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

In re:	)	
	)	
FutureGen Industrial Alliance, Inc.	)	UIC Appeal Nos.: 14-68, 14-69, 14-70 & 14-71
	)	
Permit Nos.: IL-137-6A-001	)	
IL-137-6A-002	)	
IL-137-6A-003	)	
IL-137-6A-004	)	
	)	

EPA REGION 5 MOTION FOR LEAVE TO FILE SURREPLY

The United States Environmental Protection Agency ("EPA"), Region 5 ("Region 5"), moves for leave to file its Surreply to Petitioners' Consolidated Reply in Support of Their Petition for Review ("Reply") submitted by the Andrew H. Leinberger Family Trust and DJL Farm LLC, and William and Sharon Critchelow (collectively referred to as "Petitioners") in Appeal Nos. UIC 14-68; UIC 14-69; UIC 14-70 and UIC 14-71. In support of this motion, Region 5 states that Petitioners' Reply raises new issues that Region 5 did not previously have the opportunity to address. Specifically, Petitioners' Reply raises pressure front delineation as an issue requiring review. Further Region 5 states that its Surreply responds to matters presented in the Petitioners' Reply that contain misstatements of the record, and Region 5 seeks permission to file its Surreply to avoid any potential confusion arising from such misstatements.

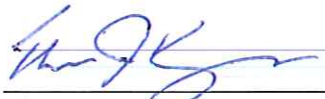
The regulations regarding the appeal of permits clearly state that Petitioners are precluded from raising "new issues or arguments in the reply." 40 C.F.R. § 124.19(c)(2). The Environmental Appeals Board ("EAB") has discretion to grant requests to file surreply briefs and typically does so in cases where new arguments are raised in opposing reply briefs or where further briefing would assist the Board in resolving disputed issues. *E.g., In re ArcelorMittal*

Cleveland Inc., NPDES Appeal No. 11-01 (EAB December 9, 2011) (Order Granting in Part EPA's Motion to File Surreply, Denying Petitioner's Request to Provide Additional Information, and Granting Oral Argument); *Keene Wastewater Treatment Plant,* NPDES Appeal No. 07-18, at 11 (EAB Mar. 19, 2008) (Order Denying Review); *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). "If a reply brief has been filed, the EAB may similarly, upon motion, allow the filing of a surreply brief." The Environmental Appeals Board Practice Manual, § IV.D.6.b. at 49.

In accordance with 40 C.F.R. § 124.19(f)(2), Region 5 contacted both Petitioners and FutureGen Industrial Alliance, Inc. ("FutureGen") regarding whether each party concurs or objects to this motion. Petitioners indicated that they object to this motion. FutureGen Industrial Alliance, Inc. has indicated that it concurs with this motion.

Region 5 respectfully requests that the EAB grant leave to file the attached proposed Surreply in this matter.

Respectfully submitted,



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Dated: December 11, 2014

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IL-137-6A-004	)	
	)	

EPA REGION 5 SURREPLY

Region 5 submits this surreply:

(1) To highlight one area where Petitioners have raised new issues and arguments in their December 4, 2014 Reply ("Reply") in contravention of 40 C.F.R. § 124.19(c)(2); and

(2) Because while the Reply rehashes many of the same claims made in the original Petition, certain misstatements of the record made in the Reply may create potential confusion. Clarifying these matters helps confirm that Petitioners' assertions do not establish any basis for review of the FutureGen permits or any need for oral argument. As explained in Region 5's Response ("EPA Response"), Region 5's permit decisions complied with the Class VI regulations, and were explained and supported in the administrative record.

First, Petitioners state that they contested the pressure front delineation that defines the extent of the Area of Review ("AoR"). (Reply page 12.) That is simply not true -- the AoR issues they presented for review focused solely on the extent of the CO2 plume, not the pressure front. (See Petition pages 4, 10-13 and 30. Petitioners may not raise this issue for the first time in their reply brief. As Region 5 pointed out in pages 8-13 of the EPA Response, using the pressure

front to define an AoR extending for a 25 mile radius (and extending well beyond the CO2 plume) is exactly the conservative approach that the Petitioners advocate. (See Reply pages 9-14.) This conservative approach is employed to account for all uncertainties associated with model input parameters and their potential impact on the size of the AoR (e.g., residual saturation) inclusive of both the plume and pressure front. The argument beginning on page 12 of Petitioners' Reply should be stricken pursuant to 40 C.F.R. § 124.19(c)(2).

Second, Petitioners state that Region 5 did not address their contention that the Environmental Appeals Board ("EAB") should review the permits because they present an important policy matter, and so concedes the issue (Reply pages 6 and 28). The only potential policy issue that Petitioners invoke is that because these are EPA's first Class VI permits, they should be "strictly reviewed" for compliance with the regulations.[1] EPA's Response explained at length how its permitting decisions complied with the regulations, and also specifically opposed Petitioners' claim that there were any policy issues at stake. (See EPA Response pages 6, 14, 19, 37, and 38.)

Third, Petitioners imply that EPA's public statements that it conducted "independent modeling" of the AoR were misleading. (Reply page 10.) At most, this contention relates to semantics and not substance. The record is clear that EPA conducted an independent review of FutureGen's AoR delineation (i.e., through a separate modeling exercise and technical evaluation of all model inputs) and separately verified the appropriateness of FutureGen's approach. (See EPA Response pages 9-13.)

[1] EPA issued a final Class VI permit to Archer Daniels Midland Company on December 1, 2014. (See *In re Archer Daniels Midland Company*, UIC Appeal No. 14-72 (EAB Nov. 26, 2014) dismissing the petition for review of that permit.) Thus, the FutureGen permits, if they become effective, would not be the "first" Class VI permits.

Fourth, Petitioners state that EPA reviewed only one database to identify wells that may require corrective action. (See, e.g., Reply pages 17 and 19.) The record is clear that EPA thoroughly reviewed two separate databases, and then after evaluating the information in those databases, concluded that there were no wells in the AoR requiring corrective action. Wells that do not pose a risk of leakage out of the injection zone are not in need of corrective action. (See EPA Response pages 20-22.) The regulations do not require Region 5 to disprove the negative as Petitioners suggest; they require a reasonable and appropriate inquiry to identify "wells that require corrective action" over an AoR encompassing almost 2,000 square miles. 40 C.F.R. §146.84(c).

Fifth, Petitioners imply that the Whitlock and Criswell wells are gas extraction wells, so that other such wells in the AoR may also penetrate the confining zone. (Reply pages 21-22) However, the record is clear that the Whitlock and Criswell wells were drilled at a gas storage field, not for the production of oil or natural gas, and are much deeper than any known oil or gas wells in the AoR. (See EPA Response page 21.) Petitioners also imply that the Whitlock and Criswell wells require corrective action. (Reply page 22), when the record is clear that they do not. (See EPA Response page 23.)

Sixth, Petitioners imply that the permits must be based on a detailed cost estimate developed by FutureGen. (See Reply pages 32-33.) In this case the detailed estimate is a product of EPA's review and modification of the original FutureGen estimate, and is fully explained and supported in the record. (EPA Response pages 27-30.)

Finally, Petitioners imply that Region 5 relies on the iterative process and regular review inherent in the Class VI operational requirements in lieu of sufficient current review and documentation. (See Reply pages 9 and 14.) The record is clear that Region 5 has carefully

reviewed the record to assure that regulatory requirements are met, documented and explained. The multi-phase permitting regime set forth in the Class VI regulations merely provides additional assurance in the future that USDWs will be protected and that newly developed information from well construction and operation will be used to refine the permit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original of this EPA Region 5 Motion for Leave to File Surreply in the matter of FutureGen Industrial Alliance, Inc. of Jacksonville, Illinois, Permit Nos. IL-137-6A-001 through IL-137-6A-004, UIC Appeal Nos. 14-68 through 14-71, and all associated attachments, were filed electronically, via the EAB eFiling System, with the Board.

Further, I certify that one copy of the EPA Region 5 Motion for Leave to File Surreply in the matter of FutureGen Industrial Alliance, Inc. of Jacksonville, Illinois, Permit Nos. IL-137-6A-001 through IL-137-6A-004, UIC Appeal Nos. 14-68 through 14-71, and all associated attachments, was sent to the Petitioner and Permit Applicant

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Dated: December 11, 2014