

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

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)	

**PERMITEE FUTUREGEN INDUSTRIAL ALLIANCE, INC.'S
MOTION FOR LEAVE TO FILE SURREPLY**

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FutureGen Industrial Alliance, Inc. (the “Alliance”) hereby submits this motion pursuant to 40 C.F.R. § 124.19(f) to the Environmental Appeals Board (“Board”) for leave to file a surreply brief (“Motion”). On October 1, 2014, Andrew H. Leinberger Family Trust, DJL Farm LLC, William Critchelow, and Sharon Critchelow (collectively, “Petitioners”) filed a Petition for Review with the Board, which the Alliance and Environmental Protection Agency Region 5 (“EPA”) each responded to on October 31, 2014. Shortly thereafter, on November 5, 2014, Petitioners submitted a Motion for Extension of Time to File Reply Briefs (“Petitioners’ Motion”), which the Board granted in part on November 12, 2014, allowing Petitioners’ Motion to file a reply brief and establishing December 5, 2014 as the deadline for filing. On December 4, 2014, the Petitioners filed their reply brief (the “Reply”). Because the Reply contains significant factual misstatements and misleading legal and regulatory positions, the Alliance respectfully requests that the Board grant this Motion and provide the Alliance with an opportunity to file a surreply.

Motion for Leave to File Surreply

The Board has broad discretion to grant requests to file surreply briefs. *See, In re ESSROC Cement Corp.*, RCRA Appeal No. 13-03 at 1 (EAB Sept. 25, 2013) (Order Granting Petitioner’s Request for Oral Argument and Granting U.S. EPA, Region 5’s Motion for Leave to File Surreply); *In re Arcelor Mittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (EAB Dec. 9, 2011) (Order Granting in Part EPA’s Motion to File Surreply, Denying Petitioner’s Request to Provide Additional Information, and Granting Oral Argument); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10 to 12, at 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing); *see also* EAB Practice Manual at 48 (noting that, “[T]he [Board] may . . . upon motion, allow the filing of a surreply brief”). Additionally,

the Board has already indicated in this proceeding that this is the appropriate time to submit this Motion—namely, after having reviewed the Petitioners’ Reply. *See, Order Denying FutureGen Industrial Alliance Inc’s Motion for Leave to File Surreply* at 4 (Nov. 20, 2014) (“If, after receiving Petitioners’ reply brief, [the Alliance] determines that it has a basis for filing a surreply, [the Alliance] may, at that time, file a motion for leave to file a surreply that specifies the grounds for that request, as required by 40 C.F.R. § 124.19(f)(2)”).

The Alliance contends that a surreply brief is appropriate for several reasons. First, the Petitioners make a number of misleading and inaccurate technical arguments in their Reply that require correction or further clarification from the Alliance. These arguments involve key elements of the permits at issue, including:

- (1) The accuracy of the Alliance’s model and the projected size and location of the CO₂ plume, *e.g., Petitioners’ Consolidated Reply in Support of Their Petition for Review* at 8-10;
- (2) Independence of EPA’s review of the Alliance’s model, *e.g., Petitioners’ Consolidated Reply* at 10-11;
- (3) The extent to which the values used in the Alliance’s model were conservative and adequate to protect underground sources of drinking water (USDWs), *e.g., Petitioners’ Consolidated Reply* at 11-14; and
- (4) A number of inflammatory accusations (“brazenly dishonest,” “skeletal,” etc., *Petitioners’ Consolidated Reply* at 29), and untrue assertions regarding the Alliance’s arguments (e.g., that the Alliance made only a single substantive argument in response to the Petitioners’ financial assurances arguments, *see*

Petitioners' Consolidated Reply at 32, when in fact, the Alliance devoted several pages of its response to this issue).

Second, Petitioners' remaining arguments—namely regarding the sufficiency of the monitoring well network and identification of wells within the Area of Review—contain similarly misleading and inaccurate statements. For example, Petitioners:

- (1) Ignore substantial evidence in the record, *e.g.*, AR # 2 at 3.41, 3.43, 4.5 (noting that the Alliance modeled 100% of the CO₂);
- (2) Erroneously portray the Alliance's monitoring well network, *e.g.*, *Petitioners' Consolidated Reply* at 15 (claiming that only two of the nine monitoring wells are relevant to early detection);
- (3) Misconstrue the UIC Class VI well regulations, *e.g.*, *Petitioners' Consolidated Reply* at 16 (citing the Class VI well regulations but omitting all portions explicitly granting EPA discretion in the methodology for identifying “all” wells); and
- (4) Mischaracterize the facts and Alliance's arguments, *e.g.*, *Petitioners' Consolidated Reply* at 27 (stating that the Alliance argued that there is an “affirmative obligation” for a member of the general public to provide scientific evidence of potential well impacts).

Therefore, because Petitioners have presented misleading arguments and mischaracterize the facts in the record, the Alliance should be given the opportunity to respond. The Alliance's surreply will ensure the Board has the benefit of such corrections and clarification that relate to material matters contained in the permits at issue in this appeal. For these reasons, the Board should grant this Motion and provide the Alliance with the opportunity to file a surreply brief.

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

In accordance with 40 C.F.R. § 124.19(f)(2), the Alliance contacted both EPA and Petitioners regarding whether each party concurs or objects to this Motion. EPA supports this Motion. The Petitioners object to this Motion.

Conclusion

For the reasons set forth herein, the Alliance respectfully requests that the Board: (1) grant the Alliance an opportunity to file a surreply brief; and (2) establish a deadline of December 19, 2014 for the filing of Respondent's surreply brief in accordance with Board regulations.

Respectfully submitted,

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Counsel for FutureGen Industrial Alliance, Inc.

Date: December 11, 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 Motion for Leave to File Reply Brief (the "Alliance's Motion") 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 Motion on the date specified below, by electronic mail and certified mail, return receipt requested to:

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[SIGNATURE FOLLOWS]

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