

ILLINOIS POLLUTION CONTROL BOARD

April 21, 2011

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

ORDER OF THE BOARD (by G. T. Girard):

On March 29, 2010, Chicago Coke Company (Chicago Coke) appealed the Illinois Environmental Protection Agency's (Agency) determination that Chicago Coke's emission reduction credits are not available as emission offsets. Chicago Coke seeks to sell emission reduction credits (ERCs) to a buyer located in the same non-attainment area. Specifically, Chicago Coke seeks to transfer the property at 11400 South Burley Avenue, Chicago, Cook County and the ERCs to Chicago Clean Energy, LLC, which would create a coal gasification plant on the property. On January 14, 2011, the Natural Resources Defense Council (NRDC) and the Sierra Club (collectively, NRDC/Sierra Club) filed a motion to intervene.

Today the Board lifts the stay and grants NRDC/Sierra Club's motion to intervene in the proceedings between Chicago Coke and the Agency regarding ERCs' availability as emissions offsets. The Board describes the procedural history of this case before discussing and ruling on the motions.

PROCEDURAL HISTORY

On May 29, 2010, Chicago Coke timely filed a petition for review (Pet.) with the Board, seeking review of a February 22, 2010, Agency decision to deny the use of ERCs as offsets. Pet. at Exh. D. The Agency wrote that the denial letter issued February 22, 2010, was the Agency's final decision and the Agency 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 the Agency'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, the Agency 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, the Agency 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, the Agency 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 the Agency'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 NO_x (35 Ill. Adm. Code 217.Supbart U, V and W)." *Id.*

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

On January 14, 2011, the NRDC and the Sierra Club filed a joint motion for leave to intervene (Mot. Interv.) 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 motion for the leave to intervene (Chicago Coke Resp.) and the Agency also filed a response to the motion for leave to intervene (Agency Resp.). On February 7, 2011, NRDC/Sierra Club moved for leave to reply to both parties' responses to NRDC/Sierra Club's motion to intervene (Mot. Repl.). On February 15, 2011, the Agency 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's motion to intervene (Agency Mot). On February 16, 2011, Chicago Coke filed a response to NRDC/Sierra Club's motion for leave to file a reply (Chicago Coke Surr). On February 18, 2011, Chicago Coke filed a response to the Agency'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 is waived. *See* 35 Ill. Adm. Code 101.500(d). The Board grants that motion and lifts the stay in this proceeding.

FACTS

Chicago Coke operates a coke facility located at 11400 South Burley Avenue, Chicago, Cook County, which is classified as a non-attainment area, pursuant to the Clean Air Act (42 U.S.C. §7401 *et. seq.*). Pet. at 1. Chicago Coke sought to sell ERCs to another buyer in the

same non-attainment area. *Id.* In three letters written to the Agency, Chicago Coke requested that the Agency recognize Chicago Coke's claimed ERCs as emissions offsets pursuant to 35 Ill. Adm. Code 203.303. Pet. at 1-2.

On July 11, 2007, Chicago Coke and the Agency met to discuss the potential sale of ERCs as offsets to be used by a purchaser of the real property of Chicago Coke, and the Agency expressed concerns about the transaction. Pet. Exh. A at 1. On August 3, 2007, Chicago Coke contacted the Agency via letter to alleviate the Agency's concern, specifically to state that Chicago Coke did not shut down prior to April 28, 2005 and therefore Chicago Coke has the ability to create ERCs based on the potential future shutdown of the facility. Pet. Exh. 1 at 9. On January 17, 2008, Bureau Chief Laurel Kroack orally stated that the Agency would not recognize the ERCs because Chicago Coke had shut down more than five years ago, but she agreed to reconsider the determination if presented with proof that the Agency has recognized ERCs from shutdowns in permits issued more than five years beyond the shutdown. Pet. Exh. B at 2.

On July 18, 2008, Chicago Coke wrote another letter to the Agency to present a list of instances in which ERCs were recognized in a facility that had shut down more than five years prior. Pet. Exh. B; Exh. E. The Agency did not respond and on January 15, 2010, Chicago Coke wrote a third letter in which Chicago Coke requested that the Agency issue a final decision regarding the matter. Pet. Exh. C. On February 22, 2010, the Agency wrote a letter confirming that the Agency does not find the ERCs to be available as offsets and that the Agency believes that Chicago Coke is permanently shut down. Pet. Exh. D. The Agency also asserts that this is the final position on the issue. *Id.*

In response to the February 22, 2010 determination, Chicago Coke filed suit in Cook County Circuit Court in March 26, 2010. Pet. Exh. E. In the complaint, Chicago Coke moved for the circuit court to enter a declaratory judgment to the effect that the Agency exceeded its statutory authority by attempting to enforce a fictitious regulation. *Id.* Chicago Coke also asked the Court to require the Agency to produce a determination that Chicago Coke is permanently shut down and that Chicago Coke's ERCs cannot be utilized as emission offsets. *Id.* at 3-4.

Also in response to the Agency's determination, Chicago Coke timely filed a petition for review with the Board on May 29, 2010. Chicago Coke appeals pursuant to Section 40 of the Environmental Protection Act (Act) (415 ILCS 5/40 (2008)) and the Board rules at 35 Ill. Adm. Code 101 and 105. In the petition, Chicago Coke asks the Board to enter an order overturning the Agency's denial of Chicago Coke's ERCs as emissions offsets, but to stay the proceedings until the other action in circuit court is resolved. Pet. at 3.

STATUTORY AND REGULATORY BACKGROUND

Section 5(d) of the Act 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 the

Agency'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) (2008).

Section 40(a)(1) of the Act provides:

If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1) (2008).

Section 40.2(a) of the Act (415 ILCS 5/40.2(e) (2008)) addresses appeals of CAAPP permit determinations and provides in pertinent part:

* * * If the Agency refuses to grant or grants with conditions a CAAPP permit, . . . the applicant, any person who participated in the public comment process pursuant to subsection 8 of Section 39.5 of this Act, or any other person who could obtain judicial review pursuant to Section 41(a) of this Act, may, within 35 days after final permit action, petition for a hearing before the Board to contest the decision of the Agency. * * * 415 ILCS 5/40.2(a) (2008).

Section 41(a) of the Act provides:

Any party to a Board hearing, any person who filed a complaint on which a hearing was denied, any person who has been denied a variance or permit under this Act, any party adversely affected by a final order or determination of the Board, and any person who participated in the public comment process under subsection (8) of Section 39.5 of this Act may obtain judicial review . . . 415 ILCS 5/41(a) (2008).

Section 101.402 of the Board's procedural rules (35 Ill. Adm. Code 101.402) concerns intervention. The relevant portions of the rule follow:

- a) The Board may permit any person to intervene in any adjudicatory proceeding. If a person seeks to intervene in an adjudicatory proceeding, the person must file a motion to do so with the Clerk and serve a copy of the motion on all parties to the proceeding. The motion must set forth the grounds for intervention.
- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.

* * *

- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:

* * *

- 2) The person may be materially prejudiced absent intervention; or
- 3) The person is so situated that the person may be adversely affected by a final Board order.
- e) An intervenor will have all the rights of an original party to the adjudicatory proceeding, except that the Board may limit the rights of the intervenor as justice may require. The limits may include providing that: the intervenor is bound by Board and hearing officer orders already issued or by evidence already admitted; that the intervenor does not control any decision deadline; and that the intervenor cannot raise issues that were raised or might more properly have been raised at an earlier stage of the proceeding. 35 Ill. Adm. Code 101.402.

MOTION TO INTERVENE

The NRDC is a national, non-profit environmental organization whose goal is to protect the environment and public health. The Sierra Club is a grassroots environmental organization whose mission is to protect and restore quality to the natural and human environment. Mot. Interv. at 1-2. NRDC/Sierra Club state the numbers of their members living in Cook County, 6,892 and 10,509 respectively, and claim that the intervention is to protect those members' interests. *Id.* at 1-3. NRDC/Sierra Club make three arguments in their original motion that hinge on their contentions that they will be materially prejudiced if not allowed to intervene and that they will be adversely affected by the Board's final order, which are the second and third prongs of Section 101.402(d) of the Board's procedural rules. 35 Ill. Adm. Code 101.402(d)(2)-(3).

First, NRDC/Sierra Club argues that they would be materially prejudiced if they were denied the ability to intervene because they would intend to make substantially different arguments than the Agency will make, despite having the same legal position. Mot. Interv. at 4. NRDC/Sierra Club intends to argue that the ERCs for PM₁₀ cannot be used as a surrogate for PM_{2.5} because surrogacy is illegal under the Clean Air Act (CAA). *Id.* Second, NRDC/Sierra Club contend that their argument that ERCs from a long-ago shut down source cannot be used as emissions offsets in a non-attainment (NA) area is more persuasive than the Agency's identical argument because the Agency is under attack by Chicago Coke on this issue, while the NRDC/Sierra Club is not. NRDC/Sierra Club justify their intervention based on Board precedent that the Board has allowed intervention in the past when the intervenor demonstrates that their pleadings may diverge from but not contradict the Agency's position. *Id.* at 5, *citing United States Steel v. IEPA*, PCB 10-23 (Dec. 3, 2009). NRDC/Sierra Club relies on the fact

that, in the past, the Board has held that when a potential intervenor's ability to challenge a particular issue may be impacted because of a Board proceeding, intervention can be appropriate. To support this contention, NRDC/Sierra Club cites People v. Freeman United Mining Company, PCB 10-61 (Apr. 15, 2010).

The second main contention is that the potential intervenor would be adversely affected by a Board decision. Mot. Interv. at 7. NRDC/Sierra Club argues that the emissions will have a negative impact on their members in Cook County. *Id.* NRDC/Sierra Club is particularly concerned that Chicago is a NA area for ozone and PM_{2.5}. *Id.* at 8. They allege that the adverse air effect would be degradation in air quality and adverse health effects. *Id.*

The final argument is that the request to intervene is timely and will not unduly delay or materially prejudice the proceeding. *Id.* at 8.

AGENCY RESPONSE

The Agency responds briefly to the Motion for Leave to Intervene. The Agency states that the Agency does not object to the intervention; however, the Agency states further that some of NRDC/Sierra Club's arguments seem outside the scope of the issues in the Petition for Review. Agency Resp. at 1. Therefore, the Agency requests that the Board limit the review to only the issues in the Petition for Review. *Id.*

CHICAGO COKE RESPONSE

Chicago Coke responds in opposition to NRDC/Sierra Club's Motion for Leave to Intervene. Chicago Coke Resp. at 1. Chicago Coke contends that NRDC/Sierra Club misconstrues the simple issue at hand and raised arguments in support of intervention that are outside the scope of that issue. *Id.* Chicago Coke asserts that the only issue in this Board review is whether the Agency "has improperly applied a fictitious unpromulgated regulation." *Id.* at 2. To that end, Chicago Coke argues that NRDC/Sierra Club has not demonstrated that they will be materially prejudiced or adversely affected if they are denied the ability to intervene. *Id.* at 3. In Chicago Coke's response, Chicago Coke addresses each of NRDC/Sierra Club's arguments and argues that they all apply to an issue outside the scope of this review. *See generally* Chicago Coke Resp.

Chicago Coke also asserts that NRDC/Sierra Club has not demonstrated that their members in Cook County will be more affected by the Board's final decision than any other citizen of the State of Illinois. Chicago Coke Resp at 5.

Chicago Coke further argues that the intervention would have an adverse effect on the proceeding because the intervention would make the proceeding more complex. *Id.* at 6. Specifically, Chicago Coke claims that Chicago Coke will have to expand its arguments to defend both against the Agency and NRDC/Sierra Club, and NRDC/Sierra Club has added extra issues. *Id.* Chicago Coke supports this argument by citing Midwest Generation, PCB 04-216 slip op. at 12 which states that the Board has previously denied intervention when the movant

sought to “make a record that is unrelated to the lone issue of [the] appeal.” *Id.* at 6-7, *citing Midwest Generation EME, LLC. v. IEPA*, PCB 04-216 slip op. at 12 (Aug. 15 2005).

Chicago Coke continues on to allege that NRDC/Sierra Club has other methods of intervention by which to protect their interests. *Id.* at 7. Chicago Coke suggests that they avail themselves of the public participation option at the hearings, and states that this is a sufficient opportunity to participate. *Id.*

In the alternative, Chicago Coke requests that NRDC/Sierra Club’s participation be limited in the following ways:

- 1) NRDC cannot participate in discovery, including serving interrogatories, requests for production of documents, or requests to admit or conducting depositions;
- 2) NRDC does not control the statutory decision deadline;
- 3) NRDC cannot raise any issues outside the scope of the matters set forth in Chicago Coke's petition for review;
- 4) NRDC cannot introduce evidence that it is not part of the record; and *Id.*
- 5) NRDC must comply with all Board or hearing officer orders, including those issued to date. Chicago Coke Resp. at 8.

MOTIONS FOR LEAVE TO FILE REPLIES

Both the Agency and NRDC/Sierra Club filed motions for leave to file replies. The Board will discuss each below and then discuss Chicago Coke’s responses.

The NRDC and The Sierra Club Motion

In NRDC/Sierra Club’s Motion for Leave to File a Reply, NRDC/Sierra Club addressed the Agency’s and Chicago Coke’s responses to the original motion to intervene. Mot. Repl. NRDC/Sierra Club argues that the issues NRDC/Sierra Club proposes are inseparable from the issues raised in the Petition for Review, that NRDC/Sierra Club has a greater interest in the proceeding than the general public, and that the intervention would not interfere with orderly and efficient conduct. Mot. Repl. at 2, 5.

Agency Motion for Leave to Reply

The Agency filed a reply to Chicago Coke’s response to the motion to intervene to clarify the Agency’s position. Agency Mot. The Agency asserts that Chicago Coke’s Response in Opposition to NRDC/Sierra Club’s Motion for Leave to Intervene contains inaccurate statements regarding the basis of the Agency’s decision. Agency Mot. at 1. Specifically, the Agency notes that the Agency has never taken the position that offsets are always unavailable from

permanently shutdown facilities, but that offsets are unavailable from Chicago Coke's facility because of circumstances applicable to that facility. *Id.* The Agency does, however, maintain that Chicago Coke's facility has been permanently shutdown since February 2002. *Id.*

Chicago Coke Response to Motion for Leave to Reply

Chicago Coke filed a surreply to NRDC/Sierra Club's Motion for Leave to Intervene. Chicago Coke Surr. In it, Chicago Coke makes three arguments. *Id.* First, Chicago Coke maintains that NRDC/Sierra Club erroneously identifies the issues and argues outside the scope of the Petition for Review. Chicago Coke Surr. at 1. Second, Chicago Coke continues to assert that NRDC/Sierra Club has identified the incorrect shutdown date of the facility, though Chicago Coke recognizes that the date is not relevant to the ultimate inquiry of the emissions offsets. *Id.* at 3. Third, Chicago Coke maintains that Chicago Coke is not trying to improperly limit the scope of the appeal, but only focus the appeal on the Agency's actual decision. *Id.* at 4. Chicago Coke states that not everything in the initial correspondence between itself and the Agency is in contention in the proceedings. *Id.* at 3.

BOARD ANALYSIS

The Board first discusses whether allowing NRDC/Sierra Club to intervene in this permit appeal is legally permissible. Next, the Board considers exercising the Board's discretion to allow the NRDC/Sierra Club to intervene and imposing limits on NRDC/Sierra Club's participation.

The Board's Authority to Allow the NRDC/Sierra Club to Intervene

The Board notes that NRDC/Sierra Club are seeking permissive intervention pursuant to 35 Ill. Adm. Code 101.402 and do not argue that they are entitled to intervention. Further, the Board notes, Chicago Coke filed this appeal under Section 40 of the Act (415 ILCS 5/40 (2008)). Pet. at 1. The Board accepted this petition finding that the Board is authorized by Section 5(d) of the Act (415 ILCS 5/5(d) (2008)) to hear this appeal and that the Agency's February 22, 2010 letter was a final decision. *See, Chicago Coke Company v. IEPA*, PCB 10-75 (Sept. 2, 2010).

The Board has consistently found that the Board "lacks the authority to give party status through intervention to persons the General Assembly does not allow to become parties to this type of proceeding." *Sutter Sanitation, Inc. v. IEPA*, PCB 04-187 (Sept. 16, 2004) and *Riverdale Recycling v. IEPA*, PCB 00-228, (Aug. 10, 2000); *see also Landfill, Inc. v. PCB*, 74 Ill. 2d 541, 557-60, 387 N.E.2d 258, 264-65 (1978); *Kibler Development Corp. v. IEPA*, PCB 05-35, slip op. at 5 (May 4, 2006). Generally an appeal pursuant to Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2008)) or the general language of Section 5(d) of the Act (415 ILCS 5/4(d) (2008)) would not allow intervention by NRDC/Sierra Club. However, this appeal is procedurally unique for two major reasons. First, the Agency is arguing that the decision at issue is not a denial of a permit application. *See generally, Chicago Coke Company v. IEPA*, PCB 10-75 (Sept. 2, 2010). Second, the subject matter of this appeal is ERCs, which are a part of the Clean Air Act regulatory and permitting scheme. Clean Air Act Permits may be appealed by a party other than an applicant pursuant to Sections 39.5 and 40.2(a) of the Act (415 ILCS 5/ 39.5 and

40.2(a) (2008)). Thus, NRDC/Sierra Club could appeal an Agency decision allowing the ERCs to be used and as discussed below, NRDC/Sierra Club may be materially prejudiced. Therefore, the Board will consider allowing intervention in this limited circumstance by examining the motion under the provisions of Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2008)).

Chicago Coke claims that NRDC/Sierra Club has not demonstrated that their members' County will be more affected by the Board's final decision than any other citizen of the State of Illinois. Chicago Coke Resp. at 5. This does not, however, mean that NRDC/Sierra Club's members in Cook County will not suffer an adverse effect; this merely means that many people will suffer an adverse effect and the members will also be affected. The Board finds that NRDC/Sierra Club convincingly argues that a Board final determination allowing the ERCs to transfer could adversely affect NRDC/Sierra Club in the form of degradation of air quality and adverse health effects.

Because NRDC/Sierra Club has demonstrated that NRDC/Sierra Club falls into one of the statutory categories of eligible intervening entities, granting NRDC/Sierra Club's motion to intervene would therefore not give party status to a person without standing to have appealed under Section 40.2(a) of the Act. The Board finds that the Board is authorized to allow NRDC/Sierra Club to intervene in this permit appeal.

The Board Will Exercise its Discretion to Allow NRDC/Sierra Club to Intervene

When ruling on a motion to intervene, the Board considers the timeliness of the motion and whether intervention will negatively impact the proceeding. *See* 35 Ill. Adm. Code 101.402(b). In the instant case, NRDC/Sierra Club did not file its motion to intervene until eleven months after the initial filing of the petition for review. This is a considerable amount of time. However, the Board also notes that the proceeding has been stayed until November 4, 2011. To date, no hearing has been scheduled, the record has not been filed, no dispositive motions are pending, and no discovery orders have issued. The Board also takes into consideration NRDC/Sierra Club's statement that NRDC/Sierra Club will contest unfavorable issues in later proceedings, and reasons that allowing NRDC/Sierra Club to intervene is beneficial for the sake of judicial economy. Mot. Interv. at 6. The Board finds the NRDC/Sierra Club's motion to intervene timely. *See* 35 Ill. Adm. Code 101.402(b). Further, with the case in the present procedural posture, and conditioning NRDC/Sierra Club's participation on the restrictions described below, the Board also finds that NRDC/Sierra Club's intervention would not "unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Adm. Code 101.402(b).

NRDC/Sierra Club seeks permissive intervention under Section 101.402(d) of the Board's procedural rules (35 Ill. Adm. Code 101.402(d)). The Board "may permit any person to intervene in any adjudicatory proceeding" if the person "may be materially prejudiced absent intervention" or the person "is so situated that the person may be adversely affected by a final Board order." 35 Ill. Adm. Code 101.402(d)(2), (3). The Board "has no reason to believe that the Agency will proceed here with anything other than its usual 'competence and zeal.'" *Kibler*, PCB 05-35, slip op. at 6. However, the Board finds that NRDC/Sierra Club's may be materially prejudiced absent intervention, as the pleadings demonstrate that NRDC/Sierra Club's interests

may diverge sharply from those of the Agency and Chicago Coke. 35 Ill. Adm. Code 101.402(d)(2). Further, the Board's findings in this proceeding could effectively eliminate NRDC/Sierra Club's arguments in any later third-party challenge to the use of the ERCs. *Id. see also* Mot. Interv. at 6.

Additionally, neither the Agency nor Chicago Coke contest NRDC/Sierra Club's representations that their members reside and recreate in and around Cook County, and also that their health and welfare may be affected by the outcome of this proceeding. Chicago Coke only contests the extent to which the NRDC/Sierra Club members will be affected. The Board has explained above why the Board does not find merit in Chicago Coke's argument about NRDC/Sierra Club's lack of adverse effect. NRDC/Sierra Club moves to object to potential use of purported ERCs as emissions offsets in the manner proposed by Chicago Coke. The Board finds that the NRDC/Sierra Club represents members that are so situated that they may be adversely affected by a final Board order within the meaning of 35 Ill. Adm. Code 101.402(d)(3). Under these circumstances, the Board will exercise its discretion to allow ABC's intervention.

The Board Will Impose Limits on NRDC/Sierra Club's Intervention as Justice Requires

As intervenors, NRDC/Sierra Club has "all the rights of an original party" to this proceeding (35 Ill. Adm. Code 101.402(e)), including the right to appeal the Board's final decision (*Kibler*, PCB 05-35, slip op. at 5). However, the Board "may limit the rights of the intervenor as justice may require." 35 Ill. Adm. Code 101.402(e). Clearly, NRDC/Sierra Club is bound by all hearing officer and Board orders already issued, and only the permit applicant, Chicago Coke, may waive the decision deadline. *See* 35 Ill. Adm. Code 101.402(e); *United States Steel Corp. v. IEPA*, PCB 10-23, slip op. at 2 (Oct. 15, 2009) ("only U.S. Steel may extend by waiver" the decision deadline under 415 ILCS 5/40.2(c) (2008)). Beyond that, however, the Agency's response to the motion for intervention says that NRDC/Sierra Club should be allowed to intervene as long as their participation is limited to the material in the Petition for Review, while Chicago Coke's response states that NRDC/Sierra Club's motion to intervene should be denied because their claims are irrelevant to the proceeding. Agency Resp. at 1; Chicago Coke Resp. at 1.

The Agency and Chicago Coke both agree in their responses that NRDC/Sierra Club raises issues that are outside the scope of the matters set forth in the Petition for Review. Furthermore, like any intervenor, NRDC/Sierra Club "must take the case as it finds it." *Saline County Landfill, Inc. v. IEPA*, County of Saline, PCB 02-108, slip op. at 6 (Apr. 18, 2002). The only appeal before the Board was brought by Chicago Coke. Accordingly, no matters beyond those set forth in Chicago Coke's petition are at issue in this appeal. *See XCTC Ltd. P'ship v. IEPA*, PCB 01-46, *Georgia-Pacific Tissue, LLC v. IEPA*, PCB 01-51 (consol.), slip op. at 1-2 (in CAAPP permit appeal, Board "lacks jurisdiction" to consider amended petition that was filed after appeal period and through which petitioner sought review of a permit condition not cited in original petition, which had been accepted for hearing). As the Agency argues, justice requires that NRDC/Sierra Club not be permitted to raise other issues. *See* 35 Ill. Adm. Code 101.402(e); *Valessares*, PCB 87-36, slip op. at 14 (July 16, 1987) (finding intervention appropriate where intervenor's issues fell within the scope of matters challenged by petition for review of siting

approval). This is consistent with the Board's long-held view that "allowing intervenor status does not enlarge the scope of review." Land & Lakes Co. v. Village of Romeoville, PCB 91-7, slip op. at 2-3 (Apr. 11, 1991) ("Allowing intervention does not imply that the [intervenor] can dispute [siting] criteria on appeal which were not raised by [the siting applicant] in its appeal of the . . . denial of siting"), *rev'd on other grounds sub nom. Land & Lakes Co. v. PCB*, 245 Ill. App. 3d 631, 616 N.E.2d 349 (3rd Dist. 1993) (affirming Board's grant of intervention).

Chicago Coke proposes additional limits on NRDC/Sierra Club's participation, which pertain to discovery and introduction of evidence. Chicago Coke Resp. at 8. Though an intervenor is a party, Chicago Coke states that NRDC/Sierra Club should not be allowed to participate in any discovery. Chicago Coke does not cite any basis for this request, however. Therefore, the Board declines to impose Chicago Coke's suggested ban on NRDC/Sierra Club's participation in discovery. See United States Steel, PCB 10-23, slip op. at 21 (Oct. 15, 2009) (where the Board refused to ban ABC's participation in discovery.). Chicago Coke also asks that NRDC/Sierra Club be barred from introducing evidence that is not part of the record. Chicago Coke Resp. at 8. The Board's review is based only on the materials in the record before the Agency at the time of the permit determination, but this well-settled principle limits the scope of evidence that any party may introduce, including Chicago Coke and the Agency. See United States Steel, PCB 10-23, slip op. at 2 (and cases cited therein); see also Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, PCB 01-49 (consol.), slip op. at 3, 19-20 (Apr. 5, 2001) (and cases cited therein), *aff'd in part and rev'd in part on other grounds sub nom. Community Landfill Co. and City of Morris v. PCB*, No. 3-01- 0552 (3rd Dist. Oct. 29, 2002) (unpublished order under Illinois Supreme Court Rule 23). The Board finds that Chicago Coke's proposed evidentiary limit on NRDC/Sierra Club's intervention is not necessary.

CONCLUSION

Exercising its discretion, the Board grants NRDC/Sierra Club's motion to intervene, giving party status to NRDC/Sierra Club as an intervenor, subject to the restrictions on NRDC/Sierra Club's participation. NRDC/Sierra Club may not raise new issues as intervenors that were not raised by Chicago Coke in this appeal. Also, NRDC/Sierra Club are bound by all hearing officer and Board orders entered in this proceeding so far. Having specified restrictions on NRDC/Sierra Club's participation, the Board declines Chicago Cokes's request that the Board schedule additional briefing on this issue. If Chicago Coke believes that any aspect of NRDC/Sierra Club's ensuing participation would unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding, Chicago Coke may make an appropriate motion at that time. Future pleadings must reflect the amended caption of this option and order.

IT IS SO ORDERED.

Board Member T.E. Johnson dissented.
Board Member C. K. Zalewski dissented

I,

John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 21, 2011, by a vote of 3-2.

A handwritten signature in black ink, reading "John T. Therriault". The signature is fluid and cursive, with a long horizontal stroke at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board