

**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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Counsel for FutureGen Industrial Alliance, Inc.

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. Because the Board granted Petitioners’ the opportunity to file a reply brief, the Alliance hereby requests that the Board grant the Alliance an opportunity to file a surreply following submission of Petitioners’ reply brief.

The Board has broad discretion to grant requests to file surreply briefs. *See, In re ESSROC Cement Corp.*, RCRA Appeal No. 13-03 at p. 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 p. 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 pp. 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing); *see also* EAB Practice Manual at p. 48 (noting that, “[T]he [Board] may . . . upon motion, allow the filing of a surreply brief”).

The Alliance contends that a surreply brief is appropriate for several reasons. Most important, Petitioners intend to rely on their expert witness in drafting their reply brief and

apparently intend to present additional technical arguments. *See* Petitioners' Motion at pp. 5-6. Such arguments likely will require careful review and a response from the Alliance's technical team. Additionally, it is expected that the Petitioners' expert will present new issues and arguments not in the administrative record in this proceeding, or proffer support for prior allegations that Petitioners believe were insufficiently supported or addressed in their extensive Petition for Review. Parity requires that the Alliance be permitted to identify and address any new matters that have not been previously covered in prior briefing.

The Alliance's surreply brief will inform the Board's decisionmaking process by directing the Board to the extensive and technical administrative record in this proceeding and by providing the Board with specific references in the record that address any new issues identified by Petitioners in their reply. The Alliance also notes that allowing it the opportunity to file a surreply will not cause any other party prejudice, particularly because Petitioners have already been given the opportunity to file a reply and EPA may seek, through its own motion, the opportunity to file a surreply as well.

The Alliance does not seek additional time to file its surreply, given its desire to complete all briefing in this matter as quickly as possible. As such, the Alliance respectfully requests that the Board allow its surreply and confirm December 22, 2014 as the filing deadline. *See* 40 C.F.R. 124.19(c)(2) (establishing 15-days after service as the deadline for a reply).¹ The Alliance is asking the Board to promptly rule on this Motion in order to allow the Alliance to ensure that the necessary individuals from the Alliance and its technical team are available to assist in the surreply.

¹ Because 15 days is actually December 20th, which is a Saturday, the deadline should be extended under the Board's rules to December 22nd.

In accordance with the Board's regulations, *see* 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 does not object to this Motion. Petitioners' indicated that they do not object to this Motion on the condition that the Alliance concur with a future motion from Petitioners wherein Petitioners plan to request leave to file a sur-response to the Alliance's surreply. In particular, Petitioners' response indicates that they believe they are entitled to file the last brief. However, the Alliance does not concur with this assertion and, therefore, the Alliance reads Petitioners' conditional approval as an objection.

For the reasons set forth herein, the Alliance respectfully requests that the Board allow the Alliance to file a surreply brief and establish a deadline of December 22, 2014 for the filing, in accordance with Board regulations.

Respectfully submitted,

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Counsel for FutureGen Industrial Alliance, Inc.

Date: November 17, 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]

/s/ John J. Buchovecky

Date: November 17, 2014

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