



RECEIVED  
U.S. E.P.A.

AUG 16 4 11:14

ENVIRONMENTAL APPEALS BOARD

HUNTON & WILLIAMS LLP  
RIVERFRONT PLAZA, EAST TOWER  
951 EAST BYRD STREET  
RICHMOND VIRGINIA 23219-4074

TEL 804 • 788 • 8200  
FAX 804 • 788 • 8218

KEVIN J. FINTO  
DIRECT DIAL- 804-788-8568  
EMAIL: kfinto@hunton.com

FILE NO 60644.000007

August 16, 2005

**By Hand**

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

Re: Prairie State Generating Station  
Permit Number 189808AAB  
PSD Permit Appeal No. PSD 05-05

Dear Ms. Durr:

Enclosed for filing is one original and three copies of Response of Prairie State Generating Company, LLC to Petitioners' Motion for Leave to File Reply Brief.

Thank you for your assistance in this matter. If you have any questions, please feel free to call me.

Sincerely,

Kevin J. Finto

KJF:lo  
Enclosure

NOV 16 10 11:14

ENVIRONMENTAL BOARD

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

IN THE MATTER OF: )  
PRAIRIE STATE )  
GENERATING STATION ) APPEAL NUMBER: PSD 05-05  
APPLICATION NUMBER: 01100065 )  
PSD PERMIT NUMBER: 189808AAB )

**RESPONSE OF PRAIRIE STATE GENERATING CO., LLC  
TO PETITIONERS' MOTION FOR LEAVE TO FILE REPLY**

Intervenor Prairie State Generating Co., LLC ("PSGC"), by counsel, hereby files this response opposing the Petitioners' Motion for Leave to File Reply. The Board's Practice Manual states that, after the responses are filed to a petition, "EAB normally does not require further briefing before issuing a decision whether to grant review." *Practice Manual* at 36. Only "on occasion" is leave granted to file a reply brief. *Id.* For the following reasons, this case does not warrant a reply brief.

As Petitioners' themselves note, this matter has already been fully and exhaustively briefed. The Petition for Review spans 114 pages. PSGC and Illinois Environmental Protection Agency ("IEPA") both filed detailed responses. The Board has sufficient information to understand the parties' respective positions and to issue a decision. There is no need to add to the record in this case.<sup>1</sup>

---

<sup>1</sup> In the recent Kentucky case cited by Petitioners, the Sierra Club and its fellow petitioners filed a 724-page reply brief after an opening brief of 116 pages, adding many new arguments and new claims in the reply. The motion in this case does not disclose how long Petitioners propose their reply to be in this case.

Petitioners waited until two weeks after Respondents filed their Responses to file their Motion For Leave. The Practice Manual states that such motions “should be filed as soon as possible upon receipt” of the responses, since the timeliness of the motion may be a factor in the Board’s consideration of whether to grant it.” *Practice Manual* at 36. PSGC submits that Board should consider the Petitioners’ delay in filing their motion.<sup>2</sup>

Moreover, none of the three reasons offered by Petitioners justifies adding to the current briefing with a reply brief.

First, Petitioners seek leave to consider *In re BP Cherry Point*, PSD Appeal No. 05-01. The Board is well-aware of the scope and rationale of its decision in *Cherry Point*. Further briefing will not aid the Board in deciding the Prairie State case.

Second, Petitioners state that their proposed reply brief will “reference” the recent Thoroughbred case in Kentucky “to assist the Board in resolving the Prairie State matter.” Motion For Leave at 3. At the outset, it should be noted that the so-called “decision” in the Thoroughbred matter is nothing more than a non-binding interlocutory recommendation. Thus, it does not represent a decision by Kentucky on the permit it issued.

More importantly, the Board should not allow this permit challenge to become an argument over the differences and similarities between the Thoroughbred and Prairie State cases. Although the projects are similar in some respects, their permits contain numerous substantive differences. For instance, Thoroughbred is a combined PSD/Title V permit, whereas Prairie State is a PSD permit. The administrative records in the respective cases are also radically different. As just one of numerous possible examples, Illinois EPA evaluated IGCC technology

---

<sup>2</sup> Both the timing of Petitioners’ motion (filed only three days after the Thoroughbred report was released in Kentucky) and their express intention to rely on the report suggest that the chief purpose of the reply brief is to confuse the Thoroughbred and Prairie State reviews.

in detail, whereas the Kentucky Division of Air Quality exercised its discretion not to require a full evaluation of IGCC. Moreover, a standard of review was applied in Kentucky (*de novo* review not limited to administrative record) wholly different from the standard this Board applies. Indeed, Kentucky does not consider this Board's precedent binding, and the hearing officer applied a BACT definition that this Board has consistently rejected.

The validity of the hearing officer's recommendation is presently the subject of much controversy in Kentucky and the parties are preparing to file extensive exceptions to it. *See, e.g.,* Motion for Leave at 4 (Sierra Club preparing its exceptions). In short, granting leave to file a reply brief here is an open invitation to engage in a collateral debate over issues that are utterly irrelevant to the lawfulness of the Prairie State permit.

For their third reason in support of the motion, Petitioners seek leave to "point to specific places in the record" where they purportedly preserved issues for appeal. Motion for Leave at 3-4. The regulations require, however, the *Petition* to contain these necessary elements:

Pursuant to 40 C.F.R. §§ 124.13 and 124.19, "the petition must contain a demonstration that all reasonably ascertainable issues raised therein were first raised during the public comment period." *In re Essex County (N.J.) Resource Recovery Fac.*, 5 E.A.D. 223-24 (EAB 1994).

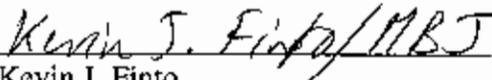
*In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998). Indeed, the regulations "contemplate that, based on EAB's review of the petition alone, the EAB will then issue a decision either granting or declining review." *Practice Manual* at 30. A reply brief is not the forum for trying to correct jurisdictional deficiencies in a petition. The Petition in this case is well over 100 pages long and should have contained all necessary elements.

Finally, a reply will unnecessarily prolong the process. As the Amicus Brief in this case notes, an expeditious resolution of this proceeding is desirable. *See* Brief as *Amici Curiae* of

Indiana Municipal Power Agency, the Missouri Joint Municipal Electric Utility Commission, the Northern Illinois Municipal Power Agency, Soyland Power Cooperative, Inc., Wolverine Power Supply Cooperative, Inc., and the Kentucky Municipal Power Agency. The Board recognizes that these types of appeals deserve priority: "*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." EAB Home Page, Frequently Asked Questions #19 (<http://www.cpa.gov/cab/cabfaq.htm#19>) (emphasis added).<sup>3</sup>

For these reasons, PSGC respectfully requests that the Board deny Petitioners' Motion for Leave to File Reply.

Respectfully submitted,

  
Kevin J. Finto  
Counsel of Record  
Harry M. Johnson, III  
Penny A. Shamblin  
HUNTON & WILLIAMS, LLP  
951 East Byrd Street  
Richmond, Virginia 23219  
Telephone: (804) 788-8568  
Facsimile: (804) 788-8218  
Email: [kfinto@hunton.com](mailto:kfinto@hunton.com)

Dated this 16th day of August, 2005.

---

<sup>3</sup> In the Kentucky case cited by Petitioners, the Sierra Club has been successful in delaying a final decision for almost three years with a series of requests for extensions and numerous other delay tactics. The Board should not allow Petitioners in these proceedings likewise to postpone a final resolution when the case is already ripe for decision .

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of August, 2005, copies of the foregoing was served by first class mail, postage prepaid on:

Bruce Nilles  
Sierra Club  
214 N. Henry St., Suite 203  
Madison, Wisconsin 53704

Verna 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

John Blair  
Valley Watch  
800 Adams Avenue  
Evansville, Indiana 47713

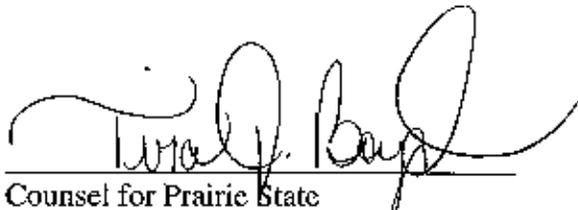
Kathy Andria  
American Bottom Conservancy  
614 N. 7<sup>th</sup> Street  
East St. Louis, Illinois 62201-1372

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

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

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

Robb H. Layman  
Assistant Counsel  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276



Tracy J. Kays

Counsel for Prairie State  
Generating Company, LLC