

**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
(1) AN EXTENSION OF TIME TO FILE
REPLY BRIEFS, AND (2) FOR AN EXPEDITED
RULING ON THIS 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 THIS MOTION**

The petitioners, Andrew H. Leinberger Family Trust, DJL Farm LLC, William Critchelow, and Sharon Critchelow (collectively, "Petitioners"), pursuant to 40 C.F.R. § 124.19(f), respectfully request that the Environmental Appeals Board ("Board") enter an order as follows:

- A. Issue an order granting a 24-day extension of time, through December 12, 2014, for Petitioners to file: (i) a reply brief responding to the response brief filed on behalf of the Environmental Protection Agency Region 5 ("EPA"), and (ii) a reply brief responding to the response brief filed by the FutureGen Industrial Alliance, Inc. ("FutureGen"); and
- B. Rule on this motion on an expedited basis, or alternatively, stay the deadline by which Petitioners must file reply briefs until a reasonable amount of time after the

Board rules on this motion, so that Petitioners are not prejudiced in filing reply briefs.

In support of this motion, Petitioners state the following:

1. On the afternoon of October 31, 2014, the EPA filed the *EPA Region 5 Consolidated Response To Petitions For Review* (“*EPA Response Brief*”). The discussion sections of the *EPA Response Brief* are collectively 37 pages long and contain numerous contentions. Based on an initial review, a variety of those contentions are misleading regarding important facts and points of law, and additional points require clarification for the Board to issue a fully informed ruling based on accurate information.

2. Also on the afternoon of October 31, 2014, FutureGen filed the *Permittee FutureGen Industrial Alliance, Inc.'s Consolidated Response To Petitions For Review* (“*FutureGen Response Brief*”). The discussion sections of the *FutureGen Response Brief* are collectively 32 pages long. As with the *EPA Response Brief*, an initial review of *FutureGen Response Brief* reveals that it contains a variety of misleading statements and arguments that require correction or clarification.

3. For comparison, the discussion sections of the *Petition* were only 27 pages long.¹

4. Petitioners normally have only 15 days from the formal service of a response brief to file their reply brief. 40 C.F.R. § 124.19(c)(2). The EPA and FutureGen formally served Petitioners with their respective response briefs, by mail, on November 3, 2014. Accordingly, without an extension of time, Petitioners have only until November 18, 2014 to file reply briefs.

¹ There are four separate *Petitions For Review*, which the Board consolidated pursuant to its October 9, 2014 Order. They are substantively identical. For purposes herein, they are treated as one petition and referred to as “*Petition*.”

5. In addition to requesting an extension of time, Petitioners request that the Board rule on this motion for an extension in a timely manner, so that Petitioners know as soon as practicable the deadline for filing their reply briefs.

6. Petitioners seek an extension of time to file reply briefs based on the following reasons:

A. As indicated by the two response briefs and their numerous attachments and references, this appeal entails a voluminous record. In addition to Petitioners' submitted materials, the EPA and FutureGen submitted response briefs that each exceeded the length of the Petition. The 15-day time period for filing a reply brief provides inadequate time for Petitioners to submit its reply briefs because each reply brief will be responding to a response brief that was substantively longer than the underlying *Petition*. Hence, there is a voluminous amount of discussion and argument in the response briefs to be fully analyzed. While both response briefs address issues raised by the Petitions, they contain substantive dissimilarities (if they were substantively identical, there would have been no reason for FutureGen to file its response brief).

B. The reply briefs are needed to correct important factual and legal misstatements in the *EPA Response Brief* and *FutureGen Response Brief*. The EPA concedes that the issues related to the four permits are complex. *EPA Response Brief*, p. 3. The sheer length of the *EPA Response Brief* attests to their concession. The Board should rule on the above-captioned appeal only after reviewing reply briefs – prepared with adequate time – that examine and correct the statements in the response briefs and provide an accurate rebuttal to the points of law asserted.

C. Because Petitioners have the burden of persuasion on appeal, they should be accorded the opportunity to file two reply briefs that give them a fair opportunity to carry their burden.

D. There are multiple, important issues involved in this appeal. *Petitions*, pp. 4-5. These issues include, but are not limited to:

i. The EPA's failure to properly determine the Area of Review, predicted carbon dioxide plume size and location, pressure front, and impacted area.

ii. The EPA's failure to assess the risks associated with the proper determination of these matters and failure to independently model for the project (as opposed to simply accepting FutureGen's inaccurate and biased modeling) to identify those risks.

iii. The EPA's approval of inadequate monitoring for the project and the EPA's failure to explain or justify the incomplete monitoring requirements set forth under the permits.

iv. The EPA's failure to require FutureGen to comply with Safe Drinking Water Act, 42 U.S.C. §§ 300f, *et seq.*, requirements and regulations regarding well identification and investigation, including relying solely on databases that were inaccurate and outdated.

v. The EPA's failure to require that the permits mandate proper financial assurances and safeguards for an unprecedented carbon sequestration project, including detailed cost estimates, financial assurances over the life of the project, and a proper pay-in period.

E. The issues in this appeal involve factual and legal complexities, which require thorough analysis. The reply briefs will materially aid the Board in rendering a fully informed ruling.

F. In light of the voluminous record and complex issues, it will take time to write two reply briefs.

G. Procedural and substantive fairness and justice require that Petitioners have additional time to fully examine each of the arguments from the EPA and FutureGen, review the numerous materials in the record cited to by the EPA and FutureGen, consult with their expert witness, and draft the reply briefs.

H. There is no dispute that this appeal involves important, precedent-setting issues. The permits at issue in this appeal pertain to a “demonstration” project that is the “first-of-a-kind.” See U.S. Department of Energy Final Environmental Impact Statement, p. S-3, AR #411. These permits will set an important precedent for commercial-scale carbon sequestration within the UIC Class VI well category. It is imperative that these permits satisfy all components of the SDWA and promulgations thereunder. Compliance is necessary to preserve underground drinking water sources, as well as preventing the movement of fluids containing contaminants that “otherwise adversely affect human health.” *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1997) (*citing* 40 C.F.R. § 144.12(a)).

I. The foregoing circumstances require a thorough review by the Board. In order for the Board to engage in that type of review, two reply briefs are needed.

J. Petitioners’ expert witness, Greg Schnaar, would have an extremely difficult time assisting Petitioners with their reply briefs under the original November 18

deadline due to his professional schedule. Additionally, counsel for Petitioners would have similar difficulty due to other professional obligations.

K. The Thanksgiving holiday falls during the requested extension period.

7. A 24-day extension, through December 12, 2014, will allow Petitioners sufficient time to file two reply briefs without causing materially prejudice to the EPA or FutureGen. As described in more detail in the contemporaneously-filed *Petitioners' Response To Permittee FutureGen Industrial Alliance, Inc.'s Motion For Expedited Review And Declarations In Support*, FutureGen is not prejudiced by this delay because there is another legal proceeding currently pending before the Illinois Pollution Control Board that allegedly is causing FutureGen's alleged financing issues that are FutureGen's sole basis for seeking an expedited ruling from the Board.

8. The Board has previously granted extensions of time to file briefs in less compelling circumstances than presented here. *See In re: Andrew B. Chase*, RCRA Appeal No. 13-04, Docket Entry No. 3 (EAB July 16, 2013) (granting a 32-day extension to file a notice of appeal due to the length and complexity of issues in an administrative law judge ruling); *In re J. Phillip Adams*, CWA Appeal No. 06-06, Docket Entry Nos. 14 and 17 (EAB Feb. 1, 2007 and Feb. 27, 2007 (granting extensions of 21 days and an additional 7 days to file reply to a notice of appeal due in part to the number of issues raised); *In re: City of Homedale Wastewater Treatment Plant*, NPDES Appeal No. 13-10, Docket Entry No. 10 (EAB Dec. 19, 2013) (granting a 32-day extension to file a reply brief where the Christmas holidays were cited as a basis); *In re: Smith Farm Enterprises, L.L.C.*, CWA Appeal No. 08-02, Docket Entry No. 3 (EAB July 24, 2008) (granting a 90-day extension to file an appeal brief based in part on complex issues); *In re: Environmental Protection Services, Inc.*, TSCA Appeal No. 06-01, Docket Entry No. 10 (EAB May 24, 2006) (granting a 52-day extension to file a

response brief in light of lengthy argument in the underlying appeal brief); *In re: West Bay Exploration Co.*, UIC Appeal No. 14-66, Docket Entry No. 13 (EAB June 2, 2014) (granting extension to file response to petition); *In re: Beeland Group, LLC*, UIC Appeal Nos. 08-01, 08-02 and 08-03, Docket Entry Nos. 7 and 11 (EAB March 28, 2008 and April 14, 2008) (granting extension of time to file summary disposition papers and an extension of time to file a reply brief).

9. Petitioners' counsel contacted both the EPA's counsel and FutureGen's counsel regarding the extension of time. Counsel for the EPA indicated that the EPA does not oppose an extension of time through December 5, 2014 for Petitioners' reply briefs deadline, but are amenable to any extension that the Board deems appropriate. Counsel for FutureGen indicated that FutureGen does not consent to an extension of Petitioners' deadline to file reply briefs, but does not oppose Petitioners' request for an expedited ruling on this motion (subject to the condition that FutureGen's opportunity and timeline for responding to this motion is not shortened or diminished). Counsel for FutureGen also indicated that FutureGen does not consent to a stay of Petitioners' deadline. See E-mails, **Exhibit 1** hereto.

WHEREFORE, for the reasons set forth above, Petitioners respectfully request that the Board do the following:

- A. Issue an order granting a 24-day extension of time, through December 12, 2014, for Petitioners to file: (i) a reply brief responding to the *EPA Response Brief*, and (ii) a reply brief responding to and *FutureGen Response Brief*; and
- B. Rule on this motion on an expedited basis, or alternatively, stay the deadline by which Petitioners must file reply briefs until a reasonable

amount of time after the Board rules on this motion, so that Petitioners are not prejudiced in filing reply briefs.

Dated: November 5, 2014

Respectively submitted, Andrew H. Leinberger
Family Trust; William and Sharon Critchelow

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Attorneys for Petitioners/Appellants

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 (1) An Extension Of Time To File Reply Briefs, And (2) For An Expedited Ruling On This 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 This Motion* electronically with the Environmental Appeals Board on November 5, 2014.

I also certify that on November 5, 2014, I delivered a copy of the foregoing *Petitioners' Motion For (1) An Extension Of Time To File Reply Briefs, And (2) For An Expedited Ruling On This 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 This Motion*, by electronic mail and regular mail to:

Ms. Susan Hedman,
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Mr. Thomas J. Krueger,
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Attorney for Petitioners/Appellants

Karl Leinberger

From: John Buchovecky <jjb@vnf.com>
Sent: Wednesday, November 05, 2014 1:51 PM
To: Karl Leinberger
Cc: Marlys Palumbo; Christopher Zentz
Subject: Re: In re FutureGen Industrial Alliance Inc. (UIC Appeal Nos. 14-68, 14-69, 14-70 and 14-71)

Karl,

1. The Alliance does not oppose Petitioners' motion for expedited consideration of the extension motion, subject to the condition that the otherwise applicable period and opportunity for the Alliance to respond to that motion is not shortened or diminished.
2. The Alliance does not concur in Petitioners' request for a stay of the deadline until after the Board rules on Petitioners' extension request.

Please let me know if you have other questions.

Sincerely,

John Buchovecky | Partner

Van Ness Feldman, LLP

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On Nov 5, 2014, at 1:47 PM, Karl Leinberger <karl@markleinlaw.com> wrote:

John:

In addition to a request for an extension, petitioners will be asking the Board to rule on the extension motion on an expedited basis, or alternatively to stay petitioners deadline until a reasonable amount of time after the Board rules on the motion for an extension. Pursuant to 40 C.F.R. 124.19(f)(2), please advise this afternoon whether the FutureGen Industrial Alliance Inc. concurs or objects to this other relief that petitioners will be seeking.

Sincerely,
Karl

<image002.jpg>

From: John Buchovecky [<mailto:jjb@vnf.com>]
Sent: Tuesday, November 04, 2014 4:50 PM
To: Karl Leinberger
Cc: Marlys Palumbo; Christopher Zentz
Subject: Re: In re FutureGen Industrial Alliance Inc. (UIC Appeal Nos. 14-68, 14-69, 14-70 and 14-71)

Mr. Leinberger,

I have conferred with the Alliance. Its view is that the existing process allows adequate time for replies and it prefers an expeditious resolution. Thus the Alliance does not concur in an extension of the reply brief deadline.

Please let me know if you have any questions.

Sincerely, John Buchovecky

John Buchovecky | Partner

<image003.png>

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From: Karl Leinberger <karl@markleinlaw.com>
Date: Monday, November 3, 2014 16:53
To: J Buchovecky <jjb@vnf.com>
Subject: In re FutureGen Industrial Alliance Inc. (UIC Appeal Nos. 14-68, 14-69, 14-70 and 14-71)

Mr. Buchovecky:

Pursuant to 40 C.F.R. 124.19(f)(2), please advise whether the FutureGen Industrial Alliance Inc. concurs or objects to a motion by petitioners for an extension of time to file two reply briefs (one responding to the EPA's response brief and one responding to FutureGen's response brief). The motion would request an extension until December 23, 2014.

I will be filing an attorney appearance in this proceeding shortly.

If you have any questions, please let me know.

Sincerely,

Karl Leinberger
One of the attorneys for Petitioners

<image004.jpg>