ILLINOIS POLLUTION CONTROL BOARD
September 2, 2010

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

ORDER OF THE BOARD (by G.T. Girard):

The Board on May 6, 2010 granted a motion to stay filed by Chicago Coke Company (Chicago Coke) that accompanied a petition for review. On June 11, 2009, the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss the petition and to lift the stay. The Board grants the motion to lift the stay to rule on the motion to dismiss. Based on the arguments, the Board finds that the Agency's decision was a final decision and the Board accepts the petition for hearing. The Board reinstates the stay and this case is stayed until 90 days before the decision deadline.

The Board will begin with a recitation of the procedural background and facts of the case. The Board then summarizes the arguments in the motions, responses, reply and surreply. The Board then discusses the reasons for this decision.

PROCEDURAL BACKGROUND

On March 29, 2010, the Board received a petition for review from Chicago Coke concerning Chicago Coke's coke production facility located at 11400 South Burley Avenue, Chicago, Cook County. The filing indicates that Chicago Coke sought to sell Chicago Coke's emission reduction credits (ERCs) to a buyer located in the same non-attainment area. The Agency denied the use of Chicago Coke's ERCs as emission offsets. Chicago Coke has filed a complaint in the Cook County Circuit Court challenging the Agency's denial of Chicago Coke's request to use Chicago Coke's ERCs as emission offsets (Pet. at 2 and Pet. Exh. E). Chicago Coke filed a waiver and asked that the Board stay the proceeding until the circuit court action is resolved. On May 6, 2010, the Board granted the motion to stay without commenting on the merits of the filing and without accepting the matter for hearing. This stay is effective until 90 days before the decision deadline, which Chicago Coke may waive.

On June 11, 2010, the Agency filed motions to vacate the stay (MOV) and to dismiss the petition for review (Mot.) filed by Chicago Coke. On June 28, 2010, Chicago Coke filed responses to the motion (Resp.V and Resp.). On June 30, 2010, the Agency filed a motion for

leave to file a reply, but a reply was not attached. On July 6, 2010, Chicago Coke filed a response to the motion for leave to file a reply asking that if the motion were granted that Chicago Coke be allowed to file a surreply. Chicago Coke argues that Chicago Coke will be prejudiced if not allowed to file a surreply. On July 12, 2010, the Agency filed a reply (Reply) and a response to the motion to file a surreply. The Agency argues that the Board's procedural rules do not contain a provision granting surreplies.

On July 15, 2010, the Board granted leave to the Agency to file a reply and leave to Chicago Coke to file a surreply, which was filed on July 22, 2010 (Surreply).

FACTS

Chicago Coke operates a coke facility located at 11400 South Burley Avenue, Chicago, Cook County, which is a non-attainment area. Pet. at 1. Chicago Coke sought to sell ERCs to another buyer in the same non-attainment area. *Id*. In three letters written to the Agency, Chicago Coke requested that the Agency recognize Chicago Coke's claimed ERCs as emissions offsets pursuant to 35 Ill. Adm. Code 203.303. Pet. at 1-2.

On February 22, 2010, the Agency denied the use of Chicago Coke's ERCs as emission offsets. Pet at 1. The Agency's letter states that the letter is in response to a letter from Chicago Coke asking for a response regarding the Agency's "final decision" on ERCs available to Chicago Coke. Pet. at Exh. D. The Agency letter states in pertinent part that "…the Illinois EPA's final decision on this issue remains the same as was previously conveyed to you. That is, the Illinois EPA does not find that the ERC's claimed are available as offsets, since it is our position that the Chicago Coke facility is permanently shutdown." *Id*.

Chicago Coke appeals pursuant to Section 40 of the Environmental Protection Act (Act) (415 ILCS 5/40 (2008)) and the Board rules at 35 Ill. Adm. Code 101 and 105. Chicago Coke also filed a complaint in the Circuit Court of Cook County relating to the February 22, 2010 Agency letter, seeking a writ of certiorari, stating Chicago Coke is unaware of any other method of review or remedy for the Agency's denial of Chicago Coke's ERCs as offsets. Pet. at 3-4. Chicago Coke believes the Circuit Court is the appropriate venue to decide the issue, but filed a petition here just to be cautious. Pet. at 2.

STATUTORY AND REGULATORY BACKGROUND

Section 5(d) of the Act provides:

> The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to

regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. 415 ILCS 5/5(d) (2008).

Section 40(a)(1) of the Act provides:

If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1) (2008).

Section 105.100(a) of the Board's procedural rules provides:

This Part applies to appeals of final decisions of the Agency and the OSFM to the Board as described in this Part. 35 Ill. Adm. Code 105.100(a).

Section 105.200(a) of the Board's procedural rules provides, in part:

This Subpart applies to any appeal to the Board of the Agency's final permit decisions and other final decisions of the Agency . . .. 35 Ill. Adm. Code 105.200(a).

AGENCY'S MOTIONS

Motion to Vacate

The Agency argues that there was no opportunity to respond to the motion for stay or the petition before the Board ruled on the motion on May 6, 2010. MOV at 2. In support, the Agency provides an affidavit of John K. Kim, Chief Legal Counsel for the Agency. In the affidavit, Mr. Kim indicates that the Agency did not learn of the proceeding until the Agency received the Board's May 6, 2010 order. *Id*. and MOV. Exh. A. The Agency asks the Board to vacate the stay to hear the motion to dismiss the petition for review. The Agency claims there is "good cause" for the Board to lift the stay as the parties appear to agree that the Board is not the proper venue for this appeal. MOV at 2.

Motion to Dismiss

The Agency argues that Section 105.108(d) of the Board rules provides that a petition is subject to dismissal if the Board determines that the petitioner does not have standing for review of the Agency's decision. Mot. at 3, citing 35 Ill. Adm. Code 105.108(d). The Agency further argues that the Board's review of the Agency's decisions must be rooted in the Act as the Board was created by the Act. *Id*., citing Landfill, Inc. v. IPCB, 74 Ill. 2d 541, 553-54.

The Agency maintains that the petition should be dismissed because the petition does not set forth the Agency's denial of a permit application. Mot. at 3. The Agency opines that

Chicago Coke "is merely aggrieved by the Agency's statement of a legal opinion" and Chicago Coke has no standing to contest the Agency's legal opinion. *Id*.

The Agency argues that no provision of the Act or Board regulations requires or authorizes the Agency to issue a binding determination that an existing source's claimed emission reductions can be used by a new or modified source to seek a permit, prior to a permit application by that new or modified source. Mot. at 4. Therefore, the Agency asserts a reviewable final decision was not issued. *Id*.

Furthermore, the Agency maintains that Chicago Coke "all but concedes" that the Board in an improper forum to review the February 22, 2010 letter in the petition. Mot. at 4. The Agency opines that Chicago Coke brought the action before the Board because of concerns regarding the complaint filed in circuit court. *Id*.

CHICAGO COKE'S RESPONSE

Response to Motion to Vacate Stay

Chicago Coke notes that the petition for review was properly served and does not know why the petition was not received. Resp.V at 2. However, Chicago Coke does not object to the Board lifting the stay to hear the motion to dismiss. *Id*. Chicago Coke objects to the substance of the motion to dismiss. *Id*.

Response in Opposition to Motion to Dismiss

Chicago Coke notes that the Agency's February 22, 2010 letter states that the letter is the Agency's "final decision" on the matter. Resp. at 1. Chicago Coke argues that the Agency's decision was the result of two and a half years of discussion on the issue of Chicago Coke's ERCs. Resp. at 2. Chicago Coke maintains that the Agency's stated basis for the final decision, that Chicago Coke's facility is "permanently shut down," is factually incorrect and lacks any basis in statute or regulation; therefore Chicago Coke filed this appeal. *Id*. Chicago Coke also filed an action in circuit court for declaratory judgment because the court and the Board each provide a different cause of action and form of relief. *Id*. A petition for review must be filed within 35 days, so filing with the Board could not be delayed. *Id*.

Chicago Coke notes that the Agency asserts conflicting bases for the motion to dismiss, asserting both a lack of standing and that the petition is frivolous. Resp. at 3. Chicago Coke argues that the Agency has "confused the basis for dismissal of a final" Agency decision with the basis for dismissal of a citizen's enforcement. *Id*. Chicago Coke argues that the frivolous standard does not apply here and the only applicable basis for dismissal argued by the Agency is the lack of standing. *Id*.

Chicago Coke argues that even though the Agency claims that the Board can only hear "traditional" permit appeals, the Board's procedural rules specifically provide for appeals of "other final decisions of the Agency." Resp. at 3, citing 35 Ill. Adm. Code 105.100(a), 105.200. Chicago Coke argues that a reading of the Board's procedural rules establishes that the Board

can hear appeal of the Agency's final decisions and not just permit appeals. Resp. at 4. Chicago Coke points to a decision by the Board that the Board will hear appeals of seal orders pursuant to Part 105 for support of this argument. Resp. at 4, citing Tarkowski v. IEPA, PCB 09-62 (May 21, 2009). Chicago Coke maintains that the Agency's February 22, 2010 letter was a final decision. Resp. at 4. Chicago Coke points out that by the February 22, 2010 letter's own terms, the decision is a "final decision" and the Agency cannot now argue that the decision is not a final decision. Resp. at 4-5.

Chicago Coke argues that the fact that there is a pending action in circuit court does not affect Chicago Coke's standing to appeal. Resp. at 6. Chicago Coke asserts that the Agency's argument that the circuit court action bars the appeal before the Board is not supported by the Act or Board regulations and is merely a "red herring". *Id*. Chicago Coke asserts that seeking alternative relief in the circuit court, while proceeding before the Board, is an attempt to avail Chicago Coke of all forms of relief that might be available. *Id*. Chicago Coke is seeking a writ of certiorari and declaratory judgment from the circuit court, and the Board has no authority to act on these causes of action. *Id*.

REPLY

The Agency argues that the motion to dismiss was properly brought pursuant to Section 105.108(d), of the Board's procedural rules and not Section 103.212 as Chicago Coke claims. Reply at 1. Contrary to Chicago Coke's position, the Agency notes that the use of the term "frivolous" was meant to describe the petition in a general sense of the word and not the specific sense only available in citizen suits. *Id*.

The Agency argues that the Agency does not claim that the Board can only hear "traditional" permit appeals but notes that the Board can only hear appeals when the Board is authorized to do so by the Act. Reply at 2. The Agency maintains that a basic principle of administrative law is that an agency takes authority from the enabling statute and cannot increase the agency's authority by administrative rule. *Id*., citing Illinois Department of Revenue v. Illinois Civil Service Commission, 357 Ill. App. 3d 352,364 (1st Dist. 2005). The Agency asserts that no portion of the Act authorizes the Board to hear Chicago Coke's appeal. *Id*. The Agency notes that Chicago Coke only cited to Section 40 and that section is inapplicable in this case. *Id*. Furthermore, the Agency maintains that Chicago Coke's reliance on Tarkowski v. IEPA, PCB 09-62 (May 21, 2009) is distinguishable, because Section 34(d) of the Act (415 ILCS 5/34(d) (2008)) explicitly provides for Board review of seal order decisions like the one at issue in that case.

The Agency asserts that Chicago Coke misconstrues the treatment of emission offsets under the Act and Board regulations. Reply at 3. The Agency maintains that emission offsets are only relevant in the context of a new or modified source and there is no provision in the Act or Board regulations for existing source to use emission reductions as offsets. *Id*. The Agency argues that until a new or modified source files a permit application, the Agency does not have the authority to issue a binding determination as to the use of particular emission offsets. *Id*. The Agency argues that thus, no final decision relating to Chicago Coke's emission offsets has been made by the Agency. *Id*.

The Agency also disagrees with Chicago Coke's reliance on the phrase "final decision" in the February 22, 2010 letter. Reply at 3. The Agency argues that Chicago Coke used the phrase first when requesting the Agency's opinion on the matter; the Agency simply mirrored that language in the response. *Id*. The Agency asserts that Chicago Coke cannot create a new form of binding decisional process by sending the Agency multiple letters demanding a legal opinion. Reply at 4.

The Agency does not contend that a filing in the circuit court divests the Board of jurisdiction in any case, but instead argues that Chicago Coke seeks mutually exclusive remedies before the Board and the Circuit Court. Reply at 4. The Agency asserts that a common law writ of certiorari is only available when administrative review of a decision is not available; conversely, petitions for review before the Board are improper in cases where common law writs of certiorari could be issued. *Id*.

SURREPLY

Chicago Coke argues that the Agency's arguments are an attempt to distract the Board from the key issue of whether or not Chicago Coke can seek Board review of an Agency final decision. Surreply at 1. As to the argument raised by the Agency that seeking relief in circuit court and before the Board are mutually exclusive, Chicago Coke asserts that the Agency fails to "articulate how" the existence of separate actions in separate forums prevent the Board from exercising the Board's authority to review Agency final decisions. Surreply at 1-2.

Chicago Coke asserts that the Agency is seeking to prevent any review of the Agency's decision. Surreply at 2. Chicago Coke notes that the Agency is also seeking dismissal of the circuit court action and one basis the Agency relies upon is that this case is pending before the Board. *Id*. Chicago Coke maintains that the Agency cannot argue to the circuit court for dismissal because the Board is reviewing the case and argue before the Board that the Board lacks the authority to review the decision. *Id*.

Chicago Coke reiterates that the Agency's February 22, 2010 letter was a final decision and reviewable by the Board. Surreply at 3. Chicago Coke acknowledges the Agency's argument as to why the letter used the language "final decision". *Id*. However, Chicago Coke argues that the use of "final decision" in the letter coupled with the lengthy history of discussions establishes that the Agency believed that the Agency had the authority to make a final decision on ERCs. *Id*.

Chicago Coke asserts that the Agency concedes that there is no formal mechanism for an existing source to seek approval of use of ERCs as the only mechanism for the Agency's consideration of ERCs is in the context of a permit application for a new or modified source. Surreply at 3. Chicago Coke argues that the emission credits are a property right that is recognized at the state and federal levels and the Agency tracks and evaluates ERCs. *Id*. Chicago Coke maintains that the Agency has developed no rules to formalize the procedures and standards for ERCs, resulting in an Agency attempt to "carve out . . . unfettered and unreviewable control over ERCs." *Id*. Chicago Coke opines that existing sources should not be

punished by the Agency's actions and the appellate court has made clear that the Agency cannot act lawlessly or outside review by the Board. Surreply at 3, citing Grigoleit Company v. IPCB, 245 Ill. App. 3d 337, 613 N.E.2d 371 (4th Dist. 1993).

Chicago Coke asserts that the Agency classified the February 22, 2010 letter as final, and only after this appeal was filed, did the Agency claim the letter was not a final decision. Surreply at 4. Chicago Coke asks that if the Board grants the motion to dismiss that the Board order the Agency to pay Chicago Coke's fees and costs for bringing this appeal. *Id*. citing Grigoleit.

Chicago Coke maintains that the Board does have the authority to review the decision and that Chicago Coke has standing. Surreply at 5. Chicago Coke reiterates that the Board's rules specifically provide for appeals of "other final decisions of the Agency" and the Agency's February 22, 2010 letter was a final decision. *Id*., citing 35 Ill. Adm. Code 105.100(a) and 105.200. Chicago Coke disagrees with the Agency's assertion that the Act does not authorize the Board to review the Agency's decision and relies on Section 5(d) of the Act (415 ILCS 5.5(d) (2008) to support the position. *Id*. Chicago Coke notes that Section 5(d) of the Act provides that the Board has the authority to conduct proceedings "upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject the Board is authorized to regulate." *Id*. Chicago Coke asserts that the Agency has not claimed that the Board lacks the authority to regulate ERCs. *Id*.

DISCUSSION

When ruling on a motion to dismiss, the Board must take all well-pled facts contained in the complaint as true, and must draw all inferences from those facts in the light most favorable to the non-movant. People v. Stein Steel Mills Svcs., Inc., PCB 02-1 (Nov. 15, 2001); Nash v. Jiminez, PCB 7-97 (Aug. 19, 2010). The Agency has asked that the Board dismiss this petition essentially because Chicago Coke lacks standing for review of the Agency's decision and because the Board lacks authority to review the decision.

Section 5 of the Act (415 ILCS 5/5 (2008) sets forth the Board's general authority, duties and responsibilities under the Act. Section 5(d) of the Act (415 ILCS 5/5(d) (2008)) specifically grants to the Board the authority to hear: 1) complaints charging violations of the Act or Board regulations; 2) administrative citations; 3) variances and adjusted standards; 4) permit application under Title X of the Act; 5) removal of seals under Section 34 of the Act; and 6) "other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate." 415 ILCS 5/5(d) (2008).

The Board's regulations include regulations over an emission reduction market system (35 Ill. Adm. Code 205) and rules on NO_x (35 Ill. Adm. Code 217.Supbart U, V and W).

The Agency argues that the Board was created by statute and has only the authority granted by statute. The Board agrees that the Board has only the authority granted to the Board by statute. *See* Granite City Division of National Steel Company v. Pollution Control Board, 155 Ill. 2d 149, 162, 613 N.E.2d 719, 724 (1993)). However, the Board disagrees with the Agency that the Board lacks the authority to hear a review of an Agency final decision on ERCs. The Board finds that Section 5(d) of the Act (415 ILCS 5/5(d) (2008)) specifically allows the Board to hear such final decisions.

The Agency's second argument is that Chicago Coke lacks standing because the Agency's February 22, 2010 decision is not a final decision. The Board has reviewed the February 22, 2010 letter and finds that the letter is a final decision. The Agency repeatedly states in the letter that this is the final decision and states reasons for the decision. Pet. at Exh. D. The Board is not convinced by the Agency's argument that no provision of the Act or Board regulations require the Agency to make a binding determination on ERCs, and thus, the Agency decision in the February 22, 2010 letter is not a final reviewable decision. The plain language of the Agency's letter makes clear that the Agency's position is not going to change and is a position that was previously taken by the Agency. *Id*. Simply because the Agency is not "required" by rule or the Act to make a final decision does not mean that a decision when made is not "final" for purposes of review.

Based on the arguments and filings in this case, the Board denies the Agency's motion to dismiss and accepts the petition for review. The Board finds that the Board is authorized by Section 5(d) of the Act (415 ILCS 5/5(d) (2008)) to hear this appeal and that the Agency's February 22, 2010 letter was a final decision. The Board reinstitutes the stay, which will remain in effect until 90 days before the decision deadline. The Board directs the hearing officer to set a date for the filing of the Agency record and for hearing when the stay is lifted. Further, any additional requests for a stay may be directed to the hearing officer.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 2, 2010, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board