

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In re:	)	
	)	
FutureGen Industrial Alliance, Inc.	)	UIC Appeal No(s): 14-68, 14-69, 14-70 &
	)	14-71
UIC Permit Nos.: IL-137-6A-001	)	
IL-137-6A-002	)	
IL-137-6A-003	)	
IL-137-6A-004	)	

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**PERMITEE FUTUREGEN INDUSTRIAL ALLIANCE, INC.’S  
RESPONSE TO “PETITIONERS’ MOTION FOR (1) AN EXTENSION OF TIME  
TO FILE REPLY BRIEFS, AND (2) FOR AN EXPEDITED RULING ON ITS MOTION,  
OR IN THE ALTERNATIVE TO AN EXPEDITED RULING, A STAY OF  
PETITIONERS’ DEADLINE TO FILE REPLY BRIEFS UNTIL A REASONABLE  
AMOUNT OF TIME AFTER THE BOARD RULES ON ITS MOTION”**

John J. Buchovecky  
Marlys S. Palumbo  
Chris D. Zentz  
Van Ness Feldman, LLP  
1050 Thomas Jefferson St. NW, 7<sup>th</sup> Floor  
Washington, D.C. 20007  
Tel.: (202) 298-1800  
Fax: (202) 338-2416  
[jib@vnf.com](mailto:jib@vnf.com)  
[mvp@vnf.com](mailto:mvp@vnf.com)  
[cdz@vnf.com](mailto:cdz@vnf.com)

*Counsel for FutureGen Industrial Alliance, Inc.*

FutureGen Industrial Alliance, Inc. (the “Alliance”) hereby responds, pursuant to 40 C.F.R. § 124.19(f)(3) (2014), to the Petitioners’ *Motion for (1) an Extension of Time to File Reply Briefs, and (2) for an Expedited Ruling on [the] Motion, or in the Alternative to an Expedited Ruling, a Stay of Petitioners’ Deadline to File Reply Briefs Until a Reasonable Amount of Time After the Board Rules on [the] Motion* (“Motion for Extension”) filed by Andrew H. Leinberger Family Trust, DJL Farm LLC, William Critchelow, and Sharon Critchelow (collectively, “Petitioners”), with the Environmental Appeals Board (“Board”) on November 5, 2014. For the reasons specified below, the Alliance objects to the Motion for Extension and requests that the Board deny Petitioners’ Motion for Extension and, instead, grant the Alliance’s pending *Motion for Expedited Review and Declarations in Support* (“Motion to Expedite”).

1. No extension is warranted because Petitioners fail to demonstrate that additional briefing is necessary.

The Alliance objects to the Motion for Extension, including both of the Petitioners’ requested forms of relief: an extension to file a reply brief or, alternatively, a stay of these proceedings until the Board rules on its Motion for Extension. No further briefing is necessary in this proceeding and, therefore, granting Petitioners’ Motion for Extension is unnecessary.

Although the Board has discretion to grant additional briefing, *see* 40 C.F.R. § 124.19(c), the Board discourages the filing of further briefing following receipt of a response from the permit issuer. *See In re Teck Cominco Alaska Incorporated, Red Dog Mine*, 11 E.A.D. 457, 471 (EAB 2004) (“[We] generally discourage the filing of additional briefing after the permit issuer’s response...”) (citing the Board Practice Manual at p. 41, which notes, “The petition should contain all supporting argumentation.”); *see also In re LCP Chems. — N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993) (noting that “[a] petition for review under § 124.19 is not analogous to a notice

of appeal that may be supplemented by further briefing. Although additional briefing may occur after review has been granted, the discretion to grant review is to be sparingly exercised. . .”). Absent compelling circumstances, the Board should reject Petitioners’ Motion for Extension.

As noted in the responses filed by the Alliance and the U.S. Environmental Protection Agency Region 5 (“EPA”) in this proceeding, Petitioners fail to articulate adequate grounds for the Board to exercise its limited review powers. *See Permittee FutureGen Industrial Alliance, Inc.’s Consolidated Response to Petitions for Review* at pp. 8-30. Because Petitioners fail to satisfy their fundamental burden of proof requirements to warrant Board consideration, further briefing is not necessary. Furthermore, allowing Petitioners to satisfy their burden through additional briefing, as Petitioners request, *see* Motion for Extension at p. 4 (claiming Petitioners need the opportunity to file reply briefs in order to carry their burden), runs clearly afoul of the Board’s precedent requiring that the initial petition contain all necessary arguments to satisfy a petitioner’s initial burden of proof. *See In re LCP Chems. — N.Y.*, 4 E.A.D. at n.9 (EAB 1993); *see also* Board Practice Manual at p. 41. As such, supplemental briefing is not an appropriate method for a petitioner to satisfy its initial evidentiary burden. *Id.*

The Alliance also notes that the Motion for Extension fails to satisfy the Board’s regulations, which require such motion to state with particularity the grounds for the motion. *See* 40 C.F.R. § 124.19(f)(2). Petitioners fail to state with any particularity those facts or items in the administrative record that require an additional response or that support granting their Motion for Extension. Instead, Petitioners simply state, nearly verbatim, the same issues identified in their Petition and rely on other general statements to persuade the Board that an extension is warranted in this case. In particular, Petitioners claim that they need more time because:

- (a) the responses from the Alliance and EPA are somewhat longer than the Petition (*see* Motion for Extension at p. 2);
- (b) the Alliance and EPA responses to the Petition allegedly contain misleading facts and points of law (*id.*);
- (c) Petitioners deserve an opportunity to further respond as a matter of “procedural and substantive fairness and justice,” (*see id.* at p. 5); and
- (d) “important precedent-setting issues” are before the Board, which require further consideration (*id.*).

In short, none of these arguments state, with sufficient particularity, an appropriate regulatory or legal basis for granting Petitioners’ Motion for Extension. Accordingly, Petitioners’ Motion for Extension should be denied.

The Petitioners’ own acknowledgement of the voluminous nature of the record in this proceeding, and the length of the responses submitted by the Alliance and EPA, undermines their asserted need for an extension. *See* Motion for Extension at pp. 2-3. As demonstrated by the evidence in the record that was cited and submitted to the Board by both the Alliance and EPA, Petitioners’ arguments were carefully considered and adequately addressed by EPA during the comment process. In light of the record, which includes both the concerns raised by Petitioners’ and substantial evidence demonstrating EPA’s reasoned consideration of those concerns, the Board now has all the materials it needs to rule expeditiously on this appeal. In a proceeding such as this one, which involves substantial briefing prior to the filing of replies, the Board has previously determined there is no need for any reply briefing. *See In re Envotech, L.P.*, 6 E.A.D. 260, 261 at n.2 (EAB 1996) (“Because the issues have been extensively briefed, the Board concludes that further briefing is unnecessary. Therefore, the motions [for leave to reply] are

hereby denied.”). Consistent with Board precedent, no further briefing is necessary because, the record is already voluminous and substantial briefing has already occurred, as Petitioners themselves point out. *See* Motion for Extension at pp. 2-3.

2. Granting Petitioners’ Motion for Extension will cause the Alliance material prejudice and harm.

In support of the Motion for Extension, Petitioners also allege that the granting of their motion will not cause EPA or the Alliance material prejudice because “there is another legal proceeding currently pending before the Illinois Pollution Control Board.” However, this argument is no longer true, as the Illinois Pollution Control Board, on November 6, 2014, granted the Alliance’s Motion for Summary Judgment. *See Opinion and Order of the Board: Grant the Motion for Summary Judgment*, PCB Case No. 2014-134 (Nov. 6, 2014).<sup>1</sup> As further described in the Alliance’s Motion to Expedite, the Alliance’s efforts to obtain commercial financing are significantly impacted by potential litigation delays. Thus, contrary to Petitioners’ arguments, any extension of time granted by the Board will result in substantial prejudice and harm to the Alliance by materially impacting the ability to finance the Alliance project.

3. Petitioners’ argument regarding the unavailability of their expert is inapposite and fails to justify granting the Petitioners’ request for an extension.

Petitioners’ finally argue that an extension is needed to allow them additional time because their expert witness would otherwise have “an extremely difficult time assisting Petitioners with their reply briefs.” *See* Motion for Extension at pp. 5-6. The Alliance has already noted in its response to the Petition that the Supplemental Report of Petitioners’ expert, filed with the Petition, is not properly before the Board. The Supplemental Report is not part of the record in this proceeding because Petitioners have failed to take the legal steps required to

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<sup>1</sup> The IPCB’s Order granting the Alliance’s Motion for Summary Judgment can be accessed at: <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-86793>.

supplement the record. *See FutureGen Industrial Alliance, Inc.'s Consolidated Response to Petitions for Review* at pp. 32-33. For this reason, the Petitioners' assertion that their expert needs additional time to address the responses submitted by the Alliance and EPA is misguided. For the same reason, future materials prepared by the Petitioners' expert should be inadmissible and, therefore, should not be considered by the Board. Accordingly, this argument also fails to justify Petitioners' request for an extension of time to allow their reply.

### CONCLUSION

For the reasons set forth herein, the Alliance respectfully requests that this Board enter an order as follows:

- A. Issue an order denying the Petitioners' Motion for Extension in its entirety, including an order denying both of the Petitioners' requested forms of relief;
- B. Issue an order denying Petitioners' request for additional briefing; and
- C. Issue an order granting the Alliance's pending Motion to Expedite.

Respectfully submitted,

/s/ John J. Buchovecky  
John J. Buchovecky  
Van Ness Feldman, LLP  
1050 Thomas Jefferson St. NW, 7th Floor  
Washington, D.C. 20007  
Phone: (202) 298-1800  
Fax: (202) 338-2416  
Email: [jjb@vnf.com](mailto:jjb@vnf.com)

*Counsel for FutureGen Industrial Alliance, Inc.*

Date: November 7, 2014

## CERTIFICATE OF SERVICE

I hereby certify that I filed the original electronically with the Environmental Appeals Board. In addition, I filed one copy of the FutureGen Industrial Alliance, Inc.'s Response to Petitioners' *Motion for (1) an Extension of Time to File Reply Briefs, and (2) for an Expedited Ruling on [the] Motion, or in the Alternative to an Expedited Ruling, a Stay of Petitioners' Deadline to File Reply Briefs Until a Reasonable Amount of Time After the Board Rules on [the] Motion* (the "Alliance's Response") by Next Day UPS with the Clerk of the Environmental Appeals Board at:

Ms. Eurika Durr  
U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
WJC East, Room 3332  
Washington, DC 20004

I also certify that I delivered a copy of the foregoing Alliance's Response on the date specified below, by electronic mail and certified mail, return receipt requested to:

Jennifer T. Nijman  
Nijman Franzetti, LLP  
10 S. LaSalle Street, Suite 3600  
Chicago, Illinois 60602  
[jn@nijmanfranzetti.com](mailto:jn@nijmanfranzetti.com)

Karl Leinberger  
Markoff Leinberger LLC  
134 N. LaSalle Street, Suite 1050  
Chicago, IL 60602  
[karl@markleinlaw.com](mailto:karl@markleinlaw.com)

Ms. Susan Hedman  
Regional Administrator  
Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
[hedman.susan@epa.gov](mailto:hedman.susan@epa.gov)

[SIGNATURE FOLLOWS]

/s/ John J. Buchovecky

Date: November 7, 2014

John J. Buchovecky

Van Ness Feldman, LLP

1050 Thomas Jefferson St. NW, 7<sup>th</sup> Floor

Washington, D.C. 20007

Phone: (202) 298-1800

Fax: (202) 338-2416

Email: [jjb@vnf.com](mailto:jjb@vnf.com)