ILLINOIS POLLUTION CONTROL BOARD
May 2, 2013

CHICAGO COKE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-75
	)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent,	)	
	)	
NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB,	)	
	)	
Intervenors.	)	

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On March 29, 2010, Chicago Coke Company (Chicago Coke) appealed the Illinois Environmental Protection Agency's (IEPA) determination that Chicago Coke's emission reduction credits (ERCs) are not available as emission offsets. Chicago Coke seeks to sell its ERCs to a buyer located in the same non-attainment area. On January 14, 2011, the Natural Resources Defense Council (NRDC) and the Sierra Club (collectively, NRDC/Sierra Club) filed a motion to intervene, which the Board granted on April 21, 2011.

Chicago Coke, IEPA, and NRDC/Sierra Club have each filed motions for summary judgment. Each party has responded to the motions. Based on the arguments and the record in this proceeding, the Board finds that there are no genuine issues of material fact and summary judgment is appropriate. Further, the Board finds that Chicago Coke has established that its ERCs are valid under Illinois law, and the Board grants Chicago Coke's motion for summary judgment. The Board therefore denies IEPA's and NRDC/Sierra Club's motions for summary judgment.

PROCEDURAL HISTORY

On March 29, 2010, Chicago Coke timely filed a petition for review (Pet.) with the Board, seeking review of a February 22, 2010, IEPA decision to deny the use of ERCs as offsets. Pet. at Exh. D. IEPA wrote that the denial letter issued February 22, 2010, was IEPA's final decision, and IEPA would not consider the matter further. *Id.*

Prior to filing the appeal with the Board, on March 26, 2010, Chicago Coke filed suit in Cook County Circuit Court in response to IEPA's letter of February 22, 2010. In the petition for

review, Chicago Coke requested a stay pending the outcome of the circuit court case. Pet. at 2. On May 6, 2010, the Board granted the stay without accepting the petition for hearing.

On June 11, 2010, IEPA filed a motion to vacate the stay and to dismiss the petition for review. On June 28, 2010, Chicago Coke responded to the motion to vacate the stay and filed a response in opposition to the motion to dismiss. On June 30, 2010, IEPA filed a motion for leave to reply and on July 6, 2010, Chicago Coke filed a response to the motion for leave to file a reply and a motion for leave to file a surreply. On July 12, 2010, IEPA responded to Chicago Coke's response to the motion for leave to file a reply and the motion to file a surreply. On July 15, 2010, the Board granted the motions for leave to file replies and surreplies. On July 22, 2010, Chicago Coke filed a surreply in opposition of the motion to dismiss.

On September 2, 2010, the Board lifted the stay, denied the motion to dismiss, accepted the petition for hearing, and renewed the stay pending circuit court action. Specifically, the Board found "that the Board is authorized by Section 5(d) of the Act (415 ILCS 5/5(d) (2008)) to hear this appeal and that IEPA's February 22, 2010 letter was a final decision." Chicago Coke, PCB 10-75, slip op. 7 (Sept. 2, 2010). The Board noted that the "Board's regulations include regulations over an emission reduction market system (35 Ill. Adm. Code 205) and rules on nitrogen oxide (NO_x) (35 Ill. Adm. Code 217.Suppart U, V and W)." *Id*.

On September 24, 2010, IEPA filed a motion to reconsider. On October 8, 2010, Chicago Coke filed a response in opposition to IEPA's motion to reconsider. On October 21, 2010, the Board denied the motion to reconsider.

On January 14, 2011, the NRDC/Sierra Club filed a joint motion for leave to intervene pursuant to Section 101.402 of the Board's rules (35 Ill. Adm. Code 101.402). On February 1, 2011, Chicago Coke filed a response in opposition to the motion for leave to intervene, and IEPA also filed a response to the motion for leave to intervene. On February 7, 2011, NRDC/Sierra Club moved for leave to reply to both parties' responses to NRDC/Sierra Club's motion to intervene. On February 15, 2011, IEPA filed a motion seeking to respond to the motion for leave to file a reply filed by NRDC/Sierra Club's motion for leave to reply and a reply to Chicago Coke's response in opposition of NRDC/Sierra Club. On February 16, 2011, Chicago Coke filed a response to NRDC/Sierra Club's motion for leave to file a reply. On February 18, 2011, Chicago Coke filed a response to IEPA's motion for leave to file a reply.

On February 4, 2011, Chicago Coke moved to lift the stay and waived the decision deadline until November 4, 2011. The Board received no responses to the motion and thus any objection to the granting of the motion was waived. *See* 35 Ill. Adm. Code 101.500(d). On April 21, 2011, the Board granted that motion and lifted the stay in this proceeding. In addition, the Board granted NRDC/Sierra Club's motion to intervene.

On June 13, 2011, IEPA filed the administrative record in this proceeding (R). On September 14, 2012, IEPA filed a supplement to the record (SR).

On August 17, 2012, the parties each filed a motion for summary judgment (IEPA Mot., NRDC Mot., and CC Mot.). Also on August 17, 2012, IEPA filed an affidavit by Laurel Kroack,

chief of the Bureau of Air (Affid.), in support of IEPA's motion for summary judgment. On September 19, 2012, the parties each filed responses to the motions for summary judgment (IEPA Resp., NRDC Resp., CC Resp. to NRDC and CC Resp. to IEPA.). On October 3, 2012, IEPA filed a motion for leave to file a reply to Chicago Coke's response to its motion for summary judgment (Reply) along with its reply. The Board grants the motion and accepts the reply.

On September 19, 2012, Chicago Coke filed motions to strike portions of IEPA's and NRDC/Sierra Club's motions for summary judgment. On October 3, 2012, IEPA and NRDC/Sierra Club responded to the motion to strike. On October 17, 2012, Chicago Coke filed motions for leave to file replies along with the replies. The Board granted the motion for leave to file a reply. In an order on December 20, 2012, the Board denied the motions to strike, but noted that Chicago Coke had not responded to the arguments it sought to have stricken. The Board granted Chicago Coke additional time to respond to the arguments.

On January 31, 2013, Chicago Coke filed its response (CC Supp. to IEPA and CC Supp. to NRDC). On February 14, 2013, IEPA filed a motion for leave to file a reply along with reply to Chicago Coke's supplemental response (SReply). The Board grants IEPA's motion to file a reply.

FACTS

Chicago Coke operates a coke facility located at 11400 South Burley Avenue, Chicago, Cook County. Chicago was classified as a non-attainment area for ozone and fine particulate matter ($PM_{2.5}$), pursuant to the Clean Air Act (CAA) (42 U.S.C. §7401 *et. seq.*)[1]. Pet. at 1; Affid. at 2. The facility consists of sixty coke ovens, joined together in an arrangement known as a battery. R. at 80. There is an accompanying by-products recovery plant. *Id*. The coke battery was used to manufacture metallurgical coke. *Id*.

The facility was formerly owned by LTV Steel, Inc. (LTV), which operated the facility until December 2001. R at 283, 807. LTV placed the coke oven battery into hot idle mode in December 2001 and ceased operation of the coke oven battery. The hot idle mode is used in shutting down these facilities to protect the equipment in order to be brought back into production. *Id*. In February 2002, LTV stopped natural gas firing for the battery and placed the battery into cold idle mode. *Id*. On December 30, 2002, Calumet Transfer, LLC bought the facility and Chicago Coke was organized to operate the facility. *Id*. At the time of purchase the facility was not in operation. R at 1604. On July 14, 2003, IEPA transferred the existing Clean Air Act Permit Program permit (CAAPP) to Chicago Coke. *Id*.

At the time of purchase, Chicago Coke decided that a pad-up rebuild was necessary for long-term operation. R. at 807. During an IEPA inspection on May 7, 2004, the plant engineer informed IEPA that he believed the plant would one day manufacture coke, even while LTV proceeded in bankruptcy. R. at 83. The facility was brought to cold idle mode in a manner that

[1] The Board notes that the Chicago area was redesignated as attainment for ozone in August 2012. CC Supp. to IEPA at 3.

would possibly allow for the facility to be reopened at some point. *Id*. Although the facility had damage, engineers were developing plans to operate the coke plant, which included the pad-up rebuild. *Id*. Maintenance was performed on the facility between the placement in cold idle mode and the sale of the property and estimates were provided for the cost of re-starting the facility. R. at 84.

IEPA was informed that there was an employee on site that was an electrician. R. at 85. While the facility did have many maintenance issues, the coke battery did not show "obvious deficiencies" and the doors were all intact. *Id*. IEPA observed that the quench tower and combustion stack were still standing and no major structural damage was evident. *Id*. "Impression after the walk through" included that the equipment "for the most part seemed pretty good". *Id*.

Chicago Coke applied for a construction permit for a "pad up" rebuild of the facility on May 3, 2004. R at 807. IEPA issued a draft permit and initiated a public comment period on the draft construction permit. R at 284. A public hearing was held on the draft construction permit on January 25, 2005. R. at 2339-2422. IEPA witnesses indicated that Chicago Coke's facility was not a new source "because the source was not permanently shutdown." R. at 2346. IEPA's witness indicated that the goal of Chicago Coke was to resume operations as soon as possible because the market for coke had improved. *Id*. Witnesses for Chicago Coke testified concerning the reopening of the facility and having support from the community. R. at 2350-57.

In April 2005, IEPA issued a "Responsiveness Summary", which responded to comments received during the public comment period on the draft construction permit. R at 282-324. IEPA found in that summary that the facility was not "permanently shutdown". R at 305, 313. On April 28, 2005, IEPA approved Chicago Coke's construction application and issued a permit. R at 807-927. That construction permit expired on October 28, 2006. R at 1584.

IEPA considered factors found in federal guidance on a case-by-case basis when determining whether a facility is permanently shutdown, with no one factor being determinative. Affid. at 2. Those factors include: 1) the reason for the shutdown, 2) the owners' intent, 3) the time the facility or source was out of operation, 4) costs and time to reactivate the source or facility, 5) permit status, 6) ongoing maintenance and inspections conducted since the shutdown, and 7) how the State handled the shutdown. Affid. at 2-3.

Specifically in 2005, IEPA relied on the representations by Chicago Coke that it intended to restart the facility in the near future as well as the evidence of maintenance and inspection at the facility. Affid. at 3. IEPA also relied on the inclusion of the facility in the State's emissions inventory, the renewal of the CAAPP in September of 2004 and the non-demolition of the buildings. *Id*.; R. at 325.

On June 1, 2007, IEPA met with Chicago Coke and representatives of Chicago Clean Energy, LLC to discuss the availability of ERCs, and at that meeting IEPA indicated that it would consider the availability of ERCs. R. at 1580. Later, on July 11, 2007, Chicago Coke met with and informed IEPA that it no longer planned to reopen the facility, but instead to sell ERCs to another buyer in the same nonattainment area. Affid. at 4; R at 1584, 1593. At that meeting

IEPA expressed concerns about the availability of ERCs for use as emission offsets by another facility. Affid. at 4. On August 3, 2007, Chicago Coke sent a letter to IEPA, which addressed concerns raised at the July 11, 2007 meeting. R. at 1584-92. Specifically, Chicago Coke stated that it did not shutdown prior to April 28, 2005, and therefore Chicago Coke has the ability to create ERCs based on the potential future shutdown of the facility. R at 1592. Chicago Coke also indicated that it had entered into a letter of intent to sell offsets of 55.9 tons of Volatile Organic Materials (VOM) ERCs, 1067 tons of NO_x ERCs and 156.9 tons of PM_{10} ERCs. R. at 1585.

During several meetings, IEPA expressed to Chicago Coke its policy that ERCs from facilities that have been permanently shutdown for five years may no longer be used. Affid. at 4; R 1589-90. At one such meeting, on January 17, 2008, Ms. Kroack orally stated that IEPA would not recognize the ERCs because Chicago Coke had shutdown more than five years ago. R. at 1580-81. Ms. Kroack agreed to reconsider the determination if presented with proof that IEPA has recognized ERCs from shutdowns in permits issued more than five years beyond the shutdown. R at 1580-81. Chicago Coke sent a second letter was to IEPA on July 18, 2008, seeking to further explain why the ERCs should be available. R. at 1580-83.

The July 18, 2008 letter to IEPA presented a list of instances in which ERCs were recognized in a facility that had shutdown more than five years prior. R at 1580-83. IEPA did not respond, and on January 15, 2010, Chicago Coke wrote the third letter in which Chicago Coke requested that IEPA issue a final decision regarding the matter. R at 1578-79. On February 22, 2010, IEPA wrote a letter confirming that IEPA does not find the ERCs to be available as offsets, and that IEPA believes that Chicago Coke is permanently shutdown. R at 1597. IEPA also stated that this is IEPA's final position on the issue. *Id*. The February 22, 2010 letter stated, in part:

> Based on a discussion I had with Laurel Kroack, Bureau Chief for the IEPA's Bureau of Air, I can confirm for you that the IEPA's final decision on this issue remains the same as previously conveyed to you. That is, the IEPA 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. R. at 1593.

Ms. Kroack stated that IEPA's decision that the ERCs were not available and Chicago Coke was permanently shutdown was based on the same federal guidance used in 2005 as well as the facts before IEPA in 2010. Affid. at 4. The factors IEPA relied on included that: 1) the facility had not operated for eight years, 2) Chicago Coke failed to perform the repairs necessary to reopen the facility, and 3) in 2007 Chicago Coke admitted it did not intend to restart the facility. *Id*. In addition, Chicago Coke reported zero emissions of regulated air pollutants from 2003 through 2008, and overall emissions were reported as minimal from 2004 and 2005. Affid. at 5, citing R. at 471-806, 1201-1435. Ms. Kroack stated that the costs to restart the coking operation were estimated in 2004 to be between $88 million and $1.2 billion, and by 2010 those cost were likely much greater. Affid. at 5.

Another factor that IEPA considered in deciding that Chicago Coke was permanently shutdown was that Chicago Coke also stopped paying operating fees in 2008 and did not submit air emission reports for 2009 and later years. Affid. at 5. Finally, IEPA had removed the facility from the State's emissions inventory in 2008. Affid. at 5-6, citing R. at 2285. As a result that removal, the State's maintenance plan submitted to USEPA in 2009 with a request for redesignation of the Chicago nonattainment area with regard to the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS), includes zero emissions for the facility. Affid. at 6, citing R. 2286.

IEPA analyzed the facts using federal rules (40 CFR § 51.165) and federal guidance to determine if emission reductions from facilities that have been permanently shutdown are creditable. Affid. at 6. IEPA also looked to the Board's rules at Section 203.303 (35 Ill. Adm. Code 203.303). *Id*. Ms. Kroack stated that the factors include:

1. the location of the source of emission reductions;

2. an examination of applicable regulations or consent orders to determine if the emission reductions to be used as offsets are in fact surplus, permanent, quantifiable, and enforceable;

3. the timing of the emission reductions; and

4. whether the emission reductions have been relied upon in a permit or for demonstrating attainment or reasonable further progress. *Id*.

Ms. Kroack stated that the express purpose of emission offsets under the CAA is to ensure that emissions from new sources do not impede an area's movement toward attainment of NAAQS or reasonable further progress towards attainment. Affid. at 6-7. Ms. Kroack indicated that IEPA uses five years as a "guideline" with regard to availability of emission reductions for use as offsets following the permanent shutdown of a facility. Affid. at 7. Ms. Kroack opined that this five-year guideline is consistent with the "State's responsibility for, and authority and discretion over, attainment planning." *Id*. Emissions more than five years old are "deemed" to have expired and the time runs from when the facility is "deemed to have permanently shutdown." *Id*. The basis for IEPA's practice is the five-year timeframe allowed for "netting" contemporaneous emission increase and decreases at a source when determining if a modification is a major modification under New Source Review (NSR). *Id*.

Ms. Kroack stated:

> In regard to the Facility, the IEPA analyzed the factors set forth in the pertinent federal guidance and determined that the February 2002 shutdown of the Facility constituted a permanent shutdown. At the time of the IEPA's decision in 2010, the age of the emission reductions from the shutdown was well-past the Five-Year Guideline, and in fact the emission reductions were used by the State to demonstrate continued attainment, and as such they were unavailable for use as Emission Offsets in any future permitting transactions. Affid. at 7.

STATUTORY AND REGULATORY BACKGROUND

The Board is reviewing IEPA's decision pursuant to Section 5(d) of the Act, which provides:

> The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of IEPA's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. 415 ILCS 5/5(d) (2010).

The Board's rules on emissions offsets are found at Section 203.303 (35 Ill. Adm. Code 203.303), Section 203.303 provides:

a) An emission offset must be obtained from a source in operation prior to the permit application for the new or modified source. Emission offsets must be effective prior to start-up of the new or modified source.

b) The emission offsets provided:

1) 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;

2) Must, in the case of a fuel combustion source, be based on the type of fuel being burned at the time the permit application is filed, and, if offset is to be produced by a future switch to a cleaner fuel, be accompanied by evidence that long-term supplies of the clean fuel are available and a commitment to a specified alternative control measure which would achieve the same degree of emission reduction if return of the dirtier fuel is proposed;

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 of [sic] area is designated a nonattainment area for the pollutant, whichever is more recent, and, until the United States Environmental Protection Agency 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;

4) Must be federally enforceable by permit;

5) Must not have been previously relied on, as demonstrated by the Agency, 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.

c) The baseline for determining the extent to which emission reductions are creditable as offsets shall be the actual emissions of the source from which the offset is to be obtained, to the extent they are within any applicable emissions limitations of this Chapter or the Act or any applicable standards adopted by USEPA pursuant to Section 111 and 112 of the Clean Air Act, and made applicable in Illinois pursuant to Section 9.1 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1009.1) [415 ILCS 5/9.1].

d) The location of sources providing the emission reductions to fulfill the offset requirements of this Section:

1) Must be achieved in the same nonattainment area as the increase being offset, except as provided as follows:

A) An owner or operator may obtain the necessary emission reductions from another nonattainment area where such other area has an equal or higher nonattainment classification than the area in which the source is located, and

B) The emission reductions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the new or modified source is located.

2) Must, for particulate matter, sulfur dioxide and carbon monoxide, be such that, relative to the site of the proposed new or modified source, the location of the offset, together with its effective stack height, ensures a positive net air quality benefit. This shall be demonstrated by atmospheric simulation modeling, unless the sources providing the offset are on the same premises or in the immediate vicinity of the new or modified source and the pollutants disperse from substantially the same effective stack height. In determining effective stack height, credit shall not be given for dispersion enhancement techniques. The owner or

operator of a proposed new or modified source shall perform the analysis to demonstrate the acceptability of the location of an offset, if the Agency declines to make such analysis. Effective stack height means actual stack height plus plume rise. Where actual stack height exceeds good engineering practices, as determined pursuant to 40 CFR 51.100 (1987) (no future amendments or editions are included), the creditable stack height shall be used.

e) Replacement of one volatile organic material with another of lesser reactivity does not constitute an emission reduction.

f) Emission reductions otherwise required by the Clean Air Act (42 U.S.C. 7401 et seq.) shall not be creditable for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by the Clean Air Act shall be creditable as emission reductions for such purposes if such emissions reductions meet the requirements of this subpart.

The parties also refer to a federal rule that provides:

(C)(1) Emissions reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs (a)(3)(ii)(C)(1)(i) through (ii) of this section.

(i) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

(ii) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units. 40 C.F.R. § 51.165 (a)(3)(ii)(C)(1).

STANDARD FOR SUMMARY JUDGMENT

The Board has received cross-motions for summary judgment from the parties. Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing

party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id*., *citing* Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

IEPA'S MOTION

IEPA notes that Chicago Coke is seeking review of IEPA's decision that emission reductions claimed by Chicago Coke are not available as emission offsets for the permitting of a major new source or modification in the Chicago ozone and $PM_{2.5}$ nonattainment area. IEPA Mot. at 1-2. IEPA claims that its decision is supported by federal and state law. IEPA Mot. at 3. The Board first summarizes IEPA's arguments and then summarizes Chicago Coke's response to IEPA's motion. The Board then summarizes IEPA's reply.

IEPA's Arguments

IEPA maintains that for nearly three years IEPA and Chicago Coke met and discussed the issue of whether or not emission reductions from the facility would be available as ERCs. IEPA Mot. at 2. IEPA determined that, based on federal guidance, ERCs were not available as the facility was permanently shutdown and the credits are no longer available. *Id*. IEPA insists that the facility was permanently shutdown in 2002 because Chicago Coke did not demonstrate a continuous intent to reopen the facility as required by federal guidance. *Id*. Therefore, IEPA contends that the emissions reduction were no longer available as ERCs. *Id*. IEPA relied on the following for its decision:

1. The facility was shutdown and physically unable to produce coke since at least February 2002;

2. Chicago Coke never operated the facility;

3. Since 2003, Chicago Coke reported zero emission of regulated air pollutants from the coking operation;

4. In 2004, repairs necessary to restart the facility were estimated to cost between $88 million and $1.2 billion;

5. Chicago Coke did not make the necessary repairs under the 2005 construction permit;

6. In 2007, Chicago Coke informed IEPA that it no longer intended to re-operate the facility;

7. The emissions from the facility were removed from the State's emission inventory in 2008;

8. Chicago Coke ceased paying operating fees in 2008; and

9. The emissions from the facility were not included in the State's emission inventory and were counted as zero emissions for purposes of the State's demonstration of continued attainment of the 1997 8-hour ozone NAAQS in 2009. IEPA Mot. at 2-3.

Based on these factors, IEPA argues that allowing Chicago Coke to use emission reductions from the facility as ERCs would be contrary to federal and state laws and regulations. IEPA Mot. at 3.

Facility Was Permanently Shutdown

IEPA explains that Section 173 of Part D of the CAA (42 U.S.C. §7503(c)) establishes permitting requirements for new major stationary sources and includes a requirement that emissions be offset when constructing in a nonattainment area. IEPA Mot. at 13. IEPA notes that emission offsets "complement" the mandate in Section 172 of the CAA (42 U.S.C. §7502(c)) that states' nonattainment planning must include reasonable further progress toward attainment.

IEPA comments that the Board's rules at Part 203 (35 Ill. Adm. Code 203) set forth requirements for construction and modification of major stationary sources in nonattainment areas. Section 203.303 generally requires a major new source or modification to obtain ERCs. IEPA Mot at 14. IEPA maintains that in interpreting and applying Section 203.303, IEPA looks to several factors to determine if ERCs are available.

IEPA acknowledges that "permanent shutdown" is not defined; however the United States Environmental Protection Agency (USEPA) has issued guidance relevant to a determination that a facility is permanently shutdown. IEPA Mot. at 14. IEPA states that a general policy of USEPA is that whether or not a facility is permanently shutdown:

> depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. *Id*., citing R at 5, 7-10, 13, 16.

IEPA argues that the intent behind a shutdown is examined using several factors on a case-by-case basis with no one factor being determinative. IEPA Mot. at 15, citing In re Monroe Elec. Gen. Plant Entergy Louisiana, Inc. Proposed Op. Permit, Pet. No 6-99-2, slip op. 8-9 (R at 39-65). IEPA notes that those factors include:

1. The reason for the shutdown;

2. Statements by the owner or operator regarding intent;

3. Duration of time the facility has been out of operation;

4. The costs and time required to reactivate the facility;

5. Status of permits;

6. Ongoing maintenance and inspections that have been conducted during shutdown; and

7. The handling of the shutdown by the State. *Id*., also citing R at 5, 7-10, 13-15, and 16-17

In particular, IEPA claims that determining if a facility is permanently shutdown will involve judgment as to whether the owner or operator's actions during shutdown support or refute an expressed statement of intent. IEPA Mot. at 16, citing R at 46-47, 13-15. IEPA argues that a shutdown lasting two or more years or that results in the removal of a source from the emissions inventory of a state is presumed permanent. IEPA Mot. at 16, citing R at 7-10, 13-15. The owner or operator would have to overcome a presumption that the shutdown was permanent to reopen the source. *Id*.

IEPA asserts that after a two-year shutdown, statements by the owner or operator of an intent to re-operate a facility "are not to be considered determinative"; rather an assessment must be made as to whether the owner or operator "demonstrated a continuous intent to reopen" the facility. IEPA Mot. at 16, citing R at 47. IEPA maintains that this determination is made by looking at the activities during the shutdown. *Id*. IEPA claims that USEPA policy is that "owners and operators of shutdown facilities must continuously demonstrate concrete plans to restart the facility sometime in the foreseeable future." IEPA Mot. at 17, citing R. at 47. If an owner or operator fails to make this demonstration, IEPA claims that this suggests that for at least a period of time the shutdown was intended to be permanent. *Id*., also citing Communities for a Better Env't v. CENCO Refining Co., 179 F.Supp.2d 1128, 1146 (C.D. Cal. 2001); R. at 1440, 1459. IEPA argues that this approach is consistent with the general proposition that a company cannot sit indefinitely on emission credits. IEPA Mot. at 17.

IEPA maintains that it considered the factors set forth in the federal guidance to determine that Chicago Coke's facility was permanently shutdown. IEPA Mot. at 17. IEPA asserts that without question the facility ceased operation in 2002, went into cold-idle, and could not promptly be restarted without significant repairs. *Id*. IEPA further asserts that after going into cold-idle, the facility never restarted, never emitted any regulated air pollutants from coking operations, and was not in physical condition to make long-term coke production a possibility. IEPA Mot. at 18. Moreover, IEPA argues that when it made its decision on February 22, 2010, the facility had not operated in eight years and since it had not operated for more than two years, based on the federal guidance, the facility was presumed to be shutdown. *Id*.

IEPA argues that Chicago Coke's actions did not demonstrate a continuous intent to reopen the facility. IEPA Mot. at 18. IEPA concedes that Chicago Coke received a construction permit, but Chicago Coke did not perform the pad-up rebuild. *Id*. IEPA notes that the construction permit expired, and Chicago Coke began negotiations for the potential sale of the

facility and claimed ERCs. *Id*. In 2007, Chicago Coke informed IEPA of its intent to sell the facility. *Id*.

IEPA acknowledges that Chicago Coke did possess a CAAPP permit to operate the facility at the time of IEPA's decision; however, the necessary construction permit had lapsed in 2006, and this rendered the CAAPP permit moot. IEPA Mot. at 18. IEPA reiterates that the facility was not physically able to operate from 2002. *Id*. IEPA further notes that Chicago Coke stopped paying CAAPP program fees in 2008 and stopped submitting air emissions reports (AERs) from 2009 forward. IEPA Mot. at 19.

IEPA also considered the cost and time necessary to restart the facility in deciding that the facility was permanently shutdown. IEPA Mot. at 19. IEPA argues that the cost and time necessary made "a future restart of the coking operation highly unlikely if not practically impossible." *Id*.

IEPA points out that the State's handling of the shutdown included the removal of the emissions from the State's emissions inventory in 2008. IEPA Mot. at 19. The emissions were not considered when IEPA submitted Illinois' maintenance plan to USEPA in support of a request for redesignation of the nonattainment area. *Id*. As to IEPA's decision during the 2005 construction permit process that the facility was not permanently shutdown, IEPA claims that absent Chicago Coke performing the pad-up rebuild and beginning operation of the facility, the date of the shutdown is February 2002, when the facility was placed in cold-idle. *Id*. IEPA argues that no subsequent determination by IEPA did or could alter the finding that the facility was shutdown in February 2002; the question is whether the shutdown was permanent. *Id*.

IEPA maintains that its decision that the facility was not permanently shutdown in 2005 was based on Chicago Coke's overcoming the presumption that the facility was not permanently shutdown. IEPA Mot. at 19. Chicago Coke presented facts and circumstances in 2005, which were not present in 2010. IEPA Mot. at 19-20. In 2010, in addition to the facility's inoperation for eight years and its existing condition, Chicago Coke admitted it did not intend to restart the facility. IEPA Mot. at 20. Therefore, in 2010, IEPA argues Chicago Coke could not demonstrate a continuous intent to reopen the facility. *Id*. IEPA opines that the facts support IEPA's decision that Chicago Coke's facility was permanently shutdown in 2002.

Emission Reduction Credits Are No Longer Available

IEPA notes that USEPA provides guidance regarding the use of ERCs, including that ERCs are not an absolute property right. IEPA Mot. at 21, citing R. at 37-38. IEPA argues that to hold that ERCs are an absolute right would impair Illinois's efforts in regulating air emissions in nonattainment areas. *Id*.

IEPA reviews several factors contained in the federal rules and Section 203.303 to determine if ERCs are available. IEPA Mot. at 21. Those factors include:

1, The location of the source of the emission reductions;

2. An examination of applicable regulations or consent orders to determine if the emission reductions to be used as offsets are in fact surplus, permanent, quantifiable, and enforceable;

3. The timing of the emission reductions; and

4. Whether the emission reductions have been relied upon in a permit or for demonstrating attainment or reasonable further progress. *Id*.

IEPA "generally uses five years as a 'guideline' with regard to the availability of credits." IEPA Mot. at 22. IEPA claims that this practice is consistent with Illinois' responsibility for and authority over attainment planning and emission over five years old are deemed to have expired. *Id*. IEPA maintains that this guideline provides finality to the availability of ERCs and is based on the practice of allowing a five-year timeframe for "netting" contemporaneous emission increases and decreases at a source when determining if a modification is major. *Id*. IEPA opines that the concepts of netting and offsetting are similar, and so IEPA uses the same five-year timeframe. *Id*.

IEPA explains that, in this case, based on the factors discussed previously, IEPA determined that the facility was permanently shutdown in February 2002. IEPA Mot. at 23. Thus, IEPA claims that the age of the emissions reductions was well past the five-year guideline and had been removed from the Illinois emission inventory. *Id*.

IEPA notes that Chicago Coke presented federal guidance which stated that ERCs can continue to exist as long as the emissions are in the inventory, and ERCs expire only when used or relied upon when issuing a permit or used in a demonstration of reasonable further progress. IEPA Mot. at 19. IEPA opines that Chicago Coke "appears to suggest" that the only way ERCs expire is through the methods described in the federal guidance provided by Chicago Coke. *Id*. IEPA asserts that even accepting that premise, the emissions from the facility were removed from the emissions inventory and therefore cannot be available. IEPA Mot.at 24.

IEPA addresses arguments by Chicago Coke that the five-year guideline has been applied inconsistently. IEPA Mot. at 25. IEPA argues that Chicago Coke mistakes IEPA's position, and Chicago Coke looked only to the timing of emission reductions. *Id*. However, IEPA maintains the timing and age of emission reduction is only one factor and is not necessarily determinative. *Id*.

Allowing Chicago Coke to Claim ERCs is Contrary to Federal Law and Board Regulations

IEPA notes that the CAA requires Illinois to maintain a "comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant" in nonattainment areas. IEPA Mot. at 26, citing 42 U.S.C. §7502(c). According to IEPA, the emissions inventory is relied upon by states and USEPA to determine the nature and extent of control strategies necessary to reach attainment in an area. IEPA Mot. at 27. If emissions reductions have been used as offsets for demonstrating attainment, IEPA indicates that the emission reductions are no longer available as credits. *Id*. IEPA submitted a required maintenance plan in 2009 to support

redesignation of the Chicago area as attainment for the 1997 eight hour ozone NAAQS. *Id.*, citing R at 2286-2338. IEPA removed the emissions from the facility from Illinois' emission inventory and thus were not included in the 2009 maintenance plan. *Id*. Therefore, IEPA asserts that the emission reductions are no longer available as ERCs for Chicago Coke facility. IEPA Mot. at 28.

Chicago Coke's Response

Chicago Coke claims that this case is simpler than IEPA suggests. CC Resp. to IEPA at 1. Chicago Coke argues that the issues are whether there is applicable federal guidance that prohibits the use of ERCs from permanently shutdown facilities, and was Chicago Coke's facility permanently shutdown. *Id*. Chicago Coke opines that IEPA's arguments establish an inherent problem in the way IEPA made its decision in that IEPA inappropriately applied federal policy statements in making its decision. *Id*. at 2. Furthermore, Chicago Coke opines that IEPA changed its position on whether and when the facility was permanently shutdown. *Id*.

IEPA's Reliance on Federal Guidance is Misplaced

Chicago Coke argues that IEPA relied on a "patchwork of inapplicable memos from various USEPA officials dating back more than 30 years" to determine that Chicago Coke's facility was permanently shutdown. CC Resp. to IEPA at 3. Chicago Coke asserts that there are "glaring flaws" in IEPA's arguments that federal guidance supports IEPA's decision that the facility was permanently shutdown. *Id*. Specifically, Chicago Coke maintains that the federal guidance cited and relied upon by IEPA deals with whether a facility is permanently shutdown in the context of determining whether the prevention of significant deterioration (PSD) regulations apply, not whether or not ERCs are valid. *Id*. at 4. Chicago Coke claims that the memos and even cases relied upon by IEPA all address whether PSD regulations apply in the case of a shutdown that might be determined to be permanent. *Id*. at 4-6. Chicago Coke "does not contest" that a new facility at the Chicago Coke site would need emission offsets, but that is what makes Chicago Coke's offsets so valuable. *Id*.

IEPA's 2005 Determination Must Stand

Chicago Coke argues that in April 2005, IEPA determined that the facility was not permanently shutdown and in 2010 cannot make the opposite conclusion. CC Resp. to IEPA at 7. Chicago Coke asserts that IEPA's 2005 determination was reached after IEPA made an analysis of Chicago Coke's operation and intent. *Id*. IEPA made the determination that the facility was not permanently shutdown in issuing a construction permit; thus Chicago Coke maintains as of April 2005 the facility was not permanently shutdown. *Id*.

Chicago Coke argues that IEPA now contradicts itself and claims the facility was permanently shutdown in 2002, yet IEPA uses the same information to make its 2010 determination on permanent shutdown. CC Resp. to IEPA at 8. Chicago Coke points out that the affidavits relied upon by IEPA were in IEPA's possession in 2005 and there have been no significant changes in operation at the facility. *Id*. Chicago Coke acknowledges IEPA's reliance

on the failure to proceed with the pad-up rebuild; however, Chicago Coke asserts IEPA can cite to no authority that equates failure to exercise a permit equals permanent shutdown. *Id*. at 9.

Chicago Coke asserts that IEPA cannot simply change its April 2005 decision and now claim the facility was closed in 2002. CC Resp. to IEPA at 9. Chicago Coke maintains that at worst, permanent shutdown did not occur until after the expiration of the construction permit. *Id*.

Chicago Coke Was Not Permanently Shutdown for Five Years

Chicago Coke takes issue with IEPA's use of a five-year guideline as has not been promulgated as a rule. CC Resp. to IEPA at 9-10. However, Chicago Coke argues that even if the five-year guideline is appropriate, Chicago Coke had not been permanently shutdown for five years in 2010. *Id*. at 10. Chicago Coke maintains that the soonest that the facility could be considered permanently shutdown is after expiration of the construction permit as it cannot have been considered shutdown while a valid construction permit was held. *Id*. Thus, Chicago Coke opines that in February of 2010, when IEPA made its decision, five years had not elapsed from the issuance of the construction permit let alone the expiration of that permit. *Id*. at 11.

IEPA's Reliance on Removal of Emissions from Emissions Inventory Should Not be Persuasive

Chicago Coke notes that IEPA's reliance on its removal of emissions from the emissions inventory to claim that ERCs are no longer available "should not be countenanced". CC Supp. to IEPA at 2. Chicago Coke agrees that Section 203.303(b)(5) (35 Ill. Adm. Code 203.303(b)(5)) provides that emission offsets that have been relied upon for demonstrating attainment are not available ERCs. *Id*. However, Chicago Coke claims that IEPA included Chicago Coke's emissions in Illinois' compliance demonstration after Chicago Coke began seeking a determination regarding ERCs. *Id*. Chicago Coke notes that it began asking IEPA to recognize ERCs in 2007 and met with IEPA in June 2007, July 2007, and January 17, 2008. *Id*., citing R. at 1580-81. Chicago Coke submitted three written requests on August 3, 2007, July 18, 2008, and January 15, 2010. *Id*., citing R. at 1584-92, 1580-83, 1578-79. During this timeframe, while Chicago Coke was attempting to obtain a determination from IEPA, IEPA removed the Chicago Coke facility from the emission inventory on January 10, 2008. *Id*.

Chicago Coke argues that IEPA "manipulated" the system by removing Chicago Coke from the emissions inventory and using the removal to demonstrate compliance, while discussing the availability of ERCs with Chicago Coke. CC Supp. to IEPA at 3. Chicago Coke asserts that IEPA's claim that the emissions are no longer available for ERCs pursuant to Section 203.303 (35 Ill. Adm. Code 203.303) is a "convenient result" given Chicago Coke's attempts to have IEPA make a determination beginning in 2007. *Id*. Chicago Coke maintains that allowing IEPA to rely on Section 203.303 to prevent Chicago Coke's ERCs would allow IEPA to "manipulate the emissions inventory" to block otherwise valid ERCs. *Id*. at 4. Furthermore, Chicago Coke opines that Section 203.303 is inapplicable to Chicago Coke as Section 203.303 states that emissions offsets "must not have been *previously* relied on" to demonstrate attainment. *Id*., citing 35 Ill. Adm. Code 203.303(b)(5). Chicago Coke maintains that when it sought a determination from IEPA regarding ERCs, its emissions were included in the state inventory;

therefore, Chicago Coke opines the emissions could not have been relied upon for an attainment demonstration. *Id*.

Chicago Coke argues that if IEPA had made its determination more quickly, Section 203.303(b)(5) would not have applied. CC Supp. to IEPA at 4. Chicago Coke notes that IEPA did not remove the emissions from the emissions inventory until two years into Chicago Coke's process seeking a determination regarding ERCs. *Id*. If IEPA had acted more quickly, there would have been no previous use of offsets, but instead IEPA's delay "artificially created the situation to now allow IEPA to assert that Section 203.303(b)(5) bars the use of the ERCs." *Id*. at 4-5.

IEPA's Reply

IEPA asserts that Chicago Coke incorrectly claims that IEPA "flip flopped" in reaching the 2010 decision that that facility was permanently shutdown. Reply 1. IEPA claims that the facts were different in 2010, specifically noting that in 2010 the facility had been closed for eight years rather than three years in 2005; in 2010 Chicago Coke had stopped paying operating fees and submitting AERs; and the emissions had been removed from the emissions inventory in 2008. Reply at 2. IEPA maintains that each of these is a significant factor that must be considered, pursuant to federal guidance, when making determinations regarding a permanent shutdown. Reply at 3.

IEPA argues that the federal guidance it relied upon is appropriate for use when determining the availability of emission reductions for use as emission offsets. Reply at 4. IEPA acknowledges that the federal guidance used by IEPA is the guidance used for PSD; however, IEPA argues that guidance is also applicable in this context. *Id*. IEPA argues that timing of emission reductions, including when emission reductions occurred and whether reductions are permanent are key factors in IEPA's five-year guideline to determine expiration, but also to timing restrictions in Section 203.303 (35 Ill. Adm. Code 203.303) and 40 C.F.R. § 51.165. *Id*. IEPA opines that federal guidance regarding permanent shutdown is therefore instructive in determining the timing of the emission reductions in this instance. *Id*.

IEPA asserts that Chicago Coke in its response failed to address the federal guidance that allows Illinois to manage ERCs in a manner that is consistent with IEPA's five-year guideline. Reply at 4. IEPA reiterates that ERCs are not an absolute property right, and states have a right to discount ERCs. *Id*. IEPA claims that in general ERCs can exist as long as the emissions are included in the state's emissions inventory, but states may include expiration dates. Reply at 4-5.

As to the supplemental response, IEPA maintains that it is "complete with baseless and improper allegation". S. Reply at 1. IEPA argues that contrary to Chicago Coke's arguments, the "undisputed facts" demonstrate that IEPA did not remove the emissions from the emissions inventory to "'artificially create' a basis" for IEPA's determination. S. Reply at 2. IEPA asserts that it removed the emissions from the inventory because the facility had been shutdown for approximately six years at that point and there had been no emissions from coke production during that time. *Id*. IEPA claims that removal of the emissions was appropriate to maintain an accurate inventory. *Id*.

IEPA asserts that Chicago Coke fails to address the "numerous occasions" IEPA not only discussed, "but clearly communicated" to Chicago Coke that its emission reductions were not available for emission offsets. S. Reply at 3. IEPA claims that it is undisputed that such occasions included January 2008, the same month that the emissions were removed from the inventory. *Id.*

CHICAGO COKE MOTION

Chicago Coke seeks summary judgment claiming that there are no genuine issues of material fact. Chicago Coke reiterates many of its arguments from the response to IEPA's motion for summary judgment in Chicago Cokes own motion. Similarly, IEPA reiterates arguments from its motion for summary judgment in IEPA's response to Chicago Coke's motion. The Board will not restate all those argument here, but instead expands on those arguments. The Board begins with a summary of Chicago Coke's arguments followed by IEPA's response and then NRDC/Sierra Club's response.

Chicago Coke's Arguments

Chicago Coke argues that IEPA decided in 2005 that the facility was not permanently shutdown and then reversed itself in 2010 finding the facility had become permanently shutdown. CC Mot. at 1. Chicago Coke asserts the IEPA misapplied federal guidance to conclude that Chicago Coke's ERCs are not available. *Id*. Chicago Coke states that the issue is straightforward and limited: are Chicago Coke's ERCs available for offsets? *Id*. at 2. Chicago Coke maintains that the issue is *not* whether a source would be subject to new source review. *Id*. Chicago Coke continues that the issue is also *not* whether a source replacing Chicago Coke would need emission credits to operate. *Id*. Chicago Coke also maintains that the issue is *not* related to the surrogacy between PM_{10} and $PM_{2.5}$ as intervenors have attempted to contest. *Id*.

No Federal Guidance Prohibits the Use of Chicago Coke's ERCs

Chicago Coke maintains that the only basis for IEPA's decision is IEPA's claim that there is federal guidance that prohibits the use of ERCs from a source that permanently shuts down. CC Mot. at 6. Chicago Coke argues that neither the CAA nor federal regulations address the issue of availability of ERCs for a third party from a source that has been permanently shutdown. *Id*. Chicago Coke asserts that the federal guidance in the record addresses whether an existing facility, which has not been operating, is permanently shutdown for purposes of determining whether PSD regulations apply. *Id*. Chicago Coke asserts that the PSD determination is not relevant to the question of whether Chicago Coke can transfer ERCs. *Id*. at 7.

Chicago Coke examined the federal guidance in the record and asserts that it is not relevant to the issue in this case. CC Mot. at 7. Chicago Coke argues that one such document is a discussion of whether the shutdown of a source was permanent, which USEPA decided by looking to the intent of the operator. *Id*., citing R. at 6. Chicago Coke notes that USEPA's decision was that the source was a new source because the shutdown had been permanent. *Id*.

Another document in the record also is limited to a decision regarding the permanent shutdown of a source in relation to the question of whether or not the source is a new source or major modification. *Id*., citing R. at 7. Chicago Coke agrees that a new source at the Chicago Coke location would need emission offsets, and that is why Chicago Coke's ERCs are valuable. *Id*. at 8.

USEPA Guidance Allows the ERCs to Remain Transferable

Chicago Coke notes that one USEPA guidance addresses whether there is a timeframe on ERCs and if they expire. CC Mot. at 8. Chicago Coke claims that this guidance provides that, in general, emission offsets continue to exist as long as those exist in the emissions inventory. *Id*. USEPA has also recognized that states could promulgate a rule that allowed for expiration of ERCs; however Chicago Coke argues IEPA has not adopted such a rule. *Id*., citing R. at 31. Based on the USEPA guidance, Chicago Coke asserts that its ERCs remain valid and transferable. *Id*.

Chicago Coke's Facility Was Not Permanently Shutdown

Chicago Coke argues that contrary to IEPA's decision in this instance, IEPA had determined in 2005 that the facility was not permanently shutdown. CC Mot at 9. Chicago Coke asserts that IEPA indicated when making its decision in 2005, that Chicago Coke made considerable efforts when the facility was temporarily shutdown to reduce costs needed to restart the facility. *Id*. Chicago Coke further asserts that IEPA relied on the placement of the facility in hot-idle mode for a period, maintaining the equipment and not dismantling, and preserving the operating permit. *Id*. at 9-10. Chicago Coke maintains that the construction permit issued in 2005 included language that the facility was not a major new source because the source was not permanently shutdown. *Id*. at 10, citing R at 808. Chicago Coke argues that none of the factors, relied upon by IEPA in 2005, had changed when IEPA "inexplicably reversed itself" in 2010 and determined that the facility was permanently shut down in 2002. CC Mot. at 10.

Chicago Coke argues that even if the facility was permanently shutdown in 2010, the facility could not have been shutdown for five years when IEPA made its decision. CC Mot. at 11. Chicago Coke argues that the earliest expiration of five years would have been April of 2010, five years after the construction permit was issued. *Id*. IEPA's decision was made on February 22, 2010, before April of 2010. *Id*.

IEPA's Response

IEPA maintains that the purpose of emission offsets and new source review in general is to ensure that new sources do not impede progress toward attainment of NAAQS. IEPA Resp. at 2. IEPA claims that to further that purpose and be consistent with federal guidance, Section 203.303, and 40 C.F. R. § 51.165, IEPA examines the timing of emission reductions that new sources propose to use as emission offsets. *Id*. IEPA asserts that once a source is permanently shutdown, IEPA follows a five-year guideline. *Id*. Under the five-year guideline, emission reductions from a source that has been permanently shutdown for five years can no longer be

used by new sources as emission offsets in a nonattainment area. *Id*. IEPA opines that federal guidance clearly allows for such management of emission offsets. *Id*.

IEPA argues that Chicago Coke is incorrect that IEPA's 2010 decision was a reversal of its prior position, with no change in facts. IEPA Resp. at 2. IEPA maintains that facts did change in that: 1) the length of time that the facility had been shutdown was now eight years; 2) the construction permit was allowed to expire without repairs; 3) Chicago Coke expressed an intent to sell the property; 4) Chicago Coke stopped paying operating fees and submitting AERs; 5) the facility was removed from Illinois' emissions inventory; and 6) IEPA relied on the emission reductions in the course of attainment planning. *Id*. at 2-3. IEPA argues that the facts in 2010 establish that Chicago Coke did not plan to restart the facility and that the shutdown was permanent. *Id*. at 3. IEPA asserts that in 2010, the emission reductions were eight years old and under the five-year guideline were no longer available. *Id*.

Federal Guidance Supports IEPA's Decision

IEPA asserts that Chicago Coke mischaracterizes IEPA's decision in that IEPA is not claiming that federal guidance prohibits the proposed use of ERCs. IEPA Resp. at 5. IEPA explains that its decision is that, based on review and analysis of applicable federal guidance, the facility was permanently shutdown, and emission reductions from the permanently shutdown facility are no longer creditable. *Id*. IEPA insists that this decision was based on IEPA's application of federal guidance to the facts and circumstances surrounding Chicago Coke's ERCs. *Id*. at 5-6.

IEPA claims that federal guidance supports its decision. IEPA Resp. at 6. IEPA offers that USEPA provides significant guidance to states regarding the use of emission reductions as emission offsets and reiterates the arguments made in its motion for summary judgment. *Id*. IEPA notes that Chicago Coke relies on a federal guidance document that provides that ERCs continue to exist as long as the ERCs are in emissions inventories; however USEPA has expressly allowed that states may include expiration dates to manage emission offsets. *Id*. IEPA claims that nothing in the federal guidance requires Illinois to manage emission offsets in any one manner. *Id*. at 6-7.

IEPA argues that the five-year guideline is consistent with federal guidance that allows a state to place expiration dates on emission reductions. IEPA Resp. at 8. The five-year guideline is also consistent with Illinois' responsibility for and authority over attainment planning under the CAA. *Id*. IEPA maintains that the five-year guideline furthers the objectives of emission offsets and NSR to ensure that emission from new sources do not impede reasonable further progress toward attainment. *Id*. IEPA also maintains that the five-year guideline is based on the five-year timeframe allowed for "'netting' contemporaneous emission increases and decreases at a source when determining whether a source modification rises to the level of a major modification under NSR." *Id*., citing 35 Ill. Adm. Code 203.207 and 203.208.

IEPA takes issue with Chicago Coke's claim that the delay in IEPA's making its final decision should be excluded from the calculation of the five-year guideline. IEPA Resp. at 9. IEPA disagrees that there was a delay, arguing that prior to July 2008, IEPA expressed concerns

with the availability of ERCs from the facility and even advised that emission reductions were not creditable because of the five-year guideline. *Id*., citing R. at 1580-83. IEPA asserts that Chicago Coke was aware of IEPA's position. *Id*.

IEPA argues that Chicago Coke "revived" the issue in a letter dated January 15, 2010, requesting that IEPA consider additional information. IEPA Resp. at 10, citing R. at 1578-83. IEPA responded that it had not changed its position, and then a year and a half later Chicago Coke asked for a final decision. *Id*., citing R. at 1578-79. IEPA asserts that based on these facts, Chicago Coke's claims that the IEPA's decision was delayed are "misleading and empty". *Id*.

Facility Was Permanently Shutdown as of February 2002

IEPA opines that Chicago Coke's argument that the facility could not have been permanently shutdown at the time of IEPA's decision dismisses federal guidance defining permanent shutdown and fails to recognize that the date of the permanent shutdown must relate back to February 2002. IEPA Resp. at 10-11. IEPA reiterates its arguments from the motion for summary judgment delineating IEPA's understanding of the federal guidance. *Id*. at 11-13. IEPA argues that the federal guidance and issue of permanent shutdown are central to determining whether Chicago Coke can transfer emission reductions. *Id*., at 13. IEPA further argues that the timing of the emission reductions is also important under IEPA's five-year guideline as well as Section 203.303 (35 Ill. Adm. Code 203.303) and 40 C.F.R. §51.165. *Id*.

IEPA maintains that Chicago Coke's argument that the earliest a five-year period could expire is April of 2010 is based on an incorrect premise that IEPA's 2005 determination changed the date of shutdown of the facility. IEPA Resp. at 15. IEPA argues that the facility went into cold-idle in February 2002, and the facility was never able to physically operate after that date. *Id*., citing R at 1598-1616. IEPA asserts that absent Chicago Coke performing the pad-up rebuild and beginning operations, the date of shutdown "is and will continue to be February 2002" and no subsequent determination by IEPA can change that date. *Id*. at 16.

IEPA's 2010 Determination is Supported by the Facts

IEPA reiterates its arguments that the facts of the case support the IEPA's 2010 determination, and that the facts were different in 2005. IEPA Resp. at 13-15. IEPA argues that the facts and circumstances before the IEPA in 2010 were significantly different from the facts and circumstances in 2005. *Id*. at 15. Applying the federal guidance to the facts, IEPA maintains that Chicago Coke's actions did not establish a continuous intent to reopen the facility. *Id*.

NRDC/Sierra Club Response

NRDC/Sierra Club "support and concur" with IEPA's facts and reasoning set forth in IEPA's motion for summary judgment. NRDC Resp. at 1. NRDC/Sierra Club argue that along with IEPA's arguments, the conclusion that IEPA's determination was correct is evident. *Id*. NRDC/Sierra Club assert that Chicago Coke's motion presents no material facts to support Chicago Coke's "facially untenable position" that the facility has never actually shutdown. *Id*. at

1-2. NRDC/Sierra Club argue that Chicago Coke's motion appears to have two main arguments: 1) that no permanent shutdown had occurred in 2005 and 2) IEPA incorrectly relied on federal guidance. *Id*. at 2.

NRDC/Sierra Club assert that Chicago Coke's arguments are based on narrow and reductive readings of IEPA's determination and the federal guidance. NRDC Resp. at 2. Further, Chicago Coke ignores the significant changes that occurred in the status of the facility since 2005 and the existence of the Illinois State Implementation Plan (SIP) provision that prohibits the use of the credits regardless of the date of shutdown. *Id*. NRDC/Sierra Club maintain that both the Illinois SIP and federal law define limitations on the use of ERCs related to the timing of the shutdown and accounting for the emissions. *Id*. NRDC/Sierra Club claim that Chicago Coke is proposing that if a statement is made that at some point a source will reopen, but then does not, the ERCs should be available. *Id*. NRDC/Sierra Club maintain that such a position is unsupportable as a matter of law and would also be bad policy. *Id*.

Chicago Coke Presents No Facts Supporting its Position that the Facility Did Not Shutdown in 2002

NRDC/Sierra Club argue that the applicable Illinois SIP provision requires that, in order for emission reductions to be used as ERCs, the emission reductions must have occurred since April 24, 1979 or the date the area is designated as nonattainment area for the pollutant. NRDC Resp. at 3. NRDC/Sierra Club assert that, unless Chicago Coke can establish that shutdown occurred after the date of nonattainment determinations for NO_x or $PM_{2.5}$, the ERCs are invalid. *Id*. NRDC/Sierra Club point out that the NO_x nonattainment determination occurred on April 15, 2005, and the $PM_{2.5}$ determination was April 4, 2005. *Id*.

NRDC/Sierra Club argue that Chicago Coke has not made a showing that the permanent shutdown occurred before April 2005 and presented nothing to counter the facts that IEPA used to determine that the facility was permanently shutdown in 2002. NRDC Resp. at 3. NRDC/Sierra Club claim that Chicago Coke relies on IEPA's 2005 determination on the construction permit as the "sole slender thread" for Chicago Coke's argument that the facility was not permanently shutdown in 2002. *Id*. NRDC/Sierra Club claim that there were numerous changes in the facts surrounding the facility between 2005 and 2010, including Chicago Coke's stated intent regarding the facility. *Id*. at 3-4. In 2005, Chicago Coke's intent was to rebuild and restart; in 2007, Chicago Coke stated its intent to sell the facility. *Id*. at 4. NRDC/Sierra Club note that in 2005 Chicago Coke was paying CAAPP fees, but ceased in 2008; and the emissions from the facility were listed in the emission inventory in 2005, but removed in 2008. *Id*.

NRDC/Sierra Club opine that Chicago Coke is arguing that IEPA's acceptance of Chicago Coke's statement of intent, even though reversed later, should be given the legal effect of forestalling shutdown or delaying the actual date of shutdown during the period when Chicago Coke was intending to reopen. *Id*. NRDC/Sierra Club claim that neither of Chicago Coke's positions is supportable. *Id*. at 5. First, NRDC/Sierra Club maintain that the notion that the facility is not now permanently shutdown is factually unsupportable and "incoherent in context". *Id*. NRDC/Sierra Club opine:

> If the Facility has not permanently shut down – *i.e.*, if there were somehow still an actual possibility that it may start producing coke again – then there are no credits to sell. Chicago Coke would have to make a final decision as to whether to shut down the Facility (as it obviously has) before transferring the credits. *Id*.

NRDC/Sierra Club argue that Chicago Coke is attempting to create a loophole that would seek temporary or permanent tolling of the date of shutdown based on statements of intent by owners or operators of a source. NRDC Resp. at 5. NRDC/Sierra Club assert that the Illinois SIP and federal regulations make clear that the date of shutdown is critical in determining the validity of ERCs. *Id*. NRDC/Sierra Club opine that the restrictions exist for good reason, to ensure that the attainment planning process is not hindered by emissions that reemerge when accounting for inventory or attainment planning. *Id*. NRDC/Sierra Club claim that if a source owner or operator states an intent to reopen and that is all that is needed to allow emissions to remain forever available, this could render meaningless an essential safeguard built into the CAA nonattainment permitting program. *Id*. NRDC/Sierra Club opine that for this reason the USEPA's Environmental Appeals Board indicated there must be a continuous intent to reopen. *Id*. at 5-6, citing R. at 39-65, 47.

NRDC/Sierra Club maintain that Section 203.303 (35 Ill. Adm. Code 203.303) also does not support Chicago Coke's position. NRDC/Sierra Club claim that a shutdown must occur before ERCs can be transferred, and a shutdown that is "unambiguously permanent gives more clarity regarding the date on which shutdown occurred." NRDC Resp. at 6. NRDC/Sierra Club note that Section 203.303 states that in order to be eligible to generate ERCs, a shutdown "'must in the case of a past shutdown of a source *or* permanent curtailment of production or operating hours,' have occurred after the nonattainment designation." *Id*. NRDC/Sierra Club claim that the words, *either* a "past shutdown" *or* a "permanent curtailment of production" represent the relevant date for determining whether a shutdown generated ERCs. *Id*.

NRDC/Sierra Club argue that the critical factor in this case is that the facility stopped operating, producing coke, and generating emissions associated with coke production in 2002. NRDC Resp. at 6. NRDC/Sierra Club assert that, whatever intention Chicago Coke may have had to reopen, that intention has been abandoned and the continued absence of production qualifies as a past shutdown. *Id*. NRDC/Sierra Club claim that the shutdown date for purposes of Section 203.303 is therefore 2002, prior to the NO_x and $PM_{2.5}$ nonattainment designations. *Id*.

Federal Guidance Supports IEPA's Decision

NRDC/Sierra Club opine that Chicago Coke dismisses the federal guidance relied upon by IEPA as irrelevant to the issue in this case. NRDC Resp. at 7. However, NRDC/Sierra Club claim the federal guidance is persuasive authority. They argue that the "lynchpin" of Chicago Coke's argument that shutdown did not occur in 2002 was in fact a PSD determination made by IEPA under the federal guidance. *Id*. NRDC/Sierra Club argue that PSD determinations are relevant to the ERC issue because permanent shutdown has similar significance for emissions in both PSD and ERC contexts. *Id*. at 7-8. NRDC/Sierra Club explain that in the PSD context, a source that is permanently shutdown must have a new permit, and in the ERC context, shutdown status determines whether past emissions are allowed to continue. *Id*. at 8. NRDC/Sierra Club

argue that the underlying question is the same in either context: whether based on the totality of the circumstances surrounding the shutdown, the emissions should be treated as continuing or permanently eliminated. *Id*. NRDC/Sierra Club assert that in both cases federal guidance treats the presence of the emissions in the emissions inventory as critical in determining if the emissions should be allowed to continue. *Id*.

NRDC/Sierra Club claim that IEPA did rely on federal guidance that relates to concerns about ERCs and not PSD permitting. NRDC Resp. at 8, citing R. at 25-33, 1537-44. NRDC/Sierra Club offer that the federal regulation at 40 C.F.R. §51.165(a)(3)(ii)(C)(1) concerns ERCs specifically and was appropriately relied upon by IEPA. *Id*.

NRDC/Sierra Club argue that there were no emissions from the facility relating to coke production in the Illinois emissions inventory after 2002, and the remaining emissions were removed from the inventory in 2008. NRDC Resp. at 9. NRDC/Sierra Club offer that the reason federal guidance does not allow for emissions removed from the emissions inventory to be used as ERCs is that adding back those emissions "would skew the attainment planning process". *Id*.

IEPA's Determination Was Required by Illinois Law

NRDC/Sierra Club take issue with Chicago Coke's characterization of IEPA's decision, They claim that Chicago Coke's motion is an effort to find "a reductive and irrational interpretation of IEPA's decision, and then complain that IEPA's decision was reductive and irrational." NRDC Resp. at 10. NRDC/Sierra Club argue that more reasonably, IEPA's determination was within the law and no other outcome was possible under the applicable SIP provisions. *Id*. NRDC/Sierra Club maintain that the provisions of Section 203.303 "rule out entirely the use of ERCs for the proposed project". *Id*. at 11. NRDC/Sierra Club assert that because the facility was shutdown before the NO_x and $PM_{2.5}$ nonattainment determinations, ERCs are not available for NO_x and $PM_{2.5}$. *Id*. Furthermore, NRDC/Sierra Club believe that the IEPA five-year guideline is an appropriate use of IEPA's authority. *Id*.

NRDC/SIERRA CLUB'S MOTION

NRDC/Sierra Club reiterate many of the arguments put forth in its response to Chicago Coke's motion for summary judgment in NRDC/Sierra Club's motion for summary judgment. Similarly, Chicago Coke's response reiterates arguments put forth in its motion and responses already summarized. The Board will not restate all those argument here, but instead expands on those arguments. The Board first summarizes the arguments of NRDC/Sierra Club and then Chicago Coke's response.

NRDC/Sierra Club's Arguments

NRDC/Sierra Club argue that IEPA's determination is correct as a matter of law because at the time IEPA determined ERCs were not available, the facility had not produced coke in nearly ten years. NRDC Mot. at 2. NRDC/Sierra Club maintain that USEPA guidance concerning ERCs support IEPA's decision, and that the guidance makes clear that the presence or absence of the emissions in the state's emission inventory is critical. *Id*. NRDC/Sierra Club

argue that the emissions from the facility have ranged from "trivial to non-existent" since 2002. *Id*.

NRDC/Sierra Club further argue that, regardless of when the shutdown occurred, ERCs are not available for new projects. NRDC Mot. at 2. NRDC/Sierra Club assert that under Illinois' SIP, credits are never available from shutdowns that occur before a nonattainment determination. *Id*. Further, NRDC/Sierra claim that if shutdown occurs after the nonattainment determination, the credits may only be used for replacement of an existing source pursuant to Illinois SIP regulations. *Id*. NRDC/Sierra Club argue that Chicago Coke's attempt at using ERCs is contrary to the express purpose of emissions offsets in the CAA, and the Board should uphold IEPA's decision. *Id*.

IEPA's Determination Supported by Record

NRDC/Sierra Club maintain that multiple undisputed facts support IEPA's conclusion that the facility is permanently shutdown and has been since 2002. NRDC Mot. at 11. However, NRDC/Sierra claim that whenever the facility was permanently shutdown, under Section 203.303 of the Board's rules (35 Ill. Adm. Code 203.303) credits as ERCs cannot be used because the Chicago area remains in nonattainment and the credits may only be used as replacement for the facility. NRDC Mot. at 11-12.

NRDC/Sierra Club argue that the facility's emissions were effectively gone from the Illinois emissions inventory and the attainment planning process in 2002, with only negligible emissions from the facility in 2002 and 2005 emissions inventories. NRDC Mot. at 12. NRDC/Sierra Club assert that emissions from the facility were not included in IEPA's emission inventory used to develop an attainment demonstration for the Chicago area. *Id*. NRDC/Sierra Club note that the facility has been in cold idle mode since 2002, has not produced coke or been capable of doing so since 2002, and the pad-up rebuild was never performed. *Id*. NRDC/Sierra Club maintain that IEPA accepted Chicago Coke's stated intention to re-start the facility in 2005; however, the owner must demonstrate a "continuous intent to reopen" in order to rebut the presumption that the facility is permanently shutdown. *Id*. at 13.

NRDC/Sierra Club argue that even if permanent shutdown did not occur until 2005 as claimed by Chicago Coke, ERCs would not be available to Chicago Coke because the credits could only be applied to a replacement source. NRDC Mot. at 13-14. NRDC/Sierra opine that Chicago Coke never "posited that the new facility" that Chicago Coke wants to sell the ERCs to was a replacement facility for the shutdown coke plant. NRDC/Sierra Club maintain that the new facility is an entirely different type of facility and Chicago Coke's reliance on certain USEPA statements is misplaced. *Id*. at 14.

For instance, NRDC/Sierra Club argue that Chicago Coke relies on a 1993 memo to support its view that the ERCs need not be used for replacement, and NRDC/Sierra Club claim that reliance is unwarranted, given USEPA's subsequent treatment of the memo. NRDC Mot. at 14. NRDC/Sierra explain that the memo addressed a problem, which occurred after the 1990 CAA amendments were adopted with the ability to use offsets. *Id*. at 15. NRDC/Sierra further explain that the memo allowed for states to "more freely" allow the use of offsets from

shutdowns prior to attainment determinations. *Id*. NRDC/Sierra Club claim that USEPA ultimately adopted an alternative to the memo, deciding not to "memorialize" the memo. *Id*. The alternative is found at 40 C.F.R. §51.165(a)(3)(ii)(C)(1) and allows for ERCs to be credited only when the shutdown occurred after the last day of the base year of the ozone SIP planning process unless the emissions are in the projected inventory used to develop the attainment demonstration. *Id*.

IEPA's Determination Required by CAA

NRDC/Sierra Club argue that the absence of Chicago Coke's shutdown emission from the emissions inventory and attainment planning process supports IEPA decision that the 2002 shutdown was permanent. NRDC Mot. at 16. NRDC/Sierra opine that the purpose of ERCs is to aid in compliance with CAA requirements that a source obtain offsets for new emissions in a nonattainment area in order to progress toward attainment. *Id*. NRDC/Sierra Club further opine that shutdown emissions to be used as offsets must be present in the inventory and used in the state's SIP planning process or the attainment process could be skewed. *Id*. at 16-17. If emissions are not in the inventory at a particular milestone, a determination of attainment could be made on the assumption that the emissions have been eliminated. *Id*. at 17. NRDC/Sierra argue that resurrecting credits to allow new emissions contravenes the SIP planning process. *Id*.

NRDC/Sierra assert the USEPA makes clear that the presence of emissions in the inventory is critical to the validity of emissions as offsets. NRDC Mot. at 17. NRDC/Sierra cite to USEPA documents to support this argument. *Id*., citing R. at 25-33. Because the facility's emissions were removed from the inventory in 2008, NRDC/Sierra maintain that the emissions cannot be used as credits pursuant to the CAA and policy regardless of when the facility was permanently shutdown. *Id*. at 18

IEPA's Presumption that a Five Year Shutdown is Permanent is Supported by Federal Policy

NRDC/Sierra Club argue that IEPA's presumption that a facility is permanently shutdown is supported by federal policy. NRDC Mot. at 18. NRDC/Sierra note that in the context of PSD determinations, USEPA uses two years to presume that a facility is permanently shutdown. *Id*. NRDC/Sierra Club claim that Chicago Coke acknowledges that states are allowed to set an expiration timeframe, and IEPA has done so here. *Id*. at 19.

IEPA's Determination is Consistent with Federal Rules Governing SIPs

NRDC/Sierra Club explain that USEPA adopted a new rule as a part of the eight-hour ozone implementation that established new requirements for SIPs and ERCs. NRDC Mot. at 19. IEPA has not adopted the new federal rule into the Illinois SIP. *Id*. NRDC/Sierra Club maintain that under the new federal rule, Chicago Coke's ERCs are invalid. *Id*. NRDC/Sierra Club claim that ERCs are valid if the shutdown occurred after the last day of the base year for the SIP planning process, and the shutdown will be treated as occurring during that timeframe if the projected emissions inventory used to determine attainment explicitly included emissions from the shutdown facility. *Id*. NRDC/Sierra Club opine that if the shutdown occurred in 2002, then

the shutdown did not occur after the last day of the base year for the SIP planning process for any relevant pollutant. *Id*. Even if the shutdown occurred in 2005, the shutdown still would not have occurred prior to the end of the ozone 2005 base year. NRDC/Sierra Club assert that since no emissions from the facility were used to develop that attainment demonstration for $PM_{2.5}$ and ozone, the shutdown credits are invalid. *Id*. at 20.

IEPA's Decision is Grounded in Legal and Policy Considerations

NRDC/Sierra Club claim that Chicago Coke implies that IEPA improperly presumed a blanket prohibition against the use of the ERCs from sources that were permanently shutdown. NRDC Mot. at 20. NRDC/Sierra Club claim that Chicago Coke's arguments are "reductive and absurd". *Id*. NRDC/Sierra Club maintain that Section 203.303 sets rules governing the ERCs from source that have been currently shutdown and allow use of credits in some instances. *Id*. NRDC/Sierra Club argue that from this context, it is clear that IEPA's decision was based on discussions that had taken place over the course of three years, as well as federal guidance. *Id*. at 21.

Chicago Coke's Response

Chicago Coke argues that NRDC/Sierra Club misstate the record when NRDC/Sierra Club claim that IEPA determined in 2010 that the facility was permanently shutdown in 2002. CC Resp. to NRDC at 2. Chicago Coke asserts that IEPA's February 2010 decision letter does not mention a date by which IEPA believes the facility was permanently shutdown. *Id*. Chicago Coke maintains that IEPA has, during this appeal, taken the position that the facility was closed in 2002. *Id*.

Chicago Coke refers to its response to the IEPA motion and reiterates that IEPA cannot erase IEPA's prior decision of April 2005, that the facility was not permanently shutdown. CC Resp. to NRDC at 3. Chicago Coke asserts that at the earliest, the facility became permanently shutdown when Chicago Coke's construction permit expired in 2006. *Id*.

Chicago Coke argues that NRDC/Sierra Club are incorrect that IEPA's five-year guideline is supported by federal policy. CC Resp. at NRDC at 3. Chicago Coke reiterates from its response to IEPA's motion, that the five-year guideline is unpromulgated and there is a question as to IEPA's authority to implement the guideline. *Id*. Chicago Coke argues that even if the five-year guideline could be implemented, that guideline does not support IEPA's decision. *Id*. Chicago Coke argues that the facility could not have been shutdown prior to April 2005 and therefore under the five-year guideline the soonest the facility could have been permanently shutdown is April 2010. *Id*.

Chicago Coke argues that NRDC/Sierra Club's claims do not support IEPA's decision that the ERCs are unavailable. CC Supp. to NRDC at 2. As to NRDC/Sierra Club's argument that the ERCs cannot be used by the source Chicago Coke originally sought to sell to, Chicago Coke claims that this argument "ignores the fact" that IEPA denied Chicago Coke's ability to use the ERCs for any project. *Id*. Chicago Coke explains that IEPA found the ERCs were invalid for any situation because Chicago Coke was permanently shutdown. *Id*. Therefore, Chicago

Coke argues that NRDC/Sierra Club's claim that the ERCs could not be used for a specific project is irrelevant. *Id*. at 3.

Chicago Coke asserts that NRDC/Sierra Club's claims regarding PM_{10} and $PM_{2.5}$ do not support its request for summary judgment, as Chicago Coke has not made claims regarding PM_{10} and $PM_{2.5}$. CC Supp. to NRDC at 3. Chicago Coke made no claims because IEPA determined that the ERCs were not available in any circumstance. *Id*.

Chicago Coke reiterates its position that IEPA's decision to remove the emissions from the emissions inventory while Chicago Coke was seeking a determination regarding the validity of ERCs was improper. CC Supp. to NRDC at 4.

DISCUSSION

The Board begins by generally explaining why summary judgment is proper. Next, the Board will set forth the issues in this proceeding. The Board will then discuss each issue in turn.

Summary Judgment is Appropriate

The parties have filed cross motions for summary judgment and all agree that there are no issues of fact in this proceeding. The Board has reviewed the record and agrees that the issues before the Board are issues of law, not of fact. Therefore, the Board finds that there are no issues of material fact and summary judgment is appropriate. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998).

Issue

The IEPA issued a decision on February 22, 2010, that indicated that Chicago Coke's ERCs were not available for use. R. at 1597. IEPA indicated this decision was based on federal guidance. *Id*. The Board is reviewing IEPA's decision pursuant to Section 5(d) of the Act (415 ILCS 5/5(d) (2010)). Therefore, the sole issue before the Board is whether or not Chicago Coke has ERCs available. In deciding this issue, the Board must also decide the applicability of IEPA's five-year guideline relating to sources that may be permanently shutdown as well as the applicability of federal guidance to ERCs in Illinois. Only after deciding these two issues can the Board come to a conclusion on the availability of ERCs for Chicago Coke.

IEPA's Five-Year Guideline

IEPA uses a five-year guideline with regard to the availability of emissions for offsets following the permanent shutdown of a facility. IEPA's five-year period runs from the time the facility is deemed to have shutdown and emissions more than five years old have expired. *See* Affid. at 7

The Illinois Administrative Procedure Act (IAPA) defines a rule as "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy . . .." 5 ILCS 100/1-70 (2010). The law is well settled that a statement of general applicability,

not properly adopted under the Illinois Administrative Procedure Act, is invalid. *See* Senn Park Nursing Center v. Miller, 104 Ill. 2d 169, 174-75, 470 N.E.2d 1029, 1032 (1984); Hernandez v. Fahner, 135 Ill. App. 3d 372, 380-83, 481 N.E.2d 1004 (1st. Dist. 1985). Where a rule affects the private rights and procedures to persons outside an agency, it constitutes a rule. Sleeth v. Department of Public Aid, 125 Ill. App.3d 847, 853, 466 N.E.2d 703 (3rd Dist. 1984). In Kaufman Grain Co., Inc. v. Director, Dept. of Agriculture, 179 Ill. App. 3d 1040, 1047-48, 534 N.E.2d 1259, the Court found a Department of Agriculture policy under which it adjudicated disputes constituted a rule within the meaning of the IAPA, and the Department's failure to properly adopt the policy renders the rule invalid. Kaufman Grain, 179 Ill. App. 3d at 1047-48.

The courts have held that "not all statements of agency policy must be announced by means of published rule." Kaufman Grain, 179 Ill. App. 3d at 1047-48. When an administrative agency interprets statutory language applied to a particular set of facts, adjudicated cases are a proper alternative method of announcing policies. *Id*., citing NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S.Ct. 1426(1969); Board of Trustees, Prairie State College v. Illinois Educational Labor Relations Board, 173 Ill. App. 3d 395, 412, 527 N.E.2d 538, 549-50 (4th Dist. 1988). *See also* Alternate Fuels, Inc. v. Director of IEPA, 215 Ill.2d 219, 246, 294 (2004) (where an incorrect interpretation of statutory language supporting the issuance of a violation applies only to a single violator, such interpretation of statutory language does not constitute a rule of general applicability).

Chicago Coke notes that the five-year guideline is unpromulgated as a rule and the Board agrees. In this instance, the Board finds that IEPA's policy is not an interpretation of statutory language applying to a single source. IEPA states that this is a policy applied to all sources. Clearly IEPA has a policy of general applicability, which has not been adopted under the provisions of the IAPA. Therefore, the Board finds that IEPA's five-year guideline is invalid.

Federal Guidance

IEPA and NRDC/Sierra Club insist that federal guidance should be relied upon, and that the guidance supports IEPA's decision. IEPA's argument is that a review of federal guidance relating to PSD determinations establishes that after a two-year shutdown, the USEPA presumes a source is permanently closed. To rebut that presumption, USEPA looks at several factors. IEPA maintains it reviewed those factors in 2005, when deciding that Chicago Coke was not permanently shutdown. However, in 2010, when IEPA made its final decision on the availability of ERCs, several of those factors had changed, and therefore, the facility was permanently shutdown in 2002.

NRDC/Sierra Club argue that the federal guidance relating to the PSD program is persuasive authority and clearly supports IEPA's decision. NRDC/Sierra Club also argue that IEPA did rely on federal guidance that relates to ERCs as well.

Chicago Coke disagrees that there is federal guidance to support IEPA's decision. Chicago Coke asserts that there is no federal regulation nor does the CAA address the availability of ERCs to a third party from a source that has been permanently shutdown. Chicago Coke challenges the relevance of the federal guidance in the record; but notes that one

federal guidance document indicates that general emission offsets exist as long as the emissions exist in the emissions inventory.

The Board has reviewed the federal guidance provided in the record as well as the federal rules. The Board agrees with NRDC/Sierra Club that the federal guidance, while not specifically dealing with ERCs, is persuasive authority on how emission offsets may be used. However, the Board is unconvinced that the federal guidance dictates that the ERCs from Chicago Coke's facility are unavailable. First, the Board is not convinced that federal guidance supports a determination that the facility is permanently shutdown. While federal guidance provides that after two years a source is presumed to be shutdown, the presumption can be rebutted. In this case, IEPA decided in 2005 that the facility was not permanently shutdown, using the federal guidance. IEPA issued a construction permit that did not expire until 2006. Also in 2004, Chicago Coke renewed the CAAPP permit and paid its fees for the permit until 2008. *See* R. at 325 and Affid. at 5.

While the facility was not operating during that time, the Board cannot find that a facility with a construction permit, paying its permit fees, and holding a CAAPP permit was shutdown. Therefore, the soonest a shutdown could occur is when the construction permit expired in 2006. Under the federal guidance, two years from "shutdown" is the earliest that a permanent shutdown would be presumed and as the construction permit did not expire until 2006; 2008 would then be the year that the facility would be presumed to have been permanently shutdown under the federal guidance. In 2007, Chicago Coke began exploring the possibility of selling ERCs. Thus, under the federal guidance, Chicago Coke began exploring options before the federal guidance would have presumed the facility was permanently shutdown.

Furthermore, while IEPA seeks to rely on federal guidance to support its decision, the Board is confused by the extent to which IEPA used the federal guidance. IEPA admits that it uses a five-year guideline to presume a facility is permanently shutdown and that emissions have expired, but the federal guidance is two years before a facility is presumed to have been permanently shutdown. Given the Board's decision that the five-year guideline is invalid, IEPA's use of federal guidance serves to further confuse the regulated community. The Board finds that IEPA's reliance on federal guidance to support its determination that the facility was permanently shutdown in 2002 is misplaced. The Board is unconvinced that the federal guidance supports IEPA's decision.

ERCs Availability

IEPA argues that ERCs are not available to Chicago Coke because based on federal guidance and IEPA's five-year guideline, the facility permanently shutdown in 2002, and ERCs are no longer available. IEPA argues that Chicago Coke did not perform the pad-up rebuild, expressed an intent to sell the facility in 2007, and stopped paying operating fees in 2008. IEPA also relies on the fact that the emissions for the source were removed from the emissions inventory in 2008. These are only some of the factors IEPA relied upon to determine that the facility was permanently shutdown in 2002.

IEPA maintains that federal guidance allows it to manage ERCs, and IEPA manages ERCs using its five-year guideline. IEPA argues that the five year guideline is consistent with the federal guidance. *See* Reply at 4-5.

NRDC/Sierra Club agrees with IEPA and also argues that the ERCs cannot be used for the purpose that Chicago Coke proposes to use them. *See* NRDC Resp. at 3. NRDC/Sierra Club maintains that the ERCs could only be used for a replacement source.

Chicago Coke maintains that the facility was not permanently shutdown in 2002 and that ERCs are available for its use.

The Board agrees with IEPA that the state can manage ERCs. *See* R. at 37. However, the Board disagrees that IEPA has properly done so. As discussed above, IEPA's five-year guideline is invalid as it has not been properly promulgated as a rule by either IEPA or the Board. Illinois has no regulations on the expiration of ERCs. This leaves IEPA with federal guidance for support of its decision. Also as discussed above, the Board disagrees with IEPA's reliance on the federal guidance. The Board notes that the federal guidance in the record regarding ERCs indicates that as long as the emission offsets remain in the state's emission inventory, the emissions do not expire. *See* R. at 31.

IEPA removed the emissions from Chicago Coke's facility from the emissions inventory in 2008, based on IEPA's five-year guideline, after Chicago Coke approached IEPA about ERCs. *See* R. at 1580-81. Thus, one of the key reasons for deciding that ERCs were not available to Chicago Coke was accomplished after Chicago Coke approached the IEPA about using ERCs and IEPA based its decision on an invalid policy. Therefore, the Board is not persuaded by the arguments that the emissions were appropriately removed from the emissions inventory or that the removal can be used as a basis for a finding that the source was permanently shutdown.

Based on the facts and a review of all the federal guidance, the Board finds that the ERCs from Chicago Coke's facility are available. The lack of Illinois regulations addressing the expiration of ERCs from sources that are shutdown and the lack of federal guidance on point support the Board's finding that IEPA's determination was incorrect. The Board is convinced that allowing ERCs from the Chicago Coke facility to be available to Chicago Coke is not contrary to the CAA or the Act and Board regulations. Therefore, the Board finds that the ERCs are available to Chicago Coke.

However, the Board is only deciding that the ERCs are available and will not decide how the ERCs may be used or how many ERCs are available. In this case, the Board is only reviewing IEPA's decision that the ERCs are not available, and IEPA has not made a decision on how the ERCs can be used. Therefore, while the Board has reviewed NRDC/Sierra Club's arguments regarding the use of ERCs, the Board will not rule on that issue in this proceeding.

CONCLUSION

Based on the arguments and the record in this proceeding the Board finds that there are no genuine issues of material fact, and summary judgment is appropriate. Further the Board

finds that Chicago Coke has established that its ERCs are valid under Illinois law, and the Board grants Chicago Coke's motion for summary judgment. The Board therefore denies IEPA's and NRDC/Sierra Club's motions for summary judgment.

This opinion constitutes the Board findings of fact and conclusions of law.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 2, 2013, by a vote of 5-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board