

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 MOTION FOR ORAL ARGUMENT ON PENDING MOTIONS AND INCORPORATED MEMORANDUM IN SUPPORT 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 29, 2014

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**Attorneys for Complainant
Sierra Club**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the matter of:

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

**SIERRA CLUB’S MOTION FOR ORAL ARGUMENT ON PENDING MOTIONS
AND INCORPORATED MEMORANDUM IN SUPPORT
(DIRECTED TO BOARD)**

Pursuant to 35 Illinois Administrative Code (“Ill. Adm. Code”) §§ 101.610 and 101.700, Complainant Sierra Club hereby files this motion for oral argument on the pending motions in this action and incorporated memorandum in support, and further states as follows:

1. 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”).

2. 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 a proposed new major source of air pollution.

3. 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.

4. On July 16, 2014, Respondents filed a motion to expedite pursuant Ill. Adm. Code § 101.512.

5. On August 25, 2014, after obtaining a brief extension of the applicable response deadlines in part in order to obtain pro hac vice admissions for Complainant’s counsel, *see* 7/29/14 Sierra Club's Motion for Extension of Time to Respond to Motion for Summary Judgment and Motion to Expedite and Incorporated Memorandum in Support; 7/31/14 Hearing Officer Order Granting Extension Until August 25, 2014, Sierra Club filed a memorandum in opposition to both the motion for summary judgment and the motion to expedite.

6. On that same date of August 25, 2014, Sierra Club filed a motion for an extension of time and continuance to allow for the discovery needed to respond to the summary judgment motion and an incorporated memorandum in support (“Sierra Club’s Motion for Continuance”) and a motion to strike and incorporated memorandum in support (“Sierra Club’s Motion to Strike”).

7. On September 8, 2014, Respondents filed a memorandum in opposition to Sierra

Club's Motion for Continuance and Motion to Strike.

8. On that same date, Respondents jointly filed a motion seeking leave to file a reply in further support of their motion for summary judgment and motion to expedite ("Respondents' Motion for Leave to File Reply").

9. Respondents attached their proposed 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").

10. Those proposed reply briefs contain several legal and factual arguments that were raised for the first time by Respondents.

11. For example, in the Proposed Reply to the Motion to Expedite at 1-5, Respondents contend that Sierra Club should be denied any discovery because it allegedly squandered the opportunity to conduct discovery and adopted a strategy of intentional delay.¹

12. In that same proposed reply brief, Respondents also submitted a new Declaration from Mark 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.

13. In their Proposed Reply to their Motion for Summary Judgment 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

¹ Sierra Club intends to respond fully to this argument at the requested oral argument and has outlined part of its response in Sierra Club's Memorandum in Opposition to Respondents' Motion for Leave to File Reply at 3-4, n. 1. Moreover, to address Respondents' specious assertions that Sierra Club has waived its rights to discovery, Sierra Club intends to submit preliminary written discovery to Respondents after the pending stay is lifted.

discovery in this action because it has not made a “compelling case” that it is entitled to discovery.

14. At present, the following motions are pending before the Board: (1) Respondents’ Motion for Summary Judgment; (2) Respondents’ Motion to Expedite; (3) Sierra Club’s Motion for Continuance; and (4) Complainant’s Motion to Strike; and (5) Respondents’ Motion for Leave to File Reply.

15. 35 Ill. Adm. Code § 101.610 provides in pertinent part that the duties and authority of the Hearing Officer include “the duty to manage proceedings assigned, *to set hearings*, to conduct a fair hearing, *to take all necessary action to* avoid delay, to maintain order, and *to ensure development of a clear, complete, and concise record for timely transmission to the Board.*” (emphasis added).

16. 35 Ill. Adm. Code § 101.700(a), which specifically addresses “oral argument,” provides in pertinent part that the “*Board may hear oral argument upon written motion of a party* or the Board’s own motion. . . . The purpose of oral argument is to address legal questions.” (emphasis added).²

17. The pending motion for summary judgment and the other interrelated procedural motions present significant and novel questions of Illinois law and, for that reason alone, Sierra Club, should be afforded an opportunity to participate in an oral argument relating to these

² Sierra Club is aware the Board has appeared to hold otherwise, *Dorothy v. Flex-n-Gate*, PCB 05-49 (March 2, 2006), but notes for purposes of potential appeal of any ruling on the pending summary judgment motion that Sierra Club contends that 35 Ill. Adm. Code § 103.212 mandates a hearing in this context. That section provides that when “the Board receives a citizen’s complaint, unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing.” On July 24, 2014, the Board determined that Sierra Club’s complaint was not duplicative or frivolous. Consequently, Sierra Club is now entitled to a hearing under the Illinois Administrative Code and this action cannot be lawfully dismissed on summary judgment without first providing such a hearing.

motions to ensure that those important legal issues receive full and fair consideration in this proceeding.

18. Furthermore, Respondents filed an exceedingly vague and premature summary judgment motion, waited for Sierra Club to respond to that motion, and are now attempting to “unveil” their true legal arguments and submit additional evidence in support of their summary judgment motion in reply briefs. This type of motion practice is not permitted under the applicable rules barring extenuating circumstances, 35 Ill. Adm. Code § 101.500(e) (replies are only allowed to “prevent material prejudice”). This effort by Respondents to use the reply rule at 35 Ill. Adm. Code § 101.500(e) as a sword rather than as a shield should not be countenanced here. Sierra Club must be given the opportunity to respond and seeks to do so in oral argument before the Board.

19. If Respondents’ Motion for Leave to File Reply is granted, Sierra Club will be severely prejudiced because it will be denied any opportunity to file a written response to a number of new arguments raised by Respondents in their two proposed replies.

20. Allowing Sierra Club to participate in oral argument on the pending motions would not fully mitigate this prejudice to Sierra Club, but it would lessen its impact by allowing Sierra Club an opportunity respond orally on the record to Respondents’ new legal contentions in their proposed replies.

21. For this additional reason, if Respondents’ Motion for Leave to File Reply is granted, an oral argument should be scheduled before any final ruling by the Board on the pending motions.

22. For all the foregoing reasons and for good cause shown, Sierra Club respectfully

moves pursuant to 35 Ill. Adm. Code §§ 101.610 and 101.700 for an order scheduling an oral argument on all the pending motions.

Respectfully submitted,

DATED: September 29, 2014

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AMEREN ENERGY MEDINA VALLEY)	
COGEN, LLC)	
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and)	
)	
FUTUREGEN INDUSTRIAL ALLIANCE INC.,)	
)	
Respondents)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached MOTION FOR ORAL ARGUMENT ON PENDING MOTIONS AND INCORPORATED MEMORANDUM IN SUPPORT; and this CERTIFICATE OF SERVICE by FedEx and e-mail upon the following persons:

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DATED this 29th day of September, 2014.

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