ILLINOIS POLLUTION CONTROL BOARD

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

To:

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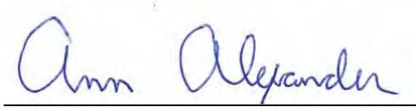
Please take notice that today I filed with the office of the Clerk of the Pollution Control Board my **Intervenor-Defendants' Response to Chicago Coke Co., Inc.'s Motion to Strike** on behalf of the Natural Resources Defense Council, a copy of which is hereby served on you.

By: 

Ann Alexander, Natural Resources Defense Council

Dated: October 3, 2012

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INTERVENOR-DEFENDANTS' RESPONSE TO
CHICAGO COKE CO., INC.'S MOTION TO STRIKE

Preliminary Statement

Intervenor-Defendants NRDC and Sierra Club[1] submit this response in opposition to Chicago Coke's Motion to Strike, Directed to NRDC's Motion for Summary Judgment ("Motion to Strike"). The Motion to Strike, grounded in the notion that Chicago Coke is not bound by regulations governing ERCs because IEPA did not spell them out specifically enough in a confirming letter, is remarkable for its brass. It does not, however, accurately reflect applicable law or the procedural history of this matter.

At bottom, Chicago Coke is playing a game of "gotcha" with IEPA. The company avoided the rigors of a permit application process by seeking pre-approval for the ERCs through

[1] Abbreviations used in this response are defined in Intervenor-Defendants' Motion for Summary Judgment dated August 17, 2012 ("Intervenor-Defendants' Motion"), unless otherwise specified.

a less formal series of meetings and exchange of correspondence. Yet having received a simple confirming letter citing to IEPA's conclusions throughout that informal process – which conclusions Chicago Coke did not like - the company now seeks to impose on the Agency all of the standards and rigors of a full-blown permit decision, including the obligation to expressly cite all legal grounds for it lest those grounds be waived. In so doing, Chicago Coke puts itself in the rather untenable position of declaring its independence from the very law that authorizes the creation and sale of ERCs to begin with.

While the stated grounds for the Motion to Strike portions of Intervenor-Defendants' motion are grounded in the Board's general directive that Intervenor-Defendants not raise issues beyond the scope of the petition, the specific portions that Chicago Coke seeks to strike cover the same substance as IEPA's brief,[2] which Chicago Coke moves to strike in a separate motion. Thus, the real issue is not any violation of the Board's directive to Intervenor-Defendants concerning scope. Rather, it is Chicago Coke's broader contention – applicable to both IEPA and Intervenor-Defendants' Motions – that it is automatically exempt from restrictive conditions in laws governing ERCs (although, it seems, not exempt from taking unconditional advantage of those laws) where those conditions are not expressly spelled out in IEPA's confirming letter.

Finally, a good portion of the subject matter that Chicago Coke seeks to strike falls squarely within the purview of even the abbreviated language in IEPA's confirming letter concerning "federal guidance." In particular, that guidance repeatedly makes reference to the presence of emissions in the state's inventory and attainment planning process as critical to their eligibility as ERCs.

[2] As discussed *infra* in Subsection A, while Intervenor-Defendants' motion references $PM_{2.5}$, it does not raise the issue of $PM_{2.5}$ surrogacy (*i.e.*, the propriety of using PM_{10} ERCs to offset $PM_{2.5}$ emissions), notwithstanding Chicago Coke's contention otherwise. It appears that Chicago Coke did not understand the purpose for which Intervenor-Defendants referenced $PM_{2.5}$, which was to rebut a contention concerning the applicability of 35 Ill.Admin.Code § 203.303 made by Chicago Coke in the August 3 Letter.

Supplemental Background

The factual and procedural background relevant to the Motion to Strike is set forth in substantial part in Intervenor-Defendants' Motion for Summary Judgment. This section supplements that background.

Events Described in the Petition

Chicago Coke's Petition, filed in March 2010, is filed "pursuant to Section 40 of the Environmental Protection Act" ("Act"), governing permit appeals. The Petition recites that the company submitted three written requests to IEPA "asking the Agency to recognize Chicago Coke's ERCs as emissions offsets under 35 Illinois Administrative Code 203.303." Petition ¶ 4. Those requests are attached to the Petition as Exhibits A through C. Petition ¶ 4.

Exhibit A is the August 3 Letter discussed at some length in the portions of Intervenor-Defendants' Motion that Chicago Coke now moves to strike. That letter references a meeting held the previous month between Chicago Coke and IEPA at which "Illinois EPA expressed certain concerns with the transaction," noting that "[i]n particular, the Illinois EPA had concerns with respect to 35 Ill. Admin. Code § 203.303." Stating that it has "reviewed the Illinois EPA's areas of concern and related documents," August 3 Letter at 1, Chicago Coke lays out its findings regarding those concerns – including a section concerning § 203.303 (with a lengthy discussion of that rule's replacement source restriction), and a discussion of the import of the absence of the Facility's emissions from the inventory. August 3 Letter at 2-6, 8.

Exhibit B, a letter to IEPA dated July 18, 2008 ("July 18 Letter"), references two additional meetings and a phone call with IEPA, during the latter of which IEPA responded to the August 3 Letter by stating that it "is not inclined to recognize these emission credits." July 18 Letter at 2.

Exhibit C, a letter to IEPA dated January 15, 2010 ("January 15 Letter), complains that IEPA "has refused to recognize that the ERCs held by Chicago Coke are available for use as emission offsets." The January 15 Letter states, "Based upon all of the above, by this letter, I am requesting that the Illinois EPA issue a final decision, in writing, responding to my request for recognition that certain ERCs held by Chicago Coke are available for use as emission offsets." *Id*. at 2.

Exhibit D, a letter to Chicago Coke's counsel from IEPA's counsel dated February 22, 2010 ("February 22 Confirming Letter") expressly responding to the January 15 Letter, IEPA's counsel states,

> Based on a discussion I had with Laurel Kroack, Bureau Chief for the Illinois EPA's Bureau of Air, I can confirm for you that the Illinois EPA's final decision on this issue *remains the same as was previously conveyed to you*. That is, the Illinois EPA does not find that the ERCs claimed are available as offsets, since it is our position that the Chicago Coke facility is permanently shutdown. Pursuant to applicable federal guidance, the ERCs are thus not available for use as you described.

Id. (emphasis added).

Exhibit E is Chicago Coke's complaint against IEPA filed in Illinois Chancery Court grounded in the same set of facts as the Petition. Paragraph 4 of that complaint states, "Illinois regulations recognize that emission offsets can be sold between companies in non-attainment areas. *See* 35 Ill.Admin.Code § 203.303(a)."

Initial Motions

IEPA moved to dismiss the Petition in June, 2010. The Board denied the motion and accepted the Petition for hearing on September 2, 2010 ("September Order"). The September Order recited Act § 40(a), the provision governing permit appeals cited in the Petition, as a basis for its jurisdiction. *Id.* at 3. The September Order noted that while the Agency had argued that

only "traditional" permit appeals are subject to the Board's jurisdiction, Chicago Coke had argued that the Board's procedural rules at 35 Ill. Adm. Code 105.200(a) expressly allow not only traditional permit appeals, but also specifically provide for appeals of "other final decisions of the Agency." September Order at 4. The Board further notes that Chicago Coke had asserted that IEPA "concedes that there is no formal mechanism for an existing source to seek approval of use of ERCs as the only mechanism for the Agency's consideration of ERCs is in the context of a permit application for a new or modified source." *Id.* at 6. Based on Chicago Coke's arguments, the Board denied IEPA's motion to dismiss. *Id.* at 8.

In January 2011, Intervenor-Defendants moved to intervene. That motion was grounded first, in Intervenor-Defendants' desire to raise the issue of $PM_{2.5}$ surrogacy – that is, the legal impropriety of using PM_{10} credits to offset $PM_{2.5}$ emissions. *See* Motion to Intervene at 12-13. It was grounded additionally in Intervenor-Defendants' contention that they are better positioned than IEPA to defend IEPA's determination, due to Petitioner's allegations concerning the Agency's history with respect to ERCs. *Id.* at 13. IEPA did not object to the Motion to Intervene, but requested that Intervenor-Defendants be limited to "the issues set forth in the Petition for Review." Respondent's Response to Motion for Intervention at 1. Accordingly, the Board granted intervention, but limited Intervenor-Defendants' participation to those issues raised in the appeal. April 21, 2011 Order at 10 ("April Order").

Argument

INTERVENOR-DEFENDANTS HAVE NOT RAISED ISSUES BEYOND THE SCOPE OF THE PETITION

The premise underlying Chicago Coke's Motion to Strike – indeed, both of its motions to strike – is demonstrably false. That premise, in a nutshell, is that IEPA is bound by the four

corners of Chicago Coke's absurdly reductive reading of the Agency's February 22 Confirming Letter that concluded the informal ERC vetting process.

As explained below, IEPA describes in its Summary Judgment motion the reasonable process it used to arrive at its decision and the import of the Confirming Letter that concluded it. Nothing in Intervenor-Defendants' motion extends beyond the scope of that description. As further explained, there is no reasonable reading of either the Petition or IEPA's decision that does not of necessity subsume all of the issues addressed in Intervenor-Defendants' motion. In any event, portions of the material that Chicago Coke seeks to strike fall squarely within the purview of the "federal guidance" explicitly referenced in the February 22 Confirming Letter.

A. Intervenor-Defendants Have Raised No Issues Beyond the Scope of Those Addressed by IEPA

Chicago Coke frames its two motions to strike very differently, grounding the Motion directed to Intervenor-Defendants' pleadings in the Board's April Order limiting the scope of intervention, but grounding the motion directed to IEPA in an argument that IEPA's rationale is confined to the explicit text of the February 22 Confirming Letter. However, Intervenor-Defendants' Motion covers no subject matter beyond that addressed in IEPA's Motion, even though the specific arguments are not identical. Both Motions address, *inter alia*, the significance of maintaining emissions in the state inventory (IEPA Motion at 19-20, 23), the limits on ERCs imposed by § 203.303 (*Id.* at 13-14, 21-22, 26-28), the import of the parallel federal rule governing ERCs at 40 C.F.R. § 51.165 (*Id.* at 20-21), and the relationship between ERC validity and attainment demonstrations (*Id.* at 26-28) – all subject matter that Chicago Coke seeks to strike (Motion to Strike at 6-7). Thus, it is clear that Chicago Coke has not presented a separate basis to strike Intervenor-Defendants' Motion, or any basis to conclude that Intervenor-

Defendants have exceeded the scope of the Petition as it is understood by IEPA. In this regard, IEPA also responded without objection to Intervenor-Defendants' discovery requests concerning the matters that Chicago Coke seeks to strike (most notably issues concerning the emission inventory and the attainment demonstrations), reflecting a view that these matters are within the purview of issues raised in the Petition.

It is clear from review of the intervention motion and responses, and the Board's order granting intervention, that the primary purpose of the restriction on the scope of the subject matter to be raised by Intervenor-Defendants was to prohibit introduction of issues concerning PM_{10} surrogacy. As explained in Intervenor-Defendants motion for intervention dated January 14, 2011, plaintiffs proposed to argue that the PM_{10} ERCs could not be used to offset $PM_{2.5}$ emissions from the Proposed Project, because using PM_{10} as a surrogate for $PM_{2.5}$ is unlawful under the CAA. *See* Intervenor-Defendants' Motion for Intervention ¶ 10. However, since this argument concerns future use of the ERCs rather than their initial validity as determined by IEPA, Chicago Coke argued that it fell outside the purview of the Petition. Chicago Coke's Response to Petition for Intervention at 3-4. The Board concurred, and limited the scope of intervention to the matters at issue in the appeal. April Order at 10. Accordingly, Intervenor-Defendants noted in their Motion that they were adhering to the Board's order, and did not raise the PM_{10} surrogacy issue.

Chicago Coke is nonetheless under the mistaken impression that Intervenor-Defendants' Motion raised the surrogacy issue, evidently based on the fact that the words "PM_{10}" and "$PM_{2.5}$" appear in the Motion papers. Motion to Strike at 8. However, the references to those pollutants have nothing to do with the surrogacy issue. As is fairly clear from the text, Intervenor-Defendants were responding to an argument raised in the August 3 Letter as to why the

"replacement source" restriction in § 203.303 should not apply to $PM_{2.5}$. Chicago Coke's argument in that Letter (which is nonsensical for the reasons explained by Intervenor-Defendants) had to do with the fact that USEPA determined that when the Chicago area was eventually redesignated attainment for PM_{10}, the applicable Part D regulations would continue to apply to $PM_{2.5}$, for which the region would remain in non-attainment. *See* Intervenor-Defendants' Motion at 15-16.[3] To the extent Chicago Coke wishes to waive that argument in this appeal, then Intervenor-Defendants' response to it becomes irrelevant, but not until then.

B. The Petition Necessarily Subsumes All Issues Pertaining to the Applicability of 35 Ill.Admin.Code § 302.303 Governing ERCs

Chicago Coke takes the position that § 203.303 is irrelevant to this proceeding and that all references to it must be stricken, because neither the February 22 Confirming Letter nor Chicago Coke's petition make reference to it. Leaving aside the fact, discussed below, that IEPA was under no legal obligation to provide a formal enumeration of applicable law in an informal exchange of correspondence (*see* Subsection C, *infra*), this argument presents a much more fundamental problem for Chicago Coke. The section that Chicago Coke seeks to banish from this proceeding contains the *entire legal basis* for its claimed right to transfer the ERCs. While Intervenor-Defendants and IEPA have necessarily focused on the restrictions that accompany this right to transfer credits, set forth in § 203.303(b), subsection (a) of that section is what actually creates the right to create and transfer ERCs to begin with. It is not as though Chicago Coke comes to the table with a pre-existing, natural law right to transfer its prior emissions as

[3] Chicago Coke had argued in the August 3 Letter that the determination meant that permits to emit $PM_{2.5}$ "will be legally issued pursuant to federal directive and guidance under Illinois' approved attainment demonstration for PM_{10}," such that the § 203.303 restriction of ERCs to replacement sources in a nonattainment area would not apply. Intervenor-Defendants responded in the Motion that there is no rational way to read USEPA's continuance of the Part D requirements for $PM_{2.5}$ as having made those Part D requirements somehow inapplicable to $PM_{2.5}$. Intervenor-Defendants' Motion at 15-16.

ERCs. Without § 203.303, it has nothing at all to transfer. Chicago Coke may not avail itself of the right created by that section without the restrictions that define that right. That IEPA did not see the need to explain this facially obvious fact to Chicago Coke in the Confirming Letter does not make it any less true.

Indeed, Chicago Coke appears to have recognized this fact at other stages of the proceeding. Its Petition correctly recites that the company wrote letters to IEPA "asking the Agency to recognize Chicago Coke's ERCs as emissions offsets under 35 Illinois Administrative Code 203.303." Petition ¶ 4. As discussed above, the August 3 Letter goes into great analytical depth concerning that section, recognizing that its requirements must be satisfied in order for the ERCs to be valid. Chicago Coke's Chancery Court complaint, attached as Exhibit E to the Petition, likewise recognizes that § 203.303 creates the right to transfer ERCs that Chicago Coke seeks to benefit from. Petition Ex. E ¶ 4.

C. IEPA's Decision Subsumes All Issues Raised by Intervenor-Defendants

Chicago Coke's argument on both Motions to Strike more or less boils down to the assertion that since the Board has categorized this matter as a "permit appeal," IEPA must be retroactively held to the strenuous standards and obligations that attend the permitting process. Motion to Strike at 4-5. This argument vastly overinterprets the significance of the Board's jurisdictional categorization, and does not comport with either applicable law or the procedural history of this matter.

1. IEPA Was Not Required to Expressly Identify Each Regulatory Ground for Denial of Chicago Coke's Request as in a Formal Permit Denial

The Petition cites § 40(a) of the Act, governing permit appeals, as the basis for the Board's jurisdiction in this matter, and the Board accepted the appeal on that basis. September

Order at 3. Petitioners attempt to extrapolate from this simple jurisdictional determination an obligation on the part of IEPA to comply with the permitting process requirement set forth in Act § 39(a) that IEPA provide an enumerated list of reasons for the denial of a permit. Motion to Strike at 4-5.

This reasoning, however, directly contradicts Chicago Coke's explicit – and correct – recognition earlier in the proceeding that the informal process it engaged in with IEPA was *not* a permitting process. Indeed, Chicago Coke's earlier filings explain its dealings with IEPA as essentially a shortcut intended to *avoid* a protracted and likely futile permitting process. Chicago Coke argued in opposition to IEPA's initial motion to dismiss that "there is no formal mechanism for an existing source to seek approval of use of ERCs as the only mechanism for the Agency's consideration of ERCs is in the context of a permit application for a new or modified source." *See* September Order at 6. In response to IEPA's claim that the Agency can only make a final decision concerning ERCs in the context of a formal permitting proceeding, Chicago Coke argued that "[r]equiring a formal permit application for a new or modified source, when IEPA has previously - and finally - made up its mind to deny the ERCs, would be an exercise in futility." Chicago Coke's Surreply in Opposition to Motion to Dismiss at 5. IEPA's assertion that a formal permitting process is a prerequisite to an appeal, Chicago Coke argued, "makes a mockery of petitioner's good faith dealings and interaction with IEPA over two and a half years." Chicago Coke's Response to Motion to Dismiss at 5-6.

Accordingly, Chicago Coke made the case to the Board that its appeal was not actually an appeal from a permit denial in the "traditional" sense, but rather falls within the purview of the Board Rules allowing appeal of "other final decisions of the Agency." *Id.* at 3-4, *citing* 35 Ill.

Adm. Code 105.200. That reasoning was adopted by the Board in the September Order. September Order at 4.

Chicago Coke's earlier characterization of the process below as an informal series of "good faith" interactions aimed at ascertaining the validity of the ERCs in advance of a full-blown application for the Proposed Project is plainly supported by the record, including the correspondence attached to the Petition reflecting a series of meetings, phone calls, and informal exchanges. Chicago Coke did not submit a formal permit application meeting the requirements of Act § 39, and the Agency likewise did not treat the company's inquiries as a permit application and provide a formal denial. Rather, the Agency informally communicated its skepticism and ultimate denial of Chicago Coke's request on multiple occasions to Chicago Coke's council, as expressly acknowledged in the letters attached as Exhibits A through C to the Petition. *See* August 3 Letter (noting that "Illinois EPA expressed certain concerns with the transaction," and responding to those concerns); July 18 Letter (noting that IEPA "is not inclined to recognize these emission credits"); January 15 Letter (noting that IEPA "has refused to recognize that the ERCs held by Chicago Coke are available for use as emission offsets"). Accordingly, in response to Chicago Coke's request in the January 15 Letter that IEPA put its response in writing, IEPA did so, incorporating by reference all of the prior reasons it had given for the denial in its February 22 Confirming Letter. *See id.* (emphasis added) ("I can confirm for you that the Illinois EPA's final decision on this issue *remains the same as was previously conveyed to you*").

In view of this history, Chicago Coke's attempt in this proceeding to impose the requirements of a formal permitting process on IEPA, to use the company's own words, "makes a mockery" of a good-faith process. Stringing the Agency along for two years of informal

interactions, and then complaining of its lack of formality, is nothing but a game of "gotcha" that should not be tolerated.

2. IEPA Expressly Incorporated by Reference its Previously Stated Grounds for Denial

As noted above, IEPA's Confirming Letter expressly referenced and incorporated its previous discussions with Chicago Coke in which it had conveyed both its denial of the company's request and the reasons for the denial. The August 3 Letter specifically identifies a number of these reasons for the denial, and attempts to respond to each. These reasons included all of the issues that Chicago Coke now seeks to strike from Intervenor-Defendants' Motion.

Thus, Chicago Coke's position that IEPA's permissible rational for the denial is confined to the issues specifically enumerated in the February 22 Confirming Letter is untenable. The Letter plainly referenced and incorporated the reasons previously provided by the Agency.

3. IEPA's Determination Cannot Rationally be Interpreted as Chicago Coke Posits

Intervenor-Defendants' Motion, as well as its response to Chicago Coke's Motion, explain that Chicago Coke's approach to the appeal is essentially to provide a reductive and irrational interpretation of IEPA's decision, and then complain that the decision was reductive and irrational. *See* Intervenor-Defendants' Motion at 20-21, Intervenor-Defendants' Response to Chicago Coke's Motion ("Response") at 10-11. Those discussions are incorporated here by reference. As explained therein, Chicago Coke's interpretation of the February 22 Confirming Letter makes no sense as a matter of logic or statutory interpretation. Although the Agency made a shorthand reference to permanent shutdown as a basis for the denial, clearly the fact of shutdown *per se* did not invalidate the credits, since § 203.303 expressly defines circumstances in which ERCs are *allowed* to be created and transferred after a permanent shutdown. Response

at 10. IEPA's motion papers provided a detailed and rational explanation of the decision process and reasoning that underlay the Confirming Letter, and Chicago Coke offers no rational alternative interpretation. *Id.* at 10-11, *citing* Kroak Affidavit at 6-8, 19-21.

D. The Federal Guidance Referenced in IEPA's Decision Addresses Matters that Chicago Coke Seeks to Strike

Two of the issues that Chicago Coke seeks to strike from Intervenor-Defendants' Motion are expressly addressed in the federal guidance to which IEPA referred in the February 22 Confirming Letter. Accordingly, even if the Board were to accept Chicago Coke's premise that the Agency is bound by the company's truncated reading of that Letter (which it clearly should not do), these issues remain pertinent to this appeal and should not be stricken.

First, Chicago Coke seeks to strike Intervenor-Defendants' arguments that the absence of the Facility's emissions from the Inventory precludes their use as ERCs. Motion to Strike at 6. However, as discussed in Intervenor-Defendants' Motion, this principle is drawn directly from federal guidance documents. *See id.* at 16-17, *citing* Meiburg Letter and Seitz Memo. As noted in the Response, Chicago Coke even cites in its Motion for Summary Judgment the portion of the Meiburg Letter referencing the critical importance of the presence in the inventory of emissions proposed for ERC credit. Response at 9.

Chicago Coke also seeks to strike references to the relationship between ERCs and attainment planning, and in particular Intervenor-Defendants' references to counterpart federal regulations governing ERCs at 40 C.F.R. § 51.165. Motion to Strike at 6-7. However, as explained in Intervenor-Defendants' motion, the role of attainment planning – central to the purpose and function of ERCs under the CAA – is discussed at length in the Seitz Memo (which Chicago Coke relied upon in its August 3 Letter). The provisions of 40 C.F.R. § 51.165, as

explained in Intervenor-Defendants' Motion, represent the follow-up and culmination of USEPA's initial discussion in the Seitz Memo as to when to allow use of ERCs pending an attainment demonstration.

Conclusion

For the foregoing reasons, Intervenor-Defendants respectfully request that the Board deny Chicago Coke's Motion to Strike.

Respectfully submitted this 3rd day of October, 2012 by:

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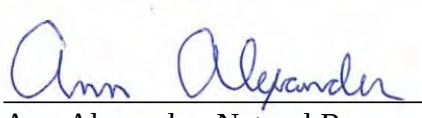
CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served via electronic mail the attached Intervenor-Defendants' Response to Chicago Coke Co., Inc.'s Motion to Strike upon the persons listed in the foregoing Notice of Filing, pursuant to mutual agreement of the parties, on this 3rd day of October, 2012.



Ann Alexander, Natural Resources Defense Council