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: Andrew B. Armstrong
Assistant Attorney
General Environmental Bureau
69 West Washington Street
18th Floor
Chicago, Illinois 60602

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on this 22nd day of July 2010, the following was filed electronically with the Illinois Pollution Control Board, which is attached and herewith served upon you: **Petitioner's Surreply in Opposition to Motion to Dismiss.**

CHICAGO COKE CO., INC.

By: *s/Elizabeth S. Harvey*
One of its attorneys

Michael J. Maher
Elizabeth Harvey
Erin E. Wright
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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 July 22, 2010.

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

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.	)	

SURREPLY IN OPPOSITION TO MOTION TO DISMISS

Petitioner, CHICAGO COKE, INC. ("petitioner"), by its attorneys Swanson, Martin & Bell, LLP, files its surreply to respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("IEPA") motion to dismiss the petition for review currently pending before the Board. In addition to the arguments made in this surreply, petitioner refers the Board to the arguments made in petitioner's response, filed with the Board on June 28, 2010.

ARGUMENT

The arguments by IEPA in its reply attempt to distract the Board's attention from the key issue: whether petitioner can seek Board review of a decision that IEPA itself termed "final." IEPA may now have realized its underlying decision lacks any basis in law or in fact. In any event, IEPA seeks to prevent petitioner from obtaining review, in any forum, of IEPA's final decision. However, this appeal is properly before the Board, and should not be dismissed.

IEPA's claims regarding the pendency of a circuit court action do not support dismissal.

IEPA asserts that the causes of action petitioner is pursuing – a writ of certiorari in circuit court and this appeal before the Board – are "mutually exclusive." IEPA has failed to

articulate how the existence of separate actions in separate forums, seeking separate relief, prevents the Board from exercising its authority to review IEPA's final decision.

IEPA apparently seeks to prevent any review whatsoever of its decision. IEPA has taken the position, in this action, that the Board lacks authority to review IEPA's final decision and has, therefore, moved to dismiss this appeal. Disingenuously, on July 2, 2010, IEPA filed a motion to dismiss the petition for writ of certiorari and for declaratory judgment, in *Chicago Coke Co., Inc. v. Scott and IEPA*, No. 10 CH 12662 (Cook County Cir. Ct.)(attached as Exhibit 2.).[1] In fact, one of IEPA's alleged bases for dismissal of the circuit court action is the pendency of this action before the Board. (*See* Ex. 2, page 12.)

Thus, IEPA asserts that the Board should dismiss because this appeal seeks a mutually exclusive remedy to the circuit court action, while asserting that the circuit court should dismiss the petition for writ of certiorari because this matter is pending before the Board. IEPA claims that administrative review of IEPA's final decision is unavailable – while contending the circuit court action should be dismissed because certiorari is available only when administrative review is unavailable. IEPA cannot have it both ways: either administrative review is available or it is not. IEPA cannot move to dismiss both actions based on the other's existence. IEPA has made a decision that it, by its own words, termed "final." Petitioner timely filed actions for different forms of relief in different forums. Not only does IEPA object to this proceeding before the Board, but it seeks to dismiss the proceeding before the circuit court. IEPA's disingenuous attempts to deny petitioner procedural due process, in every forum, should be rejected, and the motion to dismiss the Board appeal be denied.

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[1] Exhibit 1 is attached to petitioner's response in opposition to the motion to dismiss.

IEPA's letter is a reviewable decision.

IEPA continues to assert that its February 22, 2010 letter is not reviewable. In its reply, IEPA claims that although it used the term "final decision" in the February letter, it was simply "expressing its opinion" on the question posed by petitioner. However, the language used by IEPA, coupled with the lengthy history of discussions between petitioner and IEPA, demonstrates that IEPA certainly thought it had the authority to make a final decision on the ERCs. Moreover, IEPA conveyed the finality of that decision in its letter of February 22. If it did not have authority, IEPA would have refused to issue a letter expressing its "final decision." (See Ex A, B, C, and D, attached to the petition for review.) Only now that it has been challenged, pursuant to petitioner's right of due process, does IEPA claim it did not really mean what it told the petitioner on February 22.

IEPA repeatedly claims the only mechanism for IEPA consideration of ERCs is in the context of a permit application for a new or modified air pollution source. In so doing, IEPA admits that there is no formal mechanism for an existing source, like petitioner, to seek approval for use of its emission credits. (IEPA reply, p. 3.) IEPA's position ignores the real world fact that ERCs are property rights, which are recognized and encouraged at the state and federal levels. IEPA is active in evaluating, tracking, and applying ERCs. Despite IEPA's continuing involvement in the market for trade of ERCs, IEPA has failed to propose any regulations to the Board to formalize the procedures and standards for ERCs. In so doing, IEPA has attempted to carve out for itself unfettered and unreviewable control over ERCs. Existing sources like petitioner should not be punished by IEPA's actions. The appellate court has made it clear that IEPA cannot act lawlessly or outside review by the Board. *Grigoleit Company v. Pollution Control Board*, 245 Ill. App. 3d 337, 613 N.E.2d 371, 184 Ill.Dec. 344 (4th Dist. 1993).

Even more troubling, petitioner has been told that representatives of IEPA have informed other members of the regulated community – including potential purchasers of petitioner's facility – that petitioner's ERCs are not available. Petitioner needs to investigate those claims through formal discovery. If indeed IEPA has been telling others that petitioner's ERCs are unavailable, that certainly supports the fact that IEPA has made a final decision on petitioner's ERCs. It would also make more obvious the circular nature of IEPA's claims. IEPA claims that it can only act upon ERCs in a formal permit application which includes the use of ERCs. However, IEPA has already decided – and told others, including potential permit applicants who would seek to use petitioner's ERCs – that petitioner's ERCs are not available. Requiring a formal permit application for a new or modified source, when IEPA has previously – and finally – made up its mind to deny the ERCs, would be an exercise in futility. Furthermore, plaintiff relegates the ERC to a "backroom" process unprotected by customary checks and balances, such as judicial and Board review of IEPA actions.

IEPA classified its February 22, 2010 decision as "final." Only after petitioner incurred the expense of appealing that decision did IEPA claim its actions were merely an "opinion." If the Board grants the motion to dismiss, petitioner moves the Board to order IEPA to pay petitioner's fees and costs incurred in bringing and litigating this appeal. Petitioner filed this appeal based upon IEPA's specific statement in its February 22, 2010 letter that the decision is "final." Petitioner has incurred fees and costs in this matter only to have IEPA now claim that its decision was not final – despite IEPA's own words. The Board has the authority to award attorney fees, and the appellate court has directed the Board to do so when IEPA's actions cause needless expense to a petitioner. *Grigoleit Company,* 245 Ill. App. 3d at 347-348, 613 N.E. 2d at 378, 184 Ill. Dec. at 351.

Petitioner has standing, and the Board has jurisdiction, to review the decision.

As demonstrated in petitioner's response, the Board's rules specifically provide for appeals of "other final decisions of the Agency." (35 Ill. Adm. Code 105.100(a), 105.200.) IEPA itself described the February decision as a "final decision," and its own words demonstrate that IEPA considered it a final decision. IEPA's assertion that the Environmental Protection Act ("Act") does not authorize the Board to review IEPA's decision is simply wrong. Section 5(d) of the Act specifically 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." (415 ILCS 5/5(d).) IEPA has not made any claim that either it or the Board lacks authority to regulate ERCs. Petitioner has demonstrated that the February 22, 2010 decision is indeed a final determination. Thus, pursuant to Section 5(d) and the Board's procedural rules, the Board has jurisdiction to hear this appeal.

CONCLUSION

IEPA has taken conflicting positions before this Board and in the circuit court, claiming that this matter should be dismissed based partly on the pending circuit court action, while simultaneously seeking to dismiss the circuit court action based partly on this action before the Board. IEPA has issued a final decision on the availability of petitioner's ERCs, and petitioner is now entitled to review that decision. Petitioner will be deprived of procedural due process if it cannot obtain a review of IEPA's final decision. Thus, petitioner asks the Board to deny the motion to dismiss, and to reinstate the stay the Board issued on May 6, 2010. In the alternative, before the Board reaches a decision on the motion, petitioner seeks an order allowing petitioner to conduct discovery on whether IEPA representatives have told members of the regulated community that petitioner's ERCs are not available.

Finally, in the event the Board grants the motion to dismiss, petitioner moves the Board to direct IEPA to pay petitioner's attorney fees and costs incurred in this appeal. Petitioner brought this appeal based upon IEPA's own words that the decision was "final." Only after the decision was challenged did IEPA claim the decision is not final. Petitioner incurred fees and costs because of IEPA's repudiated representation of the decision.

Respectfully submitted,

CHICAGO COKE CO., INC.

By: *s/Elizabeth S. Harvey*
One of its attorneys

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Exhibit 2

rec'd 7-6-10

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO COKE CO., INC.,
an Illinois corporation,

Plaintiff,

v.

DOUGLAS P. SCOTT, Director of the Illinois Environmental Protection Agency, and THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an Agency of the State of Illinois,

Defendants.

No. 10 CH 12662

NOTICE OF MOTION

TO: Michael J. Maher
Elizabeth Harvey
Erin E. Wright
Swanson, Martin & Bell, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611

YOU ARE HEREBY notified that on July 20, at 10:00 am, or as soon thereafter as counsel may be heard, attorneys for the Defendants, DOUGLAS P. SCOTT, Director of the Illinois Environmental Protection Agency, and the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an Agency of the State of Illinois, shall appear before the honorable Judge Mary K. Rochford or any Judge sitting in her stead in Courtroom 2308 of the Richard J. Daley Center, Chicago, Illinois, and then and there present Plaintiff's Section 2-619.1 Combined Motion to Dismiss Complaint Pursuant to Sections 2-615 and 2-619, a copy of which is herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN,
Attorney General of the
State of Illinois

BY: Andrew Armstrong

Andrew B. Armstrong
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602
312-814-0660

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO COKE CO., INC., an Illinois corporation, Plaintiff, v. DOUGLAS P. SCOTT, Director of the Illinois Environmental Protection Agency, and THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an Agency of the State of Illinois, Defendants.	No. 10 CH 12662

SECTION 2-619.1 COMBINED MOTION TO DISMISS COMPLAINT PURSUANT TO SECTIONS 2-615 and 2-619

Defendants, DOUGLAS P. SCOTT, Director of the Illinois Environmental Protection Agency, and THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an Agency of the State of Illinois, pursuant to Sections 2-615 and 2-619 of the Code of Civil Procedure, 735 ILCS 5/2-615 and 2-619 (2010), respectfully move this Honorable Court to dismiss Plaintiff Chicago Coke Co., Inc.'s Verified Complaint for Common Law Writ of Certiorari and Declaratory Judgment ("Complaint") with prejudice. Plaintiff's Complaint should be dismissed because it consists entirely of legal conclusions; because it fails to state a claim for relief; because Plaintiff lacks standing; and because this Court lacks subject matter jurisdiction.

In support of their Motion, Defendants state as follows:

I. PLAINTIFF'S COMPLAINT

Plaintiff Chicago Coke Co., Inc. ("Plaintiff") alleges that it is an Illinois corporation that has its principal place of business in Chicago, Cook County, Illinois. (Complaint at ¶ 1.) Plaintiff states that, in Illinois, new or modified sources of air pollution within "non-attainment areas" for air pollution must have "emissions offsets" for the amount of air pollution that they are

expected to generate. (*Id.* at ¶ 3.) Plaintiff states that Illinois law authorizes new or modified sources of air pollution to obtain emission offsets from other companies, and that the Illinois Environmental Protection Agency ("Illinois EPA") evaluates the validity of emission offsets. (*Id.* at ¶¶ 4-5).

Plaintiff alleges that its "facility" is located in a non-attainment area. (*Id.* at ¶ 6.) By implication, Plaintiff states that it possesses "emissions reductions credits," which, it further contends, constitute a "property right for purposes of this action." (*Id.* at ¶¶ 7-8.) Plaintiff contends that it "sought to sell" its emission reduction credits to a buyer located in the same nonattainment area. (*Id.* at ¶ 7.) Plaintiff contends that it repeatedly has requested that Illinois EPA "recognize" Plaintiff's purported emission reduction credits as valid emission offsets, but that Illinois EPA declined to do so, in a letter from Illinois EPA to Plaintiff's counsel dated February 22, 2010 and attached to the Complaint as Exhibit D ("February 22, 2010 Letter"). (*Id.* at ¶¶ 9, 11.) Plaintiff interprets the February 22, 2010 Letter as "enforcing a fictitious regulation" against Plaintiff. (*Id.* at ¶ 13.) According to Plaintiff, this "fictitious regulation" would bar permanently shut-down facilities from "using" emission reduction credits as emission offsets, even though Illinois EPA has in the past issued permits to new or modified sources based on emission offsets attributable to permanently shut-down facilities. (*Id.* at ¶ 12.)

Plaintiff brings three counts against Defendants. First, Plaintiff requests a declaratory judgment pursuant to Section 2-701 of the Code of Civil Procedure, 735 ILCS 5/2-701 (2010), that would make a "binding declaration of rights regarding Plaintiff's [emission reduction credits] as offsets." (Complaint at ¶ 15.) Second, Plaintiff asks this Court to issue a common law writ of *certiorari* requiring Illinois EPA to produce a record of its supposed denial of Plaintiff's emission offsets, and that this Court reverse that denial. Third, Plaintiff seeks

litigation expenses pursuant to Section 10-55 of the Illinois Administrative Procedure Act, 5 ILCS 100/10-55 (2010), which allows a court to award litigation expenses in cases in which an "administrative rule" is invalidated.

II. LEGAL BACKGROUND

Plaintiff's Complaint relates to the regulation of air pollution by the State of Illinois pursuant to federal and state law. However, Plaintiff fundamentally misconstrues the treatment of emission offsets within that regulatory scheme. In brief, federal and state law require that a proposed new source of air pollution in a high-pollution area obtain a permit and demonstrate that the amount of pollution that it will produce will be offset by reductions in pollution from existing sources. The principal purpose of this requirement is to ensure that air pollution levels are not exacerbated by new sources. By contrast, it is not the purpose of this requirement to provide existing sources of air pollution with property rights relating to their current or past emissions of pollutants. Simply put, polluters do not have property rights in their pollution.

Neither does any relevant law provide a mechanism for an existing source of air pollution to demand that Illinois EPA make a binding determination that the existing source possesses emission offsets that may be used by a new source to obtain a permit. Instead, the only legitimate mechanism for Illinois EPA to make such a determination is the permitting process for a new source. Unfortunately for Plaintiff, an existing source cannot compel Illinois EPA to make a binding determination on emission offsets simply by sending repetitive and demanding letters or filing lawsuits.

Beginning with relevant federal law, the Clean Air Act was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1) (2009). The CAA directs

the United States Environmental Protection Agency to promulgate National Ambient Air Quality Standards ("NAAQS") specifying allowable concentrations of air pollutants. 42 U.S.C. § 7409 (2009). The CAA places the primary responsibility for ensuring air quality to the States, though. *Id.* Pursuant to the CAA, the State of Illinois is to create an "implementation plan" that will allow NAAQS to be met within Illinois. 42 U.S.C. § 7410 (2009).

The CAA directs that a State's implementation plan shall include several programs to ensure that NAAQS are met. One such program is the New Source Review ("NSR") program. The NSR program requires, among other things, that new or modified air pollution sources obtain permits prior to beginning operation. *See* 42 U.S.C. § 7475 (2009). These permits must include requirements intended to prevent NAAQS violations. *Id.* For new or modified sources in areas where NAAQS are already being violated, known as "nonattainment areas," *see* 42 U.S.C. § 7407(d)(1)(A)(i) and 7501 (2009), the NSR program's requirements are especially stringent. Such sources must obtain emission offsets before a permit may be issued. 42 U.S.C. § 7503(a)(1)(A) (2009). What this requirement aims at is that, "by the time a new or modified source commences operation," the source's increased emissions of air pollutants be "offset by an equal or greater reduction . . . in the actual emissions of such air pollutant from the same or other sources in the area." 42 U.S.C. § 7503(c)(1) (2009).

The State of Illinois has promulgated a state implementation plan that includes the NSR requirements described above. The Illinois Environmental Protection Act ("Act") specifically authorizes one State agency, the Pollution Control Board ("Board"), to "adopt regulations establishing permit programs meeting the requirements of [the CAA]," and another State agency, Illinois EPA, to "adopt procedures for the administration of such programs." 415 ILCS 5/9.1(c) (2010). Furthermore, the Act also prohibits the construction, installation, modification, or

operation of an air pollution source subject to regulation under the CAA without a permit granted by Illinois EPA. 415 ILCS 5/9.1(d)(2) (2010).

As directed by the Act, the Board has adopted regulations establishing NSR permit programs. *See* 35 Ill. Adm. Code 203.101 *et seq.* ("Part 203 Regulations"). These regulations require new and modified air pollution sources to obtain a construction permit from Illinois EPA prior to beginning operation. *See* 35 Ill. Adm. Code 203.203. In order to obtain a permit, new and modified sources in nonattainment areas must obtain emission offsets that are at least equal to the new or increased emissions that they will emit. 35 Ill. Adm. Code 203.302.

The Part 203 Regulations also provide a number of detailed minimum requirements pertaining to the type of emission offsets that a new or modified air pollution source may rely on for purposes of obtaining a permit from Illinois EPA. *See* 35 Ill. Adm. Code 203.303. To provide three examples, emission offsets must "be of the same pollutant and further be of a type with approximately the same qualitative significance for public health and welfare as that attributed to the increase from a particular change," 35 Ill. Adm. Code 203.303(b)(1); "[m]ust not have been previously relied on, as demonstrated by [Illinois EPA], in issuing any permit pursuant to 35 Ill. Adm. Code 201.142 or 201.143 or this Part, or for demonstrating attainment or reasonable further progress," 35 Ill. Adm. Code 203.303(b)(5); and must not have been otherwise required by the CAA, 35 Ill. Adm. Code 203.303(f).

The Board's regulations do not establish any mechanism by which an existing source of air pollution may seek a determination that its emission reductions may be used as emission offsets by a new or modified source in seeking a permit. Instead, the Board's regulations concerning emission offsets in the context of the NSR program are concerned only with a new or modified source's application for a permit, and Illinois EPA's decision on such an application.

To summarize, there is nothing in the State of Illinois' NSR program that grants existing air pollution sources property rights with respect to their current or past levels of emissions. Neither does any relevant law provide existing air pollution sources a right to seek a binding determination from Illinois EPA that reductions in those emissions could be utilized by a new source during the NSR permitting process. The Part 203 Regulations do not regulate the conduct of offset sources like Plaintiff, and no rights of review of any decision by Illinois EPA concerning an NSR permit issued under the Part 203 Regulations are afforded to offset sources. As is discussed below, any claim that Plaintiff possesses a cognizable legal interest within the framework of Illinois EPA's administration of the Part 203 Regulations is baseless, because those regulations do not govern offset sources.

III. ARGUMENT

A. Plaintiff's Entire Complaint Should Be Dismissed Pursuant to Section 2-615 Because It Consists of Legal Conclusions, Not Well-Pleaded Facts

Plaintiff's Complaint suffers from several fatal defects. First, Plaintiff falls far below the standard of pleading required by Illinois law. This Court should dismiss the Complaint pursuant to Section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615 (2010) ("Section 2-615"), because it relies on unsupported legal conclusions. Pursuant to Section 2-615, a pleading may be stricken when it is "substantially insufficient in law." In assessing a pleading's sufficiency, "conclusions of law or fact unsupported by specific factual allegations" are disregarded. *Newman, Raiz & Shelmadine, LLC v. Brown*, 394 Ill. App. 3d 602, 605 (1st Dist. 2009).

The gravamen of Plaintiff's Complaint is that Plaintiff possesses emission reductions credits; Plaintiff requested that Illinois EPA formally announce that the credits could be used as emission offsets by a new or modified source seeking a permit; and that Illinois EPA's refusal to do so is unlawful. Plaintiff has not alleged any facts in support of its claimed emissions

reduction credits, though. Without these facts, Plaintiff's contentions about credits and offsets are merely legal conclusions that should be disregarded for purposes of this motion to dismiss.

Surprisingly, Plaintiff never squarely alleges that it has a claim to emissions reduction credits. Instead, Plaintiff elides that issue and jumps straight to the allegation that it "sought to sell its [emission reduction credits] to a buyer located in the same non-attainment area." (Complaint at ¶ 7.) Plaintiff's approach leaves unacceptable gaps. Most basically, emission offsets must reflect a reduction in air pollution at an existing air pollution source. *See* 35 Ill. Adm. Code 203.121, 203.302, and 203.303. Plaintiff, however, fails to allege that it has ever had any interest in any air pollution source. Nor does Plaintiff allege what kind of emissions it purportedly should be credited with reducing, nor how, when, and to what extent it purportedly reduced those emissions. Furthermore, Plaintiff neglects to allege any facts supporting the conclusion that its supposed offsets meet the detailed minimum requirements for valid emission offsets under Illinois regulations. *See* 35 Ill. Adm. Code 203.303.

Plaintiff's failure to allege such basic facts renders its Complaint deficient. Plaintiff requests that this Court make a binding declaration of its supposed right to market emission offsets, yet it alleges no facts that would support that right. Without alleging facts that would establish that it has any claim to emission reduction credits, much less any facts that would establish the requirements for valid emission offsets pursuant to the Board's regulations, Plaintiff's bald contention that it is entitled to market emission offsets is merely a legal conclusion. For purposes of this motion to dismiss, this Court should disregard that legal conclusion—without which, nothing of substance is left in the Complaint.

Plaintiff's failure to allege facts in support of its legal conclusions pervades the entire Complaint. Each Count presupposes that Plaintiff actually possesses a legitimate claim to

emission reduction credits that could be utilized as emission offsets. Without Plaintiff's allegation of any facts to justify this claim, however, it would be impossible for this Court to deem the claim valid. Plaintiff's entire Complaint should be dismissed pursuant to Section 2-615 because Plaintiff has failed to plead any facts in support of its legal conclusions.

B. Count I Should Be Dismissed Pursuant to Section 2-615 Because Plaintiff Does Not, and Cannot, State Any Cause of Action, and Pursuant to Section 2-619(a)(9) Because Plaintiff Does Not Have Standing to Pursue Its Claim

Count I also should be dismissed as "substantially insufficient in law" pursuant to Section 2-615 because Plaintiff fails to state a cause of action. Even if Plaintiff were allowed to supply greater factual particularity, Plaintiff could not set out a cognizable claim that Illinois EPA has acted unlawfully by not issuing a binding determination that Plaintiff possesses marketable emission offsets. Moreover, because Plaintiff would not have standing to pursue.such a claim, Count I also should be dismissed pursuant to Section 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 619(a)(9) (2010) ("Section 2-619(a)(9)").

1. Count I of the Complaint Should Be Dismissed Pursuant to Section 2-615 Because Plaintiff Cannot State a Claim for Declaratory Judgment

In Count I of the Complaint, Plaintiff requests that this Court make a "binding declaration of rights" that Plaintiff has a right to market emission offsets, and enter an order finding that Illinois EPA has exceeded its statutory authority in refusing to acknowledge Plaintiff's purported right. Count I should be dismissed with prejudice pursuant to Section 2-615 because Plaintiff fails to state a claim for a declaratory judgment.

The Illinois declaratory judgment statute provides in pertinent part:

> (a) No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone

> interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation . . . and a declaration of the rights of the parties interested . . . . The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order would not terminate the controversy or some part thereof, giving rise to the proceeding.

735 ILCS 5/2-701 (2010). "The essential requirements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests." *Beahringer v. Page*, 204 Ill. 2d 363, 372 (Ill. 2003). The declaratory judgment statute does not create any substantive rights or duties, but "merely affords a new, additional, and cumulative procedural method for the judicial determination of the parties' rights." *Id.* at 373. A declaratory judgment action must "present a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof." *AIDA v. Time Warner Ent. Co., L.P.*, 332 Ill. App. 3d 154, 161 (1st Dist. 2002) (quoting the definition of an "actual controversy" in *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375 (Ill. 1977)).

Plaintiff's Complaint fails to present the required elements of a declaratory judgment action. Plaintiff's only statement in the Complaint with respect to its interest in this litigation is that its purported emission reduction credits constitute a property right. (Complaint at ¶ 8.) This statement has no legal basis. As discussed in detail in Section II, above, the relevant laws are concerned with emission reduction credits and emission offsets in one singular context: the issuance of permits to new and modified sources of air pollution in nonattainment areas. These laws do not create any property rights with respect to an existing source's current or past emissions. Certainly Sections 302.202 and 302.203 of the Board's Air Pollution Regulations, 35 Ill. Adm. Code 302.202 and 302.203—the only regulations that Plaintiff cites relating to

emission offsets—do not create any property rights. The regulations do not even mention the source of potential emission reduction credits. This lack of recognition is not coincidental, but rather is consistent with a regulatory scheme that neither incorporates a banking or trading program for emission reduction credits (such as to create a marketable value in the emission reductions), nor creates vested interests or property rights relative to the original source of emission reductions. Plaintiff's description of its purported emission reduction credits as a "property right" therefore is nothing more than a legal fiction.

Plaintiff's language is telling, though, insofar as it states that its purported credits "constitute a property right *for purposes of this action*." (Complaint at ¶ 8.) (emphasis added). Plaintiff either has an enforceable right for *all* purposes, or it *never* has one. Plaintiff cannot manufacture a property right by filing a declaratory judgment action. A declaratory judgment action is only a procedural mechanism for pursuing an already-existing right. *Beahringer*, 204 Ill. 2d at 373. Plaintiff's statement that it has a property right "for purposes of this action" is really a concession that it has no right at all.

Without any actual rights at stake, Plaintiff's claim for a declaratory judgment must be dismissed with prejudice, because Plaintiff cannot establish the requirements for a declaratory judgment action. *See Beahringer*, 204 Ill. 2d at 372. Plaintiff does not have a legal tangible interest, because it cannot have any property right in current or past emissions of air pollutants. Defendants do not have an opposing interest, because there are no regulations or statutes that would require, or authorize, Illinois EPA to make a binding determination of the validity of emission offsets prior to a permit application for a new or modified source. Finally, there is no actual controversy between the parties, because the entry of a declaratory judgment would not confirm any actual, independently-existing right of Plantiff's. *See AIDA*, 332 Ill. App. 3d at 161

("[T]here can be no immediate and definitive determination of the parties' rights that would be terminated by an entry of declaratory relief because plaintiff has failed to articulate a basis upon which a proper cause of action can be asserted."). Count I of Plaintiff's Complaint should be dismissed with prejudice pursuant to Section 2-615.

2. Count I Should Be Dismissed Pursuant to Section 2-619(a)(9) Because Plaintiff Lacks Standing

Plaintiff's lack of a legal tangible interest also entails that Plaintiff lacks standing to pursue this action. Thus, Section 2-619(a)(9) provides an additional basis for dismissal of Plaintiff's Complaint with prejudice. *See* 735 ILCS 619(a)(9) (2010) (allowing for the involuntary dismissal of cases when "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim").

In order for a plaintiff to have standing to bring a declaratory judgment action, there must be an "injury in fact to a legally cognizable interest." *Messenger v. Edgar*, 157 Ill. 2d 162, 170 (Ill. 1993). As part of this requirement, a plaintiff seeking a declaration "must possess a personal claim, status, or right that is capable of being affected by the grant of such relief." *Id.* at 171.

Plaintiff cannot demonstrate an injury to a legally cognizable interest that would be affected by the grant of its requested relief. Sections 302.202 and 302.203 of the Board's Air Pollution Regulations, 35 Ill. Adm. Code 302.202 and 302.203—again, the only regulations related to emission offsets cited by Plaintiff—relate only to the permitting of new and modified sources of air pollution. The regulations do not provide for any participation of existing sources of air pollution in that permitting process, nor do they accord any rights to existing sources. Plaintiff has no legally cognizable interest in the NSR permitting process.

Plaintiff's lack of a sufficient interest is demonstrated by the fact that its requested relief, if granted, would not have an immediate effect on any party's legal status. Plaintiff seeks a

"binding declaration of rights regarding Plaintiff's [emission reduction credits] as offsets." (Complaint at ¶ 15.) Such a declaration would not have any correspondence to the Board's Air Pollution Regulations. The regulations make no provision for a binding determination that an existing source has a legitimate claim to emission offsets, prior to a new or modified source's application for a permit under the regulations. Were this Court to grant such a declaration, it would have no effect unless, and until, a new or modified source were to apply for a permit seeking to use Plaintiff's emission offsets—and then only if the application were acceptable in every other fashion. Until such time, Plaintiff's supposed offsets would be of no legal significance. Because Plaintiff lacks standing, Count I of Plaintiff's Complaint should be dismissed with prejudice pursuant to Section 2-619(a)(9).

Finally, it should also be noted that Plaintiff also has filed a petition for review of Illinois EPA's February 22, 2010 Letter before the Board.[1] Illinois EPA has filed a motion to dismiss that petition on much the same grounds as are articulated in this Motion. In response to Illinois EPA's motion before the Board, Plaintiff has argued that it has standing to seek review of the February 22, 2010 Letter before the Board. (PCB 10-75, Petit.'s Resp. in Opp. To Mot. to Dismiss at 6-7). If Plaintiff wishes to maintain the position it has advanced before the Board, then Count I of its Complaint here must be dismissed under Section 2-619(a)(9) for Plaintiff's failure to exhaust its administrative remedies. *See County of Knox v. The Highlands, L.L.C.*, 188 Ill. 2d 546, 551 ("[A] party aggrieved by an administrative decision ordinarily cannot seek judicial review without first pursuing all available administrative remedies.")

[1] The entire docket of Pollution Control Board proceeding No. 10-75 is reviewable online at: http://www.ipcb.state.il.us/Cool/External/CaseView.aspx?referer=results&case=13853.

C. Count II Should Be Dismissed Pursuant to Section 2-619(a)((1) Because This Court Lacks Jurisdiction to Issue a Common Law Writ of *Certiorari*

In Count II of the Complaint, Plaintiff petitions the Court for a common law writ of *certiorari*. Count II should be dismissed with prejudice pursuant to Section 2-619(a)(1) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(1) (2010) ("Section 2-619(a)(1)"). This Court lacks subject matter jurisdiction to issue a common law writ of *certiorari* because there is no final administrative action by Illinois EPA for this Court to review.

The common law writ of *certiorari* is a general method for reviewing the actions of agencies exercising administrative functions when judicial review cannot be had under the Administrative Review Law and the statute conferring power on the agency does not provide for any other form of review. *Walters v. Department of Labor*, 356 Ill. App. 3d 785, 789 (1st Dist. 2005). A court has jurisdiction to issue a writ of *certiorari* only in cases in which an agency or other tribunal has acted in a quasi-judicial capacity. *Brown v. Duncan*, 361 Ill. App. 3d 125, 131 (1st Dist 2005). "Quasi-judicial hearings are those which concern agency decisions affecting a small number of people on individual grounds based on a particular set of disputed facts that have been adjudicated." *Id.*

This Court does not have jurisdiction to issue a common law writ of *certiorari* in this case because the February 22, 2010 Letter of which Plaintiff complains has no legal effect, and therefore there has been no adjudication affecting Plaintiff. As set forth above, nothing in the relevant law requires, or authorizes, Illinois EPA to make a binding determination of whether particular emission reduction credits can be utilized as emission offsets by a new or modified source, prior to an application for a permit for that source. As such, the February 22, 2010 Letter does not constitute a final adjudication regarding Plaintiff's claimed emission offsets. Therefore, the February 22, 2010 Letter cannot be reviewed through a common law writ of *certiorari*. *See*

Walters, 356 Ill. App. 3d at 795 (holding that, when agency was not authorized to issue a binding order, "there has been no adjudication of rights that would allow the trial court to grant a writ of *certiorari*.")

The issuance of a common law writ of *certiorari* is also improper because, as discussed in the context of Plaintiff's request for a declaratory judgment, Plaintiff has not sustained an injury to a legally cognizable interest. A writ of *certiorari* will not issue "in the absence of substantial injury or injustice to the petitioner." *Stratton v. Wenona Community Unit Dist. No. 1*, 133 Ill. 2d 413, 428 (1990). As discussed above, Plaintiff, as an existing source of air pollution, has no property interest in its current or past emissions, and no cognizable interest in the NSR permitting process. Just as Plaintiff cannot manufacture a property right by filing a declaratory judgment action, neither can Plaintiff manufacture this Court's jurisdiction to issue a writ of *certiorari* by repeatedly demanding an opinion from an agency. Count II of Plaintiff's Complaint should be dismissed with prejudice pursuant to Section 2-619(a)(1). Additionally, as with Count I, if Plaintiff maintains that it has standing to seek review of the February 22, 2010 Letter before the Board, then Count II should be dismissed because, under Plaintiff's argument, there clearly would be another form of review available to Plaintiff.

D. Count III Should Be Dismissed Pursuant to Section 2-615 Because Section 10-55(c) of the Illinois Administrative Procedure Act is Inapplicable

In Count III of the Complaint, Plaintiff petitions this Court for attorney fees pursuant to Section 10-55(c) of the Illinois Administrative Procedure Act, 5 ILCS 100/10-55(c) (2010) ("Section 10-55(c)"). Count III should be dismissed with prejudice pursuant to Section 2-615 because Plaintiff cannot establish grounds for recovery under Section 10-55(c).

Section 10-55(c) provides as follows:

> (c) In any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees.

Attorney fees generally cannot be recovered unless provided for by statute or agreement of the parties, and statutes providing for the recovery of attorney fees are in derogation of the common law and must be strictly construed. *Ardt v. Illinois*, 292 Ill. App. 3d 1059, 1063 (1st Dist. 1997). Pursuant to Section 1-70 of the Illinois Administrative Procedure Act, 5 ILCS 100/1-70 (2010), a "rule" is an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy . . . ." An agency's simple failure to follow a regulation in an individual case does not provide the basis for a recovery of litigation expenses under Section 10-55(c). *Ekco, Inc. v. Edgar*, 135 Ill. App. 3d 557, 563 (4th Dist. 1985). *See also Navarro v. Edgar*, 145 Ill. App. 3d 413, 417 (1st Dist. 1986) (rejecting request for expenses when there was no evidence that the agency's complained-of practice "was an established one, or . . . had achieved any degree of general application.").

Here, Plaintiff itself asserts that Illinois EPA's February 22, 2010 Letter cites a principle that is contrary to the regulations that Illinois EPA implements, and indeed to Illinois EPA's decisions in other cases.[2] As such, the principle allegedly announced in the February 22, 2010 Letter could not be a rule of general applicability, but instead would constitute a discrete application of law in one case by Illinois EPA. Pursuant to *Ekco and Navarro*, then, Section 10-55(c) is inapplicable. *See Ekco*, 135 Ill. App. 3d at 563; *Navarro*, 145 Ill. App. 3d at 417.

[2] Were the content of the February 22, 2010 Letter at issue for purposes of this motion—which relates only to matters on the face of the Complaint—Defendants would contest Plaintiff's interpretation of the Letter as asserting that emission offsets can never be derived from a shut-down facility. For purposes of this motion, however, Defendants accept Plaintiff's interpretation of the letter as asserted in the Complaint.

WHEREFORE, Defendants, DOUGLAS P. SCOTT, Director of the Illinois Environmental Protection Agency, and THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, an Agency of the State of Illinois, respectfully pray that this Court enter an order dismissing Plaintiff Chicago Coke Co., Inc.'s Verified Complaint for Common Law Writ of Certiorari and Declaratory Judgment with prejudice, and granting such other relief as this Court deems appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN,
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CERTIFICATE OF SERVICE

I, ANDREW B. ARMSTRONG, an Assistant Attorney General, do certify that I caused to be served this 2nd day of July, 2010, the foregoing Notice of Motion and Plaintiff's Section 2-619.1 Combined Motion to Dismiss Complaint Pursuant to Sections 2-615 and 2-619 upon the persons listed on said Notice of Motion by hand delivery to the listed address, at or before the hour of 5:00 p.m.

Andrew Armstrong

ANDREW B. ARMSTRONG