

**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
RESPONSE TO PETITIONERS' MOTION FOR STAY OF PERMITS
PENDING APPEAL**

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The FutureGen Industrial Alliance, Inc. (the “Alliance”) respectfully submits this Response (“Response”) to the Motion for Stay of Permits Pending Appeal (“Motion”) submitted by Andrew H. Leinberger Family Trust, DJL Farm LLC, William Critchelow, and Sharon Critchelow (collectively, “Petitioners”) on May 26, 2015 in the above-captioned proceeding. Petitioners seek a stay of the Board’s decision (“Decision”) to deny their petitions for further review of Region 5 of the Environmental Protection Agency’s (“EPA”) issuance of four Class VI Underground Injection Control (“UIC”) permits to the Alliance.

The Alliance objects to the Motion on the grounds that it lacks foundation in the Environmental Appeals Board’s (“Board”) precedent, it is procedurally improper, and, even if the Motion is properly before the Board, it fails to demonstrate the requisite elements to obtain a stay. For these reasons, the Alliance respectfully requests that the Board summarily and expeditiously dismiss the Motion.

ARGUMENT

I. Petitioners’ Motion is Unsupported by the Board’s Precedent

The Alliance has not located any Board precedent suggesting that a stay is appropriate in circumstances where EPA has issued final permits that have been upheld by thorough reasoning of the Board. The single Board ruling cited by Petitioners in support of the Motion can be distinguished from the facts that were carefully considered by the Board in its Decision to deny the Petitioner’s request for further review of the Alliance’s UIC permits. *See* Motion at 3 (citing *In re Environmental Disposal Systems, Inc.*, UIC Appeal No. 07-03, sli op. at 8-9 (EAB Aug. 25, 2008)). In its Decision, the Board considered, in significant detail, whether the EPA had met its regulatory burden to thoroughly review the Alliance’s UIC permit applications, and provide adequate consideration and response to public comment, prior to issuing the subject permits.

EPA defended its issuance of the permits with significant technical and regulatory support. The Alliance intervened to provide additional legal and technical support for the validity of the EPA action in issuing the permits. After extensive briefing by the parties, the Board denied the Petitioners' request to require further EPA review of the Alliance permits.

Petitioners' mistakenly 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*") to support its position that the Board has previously stayed the effect of one of its decisions to preserve the *status quo*. *Id.* at 8-9. What is critical here is the definition of *status quo*. The *EDS* decision is easily distinguished on the facts above because, in that case, EPA had decided to *terminate* a UIC permit on the grounds of "abandonment," and other regulatory violations by the UIC permit operator. The owners of the facility challenged the EPA's action, but the Board upheld EPA's termination of the subject permit. The owners then petitioned the Board to stay its decision upholding termination of the permit to allow both the EPA and the owners to "transfer" the permit to a new applicant that was qualified and prepared to operate the UIC facility. The Board granted a stay of its decision on the grounds that: 1) the motion for stay was supported by *all* parties (i.e., EPA, the owners, and new permit transferee/applicant), and 2) a stay was only necessary to preserve the *status quo* while EPA issued a permit to the new applicant prior to the owner/petitioners' having to appeal the Board's decision to the court. *Id.* Contrary to the facts of the *EDS* decision, in this case, EPA and the Alliance support the Decision and oppose the Motion, and would be irreparably harmed by any further delay in the Decision's effectiveness.

Although Petitioners allege that the *status quo* must be maintained by the issuance of a stay to prevent the Alliance from continuing construction, Petitioners conveniently disregard the fact that the construction activities at the site are not on the Petitioners' property, and are not

even remotely close to Petitioners' property. In fact, the injection well site where construction is occurring is over 1.5 miles from the closest of the Petitioners' properties. *See* AR 2 at viii (containing a map depicting residences within the Area of Review and in relation to the injection site). As such, there is no conceivable circumstance under which harm will come to Petitioners or their property from the construction activities at the site. Therefore, no stay is necessary to preserve the *status quo* as it relates to Petitioners and their property.

II. Petitioners' Motion is Procedurally Improper

As EPA correctly pointed out in its response to Petitioners' Motion, no appeal has been filed in this matter and, as a result, the Motion is premature. *See* EPA's Response to Petitioners' Motion for Stay of Permits Pending Appeal, UIC Appeal Nos. 14-68, 14-69, 14-70, & 14-17 (filed May 28, 2015).

III. The Motion Fails to Satisfy the Elements for Obtaining a Stay

Even assuming the Board determines that the Motion is ripe for decision, the Petitioners' arguments fail to satisfy the required legal elements for issuance of a stay. In particular, Petitioners' arguments fail to demonstrate that, on appeal, they are likely to have success on the merits, that they will be irreparably harmed if the stay is not granted, or that the public interest favors granting the Motion.

First, Petitioners are not likely to have success on the merits, if they elect to appeal the Decision. *See* FutureGen Industrial Alliance, Inc., 16 E.A.D. ____, slip. op. (EAB April 28, 2015). Petitioners' Motion repeats many, if not most, of the arguments already carefully considered by the Board in its Decision. Petitioners claim that they plan to appeal the Decision to the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit"). *See* Motion at 2. Unfortunately for Petitioners, the Seventh Circuit provides great deference to an agency's

decision on appeal. In particular, the Seventh Circuit applies the “arbitrary and capricious” standard when reviewing an agency decision, which the court has further described as follows:

Review under the arbitrary and capricious standard is principally concerned with ensuring that [the agency] has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made, that the [a]gency’s decision was based on a consideration of the relevant factors, and that the [a]gency made no clear error of judgement. . . . Under this highly deferential standard, an administrative decision should be upheld as long as the agency’s path may be reasonably discerned. *See, Sierra Club v. EPA*, 774 F.3d 383, 393 (7th Cir. 2014) (emphasis added and citations omitted).

As such, there is no reason to believe that, under the highly deferential standard applied by the court on appeal, Petitioners’ attempt to rehash its arguments would result in a different outcome.

Second, Petitioners’ Motion also fails to demonstrate how Petitioners will be irreparably harmed if the Motion is not granted. In particular, Petitioners’ arguments regarding this irreparable harm element rely almost exclusively on an assumption that injection will commence in the near future, or at the very least, before their appeal is considered and resolved by the Seventh Circuit. *See* Motion at 13-20. However, this is not the case. Section Q of the UIC permits at issue indicate that the Alliance must satisfy all of the permit conditions, as well as obtain prior approval from the director of EPA, before injection may commence. *See* AR 594 at 21-22. Given the project’s current schedule, the Alliance does not anticipate satisfying the necessary conditions before 2019. Thus, pursuant to the terms of the permits, the Alliance may not begin injecting CO₂ for at least four years. Additionally, as stated above, no activity conducted by the Alliance between now and at least four years from now will have any impact on Petitioners or its properties. Therefore, Petitioners’ arguments regarding potential harm from the CO₂ injection are meritless and do not satisfy the second required element for granting a stay.

Third, and finally, the public interest does not favor granting Petitioners' Motion. Again, Petitioners' arguments rely on the erroneous assumption that injection will commence in the near future. For example, Petitioners state, "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." *See* Motion at 20. However, given the anticipated timeline and permit conditions described above, there is no impending risk of any impact to either drinking water sources or human health. Further, it is highly likely that any appeal will be resolved long before injection commences and, thus, a stay is not necessary. Even if the Alliance was prepared to inject prior to the completion of Petitioners' appeal, Petitioners could at that time seek a motion for stay.

CONCLUSION

For the reasons stated above, the Alliance respectfully requests that the Board reject Petitioners' Motion without further consideration or delay. The Alliance supports the position taken by EPA and emphasizes that Petitioners' arguments fail independently for each of the foregoing reasons. Therefore, the Motion should be immediately rejected.

Respectfully submitted,

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Date: June 3, 2015

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 Response to Petitioners' Motion For Stay of Permits Pending Appeal (the "Response") 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
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I also certify that I delivered a copy of the foregoing Alliance's Response 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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