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

In re:	)	
FutureGen Industrial Alliance, Inc.	)	UIC Appeal Nos.: 14-68
	)	14-69
Permit Nos.: IL-137-6A-001	)	14-70
IL-137-6A-002	)	14-71
IL-137-6A-003	)	
IL-137-6A-004	)	

PETITIONERS' MOTION FOR STAY OF PERMITS PENDING APPEAL

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The Andrew H. Leinberger Family Trust, DJL Farm LLC, William Critchelow, and Sharon Critchelow (collectively, "Petitioners"), pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 705, respectfully moves the Environmental Appeals Board ("Board") to stay the issuance and effectiveness of the four permits[1] that the United States Environmental Protection Agency ("EPA") issued to FutureGen Industrial Alliance, Inc. ("FutureGen") and prohibit any construction for underground injection activity, pending the outcome of Petitioners' appeal to the United States Court of Appeals for the Seventh Circuit and, if necessary, the United States Supreme Court.[2]

Pursuant to 40 C.F.R. § 124.16, the effectiveness of the Permits was stayed during the pendency of the appeal to the Board. For the reasons that follow, the Board should continue the stay of the Permits, and preserve the *status quo*, pending the outcome of Petitioners appeal to federal court. Petitioners request that the Board rule on this motion prior to June 9, 2015.

Compliance with 40 C.F.R. § 124.19(f)(2)

On May 20, 2015, counsel for Petitioners contacted respective counsel for the EPA and FutureGen regarding their concurrence or objection to this motion. On May 21, 2015, counsel for EPA and counsel for FutureGen indicated that they objected to this motion for stay.

Standards Governing A Stay

The APA states, in relevant part: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. In assessing a request for a stay under § 705, the Board should follow the standards governing the issuance of a preliminary injunction. *See In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th

[1] The permits were assigned Nos. IL-137-6A-001, IL-137-6A-002, IL-137-6A-003, and IL-137-6A-004. The four permits are collectively referred to herein as the "Permits."

[2] The Board consolidated four separately-filed Petitions for purposes of appeal. For purposes of simplicity, the four petitions are collectively referred to herein as the "Petitions."

Cir. 2014) ("The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction."). "To determine whether to grant a stay, we consider [1] the moving party's likelihood of success on the merits, [2] the irreparable harm that will result to each side if the stay is either granted or denied in error, and [3] whether the public interest favors one side or the other." *Id.* (granting a stay pending appeal). "This equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor." *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013) (holding that preliminary injunctions should have been issued below).

Argument

The standards governing a stay are satisfied here, and justice requires that the Board stay the Permits pending appeal to federal court. The stay is necessary to uphold the purposes of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h, *et seq*. A main purpose of the SDWA is to protect underground drinking water sources. The court in *Phillips Petroleum Co. v. E.P.A.* stated the purpose and the liberal construction needed to give effect to its purposes:

> If a requirement 'is essential to assure that underground sources of drinking water will not be endangered,' then it is of no import whether underground injections are impeded. *Id.* Indeed, the clear overriding concern of Congress was that of 'assuring the safety of present and potential sources of drinking water.' H.R.Report No. 1185, 93d Cong., 2d Sess. at 31, U.S.Code Cong. & Admin.News 1974, p. 6484. … Moreover, the phrase 'underground injection which endangers drinking water sources' is to be liberally construed so as to effectuate the preventative and public health protective purposes of the [SDWA].' H.R.Rep. No. 1185, 93d Cong., 2d Sess. 32 (1974), U.S.Code Cong. & Admin.News 1974, pp. 6484.

803 F.2d 545, 560 (10th Cir. 1986). The Board previously has granted stays to preserve the *status quo*. *E.g., In re Environmental Disposal Systems, Inc.*, UIC Appeal No. 07-03, slip op. at 8-9 (EAB Aug. 25, 2008).

The Permits became effective on May 7, 2015 when the EPA Region 5 Administrator

issued a final decision for the Permits, which constituted a final agency action under 40 C.F.R. § 124.19(l). The Permits are effective for the life of FutureGen's project. *Permits* dated May 7, 2015, **Exhibit 1** hereto. The Permits expire on May 7, 2016 if no construction has started for FutureGen's injection site. *Id.*; AR #594. Construction has started at the proposed injection site. *Supplemental Declaration of Karl Leinberger* ("*Leinberger Dec*.") ¶ 3, **Exhibit 2** hereto. Additional construction could occur within the one-year period. The EPA Director has the authority to extend the one-year period. *Permits* dated May 7, 2015, **Ex. 1**; AR #594. The length of an extension that the EPA Director can grant may not be limited. FutureGen's attorneys informed the Board during a February 10, 2015 hearing that it intended to pursue its project and the Permits. *Leinberger Dec*., ¶ 4, **Ex. 2**. During that hearing, one of FutureGen's attorneys informed the Board that FutureGen was actively engaged in efforts to get its federal funding reinstated. *Id.* Hence, a stay of construction pending the outcome of an appeal to federal court is important to preserving the *status quo* and upholding the purposes of the SDWA.

I. Likelihood Of Success On The Merits.

A likelihood of success on the merits means only that the party seeking the injunction has "a plausible theory on the merits—not necessarily a winning one …" *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 726 (7th Cir. 2009). "[T]he Supreme Court has warned against improperly equat[ing] likelihood of success with success.... This is in keeping with the often-repeated rule that the threshold for establishing likelihood of success is low." *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 782 (7th Cir. 2011) (internal quotations and citations omitted); *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011) (for a preliminary injunction, the moving party need only show "some likelihood of success on the merits"). Hence, the likelihood of success requirement "is a low threshold,

requiring only that [the movant's] chance of prevailing is 'better than negligible.'" *Cent. States, Se. & Sw. Areas Health & Welfare Fund ex rel. McDougall v. Lewis*, 871 F. Supp. 2d 771, 778 (N.D. Ill. 2012). Under this standard, Petitioners have a likelihood of success on at least one of the issues that will be raised on appeal.[3]

With respect to all issues in the Board's April 28, 2015 ruling ("*Ruling*"), the Board failed to properly apply all three standards of review, and particularly the standards of review for (1) exercise of discretion and (2) important policy considerations. 40 C.F.R. § 124.19(a)(4)(i)(B). Under the proper application of those two standards, the Permits should have been remanded on multiple aspects of the Permits. Remand was particularly appropriate due to the first-of-its-kind project. See *Ruling*, p. 3. Further, the Board erred in applying the clearly erroneous standard regarding findings of fact and conclusions of law. 40 C.F.R. § 124.19(a)(4)(i)(A).

A. Petitioners Have A Likelihood of Success for Their Arguments Involving Permit Condition G Regarding Well Identification.

The SDWA regulations state that all wells must be identified in order to determine those needing corrective action:

> Owners or operators of Class VI wells [FutureGen] must … identify all wells that require corrective action:
>
> ***
>
> (2) … identify all penetrations, including active and abandoned wells … in the area of review that may penetrate the confining zone(s). …; and
>
> (3) Determine which abandoned wells in the area of review have been plugged in a manner that prevents the movement of carbon dioxide or other fluids that may endanger USDWs ….

40 C.F.R. § 146.84(c)(2) and (3). The SDWA regulations also state, in relevant part:

> Owners or operators of Class VI wells [FutureGen] must perform corrective action on all wells in the area of review that are determined to need corrective

[3] Petitioners do not address herein every issue that will be raised on appeal. In light of the lower standard for a likelihood of success, Petitioners not required to present the full-scale argument for every issue that will be presented on appeal.

action ….

40 C.F.R. § 146.84(d). The SDWA regulations further state:

> This section sets forth the information which must be considered by the Director in authorizing Class VI wells. … (a) Prior to the issuance of a permit for the construction of a new Class VI well …, the owner or operator shall submit, pursuant to § 146.91(e), and the Director shall consider the following:
>
> ***
>
> (2) A map showing the injection well for which a permit is sought and the applicable area of review consistent with § 146.84. Within the area of review, the map must show the number or name, and location of <u>all</u> injection wells, producing wells, abandoned wells, plugged wells or dry holes, deep stratigraphic boreholes, State- or EPA-approved subsurface cleanup sites, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells, other pertinent surface features including structures intended for human occupancy, State, Tribal, and Territory boundaries, and roads. The map should also show faults, if known or suspected. Only information of public record is required to be included on this map;
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> ***
>
> (4) A tabulation of all wells within the area of review which penetrate the injection or confining zone(s). Such data must include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the Director may require;

40 C.F.R. § 146.82(a)(2) and (4) (emphasis added).

The Board's ruled that these regulations were satisfied. *Ruling*, pp. 33-48. On appeal, there is a likelihood of success regarding this issue because the SDWA regulations required greater well identification than FutureGen performed, particularly in the immediate area of the projected carbon dioxide plume where the likelihood of migration and contamination of wells is greater due to the greater pressure in the injection zone.

It is not disputed that FutureGen did not identify "all" wells for the map it submitted in the application for its Permits. The SDWA regulations required identification of "all" wells. It was particularly important for the EPA to require FutureGen to identify gas wells that can extend deep underground.

It is not disputed that FutureGen relied almost exclusively on State databases. *E.g.,*

Ruling, pp. 36-40. It also is not disputed that the EPA's internal guidance documents indicate that State well databases are inherently flawed. EPA Consolidated Response Brief, p. 21; AR# 439. The EPA's guidance document states that governmental well databases are meant to provide "assistance with the identification of abandoned wells" (AR#439, p. 52, *AoR Evaluation and Corrective Action Guidance*). The EPA's internal guidance portrays reliance on State databases as the "first step" in identifying wells. AR#439, p. 52. FutureGen's strong reliance on State databases, which is a departure from the EPA internal guidance document stating that those databases are incomplete and flawed, required explanation and adequate support in the record.

The Board's conclusion that FutureGen did not have to identify a variety of gas wells because it was presumed that they do not require corrective action is inconsistent with the regulations. It is undisputed that there are unidentified natural gas wells in the immediate vicinity of the projected carbon dioxide plume. It is also undisputed that FutureGen does not know whether these wells need the corrective action required under the regulations. The existence of two other gas wells in the Area of Review that penetrate the confining zone make it at least reasonably possible that other gas wells in the Area of Review also require corrective action. As the EPA's internal guidance document states, oil and gas wells can be deep: "Most deep wells that may penetrate the primary confining zone of a proposed sequestration project site are related to oil and gas exploration and production. Deep well drilling for oil and gas exploration dates back to the 1870s." (AR#439, p. 52) It is reasonably likely that prior oil or gas activities in the Areas of Review penetrated the confining zone because the Whitlock well (#7-15) and Criswell well (#1-16) are oil or gas wells that artificially penetrate the confining zone AR#15 and 538. Petitioners logically argue that FutureGen was required to identify all wells in order to properly investigate which ones need corrective action. FutureGen's

suppositions do not satisfy the SDWA regulations.

The failure to identify all water wells and gas wells located in the immediate vicinity of the projected plume is a failure to satisfy the regulations, which are concerned with migratory pathways that contaminate underground drinking water sources and pose dangers to human health.

The Board's attempt to distinguish *In re: Bear Lake Properties., LLC*, UIC Appeal No. 11-03, 2012 WL 2586960 slip op. at 12-13 (EAB June 28, 2012), is not effective with at least respect to natural gas wells, which can extend deep. Because there are at least two gas wells within the Area of Review that are known to penetrate the confining zone are gas wells, there may be others. Hence, it cannot be unexpected that there are no other gas wells in the Area of Review that may penetrate the confining zone. It is particularly important under the SDWA regulations to determine if there are deep wells penetrating the confining zone, or approaching it, in areas located close to the projected carbon dioxide plume.

Additionally, wells that FutureGen failed to identify are located less than a quarter-mile from FutureGen's own projection of the carbon dioxide plume. AR#1, 2, and 497. Consequently, FutureGen's failure relates to wells near the heart of the project where the pressure will be the highest and the dangers of carbon dioxide migration into underground drinking water sources the greatest.

The Board should have required FutureGen to properly identify all wells for their map, and also to determine if any of those wells (particularly the gas wells) may need corrective action. Contrary to the *Ruling*, the regulations squarely but the burden of identifying all wells that may need corrective action on FutureGen. 40 C.F.R. § 144.12(a). If a well is unidentified, it is unknown whether it needs corrective action. FutureGen's guesswork does not satisfy the

SDWA regulations.

Additionally, the Board's ruling regarding public information is not correct. It does not account for the fact that wells can be identified from public information through means *other than* State databases. The EPA's internal guidance documents make this clear. AR#439. The Board's attempt to distinguish *In re Bear Lake Properties* falls short. At base, *In re Bear Lake* concluded that the SDWA regulations were not met where there were unidentified water wells. The conclusion that the SDWA regulations were not met here is *a fortiori* because it is undisputed that there are numerous unidentified wells and undisputed that some are gas wells which may penetrate the confining zone. Further, *In re Bear Lake Properties* did not involve a first-of-its-kind permit that requires remand under the exercise of discretion and matter of policy standards of review that are lower than the clear error standard that the Board relied exclusively relied upon.

B. Petitioners Have A Likelihood of Success for Their Arguments Involving Permit Condition H Regarding Financial Assurances.

FutureGen switched from an insurance-based approach to a trust fund-based approach late in the permit process. AR#1, Section 9.4.2.2 and Appen. D. The Board does not dispute that the EPA departed from its internal guidance document regarding using insurance for emergency and remedial responses ("E&RR"). *Ruling*, p. 60. The explanation given was insufficient. The Board's statement that the SDWA regulations did not require insurance does not reflect Petitioners' argument. *Ruling*, p. 57. The record was inadequate to support the departure and the explanation was insufficient to justify it.

The Board's conclusion that the EPA required FutureGen to provide the middle ground financial assurance for ER&R is not supported by the record and not adequately explained. The

EPA discussed a range of damages between $14.7 million and $77.9 million. *Ruling*, p. 52. The middle ground was $46.3 million. The Board, however, found that $26.7 million was a conservative middle range.

The regulations required FutureGen to have its own reliable cost estimate regarding E&RR. 40 C.F.R. § 146.85. The Board approved the use of an estimate based on information from Patrick Engineering, which was an estimate the EPA deemed too defective to use for one aspect of the Permits, yet relied upon it for the "cost tool" calculation. AR#320; AR#497, pp. 12-13; AR#511, p. 114, Comment 4.8. As the Board pointed out, the EPA's internal guidance requires cost estimates based on accurate information. *Ruling*, p. 51. The record did not support the issuance of the Permits and the departure from the EPA's internal guidance was not properly explained. As a result, remand was necessary under all the three standards of review because the SDWA regulations were not met. 40 C.F.R. §146.85(c)(1); AR#329.

The Board relied on the alleged reliance on Superfund costs. *Ruling*, p. 52. Given the existence of other underground injection projects in permit categories other than Class VI, it raises the issue left unanswered as to why no prior underground injection activity remediation information was used. There are five other classes of underground injections. The lack of support in the record and the lack of explanation for this aspect of the Permits required a remand. The fact that it is an important policy matter also required remand.

The Board's ruling post-dated FutureGen's loss of significant funding from the U.S. Department of Energy. The Board was sufficiently concerned about FutureGen's financial status, that it *sua sponte* called for the status hearing to determine if there was any reason to continue with the permit proceeding. FutureGen informed the Board of the loss of its federal funding at a February 10, 2015 status hearing. The Board should have considered FutureGen's

substantially weakened financial position in conjunction with 40 C.F.R. § 146.85(d). The Board can take judicial notice of the U.S. Department Energy's pulling of funding for FutureGen.[4]

The Board's stated that FutureGen's project is a demonstration project and can make financial assurance adjustments down the road. *Ruling*, pp. 58-60. The *Ruling* does not show, however, that the SDWA regulations are currently satisfied.

C. Petitioners Have A Likelihood of Success for Their Arguments Involving Permit Condition G Regarding Plume Dimensions and Condition M Regarding Monitoring.

The Board does not dispute that the EPA did not independently model FutureGen's predicted carbon dioxide plume shape and size. *Ruling*, pp. 14-17. For a first-of-its-kind demonstration project, the failure to independently model the plume size and shape was critical. The size and shape of the plume directly affect the monitoring required under the SDWA regulations. It also affects the E&RR costs. The monitoring and the E&RR costs both go directly to the safety of underground drinking water, which is the very purpose of the SDWA.

FutureGen's projection of the plume falls just short of Petitioners' unidentified gas and water wells. AR#1 and 2. Given the existence of a natural gas field in the immediate area of FutureGen's project, the likelihood of other unidentified natural gas wells is high. AR#1, 2, and 497.

Neither the Board nor the EPA addressed Petitioners' arguments that the size and direction of the FutureGen's injection pipes should create a lop-sided plume size and shape. FutureGen's projected plume defies common sense and is not supported by the record. When all four injection pipes are pointed in a relatively southerly (rather than northerly) direction and the

[4] *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (ruling that judicial notice was appropriate for the federal government's National Personnel Records Center).

largest pipes and highest injection rates in the most southerly pipes, it requires rational explanation, which was not provided. It also requires proper support in the record, which does not exist. For FutureGen's proposed plume size and shape to be virtually symmetrical defies belief, the record and explanation. The EPA failed to provide independent review.

There was a broader lack of independent review of the FutureGen's projected carbon dioxide plume. Petitioners submitted a report by a well-respected expert who pointed out in detail significant deficiencies in FutureGen's projected plume and the EPA's review of it. Rather than rebut the detailed report of Petitioners' expert, the EPA and the Board attempt to dismiss the issue by arguing that it is a scientific matter and the deference provided to scientific issues means no analysis is necessary. For scientific matters, however, there must be rational explanation and support in the record. These are lacking regarding the issue Petitioners raised. The exception would swallow the rule if complete deference (*i.e.*, little or no analysis) were the rule regarding every scientific issue. In light of the first-of-its-kind nature of the Permits and FutureGen's project, the standards of review for exercise of discretion and important policy matters necessitated remand.

FutureGen's monitoring system was required to be based in-part on the actual carbon dioxide plume size and shape. 40 C.F.R. §146.90. If it was not based on it, it would violate the regulations and defy common sense. An EPA's internal guidance document provides that monitoring wells should be located based on at least modeling results, projected plume migration, dip direction, and presence of potential leakage pathways (See Geologic Sequestration of Carbon Dioxide: Underground Injection Control (UIC) Program Class VI Well Testing and Monitoring Guidance, AR #441 p. 56/115. Hence, because the plume is inaccurate, the monitoring network is also inaccurate and the SDWA regulations are not satisfied.

FutureGen had the burden of proof to show that it satisfied all applicable regulations. 40 C.F.R. § 144.12(a). FutureGen failed to carry its burden of satisfying the SDWA regulations.

II. Irreparable Harm To Petitioners And The Public Outweighs Any Harm To FutureGen.

Petitioners will suffer irreparable harm if a stay is not granted. The SDWA underground injection program that the EPA administers is designed to protect underground drinking water sources and harm to humans. 42 U.S.C. § 300h (stating the dangers of underground injections to underground drinking water sources and the "health of persons"). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable." *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) (internal quotations omitted). This is particularly true in the case before the Board. The project at issue is a first-of-its-kind project using science that has not been tested at this scale or scope. *Ruling*, p. 64 (noting the "magnitude and complexity" of FutureGen's project).

It is important that the *status quo* be preserved to prevent irreparable harm to Petitioners. The stay automatically provided during the administrative appeal, 40 C.F.R. § 124.16, served this same important purpose. Hence, the stay should continue. *See Branstad v. Glickman*, 118 F. Supp. 2d 925, 943 (N.D. Iowa 2000) ("[T]he preliminary injunction would [] maintain the *status quo* as it existed during the administrative appeals ...").

The carbon dioxide to be injected is highly pressurized. *Ruling*, p. 7. The higher pressure of the carbon dioxide will naturally seek lower-pressure areas such as those where oil, gas and water wells exist. If those wells are migratory paths, the carbon dioxide can travel to the surface where it poses a danger to drinking water and human health.

Petitioners would suffer irreparable harm in at least three ways. First, they would effectively be denied judicial review. *Branstad*, 118 F. Supp. 2d at 940-41. In granting a preliminary injunction to a farmer (landowner), the *Branstad* court held: [T]he court concludes that, unless enforcement is enjoined, the Branstads face the threat of irreparable harm in the loss of the value of their right to judicial review of the USDA's 'final' decision.… [T]he Branstads should not be effectively deprived of their right to judicial review." *Id*. at 940-43. Similarly, the failure to stay the Permits would create irreparable harm by allowing the project to proceed without before the appeals process determines compliance with SDWA regulations, which would deny Petitioners right to judicial review.

Second, the Petitioners would suffer additional irreparable harm in connection with their properties and underground drinking water sources. William Critchelow's uncontradicted declaration stated that the water well next to his house, which his family uses, was contaminated when FutureGen drilled its characterization well in 2011. AR#497; Critchelow Dec., ¶ 4. Critchelow uses this well for drinking water. *Supplemental Declaration of William Critchelow*, ¶ 5, **Exhibit 3** hereto. Contamination of this well in connection with FutureGen's injection facility (which will be located even closer to Critchelow's well than the well drilled in 2011 (AR#1 and 2) will contaminate underground drinking water. The *sine qua non* of the SDWA is the prevention of the contamination of underground drinking water. *Phillips Petroleum Co.*, 803 F.2d at 560.

Similarly, the Leinberger Petitioners would be irreparably harmed if CO2 leaks through either the natural gas wells on their property. As with the Critchelow water well, FutureGen neither identified nor investigated them. The EPA did not require FutureGen to comply with the SDWA regulations in that regard. Hence, those wells can serve as conduits for the migration of

carbon dioxide into underground drinking water sources and to the surface where is can harm people and farmland. The harm to Petitioners' respective homestead, farm, and underground drinking water sources would be irreparable. *See B & D Land & Livestock Co. v. Conner*, 534 F. Supp. 2d 891, 908 (N.D. Iowa 2008) ("Furthermore, the loss of B & D's ability to continue its farming operations is not an injury for which there is an adequate remedy at law."); *Declaration of Donald Leinberger*, ¶ 7, **Exhibit 4** hereto.

Third, the release of carbon dioxide poses a significant health risk to people who reside in the vicinity. The migration of carbon dioxide to the surface via Petitioners' wells would pose a serious risk to the Critchelows and others. Substantial harm to a person's health is always irreparable harm. *See Sierra Club v. U.S. Dep't of Agric., Rural Utilities Serv.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012).

In contrast, FutureGen will not suffer irreparable harm. Even if an appeal delays the injection portion of the project for the time it could take for an appeal to be resolved, any harm from the delay is not irreparable. Money can make FutureGen whole. Significantly, a stay in this case, will not be the cause of any harm to FutureGen because FutureGen had a critical amount of its funding recently pulled from it by the U.S. Department of Energy. U.S. Department of Energy web site, www.energy.gov/fe/science-innovation/clean-coal-research/major-demonstrations/futuregen.com (stating information regarding the pulling of FutureGen's funding).[5] Any harm to FutureGen would stem from its loss of federal funding, and not a stay of the appeal in this proceeding. Moreover, the delay caused by a stay of the effectiveness of the Permits may be redundant of the delay caused by FutureGen's loss of federal funding, as well as the pendency of two other lawsuits where FutureGen is a defendant. See

[5] This information is subject to judicial notice. *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003).

Sierra Club v. Illinois Pollution Control Board, et. seq. (Illinois Appellate Court, Fourth District) and *Commonwealth Edison v. Illinois Commerce Commission, et seq*. (Illinois Supreme Court).

Moreover, even if FutureGen could overcome the foregoing, it cannot escape the fact that FutureGen is the cause of its own delay. FutureGen could have begun the permit process much earlier than it did – a matter that was wholly within FutureGen's control and wholly beyond the control of Petitioners. FutureGen did not file its application to the Environmental Protection Agency until March 2013. Hence, FutureGen has no one to blame but itself for any harm. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) ("… the state defendants are largely responsible for their own harm."); *e.g.*, *Pappan Enterprises, Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 806 (3d Cir. 1998) ("The self-inflicted nature of any harm suffered by Pappan also weighs in favor of granting preliminary injunctive relief.").

Case law shows that a stay should be granted here. In granting a temporary injunction to "preserve the *status quo*," the *Branstad v. Glickman* court held that the movant farm owner would suffer irreparable harm. 118 F. Supp. 2d 925, 940-41 (N.D. Iowa 2000). The movant sought relief from an agency determination that wetlands were improperly converted. *Id.* at 931. The court held that the farm owner would not have sufficient legal remedies for damages inflicted on the farm if the USDA continued its enforcement action. *Id.* at 943. The court held that, without an injunction, the farm owner faced "the threat of irreparable harm in the loss of the value of their right to judicial review of the USDA's 'final' decision." *Id*. at 942. Other courts have similarly held that there are less tangible injuries to farm owners where agency action would interfere with land use. *See, e.g., B & D Land & Livestock Co. v. Veneman*, 231 F. Supp. 2d 895, 910-11 (N.D. Iowa 2002).

In *Sierra Club v. Franklin Cnty. Power of Illinois, LLC*, the court found that irreparable

harm to the party seeking relief existed where a power company sought to build a new plant without a new permit. 546 F.3d 918, 936 (7th Cir. 2008). The Seventh Circuit held that environmental injuries can rarely be sufficiently remedied through compensation. *Id.* at 936. The court held that construction of the plant under the older permit would allow pollution under lower emission standards, and hence, not protect the environment. The court also emphasized that the injunction would only defer construction – it would not cause an already operating facility to shut down: "An injunction protects Sierra Club from irreparable injury while simply requiring the Company to defer construction until it obtains a permit that complies with the Clean Air Act." *Id.* Similar to *Sierra Club*, a stay would not cause FutureGen to shut down a facility that is already operating.

In *Souza v. California Dep't of Transportation*, the court held that there would be irreparable harm where there was a dispute concerning compliance with the Endangered Species Act's procedures. No. 13-CV-04407-JD, 2014 WL 1760346, *7 (N.D. Cal. May 2, 2014). The court stated in the context of the environmental statute that "[i]rreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action." *Id.* at *7 (internal quotations omitted). The court went on to state that "[i]t is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed." *Id.* (quoting *Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir.2005)). The same holds true here. Procedural deficiencies in the permitting process give rise to irreparable harm in the form of failing to ensure compliance with a federal environmental statute, the SDWA.

In *Colorado Wild Inc. v. U.S. Forest Service*, the court held that there would be irreparable harm where work on a project would create a "bureaucratic steam roller." 523 F.

Supp. 2d 1213, 1220-21 (D. Colo. 2007). The case involved the United States Forest Service granting a special use authorization to a real estate developer for particular rights-of-way across National Forest System property. *Id.* at 1215. The court found that the developer's activities would occur in reliance on, and furtherance of, the agency's authorization decision that was being challenged in court. *Id.* at 1221. The court held:

> Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to redecide. Thus, the irreparable injury threatened here is not simply whatever ground-disturbing activities are conducted in the relatively short interim before this action is decided, it is the risk that in the event the Forest Service's FEIS and ROD are overturned and the agency is required to redecide the access issue, the bureaucratic momentum created by Defendants' activities will skew the analysis and decision-making of the Forest Service towards its original, non-NEPA compliant access decision. *** The Tenth Circuit and other courts have affirmed that this type of harm is irreparable and can support issuance of a preliminary injunction. *E.g., Davis,* 302 F.3d at 1115 & n. 7; *Marsh,* 872 F.2d at 499–504.

Id. The court held that a preliminary injunction was required to prevent irreparable harm from this context. Similarly, the First Circuit has held that the "bureaucratic steamroller" principle should be considered on a motion for a preliminary injunction:

> The way that harm arises may well have to do with the psychology of decisionmakers, and perhaps a more deeply rooted human psychological instinct not to tear down projects once they are built. But the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steam roller, once started, still seems to us, after reading *Village of Gambell,* a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction. And, it does not surprise us that, since *Village of Gambell,* other courts have reached the same conclusion.

Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989).

In *Davis v. Mineta*, the Tenth Circuit held that irreparable harm would result if a preliminary injunction was not issued in connection with a multi-phase highway project. 302 F.3d 1104, 1115 (10th Cir. 2002). The dispute concerned whether the project complied with the

National Environmental Protection Act and other statutory requirements. *Id.* at 1109. The Tenth Circuit rejected arguments that there would be no irreparable harm due to the fact that the environmental harms at issue would not be implicated until the latter stages of the construction project, and long after the appeal was concluded. *Id.* at 1115 n. 7. In finding that irreparable harm would exist, the court held that "[i]f construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analyses is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project." *Id.* Similarly, in the case at hand, work on the injection portion of the project will skew the agency decisions sought in this appeal in connection with full compliance with the SDWA and its regulations.

The court in *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Service* reached a similar conclusion. 657 F. Supp. 2d 1233, 1241-42 (D. Colo. 2009). There, the court granted a preliminary injunction to environmental groups who were contesting the United States Fish and Wildlife Service's alleged failure to comply with NEPA regarding its oil and gas related management duties for the Baca National Wildlife Refuge. *Id.* at 1236 and 1248. In finding irreparable harm, the court stated:

> I conclude that Plaintiffs have presented adequate evidence that the drilling of these wells is likely to cause irreparable injury to Plaintiffs' environmental and procedural interests. *** Their remedy, which would be to either require to the USFWS conduct an EIS or to cure the deficiencies in the EA, would be meaningless if drilling were to proceed during the pendency of this litigation. In other words, the Plaintiffs' procedural interest in a proper NEPA analysis is likely to be irreparably harmed if Lexam were permitted to go forward with the very actions that threaten the harm NEPA is intended to prevent, including uninformed decisionmaking. … Even if Plaintiffs ultimately prevailed, the challenged action would most likely be complete before a decision on the merits in this action, meaning that alternatives would be foreclosed and the environmental harm would already be inflicted.

Id. at 1241-42. The same is true here. Petitioners seek to have FutureGen's project proceed in a

manner that fully complies with the SDWA and its regulations. The same type of irreparable harm that existed in *San Luis Valley Ecosystem Council* exists here.

As the foregoing shows, irreparable harm to Petitioners greatly outweighs any irreparable harm to FutureGen.

III. The Injunction Is In The Public Interest.

The irreparable harm imbalance from the preceding section is particularly acute when the public interest is taken into account. See *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008) ("When conducting this balancing, it is [] appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation."). The public interest analysis also favors Petitioners.

A stay serves the important public interest of ensuring that underground drinking water sources, and human health, are protected from FutureGen's underground injection activities. "On the side of issuing [a preliminary] injunction, we recognize the well-established public interest in preserving nature and avoiding irreparable environmental injury." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (internal quotations omitted).

Here, the public interest strongly favors issuing a stay. The SDWA is a federal statute that embodies public policy. The public interest is served by the enforcement of the SDWA and its regulations, which serve the important purpose of protecting underground drinking water sources and human health. SDWA, 42 U.S.C. § 300h. The public interest is harmed if underground drinking water sources and people are injured due to non-compliance with the SDWA and its regulations.

An important public interest is served by staying a project while an appeal to federal

court is pending to determine whether the SDWA and its regulations were followed. *See Alliance for the Wild Rockies*, 632 F.3d at 1138 ("This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs 'comports with the public interest.'"); *e.g.*, *Branstad*, 118 F. Supp. 2d at 944 ("there is also a public interest in the proper application of the Swampbuster Act, which weighs in favor of an injunction on enforcement actions under the Act in this particular case until such time as this court determines whether the Act has been correctly applied by the USDA"); *United States v. Apex Oil Co.*, No. 05-CV-242-DRH, 2008 WL 2945402, at *84 (S.D. Ill. July 28, 2008) ("[I]t is clear that entry of the requested injunction would benefit the citizens of Hartford and promote the Congressionally-expressed public interest in 'minimiz[ing] the present and future threat to human health and the environment' posed by solid and hazardous wastes."). In short, there is substantial public policy in enforcing a federal statute designed to protect underground drinking water and human health.

Additionally, the public interest is served by the stay of proposed action that would be difficult and expensive to unwind. The issuance and effectiveness of the permits were stayed under the regulations applicable to SDWA permit administrative appeals. See 40 C.F.R. § 124.16. This regulatory automatic stay provision serves embodies and signifies the public interest in ensuring that the issuance of permits are made in compliance with the environmental statute and regulations they serve. Hence, the same public interest that is served by the stay during the administrative appeal applies with equal fervor to the public interest in staying the permits pending a court appeal.

Franklin County Power of Illinois illustrates why an injunction here is in the public

interest. 546 F.3d 918. In Sierra Club, the defendant intended to build a power plant and needed a permit due to the plant's pollution. Sierra Club argued that a new permit was required because the original expired. The Sierra Club sued under the Clean Air Act and sought an injunction. It contended that the original permit was invalid under EPA regulations. The Seventh Circuit agreed and held that the district court properly granted an injunction to the Sierra Club. The Court stated that the injunction properly "prohibit[ed] the Company from actual construction of the Plant until [it has] obtained a valid PSD permit …." *Id.* at 936. The Court held that the injunction factors favored Sierra Club, including the public interest factor:

> Third, the balance of harms favors issuing an injunction. An injunction protects Sierra Club from irreparable injury while simply requiring the Company to defer construction until it obtains a permit that complies with the Clean Air Act. Finally, the record contains no evidence that the injunction harms the public interest. In fact, based on the record before us, we agree with Sierra Club that requiring the Company to obtain a valid PSD permit would likely result in decreased emissions and improved public health, which would further a stated goal of the Clean Air Act.

Id. (emphasis supplied). The same is true here. An injunction simply requires FutureGen to wait to construct its underground injection facility until compliance with the SDWA and its regulations is judicially determined. The injunction would preserve the *status quo* and preserve the public's underground drinking water which is the *sin qua non* of the SDWA.

Conclusion

For the reasons set forth above, the Board should stay the effectiveness of the Permits until an appeal to the federal courts is complete.

Dated: May 26, 2015

Respectfully submitted, Andrew H. Leinberger Family Trust; DJL Farm LLC, William Critchelow, and Sharon Critchelow, Petitioners,

/s/ Karl Leinberger

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CERTIFICATE OF SERVICE

I hereby certify that, in the matter of FutureGen Industrial Alliance, Inc., Permit Nos. IL-137-6A-001, IL-137-6A-002, IL-137-6A-003; and IL-137-6A-004, Appeal Nos. 14-68, 14-69, 14-70, and 14-71, I filed the original of the foregoing *Petitioners' Motion For Stay Of Permits Pending Appeal* electronically with the Environmental Appeals Board on May 26, 2015 using the Environmental Appeals Board's electronic filing system.

I also certify that on May 26, 2015, I delivered a copy of the foregoing *Petitioners' Motion For Stay Of Permits Pending Appeal* by electronic mail and certified mail (return receipt requested) to:

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