ILLINOIS POLLUTION CONTROL BOARD
December 20, 2012

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

ORDER OF THE BOARD (by D .Glosser):

On September 19, 2012, Chicago Coke Company (Chicago Coke) filed motions to strike portions of two separate motions for summary judgment (Mot. IEPA and Mot. NRDC). The motions for summary judgment were filed on August 17, 2012, by the Illinois Environmental Protection Agency's (IEPA) and Natural Resources Defense Council (NRDC) and the Sierra Club (collectively, NRDC/Sierra Club).(. On October 3, 2012, IEPA and NRDC/Sierra Club responded to the motion to strike (IEPA Resp. and NRDC Resp.). On October 17, 2012, Chicago Coke filed motions for leave to file replies and the replies (Reply IEPA and Reply NRDC). The Board grants the motions for leave to file replies.

In responding to the motions for summary judgment on September 19, 2012, Chicago Coke did not respond to those arguments it is seeking to strike. Therefore, the Board will address only the motions to strike in today's order. Based on the arguments, the Board denies the motions to strike arguments. The Board will allow Chicago Coke the opportunity to respond to the arguments before proceeding to decide the motions for summary judgment.

The Board first summarizes the motion to strike portions of IEPA's motions for summary judgment and IEPA's response. Then the Board summarizes Chicago Coke's reply. Next, the Board will summarize the motion to strike directed to NRDC/Sierra Club's motion for summary judgment and the NRDC/Sierra Club's response. The Board then summarizes Chicago Coke's reply. Finally, the Board will discuss the arguments and explain its decision.

MOTION TO STRIKE IEPA ARGUMENTS

The Board will first summarize Chicago Coke's arguments and then IEPA's arguments. The Board will then summarize Chicago Coke's reply.

Chicago Coke's Arguments

Chicago Coke argues that the only issue before the Board is limited to the reasons for denial contained in IEPA's February 22, 2010 letter and IEPA raises arguments beyond those reasons. Mot. IEPA at 1. Chicago Coke notes that IEPA's reason, set forth in the February 22, 2010 letter, for deciding that ERCs were unavailable is:

> 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*., citing R at 1593.

Chicago Coke agrees that its request to IEPA is not a typical permit application, but argues that the Board determined that the appeal should be treated as a permit appeal. *Id*. Further, Chicago Coke asserts that IEPA recognizes that this appeal should be treated as a permit appeal. *Id*. at 1-2.

Chicago Coke opines the law "is well-settled" that IEPA's denial letter must specify the reasons for denial, and only the reasons in the denial letter may be addressed on appeal. Mot. IEPA at 2. Chicago Coke notes that the Supreme Court has held that Section 39 of the Environmental Protection Act (Act) (415 ILCS 5/39 (2010)) requires IEPA to specify the reasons for permit denial and if a reason is not specified, it may not be raised on appeal. *Id*., citing IEPA v. IPCB, 86 Ill.2d 390, 405-06; 427 N.E.2d 162, 169-70 (1981). Furthermore, Chicago Coke maintains that the appeal to the Board is an applicant's opportunity to challenge IEPA's reason for denial. *Id*., citing Emerald Performance Materials LLC v. IEPA, PCB 04-102 (Oct. 15, 2009).

Chicago Coke acknowledges that the Board has "opined that this appeal is in the nature of an appeal of a Clean Air Act permit under Sections 39.5 and 40.2(a) of the Act [415 ILCS 5/39.5 and 40.2(a) (2010)]". Mot. IEPA at 2. Chicago Coke asserts that the appeal framework under Section 39 of the Act (415 ILCS 5/39 (2010)) is "equally applicable" in this appeal. Mot. IEPA at 2-3. Chicago Coke explains that this appeal is its opportunity to challenge the reasons given by IEPA for deciding that the earned emission credits (ERCs) were unavailable, and that opportunity is meaningless if IEPA is allowed to raise issues beyond those in the February 22, 2010 denial letter. Mot. IEPA at 3.

Chicago Coke argues that IEPA's decision was based on IEPA's interpretation that "applicable federal guidance" prohibited the use of the ERCs as the facility was permanently shut down. *Id*. Chicago Coke asserts that therefore, the only issue on appeal is whether "applicable federal guidance" prohibits the use of ERCs because the facility was permanently shut down. *Id*.

Chicago Coke maintains that on summary judgment IEPA raises reasons for denial that were not articulated in the February 22, 2010 letter. Mot. IEPA at 3. Specifically, Chicago Coke asserts that IEPA relies on and references Section 203.303 of the Board's rules (35 Ill. Adm.

Code 203.303), yet IEPA's denial did not reference that rule. *Id*. Also, Chicago Coke notes that IEPA claims that the ERCs were no longer creditable because IEPA had used the emission reductions to demonstrate State compliance with emission standards for ozone attainment. Chicago Coke argues that these arguments are beyond the scope of the denial letter and therefore the arguments should be stricken.

IEPA's Arguments

IEPA maintains that in its motion to strike, Chicago Coke is asking that the Board: 1) strike references to the regulatory framework under which the appeal is brought; 2) disregard the applicable federal guidance; and 3) discount events that prohibit Chicago Coke from receiving the relief requested in the appeal. IEPA Resp. at 2. IEPA notes that the Board acknowledged the unique procedural nature of this case and "asserted jurisdiction" pursuant to Section 5(d) of the Act (415 ILCS 5/5(d) (2010)). *Id*. IEPA argues that Section 5(d) of the Act or Part 105 of the Board's rules (35 Ill. Adm. Code 105) contain no provisions establishing what must be included in IEPA's written final decisions or restricting what the Board may rely on in those appeals. *Id*. IEPA asserts that Chicago Coke has not cited any provision of the Act or Board regulations that impose the permit denial provisions of Section 39 of the Act on all other IEPA decisions. *Id*. IEPA notes that the Board did allow intervention under the provisions of Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2010)); however IEPA further notes that the Board did not apply the substantive or procedural provisions of Section 39 of the Act (415 ILCS 5/39 (2010)) to other IEPA decisions that the Board may review. IEPA Resp. at 2-3.

IEPA explains that in its motion for summary judgment on pages 13,14, and 21, IEPA references Section 203.303 (35 Ill. Adm. Code 203.303) in explaining what emission offsets are, as this Section establishes the threshold requirement for offsets. IEPA Resp. at 3. IEPA also referenced Section 203.303 in discussing the regulatory framework surrounding emission offsets and how the regulations impact IEPA's interpretation of federal guidance. IEPA asserts that Chicago Coke fails to establish why these references are inappropriate. *Id*.

IEPA asserts that "it is disingenuous" for Chicago Coke to argue that IEPA did not consider a rule entitled "Baseline and Emission Offsets Determinations" when IEPA made its decision that the ERCs were unavailable. IEPA Resp. at 3. IEPA points to an August 3, 2007, correspondence between IEPA and Chicago Coke wherein Section 203.303 is referenced at least 13 times. *Id*., citing Rec. at 1584-92. IEPA opines that Chicago Coke is asking the Board to read the February 22, 2010 letter "so narrowly that even a general overview of applicable regulation is prohibited", and Chicago Coke offers no basis for this argument. IEPA Resp. at 4.

As to Chicago Coke's argument to strike IEPA's arguments regarding the use of the emission reductions to demonstrate attainment, IEPA states that the federal guidance document in the administrative record, relied upon by IEPA in making its decision, specifically addresses emissions inventories. IEPA Resp. at 4. IEPA quotes the provision that states "ERCs can continue to exist 'as long as they are in each subsequent emissions inventory,' but expire 'if they are . . . used in demonstration of reasonable further progress' (RFP) toward attainment." *Id*., citing Rec. at 31. IEPA asserts that given that the federal guidance expressly states that ERCs

that have been used to demonstrate RFP may not be used in future permits to offset emissions, IEPA's reliance in its motion on this argument is appropriate.

IEPA further maintains that under the federal guidance one factor to be examined when determining if a facility is permanently shutdown is the state's handling of the shutdown. IEPA Resp. at 5. IEPA explains that IEPA's response to the permanent shutdown was to remove the facility from the State's emission inventory and count the emissions as zero in the State's Maintenance Plan submitted in 2009. *Id*. IEPA argues that since this is a factor to be examined under the federal guidance to determine permanent shutdown, IEPA's arguments are appropriate. *Id*.

IEPA notes that its motion presents a second argument separate from the grounds underlying IEPA's decision, which is that a finding that the ERCs are available would violate applicable federal law and the Board's regulations. IEPA Resp. at 5. IEPA notes that the United States Environmental Protection Agency (USEPA) on August 13, 2012, approved the State's Maintenance Plan as a State Implementation Plan (SIP) and approved the State's redesignation for the Chicago ozone nonattainment area. *Id*. at 6. IEPA maintains that once the State's Maintenance Plan was approved and the area was redesignated, the emission reductions in the State's Maintenance Plan are eliminated for use for any purpose. *Id*. Thus, any order allowing the ERCs to be used by Chicago Coke would violate federal law. *Id*. IEPA asserts that Chicago Coke provides no authority that precludes IEPA from informing the Board that events subsequent to IEPA's final decision bar the relief requested. *Id*.

Chicago Coke's Reply

Chicago Coke asserts that IEPA is wrongly attempting to add new reasons for its denial in the motion for summary judgment. Reply IEPA at 1. Chicago Coke opines that it is a fundamental limitation that IEPA cannot add denial reasons under Section 39 of the Act (415 ILCS 5/39 (2010)). *Id*. at 1-2. Chicago Coke maintains that allowing IEPA to argue "after-the-fact bases" raises constitutional issues and "would make a mockery of any applicant's right to appeal" an IEPA final decision. *Id*. at 2.

Chicago Coke agrees that this is a procedurally unique case, but maintains that the uniqueness of the case does not mean IEPA can ignore "years of Board jurisprudence". Reply IEPA at 2. Chicago Coke argues that IEPA's position that Section 39 of the Act does not apply is inconsistent with IEPA's position in this appeal. Specifically, IEPA argues that Section 39 does not limit IEPA and its denial reasons, but IEPA also argues that the standard of review is the standard applied to permit appeals. *Id*. at 3, citing IEPA's motion for summary judgment at 5. Chicago Coke asserts that this "flip-flopping" is an example of IEPA's attempts to block Chicago Coke at every turn, and if the appropriate standard for review is that of a permit appeal, IEPA cannot now add denial reasons. *Id*.

Chicago Coke argues that the Board has already found this case to be in the nature of a permit appeal, and it would be unfair and prejudicial to Chicago Coke for the Board to "change the rules regarding IEPA's attempt to invent new issues". Reply IEPA at 3. Chicago Coke maintains that limiting IEPA to its written decision is essential because this appeal is Chicago

Coke's opportunity to challenge the decision. *Id*. at 4, citing Emerald Performance Materials, PCB 04-102. Chicago Coke opines that its appeal would be meaningless if IEPA were allowed to add denial reasons to those included in the written decision.

Chicago Coke also takes issue with IEPA's attempt to argue events that occurred after the February 22, 2010 letter. Reply IEPA at 4. Chicago Coke asserts that arguing that these after the fact issues abrogate fundamental fairness and is especially egregious. *Id*. at 4-5.

Based on these arguments, Chicago Coke asks the Board to strike all arguments not referenced in the February 22, 2010 denial letter.

MOTION TO STRIKE NRDC/SIERRA CLUB'S ARGUMENTS

The Board will first summarize Chicago Coke's arguments and then NRDC/Sierra Club's arguments. The Board will then summarize Chicago Coke's reply.

Chicago Coke's Arguments

Chicago Coke asserts that NRDC/Sierra Club raise a number of issues that are beyond the scope of this appeal, despite the Board's limitation that NRDC/Sierra Club could not raise any issues beyond those in Chicago Coke's petition for review. Mot. NRDC at 1. Chicago Coke argues that NRDC/Sierra Club present arguments based on matters that were in the exhibits to the petition for review; this after the Board by implication rejected the claim that such matters were appropriate for Board consideration. *Id*. at 3. Chicago Coke further argues that NRDC/Sierra Club's contention is illogical as many issues may be discussed in correspondences that are not appealable to the Board. *Id*.

Chicago Coke asserts that NRDC/Sierra Club also raise arguments beyond the reasons expressed in IEPA denial letter. Chicago Coke opines that the "it is well-settled" that IEPA's denial letter must specify the reasons for denial, and only the reasons in the denial letter may be addressed on appeal. Mot. NRDC at 4. Chicago Coke notes that the Supreme Court has held that Section 39 of the Act (415 ILCS 5/39 (2010)) requires IEPA to specify the reasons for permit denial, and if a reason is not specified, it may not be raised on appeal. *Id*., citing IEPA v. IPCB, 86 Ill.2d 390, 405-06; 427 N.E.2d 162, 169-70 (1981). Furthermore, Chicago Coke maintains that the appeal to the Board is an applicant's opportunity to challenge IEPA's reason for denial. *Id*. at 5, citing Emerald Performance Materials LLC v. IEPA, PCB 04-102 (Oct. 15, 2009).

Chicago Coke acknowledges that the Board has "opined that this appeal is in the nature of an appeal of a Clean Air Act permit under Sections 39.5 and 40.2(a) of the Act [415 ILCS 5/39.5 and 40.2(a) (2010)]". Mot. NRDC at 5. Chicago Coke asserts that the appeal framework under Section 39 of the Act (415 ILCS 5/39 (2010)) is "equally applicable" in this appeal. *Id*. Chicago Coke explains that this appeal is its opportunity to challenge the reasons given by IEPA for deciding that the ERCs were unavailable, and that opportunity is meaningless if IEPA is allowed to raise issues beyond those in the February 22, 2010 denial letter. *Id*.

Chicago Coke notes that IEPA's reason for deciding that ERCs were unavailable 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. Mot. NRDC at 5, citing R at 1593.

Chicago Coke argues that IEPA's decision was based on IEPA's interpretation that "applicable federal guidance" prohibited the use of the ERCs as the facility was permanently shut down. Chicago Coke maintains that the decision was not based on whether the ERCs are only valid for replacement projects, the surrogacy of PM_{10} credits, the removal of Chicago Coke's emission from the state emission inventory, or on Section 203.303 (35 Ill. Adm. Code 203.303) of the Board's rules. *Id*. Chicago Coke insists that NRDC/Sierra Club are barred from raising any arguments in its motion for summary judgment that are beyond IEPA's stated reasons for denial and those arguments should be stricken.

NRDC/Sierra Club's Arguments

NRDC/Sierra Club argue that Chicago Coke avoided the "rigors of a permit application process" by asking for pre-approval for the ERCs through informal meetings and correspondence and yet now Chicago Coke seeks to impose on IEPA all of the "standards and rigors" of a permit decision. NRDC Resp. at 1-2. NRDC/Sierra Club claim that the real issue raised in the motion to strike is not that NRDC/Sierra Club violated the Board's directive, but rather the contention that Chicago Coke is exempt from restrictive conditions in laws governing ERCs. *Id*. at 2. NRDC/Sierra Club maintain that much of what Chicago Coke is seeking to strike falls "squarely within the purview" of IEPA's decision letter. *Id*.

NRDC/Sierra Club note that Chicago Coke frames the two motions to strike differently, framing the motion directed to NRDC/Sierra Club as raising arguments beyond the scope of intervention. NRDC Resp. at 6. NRDC/Sierra Club argue that its arguments cover no subject beyond the arguments made by IEPA in its motion, though the specific arguments are different. *Id*. NRDC/Sierra Club opine that both motions address the significance of maintaining emissions in the state inventory, the importance of the federal rule governing ERCs, and the relationship between ERC validity and attainment demonstrations. NRDC/Sierra Club further opine that these are all arguments that Chicago Coke seeks to strike, and Chicago Coke has not presented an adequate, separate, basis to support its argument that NRDC/Sierra Club's arguments are beyond the scope of the petition for review. *Id*. at 5-7.

NRDC/Sierra Club assert that Chicago Coke is "under the mistaken impression" that it raised the issue of PM_{10} as a surrogate for $PM_{2.5}$ in the motion for summary judgment. NRDC Resp. at 7. However, NRDC/Sierra Club assert that the references to those pollutants have nothing to do with the surrogacy issue and the arguments are referring to issues raised by Chicago Coke. *Id*.

NRDC/Sierra Club argue that Chicago Coke's argument that the issue of Section 203.303 (35 Ill. Adm. Code 203.303) should be stricken is problematic for Chicago Coke in that the entire legal basis for the claimed right to transfer ERCs is found in Section 203.303 (35 Ill. Adm.

Code 203.303). NRDC Resp. at 8. NRDC/Sierra Club note that IEPA and NRDC/Sierra Club have focused on the restrictions in Section 203.303, but the rule actually creates the right to transfer Chicago Coke seeks to use. *Id*. NRDC/Sierra Club maintain that Chicago Coke does not have "pre-existing, natural law right to transfer" its emissions and without Section 203.303 (35 Ill. Adm. Code 203.303), there is nothing to transfer. *Id*. at 8-9. NRDC/Sierra Club argue that Chicago Coke appears to have recognized the relationship of Section 203.303 (35 Ill. Adm. Code 203.303) to this proceeding as Chicago Coke indicated in the petition for review that it had asked IEPA to recognize Chicago Coke's ERC emissions offsets under Section 203.303 (35 Ill. Adm. Code 203.303). *Id*. at 9, citing Pet. at ¶4.

NRDC/Sierra Club characterize Chicago Coke's arguments in the motion to strike as claiming that the Board determined this to be a permit appeal, and IEPA must be held to the permit appeal standards and obligations. NRDC Resp. at 9. NRDC/Sierra Club claim that this position "vastly overinterprets [*sic*] the significance of the Board's jurisdictional categorization and does not comport" with applicable law or the procedural history. *Id*. NRDC/Sierra Club note that the petition cited this as an appeal under Section 40 of the Act (415 ILCS 5/40 (2010)), and the Board accepted the matter under that premise. *Id*. at 9-10. However, the Board's acceptance of the petition under Section 40 does not extrapolate to an obligation on the part of IEPA to comply with permitting requirements. *Id*. at 10.

NRDC/Sierra Club note that Chicago Coke itself recognized earlier in this proceeding that the process with IEPA was an informal process and not a permitting process. NRDC Resp. at 10. NRDC/Sierra Club claim that in earlier filings Chicago Coke explained its dealing with IEPA as an attempt to avoid the permit process. *Id*. According to NRDC/Sierra Club, Chicago Coke argued to the Board that this was not a permit denial but fell within the Board's purview allowing for appeal of other IEPA decisions. *Id*. Furthermore, NRDC/Sierra Club maintain that Chicago Coke did not submit a formal permit application under Section 39 of the Act (415 ILCS 5/39 (2010)). *Id*. at 11. Based on this history, NRDC/Sierra Club assert that Chicago Coke's insistence on the requirements of a formal permitting process on IEPA is inappropriate. *Id*.

NRDC/Sierra Club argue that IEPA's letter incorporates previous discussions and correspondence including the August 3, 2007 letter (Rec. at 1584-92) that specifically enumerates reasons for denial. NRDC Resp. at 12. Furthermore, NRDC/Sierra Club argue that Chicago Coke's attempt to limit the appeal to only the specific language in the February 22, 2010 letter ignores the fact that the ERCs are not invalidated by shutdown *per se* but only by circumstances identified in Section 203.303 (35 Ill. Adm. Code 203.303). *Id*.

NRDC/Sierra Club finally argue that the arguments Chicago Coke seeks to strike are also included in the federal guidance referenced by the February 22, 2010 letter and should be considered by the Board. NRDC Resp. at 13. Specifically, the arguments by NRDC/Sierra Club concerning the absence of the facility's emissions from the state inventory and the relationship between ERCs and attainment planning are discussed by the federal guidance, and the Board should consider those arguments. *Id*.

Chicago Coke's Reply

Chicago Coke asserts that NRDC/Sierra Club misstate and misunderstand the arguments that Chicago Coke is making in support of its motion to strike. Reply NRDC at 1. Chicago Coke maintains that contrary to NRDC/Sierra Club's arguments, Chicago Coke took the only road available to it to obtain a determination regarding the validity of the ERCs. *Id*. at 2. Chicago Coke argues that IEPA must be bound by some restrictions, and the Section 39(a) requirements apply to this case. *Id*. Chicago Coke maintains that it does not contend that it is exempt form the laws governing ERCs, but rather that a reason for denial must be included in the denial letter to be raised by IEPA on appeal. *Id*. at 3.

DISCUSSION

As has been pointed out by the parties, this proceeding is unique in that while initially accepting this as a permit appeal (*see* Chicago Coke, PCB 10-75 (May 6, 2010)), ultimately the Board accepted this as an appeal of an IEPA decision pursuant to Section 5(d) of the Act (415 ILCS 5/5(d) (2010)) (*see* Chicago Coke v. IEPA, PCB 10-75 (Sept. 2, 2010). In considering whether to allow intervention by NRDC/Sierra Club, the Board looked to the provisions of Sections 39.5 and 40.2(a) of the Act (415 ILCS 5/ 39.5 and 40.2(a) (2010)). In deciding intervention, the Board made clear that such consideration was given because of the unique circumstances of this case. After noting that Chicago Coke filed its petition pursuant to Section 40 of the Act (415 ILCS 5/40 (2010), the Board stated:

> 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 v. IEPA and NRDC/Sierra Club (intervenors), PCB 10-75, slip op. 8-9 (Apr. 21, 2011).

However, contrary to Chicago Coke's interpretation, the Board did not state that this matter was or would be treated as a permit appeal. Rather, the Board looked to the permit appeal for guidance in addressing the issues raised by the motion to intervene. The Board will continue to look to the permit appeal provisions for guidance, because in a permit appeal the Board is reviewing an IEPA decision[1].

In a permit appeal, the law is well settled that when reviewing an IEPA final decision, the Board's review is generally limited to information before IEPA during IEPA's statutory review period, and is not based on information developed by the permit applicant or IEPA after IEPA's decision. Alton Packaging Corporation v. IPCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Panhandle Eastern Pipeline Company v. IEPA, PCB 98-102, slip op. at 2 (Jan. 21, 1999); American Waste Processing v. IEPA, PCB 91-38, slip op. at 2 (Oct. 1, 1992). Furthermore, IEPA's denial letter frames the issues on appeal. *See* Centralia Environmental Services v. IEPA, PCB 89-170, slip op. at 8 (Apr. 11, 1991); Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990).

Chicago Coke seeks to strike arguments made by IEPA that were not specifically referenced in the denial letter, particularly relating to Section 203.303 (35 Ill. Adm. Code 203.303), and that IEPA used the emissions from the facility as emission reductions. Likewise, Chicago Coke seeks to strike arguments by NRDC/Sierra Club relating to Section 203.303 (35 Ill. Adm. Code 203.303), and arguments that are allegedly beyond the scope of this appeal. IEPA's denial letter 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. Rec. at 1593.

The denial letter clearly references prior correspondence and discussions. In an earlier letter to IEPA, Chicago Coke's attorney discuses IEPA's concerns under Section 203.303, as well as issues relating to PM_{10} and $PM_{2.5}$. Rec. at 1584-92. Thus, Chicago Coke was aware that Section 203.303 was a part of IEPA's decision and that PM_{10} and $PM_{2.5}$ emissions offsets were a concern.

The Board has reviewed the motions for summary judgment and the motions to strike. The Board is convinced that the arguments regarding Section 203.303 (35 Ill. Adm. Code 203.303) are arguments that explain the decision by IEPA and not new denial reasons. IEPA in its motion is explaining its reasoning as to why the federal guidance demonstrates that the ERCs are not available and supports IEPA's determination that the facility is shutdown. NRDC/Sierra Club are expanding on those arguments. Therefore, the Board denies the motion to strike the arguments related to Section 203.303 (35 Ill. Adm. Code 203.303).

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[1] In contrast, in variances and adjusted standards IEPA offers a recommendation to the Board (*see* 415 ILCS 5/28.1 and 37 (2010)).

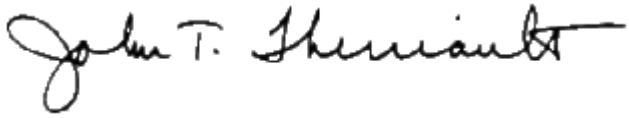
The issue for the Board in this proceeding is whether ERCs were available to be claimed as offsets. Thus, arguments that do not address this issue are not relevant. Given that limitation, IEPA's arguments regarding events that occurred after the February 22, 2010 letter, will only be considered to the extent that those arguments are relevant to the events occurring prior to February 22, 2010. Similarly, the Board will not strike NRDC/Sierra Club's arguments relating to PM_{10} and $PM_{2.5}$ surrogacy, but the Board will only consider those arguments as they relate to whether or not ERCs were available. Therefore, the Board denies the motion to strike those arguments.

CONCLUSION

The Board denies the motions to strike filed by Chicago Coke as those arguments address issues framed by the denial letter. Because Chicago Coke did not respond to these arguments in its response to the motion for summary judgment, the Board will allow Chicago Coke to file an amended response addressing these issues, before proceeding to rule on the motions for summary judgment. That response must be filed by January 21, 2013. The hearing officer may allow additional time, if a corresponding waiver of the decision deadline is provided by Chicago Coke.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 20, 2012, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board