BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the matter of:

SIERRA CLUB, Complainant, vs. AMERENENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE INC., Respondents.	)	PCB No. 2014-134 (Enforcement)

NOTICE OF FILING

To:

AMERENENERGY MEDINA VALLEY COGEN, LLC
James Michael Showalter
Renee Cipriano
Ashley Thomson
Amy Antoniolli
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606-6473
312-258-5561
Email: mshowalter@schiffhardin.com

FUTUREGEN INDUSTRIAL ALLIANCE, INC.
Dale N Johnson
Christopher D. Zentz
VAN NESS FELDMAN LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
206-623-9372
Email: dnj@vnf.com

Kyle Barry
Husch Blackwell LLP
118 South Fourth Street, Unit 101
Springfield, IL 62701
T: 217-670-1782
kyle.barry@huschblackwell.com

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield IL 62794-9274
carol.webb@illinois.gov

PLEASE TAKE NOTICE that on this date I filed with the Clerk of the Pollution Control Board of the State of Illinois: (1) SIERRA CLUB'S MEMORANDUM IN OPPOSITION TO

RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY and (2) CERTIFICATE OF SERVICE. Pursuant to the Board's procedural rules, the documents referenced above are served upon Respondents addressed as set forth above by Federal Express and email. 35 Ill. Adm. Code 101.302(c).

Respectfully submitted,

DATED: September 22, 2014

/s/ Eric Schwing
Eric M. Schwing
Attorney at Law
1100 South 5th Street
Springfield, IL 62703
(217) 544-4440
Email: eric.schwing@comcast.net

/s/ Eva Schueller
Sierra Club Environmental Law Program
85 Second St., Second Floor
San Francisco, CA 94105
(415) 977-5637
Email:eva.schueller@sierraclub.org

/s/ William J. Moore, III
William J. Moore, III, P.A.
1648 Osceola St.
Jacksonville, FL 32204
(904) 685-2172
Email: wmoore@wjmlaw.net
Sierra Club Environmental Law Program
85 Second St., Second Floor
San Francisco, CA 94105
(415) 977-5637
Email:eva.schueller@sierraclub.org

Attorneys for Complainant
Sierra Club

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SIERRA CLUB,	)	
	)	
Complainant,	)	
	)	
vs.	)	
	)	PCB No. 2014-134
AMERENENERGY MEDINA VALLEY COGEN, LLC	)	(Enforcement)
	)	
and	)	
	)	
FUTUREGEN INDUSTRIAL ALLIANCE INC.,	)	
	)	
Respondents.	)	

SIERRA CLUB'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY

Complainant Sierra Club submits this memorandum in opposition to Respondents' Motion for Leave to File Reply and respectfully requests that Respondents' motion be denied for the reasons set forth below.

I. INTRODUCTION

Respondents' Motion for Leave to File Reply, which seeks permission to file replies in support of their motion for summary judgment and motion to expedite, should be denied because Respondents have failed to demonstrate they will suffer any "material prejudice" if their proposed replies are disallowed. 35 Ill. Adm. Code § 101.500(e). Instead of setting out their legal arguments in their opening briefs in a straight-forward manner and allowing Sierra Club to

respond to those contentions, Respondents strategically submitted vague opening briefs, presuming that they would later be allowed to back-end load their full arguments into reply briefs to which no response is permitted. Granting Respondents' motion for leave in this context would allow Respondents to ignore the general prohibition against reply briefs in 35 Ill. Adm. Code § 101.500(e) and would severely prejudice Sierra Club. Because the standard set forth in 35 Ill. Adm. Code § 101.500(e) has not been met and Sierra Club will be prejudiced by the filing of Respondents' proposed reply briefs, Respondents' motion should be denied.

II. BACKGROUND

On June 11, 2014, Sierra Club filed this citizen enforcement action pursuant to Illinois Environmental Protection Act Section 31(d), 415 ILCS 5/31(d), against Respondents AmerenEnergy Medina Valley Cogen, LLC and FutureGen Industrial Alliance Inc. (collectively "Respondents") with the Illinois Pollution Control Board ("IPCB"). Sierra Club's Complaint alleges, *inter alia*, that the Respondents' proposal to construct a new boiler (Unit No. 7) at the Meredosia Energy Center in Meredosia, Illinois (the "FutureGen project"), as configured and permitted, threatens to cause air pollution and violates Section 9.1(d) of the Illinois Environmental Protection Act, 415 ILCS 5/9.1(d) (which incorporates by reference Section 165 of the Clean Air Act, 42 U.S.C. § 7475, and all associated regulations) because the project lacks a Prevention of Significant Deterioration ("PSD") permit that is required for the construction, installation, modification and operation of the proposed new unit.

On July 15, 2014, prior to any discovery being conducted or the proper admission of Respondent FutureGen Industrial Alliance Inc.'s counsel pro hac vice, Respondents filed a motion for summary judgment pursuant to 35 Ill. Adm. Code 101.516, Section 2-1005 of the

Illinois Code of Civil Procedure, 735 ILCS 5/2-1005. On July 16, 2014, Respondents filed a motion to expedite pursuant Illinois Admin. Code § 101.512.

On August 25, 2014, after obtaining a brief extension of the applicable response deadlines, Sierra Club filed a memorandum in opposition to both the motion for summary judgment and the motion to expedite. On that same date, Sierra Club also filed a motion to strike and a motion for a continuance to allow for the discovery needed to respond to the summary judgment motion.

On September 8, 2014, Respondents filed a memorandum in opposition to Sierra Club's motions to strike and for a continuance. They also filed a new motion seeking leave to file a reply in further support of their joint motion for summary judgment and motion to expedite ("Respondents' Motion for Leave to File Reply"), which is the subject of this opposition memorandum. Respondents attached their proposed joint replies to their Motion for Leave as Exhibit A ("Proposed Reply to Motion to Expedite") and Exhibit B ("Proposed Reply to Motion for Summary Judgment"). Those proposed reply briefs contain several legal and factual arguments that are being raised improperly for the first time by Respondents.

For example, in the Proposed Reply to the Motion to Expedite, Ex. A, at 1-5, Respondents contend that Sierra Club should be denied any discovery because it allegedly "squandered" the opportunity to conduct discovery and has adopted a strategy of intentional delay.[1] In that same proposed reply, Respondent submitted a new Declaration from Mark

[1] These disparaging contentions are meritless. Since July 15, 2014, Sierra Club has been occupied addressing Respondents' summary judgment motion and dealing with the pro hac vice issues that have arisen. In addition, Supreme Court Rule 201(d) states that no discovery may commence before "the time all defendants have appeared or are required to appear ... without leave of the court." Since Respondent FutureGen Alliance's counsel did not properly appear until July 30, 2014, 7/30/14 Appearance of Kyle C. Barry for Futuregen Industrial Alliance, Inc., Sierra Club was prohibited under Rule 201(d) from issuing any discovery until after that date. Moreover, consistent with its understanding of standard practice before the Board, Sierra Club

Williford, Proposed Reply to Motion to Expedite, Ex. A, at 1-2, which purports to address the netting/common ownership and control issue raised by Sierra Club in its opposition to Respondents' motion for summary judgment at 30-33 and which claims in conclusory fashion that construction has already commenced on the FutureGen project.

Similarly, in their Proposed Reply to their Motion for Summary Judgment, Ex. B, at 4-13, Respondents make several new legal arguments to support their summary judgment motion, including, *inter alia*, the contentions that *Chevron* deference principles mandate that summary judgment be granted and that Sierra Club should be denied any opportunity to conduct any discovery in this action because it has not made a "compelling case" that it is entitled to discovery.

II. STANDARD GOVERNING THE SUBMISSION OF REPLY BRIEFS

35 Ill. Adm. Code § 101.500(e) sets for the standard governing the submission of reply briefs associated with motions filed with the Board. That rule provides that a party filing a motion "***will not have the right to reply, except as permitted*** by the Board or the hearing officer ***to prevent material prejudice***." This rule is abundantly clear. Replies are only allowed where a moving party shows that they must be permitted to avoid material prejudice.

III. LEGAL ARGUMENT

Respondents' Motion for Leave to File Reply must be denied, first and foremost, because Respondents have failed to demonstrate in their motion that they will suffer "material prejudice"

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has prudently sought resolve the pending dispositive motion before engaging in negotiations with Respondents about a comprehensive discovery schedule to be submitted for approval by the Hearing Officer. *See, e.g.*, Joint Proposed Discovery Schedule in *United City of Yorkville v. Hamman Farms*, PCB No. 08-96 (Enforcement-Land, Air, Water Nov. 24, 2010)(discovery schedule negotiated after a preliminary motion to dismiss was filed and resolved) (Ex. 1). Respondents fault Sierra Club for having not yet pursued discovery. However, such efforts would have been wasteful and counter-productive without an approved discovery schedule.. Respondents point to no authority, nor can they, supporting the proposition that a complainant must initiate discovery immediately upon filing a complaint.

unless their proposed reply briefs are filed. 35 Ill. Adm. Code § 101.500(e). In fact, Respondents' motion does not even attempt to make such a showing. All that Respondents say their motion for leave is that:

> Sierra Club has alleged facts and legal conclusions . . . ***that merit a response from Respondents*** [and that] . . . [c]onsequently, pursuant to Illinois Admin. Code 101.500(e), Respondents seek to file a proposed Reply [to their motions for summary judgment and to expedite] ***to aid this Board in evaluating the merits of Respondents' motions***. . . . Respondents' Motion for Summary Judgment and Motion to Expedite involve complex, substantive issues relating to Sierra Club's collateral attack on the construction permit for the FutureGen 2.0 Project issued by the Illinois Environmental Protection Agency. . . . ***Allowing Respondents to file reply briefs will enable them to fully respond to the issues of fact and law raised by Sierra Club*** in its responsive briefing ***and to provide the Board with the complete background necessary to rule on Respondents' motions***.

Respondents' Motion for Leave to File Reply at 2-3 (emphasis added).

Claiming that an opposition brief "merits a response" or that a reply will "aid the Board in evaluating" a motion does not equate with a showing of material prejudice. Every moving party would be entitled to a reply if that were the standard under 35 Ill. Adm. Code § 101.500(e). Similarly, the fact that the pending motions address "complex, substantive issues" does not mean that material prejudice will result unless Respondents are permitted to file their proposed replies. Likewise, even if Respondents are correct that their proposed replies will allow them to more "fully respond to issues of fact and law raised by Sierra Club … and to provide the Board with the complete background" for the motions, that does not mean that material prejudice will result from denying their motion. Every moving party can claim that a reply will allow them to "fully respond" to a memorandum in opposition and to provide a more "complete background." However, the simple denial of a moving party's ability to take a second bite at the apple by way of a reply to provide a more full response to an opposition memorandum or additional

background information cannot possibly equate with "material prejudice." Otherwise, reply briefs would be the rule rather than the exception under 35 Ill. Adm. Code § 101.500(e).

Although there are unquestionably situations where "material prejudice" would ensue if a reply brief was not allowed, this is not one of them. Here, Respondents deliberately submitted a vague and premature summary judgment motion which Sierra Club was forced to oppose. Granting Respondents' motion in this context would allow them to improperly shoe-horn new legal arguments supporting summary judgment into their reply briefs. Not only would this give Respondents the last word on summary judgment in contradiction to the reply rule at 35 Ill. Adm. Code § 101.500(e), it would also deny Sierra Club any opportunity to address Respondents' new legal contentions. It goes without saying that such a result would be unfair and prejudicial to Sierra Club, who is entitled to rely on 35 Ill. Adm. Code § 101.500(e)'s prohibition against replies absent extenuating circumstances.

Moreover, Respondents cannot legitimately claim that the new arguments in their proposed replies were necessary to respond to unanticipated contentions in Sierra Club's opposition memoranda. The new arguments in Respondents' proposed reply briefs [2] could and should have been made in their opening motions. This transparent effort on Respondents' part to improperly use the reply brief rule as a sword rather than as a shield should be rejected.

[2] One possible exception was the submission of the Declaration from Mark Williford in Respondents' Proposed Reply to Motion to Expedite, Ex. A, at 1-2, which is the type of information Sierra Club seeks to obtain and evaluate during discovery, as proper in an enforcement suit.

IV. CONCLUSION

For all the foregoing reasons, Complainant Sierra Club respectfully requests that Respondents' Motion for Leave to File Reply be denied in its entirety.

Respectfully submitted,

DATED: September 22, 2014

/s/ Eric Schwing
Eric M. Schwing
Attorney at Law
1100 South 5th Street
Springfield, IL 62703
(217) 544-4440
Email: eric.schwing@comcast.net

/s/ Eva Schueller
Eva Schueller
Sierra Club Environmental Law Program
85 Second St., Second Floor
San Francisco, CA 94105
(415) 977-5637
Email: eva.schueller@sierraclub.org

/s/ William Moore
William J. Moore, III
William J. Moore, III, P.A.
1648 Osceola Street
Jacksonville, FL 32204
(904) 685-2172
Email: wmoore@wjmlaw.net

Counsel for the Complainant

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY; and this CERTIFICATE OF SERVICE by FedEx and e-mail upon the following persons:

AMERENENERGY MEDINA VALLEY COGEN, LLC
James Michael Showalter
Renee Cipriano
Ashley Thomson
Amy Antoniolli
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606-6473
312-258-5561
Email: mshowalter@schiffhardin.com

FUTUREGEN INDUSTRIAL ALLIANCE, INC.
Dale N Johnson
Christopher D. Zentz
VAN NESS FELDMAN LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
206-623-9372
Email: dnj@vnf.com

Kyle Barry
Husch Blackwell LLP
118 South Fourth Street, Unit 101
Springfield, IL 62701
T: 217-670-1782
kyle.barry@huschblackwell.com

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield IL 62794-9274
carol.webb@illinois.gov

DATED this 22th day of September, 2014.

/s/ Eva Schueller
Sierra Club Environmental Law Program
85 Second St., Second Floor
San Francisco, CA 94105
(415) 977-5637
Email:eva.schueller@sierraclub.org