

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

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

**PETITIONERS' RESPONSE TO PERMITTEE
 FUTUREGEN INDUSTRIAL ALLIANCE, INC.'S MOTION
FOR EXPEDITED REVIEW AND DECLARATIONS IN SUPPORT**

Pursuant to 40 C.F.R. § 124.19(f)(3), Petitioners the Leinberger Family (Andrew H. Leinberger Family Trust and DJL Farm LLC) and the Critchelow Family (William and Sharon Critchelow) (collectively, "Petitioners") submit the following response to clarify its opposition regarding *Permittee FutureGen Industrial Alliance, Inc.'s Motion For Expedited Review And Declarations In Support* ("Motion").

The *Motion* does not present a complete or accurate description of Petitioners' response to the request that it not oppose the *Motion*. In response to FutureGen Industrial Alliance, Inc.'s ("FutureGen") request, Petitioners' counsel informed FutureGen's counsel that Petitioners would not object to the Motion *so long as* any expedited review which the EAB may in its discretion elect to apply would not affect Petitioners' time for filing reply briefs, including an extension of time, and hence, would occur thereafter. Petitioners' counsel further explained to FutureGen's counsel that it was likely that Petitioners would need to seek an extension of time to file their reply briefs. In short, Petitioners did not agree to any expediting of this proceeding irrespective

of its need for additional time to file reply briefs. Petitioners will be filing shortly a motion for an extension of time to file reply briefs.

To be clear, it is neither Petitioners' intent nor purpose to delay a final decision by the Environmental Appeal Board ("Board"). Petitioners believe that the Board should be free to exercise its discretion as to whether this matter should take priority over other matters currently on its docket, and whether FutureGen has set forth a proper basis for expediting. But any such expedited review, even if it is otherwise proper, must not affect or limit in any way Petitioners' fundamental right to a full and fair opportunity to respond to the numerous misleading arguments raised in FutureGen's brief in opposition to this appeal. Further, by not opposing FutureGen's *Motion* on the condition that Petitioners had sufficient time (including an extension) to file reply briefs, Petitioners wish to clarify to the Board that they believe this matter deserves anything less than a thorough, deliberate and careful review by the Board. The four permits at issue in this proceeding will set an important precedent for a first-of-its kind carbon sequestration project. This appeal addresses significant issues for the "world's first large-scale, near-zero emissions power plant using carbon capture and storage [project] ..." *Motion*, p. 2. Accordingly, Petitioners submit that whether an expedited review is appropriate is affected by the need for a decision based on full and accurate information and a careful administrative review of these precedent-setting permits.

Even if the FutureGen financing deadlines it describes in its *Motion* are legitimate, they are a problem of FutureGen's own making and not due to any fault of Petitioners. FutureGen could have begun the permit process much earlier than it did - - a matter that was wholly within FutureGen's control and wholly beyond the control of Petitioners. As FutureGen concedes, the current incarnation of FutureGen was formed in 2010. *Motion*, p. 2. Yet, FutureGen admits that

it delayed filing its application to the Environmental Protection Agency until March 2013. *Id.* Petitioners bear no blame for any timeline predicament that FutureGen may be facing.

Further, the record should be clear that the legal problems which Petitioners have identified in this appeal concerning the issuance of the FutureGen permits in violation of the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300f, *et seq.*, and its regulations are not the sole obstacle which FutureGen faces in meeting its financing deadlines. FutureGen is a respondent in a permit proceeding for this project currently pending before the Illinois Pollution Control Board (“IPCB”). On July 16, 2014, FutureGen filed a similar motion to expedite the IPCB proceeding based on the same alleged financing representations that it proffers here. *See Defendants’ Memorandum of Law In Support of their Motion to Expedite*, pp. 3-4, at <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-85089>.¹ As of the date of the instant filing, the IPCB still has not granted FutureGen’s motion to expedite. Therefore, to be clear, there is another legal proceeding which is totally separate from this appeal and in which Petitioners have no role whatsoever that must be decided before FutureGen’s alleged financing issues can be resolved. In this regard, FutureGen will not be prejudiced by agreeing not to oppose Petitioners’ soon to be filed request for an extension of time in which to file their reply briefs to both FutureGen’s and the United States Environmental Protection Agency’s briefs in opposition to this appeal.

Finally, by conditionally agreeing not to oppose FutureGen’s *Motion* if we got sufficient additional time to file reply briefs, Petitioners did not intend to and do not concede that FutureGen’s reference to its non-profit status and alleged public benefits of the project are

¹ The Board should take administrative notice of this publicly available document. *See Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007). This document is offered only to show that FutureGen makes the same argument there as it does here.

irrelevant to its *Motion*. FutureGen cites no authority regarding their alleged relevance and fails to offer any “particularity” or “legal argument” in that regard. See 40 C.F.R. § 124.19(f)(2). Petitioners submit that the only relevant consideration here is full compliance with the SDWA and its regulations. Non-profit status and alleged public benefits cannot outweigh the legal mandate to protect the rights of Petitioners and general public by requiring the four permits to fully comply with the SDWA and its regulations.

It similarly bears noting that FutureGen’s reliance upon *In re La Paloma Energy Center, LLC*, PSD-TX-1288-GHG (Filing #9) is wholly misplaced. *La Paloma Energy Center* involved a PSD permit, which is a proceeding governed by a regulatory-mandated compressed timeline. See 40 C.F.R. § 124.19(b), (c) and (e) (providing a tighter schedule for PSD permit reviews). There is no PSD permit involved in this appeal.

Conclusion

For the reasons set forth above, FutureGen has not carried its burden to show that this matter should be expedited, but even if the Board believes that expediting is appropriate, it should occur only after Petitioners’ have received an extension of time to file their reply briefs. Otherwise, Petitioners’ submit that the *Motion* should be denied.

Dated: November 5, 2014

Respectively submitted, Andrew H. Leinberger
Family Trust; William and Sharon Critchelow

/s/ Jennifer T. Nijman
Jennifer T. Nijman
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60602
(312) 251-5255
(312) 251-4610 – facsimile
Jn@nijmanfranzetti.com

Karl Leinberger
Markoff Leinberger LLC
134 N. LaSalle Street, Suite 1050
Chicago, IL 60602
(312) 726-4162
(312) 674-7272 – facsimile
karl@markleinlaw.com

Attorneys for Petitioners/Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on November 5, 2014, in the matter of FutureGen Industrial Alliance, Inc., Permit Nos. IL-137-6A-001, IL-137-6A-002, IL-137-6A-003; and IL-137-6A-004, UIC Appeal Nos. 14-68, 14-69, 14-70, and 14-71, I filed the foregoing *Petitioners' Response To Permittee FutureGen Industrial Alliance, Inc.'s Motion For Expedited Review And Declarations In Support* electronically with the Environmental Appeals Board.

I also certify that on November 5, 2014, I delivered a copy of the foregoing *Petitioners' Response To Permittee FutureGen Industrial Alliance, Inc.'s Motion For Expedited Review And Declarations In Support* by electronic mail and U.S. mail to:

Ms. Susan Hedman
Regional Administrator
Mr. Thomas J. Krueger
Regional Counsel
Environmental Protection
Agency Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3507

John J. Buchovecky
Marlys S. Palumbo
Chris D. Zentz
Van Ness Feldman, LLP
1050 Thomas Jefferson St. NW, 7th Floor
Washington D.C. 20007

/s/ Jennifer Nijman
Jennifer Nijman
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3600
Chicago, Illinois 60602
(312) 251-5255
(312) 251-4610 – facsimile

Attorney for Petitioners/Appellants