

**Elizabeth A. Leifel**  
312.876.6151  
eleifel@sonnenschein.com

7800 Sears Tower  
233 South Wacker Drive  
Chicago, IL 60606-6404  
312.876.8000  
312.876.7934 fax  
www.sonnenschein.com

Chicago  
Kansas City  
Los Angeles  
New York  
Phoenix  
San Francisco  
Short Hills, N.J.  
St. Louis  
Washington, D.C.  
West Palm Beach

September 28, 2006

VIA FEDERAL EXPRESS

Ms. 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

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U.S. E.P.A.  
2006 SEP 29 AM 10:02  
ENVIR. APPEALS BOARD

Re: City of Springfield  
Permit No. 167120AAO  
PSD Permit Appeal No. 06-07

Dear Ms. Durr:

Enclosed for filing is one original and five copies of the City of Springfield's Response Seeking Summary Disposition and Motion for Summary Disposition in the above-captioned matter.

Sincerely,



Elizabeth A. Leifel

Enclosures

cc: Ms. Jenifer Johnson, Esq. (w/encl.)  
Mr. Jay Bartlett (w/encl.)  
Mr. Bruce Nilles, Esq. (w/encl.)  
Ms. Mary Gade, Esq. (w/encl.)

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

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ENVIR. APPEALS BOARD

IN RE: )

CITY OF SPRINGFIELD )

APPLICATION NO.: 0411005D )

I.D. NO.: 167120AAO )

No. PSD 06-07

**THE CITY OF SPRINGFIELD'S RESPONSE  
SEEKING SUMMARY DISPOSITION  
AND MOTION FOR SUMMARY DISPOSITION**

**I. INTRODUCTION**

The City of Springfield, Illinois (the "City"), owns and operates a municipal electric utility known as City Water, Light & Power ("CWLP"). The CWLP generating plant consists of two coal-fired generating stations: the Dallman Generating Station ("Dallman") and the Lakeside Generating Station ("Lakeside"). On August 10, 2006, the Illinois Environmental Protection Agency (the "IEPA") issued a final construction permit ("Permit") for a new generating unit, known as Dallman Unit 4, under the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the "CAA"). The City hereby responds to the Petition for Review (the "Petition") filed by David Maulding ("Petitioner"). Petitioner, who did not submit comments on the draft permit or participate in any way in the permit process, seeks review only of what he asserts are changes from the draft to the final Permit. (Petition, at 6). Because the Permit on its face does not give effect to the conditions appealed by Maulding and, indeed, expressly renders these conditions ineffective, Petitioner's

request for relief is without substance and presents no issue for determination by the Board. Therefore, the City seeks summary disposition of the Petition.

In support of its request, the City states as follows:

## **II. STATEMENT OF UNDISPUTED FACTS**

1. CWLP has proposed to construct a new 250 MW coal-fired unit, known as Dallman Unit 4, at the Dallman Generating Station. Dallman Unit 4 would replace two existing coal-fired generating units at the Lakeside Generating Station

2. On November 18, 2004, CWLP applied to the IEPA for a construction permit (Application No. 0411050) under the PSD program of the CAA, 42 U.S.C. 7401, *et seq.*

3. On February 4, 2006, the IEPA issued a draft PSD permit, I.D. No. 167120AAO, to CWLP and began accepting public comments on the draft permit.

4. Petitioner did not submit comments on the draft permit or participate in any manner in the public process prior to the filing of his Petition.

5. IEPA held a public hearing on the draft permit on March 22, 2006. The public comment period ended on May 22, 2006.

6. The IEPA issued the final PSD Permit to the City on August 10, 2006.

7. The final Permit conditionally incorporated certain conditions voluntarily developed between the City and the Sierra Club (the "Agreement") and presented to the IEPA for inclusion in the Permit. The City and the Sierra Club negotiated the Agreement, in part, to avoid potential delay in the construction of Dallman Unit 4 that may have accompanied an appeal of the final Permit by the Sierra Club.

8. Under the Agreement, the City committed, *inter alia*, to purchase 120 MW of wind capacity; to emissions limits for SO<sub>2</sub>, NO<sub>x</sub>, total PM, filterable PM, opacity, and sulfuric acid mist; and to undertake energy conservation and demand-side management initiatives.

9. As consideration for the City's commitments, the Sierra Club agreed not to appeal the Permit once it was issued.

10. The final Permit incorporated the terms and conditions of the Agreement in Condition 1.6.c and Attachment 5, as follows:

Condition 1.6.c: If the issuance of this permit is appealed pursuant to federal law, under 40 CFR Part 124 or other federal regulations or provisions under the Clean Air Act, or is appealed pursuant to state law, under the Environmental Protection Act or other state law or regulations thereunder, or under common law, the above requirements, which were voluntarily accepted by the Permittee pursuant to an agreement with the Sierra Club with the objective of avoiding such an appeal, *shall not be effective*.

(Permit, at 10) (emphasis provided).

11. The IEPA also added the following language to the Permit, at Condition 1.6.c and Attachment 5, which was not part of the Agreement: "In the event of such an appeal, these requirements would only become effective if and to the extent that the acceptance of the agreement is *reaffirmed* by the Permittee and the Sierra Club." (Permit, at 10) (emphasis provided).

12. Petitioner filed this appeal on September 8, 2006. In the Petition, he raised three issues for review, all of which turn exclusively upon the incorporation of conditions from the Agreement in the final Permit:

1. Petitioner asserts that IEPA has failed to document or articulate any explanation for the changes (sic) made to the final Permit. IEPA simply notes that an agreement between the City and the Sierra Club was reached, and simply incorporates those terms into the permit, with no explanation of the decision making process, and no articulation of the impact of those contract terms on the environmental conditions at the core of the permitting process.

2. Petitioner asserts that IEPA has imposed conditions or requirements not reasonably related to the discharges associated with the proposed plant. Permit conditions must be somewhat reasonably related to the discharges from the proposed plant to have any basis in law. The conditions exceed the authority and jurisdiction of IEPA.
3. Based on this appeal, and the explicit terms of the Permit, this Permit must be amended to reflect that the contingent Conditions imposed by Condition 1.6 and Amendment 5 are null and void.

(Petition, at 6). Based on his filing, if the conditions derived from the Agreement are without effect in the final Permit, there is no substance to Petitioner's appeal.

### III. ARGUMENT

13. The Board generally does not grant review of a permit unless one of two conditions is established on the face of the petition: (a) that the contested permit condition is based on a clearly erroneous finding of fact or conclusion of law; or (b) that the petition implicates an important policy consideration that warrants review. 40 C.F.R. § 124.19(a); *see In re Amerada Hess Corp.*, PSD Appeal No. 04-03, slip op. at 11, 12 E.A.D. \_\_\_, 2005 WL 289445, at \*5 (EAB, Feb. 1, 2005); *In re Sutter Power Plant*, 8 E.A.D. 680, 686-87 (EAB 1999).

14. The preamble to the Part 124 permitting regulations guides the Board's review of PSD permits. That preamble states that the Board's review power "should be only sparingly exercised" and that most permit conditions should be finally determined at the Regional level. *See In re Knauf Fiberglass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (*quoting* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

15. For each issue raised, a petitioner must demonstrate that the petitioner participated in the public comment process, including any public hearing, or that the petition is limited to those conditions in the final permit that differ materially from those contained in the draft permit.

40 C.F.R. § 124.19(a); *Amerada Hess, slip op.* at 10-11. Here, the Petitioner admittedly did not participate in any manner in the public process leading to IEPA's issuance of the final Permit. Instead, the Petition seeks review only of those Permit conditions incorporated from the Agreement between the City and the Sierra Club, which Petitioner asserts differ from those contained in the draft permit. (Permit, at Condition 1.6 and Attachment 5).

16. Thus, the *entirety* of Petitioner's appeal rests upon his position that the terms and conditions derived from the Agreement should not be included in the final Permit. The *only* relief Petitioner seeks is a declaration by the Board "that this Permit is in force, free from any of the Alternate Conditions imposed by the Sierra Club Agreement ... [which] should be stricken from this permit." (Petition, at 12-13).

17. As a matter of law, the Board cannot grant and should not hear the Petition, because the issues presented and the request for relief are without substance and present no issue for determination by the Board. The Board summarily may dispose of the Petition, because the very conditions of the final Permit challenged by Petitioner, based upon the Permit's plain language, are without effect. The Permit, on its face, provides that the conditions incorporated from the Agreement (Condition 1.6 and Attachment 5) are null and void in the event the final Permit is appealed: "If the issuance of this permit is appealed . . . [such conditions] shall not be effective." (Permit, at 10). Petitioner's appeal rendered Condition 1.6 and Attachment 5 ineffective. Petitioner already has received full satisfaction. There is no additional relief the Board can provide. Further, remand to the IEPA "for issuance of a permit free from [these] conditions" (Petition, p. 13) would serve no purpose. There is no action for the IEPA to take.

18. While the Petition did not reach the point, the City further notes that the language contained in the final Permit purportedly allowing conditions derived from the Agreement to remain in effect, regardless of an appeal, is invalid and cannot prevent the summary disposition

of the Petition. (*See* Permit, at 10, stating, “In the event of such an appeal, these requirements would only become effective if and to the extent that the acceptance of the agreement is *reaffirmed* by the Permittee and the Sierra Club.”).

19. Even upon remand, the IEPA would be without authority to modify the permit based upon the Agreement being “reaffirmed” by the parties. Modification of the permit would require final agency action according to the specified procedures for permit modification. *See* 35 Ill. Admin. Code § 252.102 (providing that PSD permit modifications are subject to specific public notice provisions). The courts repeatedly have rejected efforts to modify permits after-the-fact and outside the statutory process. *See, e.g., City of San Diego v. Whitman*, 242 F.3d 1097, 1101-02 (9th Cir. 2001) (holding that letter submitted by U.S. EPA after permit had been issued could not constitute valid renewal of NPDES permit, subjecting it to review, because the letter did not constitute “final agency action” to renew the permit); *see also Citizens for a Better Environment-California v. Union Oil Co. of California*, 861 F. Supp. 899 (N.D. Cal. 1994) (finding that cease and desist order, entered after the issuance of an NPDES permit, could not alter the terms of the permit without following required modification procedures).


20. This rationale applies with full force here. Even if the City and the Sierra Club were to reaffirm their Agreement, their private reaffirmation could not constitute final agency action resulting in any possible modification to the Permit. Thus, this “reaffirmation” clause is merely superfluous and does not constitute clear error sufficient to support a remand.

#### IV. CONCLUSION

WHEREFORE, for all of the foregoing reasons, the City of Springfield respectfully requests that the Board summarily dispose of Petitioner David Maulding's Petition for Review and grant other such relief as is just and appropriate.

Dated September 29, 2006

Respectfully submitted,

By:   
One of the Attorneys for the  
City of Springfield, Illinois

Thomas A. Andreoli  
Elizabeth A. Leifel  
SONNENSCHN NATH & ROSENTHAL LLP  
7800 Sears Tower  
233 South Wacker Drive  
Chicago, Illinois 60606  
(312) 876-8000



**CERTIFICATE OF SERVICE**

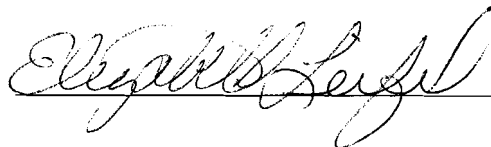
I the undersigned, an attorney, hereby certify that on the 20th day of September, 2006, service of a true and complete copy of the **City of Springfield's Response Seeking Summary Disposition and Motion for Summary Disposition** was made upon the following parties:

Sally Carter, Esq.  
Office of General Counsel  
Illinois Environmental Protection Agency  
1021 N. Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794

Bruce Nilles, Esq.  
Sierra Club  
122 West Washington Ave, Suite 830  
Madison, WI 53703

Donald M. Craven, Esq.  
Counselors at Law  
1005 North Seventh Street  
Springfield, IL 62702

by depositing the same in the U.S. Mail.

A handwritten signature in cursive script, likely belonging to the undersigned attorney, is written over a horizontal line.