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

2006 APR 11 PM 3:00
ENVIR. APPEALS BOARD

IN THE MATTER OF:)
)
PRAIRIE STATE) PSD APPEAL NO. 05-05
GENERATING STATION)
I.D. NO. 189808AAB)
PERMIT APPLICATION NO. 01100065)

NOTICE

To:

Eurika Durr,
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Bertram C. Frey
Acting Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency,
Region V
77 W. Jackson Boulevard
Chicago, Illinois 60604-3507

Bruce Nilles
Sierra Club
214 North Henry Street, Suite 203
Madison, Wisconsin 53704

Verena Owen
Lake County Conservation Alliance
421 Ravine Drive
Winthrop Harbor, Illinois 60096

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, Massachusetts 02108

Kevin Finto
Penni Shamblin
Harry Johnson
Hunton & Williams
Riverfront Plaza East Tower
951 East Byrd Street
Richmond, Virginia 23219

Kathy Andria
American Bottom Conservancy
614 North 7th Street
East St. Louis, Illinois 62201-1372

Brian Urbaszewski
American Lung Association of
Metropolitan Chicago
1440 West Washington Blvd.
Chicago, Illinois 60607

Kathleen Logan-Smith
Health & Environmental Justice - St. Louis
P.O. Box 2038
St. Louis, Missouri 63158

John Blair
Valley Watch
800 Adams Avenue
Evansville, Indiana 47713

PLEASE TAKE NOTICE that I have today filed with the Clerk of the Environmental Appeals Board an original (1) and five (5) copies of **OBJECTION TO SIERRA CLUB'S MOTION FOR LEAVE TO FILE RESPONSE BRIEF** of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Sally Carter
Assistant Counsel
Division of Legal Counsel

Date: March 20, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

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

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PRAIRIE STATE)	PSD APPEAL NO. 05-05
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**OBJECTION TO SIERRA CLUB’S MOTION
FOR LEAVE TO FILE RESPONSE BRIEF**

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its attorneys, and files with the ENVIRONMENTAL APPEALS BOARD (“EAB”) this Objection to the Motion for Leave to File Response Brief (hereinafter “Motion”) filed by Petitioners, SIERRA CLUB *et al.*, in the above-referenced cause.

To simply give a bit of overview to the procedural history of this proceeding from the April 28, 2005, issuance of the Construction Permit/PSD Approval to Prairie State authorizing construction of the mine-mouth coal-fired power plant, the following events are restated. On or about June 8, 2005, Petitioners filed a Petition for Review, challenging the Illinois EPA’s permit decision on a variety of grounds relating to the PSD Approval. On July 29, 2005, the Illinois EPA filed its Response to Petition (hereinafter “Response”) and the Certified Index of the Administrative Record. On August 15, 2005, the Petitioners sought leave to File Reply Brief to the Illinois EPA’s Response. In an Order Granting Motion to File Reply Brief, dated August 19, 2005, the EAB, while allowing a thirty-page reply brief, stated, “[n]o further responses will be permitted in this matter.” *In re Prairie State Generating Station*, PSD Appeal No. 05-05, slip op. at 3 (EAB,

August 19, 2005). The EAB's statement in the August 19, 2005, slip opinion is in accord with its general acknowledgment that PSD appeals are to be given priority. *See*, EAB Home Page, Frequently Asked Questions #19 (<http://www.epa.gov/eab/eabfaq.htm#19> ("New source permits, such as those under the PSD program, and cases involving RCRA combustion strategy permits are assigned the highest priority relative to other categories of cases"). Thereafter, Petitioners' filed their Reply on September 15, 2005.

In an order dated December 12, 2005, the EAB instructed the USEPA to brief the merits of the Illinois EPA's BACT analysis, particularly the first step concerning the use of low-sulfur coal at a mine-mouth facility designed to employ high-sulfur coal. No further briefing from the parties was requested on these issues. The USEPA filed its Brief of the EPA Office of Air and Radiation and Region V on March 7, 2006. In this regard, the Petitioners seize upon USEPA's position as one with "broad-ranging significance" that "directly affects Petitioners' interests." Motion at page 2. However, when coupled with the reply briefing allowed by the EAB, including a directive to the USEPA to weigh in on the issue, stating that it "believes that further briefing from OGC and the Region would be helpful in this case," this context suggests that the EAB understood the significance of the issues. *In re Prairie State Generating Station*, PSD Appeal No. 05-05, slip op. at 11 (EAB, December 12, 2005). It does not suggest that additional briefing and delay is warranted.

Petitioners' claim that the USEPA raised novel arguments in its brief thereby justifying additional briefing by the Petitioners is disingenuous. According to Petitioners, the USEPA was the first to argue that "the applicant's desire to utilize coal from an adjacent mine should be considered part of the 'basic design' of the proposed source,

thereby excusing IEPA's failure to consider the use of low-sulfur coal from alternative sources during its BACT analysis." Motion at page 2. However, the Illinois EPA first explored this issue for the public in the February 2004, Project Summary wherein, the Illinois EPA stated:

With respect to alternative sources of coal, e.g., low-sulfur western coal from Wyoming or Montana, the proposed plant is being designed and developed to burn high-sulfur Illinois coal, the locally available coal. It would be inconsistent with the scope of the project to use coal from other regions of the country. Rather, the BACT determination addresses the appropriate control technology for SO₂ emissions association with use of this coal at the proposed plant.

Project Summary at 8. The Illinois EPA continued to explain its position, as follows, in its April 28, 2005, Responsiveness Summary.

The project that must be addressed when evaluating BACT is the project for which an application has been submitted, i.e., a proposed mine-mouth power plant. The source of coal for which the plant would be developed is a specific reserve of 240 million tons of recoverable coal, which would meet the needs of the proposed plant for more than 30 years. Accordingly, the use of a particular coal supply is an inherent aspect of the proposed project. To require an evaluation of an alternative coal supply, as suggested by this comment, would constitute a fundamental change to the project.

Response to Comment No. 46. *See also*, Response to Comment Nos. 47-48, 52, 108-109, 119-120. In fact, the Petitioners' acknowledge the Illinois EPA's stance in its Petition for Review. *See*, Petition for Review at page 32. "IEPA repeatedly asserts that considering low-sulfur coal is outside the scope of the project and would redefine the source because Prairie State is a mine-mouth plant designed to use a specific fuel." The Illinois EPA went onto defend its position, at length, in its Response stating that "[t]he Illinois EPA did not consider it necessary to further formally evaluate low-sulfur coal as an available control option because its use as the principal fuel source for the proposed plant would fundamentally alter the plant's design. The PSD regulations do not compel a permit

applicant to change its basic design of a proposed source so as to achieve emission reductions.” *See*, Response to Petition at page 66; *see also*, pages 63-78. Nor should it be ignored that Petitioners had every opportunity to address this issue in its Reply Brief. As such, the USEPA was not the first to raise the argument in this proceeding; the Illinois EPA has repeatedly done so¹. Accordingly, Petitioners have had every occasion to respond to such arguments, so Petitioners cannot be heard to complain about the USEPA raising similar arguments in its March 7, 2006, Brief.


By the same token, Petitioners’ assertion that it has not yet had the opportunity to address the USEPA’s position that “the Clean Air Act does not require permitting agencies to consider the need for a proposed facility, or ‘alternatives such as energy efficiency or demand management’” is without support. In challenging the Illinois EPA’s decision, the Petitioners initially argued that the Clean Air Act provided the Illinois EPA with broad authority to consider the need for or alternatives to the proposed source. *See*, Petition at pages 11-17. As Petitioners have already briefed this issue, Petitioners’ argument is a ruse.

¹ In addition, Prairie State made similar arguments in its Petition Response. *See*, Prairie State Brief at pages 43-46.

For the reasons set forth herein, the Illinois EPA respectfully requests that the EAB deny Petitioners' Motion for Leave to File Response Brief or, in the alternative, order such relief that is deemed just and appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Sally Carter
Assistant Counsel
Division of Legal Counsel

Date: March 20, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March 2006, I did send, by first class mail, postage prepaid, one (1) original and five (5) copies of the following instrument entitled

OBJECTION TO SIERRA CLUB'S MOTION FOR LEAVE TO FILE RESPONSE

BRIEF to:

Eurika Durr,
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

and a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal

Service to:

Bruce Nilles
Sierra Club
214 North Henry Street, Suite 203
Madison, Wisconsin 53704

Verena Owen
Lake County Conservation Alliance
421 Ravine Drive
Winthrop Harbor, Illinois 60096

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, Massachusetts 02108

Bertram C. Frey
Acting Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency,
Region 5
Chicago, Illinois 60604-3507

Kevin Finto
Harry Johnson, III
Penni Shamblin
Hunton & Williams
Riverfront Plaza East Tower
951 East Byrd Street
Richmond, Virginia 23219

John Blair
Valley Watch
800 Adams Avenue
Evansville, Indiana 47713

Kathy Andria
American Bottom Conservancy
614 North 7th Street
East St. Louis, Illinois 62201-1372

Brian Urbaszewski
American Lung Association of
Metropolitan Chicago
1440 West Washington Blvd.
Chicago, Illinois 60607

Kathleen Logan-Smith
Health & Environmental Justice - St. Louis
P.O. Box 2038
St. Louis, Missouri 63158

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This filing is submitted on recycled paper.