BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,	)	
Petitioner,	)	
v.	)	
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 10-75 (Permit Appeal)
Respondent,	)	
NATURAL RESOURCES DEFENSE COUNCIL, INC., and SIERRA CLUB,	)	
Intervenors.	)	

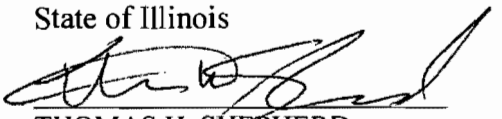
NOTICE OF FILING

TO: See Attached List

PLEASE TAKE NOTICE that on the 3rd day of October, 2012, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached The Illinois Environmental Protection Agency's Response to Petitioner's Motion to Strike, Directed to IEPA's Motion for Summary Judgment, a copy of which is hereby served upon you.

Respectfully submitted,

LISA MADIGAN,
Attorney General of the
State of Illinois

By: 

THOMAS H. SHEPHERD
Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-5361

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

Mr. Brad Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601
hallorab@ipcb.state.org

SWANSON, MARTIN & BELL
Michael J. Maher
Elizabeth S. Harvey
One IBM Plaza
330 N. Wabash, Suite 3300
Chicago, IL 60611
eharvey@smbtrials.com

NATURAL RESOURCES DEFENSE COUNCIL
Ann Alexander
Meleah Geertsma
2 North Riverside Plaza
Suite 2250
Chicago, IL 60606
aalexander@nrdc.org
mgeertsma@nrdc.org

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THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO PETITIONER'S MOTION TO STRIKE, DIRECTED TO IEPA'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, and in Response to the Motion to Strike, Directed to IEPA's Motion for Summary Judgment ("Motion to Strike") filed by Petitioner CHICAGO COKE CO., INC. ("Chicago Coke" or "Petitioner"), states as follows:

I. ARGUMENT

Chicago Coke moves to strike portions of the Illinois EPA's Motion for Summary Judgment ("Motion") on the ground that they are beyond the scope of the Agency's February 22, 2010 decision on appeal in this matter. Specifically, Chicago Coke seeks to strike the Illinois EPA's "references to and arguments regarding" 35 Ill. Adm. Code 203.303 and "all claims that the [emission reduction credits ("ERCs")] were not creditable because IEPA had used the emission reductions to demonstrate compliance." In requesting that these references be stricken

from the Motion, Chicago Coke asks the Board to strike references to the regulatory framework under which this appeal is brought, disregard the applicable federal guidance regarding the availability of ERCs, and discount events that bar the relief requested by Chicago Coke in this appeal.

As the Board has acknowledged, this is a procedurally unique case. *Chicago Coke v. IEPA*, PCB 10-75, slip op. at 8 (Apr. 21, 2011). On appeal is the Agency's 2010 decision that Chicago Coke's emission reductions are not creditable as emission offsets. Chicago Coke appealed this decision under Section 40 of the Environmental Protection Act ("Act"), titled "Appeal of Permit Denial," although it is undisputed that no permit was ever submitted to, or denied by, Illinois EPA.

The Board asserted jurisdiction over this matter pursuant to Section 5(d) of the Act, 415 ILCS 5/5(d), wherein the Board shall have the authority to conduct proceedings ... upon other petitions for review of final determinations." *Chicago Coke v. IEPA*, PCB 10-75, slip op. at 8 (Sept. 2, 2010). Part 105 of the Board's procedural rules shall apply to any appeal to the Board of final decisions of the Illinois EPA. 35 Ill. Adm. Code 105.200. There are no provisions in Section 5(d) or Part 105 establishing what must be contained in other written Agency final decisions, or restricting what may be relied upon by the Board in appeals of those decisions. Section 39 of the Act sets forth detailed requirements specific to permit issuance. *See* 415 ILCS 5/39 (titled "Issuance of Permits; procedures").[1] Chicago Coke does not refer this Court to any provision of the Act or Board regulations that imposes Section 39's requirements on all other Agency final decisions. While the Board allowed intervention "in this limited circumstance"

[1] Taking Chicago Coke's argument to its logical conclusion, the deadlines, notice requirements, and hearing requirements under Section 39 would also be imposed on all "Agency final decisions." *See e.g.*, 415 ILCS 39(a) and (f).

under the provisions of Section 40.2(a) of the Act, 415 ILCS 5/40.2(a), it has never claimed that the substantive or procedural permitting provisions under Section 39 of the Act apply to "other decisions" of the Agency as well. *Chicago Coke v. IEPA*, PCB 10-75, slip op. at 9 (Apr. 21, 2011).

A. References to 35 Ill. Adm. Code 203.303 on Pages 13-14 and 21

On Pages 13-14 and 21 of its Motion, the Illinois EPA references 35 Ill. Adm. Code Section 203.303 in explaining what emission offsets are, as Section 203.303 establishes the threshold requirement for offsets; in discussing the regulatory framework surrounding emission offsets; and in discussing how such regulations tie into the Agency's interpretation of the federal guidance and into the Agency's Five-Year Guideline. Chicago Coke fails to establish why such references are in any way inappropriate.

It is disingenuous for Chicago Coke to argue that the Agency did not consider Section 203.303, titled "Baseline and Emission Offsets Determination," in making its decision regarding Chicago Coke's claimed emission offsets, or that Chicago Coke was unaware of said consideration. In Chicago Coke's correspondence, dated August 3, 2007, Chicago Coke acknowledges the parties' prior discussions on the claimed ERCs and attempts to address concerns that the Agency had "with respect to 35 Ill. Admin Code § 203.303." (*See* Ltr. from Katherine Hodge to the Illinois EPA (Aug. 3, 2007) at. p. 1 (Admin. Record at p. 1584 and attached as Exh. A)). Chicago Coke goes on to expressly reference Section 203.303 at least thirteen times in the body of the letter. In particular, in a section titled "Section 203.303," Chicago Coke addressed the Agency's concerns regarding the "timing of the shutdown" of the Facility as it related to emission offsets allowed under Section 203.303. (*Id.* at p. 2-3). Indeed, in its August 3, 2007 letter, Chicago Coke essentially made the same argument regarding

permanent shutdown as the company asserted in its opposition to the Illinois EPA's Motion. (*Id.* at p. 3; Resp. at p 7).

Chicago Coke asks the Board to read the Illinois EPA's 2010 letter so narrowly that even a general overview of applicable regulations is prohibited, a concept for which Chicago Coke provides no basis. Further, it is abundantly clear from the communications between the parties that the Agency considered Section 203.303 in analyzing the creditability of the Facility's emission reductions, belying Chicago Coke's claimed concern that it faces an "endless parade of new reasons for denying a permit." (Motion to Strike ¶ 5). Rather, the Illinois EPA presents in its Motion the regulation that sets forth the general requirements for emission offsets and which was discussed between parties on numerous occasions prior to the Agency's February 2010 decision.

Accordingly, Chicago Coke's motion to strike "all references to and arguments regarding" Section 203.303 should be denied.

B. Claims that Emissions Reductions are not Creditable Because They Were Relied Upon to Demonstrate Continued Attainment.

Chicago Coke further argues that references to the Illinois EPA's use of the Facility's emission reductions to demonstrate attainment should be stricken on the ground that the "arguments on these identified issues are beyond the scope of this appeal." ("Motion to Strike ¶ 10). This argument, however, is puzzling given that a federal guidance document in the Administrative Record, relied upon by the Agency in issuing its decision, and which is cited by both Respondent and Petitioner in their respective motions for summary judgment in this matter, states that "in general" ERCs can continue to exist "as long as they are in each subsequent emissions inventory," but expire "if they are ... used in a demonstration of reasonable further progress" toward attainment ("RFP"). (*See* Ltr. from Stanley Meiburg, Director, USEPA, Air,

Pesticides and Toxics Div., to William R. Campbell, Exec. Director, Texas Air Control Bd. (11/19/1992) at p. 7 (Admin. Record at p. 0031) *emphasis added; see also* Mtn. ¶¶ 50-51; Petitioner's Mtn. for Summary Judgment at 8). Given that applicable federal guidance expressly states that ERCs that have been used to demonstrate RFP may not be used in future permits to offset new emissions, the Illinois EPA's reliance in its Motion on the use of the Facility's emission reductions by the State of Illinois ("State") to demonstrate attainment is appropriate.

Also, federal guidance identified in the Illinois EPA's Motion identifies that one of the factors examined in determining if a facility has been permanently shutdown is the state's handling of the shutdown. (Mtn. ¶ 33). Here, in response to the permanent shutdown of the Facility, the State removed the Facility from the State's Emissions Inventory and "counted" the Facility's emissions as zero in the State's Maintenance Plan, submitted to the USEPA in 2009 with the State's request for redesignation of the Chicago nonattainment area. (Mtn. ¶ 17, 20, and 42). Since the State's use of the Facility's emission reductions to demonstrate continued attainment is a factor to be examined under the applicable federal guidance in determining a permanent shutdown, this information falls squarely within the scope of this appeal.

Accordingly, Chicago Coke's motion to strike such arguments, including from Pages 20-26 of the Motion, should be denied.

C. The Relief Sought by Chicago Coke Would Violate Federal Law and the Board's Regulations.

Additionally, the Illinois EPA presents in its Motion a second argument that is separate from the grounds underlying the Agency's decision on appeal. The Illinois EPA points out that any ruling by the Board that Chicago Coke's emission reductions are creditable as Emission Offsets would violate applicable federal law and Section 203.303(b)(5) of the Board's regulations, due in part to events that occurred subsequent to the Agency's decision. (Mtn. at pp.

26-28, ¶¶ 1-7). In particular, on August 13, 2012, the United States Environmental Protection Agency approved the State's Maintenance Plan as a State Implementation Plan ("SIP") revision, and approved the State's redesignation request for the Chicago ozone nonattainment area. The Maintenance Plan relied upon Chicago Coke's emission reductions in demonstrating continued attainment, which is a prerequisite to redesignation. (Mtn. at p. 26, ¶ 6; 77 Fed. Reg. 48062 (Aug. 13, 2012)).

Once the Illinois EPA relied upon the emission reductions in its Maintenance Plan in 2009, and certainly after the Plan was approved by the USEPA in 2012, the reductions were eliminated for use for any other purpose. Under applicable federal guidance, ERCs are not absolute property rights held by the owner or operator of a facility and states "have always" had the ability to rely on facilities' emission reductions to demonstrate attainment or RFP. (Mtn. ¶ 46 *citing* federal guidance in Admin. Record at p. 0037; 40 C.F.R. § 51.165(a)(3)(ii)(G)). Any order allowing the emission reductions to be credited as emission offsets would be authorizing "double-counting" of the emission reductions in violation of Section 203.303(b)(5) of the Board's Air Pollution Regulations and Section 51.165(a)(3)(ii)(G) of the federal regulations. *See* 35 Ill. Adm. Code 203.303(b)(5) ("the emission offsets provided:... must not have been relied on, as demonstrated by the Agency,... for demonstrating attainment or [RFP]"); 40 C.F.R § 51.165(a)(3)(ii)(G) ("Credit of an emission reduction can be claimed to the extent that... the State has not relied on it in demonstrating attainment or [RFP]").

Chicago Coke does not present any authority that precludes the Illinois EPA from informing the Board that events subsequent to an "Agency final decision" bar the relief sought. Accordingly, in regard to the Illinois EPA's second argument in its Motion, Chicago Coke's motion to strike the Illinois EPA's reliance on 35 Ill. Adm. Code 203.303 on Pages 26-28 of the

Motion and the arguments that the "IEPA had already used the emission reductions to demonstrate compliance" should be denied.

CONCLUSION

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board issue an order denying Petitioner's motion to strike and any relief the Board deems just and proper.

Respectfully Submitted,

THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY, by

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____

THOMAS H. SHEPHERD
Assistant Attorney General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602
Tel: (312) 814-5361

HODGE · DWYER · ZEMAN
ATTORNEYS AT LAW

KATHERINE D. HODGE
E-mail: khodge@hdzlaw.com

August 3, 2007

John J. Kim, Esq.
Managing Attorney
Air Regulatory Unit
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276, Mail Code #21
Springfield, Illinois 62794-9276

RE: Chicago Coke Co., Inc.
Emission Reduction Credits
Our File No.: COKE:001

Dear John:

On July 11, 2007, representatives of Chicago Coke Co., Inc. ("Chicago Coke") met with representatives of the Illinois Environmental Protection Agency (the "Meeting") regarding the potential for the sale of certain emission reduction credits (the "ERCs") as offsets to be used by a purchaser of the real property of Chicago Coke, located at 11400 South Burley Avenue, Chicago, Illinois (the "Real Property"). The Illinois EPA expressed certain concerns with the transaction. In particular, the Illinois EPA had concerns with respect to 35 Ill. Admin. Code § 203.303. We have reviewed the Illinois EPA's areas of concern and related documents. Our findings are discussed below.

I. BACKGROUND

Chicago Coke purchased the Real Property in 2002. Chicago Coke acquired the existing Clean Air Act Permit Program ("CAAPP") permit (permit #96030032) associated with the Real Property on July 14, 2003. All appropriate fees have been paid and Chicago Coke continues to hold the valid CAAPP permit. Chicago Coke applied for a construction permit for a pad-up rebuild of the facility on May 3, 2004. Construction Permit No. 04010037 was issued to Chicago Coke on April 28, 2005 for a pad-up rebuild of the facility (the "Construction Permit"). Following issuance of the permit, Chicago Coke secured conditional financing and identified prospective purchasers of coke. The Construction Permit expired on October 28, 2006. Chicago Coke and Chicago Clean Energy, LLC ("CCE") began negotiations regarding a potential sale of the Real Property and certain emission reduction credits ("ERCs") in mid-2006, and are currently

3150 ROLAND AVENUE ▲ POST OFFICE BOX 5776 ▲ SPRINGFIELD, ILLINOIS 62705-5776
TELEPHONE 217-523-4900 ▲ FACSIMILE 217-523-4948

EXHIBIT
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in the process of transferring the Real Property from Chicago Coke to CCE. As you are aware, CCE intends to construct a coal gasification plant on the Real Property. In addition to the Real Property, Chicago Coke and CCE wish to transfer ERCs from Chicago Coke to CCE for use as offsets by CCE. Chicago Coke and CCE have entered into a Letter of Intent wherein CCE will purchase 55.9 tons of VOM ERCs, 1067 tons of NO_x ERCs, and 156.9 tons of PM_{10} ERCs (to offset emissions of PM_{10} and as a surrogate for $PM_{2.5}$) as referenced in Attachment 3 of the Construction Permit (the "Attachment"). It is our understanding that the Illinois EPA has made a determination with regard to the accuracy of the emission totals listed in the Attachment and will not revisit these emission totals.

II. SECTION 203.303

The Illinois EPA's concern with the use of PM ERCs from shutdown sources as offsets under the State's New Source Review ("NSR") regulations, pursuant to the recent $PM_{2.5}$ nonattainment designation, is based on Section 203.303(b)(3) which states that offsets:

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

35 Ill. Admin. Code § 203.303. (Emphasis added.)

Section 203.303 includes two separate issues: 1) the timing of any past shutdown; and, 2) whether such shutdown credits may only be used as a replacement source for the shutdown. We address these issues separately below.

A. Timing of the Shutdown

As stated above, Section 203.303 provides that "in the case of a past shutdown of a source or permanent curtailment of production or operating hours, have occurred since April 24, 1979, or the date the area is designated a nonattainment area for the pollutant, whichever is more recent,..." *Id.* In the matter at hand, Chicago Coke clearly did not "shut down" before April 24, 1979. Therefore, the question is whether Chicago Coke "shut down" before April 5, 2005, the date that the $PM_{2.5}$ nonattainment designation became effective. *See* 70 FR 19844.

The shutdown of a source is not defined in the Illinois Environmental Protection Act (the "Act"), the associated Illinois environmental regulations, or in federal regulations regarding new source review. Therefore, it is not completely clear when, or if, Chicago Coke has "shut down." Chicago Coke holds an active CAAPP Permit. Chicago Coke's CAAPP fees are up to date, and Chicago Coke timely applied for a renewal of the permit. The permit allows the operation of coke ovens, a by-products plant, a boiler, and coal/coke handling operations. The coke ovens, by-products plant, and boiler have not operated since early 2002.

However, it is clear that Chicago Coke did not "shut down" in 2002. Again, Chicago Coke applied for, and obtained, the Construction Permit for a pad-up rebuild of the facility. During the hearing regarding the issuance of the Construction Permit, the Illinois EPA stated "[t]his facility is not considered a new major source because the source was not permanently shut down." Chicago Coke Construction Permit Hearing Transcript at p8. *See also* Responsiveness Summary for Public Questions and Comments on the Construction Permit Application from Chicago Coke Company at p24 ("This source is not considered a new major source because the source was not permanently shut down.") *Id.* at 31-32. The Illinois EPA issued the Construction Permit on April 28, 2005.

The Illinois EPA could not have issued the Construction Permit for a pad-up rebuild at Chicago Coke if Chicago Coke had been "shut down" as of the issuance date of the Construction Permit. The Illinois EPA would necessarily have considered Chicago Coke to be a new source and to have permitted it accordingly. Therefore, for purposes of NSR/PSD, the Illinois EPA is on record that Chicago Coke did not "shut down" prior to April 28, 2005.[1] Since any potential shutdown of Chicago Coke occurred after the date that the area including Chicago Coke was designated to be a nonattainment area for $PM_{2.5}$, and for every pollutant of concern, the first factor in Section 203.303 is clearly satisfied.

B. Replacement Source

Section 203.303 also provides that "until the United States Environmental Protection Agency ("USEPA") has approved the attainment demonstration and state trading or marketing rules for the relevant pollutant, the proposed new or modified source must be a replacement for the shutdown or curtailment." 35 Ill. Admin. Code § 203.303. USEPA has not approved a $PM_{2.5}$ demonstration for Illinois. However, the area surrounding and including Chicago Coke (the "Lake Calumet Area") was designated as a nonattainment area for PM_{10} in 1990. *See* Maintenance Plan for Particulate Matter less than 10 Microns (PM10) for the Lake Calumet Moderate Nonattainment Area in Cook County, Illinois (Draft), Illinois EPA, June 25, 2005, at p3 and 5. "[US]EPA fully approved the Lake Calumet PM-10 nonattainment area SIP on July 14, 1999 (64 FR 37847). With this approval, Illinois had fulfilled all Clean Air Act

[1] It must be noted that the Construction Permit and a subsequent amendment did not expire until October 28, 2006, and it is likely that Chicago Coke did not, or will not, "shut down" for the purposes of NSR/PSD until sometime following that date.

requirements for Part D plans for the Lake Calumet moderate PM-10 nonattainment area."[2] 70 FR 55545, 55547. The Lake Calumet Area was redesignated as attainment for PM_{10} effective November 21, 2005. *See* 70 FR 55545. In discussing the redesignation and its effects on NSR/PSD, the USEPA stated as follows:

> The requirements of the Part D--New Source Review (NSR) permit program will be replaced by the Part C--Prevention of Significant Deterioration (PSD) program for major new sources of PM-10 once the area has been redesignated. Because the PSD program was delegated to the State of Illinois on February 28, 1980, and amended on November 17, 1981, it will become fully effective immediately upon redesignation. However, because this area is included within the Chicago PM[2.5] nonattainment area, the requirements of the Part D NSR permit program will also continue to apply to new or modified sources of particulate matter, with the exception that PM[2.5] will now be the indicator for particulate matter rather than PM-10.

70 FR 55545, 55547. (Emphasis added.)

In addition, the USEPA generally allows States to use an existing PM_{10} major NSR permitting program as an interim measure until a $PM_{2.5}$ program can be implemented. The USEPA recently reiterated its position on this issue and stated:

> Our current guidance permits States to implement a PM[10] nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the PM[2.5] NAAQS. A State's surrogate major NSR program in PM[2.5] nonattainment areas may consist of either the implementation of the State's SIP-approved nonattainment major NSR program for PM[10] or implementation of a major NSR program for PM[10] under the authority in 40 CFR Part 51, Appendix S. Appendix S generally applies where a State lacks a nonattainment major NSR program covering a particular pollutant.

70 FR 65984, 66045.

Illinois has a SIP-approved nonattainment major NSR program for PM_{10} for the Lake Calumet Area and the authority to use the PM_{10} program for $PM_{2.5}$ permitting at this time. Pursuant to the redesignation of the Lake Calumet Area to attainment, the USEPA mandated that requirements of the Part D NSR permit program would continue to apply to new or modified

[2] Also, *see generally*, 35 Ill. Admin. Code Part 203 (providing general requirements for new sources and providing specifically that, "[i]n any nonattainment area, no person shall cause or allow the construction of a new major stationary source or major modification that is major for the pollutant for which the area is designated a nonattainment area, except as in compliance with this Part for that pollutant.") 35 Ill. Admin. Code 203.201.

sources of $PM_{2.5}$. Therefore, NSR permits for $PM_{2.5}$ in Illinois will be legally issued pursuant to federal directive and guidance under Illinois' approved attainment demonstration for PM_{10}. Since any permit related to the matter at hand will be issued under an approved attainment demonstration, the replacement requirement of Section 203.303 is not applicable here.

C. **Additional Information Regarding Replacement Sources**

Section 203.303 became effective on April 30, 1993, and was "submitted to USEPA on June 21, 1993" for consideration for inclusion in the State Implementation Plan. 59 FR 48839, 48840. The USEPA accepted the language as consistent with the federal rule.

One month later, on July 21, 1993, USEPA issued a guidance document (July 21, 1993, Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards (MD-10) regarding Use of Shutdown Credits for Offsets ("Seitz Memo")), wherein USEPA changed its position with regard to the use of ERCs from shutdowns. Prior to the Seitz Memo, USEPA maintained that 40 CFR § 51.165(a)(3)(ii)(C)(2) required that "where a State lacks an approved attainment demonstration, emissions reductions from shutdowns or curtailments cannot be used as new source offsets unless the shutdown or curtailment occurs on or after the date a new source permit application is filed." Seitz Memo at 1. However, "a concern raised is that because the Clean Air Act Amendments of 1990 ("1990 Amendments") have created new schedules for submitting attainment demonstrations, the existing NSR rules restricting the use of so-called "prior shutdown credits" may be read as unnecessarily hindering a State's ability to establish a viable offset banking program for several years." *Id.* at 1. USEPA eventually concluded that, since attainment demonstrations were not even due at the time, "States should be able to follow, during the interim period between the present and the date when EPA acts to approve - - or disapprove an attainment demonstration that is due, the shutdown requirements applicable to areas with attainment demonstrations." *Id.* at 1. The Guidance also allows States to "interpret their own regulations. . . in accordance with this policy." Seitz Memo at 2.

Thereafter, USEPA proposed major reform to the NSR rules in 1996. *See* 61 FR 38249. While the specific rule in question here has not been finalized, it is clear that USEPA stands behind the positions taken in the Seitz Memo. In the proposed NSR reform, USEPA discussed the Guidance by stating that "the EPA took the position that such credits may be used as offsets until the EPA acts to approve or disapprove an attainment demonstration that is due." 61 FR 38249, 38313 (July 23, 1996). USEPA also stated that "EPA is proposing to adopt the policies reflected in the July 21, 1993 policy statement as regulatory changes. The EPA continues to adhere to its view in the July 31, 1993 policy statement that the 1990 Amendments' provisions for ozone nonattainment areas justify use of prior shutdown and curtailment credits as offsets in the interim period before the EPA approves or disapproves any required attainment demonstration. The EPA believes that the safeguards in the new requirements of the 1990 Amendments provide adequate assurance of progress toward attainment so that restrictions on the use of prior shutdown or curtailment credits is not necessary." *Id.* Among the reasons stated

for making the change to the shutdown ERC policy were that "EPA believes the interim period prior to approval or disapproval of attainment demonstrations for ozone nonattainment areas will continue after the promulgation of this final rule" and "areas may be designated as new ozone nonattainment areas in the future that will have future attainment dates, and if designated moderate or above will have future dates for submission of an attainment demonstration. *Id.* at 38312.

In summary, Illinois' rule requires that only replacement sources can use shutdown credits before USEPA has approved the appropriate attainment demonstration. USEPA has not approved an Illinois $PM_{2.5}$ or 8-hr. ozone attainment demonstration. However, standing USEPA guidance and federal register preamble discussion regarding this issue indicate that the rules applicable in areas having existing USEPA approved attainment demonstrations should apply until USEPA approves or disapproves any newly required attainment demonstration. Notably, areas with existing USEPA approved attainment demonstrations are not required to restrict the use of shutdown credits to replacement sources. Further, states are allowed to interpret their own rules in accordance with the guidance. Under the Guidance, Illinois may interpret its rule, in the interim before USEPA has approved its attainment demonstration, to read as if such a demonstration has been approved. We understand that the Illinois EPA has in the past interpreted its rules, in matters such as this, in a manner that did not restrict the use of shutdown credits to replacement sources. Therefore, shutdown ERCs may be used by any appropriate source, not merely by replacement sources.

III. 5-YEAR EXPIRATION PERIOD FOR ERCs

As you are aware, the Act and related Illinois regulations do not specifically mandate that ERCs may only be generated from shutdowns that occurred within the past five years. However, it has been indicated that the Illinois EPA has such a policy. In the matter at hand, for purposes of NSR/PSD, Chicago Coke could not have been shut down before April 25, 2005, the date that Construction Permit was issued. Therefore, the earliest that any 5-year expiration period could end would be April 28, 2010.[3]

A brief review of the expiration period for other states indicates that established ERCs are good for 10 years in Pennsylvania, New Jersey, and Massachusetts; 7 years in Colorado; 5 years in Texas, Michigan, and Washington; and, do not expire in Georgia. Each of these states has either a trading or an official banking/ERC recognition program.

There appears to be one federal guidance document that has addressed the expiration issue directly. That guidance document states:

11. Is there a time frame for offset expiration?

[3] However, it is likely that Chicago Coke could not be considered to be "shut down" during the period that it held the validly issued Construction Permit.

> In general, offsets can continue to exist as long as they are accounted for in each subsequent emissions inventory. They expire if they are used, or relied upon, in issuing a permit for a major stationary source or major modification in a nonattainment area, or are used in a demonstration of reasonable further progress.
>
> The State may include an expiration date in its SIP to ensure effective management of the offsets. For example, TACB's proposed banking rule would require each individually banked offset to expire 5 years after the date the reduction occurs, if it is not used. The rule also provides that a particular banked reduction will depreciate by 3% each year that it remains in the bank. EPA is supportive of the approach Texas has taken in its proposed banking rule to limit the lifetime of the offsets and to allow for an annual depreciation.

Stanley Meiburg, Director, Air, Pesticides and Toxics Division (6T), Interim Guidance on New Source Review (NSR) Questions Raised in Letters Dated September 9 and 24, 1992. November 19, 1992.

Therefore, there is apparently no absolute time limit or specific expiration period for generating or using ERCs. Further, since Illinois does not include any timeframe in its SIP, it need not use five years, or any other time limitation when determining whether an ERC generated from a shutdown may expire. However, even if the Illinois EPA should determine that a 5-year expiration period must be adhered to, the ERCs at issue here were not generated from a shutdown that occurred more than five years ago.

IV. USE OF CHICAGO COKE'S EMISSIONS IN AN ATTAINMENT PLAN OR FOR RFP

There does not appear to be any federal guidance regarding the use of properly permitted emissions from a source that is not currently operating for the purposes of an attainment plan or for reasonable further progress. However, there is guidance regarding shutdowns that may properly be used during the redesignation of an area to attainment. While we recognize that such guidance is not directly on point, the goal of any attainment plan or any demonstration of reasonable further progress is to ensure that a specific geographic area is moving toward an eventual redesignation of such area to attainment. In fact, the "term 'reasonable further progress' means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." 42 USCS § 7501. (Emphasis added.)

Redesignation is achieved as a response to a request for redesignation. Permanent and enforceable emissions reductions from shutdown sources may be included in such a redesignation request. However, "[e]mission reductions from source shutdowns can be considered permanent and enforceable to the extent that those shutdowns have been reflected in the SIP and all applicable permits have been modified accordingly." 67 FR 36124, 36129-36130.

Further, a SIP must include "enforceable emission limitations and other control measures, means, or techniques..." 42 USCS § 7410. In the matter at hand, any emission reductions that the Illinois EPA believes may have occurred at Chicago Coke are not permanent or enforceable. Chicago Coke maintains its CAAPP permit. Chicago Coke could operate its plant, particularly its boiler, at any time. Therefore, any reductions that the Illinois EPA may claim for a shutdown of any source that still holds an active permit would not be applicable toward redesignation of a nonattainment area.

V. 2005 INVENTORY

The 2005 emissions inventory indicates that Chicago Coke had minimal emissions of VOM and a few tons of emissions of PM/PM_{10}/$PM_{2.5}$, but no other emissions. As discussed at the Meeting, it is our understanding that the 2005 inventory reflects "actual" emissions from the year 2005. A recent federal guidance document indicates that ERCs may be generated by a source when the underlying emissions are no longer in the state emissions inventory. In the matter addressed by the guidance, a facility shut down a unit before a certain NESHAP was implemented. The source requested credit for the full amount of the actual emissions from the unit rather than the amount of emissions that would have occurred if the unit had shut down after the implementation of the NESHAP. Stephen Rothblatt of Region V stated "Sonoco Flexible Packaging (Sonoco) shutdown its Tower 7 coating line in 2005, resulting in an estimated emission reduction of 507 tons per year of volatile organic compounds (primarily Toluene). It is our understanding that the Tower 7 coating line has been permanently shut down and removed from the emissions inventory as a source of emissions at the Sonoco facility." Letter from Stephen Rothblatt, Director, Air and Radiation Division, to Mr. Paul Dubenetzky, Assistant Commissioner, Office of Air Quality, Indiana Department of Environmental Management, February 14, 2006.

There, even though the unit had been removed from the emissions inventory, Mr. Rothblatt stated, "we find that all of the actual emission reductions should be available and creditable because the reductions resulting from the shutdown of the Tower 7 coating line were not 'required by the Act'." *Id.* Therefore, even though the 2005 Illinois inventory does not include emissions for many of Chicago Coke's emission units, the lack of emissions in the inventory should not be an impediment to Chicago Coke's ability to generate ERCs.

VI. CONCLUSION

The Illinois EPA has recognized that Chicago Coke had not shut down as of April 28, 2005. Since Chicago Coke did not shut down before the Chicago Area was designated as a nonattainment area for any pollutant, the first clause of Section 203.303 is inapplicable. The second clause of Section 203.303 is also inapplicable because the USEPA has approved the attainment demonstration under which permitting in the matter at hand will be accomplished. Further, Section 203.303 was promulgated to comply with federal intentions which have since been altered by federal guidance and by rule. Chicago Coke has an active CAAPP permit. The Illinois EPA continues to bill Chicago Coke for Title V fees and Chicago Coke continues to pay such fees. Any use of the emissions of Chicago Coke for an attainment demonstration or for RFP would not be permanent or enforceable so long as Chicago Coke maintains its CAAPP permit. For these reasons, and for the reasons discussed herein, Chicago Coke respectfully requests that the Illinois EPA acknowledge its ability to create ERCs based on the potential shutdown of its facility. As you are aware, this matter involves several transactions. A timely response would be greatly appreciated.

Sincerely,

Katherine D. Hodge

KDH:GWN:had

COKE-001\Corr\John J. Kim Ltr - Offsets July 2007

CERTIFICATE OF SERVICE

I, THOMAS H. SHEPHERD, do certify that I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board a Notice of Filing and The Illinois Environmental Protection Agency's Response to Petitioner's Motion to Strike, Directed to IEPA's Motion for Summary Judgment and caused them to be served this 3rd day of October, 2012, by emailing true and correct copies of same upon the persons and e-mail addresses listed on the foregoing Notice of Filing at of before the hour of 5:00 p.m.

THOMAS H. SHEPHERD