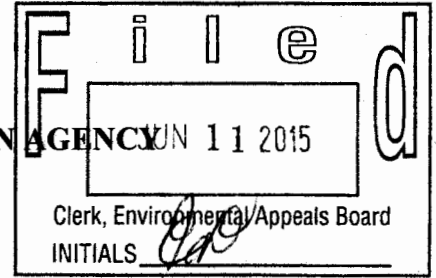


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
FutureGen Industrial Alliance, Inc.)
)
Permit Nos.: IL-137-6A-001)
IL-137-6A-002)
IL-137-6A-003)
IL-137-6A-004)
)

UIC Appeal No(s): 14-68, 14-69, 14-70
& 14-71

ORDER DENYING STAY PENDING APPEAL

The Environmental Appeals Board issued an Order Denying Review in the above-captioned appeals on April 28, 2015 (“Order Denying Review”). By motion, Petitioners now seek to stay the issuance and effectiveness of the four underlying permits, pending the outcome of a not-yet-filed appeal to the United States Court of Appeals for the Seventh Circuit. EPA Region 5 and the permittee, FutureGen Industrial Alliance Inc. (“FutureGen”), object to Petitioners’ motion. For the reasons that follow, the Board denies Petitioners’ motion to stay.

The regulations governing the Board’s review of the permit provide that a final permit becomes final following permit issuance after the Board denies a petition for review. 40 C.F.R. § 124.19(1)(2)(i). The Administrative Procedure Act (“APA”) provides that “[w]hen 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. Nothing in the permitting regulations or the APA provide a

standard to be applied in determining whether “justice” requires a stay of an Agency decision pending judicial review.¹

In objecting to Petitioners’ motion, both the Region and FutureGen argue that this motion to stay the effectiveness of the permits “is premature [because] no appeal has been filed in this matter.” Region’s Response at 1; *see also* FutureGen’s Response at 3. The Board agrees that without a pending appeal, Petitioners’ have no grounds for a stay. Even assuming, however, that Petitioners timely seek review in the Circuit Courts of Appeal, Petitioners still have not demonstrated that justice warrants a stay of these permits.

In support of their motion, Petitioners argue that irreparable harm to underground sources of drinking water will occur as a result of FutureGen’s injection of waste carbon dioxide pursuant to these permits. *See* Motion at 13-15. This alleged harm, however, could not occur

¹ Petitioners argue that the standard for preliminary injunctions should be applied here and, thus, the Board should consider Petitioners’ likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. *See* Motion at 2 (citing the standard for preliminary injunctions and a Seventh Circuit Court of Appeals decision concerning a bankruptcy appeal to a U.S. District Court -- *In re A & F Enterprises, Inc.*, 742 F.3d 763, 766 (7th Cir. 2014)). Although both the Region and FutureGen seem to accept that this standard applies by analyzing the preliminary injunction factors in their respective responses, the Board considers whether justice requires a stay of these permits pending appeal in accordance with the APA. 5 U.S.C. § 705. In so doing, the Board considers, as Petitioners request, any potential irreparable harm that could occur while on appeal if a reviewing court were to find the Board’s decision to be erroneous. The Board does not, however, consider the petitioners’ likelihood of success on the merits because in order to find in favor of the movant, the Board would have to reconsider its own decision in the absence of a valid motion to reconsider, determine it is likely erroneous, and then allow that likely erroneous decision to stand uncorrected. Rather, the Board stands by its Order Denying Review of this matter for all of the reasons contained therein.

unless and until FutureGen seeks and obtains approval to operate the wells as required by 40 C.F.R. § 146.82(c) and Section Q of the permits issued (requiring FutureGen to obtain approval from EPA prior to commencing injection). *See* Region's Response at 2 (citing 40 C.F.R. § 146.82(c); FutureGen's Response at 4 (citing FutureGen's Final Permits, Section Q); *see also* Order Denying Review at 24-25, 32 (citing FutureGen Final Permits at 21-22).

FutureGen does not anticipate being at the point of injection for at least another four years.

FutureGen's Response at 4. In the meantime, while any potential review in the Circuit Court of Appeals is pending, any construction activities in preparation for injection will occur on FutureGen's property and at FutureGen's expense. *Id.* at 2-3. Petitioners have alleged no harm from such activities. *See* generally Motion at 13-15 (and attached declarations). Thus, Petitioners have identified no potentially irreparable harm to underground sources of groundwater that will occur if these permits are not stayed pending appeal.

Petitioners rely on the Board's decision in *In re Environmental Disposal Systems, Inc.*, UIC Appeal No. 07-03, slip op (EAB Aug. 25, 2008) ("*EDS*"), in urging the Board to grant a stay of these permits. Motion at 2. The Board's order in *EDS*, however, is not persuasive. That case involved the Board's decision to uphold the *termination* of a permit, rather than the granting of a permit. Additionally, no party opposed staying the termination pending a federal appeals court decision, particularly where another entity's application for transfer of the permit was pending and expected to be completed within six months. *See EDS*, slip op. at 8. Thus, the underlying reasons for maintaining the status quo that were present in *EDS* are simply not present here.

The Board is similarly not persuaded by Petitioners recitation of preliminary injunctions granted in cases challenging procedural deficiencies under the National Environmental Policy Act or the Endangered Species Act. Motion at 19. Moving forward on the projects in those cases risked rendering any success on appeal meaningless because irreparable harm already would have occurred by the time the appeal was decided. Motion at 19. Petitioners in this case have not alleged a similar risk here because the alleged harm – which is based on the *injection* of CO₂ – is not expected to occur prior to the outcome of any appeal filed.

Given that no appeal is pending and that the alleged irreparable harm to underground sources of groundwater will not occur any time in the near future, and certainly not before the FutureGen has sought and obtained approval to begin operating the wells, the Board concludes that justice does not require the Board to stay the effectiveness of its decision pending judicial review at this time. *See* 5 U.S.C. § 705. As such, the Board **denies** Petitioners' motion as premature and without merit.

So ordered.²

Dated: *June 11, 2015*

ENVIRONMENTAL APPEALS BOARD

By: *Kathie A. Stein for Leslye M. Fraser*
Judge Leslye M. Fraser
Environmental Appeals Board

² The two-member panel deciding this matter consists of Environmental Appeals Judges Leslye M. Fraser and Kathie A. Stein.

CERTIFICATE OF SERVICE

I certify that copies of the forgoing Order Denying Stay Pending Appeal in the matter of *FutureGen Industrial Alliance, Inc.*, UIC Appeal Nos. 14-68 through 14-71, were sent to the following persons in the manner indicated:

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Dated: JUN 11 2015



Annette Duncan
Secretary