

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

IN THE MATTER OF:)
CHRISTIAN COUNTY)
GENERATION, LLC)

APPEAL NUMBER: 12-01
APPLICATION NUMBER: 05040027
FACILITY ID NUMBER: 02106ACB

PETITIONERS' RESPONSE TO CHRISTIAN COUNTY
GENERATION LLC'S MOTION TO EXCLUDE AND CROSS-
MOTION FOR LEAVE TO EXCEED PAGE LIMIT

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Petitioners Natural Resources Defense Council (“NRDC”) and Sierra Club (collectively, “Petitioners”) hereby respond to the motion filed today by Christian County Generation, LLC (“CCG”) to exclude their Petition for Review in the captioned matter, and cross-move this Board for leave to file a Petition for Review in the captioned matter in excess of the 14,000 word limit specified in the Board’s April 19, 2011 Order Governing Petitions for Review of Clean Air Act New Source Review Permits (“Order”). Although the Petition for Review in this matter (“Petition”) was already filed in this matter on May 30, 2012, Petitioners were unaware of the Order until today.

Petitioners regret the error. However, for the reasons set forth below, Petitioners urge the Board to grant retroactive leave to file the longer document given the severe complexity of the issues at stake, as documented in the Petition and discussed below. In the alternative, Petitioners request leave to submit an amended petition that complies with the page limit specified in the Order, or with any other longer page limit the Board may choose to impose based on the considerations described in this motion. As the Board recently confirmed in an order issued in *In re Avenal Power Center, LLC*, PSD Appeal Nos. 11-02 – 11-05, it retains discretion to modify the procedures set forth in the Order on a case-specific basis. *See* Order Consolidating Petitions for Review and Establishing Word Limitations for Responses, June 30, 2011.

In support of their motion, Petitioners state as follows:

1. Petitioners timely filed the Petition on May 30, 2012. At the time of filing, Petitioners had reviewed the Board’s practice manual and spoken to Board clerk’s office personnel, but since they learned of no page limits through those sources, the filed Petition was 88 pages in length.

2. The comment process underlying this appeal was extraordinarily complex and lengthy. Petitioners hired multiple consultants to review the draft permit and associated Illinois EPA records, and submitted to Illinois EPA a 156-page (exclusive of more than 1.6 GB of exhibits) highly technical analysis of multiple issues involving a strong technical component, covering six major subject areas and multiple sub-issues pertaining to each specific pollutant at issue (Petition Ex. 1). In response to petitioners' comments, Illinois EPA submitted a responsiveness summary ("RS") totaling 331 pages (Petition Exhibit 3).

3. The Petition raises a small and carefully chosen subset of the issues raised in Petitioners' comments. Petitioners raised only those issues that they believe reflect the most clear errors and/or critical policy issues at stake. Most of the issues chosen for appeal – and notably the question of whether carbon capture and sequestration ("CCS") represents the Best Available Control Technology ("BACT") for carbon dioxide ("CO₂") emissions – are fundamentally questions of first impression.

4. Although the ultimate questions are of a legal or policy nature, simply setting forth the questions in a comprehensible way requires an extensive explanation of the underlying technical background and controversy. The alternative would be Petitioners to include only cursory references to the background material in a much shorter petition, leaving the Board to pick through IEPA's 331 comment response (which contains only minimal guidance for locating responses to specific issues) to determine whether issues were fairly addressed. Petitioners believe that a more efficient and economical means of tackling the critical issues they have raised is via a document that

thoroughly explains both the complex issue raised in comments and Illinois' EPA's response to it.

5. Specifically, the issues raised in the Petition, and the reason the additional page space is necessary for each, are as follows:

a. *Whether limits based on CCS constitute BACT* – Petition pp. 5-33.

This section is grounded in a lengthy factual history contained in the record of analysis submitted by the Applicant in multiple contexts which Petitioners content demonstrates the feasibility of CCS for the proposed project. While Petitioners have condensed the history to the extent possible, presenting a cogent argument requires in addition a response to the more than 40 single-spaced pages of discussion of CCS in the RS. *See* RS at 108 *et seq.* Additionally, given the emerging law and policy concerning CCS, reflected in recent USEPA guidance and rule proposal, it was also essential that Petitioners devote a number of pages to explaining the relationship between broader BACT principles and USEPA's CCS-specific guidance (Petition pp. 8-13).

b. *Whether reliance on an Illinois' law to avoid the BACT clean fuels requirement violates the U.S. Constitution* – Petition pp. 32-51.

Although this argument does not rely as heavily on technical explication as do the others, the subtle and complex nature of the constitutional questions involved requires, minimally, the pages of explanation devoted to it. As set forth in the petition, the

constitutional arguments implicate both the Supremacy Clause and the Dormant Commerce Clause, each requiring a separate discussion.

- c. *Whether IEPA erred in determining that no technology for controlling equipment leak emissions was cost effective* -- Petition pp. 51-72.

This issue was chosen for appeal out of a large array of errors in determining BACT explained in Petitioners' comments and addressed (generally not adequately) by Illinois EPA. Petitioners selected it because Illinois' EPA's actions conflict with USEPA determinations concerning the emission factors at issue, raising an important policy question with regard to emissions estimation. At issue is the decision by Illinois EPA to rely on a variant of a set of emission factors from an unrelated industry to estimate the volume of leak emissions, and hence determine the cost effectiveness of controlling them. As is evident from the Petition, simply explaining this issue requires an extensive technical discussion of the nature of the emission factors and the industry-specific reasons they are not applicable to the proposed project, as well as a sophisticated and necessarily lengthy discussion of the digression from those factors (to include only those derived from waste streams ethylene) adopted by Illinois EPA.

- d. *Whether Illinois EPA's modeling was flawed* – Petition pp. 72-83.

This relatively short section is subdivided into multiple subparts, each explaining very briefly the bases for Petitioners' contention that the modeling was flawed, in particular by Illinois EPA's decision to use

the existing “Scheffe tables” instead of conducting its own ozone modeling analysis. Petitioners held the section to 11 pages notwithstanding the technical complexity of the modeling issues and the extensive administrative background necessary to demonstrate that use of the Scheffe tables is inconsistent with the law and USEPA policy.

- e. *Whether the subject permit allows for phased construction* – Petition pp. 83-88. This very short section was necessitated by information that Petitioners received shortly prior to filing indicating that the Applicant intended to implement a phased construction plan not addressed in the application or permit.

6. For all of these reasons, Petitioners believe that 88 pages is a reasonable amount of page space to lay out for the Board the issues described above. However, should the Board disagree, Petitioners remain willing to reduce the length of their filing, to 14,000 words if the Board so orders, and promptly file the shorter version of the petition with the Board.

7. Applicant CCG has clearly indicated, in its Project application and elsewhere, that it is not poised to commence construction in the absence of the automatic stay imposed by the filing of the Petition. The Illinois General Assembly failed this session to pass the legislation that would have authorized the subsidy that the Applicant claims is necessary to render the proposed facility economically viable. Indeed, the Applicant’s claim that the subsidy is critical to the project is a lynchpin of Illinois’ EPA’s analysis of the Supremacy Clause issues. *See* Petition at 35.

8. Petitioners will not object to a response by Illinois EPA and CCG that matches the Petition in length.

CONCLUSION

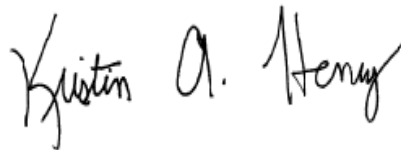
For the foregoing reasons, we respectfully request that the EAB grant Petitioners' request for retroactive leave to file their 88-page Petition; or, in the alternative, for leave to file an amended petition complying with the Order or any longer page limit the Board may choose to establish.

June 11, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2012, copies of the foregoing Response to Motion to Exclude and Cross-Motion of Natural Resources Defense Council and Sierra Club were served by first class mail, postage prepaid to:

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