSES TO MOTION FOR LEAVE TO INTERVENE

Preliminary Statement

Intervention movants NRDC[1] and Sierra Club submit this memorandum in reply to the responses to their motion submitted by Petitioner Chicago Coke and Respondent IEPA. Both responses mischaracterize the scope of the issues on appeal (although IEPA's does not object to intervention). The issues Chicago Coke claims are not part of this proceeding – surrogacy between PM_{10} and $PM_{2.5}$, and the application of the ERCs to a particular project planned by Chicago Coke's intended purchaser – were raised at length by Chicago Coke in correspondence with IEPA that was appended to the Petition for Review ("Petition"), and are inextricably bound up as a legal matter with Chicago Coke's claims. Additionally, Chicago Coke misconstrues the nature of Movants' interest in this matter and the prejudice it would suffer if denied intervention. Movants have not expressed a vague worry about the vigor of IEPA's defense, but rather specific concerns that (i) IEPA may not be in a position to effectively make arguments critical to its defense due to its past actions, and (ii) Movants could be foreclosed from challenging use of the

[1] Abbreviations used in this reply memorandum are defined in the Motion for Intervention unless otherwise specified.

ERCs when they are used to support the proposed project (the one specifically identified by Chicago Coke in its petition). Both of these concerns, coupled with the strong interest of Movants' members in keeping additional pollution out of their non-attainment airshed, are ample grounds to support intervention.

Argument

Point I

THE ISSUES MOVANTS PROPOSE TO ARGUE ARE INSEPARABLE FROM THE ISSUES RAISED IN THE PETITION

In their motion for intervention, Movants identified two specific legal grounds that support IEPA's decision that IEPA cannot or likely will not argue in this proceeding. Those grounds are (i) that PM_{10} ERCs may not be used to offset emissions of a different pollutant, $PM_{2.5}$; and (ii) the federal Clean Air Act, and not merely IEPA's rules or policies, mandated IEPA's conclusion that the ERCs were not valid. If Movants were denied the opportunity to make these arguments in this proceeding, they could be prejudiced in any subsequent appeal of a permit for the proposed project, because they might not be able to raise those arguments if the ERCs had already been deemed valid by the Board on this appeal. *See* Motion for Intervention ¶¶ 9-14.

In response, Chicago Coke argues that the issue of PM_{10} surrogacy is not addressed specifically in its petition or IEPA's decision, and hence cannot be raised by Movants. *See* Chicago Coke Co., Inc.'s Response in Opposition to Movant's Motion for Leave to Intervent ("Chicago Coke Response") at 3-4. IEPA appears to echo this view in its response, although it does not specifically identify the issues that it believes are "outside the scope" of the Petition, and alleges that only "some" of them are. Chicago Coke also claims that "the application of the specific ERCs to any specific emission, is beyond the scope of this appeal." *Id*. at 4.

In the first instance, Chicago Coke never specifically addresses Movants' argument that IEPA is not in an effective position to argue that its decision was mandated by the CAA. The Motion for Intervention is not grounded in arguments that IEPA will lack "competence and zeal," or will fail to "resolutely defend" its decision. Chicago Coke Response at 4-5. Movants have no doubt that the Agency will put up a skilled and vigorous defense. The problem, however, is that Petitioner has alleged that IEPA has not consistently held to the position articulated in its determination that the ERCs are not valid. This accusation would detract from IEPA's ability to argue that the CAA compelled its conclusion that the ERCs are expired. If the CAA did, in fact, compel that conclusion – and Movants firmly believe it did – then that issue is critical to the Board's determination. But if IEPA does make that argument – which it may well not, in view of Chicago Coke's allegations – Movants are in a much stronger position to present it than IEPA. *See* Motion for Intervention ¶ 11.

With respect to the $PM_{10}/PM_{2.5}$ surrogacy issue, Chicago Coke is simply wrong that this issue is not before the Board. First, Chicago Coke itself raised this issue in its correspondence with IEPA appended to its Petition. The Petition states that Chicago Coke submitted "three formal, written requests" to IEPA to recognize the ERCs as offsets, and appends these requests as exhibits. Petition ¶ 4. In these written requests, Chicago Coke expressly addressed the issue of $PM_{10}/PM_{2.5}$ surrogacy, and argued at length (albeit incorrectly) why IEPA should allow the use of its PM_{10} ERCs to meet Clean Air Act offset requirements in a $PM_{2.5}$ non-attainment area. *See* Petition Exhibit A at 4-5.

Even more importantly, the $PM_{10}/PM_{2.5}$ surrogacy issue is inextricably bound up with, and inseparable from, the overarching question raised on appeal, which is whether IEPA was

correct in determining that the ERCs had expired. The Illinois regulatory provision defining the expiration timeline of ERCs states that ERCs,

> 3) Must, in the case of a past shutdown of a source or permanent curtailment of production or operating hours, have occurred since April 24, 1979, or the date of area is designated a nonattainment area for the pollutant, whichever is more recent, and, until the United States Environmental Protection Agency (USEPA) has approved the attainment demonstration and state trading or marketing rules for the relevant pollutant, the proposed new or modified source must be a replacement for the shutdown or curtailment. . .

35 Ill. Admin. Code 203.303(a)(3). Thus, the expiration of ERCs is expressly pegged to the date of a non-attainment designation for each specific pollutant. That date is different for PM_{10} – for which the region is now in attainment – than for $PM_{2,5}$, for which it was designated non-attainment in 2005 (after, according to both IEPA and Movants, the facility at issue was shut down). There is thus no way to avoid the surrogacy issue in this proceeding, no matter how much Chicago Coke may want to.

Similarly, the intended use of the credits to support a particular proposed coal gasification project in Chicago is expressly set forth in the Petition. The Petition recites that "Chicago Coke sought to sell its emission reduction credits ("ERCs") to a buyer located in the same non-attainment area," Petition ¶ 3, and the correspondence with IEPA appended to the Petition describes at length the negotiation of a Letter of Intent to sell the ERCs to support the gasification project. *See* Petition Exhibit A and 1-2. Chicago Coke is in no position to pretend that it is seeking validation of the ERCs in a vacuum.

As an overall matter, the Board's rules make clear that the scope of the administrative record defines the scope of this appeal. *See* 35 Ill. Admin. Code 105.214(a) (the hearing shall be based "on the record before the Agency at the time the permit or decision was issued"). The documents addressing at length the surrogacy issue and the intended sale of the ERCs to support

the gasification project are clearly part of the administrative record, as well as being part of the Petition itself. All of these documents can and should be considered by the Board in determining whether to uphold IEPA's determination that the ERCs are not valid.

Point II

MOVANTS HAVE A MORE PARTICULARIZE INTEREST IN THIS PROCEEDING THAN DOES THE PUBLIC AT LARGE

Chicago Coke presents boilerplate arguments that the interest identified by Movants is "speculative, hypothetical, and irrelevant," and not "more specific than that applicable to any citizen of the State of Illinois." It makes no actual effort, however, to address in any way the detailed description of their interest provided by Movants. *See* Motion for Intervention ¶¶ 15-16.

Specifically, Movants not only stated the obvious – that their members living near the proposed facility on the southeast side of Chicago will suffer more adverse impacts than those living in, say, Carbondale – but pointed out as well that their members living in the Chicago region $PM_{2.5}$ NA will by definition suffer more harm from the Project than those living outside it. Id. ¶ 16. This fact also renders irrelevant the whole discussion of whether the ERCs are to be used for the gasification project for which Chicago Coke has proposed to sell them (although they clearly are). Even if they were used for a completely different project, that project would by definition have to be within the same NA. Thus, regardless of who uses the credits, if *anyone* uses them, the result will be more pollution in the Chicago region NA.

Point III

MOVANTS SHOULD BE ALLOWED TO PARTICIPATE FULLY IN THIS PROCEEDING, WHICH WILL NOT INTERFERE WITH ITS ORDERLY AND EFFICIENT CONDUCT

Petitioner expresses concern that allowing intervention will "interfere with an orderly or efficient proceeding." Chicago Coke Response at 6, citing 35 Ill. Admin. Code 101.402(b). The

basis for this concern is that allowing Movants to argue issues that may not be argued by IEPA would render the proceeding more "complex." *Id.* Complexity, however, is not synonymous with disorder or inefficiency. Movants have confidence that the Board is quite capable of maintaining order notwithstanding the addition to the proceeding of a few additional legal arguments. It is clear from the Board precedent cited by Movants that a proposal by intervenors to raise arguments that differ from IEPA's positions is a reason *to* grant intervention, not a reason to reject it. Motion for Intervention ¶ 12.

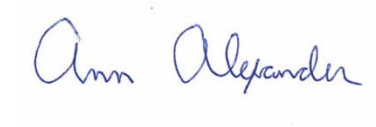
There is also no reason why Movants should be bound be the restrictions proposed by Petitioner (Chicago Coke Response at 8), rather than being allowed to fully participate in this proceeding. To the extent discovery is allowed at all in this proceeding, which is to be conducted exclusively on the administrative record (35 Ill. Admin. Code 105.214(a)), Petitioner has presented no valid substantive reason why Movants' participation would be disruptive, beyond the fact that it does not want them there. Particularly given that Movants may take positions at odds with those of IEPA, it is essential that Petitioners be present at depositions that IEPA is taking or defending, and be allowed to ask questions in discovery that IEPA may not choose to ask.

That issue aside, Movants have no objection to proposed limitation No. 2 (that they not control the statutory decision deadline) and No. 5 (that they must comply with all Board or hearing officer orders).

Conclusion

For the foregoing reasons, Movants respectfully request that their Motion for Intervention be granted, without restriction except as specified above.

Respectfully submitted this 7th day of February, 2011 by:



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