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 19th day of September 2012, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s 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 September 19, 2012.

s/Elizabeth S. Harvey

7012-002

SERVICE LIST

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PCB 10-75
(Permit Appeal -- Air)

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RESPONSE TO IEPA'S MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

This case is much simpler than IEPA's motion for summary judgment suggests. IEPA denied the use of Chicago Coke's emission reduction credits ("ERCs") as emission offsets. IEPA's denial was based on its claim that "applicable federal guidance" prevents the use of Chicago Coke's ERCs because the Chicago Coke facility is allegedly permanently shutdown. Therefore, there are two issues in this case: 1) is there "applicable federal guidance" which prohibits the use of ERCs from facilities which are "permanently shutdown"; and 2) is the Chicago Coke facility permanently shutdown?

The arguments presented in IEPA's motion for summary judgment demonstrate the inherent problem with the way IEPA made its decision. IEPA inappropriately applied federal policy statements in making its decision, perhaps because federal "guidance" is a patchwork of memos addressing specific situations, and perhaps because IEPA has not bothered to propose regulations. The federal guidance documents identified by IEPA do not address the issue here. IEPA used inapplicable federal guidance, some of it more than 30 years old, in denying the availability of Chicago Coke's ERCs.

Further, IEPA inappropriately changed its position on whether, and if so when, the Chicago Coke facility was "permanently shutdown." IEPA tries to rewrite history. Despite its April 2005 finding that the facility was not "permanently shutdown," IEPA now claims the facility was permanently shutdown in February 2002. There is no justification for this flip-flop. Furthermore, even assuming the Chicago Coke facility became permanently shutdown immediately following IEPA's April 2005 decision, Chicago Coke's ERCs were still valid when IEPA made its February 22, 2010 decision.

Contrary to IEPA's implications, Chicago Coke is not trying to evade environmental restrictions. Under the unique circumstances of this case, Chicago Coke merely seeks to make its ERCs available as emission offsets. The regulatory system contemplates that ERCs will be used to offset emissions and allow continued economic growth, while protecting the environment. IEPA's February 2010 decision erroneously prevents Chicago Coke from making its ERCs available.

ARGUMENT

On February 22, 2010, IEPA issued its final written decision denying Chicago Coke's request for a determination that its ERCs are available as emission offsets. The only reason given for IEPA's denial is:

> [T]he Chicago Coke facility is permanently shutdown. Pursuant to applicable federal guidance, the ERCs are thus not available for use...
>
> February 22, 2010 IEPA decision. IEPA 1593, also attached to Chicago Coke petition for review as Exhibit D.

IEPA is limited to the reasons identified, in its written decision, as the basis for that decision. *IEPA v. IPCB*, 86 Ill.2d 390, 405-406, 427 N.E.2d 162, 169-170 (1981)(prohibiting IEPA from raising, on appeal, a new issue as a basis for its decision, where IEPA's written decision did not include that new reason).

Chicago Coke has simultaneously filed a motion to strike portions of IEPA's Motion for Summary Judgment, on the grounds that IEPA improperly seeks to expand the scope of this appeal by raising issues not identified in IEPA's February 22, 2010 decision. Pending a ruling on that motion to strike, Chicago Coke has not responded to IEPA's arguments at issue in the motion to strike.[1] Chicago Coke reserves the right to respond to those claims, consistent with the ruling on the motion to strike.

IEPA has not identified any applicable federal guidance which addresses the use of ERCs from shutdown facilities.

IEPA admits the term "permanent shutdown" is not defined under federal law, the Environmental Protection Act ("Act"), or the Board's regulations. IEPA Motion for Summary Judgment, p. 14. Lacking an applicable definition, IEPA relied upon what it asserts is "guidance" from USEPA on what constitutes a "permanent shutdown." That purported "guidance" is nothing more than a patchwork of inapplicable memos from various USEPA officials dating back more than 30 years. There are glaring flaws in IEPA's argument that this purported guidance required the denial of Chicago Coke's

[1] Chicago Coke has moved to strike: a) all references to and arguments regarding Section 203.303, including those at pages 13-14, page 21, and pages 26-28; and b) all claims that Chicago Coke's ERCs are not creditable because IEPA had used the emission reductions to demonstrate compliance, including much of Section V(2) at pages 20-26, and the arguments at pages 26-28.

ERCs. The guidance identified by IEPA does not discuss when a facility is "permanently shutdown" in the context of availability of ERCs. This is critically important because the emission offset program specifically contemplates the use of ERCs after the fact. The federal guidance asserted by IEPA does not support its decision.

The guidance used by IEPA does not address the use of ERCs.

The guidance raised by IEPA does not address a "permanent shutdown" in the context at issue here: whether ERCs from a permanently shutdown source are available to others as emission offsets. In fact, none of the identified guidance supports IEPA's use in this case. Instead, the identified guidance relates to a different regulatory issue: whether an existing facility has been "permanently shutdown" for purposes of determining whether the "prevention of significant deterioration" ("PSD") regulations apply. Under the PSD regulations, where an existing facility wishes to restart operations after having been "permanently shutdown," reopening the facility can be considered a "major new source." In a non-attainment area, a major new source must have emission credits sufficient to offset that source's emissions.

The guidance identified by IEPA in its motion for summary judgment speaks to whether PSD regulations apply, and not to whether ERCs from a "permanently shutdown" facility can be used as emission credits. For example, the "9/6/78 Reich Memo" cited by IEPA (IEPA Exhibit 14) gave guidance on whether a source, shutdown following an industrial accident, was subject to the PSD requirements. The memo states "a source which had been shutdown would be a new source for PSD purposes upon reopening if the shutdown was permanent." (9/6/78 Reich Memo, p. 1, IEPA

0007, included as IEPA Exhibit 14 (emphasis added).)[2] The memo does not discuss ERCs, or even mention ERCs. Thus, any "guidance" it may give on "permanent shutdown" is not applicable to this case.

IEPA also cites the "8/8/80 Reich Memo" as support for its decision. That memo is also inapposite. The question addressed by the 8/8/80 Reich Memo is, again, the "implications as to PSD permitting" for a source which had been shut down. The memo concludes "a source which has been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent." (8/8/80 Reich Memo, p.1, IEPA 0005, included as IEPA Exhibit 15 (emphasis added).) Like the 9/6/78 Reich Memo, the 8/8/80 Reich Memo does not discuss or even mention ERCs.

The "5/27/87 Seitz Memo," also cited by IEPA, discusses "permanent shutdown" only in the context of a PSD determination. This memo discussed whether a closed roaster leach acid plant in Arizona was subject to PSD review. The 5/27/87 Seitz memo defines the issue as "whether or not a source which has been shut down is subject to PSD review..." (5/27/87 Seitz Memo, p. 1, IEPA 0013, included as IEPA Exhibit 16 (emphasis added).) The memo does not discuss or mention ERCs or their use.

The subsequent "11/19/91 Arsenic Memo," also cited by IEPA, is likewise inapplicable to this case. The 11/19/91 Arsenic Memo sums up the "general policy" of previous USEPA memos, including the 9/6/78 Reich Memo and the 5/27/87 Seitz Memo, as discussing "whether a shutdown plant if reopened would be subject to PSD as a new source." (11/19/91 Arsenic Memo, p. 1, IEPA 0016, included as IEPA Exhibit 17 (emphasis added).) The 11/19/91 Arsenic memo does not discuss or mention

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[2] In the interests of reducing paper use, Chicago Coke has not "reattached" documents which are included as exhibits in either IEPA's Motion for Summary Judgment or as exhibits to Chicago Coke's August 17, 2012 Motion for Summary Judgment. Chicago Coke will refer to those exhibits as included with the motions for summary judgment.

ERCs; it is focused on whether a closed facility is subject to PSD requirements.[3]

IEPA also relies on USEPA's order in *In re Monroe Electric Generating Plant Entergy Louisiana, Inc. Proposed Operating Permit*, Pet. 6-99-2 (IEPA Exhibit 18). Like the previously discussed documents, the *Monroe Electric* order involves a determination whether the plant at issue was in compliance with PSD requirements. The order does not address ERCs. IEPA even admits that the order relates to new source review and PSD permitting. (IEPA Motion for Summary Judgment, p. 15.) None of the discussed guidance addresses the use of ERCs as emission offsets. IEPA cannot rely upon a patchwork of USEPA memos and orders, some more than 30 years old, which clearly address a different regulatory program.

None of the federal guidance identified by IEPA in its motion for summary judgment provides guidance on the critical issue in this appeal: when is a facility "permanently shutdown" in the context of whether ERCs from that facility are available as emission offsets? The guidance cited by IEPA is on a separate issue: whether a facility which has been shutdown is subject to PSD requirements if it wishes to reopen. The cited guidance is clear, by its own language, that it never addresses the context here, the use of ERCs from a facility which never intended to permanently close. None of the cited guidance even mentions ERCs.

Chicago Coke does not contest that a new facility at the Chicago Coke location would need emission offsets. The need for offsets is exactly what makes Chicago Coke's ERCs valuable. IEPA has not identified any federal guidance which supports IEPA's unpromulgated rule as a basis for denial. Because the guidance cited by IEPA

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[3] It is interesting to note that the 11/19/91 Rasnic Memo concludes that the facility at issue, the Watertown Power Plant, demonstrated it had not been permanently shutdown. Thus, the Rasnic Memo concluded that the Watertown Plant was not subject to PSD requirements. (IEPA 0017.)

is not applicable, and because IEPA does not cite any other support for its decision, IEPA is not entitled to a judgment as a matter of law. Summary judgment should be denied.

IEPA cannot erase its prior determination that the Chicago Coke facility was not permanently shutdown.

Contrary to the position IEPA now takes, in April 2005 IEPA specifically made the opposite conclusion, finding the Chicago Coke facility was not permanently shutdown. Chicago Coke applied for (and received) a construction permit for a "pad up" rebuild. In responding to public comments on the permit application, IEPA concluded:

> [Chicago Coke] is not considered a new major source because [it] was not permanently shutdown.
>
> Responsiveness Summary, p. 24, IEPA 0305 (attached to Chicago Coke's Motion for Summary Judgment as Exhibit 4)(emphasis added).

This determination—that the Chicago Coke facility was not permanently shutdown as of April 2005—was reached after IEPA's analysis of consideration of Chicago Coke's operations and intent, and after consideration of public comments. (See generally Responsiveness Summary, attached to Chicago Coke's Motion for Summary Judgment as Exhibit 4.)

IEPA included a similar statement, affirming that the facility was not permanently shutdown in Chicago Coke's construction permit, issued on April 28, 2005:

> This source is not considered....permanently shutdown. In particular, the source made considerable efforts when operations were temporarily discontinued to ensure the minimum effort and cost of resuming operations at the facility.
>
> Construction permit, IEPA 0808 (attached to Chicago Coke's Motion for Summary Judgment as Exhibit 5).

Thus, contrary to IEPA's current claims, as of April 2005, the Chicago Coke facility was not permanently shutdown.

However, in an effort to rewrite history, IEPA contradicts itself and now contends the Chicago Coke facility has been permanently shutdown since February 2002.[4] IEPA suggests its April 2005 finding that the facility was not permanently shutdown can be erased, simply because IEPA says so. Indeed, IEPA uses the same information available to it when making its April 2005 determination to now claim the facility was permanently shutdown in 2002. For example, the two affidavits cited by IEPA (Gratson affidavit, IEPA Exhibit 4, and Nay affidavit, IEPA Exhibit 5) are both dated in May 2004. Despite its earlier decision to the contrary, IEPA asserts that the costs to perform the pad-up rebuild, even in 2004, means the facility would not reopen, and thus the shutdown was permanent in 2002. IEPA's information on the cost of the rebuild comes from Mr. Nay's May 2004 affidavit, and is thus information IEPA possessed in 2005 when it reached the opposite conclusion. (Nay affidavit, IEPA 1727-1728, IEPA Exhibit 5.) IEPA does not explain why it reached a different conclusion, in 2010, using the same information it had in 2005. IEPA's use of the same information, to reach an opposite conclusion, is especially confusing because IEPA claims that its 2005 determination (that the facility was not permanently shutdown) was based on the facts existing in 2005, but that its 2010 decision was based on the 2010 facts and circumstances. (IEPA Motion for Summary Judgment at 20.) In reality, IEPA has used the same facts to reach opposite conclusions.

As of April 2005, IEPA determined the Chicago Coke facility was not permanently shutdown. There were no significant changes in operations at the facility between April 2005 and February 2010, as Chicago Coke's president attests in his affidavit. (Affidavit

[4] IEPA did not bother to include the alleged February 2002 date in its 2010 decision in this matter, raising serious questions whether IEPA can even argue the February 2002 date. *See, e.g., IEPA v. IPCB*, 86 Ill.2d 390, 405-406, 427 N.E.2d 162, 169-170 (1981)(prohibiting IEPA from raising, on appeal, an issue as a basis for its decision, where IEPA's written decision did not include that new reason).

of Simon Beemsterboer, attached as Exhibit 6 to Chicago Coke's Motion for Summary Judgment.) Although IEPA points with disapproval to the fact that Chicago Coke did not proceed with the permitted pad-up rebuild, IEPA has failed to point to any guidance that suggests that a decision not to exercise a permit equates automatically to a "permanent shutdown." Even if, without admitting, a decision not to proceed with the permitted rebuild, but to instead sell the facility, somehow did create a "permanent shutdown," IEPA has presented no authority that the "permanent shutdown" can then be deemed to have occurred years before. IEPA has used decisions made in 2006 and 2007 (to sell the facility) to contend that the alleged permanent shutdown occurred back in 2002.

IEPA cannot magically change its April 2005 decision that the Chicago Coke facility was not "permanently shutdown" to now claim that the facility was permanently shutdown in February 2002. As of April 2005, IEPA found the facility was not permanently shutdown. At worst, if the Chicago Coke facility subsequently became permanently shutdown by virtue of Chicago Coke's decisions (which Chicago Coke does not admit) to sell the facility, the date of permanent closure cannot be any earlier than October 28, 2006, when the construction permit expired. Even under that scenario Chicago Coke's ERCs remain available.

Chicago Coke was not permanently shutdown for five years.

IEPA admits it uses five years as a "guideline" for the availability of emission reductions for use as offsets, following the permanent shutdown of a facility. As IEPA explains it, emission reductions more than five years old are deemed to be expired.[5] "The five-year lifespan of the emission reductions begins to run from the date the facility

[5] IEPA does not explain its authority to simply apply self-created guidelines, instead of proposing an appropriate regulation for consideration and adoption by the Board. Chicago Coke does not waive its right to challenge IEPA's authority to unilaterally impose a five-year restriction without formal rulemaking.

is deemed to have permanently shutdown." (IEPA Motion for Summary Judgment, p. 22.) This "guideline" is not promulgated as a regulation, and IEPA cannot even point to any document setting forth this "guideline." There is, therefore, serious doubt as to IEPA's authority to use a self-created guideline to deny Chicago Coke the use of its ERCs.

However, even putting aside questions on IEPA's authority to apply the five-year "guideline," that five-year guideline does not bar Chicago Coke's use of its ERCs. The operative question in applying IEPA's own guideline is whether the facility was permanently shutdown for five years or more at the time of IEPA's decision. The Chicago Coke facility had not been permanently shutdown for five years when IEPA made its decision in February 2010. Therefore, IEPA's unpromulgated guideline does not bar the use of the ERCs.

As discussed above, in April 2005 IEPA determined the Chicago Coke facility was not permanently shutdown. Therefore, simply by the calendar, the facility could not have been permanently shutdown for five years when IEPA made its February 2010 decision. IEPA cannot erase its April 2005 decision. Even if subsequent events could have caused Chicago Coke's facility to be considered permanently shutdown, the date of permanent closure cannot be any earlier than the date of those subsequent events. For example, a permanent shutdown could not have occurred before October 28, 2006, when Chicago Coke's construction permit expired. (IEPA 1584.) As IEPA seems to put great weight on Chicago Coke's decision not to rebuild the facility, Chicago Coke cannot be considered to have been permanently shutdown while it held a valid construction permit (April 2005 to October 2006).

Therefore, even applying IEPA's own five-year guideline, and even assuming the Chicago Coke facility became permanently shutdown at some point after April 2005, Chicago Coke's ERCs were still valid when IEPA made its decision on February 22, 2010. It is impossible for the facility to have been shutdown in April 2005, when IEPA determined the facility was not permanently shutdown. Even if the facility could be considered permanently shutdown as of the day after IEPA's April 2005 decision, the unpromulgated five-year guideline could not have run before IEPA's February 2010 decision.[6] Thus, Chicago Coke's ERCs remain viable, even applying IEPA's own arguments.

CONCLUSION

IEPA has not identified any applicable federal guidance which addresses the use of ERCs from "permanently shutdown" facilities. Because the guidance cited by IEPA is not applicable, and because IEPA does not cite any other support for its decision, IEPA is not entitled to a judgment as a matter of law. Further, IEPA cannot turn back time on its prior decision that, as of April 2005, the Chicago Coke facility was not permanently shutdown. Even if the Chicago Coke facility subsequently became permanently shutdown, it could not have been permanently shutdown for five years when IEPA made its February 2010 decision. Applying IEPA's own five-year expiration policy, Chicago Coke's ERCs were valid at the time of IEPA's decision.

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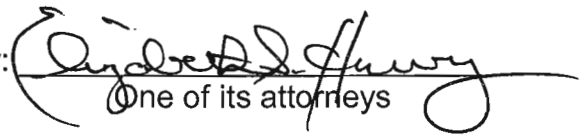
[6] As argued in Chicago Coke's Motion for Summary Judgment, there was a lengthy delay in obtaining a decision from IEPA. The period of delay should not be included in any calculation of a five-year period. (Chicago Coke Motion for Summary Judgment, p. 11.)

Because IEPA has not demonstrated it is entitled to judgment as a matter of law, its motion for summary judgment must be denied. Chicago Coke further asks the Board to 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: 
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