

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PRAIRIE STATE GENERATING COMPANY, )  
LLC, )  
 )  
a Delaware Corporation, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
 )  
Respondent. )

PCB No. 25-11  
(Permit Appeal – Air)

**NOTICE OF FILING**

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PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Pollution Control Board the attached MOTION TO CLARIFY, copies of which are hereby served upon you.

Dated: March 19, 2025

Respectfully Submitted,

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PRAIRIE STATE GENERATING COMPANY,	)	
LLC,	)	
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a Delaware Corporation,	)	
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Petitioner,	)	
	)	PCB No. 25-11
v.	)	(Permit Appeal – Air)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**PRAIRIE STATE GENERATING COMPANY, LLC’S MOTION TO CLARIFY**

Petitioner Prairie State Generating Company, LLC (“Prairie State”), pursuant to 35 Ill. Admin. Code § 101.500, respectfully moves the Board to clarify that its December 5, 2024 Opinion and Order of the Board (the “Board Order”) ordered Illinois EPA to act on Prairie State’s pending 2011 Clean Air Act Permit Program (“CAAPP”) permit application (the “Application”) after Prairie State submitted another update to that Application and that the Board did not order Prairie State to file an entirely new CAAPP permit application. In support of this Motion, Prairie State states as follows:

1. On August 30, 2024, Prairie State initiated this proceeding by filing a Petition for Hearing, pursuant to 415 ILCS 5/40.2(a), requesting that the Board require Illinois EPA to take final action on Prairie State’s 2011 Application. *See* Pet. at 1-3. In its Petition, Prairie State alleged that it submitted a timely and complete Application regarding its facility on May 5, 2011. Pet., ¶ 4. Prairie State also alleged that it had subsequently updated its complete Application as required by Illinois law. *Id.*, ¶ 5. Finally, Prairie State alerted the Board to the fact that Sierra Club had

initiated an action against Prairie State alleging that Prairie State was operating its facility illegally because IEPA had not issued a CAAPP permit (the “Federal Litigation”). *Id.*, ¶¶ 10, 11 and Ex. A thereto.

2. In its October 4, 2024 Answer Including Certificate of Record on Appeal, Illinois EPA admitted that it issued a notice informing Prairie State that its Application was administratively complete on May 18, 2011. Ans. at 3. Illinois EPA also admitted that Prairie State had updated its Application and did not dispute that it had not yet processed Prairie State’s pending Application. Ans. at 4. Illinois EPA also noted that it had requested that Prairie State further update its Application and discussed the timing of the steps that Illinois EPA would need to take after Prairie State submitted that additional update. Ans. at 4 n.6, 5, 7.

3. The Board granted Prairie State’s Petition and directed Illinois EPA to (1) “issue a draft permit or a denial of a permit within one year of Prairie State filing an updated, complete application for a Clean Air Act Permit Program permit” and (2) “issue a final permit, if it decides to issue a draft permit, within two years of Prairie State filing an updated, complete Clean Air Act Permit Program permit application.” Board Order at 6. Throughout its Order, the Board made it clear that it was ordering Illinois EPA to take action on the 2011 Application after Prairie State submitted another update to that Application. *See* Board Order at 2 (referring in the “**FACTS**” section to the 2011 Application and to Illinois EPA’s failure to act on that Application), 4 (referring in the “**Prairie State’s Arguments**” section to Prairie State’s request that Illinois EPA be required to take action on the 2011 Application “within one year of Prairie State submitting an update to its CAAPP permit application”), 5-6 (referring in the “**IEPA’s Arguments**” section to IEPA’s position as to when it should be required to take action after Prairie State “submits an updated, complete application,” in the “**Board Discussion**” section to the fact that Prairie State is entitled to action

on the 2011 Application, and directing Illinois EPA to either issue a draft permit or refuse to grant a permit within one year after Prairie State “submits an update[]” to its 2011 Application), 6 (in the “**CONCLUSION**” section referring twice to the filing of “an updated, complete CAAPP permit application”).

4. On January 2, 2025, in conformance with the Board Order, Prairie State submitted a further update to its 2011 Application to Illinois EPA. As required by the Board Order, Illinois EPA is currently in the process of considering the updated 2011 Application.

5. Prairie State believes that there can be no reasonable dispute that Board Order ordered Illinois EPA to take action with respect to the now-updated 2011 Application, and both Prairie State and Illinois EPA have been proceeding accordingly. In the Federal Litigation, however, Sierra Club has attempted to sow doubt about whether the Board ordered Illinois EPA to take action with respect to the further-updated 2011 Application or on some hypothetical new application by myopically focusing on two references to a “new CAAPP permit application” that appear in the second paragraph of the Board Order. Paragraph 2 states as follows:

As discussed below, the Board agrees with Prairie State and directs IEPA to issue a draft permit or a refusal to grant a permit within one year of Prairie State filing its *new* CAAPP permit application. The Board also directs IEPA to issue a final permit, if it decides to issue a draft permit, within two years of Prairie State filing its *new* CAAPP permit application.

(emphasis added).

6. In particular, Sierra Club has misleadingly suggested to the Court that the Board ordered Prairie State to file an entirely new CAAPP Application and that Illinois EPA was ordered to act on that new application, rather than Illinois EPA being ordered to act on the further-updated 2011 Application. *See* Pl.’s Opp’n to Def.’s Mot. to Stay, at 4, 5, 7, the relevant pages of which are attached as Ex. A (focusing on the two references to a “new CAAPP permit application”); Pl.’s

Opp'n to Def.'s Cross-Mot. for J. on the Pleadings, at 12-13, the relevant pages of which are attached as Ex. B (mischaracterizing Prairie State's arguments and suggesting that the Board ordered Prairie State to submit a "new" application that would restart Illinois EPA's statutory 24-month deadline to take final action).

7. There should be no confusion that the Board ordered Illinois EPA to act on Prairie State's further-updated 2011 CAAPP Application. As a result, Prairie State requests that the Board amend the Board Order to clarify that point and, in particular, Prairie State suggests that the Board amend the Board order by changing the references to a "its new CAAPP permit application" in the second paragraph to "a further update to its 2011 CAAPP permit application."

**WHEREFORE**, Prairie State Generating Company, LLC respectfully requests that the Board amend the Board Order:

- A. By replacing the references to a "new CAAPP permit application" in the second paragraph of the Board Order with references to "a further update to its 2011 CAAPP permit application";
- B. Make such other amendments as the Board deems necessary to clarify that the Board was not ordering Prairie State to file a "new" CAAPP permit application and, instead, was ordering Illinois EPA to take action on Prairie State's 2011 Application after Prairie State submitted a further update to that Application; and
- C. For other such relief as the Board deems just and proper.

Dated: March 19, 2025

Respectfully Submitted,

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# **EXHIBIT A**



**IN THE UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF ILLINOIS**

<b>SIERRA CLUB,</b>	)	
	)	
	)	
<i>Plaintiff,</i>	)	<b>Case No. 3:23-cv-00919-RJD</b>
	)	
<b>vs.</b>	)	
	)	
<b>PRAIRIE STATE GENERATING COMPANY, LLC,</b>	)	
	)	
<i>Defendant.</i>	)	

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO STAY**

Plaintiff Sierra Club, by and through undersigned Counsel, submits this Memorandum in Opposition to Defendant’s Motion to Stay Proceedings.

**I. Introduction**

Prairie State Generating Company (“PSGC”) has operated the 1,600-MW Prairie State Energy Campus power plant (“PSEC” or “Power Plant”) without an operating permit for over a decade, in violation of federal and Illinois law. In response to the current litigation, and in particular, in response to this Court’s ruling of August, 9, 2024, PSGC belatedly sought to come into compliance with federal and Illinois law by seeking an order from a state administrative board directing the Illinois Environmental Protection Agency (“Illinois EPA”) to issue a valid operating permit; by seeking a stay, PSGC now attempts to leverage those state proceedings to call a two-year halt to the federal litigation here.

Although couched as a Motion for a Stay, by its filing PSGC clearly intends for this Court to reconsider its holding on PSGC’s Motion to Dismiss in light of state regulatory proceedings. PSGC argues that Illinois EPA’s litigation position in the state regulatory

has never obtained such a permit but has nevertheless operated the Power Plant since October 8, 2011.

Defendant also filed the Motion at issue here on November 20, 2024, citing the pendency of its petition before the Illinois Pollution Control Board. *See* Doc. 46, Motion to Stay; and Doc. 46-1, Memorandum in Support of its Motion to Stay (hereinafter “Stay Memo”). On December 5, the PCB, after holding a hearing, granted in part PSGC’s petition and issued an order directing Illinois EPA “to issue a draft permit or a refusal to grant a permit within one year of Prairie State filing an updated, complete CAAPP permit application...[and], if it decides to issue a draft permit,” to issue a final permit “within two years of Prairie State filing an updated, complete CAAPP permit application.” PCB Order at 7. The PCB decision says nothing about whether PSEC has been operated unlawfully or is permitted to operate while Illinois EPA prepares the draft permit. *See, generally*, PCB Order. Notably, however, the PCB characterized its order as directing Illinois EPA to act on PSGC’s “*new* CAAPP permit application.” *Id.* at 2 (emphasis added).

On December 5, 2024, Plaintiffs filed a Motion for Judgment on the Pleadings, which is currently pending before this Court. In that Motion, Plaintiff explains why PSGC’s admissions in its Answer resolve the issues in this case and explains why the various affirmative defenses claimed by PSGC are inapposite here.

### **III. Argument**

#### **A. The Court Should Not Stay this Case Before Resolving Plaintiff’s Motion for Judgment on the Pleadings**

Federal district courts have a “virtually unflagging obligation ... to exercise the jurisdiction given them.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). As such, any circumstance “under which a District Court may decline to

exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court.” *Id.* at 1244 (internal quotations omitted). Where a request for a stay is premised on the existence of a parallel state proceeding, “the district court must undertake a two-part inquiry. First, the court must determine whether ‘the concurrent state and federal actions are actually parallel. Then, once it is established that the suits are parallel, the court must consider a number of non-exclusive factors that might demonstrate the existence of exceptional circumstances.’” *Tyrer v. City of S. Beloit, Ill.*, 456 F.3d 744, 751 (7th Cir. 2006) (internal quotations omitted). In conducting this inquiry, a federal court’s “task . . . is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist ‘exceptional’ circumstances, the ‘clearest of justifications,’ that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25–26 (1983).

Here, the request fails in the first instance because Defendant has not identified an ongoing parallel state proceeding in which the issues raised in this litigation will be addressed. The PCB has issued its order without reaching the issue. The Illinois EPA is under an administrative obligation to issue a final CAAPP permit “if it decides to issue a draft permit,” PCB Order at 7, within two years of PSGC’s filing of a “new CAAPP permit application,” *id.* at 2. But the notice-and-comment associated with such a hypothetical future permit, or any challenges to its specific terms, will not resolve the legality or address the consequences of the Power Plant’s past (and current) operation.

Even if either the (now-complete) PCB proceeding or the (as-yet-begun) permit drafting and comment process did qualify, none of the “exceptional circumstances” permitting a district court to abstain from its timely exercise of jurisdiction apply here. *See Tyrer*, 456 F.3d at 751. As

discussed below, concurrent jurisdiction poses no legal difficulties; this Court is not an inconvenient forum; piecemeal litigation is not a meaningful risk to Defendant; and this is properly a federal legal issue. Conversely, circumstances argue against a stay: Plaintiff filed *this* litigation first, making the Defendant's petition before PCB a belated attempt to avoid further liability, and given the fact of Illinois EPA's prior delay, Plaintiff is reasonably concerned that its interests in ensuring PSGC *only* operates pursuant to a lawful CAAPP permit will be protected in a timely manner by the state forums. *See id.*; *Schneider Nat. Carriers, Inc. v. Carr*, 903 F.2d 1154, 1157 (7th Cir. 1990). For these reasons alone, it would be improper for the Court to rely on the existence of ongoing Illinois state proceedings as a basis for staying this case.

The Court may of course issue a discretionary stay for other reasons. And to that effect, Plaintiff agrees with Defendant that *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), lays out the three relevant factors of the standard for whether to grant a discretionary stay: (1) "whether a stay will simplify the issues in question and streamline the trial," (2) "whether a stay will reduce the burden of litigation on the parties and on the court," and (3) "whether a stay will unduly prejudice or tactically disadvantage the non-moving party[.]" *See Pfizer Inc. v. Apotex Inc.*, 640 F. Supp. 2d 1006, 1007 (N.D. Ill. 2009). However, as discussed in more detail below, no evaluation of those three factors supports Defendant's arguments for a stay in this case before resolving Plaintiff's pending Motion for Judgment on the Pleadings, Doc. 56-1.

### **1. Defendant's Belated Efforts to Secure a Legal Operating Permit Cannot Resolve the Relevant Legal Issues in this Case**

Plaintiff agrees with Defendant that the relevant question for the first factor of the stay test is "whether certain issues, or perhaps the entire case, might be resolved by actions that will occur during the stay." Stay Memo at 11 (citing *In re Groupon Derivative Litigation*, 882 F. Supp. 2d 1043, 1049 (N.D. Ill. 2012)). Plaintiff also appreciates the efforts PSGC is belatedly

taking to secure an operating permit for PSEC. However, belated issuance of a permit by the Illinois EPA does not and cannot excuse Defendant's past violations of the Clean Air Act and Illinois's State Implementation Plan. 415 ILCS 5/39.5; *See* Doc. 56-1, Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings at 6-7 (hereinafter "Judgment Memo"). By its very nature, Plaintiff's complaint focuses on past and ongoing misdeeds; the possibility that PSEC may come into compliance two years from now has no bearing whatsoever on Defendant's ultimate culpability for its past operation. Thus, on the question of liability there is no reasonable argument to stay the case.

Defendant has argued that a stay would nonetheless be appropriate under this factor (potential to resolve issues) because, it argues, resolution of the Illinois EPA permit issuance process will weigh on two aspects of any potential remedy. First, PSGC argues that issuance of a legal operating permit would eliminate the possibility of an injunction preventing PSEC from operating without a permit. Stay Memo at 12. This argument is remarkably cynical: the purpose of an injunction is to prevent a party from engaging in illegal activity, and Defendant is essentially asking this Court to stay this case until it is able to make its illegal operation of PSEC legal. Nor is it reasonable for PSGC to ask this Court to suspend proceedings and deny *any* possibility of future relief to avoid one possible form of that relief—especially since this Court has discretion to fashion a remedy that avoids the outcome PSGC claims necessitates a stay. This Court may consider the PCB order in crafting a remedy that permits PSEC's continued operation pending issuance of a valid operating permit in response to the "new CAAPP permit application" on which the PCB has ordered Illinois EPA to act. For instance, the Court could impose an injunction against operation of PSEC that goes into effect only after two years' time, or some other amount of time that matches Illinois EPA's estimate for when it expects to be able to issue

Dated: December 10, 2024

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# **EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**SIERRA CLUB,**

*Plaintiff,*

**Case No. 3:23-cv-00919-RJD**

**VS.**

**PRAIRIE STATE GENERATING  
COMPANY, LLC,**

***Defendant.***

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S  
CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS**

In support of its Cross-Motion for Judgment on the Pleadings, Prairie State Generating Company (“PSGC”) advances a single argument: that the text of 415 ILCS § 5/39.5 establishes an open-ended application shield, such that the Illinois Environmental Protection Agency’s (“Illinois EPA’s”) “final permit action” in failing to issue a permit by the statutorily-mandated date does not affect PSGC’s ability to operate its 1,600-MW coal-fired power plant unless and until PSGC decides to litigate this inaction. In support of this argument, PSGC invokes portions of a 2009 U.S. EPA Order on a Petition to Object to a Title V Permit and the Illinois EPA and Pollution Control Board (“PCB”) responses to PSGC’s own petition challenging the Illinois EPA’s “final permit action” failing to grant its requested permit. Neither squarely address the issue here, and neither provide any reasoning in support of PSGC’s position. PSGC also invokes various documents relating to the analogous federal provision and that of another state (Missouri), but none of these documents address *Illinois’* statutory permit scheme specifically.



mischaracterizes both “Sierra Club’s theory” and the PCB’s decision: As explained below, the PCB Order actually supports the inference that the 2011 Application was constructively denied, by requiring PSGC to file an entirely new application and starting the 24-month clock after the new application was filed.

The PCB decision found, consistent with Sierra Club’s position, that § 5/39.5(5)(j) “unequivocally requires the Agency to act on initial CAAPP permit applications within 24 months,” and that “the failure to take such action can be appealed to the Board.” PCB Order at 6. PSGC purports to find an inconsistency from the fact that the PCB ordered Illinois EPA to “act on the CAAPP Application,” because (PSGC implicitly assumes) if the permit had been “‘constructively’ denied,” there would be no application to act on. PSGC Br. at 14. According to PGSC, ILPCB’s granting of relief in 2024 could not have happened if the 2011 permit application had been “constructively denied” 24 months after its filing.

However, the PCB did not order Illinois EPA to act on PSGC’s application as-is. Rather, PCB directed Illinois EPA to issue a draft permit “within one year of Prairie State filing an updated, complete application.” PCB Order at 7. And the PCB Order describes PSGC as filing a “new CAAPP permit application.” *Id.* at 1. If, as PSGC claims, Illinois EPA could no longer act on its initial permit application if the agency’s inaction led to a constructive denial, then the PCB’s Order supports the inference that Illinois EPA had taken final action, by directing PSCG to file an “updated, complete CAAPP application,” and resetting Illinois EPA’s 24-month clock to issue a permit once PSGC has filed a “new CAAPP application.” PCB Order at 1, 6.

But even if the PCB had ordered Illinois EPA to act on the permit application as-is, the logic undergirding PSGC’s claim of inconsistency between the PCB Order and Sierra Club’s

position is wrong. Had the 2011 Application been denied outright, an order granting relief for a wrongful denial would have directed the Illinois EPA to act on the pending 2011 application. There is no inconsistency between reading the CAAPP statute to deny applicants the benefit of the application shield after Illinois EPA has taken “final action,” and PCB’s ability, in granting relief from the “final permit action,” to require the Illinois EPA to act differently with respect to the application at issue.

Neither Illinois EPA’s pleading nor PCB’s Order in response to PSGC’s petition for review offer any reason for the Court to reject its own reading of the CAAPP statute’s text and structure. Under *Loper-Bright*, this Court need not defer to even unequivocal statements by either agency as to the meaning of the relevant statutory language. But even so, neither the Answer nor the PCB Order includes such a statement. To the contrary, Illinois EPA’s reasoning relies on conflating the CAAPP statute with a separate permitting statute that incorporates the opposite presumption in the case of agency inaction, and the PCB Order says nothing about an application shield, but instead directs PSGC to file a “new” application—language more consistent with Sierra Club’s interpretation of the statute than PSGC’s.

**B. The EPA Order and Guidance on Which PSGC Relies Do Not Address the Legality of Operating a Major Source After “Final Permit Action”**

For its second “authority,” PSGC invokes a portion of a 2009 EPA Administrator Order granting in part and denying in part a petition to object to a CAAPP permit for the United States Steel Corporation, Granite City Works. PSGC Br. at 15 (citing Doc. 46-8 at 3); *see also* 42 U.S.C. § 7661d(b)(2). As relevant here, the petition argued the Title V permit issued by Illinois EPA was legally deficient because it did not include monitoring provisions that conformed to the

permit or permit modification must be submitted.”<sup>6</sup> The treatise thus contemplates state-specific variation in the operation and timing of an “application shield.”

### CONCLUSION

For the foregoing reasons, the Court should reaffirm its decision on PSGC’s Motion to Dismiss and deny PSGC’ Motion for Judgment on the Pleadings.

Dated: February 10, 2025

/s/ Megan Wachspress

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<sup>6</sup> *Id.*

**CERTIFICATE OF SERVICE**

I, Robert Middleton, certify that on this 19th Day of March, 2025:

I have electronically served a true and correct copy of Prairie State's MOTION TO CLARIFY by electronically filing with the clerk of the Illinois Pollution Control Board and by e-mail upon the following persons.

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