ILLINOIS POLLUTION CONTROL BOARD
November 6, 2014

SIERRA CLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 14-134
	)	(Citizens Enforcement - Air)
AMEREN ENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE INC.,	)	
	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On June 16, 2014 the Sierra Club (Sierra Club) filed a one-count complaint against Ameren Energy Medina Valley Cogen, LLC (Ameren Energy) and FutureGen Industrial Alliance, Inc. (FutureGen) (collectively respondents) alleging a violation of Section 9.1(d) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/9.1(d) (2012)). The alleged violation relates to the construction of a new coal-fired oxy-combustion power plant at the Meredosia Energy Center , 800 South Washington Street, Meredosia, Morgan County (the FutureGen Project). The Board has several pending motions, including respondents' motion for summary judgment and motion asking the Board to expedite its decision in this proceeding. Sierra Club filed its response to both those motions and filed additional motions. Today's order addresses all outstanding motions.

The Board finds that summary judgment is appropriate as no genuine issue of material fact exists. Therefore, the Board grants respondents' motion for summary judgment. Based on the undisputed facts, the Board finds that respondents have not violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)). As the Board has granted summary judgment, the request to expedite the decision is moot. Also the Board denies the motions for a continuance and for oral argument filed by the Sierra Club.

The Board first summarizes the procedural history and then addresses the motions for oral argument, leave to file reply, and to strike. The Board then summarizes the complaint. Next the Board recites the facts of the case followed by the statutory and regulatory background. The Board addresses the motion for a continuance before summarizing respondents' and Sierra Club's arguments on the motion for summary judgment. The Board then discusses its decision and reasons for granting the motion for summary judgment.

PROCEDURAL HISTORY

On June 16, 2014, complainant Sierra Club filed a one-count complaint against respondents Ameren Energy and FutureGen (Comp.). On July 15, 2014, respondents filed a

motion for summary judgment (MSJ). On July 16, 2014, respondents filed a motion to expedite. On July 24, 2014, the Board accepted the complaint for hearing.

On July 29, 2014, Sierra Club filed a motion for extension of time to respond to respondents' motion for summary judgment and motion to expedite. On July 31, 2014, the hearing officer granted Sierra Club's motion for extension of time until August 25, 2014, to respond to respondents' motion for summary judgment and motion to expedite.

On August 6, 2014, respondent Ameren Energy filed its answer to the Complaint (Ameren's Answer). On August 8, 2014, respondent FutureGen filed its answer to Sierra Club's complaint (FutureGen's Answer).

On August 25, 2014, Sierra Club filed its response in opposition to respondents' motion for summary judgment (Resp.) and motion to expedite. On August 25, 2014, Sierra Club also filed a motion for continuance to allow for discovery necessary to respond to respondents' motion for summary judgment (Mot. Cont.), and a motion to strike respondents' motion for summary judgment to the extent that it relies upon statements made in the Illinois Environmental Protection Agency's (IEPA) responsiveness summary (Mot. to Str.). *See* MSJ Exh. 3.

On September 8, 2014, respondents filed a response to the motion to strike (Resp. to Str.) and to the motion for continuance to allow for discovery (Resp. Cont). In addition, respondents filed a motion for leave to file a reply (Mot. Reply) to both the motion to expedite (Exh. A) and the motion for summary judgment (Reply).

On September 22, 2014, Sierra Club filed a response in opposition to the motion for leave to file a reply (Resp. Reply).

On September 29, 2014, Sierra Club filed a motion for oral argument on pending motions (Mot. Oral Arg.)

On September 12, 2014, the parties filed a joint motion requesting a stay in the proceedings until October 2, 2014. On September 18, 2014, the Board granted that motion. On October 2, 2014, at a scheduled status call, the parties again asked that the Board delay ruling on the outstanding motions at the October 15, 2014 Board meeting, while settlement negotiations proceeded. *See* Hearing Officer Order (Oct. 2, 2014). A status conference for October 16, 2014 was set. *Id*.

On October 16, 2014, Sierra Club was granted leave to file an additional request for stay within the next seven days. Respondents indicated that they would oppose any such motion and asked that the Board rule on the outstanding motions. *See* Hearing Officer Order (Oct. 16, 2014).

MOTION FOR ORAL ARGUMENT

Sierra Club argues that the pending motion for summary judgment and the other pending motions "present significant and novel questions of Illinois law", and therefore Sierra Club

should be allowed to participate in oral argument. Mot. Oral Arg. at 4. Further, Sierra Club maintains that allowing oral argument will "lessen" the "impact" of allowing a reply but give Sierra Club the opportunity to respond to "new legal contentions" in the reply. *Id*. at 5.

Respondents did not file a response to the motion for oral argument.

Section 101.700(a) states that "the Board may hear oral argument upon written motion of a party or the Board's own motion.". 35 Ill. Adm. Code 101.700(a). Section 101.700(b) states that in considering a motion for oral argument, "the Board will consider, but is not limited to considering, the uniqueness of the issue or proceeding and whether the issue or proceeding involves a conflict of law.". 35 Ill. Adm. Code 101.700(b). The Board is unconvinced that the issues in this enforcement proceeding warrant oral argument. The Board has before it significant filings, with substantial arguments and those filings are sufficient for the Board to render its decision. Therefore, the motion for oral argument is denied.

MOTION FOR LEAVE TO FILE REPLY

Respondents seek leave to reply to Sierra Club's response to the motion for summary judgment and the motion to expedite. *See* Mot. for Reply at 1. Respondents maintain that Sierra Club has alleged facts and legal conclusions that merit a response from respondents. *Id*. at 2. Respondents note that the Board may allow a reply to prevent material prejudice. *Id*., citing 35 Ill. Adm. Code 101.500(e). Respondents assert that the motions for summary judgment and to expedite involve complex and substantive legal issues and allowing respondents to reply will enable respondents to address issues of fact and law raised by Sierra Club. *Id*. at 2-3.

Sierra Club opposes the motion for leave to file a reply, claiming that respondents failed to demonstrate that "material prejudice" will result if a reply is not allowed. Resp. Reply at 1. Sierra Club claims that respondents "strategically submitted vague opening briefs, presuming that they would later be allowed to back-end load" arguments in reply. *Id*. at 1-2. Sierra Club argues that the replies contain legal and factual argument being raised for the first time and that is improper. *Id*. at 3.

Sierra Club argues that respondents do not claim material prejudice, but rather, that the arguments of Sierra Club "merit a response". Resp. Reply at 5. Sierra Club opines that every moving party could argue that a reply should be allowed so that the movant could fully respond to arguments. *Id*. However, Sierra Club maintains that allowing the moving party the opportunity to fully respond to arguments is not required and material prejudice will not be suffered by the moving party. *Id*. at 5-6.

Sierra Club further argues that allowing respondents to reply would give respondents "the last word on summary judgment" and that is in contradiction of Section 101.500(e). Resp. Reply at 6. Sierra Club asserts that allowing the reply would thus prejudice Sierra Club. *Id*. Sierra Club maintains that the new arguments in reply could have and should have been made in the opening motion and the failure to do so is an attempt by respondents to use the reply "as a sword rather than a shield". *Id*.

Board Discussion on Reply

Section 101.500(e) provides:

> The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response. 35 Ill. Adm. Code 101.500(e).

While the Board appreciates the concerns raised by Sierra Club, the Board is unconvinced by the arguments. Sierra Club filed a substantial response to the motion for summary judgment and incorporated its arguments from the motion for continuance into that response. Sierra Club offered substantial arguments, including asserting legal theories on the type of motion for summary judgment respondents filed. Therefore, the Board is convinced that material prejudice will result for respondents if the reply is not allowed. The Board grants the motion for leave to file a reply.

MOTION TO STRIKE

Sierra Club argues that the motion for summary judgment included documents "purportedly authenticated" by counsel for respondents. Mot. to Str. at 2. Those documents are derived from the permitting process that resulted in the FutureGen Project receiving the minor source air permit for the construction of Boiler #7. *Id*. One document is IEPA's responsiveness summary that Sierra Club claims "is filled with IEPA's legal conclusions and hearsay." *Id*. at 3-4. Sierra Club maintains that respondents support the motion for summary judgment with the responsiveness summary. *Id*. at 2-3. Sierra Club asserts that legal conclusions and hearsay may not be relied upon to support a motion for summary judgment. *Id*. at 3, citing Gassner v. Raynor Mfg. Co., 409 Ill. App. 3d 995, 1005 (2nd Dist. 2011).

Respondents claim that under Illinois rule, hearsay is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Resp. to Str. at 2. Respondents argue that IEPA's responsiveness summary is used to demonstrate that Sierra Club submitted comments to IEPA on issues identical to those raised in the complaint. *Id*. Respondents maintain that the responsiveness summary is not offered for the truth of the matter asserted. *Id*. at 3. Respondents argue that the responsiveness summary is offered to provide the Board with procedural context and to provide the Board with IEPA's response to comments provided to IEPA by Sierra Club. *Id*. Respondents assert that the responsiveness summary does not meet the basic definition of hearsay and therefore the motion to strike should be denied. *Id*.

Respondents further argue that even if the responsiveness summary was hearsay as defined above, it meets the exception found in Illinois Rules for public records and reports. Resp. to Str. at 3. This exception applies to reports setting forth "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report." *Id*. The responsiveness summary was made in the course of IEPA's business and is required by rule to be prepared in a

permitting proceeding. *Id*. at 4. Therefore, respondents argue the responsiveness summary is admissible evidence. *Id*.

The Board is unconvinced that the responsiveness summary meets the definition of hearsay in Illinois law. Further, the Board agrees that even if the document is hearsay, the document is exempt as a public record prepared in the course of IEPA required duties. Therefore, the motion to strike is denied.

COMPLAINT

The complaint concerns respondents' proposed construction of the FutureGen Project at the Meredosia Energy Center .

Sierra Club seeks an order "requiring respondents . . . to comply with federal requirements." Comp. at 1. Specifically, the complaint alleges that respondents violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)) by proposing to construct a new or modified major emitting facility without a permit required by the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) Program. Comp. at 8.

Specifically, Sierra Club alleges that the FutureGen Project has the "potential to emit" in excess of 100 tons per year (tpy) of the nitrogen oxides (NO_x), sulfur dioxide (SO_2), and carbon monoxide. Comp. at 7; *see* 40 C.F.R. § 52.21(b)(4)(2013). Sierra Club also alleges that the FutureGen Project has the potential to emit ozone in excess of 100,000 tpy of carbon dioxide (CO_2) equivalent. Comp. at 7. Therefore, Sierra Club asserts that the FutureGen Project is a "major emitting facility," as that term is defined by 42 U.S.C. § 7475(a) and a "major stationary source," as that term is defined by 40 C.F.R § 52.21(b) (1) (2013). Comp. at 7.

Sierra Club further asserts that Morgan County is classified by the United States Environmental Protection Agency's (USEPA) National Ambient Air Quality Standards (NAAQS) as either "attainment" or "unclassifiable" for all pollutants. Comp. at 5; *see* 42 U.S.C. § 7409. Sierra Club alleges that, pursuant to federal PSD requirements, for areas designated as "attainment" or "unclassifiable," a major emitting facility that commences "construction" (which includes a modification) is "subject to the best available control technology for each pollutant" subject to regulation under 42 U.S.C. § 7475(a)(4). Comp. at 7. Sierra Club alleges that respondents, as developers of a major emitting facility, were required to obtain a PSD permit, failed to obtain such a permit before proposing to construct the FutureGen Project, and consequently are in violation of Section 9.1(d) of the Act (which incorporates Section 165(a) of the CAA into Illinois law). Comp. at 8.

FACTS

Before delineating the specific facts of this proceeding, the Board will begin by discussing actions taken in federal court that relate to this proceeding. The Board will then recite the facts pertinent to this case.

Federal Court Action

On December 9, 2013, Sierra Club filed a complaint against FutureGen in the United States District Court for the Central District of Illinois, Urbana Division (Central District) alleging that FutureGen was attempting to construct a major modification to the Meredosia Energy Center without a PSD Permit. *See* Sierra Club, Inc. v. FutureGen Indus. Alliance, 2014 U.S. Dist. LEXIS 77902; and Resp. Exh. 2.

On February 2, 2014, FutureGen filed a "motion for judgment on the pleadings" in the Central District and a motion to dismiss, based on lack of subject matter jurisdiction, the fact that FutureGen had a proper permit, and the assertion that Sierra Club's complaint was an improper collateral attack on IEPA's decision. Resp. Exh. 2.

On June 9, 2014, the Central District entered judgment finding that there was subject matter jurisdiction to hear this case; and that the complaint should be dismissed because the Board, not federal court, was the appropriate forum in which Sierra Club should pursue its grievance. Resp. Exh. 2.

Facts Related to Allegations in the Complaint

Ameren Energy is a corporation organized under the laws of Illinois. Comp. at 3. Ameren Energy is a direct, wholly owned subsidiary of Ameren Corporation, and is an investor-owned, publicly traded company. Comp. at 2. FutureGen is a non-profit corporation organized under the laws of Delaware. Comp. at 4.

Sierra Club is an incorporated not-for-profit organization with its headquarters at 85 Second Street, 2nd Floor, San Francisco, California and its Illinois Chapter Office at 70 E. Lake Street, Suite 1500, Chicago. Comp. at 3. Sierra Club defines its purpose as preserving, protecting and enhancing the natural environment. Comp. at 3.

In September 2010, FutureGen signed a cooperative agreement with the United States Department of Energy to develop FutureGen. *See* Sierra Club, Inc. v. FutureGen Indus. Alliance, 2014 U.S. Dist. LEXIS 77902; Resp. Exh. 2. Ameren Energy is a partner to the Project. MSJ at 1. FutureGen is proposed as a full-scale coal-fired oxy-combustion power plant at the existing Meredosia Energy Center. MSJ at 1. The FutureGen Project will physically replace an existing boiler at the Meredosia Energy Center with a new oxy-combustion capable boiler that will use the existing Turbine 4 and other auxiliary equipment. MSJ Exh. 1 at 3.

On February 9, 2012, IEPA received an application from respondents requesting a permit to construct the FutureGen Project at the Meredosia Energy Center. MSJ Exh. 3 at 2. As proposed to IEPA, the FutureGen Project would enable the use of carbon capture and sequestration technology, with a portion of the CO_2 emissions from the plant being captured and sent by pipeline to a sequestration facility about 30 miles east of the plant. MSJ Exh. 3 at 2. On February 9, 2012, IEPA also received an application from FutureGen for a construction permit for an oil-fired engine generator to provide electricity to buildings during power outages at the sequestration site. MSJ Exh. 3 at 2.

IEPA completed its initial review of FutureGen's applications and made a preliminary determination that respondents' applications met the standards for issuance of a construction permit and prepared draft permits for public review and comment. MSJ. Exh. 3 at 3. The public comment period began with the publication of a notice in the *Jacksonville Journal-Courier* on August 24, 2013. MSJ Exh. 3 at 3. The notice was published again in the *Jacksonville Journal-Courier* on August 31, 2013, and September 7, 2013. MSJ Exh. 3 at 3. A public hearing was held on October 9, 2013, at the Meredosia High School to receive oral comments and answer questions regarding the applications and the draft air permits. MSJ Exh. 3. The comment period closed on November 8, 2013. MSJ. Exh. 3 at 3.

During the public comment period, Sierra Club submitted lengthy commentary against IEPA's draft permits for the FutureGen Project. *See* MSJ Exh. 2. Sierra Club's principal argument against the draft permits was that the minor source permits were insufficient because construction of the FutureGen Project would cause "significant net emission increases" for Particulate Matter (PM), Particulate Matter smaller than 10 microns in diameter (PM_{10}), Particulate Matter smaller than 2.5 microns in diameter ($PM_{2.5}$), SO_2, NO_x, Sulfuric Acid Mist (SAM), fluorides, and Greenhouse Gases" and therefore respondents were subject to more stringent federal PSD requirements. MSJ Exh. 2 at 3.

On December 13, 2013, IEPA issued an air pollution control construction permit to respondents for construction of the FutureGen Project. MSJ Exh. 1. On December 13, 2013, IEPA issued a second air pollution control construction permit to FutureGen for construction of a backup engine to be located at the site of the separate carbon dioxide sequestration facility in rural Morgan County. *Id*.

IEPA's minor source construction permits issued for the project identify the applicable rules governing emissions from the plant, and establish enforceable limits on its emissions. MSJ Exh. 1 at 50-53. The minor source construction permits provide that the FutureGen Project is not subject to federal PSD requirements because the "project will not be accompanied by significant net increases in emissions of PSD pollutants, considering the past actual emissions of the existing" Meredosia Energy Center. MSJ Exh. 1 at 3.

Respondents' minor source construction permits provide that they will expire on August 31, 2014, if commencement of the FutureGen Project's oxy-combustion boiler (Boiler 7) does not begin before that date. MSJ Exh. 1 at 4. The minor source permits further require that upon startup of Boiler 7, Boilers 1 through 6 at the Meredosia Energy Center must be permanently shut down. *Id*. The permit includes a note stating:

> This permit is issued based on this project not being a major modification subject to PSD because it will be accompanied by contemporaneous decrease in emissions such that the increase or net increase in emissions of the PSD pollutants are not significant, as further described in Attachment 1, Tables 1A and 1B. *Id*.

Table 1A details the emissions from the project, and Table 1B provides an analysis of net changes in emissions. *Id*. at Attachment 1 at 1-1, 1-2. The change in emission is the difference between the past emissions and the future emissions. *Id*. at 1-2.

STATUTORY BACKGROUND

Section 31(d) of the Act, provides in pertinent part the following:

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(d)(1) Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (c) of this Section. 415 ILCS 5/31.1(d) (2012).

Section 9.1(d) provides that no person shall:

(1) violate any provisions of Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto; or

(2) construct, install, modify or operate any equipment, building, facility, source or installation which is subject to regulation under Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, except in compliance with the requirements of such Sections and federal regulations adopted pursuant thereto, and no such action shall be undertaken (A) without a permit granted by the Agency whenever a permit is required pursuant to (i) this Act or Board regulations or (ii) Section 111, 112, 165, or 173 of the Clean Air Act or federal regulations adopted pursuant thereto or (B) in violation of any conditions imposed by such permit. Any denial of such a permit or any conditions imposed in such a permit shall be reviewable by the Board in accordance with Section 40 of this Act. 415 ILCS 5/9.1(d) (2012).

Section 165 of the CAA provides in pertinent part the following:

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source. (42 U.S.C.A. § 7475(a)(1)-(7)):

MOTION FOR CONTINUANCE

Sierra Club's Arguments

Sierra Club states that "[r]espondents assert that Sierra Club is completely incapable of acquiring the evidence necessary to prove its claims and, when construed broadly, these contentions purport to put Sierra Club to its proof on every conceivable fact and legal theory implicated by the litigation." Mot.Cont. at 4; referring to Williams v. Covenant Med. Ctr., 316 Ill. App. 3d 682, 688 (4th Dist. 2000) (citing Celotex Corp. v Catrett, 477 U.S 317, 323 (1986));

Jiotis v. Burr Ridge Park Dist., 2014 IL App (2d) 121293, at 24-30, 44-50 (2d Dist. 2014); Willett v. Cessna Aircraft Co., 366 Ill. App. 3d 360, 368-369 (1st Dist. 2006).

Although Sierra Club states that "35 Ill. Adm. Code § 101.516(a) allows for the filing of summary judgment motions at any time up until the last thirty (30) days before a hearing," it nevertheless asserts that because respondents' motion is a "Celotex-type" summary judgment motion, "concepts of fundamental fairness dictate that these motions cannot be pursued prematurely, without giving plaintiffs a full and fair opportunity to conduct discovery and endeavor to substantiate their claims." Mot.Cont. at 4. Sierra Club defines a "Celotex-type" motion as a summary judgment motion which contends that "a non-moving party is incapable of acquiring the evidence necessary to prove their claims . . .". Mot.Cont. at 4. Consequently, Sierra Club argues that "premature Celotex-type summary judgment motions must be excused from strict compliance with Supreme Court Rule 191 (Rule 191) and afforded continuances to complete necessary discovery before being required to respond. Mot.Cont. at 4; citing Williams v. Covenant Med. Ctr., 316 Ill. App. 3d at 692 ("Rule 191(b) was adopted before Celotex-type motions were widely used and was never intended to apply to them" and "a plaintiff should not be required to comply with Rule 191(b) when a defendant files a premature Celotex-type motion" since without discovery, compliance may well be impossible).

Rule 191(b) states the following:

> (b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion.

Sierra Club asserts that respondents' motion for summary judgment is a "Celotex-type" motion because "it asserts that Sierra Club is completely incapable of acquiring the evidence necessary to prove its claims." Mot.Cont. at 4. As such, Sierra Club argues that respondents' motion should be denied because they have failed to satisfy their burden of production pursuant to a "Celotex-type" motion. Mot.Cont. at 7.

In addition, Sierra Club states that "despite these sound arguments for denying Respondents' summary judgment," it is still concerned that Sierra Club may be "obliged to respond to the pending motion for summary judgment in full, with affidavits addressing the expansive range of factual and highly technical issues that are in dispute and without the benefit of discovery." Mot.Cont. at 8. Therefore, Sierra Club states that it moves pursuant to 35 Ill.

Adm. Code 101.516(a) and Rule 191(b) for "an extension of time and/or a continuance of four (4) months from the date this motion is ruled on to respond to the pending motion for summary judgment. Sierra Club asserts that an extension of time or continuance is necessary to allow it "sufficient time to complete discovery and obtain the affidavits and/or other admissible evidence substantiating disputed factual issues relating to the pending motion that Sierra Club would otherwise be unable to procure." Mot.Cont. at 8.

Respondent's Arguments

In response to Sierra Club's arguments, respondents state that "[a] decisive factor in reviewing a court's exercise of discretion is whether the party seeking the continuance acted with due diligence in proceeding with the cause." Resp.Cont. at 1-2; citing Sands v. J.I Case Co., 239 Ill. App. 3d 19, 26 (4th Dist. 1992). Respondents assert that Sierra Club "disregards the ample opportunity it has had to engage in discovery in light of the fact that it has known of the substantive bases for its claims for well over a year." Resp.Cont. at 3. In support of this claim, respondents point out that in October and November 2013, Sierra Club participated in the public comment process pertaining to the FutureGen Project. Resp.Cont. at 3. Respondents assert that, as a part of the public comment process, Sierra Club "submitted voluminous comments about the subjects relating to sulfuric acid mist and creditable emissions decreases that it now asserts as bases for further delay." Resp.Cont. at Exhibit A to the Declaration of Dale Johnson in Support of Respondents' Reply – Motion to Expedite (Johnson Decl.).

In addition, respondents point out that in December 2013, Sierra Club filed "nearly the same claim" against respondents in the Central District that Sierra Club now brings before the Board. Resp.Cont. at 3-4. Respondents also refer to Sierra Club's May 2014 request for discovery and assertion of the need for discovery during oral argument before the federal court. Resp.Cont. at 4; referring to Johnson Decl., Exh. B, D, and E. Moreover, respondents assert that Sierra Club waited until the last day its response was due to request an extension of time to respond to respondents' motion for summary judgment. Resp.Cont. at 4. Based on these assertions, respondents conclude that "further discovery is unnecessary to resolve this case . . . [and] [e]ven if it were, Sierra Club has had ample time to obtain the information it claims is necessary to address the legal issues in this case." Resp.Cont. at 4. Respondents further state that "to the extent that Sierra Club suffers any prejudice as a result of expediting this case it is prejudice of Sierra Club's own making." Resp.Cont. at 4.

As an additional matter, respondents contend that Sierra Club has mischaracterized their motion for summary judgment as a "Celotex-type" motion. Resp.Cont. at 2. Respondents assert that its motion does not seek to show that Sierra Club is "completely incapable of acquiring the evidence necessary to prove its claims." Rather, respondents claim that their motion "affirmatively disproves petitioner's case by introducing uncontroverted evidence of the minor source permit and the related permit process undertaken by IEPA that entitles [r]espondents to judgment as a matter of law." Resp.Cont. at 2. Therefore, respondents claim that their motion is a "traditional motion," and as such Sierra Club's proposition that it is entitled to a continuance is unfounded. Resp.Cont. at 2.

Respondents conclude by stating that "time is of the essence if the promising technology" of the FutureGen Project is to be realized. Resp.Cont. at 5. Respondents also request that if the Board does conclude that Sierra Club is entitled to an extension of time, "any such delay must account for Sierra Club's deliberate failure to utilize the time since filing its complaint to prepare its case." Resp.Cont. at 5.

Board Discussion on Continuance

For the reasons discussed below, the Board finds that summary judgment is appropriate at this time. As set forth below, the Board finds that there is no issue of material fact and judgment is appropriate. Therefore, the motion for continuance is denied.

MOTION FOR SUMMARY JUDGMENT

The Board begins by summarizing the arguments for summary judgment made by respondents. The Board then proceeds to the response by Sierra Club and respondents' reply. The Board concludes by discussing the Board's decision and its reasons for granting summary judgment.

Respondents' Arguments

Respondents assert that the issues raised in this case are questions of law, not fact. Specifically, respondents claim that there is no dispute that IEPA issued a minor source construction permit for the FutureGen Project; and, thus respondents' construction of the FutureGen Project is lawful. As Sierra Club has presented no arguments that the construction of the minor source is unlawful, respondents are entitled to judgment as a matter of law. MSJ at 2.

In support of its position, respondents contend that the FutureGen Project is not subject to PSD requirements under 42 U.S.C. § 7475 and 40 C.F.R. § 52.21 because IEPA has determined that respondents are not constructing a "major modification" pursuant to the CAA. MSJ at 6. Respondents therefore claim that construction of the FutureGen Project is lawful pursuant to their IEPA-issued minor source construction permit and that Sierra Club has no basis for asserting that a PSD permit is required.

Respondents Received the Permit to Construct the Facility

Respondents argue that the Board's regulations require a permit be issued before construction of a new source is allowed. MSJ at 6, citing 35 Ill. Adm. Code 201.142. Respondents note that IEPA issues a permit through a process overseen by USEPA. *Id.* IEPA explicitly concluded that no PSD permit was required, and USEPA did not object to the draft permit. *Id.* Thus, respondents argue they have obtained the proper permit for the facility. *Id.*

Respondents Do Not Require a PSD Permit

Respondents agree that the power plant is both a "Major Emitting Facility" and "Major Stationary Source" as defined by the CAA. MSJ at 2, citing 42 U.S.C. § 7479; 40 C.F.R. §

52.21(b)(1)(i)(a). These types of sources must obtain a PSD permit unless the project is in a category exempted by regulation. *Id*., citing 40 C.F.R. § 52.21(b)(2)(iii). Further, respondents opine that a project is subject to PSD review only if the modification will result in both: 1) a "significant emissions increase" of a regulated pollutant, and 2) a "significant net emissions increase" of that pollutant from the major stationary source. MSJ at 3, 6, citing to 40 C.F.R. § 52.21(b)(2), (b)(3), (b)(40), and (b)(50).

Respondents state that IEPA is the appropriate agency to address whether or not a source is a PSD source as a part of its permitting decision. MSJ at 6. IEPA specifically addressed Sierra Club's concerns during the permitting process. *Id*. Respondents argue that IEPA determined that there is no significant net emissions increase from the modifications at Meredosia Energy Center. *Id*., citing MSJ Ex. 3 at 17. Respondents maintain that in making this determination IEPA considered all contemporaneous emission increases and decreases for each PSD regulated pollutant at the Meredosia Energy Center. MSJ at 7. Respondents note that the Meredosia Energy Center had been "largely shut down contemporaneous" with the FutureGen Project construction. *Id*. Respondents argue that based on this information IEPA correctly determined that respondents were not required to obtain a PSD permit for the FutureGen Project. *Id*.

Respondents note that the construction permit makes clear that IEPA considered the issue of increases and decrease in emissions, and specifically considered the past emissions from theMeredosia Energy Center. MSJ at 7, citing MSJ Exh. 1 at 3. Respondents also note that the permit includes a source wide condition that the permit is "issued based on this project not being a major modification subject to PSD because it will be accompanied by contemporaneous decreases in emissions. . .". *Id*., citing MSJ Exh. 1 at 4.

Respondents maintain that Sierra Club's claims have already been rejected by IEPA and the Board should not re-evaluate the claims. MSJ. At 7. Respondents point to IEPA's responsiveness summary, which includes the responses to Sierra Club's concerns. *Id*. Respondents note that the responsiveness summary states that "net increases in emissions of regulated NSR [new source review] pollutants from this project will not be significant." MSJ Exh. 3 at 17.

Respondents claim that IEPA's conclusion is clear in the minor source construction permit. That permit states that "[t]his permit is issued based on this project not being a major modification subject to PSD because it will be accompanied by contemporaneous decreases in emissions such that the increases or net increases in emissions of PSD pollutants are not significant . . .." MSJ at. 7; referring to MSJ Exh. 1 at 3.

Respondents contend that they are in compliance with Section 9.1 of the Act because IEPA has determined that the FutureGen Project requires only a minor source permit, and respondents are operating in accordance with that permit. Respondents therefore assert that there is no factual or legal basis for Sierra Club's assertion that construction of the FutureGen Project without a PSD permit violates the Act.

Sierra Club's Arguments

Sierra Club argues that respondents present unsupported legal arguments that lack merit. Resp. at 1. Sierra Club insists that the complaint sets forth a valid claim for relief, and there is no basis in Illinois law to assert that Sierra Club's complaint is barred because IEPA issued the FutureGen Project a minor source permit. Sierra Club acknowledges that IEPA "disagrees with Sierra Club's legal analysis on PSD issues", but argues that disagreement is also no basis to argue that the complaint is barred. *Id*.

Summary Judgment

Sierra Club asserts that the appropriate standard for summary judgment provides that "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. Resp. at 9, *citing* Des Plaines River Watershed Alliance v. IEPA, PCB 04-88, slip. op. at 7 (Nov. 17, 2005). Sierra Club further claims that there are two types of summary judgment recognized in Illinois: 1) traditional summary judgment and 2) "Celotex-type" summary judgment. Resp. at 10. According to Sierra Club, a traditional summary judgment motion "endeavors to affirmatively disprove[e] the plaintiff's case by introducing evidence that if, uncontroverted, would entitle the movant to judgment as a matter of law." Resp. at 10. Sierra Club states that a "Celotex-type" summary judgment motion relies on the burden-shifting mechanism of the summary judgment procedure to "establish…that the non-movant lacks sufficient evidence to prove an essential element of the cause of action. Resp. at 10, *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Further, Sierra Club argues that respondents' motion for summary judgment is premature, or "at a minimum, Sierra Club must be afforded an opportunity to engage in reasonable discovery prior to having to provide a full response to respondents' motion." Resp. at 2. Sierra Club bases this assertion on its characterization of respondents' motion as a "Celotex-type" motion. Resp. at 10. As a "Celotex-type" motion, Sierra Club contends that respondents must demonstrate that that Sierra Club "cannot acquire sufficient evidence to make its case." Resp. at 11; *citing* Willett v. Cessna Aircraft Co., 366 Ill. App. 3d 360, 368-69 (1st Dist. 2006). Consequently, Sierra Club argues that it can rely on pleadings contained in its complaint to demonstrate that it can "acquire sufficient evidence to arguably entitle [Sierra Club] to judgment," and thereby defeat respondents' motion. Resp. at 13; citing Willet v. Cessna Aircraft Co., 366 Ill. App. 3d at 368-69. Sierra Club further asserts that its pleadings set forth sufficient evidence to "arguably entitle" it to judgment, and therefore respondents' motion must be denied.

Sierra Club argues that with a "Celotex-type" motion, a defendant can only meet its burden of production by showing that the plaintiff cannot acquire sufficient evidence to make its case. Resp. at 10, *citing* Willett v. Cessna Aircraft Co., 366 Ill. App. 360, 369 (1st Dist. 2006). Sierra Club argues that respondents' motion is a "Celotex-type" motion because it asserts that respondents are entitled to judgment as a matter of law because respondents' construction is lawful pursuant to its IEPA permit and because it asserts that Sierra Club cannot establish any evidence refuting the lawfulness of their actions pursuant to that permit. Resp. at 11.

Sierra Club contends that, because respondents' motion is a "Celotex-type" motion, it cannot be pursued without first giving plaintiffs "a full and fair opportunity to conduct discovery and endeavor to substantiate their claims." Resp. at 12. Sierra Club therefore concludes that because respondents' motion is "Celotex-type", the Board should not grant the motion for summary judgment before allowing Sierra Club to conduct needed discovery. Resp. at 12.

Sierra Club's Claims are not Barred

Sierra Club contends that respondents' motion "appears to be based solely on the legal contention that because IEPA issued the FutureGen Project a minor source permit . . . Sierra Club is barred from pursuing an independent claim under Section 9.1(d)." Resp. at 18. Sierra Club states that this argument lacks merit because the issuance of a minor source permit in this context does not "bar or impede Sierra Club's claims in any manner." In support of this argument, Sierra Club refers to Weiler v. Chatham Forest Products, Inc., 392 F.3d 532 (2d Cir. 2004) for the proposition that "a state determination that a prospective source of air pollution is not a major emitting facility does not prevent a private plaintiff from bringing a suit seeking to enjoin construction of the facility pursuant to section 304(a)(3) of the CAA." Resp. at 21. Sierra Club similarly refers to NRDC v. BP Prods. N. Am., Inc., 2009 U.S. Dist. LEXIS 54363 in support of its assertion that "the plain language of Section 304(b)(3) [CAA] provides for citizen suits for construction without a permit required under Part C (PSD) and Part D (non-attainment of NSR) of the Act . . .". Resp. at 22-23.

Sierra Club points out that the federal decisions it refers to turn on the language of the citizen suit provision of the CAA, while this case is brought pursuant to Illinois state law. Resp. at 26. Nonetheless, Sierra Club argues that Section 9.1 of the Act "lacks many of the jurisdictional restrictions and other limitations that are imposed on citizen suits under Section 304 of the CAA." Resp. at 26-27. Sierra Club therefore asserts that "a much broader range of claims may be pursued under Section 9.1 than under CAA Section 304." Resp. at 27. For these reasons, Sierra Club concludes that "it is abundantly clear that the issuance of the FutureGen Project's minor source permit does not bar or impede Sierra Club's claims." Resp. at 27.

Sierra Club asserts that it does not challenge IEPA's issuance of respondent's construction permit. Resp. at 6. Rather, Sierra Club claims that IEPA minor source construction permit does not accurately account for the emissions output that will result from the FutureGen Project. Resp. at 6. Sierra Club claims that the FutureGen Project will emit "in excess of 100 tons per year" of NO_x, SO_2, carbon monoxide, and ozone, and more than 100,000 tons per year of CO_2 equivalent. Comp. at 7. Based on these allegations, Sierra Club contends that the FutureGen Project is a "major stationary source" that will result in either "a significant emissions increase" or "a significant net emissions increase." Resp. at 15. Sierra Club therefore argues that the FutureGen Project is subject to PSD review, and thus requires a PSD permit to be in compliance with Section 9.1 of the Act. Resp. at 6.

Sierra Club claims that the results of IEPA's responsiveness summary and the issuance of respondents' construction permit does not prevent Sierra Club from asserting a claim that regardless of whether IEPA issued a minor source construction permit, it is not barred from

asserting that respondents are required to obtain a PSD permit. Resp. at 2. Sierra Club asserts that respondents "fail to present a case that precludes all possibility of liability". Resp. at 2; citing Malone v. Am. Cyanamid Co., 271 Ill. App. 3d 843, 845-46 (4th Dist. 1995).

Sierra Club is Entitled to Rely on its Pleadings to Create a Genuine Issue of Material Fact

Sierra Club states that respondents' summary judgment motion is "based on the theory that the issuance" of the FutureGen Project's minor source permit "bars Sierra Club from prevailing on its claim" that the FutureGen Project is required to have a PSD permit. Resp. at 29. Sierra Club argues the presence of "genuine issues of material fact" that should preclude a finding of summary judgment. Resp. at 30.

Sierra Club asserts that, pursuant to the CAA, the netting of emissions is only allowed within a major stationary source between emissions units under common ownership and control. Resp. at 28-29, *citing* 40 C.F.R. § 52.21(b)(3)(i); §52.21(b)(1)(i)(a); and §52.21(b)(5). Sierra Club argues that unless respondents are "allowed to take advantage of significant netting credits associated with the retirement of the existing units at the Meredosia Energy Center," emissions from the FutureGen Project will be sufficient to require a PSD permit. Resp. at 29. Sierra Club opines that discovery is necessary to determine whether the FutureGen Project and the retired Boilers 1-6 at the Meredosia Energy Center are under common ownership and control and will be under common ownership and control at the time construction commences. Resp. at 31-32. Thus, Sierra Club bases one of its claims on the theory that the FutureGen Project cannot lawfully net out of PSD because of lack of common ownership and control between FutureGen and the Meredosia Energy Center.

Sierra Club next argues that there is a genuine issue of material fact because emission decreases from the pre-existing the Meredosia Energy Center Units are not "creditable" because they lack "approximately the same qualitative significance for public health and welfare as that attributed to the increase." Resp. at 33. In support of this argument, Sierra Club refers to a 1992 memorandum from the USEPA to the Minnesota Department of Air Quality Management for the following proposition:

> The PSD regulations restrict the creditability of some decrease in emissions of the purpose of emissions netting. In particular, one provision allows credit for a reduction only to the extent that it has approximately the same qualitative significance for public health and welfare as the increase from the proposed change [see 52.21(b) (3) (vi) (c)], When there is reason to believe that the reduction in ambient concentrations from the decrease will not be sufficient to prevent the proposed emissions increase from causing or contributing to a violation of any NAAQS or PSD increment, this provision requires an applicant to demonstrate that the proposed netting transaction (despite the absence of a significant net increase in emissions) will not cause or contribute to such a violation . . .. Resp. at 34, citing August 11, 1992, Memorandum from John Calcagni to David Kee, re: proposed Netting for Modifications at Cyprus Northshore Mining Corporation, Silver Bay Minnesota at 6 (http://www.epa.gov/NSR/ttnnsr01/gen/cyprus.html)

Sierra Club asserts that "through legal and expert analysis of existing air modeling demonstrations, [and] adjustments to that available modeling," it intends to prove that the increases in emissions from Boiler #7, as configured and permitted, will cause or contribute to a NAAQS violation for SO_2, NO_x, and $PM_{2.5}$. Resp. at 33.

Sierra Club claims that respondents' motion for summary judgment should be denied because the construction of Boiler #7 cannot "net out of PSD," because Sierra Club will demonstrate that emission decreases from the pre-existing the MeredosiaEnergy Center Units are not "creditable" as they lack "approximately the same qualitative significance for public health and welfare as that attributed to the increase." Resp. at 37.

Sierra Club maintains that respondents' motion for summary judgment should be denied because if discovery is allowed, Sierra Club will show respondents cannot "net out of PSD" because their net emissions increase of SAM, and potentially several other pollutants, will exceed the significance threshold of 7 tpy due to ineffective limitations and emissions of SAM. Resp. at 38.

Sierra Club claims that expected emissions for respondents' minor source permit were evaluated under the assumption that the FutureGen Project would be restricted to no more than a 45% load, but respondents' construction permit lacks a limit reflecting that assumption. Resp. at 37. Sierra Club asserts that if discovery is allowed, it will demonstrate that the proposed construction of the FutureGen Project will result in a net emissions increase of SAM in excess of PSD significance levels. Resp. at 37. Sierra Club therefore concludes that respondents' motion for summary judgment should be denied to allow it necessary discovery to show that respondents will cause emissions increases in excess of PSD significance levels. Resp. at 37.

Respondent's Reply

Respondents argue that "Sierra Club fails to allege any violation of the Act, implementing regulation, or Agency-issued permit; it instead builds its case on a supposition that the IEPA– which it never sued – was wrong when it issued respondents' permit." Reply at 1. Moreover, respondents argue that Sierra Club mischaracterizes the law and depends solely on unrelated decisions of the Environmental Appeals Board (EAB) in struggling to pursue a permit appeal masked as an enforcement action. *Id*.

Respondents argue that respondents are entitled to summary judgment for the following reasons:

1) The FutureGen Project has an appropriate IEPA-issued permit. IEPA rejected Sierra Club's arguments, but Sierra Club refuses to concede that it lost;

2) The question before the Board in this matter is whether, as a matter of Illinois law, respondents' construction of the FutureGen Project violates

Section 9.1(d) of the Act. 415 ILCS 5/9.1(d). Respondents argue it does not;

3) Sierra Club incorrectly claims that the federal EAB has implicitly granted it substantial appellate rights;

4) No amount of discovery can transform IEPA's permissible choices into a demonstration that respondents' actions violate Illinois or federal law since the IEPA is entrusted with issuing permits;

5) Sierra Club's efforts to characterize the documents upon which respondents' summary judgment motion relies as "hearsay" are baseless and should be rejected. Reply at 2-3.

Respondents argue that Sierra Club brings a novel claim under Section 9.1 of the Act and respondents are unaware that the Board has deliberated any prior third-party enforcement action alleging a violation of federal law through Section 9.1 of the Act. Reply at 3. Respondents argue that Section 9.1 of the Act is customarily enforced by state agencies. *Id*. Respondents state that this is a case of first impression. *Id*. Respondents claim that "Sierra Club brings an action against *permit holders* even though at its very core the Sierra Club allegations are based on a challenge to the *type* of permit issued by IEPA, the *permitting agency*." *Id*. (emphasis in the original). Respondents argue the Board should not allow Sierra Club the opportunity to use an enforcement action to overturn the IEPA's permitting decision. *Id*.

Sierra Club's Claims Are Fundamentally Flawed

Respondents disagree with Sierra Club's contention that there are "genuine" issues of material fact which prevent issuance of summary judgment. Reply at 4. "'Genuine' issues in the context of this matter include assertions which could cause a reasonable fact-finder to find in favor of the party opposing summary judgment." *Id*. In determining the "genuineness" of a factual matter, a court must disregard individual conclusions and self-interested statements and consider only facts which are admissible in evidence. *Id*.

Respondents state that Sierra Club does not factually contest what happened in FutureGen Project permitting proceeding. Reply at 4. Respondents claim that Sierra Club concedes that respondents have an air permit; however, Sierra Club asserts that IEPA's determination in this matter was either potentially legally incorrect or is not binding on Sierra Club. *Id*. Respondents argue that Sierra Club's claims would fundamentally upset the judiciously balanced approach USEPA and IEPA have produced for issuance of air permits in Illinois. *Id*. at 5.

IEPA, not the Board, Issues Permits

Respondents assert that the complaint "effectively asks the Board to review IEPA's permit decision." Reply at 5. However, respondents argue that the Board does not issue permits, IEPA does. *Id*. Respondents state that Sierra Club disagrees with IEPA's permit decision and is

attempting to evade IEPA's authority by requesting that the Board arrive at a different conclusion. *Id*. By doing so, respondents argue that "Sierra Club's challenge in this matter constitutes a fundamental challenge to Illinois administrative law, precedent, and policy." *Id*.

Respondents state that Sierra Club can, in limited circumstances by state law, appeal certain types of permits, but Sierra Club should not be allowed to usurp the Illinois regulatory and permitting processes. Reply at 5. Moreover, respondents argue Sierra Club should not be allowed to effectively appeal a permit decision through enforcement action, when state law has not provided a direct right of appeal. *Id*. Respondents argue that "such an action willfully seeks to undermine valid conclusions reached by IEPA, particularly when what it claims to be its 'genuine' disputes of material fact are reliant on a variety of technical materials and arguments . . .". *Id*.

Respondents state that this Board does not issue permits because the IEPA does, and the IEPA's duties under the Act include "[determining] whether specific applicants are entitled to permits." Reply at 6, citing Illinois Power Co. v. PCB, 100 Ill. App. 3d 528, 426 N.E.2d 1258 (1981). Respondents argue that Sierra Club erroneously believes the Board should make its own decision without giving any deference to IEPA's pre-existing evaluation of the same facts. *Id*. Respondents argue that Sierra Club's citizen enforcement suit fails because respondents have the proper permit, as determined by IEPA, and accordingly respondents are not in violation of Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)). *Id*. at 6-7.

IEPA's Issued Permit Precludes Arguments That There Are Genuine Issues of Fact

Respondents assert that the FutureGen Project has a properly issued permit as well as IEPA's determination that Sierra Club's claims are without merit. Reply at 8. Furthermore, respondents argue that a citizen enforcement action is a tool to assist the government in enforcing laws, not to collaterally attack decision already made by regulators. *Id*., citing Goodman v. Pa. Dep't Envt'l Prot., No. 07-4779, 20089 WL 2682698 (E.D. Pa. June 30, 2008). Respondents reiterate that IEPA issued the proper construction permit, and IEPA's decision is entitled to deference. Reply at 9. Respondents assert that the permit cannot be questioned in this enforcement proceeding. *Id*. at 10.

Respondents maintain that Sierra Club "assumes it is entitled to unlimited appeals" on permitting decisions; however, respondents argue that is not the case. Reply at 10. Respondents opine that the Act does not grant a direct appeal right for a construction permit, and Illinois law is not required to provide such an opportunity. *Id*. at 10-11. Respondents argue that this proceeding is a permit appeal disguised as an enforcement action. Reply at 11.

Discussion On Motion For Summary Judgment

The Board will first set forth the standard of review for summary judgment and then the burden of proof in an enforcement action. The Board will then discuss its findings.

Standard of Review for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, Ltd., 181 Ill. 2d at 483, 693 N.E. 2d at 370, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on the pleadings, but must "present a factual basis which would arguably entitle [it] to judgment." Gauthier v. Westfall, 266 Ill. App. -3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Burden of Proof

In an enforcement proceeding before the Board, the burden of proof is by a preponderance of the evidence. Lefton Iron & Metal Company, Inc. v. City of East St. Louis, PCB 89-53 at 3, (Apr. 12, 1990); Bachert v. Village of Toledo Illinois, *et al.*, PCB 85-80 at 3, (Nov. 7, 1985); Industrial Salvage Inc. v. County of Marion, PCB 83-173 at 3-4, (Aug. 2, 1984), *citing* Arrington v. Water E. Heller International Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50,58, (1st Dist. 1975). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage at 4, *citing* Estate of Ragen, 79 Ill. App. 3d 8, 198 N.E.2d 198, 203, (1st Dist. 1979). A complainant in an enforcement proceeding has the burden of proving violations of the Act by a preponderance of the evidence. Lake County Forest Preserve District v. Neil Ostro, PCB 92-80, (Mar. 31, 1994). Once the complainant presents sufficient evidence to make a prima facie case, the burden of going forward shifts to the respondent to disprove the propositions (Illinois Environmental Protection Agency v. Bliss, PCB 83-17, (Aug. 2, 1984)). *See* Nelson v. Kane County Forest Preserve, *et. al.*, PCB 94-244 (July 18, 1996); People v. Chalmers, PCB 96-111 (Jan. 6, 2000).

Findings

The Board first determines if summary judgment is appropriate and then determines if there is a violation of Section 9.1(d)(2) of the Act (415 ILCS 5/9.1(d)(2) (2012)). The Board follows with a determination on Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2012)).

Summary Judgment is Appropriate

The complaint alleges that respondents violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)) by proposing to construct a new or modified major emitting facility without a permit required by the CAA PSD Program. The fact that respondents have a permit for the FutureGen Project is not in dispute. However, Sierra Club argues that it is the wrong permit and with discovery, Sierra Club can prove that allegation. Sierra Club devotes large segments of its legal argument as to what type of motion for summary judgment was filed by respondent.

The Board is unpersuaded that the type of motion for summary judgment is of importance in this case. The Board further disagrees with Sierra Club that additional discovery will allow Sierra Club to demonstrate a violation of Section 9.1(d) of the Act. The complaint is based on the existence of a permit that allegedly does not conform to the CAA PSD program. The permit at issue is in the record, and the parties agree that a permit has been issued. Therefore, the issue in this proceeding is a question of law and whether or not the FutureGen Project permit, as issued, protects FutureGen from allegations that it violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)). Therefore, the Board finds that summary judgment is appropriate.

No Violation of Section 9.1(d)(2) of the Act

Section 9.1(d)(2) of the Act provides in part that no person shall construct, install, modify or operate any equipment, building, facility, source or installation which is subject to regulation under CAA without a permit granted by the IEPA whenever a permit is required. 415 ILCS 5/9.1(d) (2012). As stated above, the parties agree that respondents have a permit to construct the FutureGen Project pursuant to the Act and CAA. Sierra Club asserts it's the wrong permit and as such the respondents are in violation of Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)). However, under Section 9.1(d)(2) of the Act, the question is, if a permit is required has a permit been issued? In this case, a permit has been issued. Therefore, the Board cannot find a violation of Section 9.1(d)(2) of the Act (415 ILCS 5/9.1(d)(2) (2012)).

Furthermore, during IEPA's review of the permit application, Sierra Club raised many of the issues to IEPA that it now alleges in the complaint. Specifically, Sierra Club argued to IEPA that a minor source permit should not be issued and that the permit should be subject to more stringent PSD requirements. MSJ Exh. 2 at 2-3. IEPA went on to issue the minor source permit, noting that the project will not be accompanied by significant net emissions increases considering past actual emissions of the existing source. MSJ Exh. 1 at 3. Additionally, the permit was specifically based on the project not being a major modification subject to PSD requirements.

IEPA issued a construction permit after reviewing the application and comments, including comments from Sierra Club that echo its allegation and arguments here. IEPA determined that a minor source construction permit was the correct permit. Therefore, the Board finds that respondents have not violated Section 9.1(d)(2) of the Act (415 ILCS 5/9.1(d)(2) (2012)), as respondents have been issued a permit.

No Violation of Section 9.1(d)(1) of the Act

The Board next examines the provisions of Section 9.1(d)(1) of the Act, which provide that no person shall violate any provisions of Sections 111, 112, 165 or 173 of the CAA. 415 ILCS 5/9.1(d)(1) (2012). Sierra Club argues that the Board can hear a challenge to the permit issued to the FutureGen Project, and cites to various decisions in federal law as persuasive authority. The Board is unconvinced by those cases. The Board finds that case law in Illinois limits the Board's ability to review IEPA's permitting decisions, and specifically the Board lacks authority to overturn an IEPA permitting decision in an enforcement action.

The Board's authority to review IEPA's permitting decisions isset forth in the Act. The Board has the authority to review permits when the applicant appeals the permit or in limited situations where the Act allows a third party to challenge issuance of a permit. *See* 415 ILCS 5/40 (2012). However, it has long been established that the Board lacks jurisdiction to entertain allegations that a permit determination by the Agency violated the Act. *See* Anielle Lipe and Nykole Gillette v. IEPA, PCB 12-95, slip op. at 9 (May 3, 2012) (relying on Landfill, Inc. v. PCB, 74 Ill. 2d 541, 557, 387 N.E.2d 258 (1978)); *see also* Mahomet Valley Water Authority *et. al.* v. Clinton Landfill, Inc., PCB 13-22, slip op. at 21 (Sept. 19, 2013) *appeals pending as* Mahomet Valley Water Auth., *et al*. v. PCB and Clinton Landfill, Inc., No. 4-14-0002 (4th Dist.);.

Sierra Club has not named the IEPA as a party to this proceeding and instead alleges that respondents are in violation because respondents hold the wrong permit. Sierra Club acknowledges that a permit has been issued. Sierra Club asserts that the FutureGen Project should have been subject to the more stringent PSD requirements. IEPA disagreed and issued a construction permit and that permit specifically addressed PSD requirements. Thus, the Board finds that Sierra Club is in fact challenging IEPA's determination that no PSD permit is required.

Sierra Club argues that federal law provides authority to the Board to review a challenge to the permit issued to the FutureGen Project. The Board finds more persuasive Illinois law. Specifically, the Board believes that the facts of this case are analogous to Mahomet Valley. In Mahomet Valley, complainants alleged that the respondent violated provisions of the Act by transforming its landfill to a chemical waste unit. Mahomet Valley, PCB 13-22. IEPA issued a permit to the respondent to allow acceptance of the waste at issue. *Id*. The Board found that:

> Under Section 31(d)(1) of the Act, the Board has jurisdiction over the violations of the Act alleged in the complaint. Landfill, Inc. and its progeny do not apply to divest the Board of jurisdiction to hear a complaint against CLI alleging violations of the Act. *Id*. slip op. at 21.

However, the Board went on to find that certain counts of the complaint were frivolous as it sought relief the Board lacks the authority to grant. *Id*. slip. op. at 27. The Board stated:

> The Board further finds that counts I, II, and III of the complaint are frivolous because they ask for relief that the Board does not have the authority to grant. The complaint alleges that CLI [respondent] violated the Act by failing to obtain additional siting approval for the CWU [chemical waste unit] from the DeWitt County Board. Comp. at 2 (¶1). This failure allegedly resulted in violations of Sections 21(e), 39(a), 39(c), and 39.2 of the Act. If the Board were to find that CLI is required to obtain local siting authority for the CWU, that finding would invalidate the permit issued by the Agency. The determination of whether additional local siting approval is required is a permitting decision for the IEPA, and the Board making this determination would have the same effect as the Board undertaking the role of permitting authority, a duty expressly assigned to the IEPA. *See* Landfill, Inc., 74 Ill. 2d at 560, 387 N.E.2d at 265. Complainants seek relief that would impact the IEPA's authority to issue a permit - an action that

> complainants do not have the right to bring before the Board. Accordingly, the Board does not have the authority to grant the relief complainants request in counts I, II, and III. *Id* slip op. at 27.

While the Board found in Mahomet Valley that a review of IEPA's permitting action was beyond the Board's authority, the Board continued stating:

> The Board agrees with the People's position that "a permit is no shield allowing wanton violations of the Act." People Resp. at 5; *see* Landfill, Inc., 74 Ill. 2d at 559-60, 387 N.E.2d at 265 ("grant of a permit does not insulate violators of the Act or give them a license to pollute"). The Board notes that, as the Board held above, Section 31(d) authorizes enforcement actions against parties who violate Illinois environmental requirements. *See* 415 ILCS 5/31(d). Therefore, if the landfill causes any violation of the Act or regulations, there are safeguards in place to address that activity. Here, complainants failed to allege such a violation but if a violation occurs in the future, complainants are entitled to pursue any enforcement action authorized by Section 31(d). *See* Elgin v. County of Cook, 169 Ill. 2d 53, 61, 660 N.E.2d 875, 880 (1995) (Court rejected collateral attack on Agency-issued permit but noted "it is clear that if at any point the [landfill] or its development actually threatens the environment . . . adequate safeguards exist to at that point stop any further development and/or operation"). Mahomet Valley, PCB 13-22, slip op. at 27.

Sierra Club alleges that respondents obtained the wrong permit from IEPA, and that the FutureGen Project is subject to PSD provisions of the CAA. In order to find that respondents violated Section 9.1(d)(1) of the Act, the Board would have to find that the FutureGen Project permit violated the CAA. For the Board to make this finding, the Board would necessarily be required to review IEPA's permit decision and overturn that decision. Thus, while Sierra Club did not name the IEPA, like Mahomet Valley, Sierra Club is asking that the Board review IEPA's permit decision. The Board finds that it cannot review IEPA's permit decision in the context of this enforcement proceeding.

IEPA issued a valid permit to the respondents for the FutureGen Project. Therefore, the Board finds that respondents have not violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)). Thus the Board grants the motion for summary judgment and closes the docket.

CONCLUSION

The Board finds that oral argument is not necessary and denies the request by Sierra Club for oral argument. The Board also denies Sierra Club's motions for continuance and to strike. The Board grants respondents leave to file a reply and finds that the motion for expedited review is moot.

As to summary judgment, the Board finds that there are no issues of fact and that respondents are entitled to judgment as a matter of law. IEPA has issued a valid permit to

respondents for the FutureGen Project and therefore respondents have not violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)).

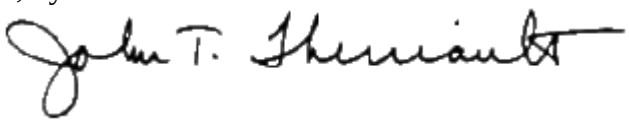
ORDER

The Board grants the motion for summary judgment and finds that respondents have not violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)).

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 6, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board