

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 31st day of January 2013, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Supplemental Response to NRDC'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 January 31, 2013.

s/Elizabeth S. Harvey

7012-002

SERVICE LIST

**Chicago Coke Co., Inc. v. Illinois Environmental Protection Agency and
Natural Resources Defense Council and Sierra Club**

PCB 10-75

(Permit Appeal -- Air)

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CHICAGO COKE'S SUPPLEMENTAL RESPONSE TO
NRDC's MOTION FOR SUMMARY JUDGMENT

Petitioner CHICAGO COKE CO., INC. ("Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, submits its supplemental response in opposition to intervenors NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB's (collectively, "NRDC") August 17, 2012 motion for summary judgment.

INTRODUCTION

This supplemental response is submitted in accordance with the Board's December 20, 2012 order. In that order, the Board denied Chicago Coke's motion to strike portions of NRDC's motion for summary judgment. The Board allowed Chicago Coke to supplement its response, to address the arguments which were the subject of the motion to strike. This supplemental response addresses only those arguments. Chicago Coke refers the Board to Chicago Coke's September 19, 2012 response, for responses to the other arguments made by NRDC. Chicago Coke incorporates its

September 19, 2012 response as if set forth fully.

ARGUMENT

NRDC makes several additional claims that it asserts support IEPA's decision that Chicago Coke's ERCs are unavailable. NRDC claims: 1) Chicago Coke's emission reduction credits ("ERC") would only be valid for a "replacement source," and the project discussed between Chicago Coke and IEPA is not a "replacement source"; 2) Chicago Coke's prior position on PM₁₀ and PM_{2.5} is not supported by federal guidance; and 3) Chicago Coke's ERCs are not valid because Chicago Coke's emissions had been removed from the emissions inventory. However, none of these claims support summary judgment in NRDC's favor.

First, NRDC alleges Chicago Coke's ERCs cannot be used for the project to which Chicago Coke originally wished to sell its ERCs because that project is not a "replacement source." When Chicago Coke began its quest to obtain approval from IEPA for the use of Chicago Coke's ERCs, Chicago Coke was working toward the sale of its ERCs to Chicago Clean Energy, LLC ("CCE"). CCE planned to build a coal gasification plant, and wished to purchase Chicago Coke's ERCs. (IEPA 1584- IEPA 1585, included in Group Exhibit 7 to Chicago Coke's August 17, 2012 Motion for Summary Judgment.) NRDC asserts that a coal gasification plant is not a "replacement source" and, therefore, Chicago Coke's ERCs could not be used for the CCE project.

However, this argument ignores the fact that IEPA's February 22, 2010 decision denied any use of Chicago Coke's ERCs. IEPA did not deny the use of the ERCs for the CCE project: instead, it found the ERCs were not valid in any situation because the Chicago Coke facility was allegedly permanently shutdown. IEPA's decision clearly states:

[T]he 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.

IEPA February 22, 2010 decision. (Attached as Exhibit A.)¹

Thus, IEPA's decision—the subject of this appeal—is that Chicago Coke's ERCs cannot be used for any purpose. Chicago Coke is challenging that decision, which destroys the economic viability of the credits in any situation and for any potential buyer of Chicago Coke's ERCs. NRDC's assertion that the CCE project is not a "replacement source," such that Chicago Coke's ERCs could not be used, is simply irrelevant.² IEPA's decision prevents Chicago Coke from using its ERCs, in any situation. Thus, whether or not the CCE project is a "replacement source" does not support NRDC's motion for summary judgment.

Similarly, NRDC's claims regarding PM₁₀ and PM_{2.5} do not support its request for summary judgment. NRDC asserts that Chicago Coke's statements, during the proceeding with IEPA, regarding PM₁₀ and PM_{2.5} are not supported by federal guidance. However, Chicago Coke did not make any such claims in this appeal. That is because IEPA's decision is that Chicago Coke's ERCs are unavailable in any situation—IEPA did not find that the ERCs are invalid because of the interplay between PM₁₀ and PM_{2.5}. Claims regarding PM₁₀ and PM_{2.5} do not support IEPA's decision because IEPA's decision was not that the ERCs cannot be used because of particulate matter regulations. Instead, IEPA denied any use of Chicago Coke's ERCs. NRDC's

¹ IEPA's decision letter is attached as Exhibit D to Chicago Coke's Petition for Review. It is included here as Exhibit A for the Board's convenience.

² Chicago Coke does not admit that the CCE project is (or is not) a "replacement source" and reserves its rights to contest any such finding.

argument is, again, irrelevant to this appeal.³

NRDC also asserts that IEPA's decision denying the use of the ERCs was correct because Chicago Coke's emissions were removed from the Illinois emissions inventory. However, as explained fully in Chicago Coke's supplemental response to IEPA's motion for summary judgment, filed contemporaneously, IEPA removed Chicago Coke's emissions from the inventory months after Chicago Coke began asking IEPA for a determination that the ERCs are valid. It was improper and disingenuous for IEPA to remove the emissions while continuing discussions with Chicago Coke about the use of the ERCs. Chicago Coke incorporates those arguments made in its supplemental response to IEPA's motion for summary judgment as if those arguments were fully set forth. (Chicago Coke's Supplemental Response to IEPA's Motion for Summary Judgment, pp. 2-6.)

CONCLUSION

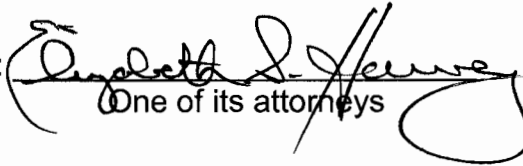
None of the NRDC's claims support its motion for summary judgment. Instead, NRDC's assertions are irrelevant to the issue at hand: whether IEPA's decision denying the use of Chicago Coke's ERCs for any purpose is supported. NRDC has not demonstrated it is entitled to judgment as a matter of law.

The Board should deny NRDC's motion for summary judgment. Further, Chicago Coke asks the Board to grant Chicago Coke's August 17, 2012 motion for summary judgment.

³ The Board has already found that it would consider arguments regarding PM₁₀ and PM_{2.5} "only as they relate to whether or not ERCs were available." (December 20, 2012 order, p. 10.) NRDC's argument is not relevant to IEPA's decision that the ERCs are not available in any circumstance. Thus, the Board should not consider the argument.

Respectfully submitted,

CHICAGO COKE CO., INC.

By: 
One of its attorneys

Dated: January 31, 2013

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Exhibit A



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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PAT QUINN, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

(217) 782-5544
(217) 782-9143 (TDD)

February 22, 2010

Katherine D. Hodge
Hodge Dwyer & Driver
3150 Roland Avenue
P.O. Box 5776
Springfield, Illinois 62705

Re: Chicago Coke Co., Inc.
Emission Reduction Credits

Dear Kathy:

Thank you for your letter dated January 15, 2010. You asked that the Illinois Environmental Protection Agency ("Illinois EPA") respond as to our final decision on whether certain Emission Reduction Credits ("ERCs") claimed by Chicago Coke Co., Inc. ("Chicago Coke"), are available for use as emission offsets for the permitting of major new sources and/or major modifications in the Chicago area.

Based on a discussion I had with Laurel Kroack, Bureau Chief for the Illinois EPA's Bureau of Air, I can confirm for you 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 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.

I hope this makes clear the Illinois EPA's position on this issue. If not, or if you have any further questions, please do not hesitate to contact me. Thank you.

Sincerely,

John J. Kim
Chief Legal Counsel