BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB,	)	
	)	
Complainant,	)	**PCB 2014-134**
	)	**(Enforcement-Air)**
v.	)	
	)	
AMERENENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE, INC.,	)	
	)	
	)	
Respondents.	)	

NOTICE OF FILING

John Therriault, Clerk of the Board ILLINOIS POLLUTION CONTROL BOARD James R. Thompson Center 100 West Randolph, Suite 11-500 Chicago, IL 60601	Carol Webb, Hearing Officer ILLINOIS POLLUTION CONTROL BOARD 1021 North Grand Avenue East P.O. Box 19274 Springfield IL 62794-9274 carol.webb@illinois.gov
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PLEASE TAKE NOTICE that I have today e-filed with the Office of the Clerk of the Illinois Pollution Control Board: RESPONDENTS' RESPONSE TO MOTION TO STRIKE AND MEMORANDUM IN SUPPORT, RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION FOR EXTENSION OF TIME AND A CONTINUANCE TO ALLOW FOR DISCOVERY NECESSARY TO RESPOND TO SUMMARY JUDGMENT, RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY, RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO EXPEDITE, RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT and APPEARANCE, copies of which are herewith served upon you.

DATED this 8th day of September, 2014.

/s/ Amy Antoniolli

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RESPONDENTS' RESPONSE TO MOTION TO STRIKE AND MEMORANDUM IN SUPPORT

In response to Complainant Sierra Club's ("Sierra Club") Motion to Strike and Incorporated Memorandum in Support ("Motion to Strike") submitted pursuant to Section 2-615 of the Illinois Code of Civil Procedure and Supreme Court Rule 191(a), Respondents AmerenEnergy Medina Valley Cogen, LLC ("Ameren") and the FutureGen Industrial Alliance Inc. (the "Alliance") [collectively, the "Respondents"] state as follows:

1. On December 9, 2013, Sierra Club filed a citizen suit pursuant to 42 U.S.C. § 7604(a)(3) in U.S. District Court, based on the false premise that Ameren and the Alliance are proposing to construct the Project without the necessary federal air permit. At Respondents' request, the U.S. District Court expedited consideration of a motion to dismiss filed by Respondents on jurisdictional grounds. On or about May 20, 2014, the U.S. District Court chose to abstain in favor of review of Sierra Club's claim by the State of Illinois and granted Respondents' motion to dismiss. Sierra Club proceeded to file the instant complaint alleging violations of the Illinois Environmental Protection Act with the Illinois Pollution Control Board ("Board") on or about June 11, 2014.

2. On July 15, 2014, Respondents filed a motion for summary judgment ("SJ Motion") pursuant to 35 Ill. Adm. Code 101.516 and Section 2-1005 of the Illinois Code of Civil Procedure, 735 ICLS 5/2-1005.

3. In its Memorandum in Support of their Motion for Summary Judgment ("Memo in Support"), Respondents provided a statement of material facts in support of its SJ Motion. In doing so, Respondents pointed the Board to a document prepared by the Illinois Environmental Protection Agency ("IEPA") entitled "Responsiveness Summary for Public Questions and Comments on the Applications for Air Pollution Control," dated December 2013 ("Responsiveness Summary.") Memo in Support at 4.

4. Complainant objects to inclusion of the Responsiveness Summary on the grounds that, under Illinois Supreme Court Rule 191(a), it is inadmissible hearsay and, therefore, should be stricken from the record. Motion to Strike at ¶¶ 9-11.

The Responsiveness Summary is Not Hearsay

5. Rule 801(c) of the Illinois Rules of Evidence defines hearsay 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." Evid. Rule 801(c). Similarly, Illinois courts have held that, "a statement offered for some reason, other than for the truth of the matter asserted, is generally admissible because it is not hearsay." *People v. Hammonds*, 354 Ill.Dec. 70, 85 (Ill. App. Ct. 1st Dist. 2011) (citing *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106 (Ill. App. Ct. 2d Dist. 2009)).

6. Respondents' Memo in Support discussed the Responsiveness Summary in the context of noting that Sierra Club had already submitted comments on issues identical to those presented in this proceeding and for purposes of demonstrating that Complainant had an opportunity to be heard by IEPA before it issued a final Construction Permit for the Respondents' FutureGen 2.0 Project, which is a clean coal demonstration project located in Meredosia, Illinois ("Project").

7. Accordingly, regardless of whether the Responsiveness Summary contains inadmissible hearsay as Sierra Club suggests (which as addressed below, it does not) the Responsiveness Summary is offered for purposes other than to prove "the truth of the matter asserted," an indispensable element of the "hearsay" definition under the Illinois Rules of Evidence. Respondents have not offered the Responsiveness Summary exclusively as evidence of the conclusions or statements made therein. Instead, the Responsiveness Summary is used to provide the Board with procedural context and to note that IEPA was responsive to comments provided by Sierra Club to IEPA on issues relevant to this proceeding. Because the Responsiveness Summary does not meet the basic definition required by Illinois' Rules of Evidence,[1] it is not hearsay and should not be stricken from the Memo in Support.

The Responsiveness Summary Qualifies for an Exception in the Hearsay Rule

8. Furthermore, even if the Responsiveness Summary was hearsay under the definition discussed above, the Responsiveness Summary meets the requirements of the "Public Records and Reports" hearsay exception, found in Rule 803(8) of the Illinois Rules of Evidence. Evid. Rule 803(8). Specifically, this exception states, "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) *matters observed pursuant to duty imposed by law as to which matters there was a duty to report*, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, unless the sources of information or other circumstances indicate lack of trustworthiness." *Id*. (emphasis added) ("Public Records Exception").

[1] Furthermore, the Responsiveness Summary is a public "record" under Illinois' State Records Act (5 ILCS 160/2) and the courts have consistently held that it is appropriate for the courts to take judicial notice of such public records. *E.g.*, *White & Brewer Trucking, Inc. v. Donley*, 925 F. Supp. 1306, 1310, fn. 6 (C.D. Il. 1997) (holding that the court may take judicial notice of public records prepared by IEPA that were incorporated into pleadings); *Garrido v. Arena*, 373 Ill. Dec. 182, 196 (1st Dist. 2013) (citing *Maldonado v. Creative Woodworking Concepts, Inc.*, 296 Ill. App. 3d 935, 938 (1998) for the proposition that, "Records from the Illinois Secretary of State's office . . . are public records that this court may take judicial notice of.").

9. With regard to the Public Records Exception, Illinois courts have held that, "The prerequisite for admission of a public record as an exception to the hearsay rule is that the record is made in the ordinary course of business and that it is authorized by statute, *agency regulation*, or is required by the nature of the public office." *People v. Williams*, 143 Ill. App. 3d 658, 663 (1st Dist. 1986) (citing, *People v. Hester*, 88 Ill. App. 3d 391, 395 (2nd Dist. 1980)) (emphasis added); *accord*, *Topps v. Unicorn Ins. Co.*, 271 Ill. App. 3d 111 (1st Dist. 1995), *People v. Brown*, 194 Ill. App. 3d 958, 969 (1st Dist. 1989).

10. By regulation, when reviewing permit applications, IEPA is required to prepare a responsive summary that responds to public comments. Specifically, IEPA's governing regulations state, "Responsiveness summary *shall be prepared* by the [IEPA]." 35 Ill. Adm. Code 166.192(a) (emphasis added). The Illinois courts have also held that such a responsiveness summary is required. *See*, *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill. App. 3d 391, 399 (4th Dist. 2002) (where the Court stated, "In addition, the IEPA must issue a responsiveness summary, addressing the comments made during the public hearing."). Further, courts have held that IEPA reports are generally admissible and are not hearsay, so long as they survive a trustworthiness inquiry. *See*, *U.S. v. Saporito*, 684 F. Supp. 2d 1043, 1048 (N.D. Ill. 2010) (citing, *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1206 (8th Cir. 1990)).

11. Because IEPA was required to prepare the Responsiveness Summary by law, the Responsiveness Summary is a matter "observed pursuant to a duty imposed by law" and for which there is "a duty to report," as required by the Public Records Exception. As a result, even if the Responsiveness Summary were considered hearsay, it qualifies for the Public Records Exception. *People v. Williams*, 143 Ill. App. at 663. Accordingly, the Responsiveness Summary is not hearsay and, therefore, is admissible evidence.

12. For the reasons set forth herein, the Respondents respectfully request that the Board enter an order denying Complainant's Motion to Strike.

//

Respectfully submitted this 8th day of September, 2014.

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RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION FOR EXTENSION OF TIME AND A CONTINUANCE TO ALLOW FOR DISCOVERY NECESSARY TO RESPOND TO SUMMARY JUDGMENT

1. On July 31, 2014, the Hearing Officer issued an order granting Sierra Club's request for an extension of time to respond to Respondents' Motion for Summary Judgment. This order noted that "[n]o additional extensions will be given." Now Sierra Club requests just such an extension. Sierra Club's request is premised on the assertion that it requires an additional four months to engage in discovery, but Sierra Club filed its complaint with this Board nearly three months ago and has yet to propound any discovery. It did not do so after filing its claim, it did not do so after service of Respondents Motion for Summary Judgment, and it did not do so after receiving an extension of time to complete its response to that motion. Sierra Club's approach is consistent with a strategy of delay. Such delays, if they occur, could kill the FutureGen 2.0 Project, which the Sierra Club clearly knows. Its request for an extension of time is disingenuous and unnecessary. The Board should deny Sierra Club's Motion for Continuance.

2. Litigants do not have an absolute right to a continuance, and the granting or denial of a motion for continuance lies within the discretion of the trial court. *Sands v. J.I. Case Co.,* 239 Ill.App.3d 19, 26, 178 Ill.Dec. 920, 605 N.E.2d 714, 718 (1992). A decisive factor in reviewing a court's exercise of its discretion is whether the party seeking the continuance acted

with due diligence in proceeding with the cause. *Sands,* 239 Ill.App.3d at 27, 178 Ill.Dec. 920, 605 N.E.2d at 718. Even if the denial of a continuance is found to be erroneous, it does not, in any event, constitute a denial of due process, as Sierra Club suggests. *In re Marriage of Pillot* (1986), 145 Ill.App.3d 293, 298, 99 Ill.Dec. 512, 495 N.E.2d 1247.

3. The Motion for Continuance is largely a restatement of Sierra Club's Response in Opposition to Respondents' Motion for Summary Judgment and its Response in Opposition to Respondents' Motion to Expedite. Accordingly, Respondents incorporate by reference their proposed replies in support of those motions in this response.

4. Sierra Club devotes not less than five pages of its memorandum in support of its Motion for Continuance and much of its Response to Respondents' Motion for Summary Judgment to the nuances of summary judgment practice in Illinois. Motion for Continuance, pp. 3-8; Response to Motion for Summary Judgment, pp. 8-14. Sierra Club characterizes Respondents' Motion for Summary Judgment as a "Celotex-type" motion and argues that a continuance is therefore virtually mandated. Motion for Continuance pp. 5-7; Response to Motion for Summary Judgment, pp. 4-5. This is not the rule of law in Illinois. *Sands,* 239 Ill.App.3d at 27, 178 Ill.Dec. 920, 605 N.E.2d at 718.

5. To the extent it is relevant, Sierra Club mischaracterizes Respondents' motion. Respondents' motion is not a "Celotex-type" motion. The 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 Respondents to judgment as a matter of law. Thus, Respondents' motion is a "traditional" motion. *See*, *Williams v. Covenant Medical Center*, 316 Ill.App.3d 688, 250 Ill.Dec. 40, 737 N.E.2d 662 (2000) ("by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test)"). Sierra Club's reliance on *Williams*, for the proposition that it is entitled to a continuance because Respondents have filed a "Celotex-type" motion is misplaced.

6. Moreover, Sierra Club disregards the ample opportunity that 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. Sierra Club's Motion for Continuance is premised on the assertion that it "cannot procure the critical [ ] evidence without an opportunity to engage in substantial and comprehensive discovery." Motion, p. 12. But Sierra Club has had an opportunity to engage in discovery and simply chose not to.

7. Sierra Club is intimately familiar with the FutureGen Project and has been aware of its purported discovery needs for well over a year. In October and November 2013, Sierra Club participated in the public comment process pertaining to the Project. As part of that process, it submitted voluminous comments about the subjects relating to sulfuric acid mist and creditable emissions decreases that it now asserts as bases for further delay. *See* Sierra Club comments attached as Exhibit ("Ex.") A to the Declaration of Dale Johnson in Support of Respondents' Reply—Motion to Expedite ("Johnson Decl.")[1] (asserting inter alia that the FutureGen Project is a major source of sulfuric acid mist (p.5), and that emissions decreases at the Meredosia facility are not creditable because they lack the same "qualitative significance" for public health and welfare as the corresponding emissions increases (p.9)).[2]

8. On December 9, 2013, Sierra Club filed nearly the same claim against Respondents in the U.S. District Court for the Central District of Illinois that it now brings before

[1] As a courtesy to the Board, in the interest of limiting the number of redundant documents filed in this case this Declaration and attachments are not reproduced and attached to this memorandum.

[2] For the first time, Sierra Club also claims that discovery is necessary to determine whether the PSD netting requirement for common control has been met by raising questions as to whether the Meredosia Energy Center has in fact been under the common control of the same owner or operator during the applicable netting period. Motion for Continuance, p. 10; Response to Motion for Summary Judgment, pp. 30-33. Construction of the FutureGen 2.0 Project commenced prior to the August 31, 2104 deadline established in the air construction permit for the Project. Declaration of Mark Williford attached to Respondents' Reply – Motion to Expedite. Ameren owned the Meredosia Energy Center at the time construction commenced. *Id*. No transfer of ownership of the Meredosia Energy Center from Ameren to the Alliance has occurred. *Id*. As a result, the "common control" requirement of the federal PSD netting regulations was fully satisfied because Ameren was in fact the owner of the entire Meredosia facility, including the portion upon which the Project is located, during the "contemporaneous" five-year period used for performing the PSD netting analysis. *See* 40 C.F.R. §52.21(b)(3) (providing that the emissions reductions are creditable if they occurred "five years before *construction* on the particular change *commences*.") (emphasis added).

this Board. In early May 2014, Sierra Club propounded discovery on Respondents in that case. Johnson Decl., Ex's B and E. It also asserted the need for discovery during oral argument before the court. Johnson Decl., Ex. D.

9. When confronted with Respondents' Motion for Summary Judgment in this case, Sierra Club waited until the day its response was due to request an extension of time to respond. The Hearing Officer made clear that although she would grant the request, "[n]o additional extensions will be given." Now, in response to Respondents' Motion for Summary Judgment, in its Response to Respondents' Motion to Expedite, and in its Motion For Extension of Time and Continuance, Sierra Club seeks several more months of delay under the guise of the need to engage in discovery.

10. As is clear from Respondents' Motion for Summary Judgment and Reply in Support of that motion, further discovery is unnecessary to resolve this case. Even 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. Sierra Club asserts that it needs approximately four months to "complete" discovery and an additional month to prepare for a hearing on the merits. Motion for Continuance, p.13. Yet notwithstanding full knowledge of its claims and related discovery needs for over a year and abundant time to engage in discovery, Sierra Club has undertaken no discovery in this proceeding. Had it done so at the outset of this case, Sierra Club's discovery would nearly be complete according to its own proposed four-month schedule.

11. Thus to the extent Sierra Club suffers any prejudice as a result of expediting this case, it is prejudice of Sierra Club's own making. On the other hand, the entire FutureGen Project is imperiled by further delay. *See* Respondents Memorandum in Support of Motion to Expedite and Reply in Support of that motion.

12. Sierra Club has already demonstrated a pattern of delay in the proceedings before this Board. In its July 28, 2014 Motion for Extension of Time to respond to Respondents pending Motion for Summary Judgment, Sierra Club made clear that it intended to request

further delay. Notwithstanding the Hearing Officer's July 31, 2014 Order granting Sierra Club's request that "[n]o additional extensions will be given," that is precisely what Sierra Club has done in both its Response to the Motion for Summary Judgment and in its related Motion for Extension to allow for Discovery.

13. Time is of the essence if the promising technology associated with FutureGen 2.0 Project is to be realized. This Board should expedite all aspects of this case, including a decision pertaining to the pending Motion for Summary Judgment. In the unlikely event the Board concludes that Sierra Club is entitled to additional delay, any such delay must account for Sierra Club's deliberate failure to utilize the time since filing its complaint to prepare its case.

For the reasons set forth herein, the Respondents respectfully request that this Board enter an order denying Sierra Club's Motion for Continuance.

Respectfully submitted this 8th day of September, 2014.

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RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY

Ameren Energy Medina Valley Cogen, LLC and FutureGen Industrial Alliance, Inc. ("FutureGen") (collectively, "Respondents") bring this Motion for Leave to File Reply in Further Support of Respondents' Motion for Summary Judgment and Respondents' Motion Expedite pursuant to 35 Illinois Admin. Code 101.500(e). This motion should be granted for the following reasons:

1. Complainant Sierra Club originally filed a complaint in this action on June 11, 2014, after its nearly identical claim before the United States District Court for the Central District of Illinois was dismissed.

2. On July 15, 2014, Respondents filed their pending Motion for Summary Judgment.

3. On July 16, 2014, Respondents filed their pending Motion to Expedite.

4. On July 28, 2014, the day its response to the Motion for Summary Judgment was due under 35 Illinois Admin. Code 101.500(d), Sierra Club filed a Motion for Extension of Time to Respond to Respondents' Motion for Summary Judgment and Motion to Expedite.

5. On July 31, 2014 the Hearing Officer issued an order granting Sierra Club's Motion for Extension of Time until August 25, 2014. This order noted that "[n]o additional extensions will be given."

6. On August 25, 2014 Sierra Club filed a 38-page Memorandum in Opposition to Respondent's Motion for summary Judgment and its Memorandum in Opposition to Respondents Motion to Expedite. Sierra Club's Motion in Opposition to Respondents' Motion for Summary Judgment incorporates a separate Motion to Strike and a Motion for Extension of time and a Continuance to Allow for Discovery Necessary to Respond to Respondents' Motion for Summary Judgment. Together, Sierra Club's responses and related motions amount to a request for substantial delay in this Board's proceedings.

7. Sierra Club has alleged facts and legal conclusions in its responses and related motions that merit a response from Respondents.

8. Consequently, pursuant to Illinois Admin. Code 101.500(e), Respondents seek to file a proposed Reply in Further Support of Respondents' Motion for Summary Judgment and a proposed Reply in Further Support of Respondents' Motion to Expedite attached hereto as Exhibits A and B respectively, to aid this Board in evaluating the merits of Respondents' motions.

9. Pursuant to Illinois Admin. Code 101.500(e), the Board and Hearing Officer have the discretion to allow reply briefs "to prevent material prejudice."

10. Respondents' Motion for Summary Judgment and Motion to Expedite involve complex, substantive issues relating to Sierra Club's collateral attack on the construction permit for the FutureGen 2.0 Project issued by the Illinois Environmental Protection Agency.

11. Allowing Respondents to file reply briefs will enable them to fully respond to the issues of fact and law raised by Sierra Club in its responsive briefing and to provide the Board with the complete background necessary to rule on Respondents' motions.

12. For these reasons, Respondents respectfully request that this Board grant their Motion for Leave to File a Reply and such other relief as this Board deems just and proper.

Respectfully submitted this 8th day of September, 2014.

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RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY

EXHIBIT A

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RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO EXPEDITE

Respondents AmerenEnergy Medina Valley Cogen, LLC ("Ameren") and the FutureGen Industrial Alliance Inc. (the "Alliance") [collectively, "Respondents"] have demonstrated the severe impacts on the FutureGen Project associated with the delay Sierra Club seeks in this case. Although the FutureGen Project has received the proper permits and construction has commenced, the very presence of Sierra Club's meritless attack on the Project has frustrated private sector financing and thereby imperils further government funding for the Project.

Plaintiffs filed their complaint nearly three months ago and have failed to undertake any discovery. Sierra Club's request for an additional four months to engage in discovery at this stage is disingenuous, unnecessary, and should be denied.

1. Sierra Club has Squandered its Opportunity to Engage in Discovery.

Sierra Club is intimately familiar with the FutureGen Project and has been aware of its purported discovery needs for well over a year. In October and November 2013, Sierra Club participated in the public comment process pertaining to the Project. It submitted voluminous comments about the subjects it now asserts as the bases for further delay and discovery. Attached hereto as Exhibit ("Ex.") A to the Declaration of Dale Johnson ("Johnson Decl.") is a November 8, 2013 Letter from Robert Ukeiley to Robert Studdard (asserting *inter alia* that the

FutureGen Project is a major source of sulfuric acid mist (p.5), and that emissions decreases at the Meredosia facility are not creditable because they lack the same "qualitative significance" for public health and welfare as the corresponding emissions increases (p.9)).[1]

On December 9, 2013, Sierra Club filed nearly the same claim against Respondents in the U.S. District Court for the Central District of Illinois that it now brings before this Board. In early May 2014, Sierra Club propounded discovery on Respondents in that case. Johnson Decl., Ex's B and E. It also asserted the need for discovery during oral argument before the court. Johnson Decl., Ex. D.

When confronted with Respondents' Motion for Summary Judgment in this case, Sierra Club waited until the day its response was due to request an extension of time to respond. The Hearing Officer made clear that although she would grant the request, "[n]o additional extensions will be given." Now, in response to Respondents' Motion for Summary Judgment, in its Response to Respondents' Motion to Expedite, and in its Motion For Extension of Time and Continuance, Sierra Club seeks several more months of delay under the guise of the need to engage in discovery.

2. <u>Additional Delay is Not Necessary</u>.

As is clear from Respondents' Motion for Summary Judgment and Reply in support of that motion, further discovery is unnecessary to resolve this case. Even 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. Sierra Club asserts that it needs approximately four months to "complete" discovery

[1] For the first time, Sierra Club also claims that discovery is necessary to determine whether the PSD netting requirement for common control has been met by raising questions as to whether the Meredosia Energy Center has in fact been under the common control of the same owner or operator during the applicable netting period. Response to Motion for Summary Judgment, pp. 30-33. Construction of the FutureGen 2.0 Project commenced prior to the August 31, 2104 deadline established in the air construction permit for the Project. Declaration of Mark Williford ("Williford's Decl.") attached hereto. Ameren owned the Meredosia Energy Center at the time construction commenced. *Id.* No transfer of ownership of the Meredosia Energy Center from Ameren to the Alliance has occurred. *Id.* As a result, the "common control" requirement of the the federal PSD netting regulations was fully satisfied because Ameren was in fact the owner of the entire Meredosia facility, including the portion upon which the Project is located, during the "contemporaneous" five-year period used for performing the PSD netting analysis. *See* 40 C.F.R. §52.21(b)(3) (providing that the emissions reductions are creditable if they occurred "five years before *construction* on the particular change *commences*.") (emphasis added).

and an additional month to prepare for a hearing on the merits. Sierra Club Response, p. 5. Yet notwithstanding full knowledge of its claims and related discovery needs for over a year and abundant time to engage in discovery, Sierra Club has undertaken no discovery in this proceeding. Had it done so at the outset of this case, Sierra Club's discovery would nearly be complete according to its own proposed four-month schedule.

Thus to the extent Sierra Club suffers any prejudice as a result of expediting this case, it is prejudice of Sierra Club's own making. On the other hand, the entire FutureGen Project is imperiled by further delay.

Sierra Club will not suffer material prejudice as a result of expedited review of its claim, but the FutureGen Project may be abandoned if it is not. Sierra Club has participated at all stages of review in this case and has all of the information necessary to respond to Respondents' Motion for Summary Judgment. All relevant records pertaining to IEPA's determination that a PSD permit is not required for the Project are included in the record compiled by IEPA during the FutureGen 2.0 permitting process. These records contain the information about the physical and operational design of the Project, and related emissions, relied upon by IEPA and the applicants in performing the netting analysis including, but not limited to: the permit application; the air construction permit dated December 13, 2013; applicable U.S. EPA and IEPA guidance documents; public comments and IEPA's responses thereto; and, related documents.

3. <u>Additional Delay may Result in Termination of FutureGen 2.0</u>.

Time is on Sierra Club's side and Sierra Club knows it. Sierra Club's opposition to Respondents' Motion to Expedite and its related Motion for Continuance are consistent with a strategy of delay that this Board should reject.

The Project is a public-private partnership, with costs shared by the U.S. Department of Energy, the alliance and other Project partners. *See* Declaration of Kenneth K. Humphreys Jr. at p. 2 (previously submitted in support of Respondents' Motion for Expedited Review). Both

federal and commercial financing are integral parts of Project funding. The federal government has appropriated one billion dollars for the Project that must be expended by September 30, 2015 without risking a loss of funding. *Id.* But the Project does not rely solely on federal funding. Commercial financing is also necessary for completion of the Project. Sierra Club's pending case adversely impacts the Alliance's ability to obtain private financing, further limiting Project funding. *Id*. The ability to obtain private sector financing is also closely linked to the U.S. Department of Energy's decision to continue to fund the Project. "Failure to obtain firm commercial commitments will likely result in a decision by DOE to withdraw [federal] funding for the Project." *Id*. at 10.

Sierra Club does not refute the risks associated with further project delay, rather it asserts that because funding is available now, the Alliance can commence construction and expend one billion dollars by the federal deadline, which is "more than a year away." Memorandum in Opposition to Respondent's Motion to Expedite, p.2. This argument simply ignores the complex relationship between private sector funding and release of federal funds for the Project. It also reflects Sierra Club's fundamental misunderstanding about how complex project development and construction schedules function.

Sierra Club further argues that allowing "unlawful" construction of the Project outweighs the risk of delay. This argument merely begs the question by assuming the "unlawfulness" of the Project. Sierra Club ignores the valid minor source permit already issued by IEPA. Sierra Club's orchestrated attempt to delay hearing of this case is premised on claims that have already been addressed by IEPA and that were accounted for in the process that resulted in issuance of the Project's minor source permit.

4. <u>Sierra Club has Adopted a Strategy of Delay</u>.

Sierra Club has already demonstrated a pattern of delay in the proceedings before this Board. In its July 28, 2014 Motion for Extension of Time to respond to Respondents pending Motion for Summary Judgment, Sierra Club made clear that it intended to request further delay.

Notwithstanding the Hearing Officer's July 31, 2014 Order granting Sierra club's request that "[n]o additional extensions will be given," that is precisely what Sierra Club has done in both its Response to the Motion for Summary Judgment and in its related Motion for Extension to allow for Discovery.

Litigants do not have an absolute right to a continuance, and the granting or denial of a motion for continuance lies within the discretion of the trial court and will not be overturned absent an abuse of discretion. *Sands v. J.I. Case Co.*, 239 Ill.App.3d 19, 26, 178 Ill.Dec. 920, 605 N.E.2d 714, 718 (1992). A decisive factor in reviewing a court's exercise of its discretion is whether the party seeking the continuance acted with due diligence in proceeding with the cause. *Sands*, 239 Ill.App.3d at 27, 178 Ill.Dec. 920, 605 N.E.2d at 718. Sierra Club invokes the Due Process Clause of the Illinois Constitution in support of its effort to further delay consideration of this case. The cases it cites in support are unavailing.

Time is of the essence if the promising technology associated with FutureGen 2.0 Project is to be realized. This Board should expedite all aspects of this case, including a decision pertaining to the pending Motion for Summary Judgment. In the unlikely event the Board concludes that Sierra Club is entitled to additional delay, any such delay must account for Sierra Club's deliberate failure to utilize the time since filing its complaint to prepare its case.

CONCLUSION

For the reasons set forth herein, the Respondents respectfully request that this Board enter an order directing expedited review of this case.

Respectfully submitted this 8th day of September, 2014.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB,	)	
	)	PCB 2014-134
Complainant,	)	
	)	(Enforcement-Air)
v.	)	
	)	
AMEREN ENERGY MEDINA VALLEY COGEN, LLC	)	
	)	
and	)	
	)	
FUTUREGEN INDUSTRIAL ALLIANCE INC.,	)	
	)	
Respondents.	)	

DECLARATION OF DALE N. JOHNSON IN SUPPORT OF RESPONDENTS' MOTION TO EXPEDITE

I, Dale N. Johnson, state as follows:

1. I am over eighteen years of age, have personal knowledge of the matters herein, and am competent to testify regarding all matters set forth herein.

2. Attached hereto as **Exhibit A** is a true and correct copy of Sierra Club's written comments related to the Draft Construction Permit for the FutureGen 2.0 Project dated November 8, 2013

3. Attached as **Exhibit B** is a true and correct copy of Sierra Club's First Set of Requests for Production to the FutureGen Alliance in the U.S. District Court case of *Sierra Club v. Ameren Energy Medina Valley Cogen , LLC et al.* (Civil Action No. 3:13-cv-3408-CSB-DGB.

4. Attached as **Exhibit C** is a true and correct copy of Sierra Club's First Set of Requests for Production to Ameren Energy Medina Valley Cogen, LLC in the U.S. District Court case of *Sierra Club v. Ameren Energy Medina Valley Cogen , LLC et al.* (Civil Action No. 3:13-cv-3408-CSB-DGB.

5. Attached hereto as **Exhibit D** is a true and correct copy of page 1 and pages 27 through 31 of the transcript of the May 16, 2014, oral argument before the Honorable Colin Stirling Bruce, U.S. District Court Judge, pertaining to Respondents Ameren Energy Medina Valley Cogen, LLC, and FutureGen Alliance, Inc.'s Motion to Dismiss.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 8th day of September, 2014.

Dale N. Johnson
Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104-1728

EXHIBIT A

SIERRA CLUB
FOUNDED 1892

VIA EMAIL

November 8, 2013

Dean Studer - Hearing Officer,
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P.O. Box 19276,
Springfield, IL 62794-9276
Dean.Studer@illinois.gov
epa.publichearingcom@illinois.gov

Re: Ameren Energy Resources and FutureGen Industrial Alliance Construction Permit for the FutureGen 2.0 Project (137805AAA) Application No.: 12020013

Dear Mr. Studer:

On behalf of the Sierra Club and the Natural Resources Defense Council (NRDC), we write to submit comments on the draft Clean Air Act minor source permit that the Illinois Environmental Protection Agency (Illinois EPA) has proposed to issue for FutureGen 2.0 coal-fired power plant, 137805AAA. Adding a new coal-fired power plant to Illinois is extremely ill advised. The Applicant's own analysis shows that the area in which this new coal-fired power plant is proposed is already riddled with sulfur dioxide pollution levels that exceed the health-based national ambient air quality standard by more than ten times. While there are no ozone monitors in Morgan County where the new coal-fired unit is proposed, lack of data regarding pollution levels does not make anyone safe. What we do know is that the nearby Jersey County ozone monitor has a 2010 – 2012 design value of 79 parts per billion (ppb) thus exceeding the health based ambient air quality standard of 75 ppb. Neighboring Sangamon County has an ozone monitor that appears to have been installed in 2011. Its 2011 4th highest value was 79 ppb and its 2012 4th highest was 76 ppb. Thus, Sangamon County also appears to be headed for a nonattainment designation for the 2008 ozone standard. Permitting the addition of over 3,468,000 pounds per year of nitrogen dioxide, an ozone precursor, and the addition of over 646,000 pounds per year of sulfur dioxide to this area that is already violating health based air quality standards is wrong.

It is in this context that we submit the following comments explaining why it would be illegal for IEPA to issue its proposed air pollution permit to Ameren's proposed new coal-fired power plant.

I. THE DRAFT PERMIT VIOLATES THE CLEAN AIR ACT'S PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS BECAUSE THE PROPOSED COAL-FIRED UNIT TRIGGERS PREVENTION OF SIGNIFICANT DETERIORATION.

The Prevention of Significant Deterioration (PSD) program found in Part C of Title I of the federal Clean Air Act establishes the statutory framework for protecting public health and welfare from adverse effects of air pollution in areas designated attainment. Congress specified that the PSD program is intended to:

> insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources"; and (2) "assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

42 U.S.C. § 7470.

To accomplish these purposes, the Clean Air Act relies primarily on a pre-construction permitting program as the mechanism for reviewing proposals to increase air pollution in areas meeting the National Ambient Air Quality Standards (NAAQS). The Clean Air Act generally requires PSD permits prior to construction and/or operation of new major stationary sources and major modifications to stationary sources in areas designated attainment or unclassified for the pollutants to be emitted by the sources. ***See*** 42 U.S.C. §§ 7475 (a) and 7479(2)(C). "Modification" is defined to include, "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4).

IEPA and the Applicant agree that the new oxy-boiler and most of the other changes occurring because of the FutureGen 2.0 project are new construction and/or

physical changes or changes of operation. ***See e.g.*** Ex. 1 at 23, Table 3-1.[1] Furthermore, IEPA and the Applicant agree that these activities will create significant emission increases for NSR regulated pollutants. The Applicant states:

> FutureGen 2.0 emissions increases are greater than the significant emissions rates so the Project will result in a significant emissions increase as that term is defined in the US EPA regulations.

Ex. 1 at 31, 33. ***See also*** Draft Permit at Attachment 1. Actually, the Applicant claims its emission increases are not significant for lead and fluorides. ***See*** Ex. 1 at 38. However, as explained below, fluorides are significant.

Therefore, except for fluorides, the only issue with regard to PSD applicability is whether the changes cause significant net emission increases. The Applicant and IEPA claim that they do not. ***See e.g.*** Draft Permit at Finding 3 ("this project will not be accompanied by significant net increases in emissions of PSD pollutants"). However, as detailed below, the changes do cause significant net emission increases for Particulate Matter (PM), Particulate Matter smaller than 10 microns in diameter (PM10), Particulate Matter smaller than 2.5 microns in diameter (PM2.5), sulfur dioxide (SO_2), nitrogen oxides (NOx), Sulfuric Acid Mist (SAM), fluorides, and Greenhouse Gases. Thus, PSD is an applicable requirement for these pollutants which requires the Applicant to obtain a PSD permit.

A. SHUTDOWN OF UNITS 1 – 6 ARE NOT CREDITABLE EMISSION DECREASES FOR PM, PM10, PM2.5, NOx AND SO_2 BECAUSE THEY OCCURRED BEFORE THE MINOR SOURCE BASELINE DATE

The Applicant admits that for a decrease to be creditable under the PSD regulations the following must be true. "All increases and decreases have occurred after the applicable minor source baseline date." Ex. 1 at 33. ***See also*** 40 C.F.R. § 52.21(b)(3)(iv). While the Applicant clearly acknowledges that a decrease must occur after the minor source baseline date, the Applicant and IEPA completely fail to discuss this requirement, much less demonstrate that it is met.

The decreases in PM2.5 emissions from the shutdown of existing boilers did not occur after the PM2.5 minor source baseline date. The trigger date must occur before the minor source baseline date. ***See e.g.*** 75 Fed. Reg. 64,864, 64,868 (Oct. 20, 2010). After the trigger date, the minor source baseline date is established when

[1] Exhibit 1 is a compilation of documents provided by IEPA. Since it does not include sequential page numbers throughout, we refer to the page numbers in the pdf reader.

the first complete PSD permit application covering the pollutant in question is filed for the area at issue. *Id.*

The trigger date for PM2.5 is October 20, 2011. 75 Fed. Reg. at 64,887. Therefore, by definition, the minor source baseline date for PM2.5 cannot be before October 20, 2011. According to the Applicant, the decrease at Units 1 – 4 happened on November 9, 2009 when the units were removed from service. Ex. 1 at 34. Thus, this decrease from Units 1-4 is not creditable because it happened before the PM2.5 minor source baseline date.

Units 5 & 6 were removed from service and thus created decreases, according to the Applicant, on January 1, 2012. Ex. 1 at 34. However, the Applicant and IEPA did not claim, nor do we think they could, that a complete PSD application covering Morgan County, Illinois, was filed between October 21, 2011 and December 31, 2011. Thus, the PM2.5 reductions from Units 5 & 6 are also not creditable. The fact that increase from the 2008 emergency engine generator is not creditable does not change the conclusion. The new equipment for FutureGen 2.0 will create an increase of 97 tpy of PM2.5. There are no creditable increases or decreases so the net increase is also 97 tpy of PM2.5. This is above the significance threshold of 10 tpy so FutureGen 2.0 triggers PSD for PM2.5.

A similar analysis should apply to PM, PM10, SO_2 and NOx. Neither the Applicant nor IEPA claim that the minor source baseline date was established for PM, PM10, SO_2 or NOx in Morgan County before November 9, 2009 or January 1, 2012. We have no reason to believe that the minor source baseline date was triggered for PM, PM10, SO_2 or NOx in Morgan County before November 9, 2009 or January 1, 2012. Thus, the decreases from the shutdown of Boilers 1-6 are not creditable for PM, PM10, SO_2 or NOx. Therefore, FutureGen 2.0 causes a significant net emission increase for these pollutants as well as a significant emission increase, triggering PSD.

B. THE APPLICANT AND IEPA UNDERESTIMATE THE EMISSION INCREASES

In calculating the net emissions, IEPA and the Applicant under-calculated the emission increases from the new equipment. First, they failed to consider CO_2 from the scrubbers, that is the hydrated lime using circulating dry scrubber (CDS) and the trona using direct contact cooling/polishing system (DCCPS). Both of these systems produce CO_2 as a byproduct of the reaction with SO_2. However, this CO_2 was not considered.

IEPA and the Applicant also failed to consider fugitive emissions from the coal in the coal trucks. We do not mean the emissions that the coal trucks generate

off the road but rather coal that is blown out of the back of the coal truck while the coal trucks are on-site. IEPA and the Applicant also underestimate fugitive emissions from the haul roads. ***See*** Victoria R. Stamper, Evaluation of Particulate Matter Emissions from Haul Road at the Proposed FutureGen 2.0 Project at the Meredosia Energy Center, Nov. 7, 2013 at 6, attached as Ex. 2.[2]

In addition, the application assumes only N_2 is the output from the air separation unit. Ex. 1 at 16. The draft permit does not requiring any testing and monitoring to see if any NOx, N_2O, ozone, methane, or carbon dioxide is emitted from the air separation unit. All of these pollutants could be formed and emitted in the air separation unit because they are constituents of ambient air.

C. FUTUREGEN 2.0 IS A MAJOR SOURCE FOR SULFURIC ACID MIST, FLOURIDES AND NOx

The draft permit claims that the net emission increase of sulfuric acid mist (SAM) is 6.92 tons per year (tpy), which is just 0.08 tpy below the 7 tpy major source threshold. Draft Permit at Table 1B. However, the Applicant left out SAM from the installation of the diesel engine permitted on November 21, 2008, IEPA Permit No. 08100029, in its calculations. ***Id.***; Project Summary at 5. Of course, diesel fuel permitted to be burned in the emergency diesel generator permitted in 2008 contained sulfur. Therefore, the Applicant must quantify that emergency diesel generators sulfuric acid mist potential to emit PTE in 2008 to see if, accepting all other premises, which we don't, that diesel engine, would push the facility over the major source threshold for sulfuric acid mist.

However, as mentioned above, we do not accept all of the Applicant's other premises in calculating the significant net emission increases. The Applicant assumed that the oxy-boiler's SAM emission rate while air firing is 2.97 lb/hr. Ex. 1 at 25. However, the Applicant also assumed that the oxy-boiler would only operate at air firing up to 45% load and only for 4800 hours per year. Ex. 1 at 24.

This assumption is not enforceable as a practical matter. The draft permit does not limit the oxy-boiler to 4800 hours per year of air firing and does not limit it to only air firing below 45% load. Rather, the draft permit says the opposite. The draft permit explains: "In the event of an upset in the operation of the boiler or an outage or upset in the CO_2 pipeline or the sequestration facility, the boiler can transition back into air firing mode." Draft Permit 2.1.1. This is true. But it is equally true that as the permit is currently written, the Applicant is permitted to

[2] This report identified other flaws in the Applicant and draft permit which are hereby incorporated herein by reference.

operate the oxy-boiler in air-firing mode all the time. Air-firing mode is much more economical and efficient. The owners or operators could choose to operate in air firing mode for a variety of reasons such as outage or upset in the boiler, including the air separation unit, the pipeline or the sequestration site. ***See*** Project Summary at 2. In addition, because the permit does not require carbon capture, it could be simply that the operator chooses to operate the plant as a "traditional" pulverized coal plant. The air separation unit is very expensive to operate so the owners and operators have a tremendous financial incentive to operate this unit air firing as much as possible. It is also critical to keep in mind that the conditions in this permit are permanent. The owners and operators current intent can certainly change in the decades to come. Operating at full load air firing, this would be the only pulverized coal unit permitted in the last decade or longer without SCR.

Minor source status to avoid PSD, that is a source's potential to emit, must be calculated based on the maximum output, that is 100% load, and every hour of the year unless there is a physical or legal restriction. ***See*** 40 C.F.R. § 52.21(b)(4). Thus, the SAM emission factor for air-firing should be 6.6 lb/hr (2.97 * 1/.45 = 6.6) as there is no physical or legal restriction on operating the oxy-boiler in air-firing mode above 45% load. There is also no enforceable limit on hours of operation firing air. Therefore, the potential to emit must be based on 8,760 hours per year which results in the following calculation. 6.6 lb/hr * 8,760 hours per year = 28.9 tons per year. The Applicant claims a contemporaneous emission decrease of 3.58 tons per year of SAM. Ex. 1 at 38. As explained elsewhere, we dispute this claim but even if you accepted the decrease as true, that would still result in a SAM net increase of 25.3 tpy based on increases from the oxy-boiler alone. This is above the SAM significance threshold of 7 tpy, making FutureGen 2.0 a PSD major source for SAM.

The SAM emission limits in Draft Permit Condition 2.1.6(b) does not change this conclusion. The Draft Permit lacks testing, monitoring and reporting for SAM emissions. It does not even have a one-time stack test, much less continuous monitoring that applies at all times including startup, shutdown or malfunction. Thus, those limits do not change the potential to emit 28.9 tpy or the significant net increase of 25.3 tpy. ***See*** 40 C.F.R. § 52.21(b)(4).

We note that FutureGen 2.0 would be a major source based on removing either one of the unenforceable assumptions alone. That is if one accepted the Applicant's emission rate of 2.97 lb/hr but calculated PTE based on the permitted 8760 hours per year, that would be 13 tpy SAM. Minus the disputed 3.58 contemporaneous decrease, the net increase would still be 9.4 tpy which is above the SAM significance threshold.

Similar, if one accepts the 4800 hour per year limitation but corrects the load to the allowable 100% while air firing, the emission rate is 6.6 lb/hr * 4800 hr/ yr = 15.84 tpy year. Subtracting the disputed decrease of 3.58 leaves a net increase of 12.26 tpy which is above the 7 tpy significance threshold.

We also note that the Applicant did not actually provide the SAM emission rate estimates from Babcock and Wilcox. ***See*** Ex. 1 at 25, ftnt 3. However, to the extent they are based on the nominal heat input of 1,605 mmbtu/hr, Ex. 1 at 24, it under-predicts potential to emit. The only enforceable limit is 14,500,000 mmbtu/yr. Draft permit at 13, Condition 2.1.6.a. That works out to an hourly maximum heat input of 1,655 mmbtu/hr maximum. (14,500,000/8760 = 1,655.25).

Finally, we note that in the original permit application, the Applicant stated that SO3 emissions would be 26 tons per year when air firing at 45% load. Ex. 1 at 215. Even at 4800 hours per year/ that is 14.2 tpy which would make the source major for sulfuric acid mist. (26 * 4800/8760 = 14.247). The Applicant has not explained why the revised application assumed less SAM emissions.

The same basic problems apply to NOx. The Applicant claimed the oxy-boiler's NOx emissions while air firing is 319 lb/hr based on a 45% load. Ex. 1 at 25. However, at the permitted 100% load air firing, this would be 708.9 lb/hr. (1/.45 * 319 = 708.88). 708.9 lb/hr * 8760 hr/yr = 3104.9 tpy. (708.9 * 8760 / 2000 = 3104.93). Even accepting the Applicant's disputed contemporaneous decrease of 2,813 tpy, the net increase for just the main boiler would be 291.9 tpy which is above the 40 ton per year significance threshold for NOx. The annual limit in Draft Permit Condition 2.1.6(b) is not enforceable as a practical matter because the Draft Permit does not say that CEMs have to operate all the time and that compliance with the annual limit has to be determined based on NOx emissions during every hour of operation.

Fluorides are also above the significance level. The Applicant claims a 0.63 lb/hr emission factor at 45% load. Ex. 1 at 25. This translates to 1.4 lb/hr at the permitted 100% load. (1/.45 * 0.63 = 1.4). 1.4 lb/hr for a full year is 6.1 tpy. (1.4 * 8760 / 2000 = 6.132). This is above the 3 tpy significance threshold. The Applicant did not claim that there was a contemporaneous decrease so the new boiler triggers PSD for fluorides also.

Again, the fluorides emission limit in Draft Permit Condition 2.1.6(b) does not change this conclusion. The Draft Permit is completely devoid of any monitoring, testing or reporting for fluorides. Thus, the fluorides emission limit is

not federally or practically enforceable and therefore does not impact the potential to emit calculation. ***See*** 40 C.F.R. § 52.21(b)(4).

D. FUTUREGEN 2.0 IS ALSO A PSD MAJOR SOURCE BECAUSE THE APPLICANT USED AN IMPREMISSIBLE BASELINE PERIOD FOR EMISSION DECREASES.

FutureGen 2.0 also triggers PSD for all pollutants but sulfur dioxide and PM10, because the Applicant's analysis incorrectly used a baseline for calculating the emission decreases from the shutdown of Boilers 1 – 6 that is more than 5 years prior to commencing construction on the FutureGen 2.0 project. The Applicant used a baseline for calculating the decreases from the Boilers 1 – 6 of March 2007 to February 2009. However, the Applicant indicates it intends to commence construction in July 2014. ***See*** Draft Permit, Table 1B, Note A. Thus, the baseline period can begin no earlier than August 2009.

40 C.F.R. § 52.21(b)(3)(i)(B) says baseline "actual emissions for calculating increases and decreases under this paragraph (b)(3)(i)(b) shall be determined as provided in paragraph (b)(48) of this section, except that paragraphs (b)(48)(i)(c) and (b)(48)(ii)(d) of this section shall not apply."

Paragraph (b)(48) provides the baseline is the:

> average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding when **the owner or operator begins actual construction of the project.**

40 C.F.R. § 52.21(b)(48)(emphasis added).

The Applicant goes on to claim, without any citation, that "US EPA has determined that the baseline period for contemporaneous emissions changes is based on the date the change occurred." Ex. 1 at 34. This claim contradicts the plain language of 52.21(b)(48) which says the baseline for contemporaneous increases and decreases is "***any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding when the owner or operator begins actual construction of the project.***" The plain language controls. Thus, the baseline period can thus start no earlier than August 2009, which is five years prior to when the Applicant will begin actual construction. ***See*** Ex. 1 at 61.

If the correct baseline is used, FutureGen 2.0 will result in significant net emission increases for GHG, PM2.5, and NOx. The following calculations rely on the project's potential emissions from the Draft Permit, Attachment 1, Table 1B and data from the EPA's Clean Air Markets database, attached as Ex. 3. We exclude the increase from the emergency engine-generator permitted in 2008 as this was before the baseline period. However, we accept the Applicant's PTE calculations for the sake of this analysis even though we dispute them elsewhere.

Using the proper baseline, the creditable decrease in NOx emissions from the shutdown of boilers at Meredosia should be 882 tpy (Ex. 3, cell H146, 1,764 / 2 = 882), resulting in net emissions increase of of 852 tpy (1,734.4-882), far above the threshold of 40 tpy. For PM 2.5, using the Draft Permit's emission factor, the proper baseline results in a creditable decrease of 72 tpy (Ex. 3, cell L146, 287,363.2 lbs/24 months / 2 = 14,3681.6/2,000 = 71.8 tpy), which results in a net emissions increase of 25 tpy (97 – 72 = 25). This is over the PM2.5 significance threshold of 10 tpy. Finally, for CO_2, the proper baseline calculation results in a creditable decrease of 935,848 tpy (Ex. 3, cell I146, 1,871,695 / 2 = 935,847.5), resulting in a net emissions increase of 586,655 tpy (1,522,503 – 935,848 = 586,655). This exceeds the 75,000 tpy significance threshold to an extent that easily covers any potential creditable decrease from NOx or methane that may not have been included in the Applicant's calculation.

E. THE APPLICANT CANNOT NET OUT BECAUSE THE EMISSION INCREASE WILL CAUSE VIOLATIONS OF THE NAAQS

> The PSD regulations restrict the creditability of some decreases in emissions for 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)]. Where 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 (see 54 FR 27298). Even if EPA found the proffered reductions otherwise quantitatively acceptable in this case--where the existing emissions units have not contributed to ambient concentrations for the last 10 years-- Cyprus would have to perform sufficient air quality modeling to demonstrate that the

emissions increase from the new units would not violate the applicable NAAQS and PSD increments before the reductions could be credited (see 54 FR 27298).

Aug. 11, 1992 Memorandum from John Calcagni to David Kee, re: Proposed Netting for Modifications at Cyprus Northshore Mining Corporation, Silver Baym Minnesota, attached as Ex. 4 at 6.

FutureGen 2.0 modeling establishes that it violates the 1-hour SO_2 and NOx NAAQS. Ex. 1 at 6-7. Therefore, FutureGen 2.0 cannot net out of PSD.

The Applicant tries to excuse its violations of the NAAQS by claiming that because its contribution to the NAAQS violation was below what it claims is the significant impact level, there is no problem. However, the U.S. Court of Appeals for the District of Columbia has recently rejected the use of significant impact levels. ***See Sierra Club v. EPA***, 705 F.3d 458 (D.C. Cir. 2013).

Moreover, even before that decision, US EPA had determined that if a source causes any NAAQS violations, regardless of the level of contribution, the violation cannot be forgive. The Applicant failed to do any this analysis.

We also note that the modeling determined there would be NAAQS violations even though the modeling was not conservative, that is it under-predicted violations or ignored violations. For example, the Applicant only modeled the oxy-boiler air firing as low power operations, which we assume is limited to 45% load based on the assumptions about air firing that the Applicant made in calculating PTE. Ex. 1 at 46. However, as explained above, the permit allows and even says that the oxy-boiler can and will operate in air firing mode outside of startups and shutdowns. Thus, NOx and SO_2 modeling must be done for air firing at 100% load. This is particularly important because a mere 4 or 8 hours of emissions per year can cause NAAQS violations of the 1-hour NAAQS.

Furthermore, the Applicant did not model the haul roads or new emergency diesel generator at sequestration site and old generator at old site and coal pile fugitives for PM10 and PM2.5. There are new haul roads and also there is much more activity on the haul roads as trona and lime were not used on site and the ash used to be disposed of on-site rather than being hauled off-site. Ex. 1 at 22. In modeling the haul roads, the Applicant must use worst day emissions which we provided in the Stamper report. ***See*** Ex. 2 at 7. Also, the Applicant failed to consider coal blown out of the coal trucks while they are hauling the coal in.

II. THE EMISSION LIMITS FOR THE NEW UNIT ARE NOT ENFORCEABLE

There are numerous provisions of the application and draft permit which are not federally enforceable or not enforceable as a practical matter. For example, lead PTE was based on AP42 emission factors. Ex. 1 at 25, fn 8. VOC was based on vendor estimates. ***Id.*** at fn 4. The draft permit does not require any testing to confirm these emission factor estimates are not actually exceeded. Thus, the claim that the source is minor for these pollutants is not enforceable. In order to make these enforceable, the permit needs to require a CEMS or annual stack testing at various loads and all operating scenarios including air firing coupled with parametric monitoring.

CH_4 and N_2O PTE was from default emission factors from the 40 C.F.R. § 98 mandatory greenhouse gas reporting rule. ***Id.*** at 25, fn 6. The permit needs adequate testing for these to confirm. The Draft Permit requires one time testing. That is not enough.

Furthermore, the permit must require commencement of construction by not later than 8/14 in order for the Applicant's disputed claim of contemporaneous reductions to be valid under the Applicant's own theory. This is so because the last time Unit 1-4 emitted pollution was 8/09. ***See*** Ex. 3.

NOx and SO_2 monitoring must apply all the time for netting to be valide including during startups, shutdowns and malfunctions (SSM). Alternative monitoring or NSPS monitoring is not sufficient as it does not require emission data from every hour of operations.

The application claims that the "auxiliary boiler will utilize ultra low sulfur diesel oil[.]" Ex. 1 at 21. This is 15 ppm sulfur. Ex. 1 at 27, ftnt. 13. However, the draft permit only limits the auxiliary boiler to 5000 ppm sulfur oil. Draft permit at 2.2.3-1(a)(iii)(A). Therefore, the permit needs a condition limiting the auxiliary boiler to 15 ppm sulfur diesel as well as monitoring and reporting to make this condition enforceable as a practical matter. The reporting must ensure that the source does not use diesel currently on site that is above 15 ppm sulfur or transmix diesel.

The application claims that the oxy-boiler will have a total HAP emission of no greater than 1.09 lb/hr at all times including startup, shutdown and malfunction. Ex. 1 at 59. Therefore, the permit needs a total HAP emission limit of 1.09 lb/hr

that applies at all times including startup, shutdown and malfunction. The permit should also include a HAPs CEM which monitors HCL and other HAPs at all times including during startup, shutdown, and malfunction.

This is critical because AP-42 reports a HCL emission factor of 1.2 lb/ton. This means that burning a mere 16,666 tons of coal in the oxy boiler uncontrolled would put the source over the 10 tons per year HAPs major source threshold.

The application assumes 95% control for two transfer points for the coal handling equipment: (1) Conveyor C to Chain Conveyor and, (2) Chain Conveyor to Coal Silos. Ex. 1 at 52. Therefore the permit must have emission limits, testing and monitoring to ensure that these emission limits, that is 0.85 lh/hr PM, 0.38 lb/hr PM10 and 0.0425 lb/hr PM2.5 for each of these transfer points, is not exceeded. In addition, the permit must require there be zero fugitive emissions from these transfer points and monitoring, testing and report to ensure compliance with the absolute restriction on fugitives from the transfer points.

Similarly, the application assumes 0.02 grains per dry standard cubic feet PM emissions from the ash silo bin vent, lime transfer and trona transfer. Ex. 1 at 53, 54, 55. The permit needs to have an emission limit of 0.02 grains per dry standard cubic feet for these emission sources and monitoring, testing and reporting to ensure this 0.02 grains limit is enforceable as a practical matter. Similarly, the permit needs to limit the trona transfer flow to no more than 700 scfm, the lime flow to 1,500 scfm, the ash flow to 2,500 scfm. ***Id.*** The permit needs testing, monitoring and reporting to ensure that these flow limits are not violated. In the alternative, these emission points could have PM CEMs.

The permit also needs to limit coal to 744,600 tons per year of coal as many of the emission calculations are based on this assumption. The 14,500,000 mmbtu/yr limit is important for other calculations but it is not sufficient for all calculations such as the coal transfer equipment and the haul roads. The permit must also include monitoring and reporting to ensure that the 744,600 tons per year of coal limit is enforceable as a practical matter.

As to the Pugmill to trucks droppoint, the application assumes the ash is wetted to 15% moisture. Ex. 1 at 53. The permit must have an enforceable requirement that the ash be wetted to 15% moisture content and testing, monitoring and reporting for this requirement.

The permit must limit the drift flow for the Unit 4 main cooling tower to 0.94 gpm, for the ASU/CPU cooling tower to 0.23 gpm and the DCCPS cooling tower to

0.16 gpm. ***See*** Ex. 1 at 56. The permit must also limit the total dissolved solids (TDS) to 518 ppm for the Unit 4 main cooling tower, 2090 ppm for the ASU/CPU cooling tower and 7043 ppm for the DCCPS cooling tower. The permit must have testing, monitoring and report requirements to ensure these gpm and TDS limits are not exceeded.

The annual NOx, CO, PM, PM10, PM2.5 and GHG limits for the auxiliary boiler are not enforceable as a practical matter. One time testing tells nothing about annual emissions. While Draft Permit Condition 2.2.9(g)(iii) states that the Applicant should keep records of these pollutants in tons/month and tons/year, there is no data for the Applicant to keep these records. In addition, the initial test for NOx and CO is within one year of startup of the oxy-boiler. ***See*** Draft Permit Condition 2.2.7-2(a)(i). There is no reason to allow a year of operations to go by before determining initial compliance.

III. THE ILLINOIS CLEAN COAL PORTFOLIO STANDARD LAW DOES NOT ABDICATE ILLINOIS EPA OF ITS RESPONSIBILITY TO ISSUE A PERMIT FOR THIS FACILITY THAT IS COMPLIANT WITH THE CLEAN AIR ACT.

IEPA should include permit terms requiring carbon capture in this construction permit. The Illinois Administrative Code expressly recognizes the IEPA's discretion in setting permit terms and conditions. ***See*** 35 IAC Section 201.156 ("The Agency may impose such conditions in a construction permit as may be necessary to accomplish the purposes of the Act, and as are not inconsistent with the regulations promulgated by the Board thereunder.").

During the public hearing on the draft permit, the Applicant suggested that the Illinois Public Agency Act's definition of a clean coal facility may somehow preclude inclusion of carbon capture requirements in this construction permit. The Public Agency Act, however, does not include any such limitation. The law's purpose is to create an independent state agency, the Illinois Public Agency (IPA), to develop and administer electricity procurement plans for investor-owned electric utilities supplying over 100,000 Illinois customers. ***See*** Public Act 95-0481. Under the law, plans must include the procurement of cost-effective renewable energy resources. The law also states that "the goal of the State [is] that by January 1, 2025, 25% of the electricity used in the State shall be generated by cost-effective clean coal facilities." The Illinois Commerce Commission (ICC) has stated that the law then "set[s] forth a framework for evaluation and approval of certain clean coal sourcing agreements," and "provides that the IPA and the ICC may approve such sourcing agreements, as long as they do not exceed cost-based benchmarks." Re FutureGen

Industrial Alliance, Inc., 13-0034, June 26, 2013 (Ill.C.C.). As such, "clean coal" facilities are defined in the law.

In relevant part, the Public Agency Act defines a "clean coal facility" as "an electric generating facility that uses primarily coal as a feedstock and that captures and sequesters carbon dioxide emissions at ... at least 70% of the total carbon dioxide emissions that the facility would otherwise emit if, at the time construction commences, the facility is scheduled to commence operation during 2016 or 2017..." The definition also limits emissions from such facilities to the "allowable emission rates for sulfur dioxide, nitrogen oxides, carbon monoxide, particulates and mercury for a natural gas-fired combined-cycle facility the same size as and in the same location as the clean coal facility at the time the clean coal facility obtains an approved air permit." 20 ILCS 3855/1-10.

The law does not, however, discuss requirements for "clean coal" construction permits, nor does it limit IEPA's authority with respect to issuing a robust permit in accordance with the purposes of Illinois' Environmental Protection Act. Indeed, there is nothing in the Public Agency Act suggesting that carbon capture should not also be included in the construction permit. Whether the restrictions included in the Public Agency Act's definition of a "clean coal facility" are included in any financing, cooperation, or purchasing agreements that the permittee has entered into should not insulate the air permit from including similar restrictions.

The hearing officer made clear that this permit is governed by the Illinois Environmental Protection Act rather than the Public Agency Act. At the hearing, he explained: "And I can tell you that our authority to issue permits is not based on the act that you stated, it's based on the Environmental Protection Act." Public Hearing Transcript at 32:9-18.

IV. ILLINOIS EPA SHOULD CONSIDER THE PROPOSED NEW SOURCE PERFORMANCE STANDARD FOR GREENHOUSE GAS EMISSIONS.

New electric generating units are affected units under the US EPA's proposed new source performance standard (NSPS) for emissions of carbon dioxide. According to the US EPA's new proposed rule, the NSPS "will apply to both a new, greenfield EGU facility or an existing facility that adds EGU capacity by adding a new EGU that is an affected facility under this NSPS." Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, [EPA-HQ-OAR-2013-0495; RL-9839-4], at 309-10 (September 20, 2013).

The draft permit states that the oxy-combustion boiler is a new unit under 40 C.F.R. 60 subpart Da. Draft Permit at 4; ***see also*** Ex. 1 at 181, 189; Draft Permit at Condition 2.1.4(b)(ii)(the affected boiler is a "new" unit). As such, the NSPS for carbon dioxide will apply to FutureGen's oxy-combustion boiler. The draft permit's project summary section also appears to acknowledge that the proposed rule will apply to FutureGen 2.0's oxy-combustion boiler, but states that the new limitations are not included in the permit "because USEPA has not completed this rulemaking." Draft Permit at 6, fn. 12 (stating that the unit will satisfy the new rule because "the plant would be designed to sequester CO_2, as the USEPA proposed for new coal-fired generating units.)

Under the Clean Air Act, however, the emission limits in the proposed rule will apply from the date of the proposal once the rule is finalized. 42 U.S.C. §§ 7411(a)(2). And as a major source of carbon dioxide, as shown above, FutureGen 2.0 will be required to comply with the best available control technology (BACT) for that pollutant. The proposed rule establishes limits which will form the "floor" with this requirement. As such, the Illinois EPA should use its discretion to include the proposed rule's CO_2 limits in the draft permit.

V. MISCELLANEOUS ISSUES

A. THE DRAFT PERMIT CONTAINS THE INCORRECT NSPS EMISSION LIMITS FOR THE OXY-BOILER

Both the Applicant and IEPA agree that the latest NSPS Subpart Da applies to the oxy-boiler. However, the application incorrectly cites to 40 C.F.R. § 60.44Da(f)(1)(i) & (ii) and incorrectly states that the oxy-boiler has to comply with a 0.07 lb/MWhr (gross) or 0.76 lb/MWhr (net) NOx emission limit based on a 30 day rolling averaging. Ex. 1 at 40. 40 C.F.R. § 66.44Da(f) applies to IGCC units that commence construction, reconstruction or modification before May 4, 2011. The oxy-boiler is not an IGCC unit and did not commence construction, reconstruction, or modification before May 4, 2011.

Condition 2.1.3-1(a)(ii) correctly cites to 40 C.F.R. § 60.44Da(g)(1) but ignores half the standard. 40 C.F.R. § 60.44Da(g)(1) provides:

> (g) Except as provided in paragraphs (h) of this section and § 60.45Da, on and after the date on which the initial performance test is completed or required to be completed under § 60.8, whichever date comes first, no owner or operator of an affected facility that commenced construction, reconstruction, or modification after May 3, 2011, **shall cause to be discharged into the atmosphere** from that affected facility

any gases that contain NOX (expressed as NO2) **in excess of the applicable emissions limit** specified in paragraphs (g)(1) through (3) of this section.

(1) For an affected facility which commenced construction or reconstruction, any gases that contain NOX **in excess of either**:

(i) 88 ng/J (0.70 lb/MWh) gross energy output; **or**
(ii) 95 ng/J (0.76 lb/MWh) net energy output.

40 C.F.R. § 60.44Da(g)(1)(2013)(emphasis added).

Similarly, the alternative standards for combined NOx and CO provides:

b) On and after the date on which the initial performance test is completed or required to be completed under § 60.8 no owner or operator of an affected facility that commenced construction, reconstruction, or modification after May 3, 2011, shall cause to be discharged into the atmosphere from that affected facility any gases that contain NOX (expressed as NO2) plus CO in excess of the applicable emissions limit specified in paragraphs (b)(1) through (3) of this section as determined on a 30-boiler operating day rolling average basis.

(1) For an affected facility which commenced construction or reconstruction, any gases that contain NOX plus CO in **excess of either**:

(i) 140 ng/J (1.1 lb/MWh) gross energy output; **or**
(ii) 150 ng/J (1.2 lb/MWh) net energy output.

40 C.F.R. § 60.45Da(b)(2013)(emphasis added). Thus condition 2.1.3-1(a)(ii) must include both the gross and net energy standards and clearly provide that the source has to comply with both.

The same is true for the SO_2 emission limit in permit condition 2.1.3-1(a)(i). It fails to include the net energy emission limit even though that limit is applicable. 40 C.F.R. § 60.45Da(l)(1) provides:

(l) Except as provided in paragraphs (j) and (m) of this section, on and after the date on which the initial performance test is completed or required to be completed under § 60.8, whichever date comes first, no owner or operator of an affected facility for which construction,

reconstruction, or modification commenced after May 3, 2011, shall cause to be discharged into the atmosphere from that affected facility, any gases that contain SO2 in excess of the applicable emissions limit specified in paragraphs (l)(1) and (2) of this section.

(1) For an affected facility which commenced construction or reconstruction, any gases that contain SO2 **in excess of either**:

(i) 130 ng/J (1.0 lb/MWh) gross energy output; **or**

(ii) 140 ng/J (1.2 lb/MWh) net energy output; **or**
(iii) 3 percent of the potential combustion concentration (97 percent reduction).

40 C.F.R. § 60.43Da(l)(1)(2013)(emphasis added). Thus, permit condition 2.1.3-1(a)(i) must require to the source to comply with the NSPS gross, net **and** percentage reduction standard.

The same is also true for PM. The NSPS provides:

(e) Except as provided in paragraph (f) of this section, the owner or operator of an affected facility that commenced construction, reconstruction, or modification commenced after May 3, 2011, shall meet the requirements specified in paragraphs (e)(1) and (2) of this section.

(1) On and after the date on which the initial performance test is completed or required to be completed under § 60.8, whichever date comes first, the owner or operator **shall not cause to be discharged** into the atmosphere from that affected facility **any gases that contain PM in excess of** the applicable emissions limit specified in paragraphs (e)(1)(i) **or** (ii) of this section.

(i) For an affected facility which commenced construction **or** reconstruction:

(A) 11 ng/J (0.090 lb/MWh) gross energy output; or
(B) 12 ng/J (0.097 lb/MWh) net energy output.

40 C.F.R. § 60.42Da(e)(1)(i)(2013)(emphasis added). Thus, permit condition 2.1.3-1(a)(iii) must require compliance with both the gross and net PM limits.

Moreover, 40 C.F.R. § 60.48Da(a) provides that: "For affected facilities for which construction, modification, or reconstruction commenced after May 3, 2011, the applicable SO_2 emissions limit under § 60.43Da, NOx emissions limit under § 60.44Da, and NOx plus CO emissions limit under § 60.45Da apply at all times." Thus, the permit should make clear that these limits apply during startup, shutdown and malfunction and ensure that the permit has monitoring and reporting to ensure compliance at all times including monitoring and reporting of net electricity production.

IEPA must make a determination of whether this facility, with its huge parasitic loads and energy penalties from the ASU, CPU and double scrubbers can comply with the net energy emission standards. If the facility cannot, IEPA must deny the permit.

Finally, we note that the NSPS is self-executing and there can be no permit shield in this minor source permit. Thus, even if IEPA does not correct these errors in this permit, we can and will enforce the net energy emission limits if the Applicant violates them.

B. THE PERMIT MUST REQUIRE THE OPERATION OF THE CO_2 CEMS AT ALL TIMES THE UNIT IS OPERATING

Permit condition 2.1.9-6 states that it is emission monitoring for CO_2. However, it states that:

> Pursuant to 40 CFR 60.49Da(a) for the affected boiler, the Permittee shall install, certify, operate and maintain a CEMS for CO2 emissions.

Draft Permit condition 2.1.9-6. However, 40 C.F.R. § 60.49Da(a)(2013) is the regulation addressing continuous opacity monitoring systems (COMS) and other opacity measuring technics. Thus, it appears the draft permit did not mean to cite to 40 CFR 60.49Da(a). We cannot tell what IEPA meant to cite to. Therefore, we should be given an opportunity to comment on this issue after IEPA addresses it.

Nevertheless, the draft permit must make clear that 40 C.F.R. § 60.49Da(f)(2) is not applicable to monitoring to comply with the CO_2 and all other annual emission limits in Draft Permit condition 2.1.6(b). 40 C.F.R. § 60.49Da(f)(2) allows sources to ignore their emissions 10% of the time during boiler operating days and all of the time when a day is not a boiler operating day. This means that monitoring for a limit that is supposed to refer potential to emit and keep the source from triggering PSD would substantially underreport actual emissions. This would make the permit not enforceable as a practical matter. Therefore, the permit must

require monitoring for CO_2, SO_2 and NOx at all times that the boiler is combusting any type of fuel. This may require redundant CEMs.

C. THE MERCURY LIMIT NEEDS TO BE CLARIFIED.

Condition 2.1.3-1(b)(i)(C) sets a mercury limit of 0.003 lb/GWh for "not low rank coal" and 0.04 lb/GWh for "low rank coal." In order for this condition to be enforceable as a practical matter, it must define low rank coal. In addition, this condition must explain what the emission limit is when a facility burns a blend of low rank and not low rank coal. This is important because FutureGen intends to burn a blend of Wyoming coal and Illinois coal. *See* Ex. 1 at 64.

D. THE HAUL ROADS NEED A DIFFERENT LIMIT

Condition 2.6.4 does not have a PM2.5 limit. However, the application claims maximum emissions of 0.11 tpy. Ex. 1 at 57. We dispute that this is what the emissions will be. However, to the extent IEPA maintains that this is that emissions will be, the permit must contain this limit and include testing, monitoring and reporting to ensure this limit is not violated.

Condition 2.6.4 needs testing, monitoring and reporting to ensure this limit is not violated. Condition 2.6.6(c) is not sufficient as it does not require testing or monitoring. IEPA should also define what it means by "design PM and PM_{10} emission rates" in Draft Permit Condition 2.6.6.

Sincerely,

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Counsel for Natural Resources Defense Council

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

SIERRA CLUB, . Plaintiff, vs. AMERENENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE INC., Defendants.	Civil Action No. 3:13-cv-3408-CSB-DGB

SIERRA CLUB'S FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANT FUTUREGEN INDUSTRIAL ALLIANCE, INC.

To: **Dale Johnson, WSBA #26629**
Van Ness Feldman LLP
1050 Thomas Jefferson Street NW
Seventh Floor
Washington, DC 20007
Attorney for Defendant
FutureGen Industrial Alliance, Inc.

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Sierra Club issues the following First Set of Requests for Production to Defendant FutureGen Industrial Alliance ("FutureGen"), to be answered within 30 days of the date of service of these requests.

DEFINITIONS AND INSTRUCTIONS

1. The term "document" or "documents" is used in the broadest sense to include all documents and things within the scope of Fed. R. Civ. P. 34.

2. The terms "referring to" or "relating to" shall mean concerning, relating to, pertaining to, consisting of, constituting, reflecting, evidencing or concerning in any way logically or factually the subject matter of the request.

3. "Communication" means any disclosure, transfer, or exchange of information or opinion, however made.

4. The term "construction permit" refers to the minor source construction permit issued by the Illinois Environmental Protection Agency to FutureGen and AmerenEnergy Medina Valley Cogen, LLC on December 13, 2013.

5. "IEPA" means the Illinois Environmental Protection Agency.

6. "FutureGen Project" refers to the proposed construction of Boiler #7 and related equipment in Meredosia, Illinois.

7. "You," "your" or "your company" means FutureGen Industrial Alliance, Inc. and its employees, agents, directors, consultants and counsel.

8. Pursuant to Fed. R. Civ. P. 26(e), you must supplement your response to this request if you learn that the response is in some material respect incomplete or incorrect.

9. All documents that respond, in whole or in part, to any part or clause of any paragraph of these document requests shall be produced in their entirety, including all attachments and enclosures. Only one copy need be produced of identical documents that are responsive to more than one paragraph but please identify all requests to which the document is

responsive. Similarly, you need not produce documents which are identical to documents produced by AmerenEnergy Medina Valley Cogen, LLC but please identify all requests to which such documents are responsive.

10. With respect to any electronically stored information (ESI), please provide such data in a form that does not require specialized or proprietary hardware or software, or provide it in a format that Sierra Club confirms it will be able to utilize. Please provide all Microsoft Excel spreadsheets and all AERMOD system files in their native, electronic format. By AERMOD system, we mean all of the programs used for AERMOD including, but not limited to AERMET, and AERMINUTE. For each data file provided, please include: a short narrative description of the contents of the file, translation of any coded fields, and the number of records in the file.

FIRST REQUESTS FOR PRODUCTION

1. Please produce all documents and communications relating to the construction permit.
2. Please produce all documents and communications relating to Sierra Club and Natural Resources Defense Council's comments regarding the draft construction permit, dated November 8, 2013.
3. Please produce all documents and communications relating to your netting analysis in support of the application for the construction permit.
4. Please produce all documents and communications relating to IEPA's decision to issue the construction permit.
5. Please produce all documents and communications relating to U.S. EPA's position regarding the construction permit.

6. Please produce all documents and communications relating to U.S. EPA and IEPA guidance on the Clean Air Act permitting process and the netting analysis for Prevention of Significant Deterioration permitting.

Respectfully submitted,

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Counsel for the Plaintiff Sierra Club

Dated: May 6, 2014

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

SIERRA CLUB, Plaintiff, vs. AMERENENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE INC., Defendants.	)	Civil Action No. 3:13-cv-3408-CSB-DGB

SIERRA CLUB'S FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANT AMERENENERGY MEDINA VALLEY COGEN, LLC

To: **Renee Cipriano**
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Tel: 312-258-5500
Attorneys for Defendant
AmerenEnergy Medina Valley Cogen, LLC

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Sierra Club issues the following Requests for Production to Defendant AmerenEnergy Medina Valley Cogen, LLC ("AmerenEnergy"), to be answered within 30 days of the date of service of these requests.

DEFINITIONS AND INSTRUCTIONS

1. The term "document" or "documents" is used in the broadest sense to include all documents and things within the scope of Fed. R. Civ. P. 34.

2. The terms "referring to" or "relating to" shall mean concerning, relating to, pertaining to, consisting of, constituting, reflecting, evidencing or concerning in any way logically or factually the subject matter of the request.

3. "Communication" means any disclosure, transfer, or exchange of information or opinion, however made.

4. The term "construction permit" refers to the minor source construction permit issued by the Illinois Environmental Protection Agency to FutureGen Industrial Alliance and AmerenEnergy Medina Valley Cogen, LLC on December 13, 2013.

5. "IEPA" means the Illinois Environmental Protection Agency.

6. "FutureGen Project" refers to the proposed construction of Boiler #7 and related equipment in Meredosia, Illinois.

7. "You," "your" or "your company" means AmerenEnergy Medina Valley Cogen, LLC and its employees, agents, directors, consultants and counsel.

8. Pursuant to Fed. R. Civ. P. 26(e), you must supplement your response to this request if you learn that the response is in some material respect incomplete or incorrect.

9. All documents that respond, in whole or in part, to any part or clause of any paragraph of these document requests shall be produced in their entirety, including all attachments and enclosures. Only one copy need be produced of identical documents that are responsive to more than one paragraph but please identify all responses to which the document is

responsive. Similarly, you need not produce documents which are identical to documents produced by the FutureGen Industrial Alliance because please identify all responses to which such documents are responsive.

10. With respect to any electronically stored information (ESI), please provide such data in a form that does not require specialized or proprietary hardware or software, or provide it in a format that Sierra Club confirms it will be able to utilize. Please provide all Microsoft Excel spreadsheets and all AERMOD system files in their native, electronic format. By AERMOD system, we mean all of the programs used for AERMOD including, but not limited to AERMET, and AERMINUTE. For each data file provided, please include: a short narrative description of the contents of the file, translation of any coded fields, and the number of records in the file.

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5. Please produce all documents and communications relating to U.S. EPA's position regarding the construction permit.

6. Please produce all documents and communications relating to U.S. EPA and IEPA guidance on the Clean Air Act permitting process and the netting analysis for Prevention of Significant Deterioration permitting.

Respectfully submitted,

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Counsel for the Plaintiff Sierra Club

Dated: April 25, 2014

EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Sierra Club, Inc.,

Plaintiff,

vs.

AmerenEnergy Medina Valley Cogen, LLC., et al.,

Defendants.

Docket No. 13-3408

Urbana, Illinois
May 16, 2014
10:30 a.m.

ORAL ARGUMENT on MOTION TO DISMISS

BEFORE THE HONORABLE COLIN STIRLING BRUCE
UNITED STATES DISTRICT JUDGE

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the building. All right.

You were talking about --

MR. UKEILEY: Right.

THE COURT: -- why you were bringing -- and you don't have to wrap your answer.

MR. UKEILEY: Thank you.

THE COURT: You were explaining -- I think I understand why you're -- why you didn't want to bring one before, a complaint before the Illinois Pollution Control Board.

So if I was going to sum up what you were saying and so I understand correctly, you're really making a choice. In your view, Sierra Club's view, since it's the enforcement of federal law, your view is that the IEPA is more or less just a pass-through; and the P-- the Pollution Control Board would be, again, just another entity when, really, the meat of it would be a federal law, so you want to be in Federal Court. Would that be a fair statement?

MR. UKEILEY: Yes.

Also, I'm -- I don't know the procedure in front of the Illinois Pollution Control Board. But it's essential that we get full discovery. So different state environmental forums have different rules about discovery. You know, some just have, like, written

discovery but no depositions or -- they don't necessarily all have full federal discovery.

But we need full federal discovery, which kind of gets to that point about what the trial would look like and how defense counsel was saying how it would look exactly the same as we're at now.

I explicitly told two of defense counsels what our case was about in very great detail because at one point they were saying that, you know, we could -- they'd just turn over the discovery that we needed, so I provided them with all the details.

So what trial will look like -- and, also -- sorry -- defense counsel said that we, Sierra Club, has been participating in the process of the state permit for two years. And that's not the way it works.

The way it works is that the, the applicant and the state agency get together, and they work on the permit for two years. And then after they've gone through that process for a long time and they've negotiated positions, then they have a public comment period. And it's very short. I don't remember what the public comment period was in this case. It's normally 30 days. Sometimes they give us a little longer. But it's very short. That's why it takes them two years. And, basically, we're expected to do -- what it took them

two years, we're expected to do in 30 days.

But it's even more challenging because we don't have the access to all their information. So one of the things we talk about in discovery is there are calculations about how much this source will put out, and those calculations are produced -- sorry to go into minutiae, but it's relevant.

So the calculations are produced by engineers using an Excel spreadsheet. And one of the key factors is the formulas in the spreadsheet -- right? -- because garbage in, garbage out. Like, if you have the wrong formula, it doesn't work out. We don't get access to things like that during the 30-day period.

And even if we did, you know, they don't give us, like, six months' notice that the 30-day period for comments is going to be on Date X so we can line up our experts who are -- we have a relatively small pool of experts, and so we can't always say, "Drop everything else and help us."

So we don't get access to information, and, and we don't have enough time. So we don't present our full case. And, plus, we know that this is not a record review, so we don't present our full case during that 30-day comment period. In fact, sometimes, because we're a nonprofit, we scale down dramatically what we present

during that comment period because we know that there should be another process where we'll be able to present our case after having all the information. So at the end of two years, our case is going to look very different.

For example, one of the requirements in the netting analysis -- and we agree that this case comes down to the netting analysis, except for two pollutants where, where they, they said -- for two pollutants, they said: We don't even need to net out; we're just below the standard.

And we said: No, you're not.

And I imagine that during the course of this proceeding, they'll change their position and they'll say: Well, even if we are above the major source threshold for these two pollutants, we did net out.

But, so putting those two pollutants to the side, this case is about whether they netted out of PSD. And, but one of the requirements of netting out is that you have to show that the new pollution -- and I can't quote the language -- but basically is equivalent to the old pollution. Right? So you're -- to make up numbers -- you're putting out 100 times of new pollution. You get someone else to reduce 100 times of old pollution. So you would think that would be equal, but it's not necessarily because pollution is influenced by

weather, for example. So 100 tons of pollution reduction in the winter and 100 tons of pollution increase in the summer is not equivalent. So there's this requirement to net out.

And to -- one of the interpretations of "equivalent" means that the new pollution will not cause violations of national ambient air quality standards, and that analysis is done by a computer model. You take your pollution, plug it into a computer model, and you see if it will make impacts above ambient air quality standards, national ambient air quality standards.

So we, we did not address the modeling at all in our comments. We didn't have --

THE COURT: Do you have the information you need to talk about that from the defendants?

MR. UKEILEY: No. We, we -- as far as I know, we don't have the modeling yet. That's -- during those conversations, I made very clear to defense counsel that that's something we need.

And, again, so I've had defendants turn the modeling over in paper. So they turn over 10,000 or 100,000 pages of, like, computer code, basically. So you need the modeling in what we call the "native format," or it's meaningless. And then you need to give the modeling to a modeling expert.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB, Complainant, v. AMEREN ENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE INC., Respondents.	)	PCB 2014-134 DECLARATION OF MARK H. WILLIFORD IN SUPPORT OF RESPONDENTS' REPLY--MOTION FOR EXPEDITED REVIEW

I, Mark H. Williford declare under penalty of perjury that the following is true and correct:

1. I am over eighteen years of age, have personal knowledge of the matters herein, and am competent to testify regarding all matters set forth herein.

2. I am the vice president for generation of the FutureGen Alliance (the "Alliance"), a non-profit corporation and international consortium of companies that will build and operate the FutureGen 2.0 clean energy project in Morgan County, Illinois (the "Project"). The Project is to be the world's first large-scale, near-zero emissions power plant using carbon capture and storage ("CCS") and oxy-combustion technologies.

3. The Project is being built at Ameren Energy Medina Valley Cogen, LLC's ("Ameren") existing Meredosia Energy Center in Meredosia, Illinois. Construction of the Project commenced prior to the August 31, 2104 deadline and notification was provided by Ameren Energy Medina Valley Cogen, LLC and the Alliance to the Illinois Environmental Protection Agency via a letter dated August 29, 2014, attached hereto as **Exhibit A**.

4. The Meredosia Energy Center is located in Morgan County, Illinois, at the southern edge of the Village of Meredosia on the Illinois River. The Meredosia Energy Center consists of four electric utility steam generating units. Prior to shutdown, three of the Meredosia

Energy Center electric generating units (Units 1-3) comprised five boilers (Boilers 1-5) serving three steam turbines, while the last remaining unit (Unit 4) consisted of a single oil fired boiler (Boiler 6) serving one steam turbine. None of the existing electric generating units at the Meredosia Energy Center are currently in operation. The Project will physically replace Unit 4 (Boiler 6) with a new coal-fired oxy-combustion boiler that will use the existing Turbine 4, other auxiliary equipment, and certain other balance of plant equipment at the existing facility. The five remaining coal-fired boilers at Meredosia Energy Center Units 1-3 will be permanently retired from service.

5. At the time Project construction commenced the Meredosia Energy Center was owned by Ameren. There has been no transfer of ownership of the Meredosia Energy Center between Ameren and the Alliance.

EXECUTED on September 5, 2014.

Mark H. Williford, Declarant

EXHIBIT A

Ameren

August 29, 2014

Mr. Ray Pilapil
State of Illinois
Environmental Protection Agency
Division of Air Pollution Control
Compliance
1021 North Grand Avenue East
Springfield, IL 62794-9276

Re: Notification of Construction
FutureGen 2.0 Repowering Project at the Meredosia Energy Center
Application No.: 12020013; I.D. No. 137805AAA

Dear Mr. Pilapil:

This letter serves as written notification to the Illinois Environmental Protection Agency that construction of the oxy-combustion boiler and other ancillary facilities for the FutureGen 2.0 Repowering Project has commenced at the Meredosia Energy Center. Construction commenced prior to the August 31, 2014 expiration date set forth in Section 1.2(a) of the construction permit for the FutureGen 2.0 Repowering Project (Application No.: 12020013). This notification also satisfies the notification requirements for the boilers and other emissions units that are subject to NSPS, as provided in Section 1.4 (c) of the Construction Permit Section and 40 C.F.R. 60.7 (a)(1).

Please contact Steve Whitworth at (314) 554-4908 or Mark Williford at (314) 402-7067 if you have any questions regarding this notification or if you need additional information.

Sincerely,

Steven Whitworth
Director, Environmental Services
Ameren Corporation

Mark Williford
Vice President, Generation
FutureGen Industrial Alliance

cc: Dean Hayden – IEPA, Peoria Regional Office
US EPA Region 5 – Air Branch
Paul Wood – FutureGen Industrial Alliance

RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY

EXHIBIT B

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB,	)	
	)	
Complainant,	)	**PCB 2014-134**
	)	**(Enforcement-Air)**
v.	)	
	)	
AMERENENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE, INC.,	)	
	)	
Respondents.	)	

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Respondents AmerenEnergy Medina Valley Cogen, LLC and FutureGen Industrial Alliance, Inc., ("Respondents") submit this Respondent's Reply in Support of Their Motion for Summary Judgment ("Reply"). Respondents filed a Motion for Summary Judgment ("Motion") electronically with the Illinois Pollution Control Board on July 15, 2014. Since Sierra Club first collaterally attacked Respondents' permit in federal court, Respondents have moved expeditiously to resolve this litigation. As before, Sierra Club seeks to extend this litigation indefinitely believing that a vacuous "delay kills projects" strategy can achieve success Sierra Club cannot find on the merits. Here, 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 Illinois Environmental Protection Agency ("IEPA" or "Agency") – which it never sued – was wrong when it issued Respondents' permit. To turn this unsubstantiated belief into argument, Sierra Club mischaracterizes the law and relies only on irrelevant decisions of the Environmental Appeals Board ("EAB") in attempting to pursue a permit appeal disguised as an enforcement

action. For the reasons set forth in Respondents' Motion, Respondents are entitled to summary judgment for the following reasons:

1. The FutureGen Facility has an appropriate IEPA-issued permit. IEPA evaluated the evidence – including a permit application AND Sierra Club's submittals – in determining that Respondents' facility was not required to have a PSD permit. IEPA flatly rejected Sierra Club's arguments. But, Sierra Club refuses to concede that it lost and instead seeks a second bite at the "permitting apple," with the permit being written by the Board.

2. Sierra Club's arguments to the effect that a federal forum should have considered their arguments are misplaced. 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 Illinois Environmental Protection Act (the "Act"). 415 ILCS 5/9.1(d). Simply stated, it is not.

3. Sierra Club avers that the federal EAB has implicitly granted it substantial appellate rights when appropriately delegated state agencies like IEPA have made decisions within their purview that facilities like the FutureGen project do not require PSD permits. Not so.

4. IEPA, not the Board, issues permits. IEPA, not the Board or Sierra Club, is entrusted in the first instance to weigh permit applications and determine what permits are to issue, and what conditions should be included in those permits. No amount of discovery can transform IEPA's permissible choices into a demonstration that Respondents' actions – which are explicitly permitted by those choices – violate Illinois or federal law. [1]

[1] Sierra Club's "new," equally un-meritorious argument is that the ownership arrangement of the involved facility alters IEPA's "netting" analysis. (Response at 30-33.) Construction of the project

5. Sierra Club's evidentiary objections are misplaced. As Sierra Club admits, the documents upon which Respondents' summary judgment motion relies are public records and the authenticity of the documents have not been questioned. Under the Illinois Rules of Evidence, the Cipriano Declaration provides a sufficient basis to admit them. Accordingly, Sierra Club's efforts to characterize these documents as "hearsay," *see* Motion to Strike at 1-4, are baseless and should be rejected.[2]

Sierra Club is bringing a novel claim under Section 9.1 of the Act. Respondents are not aware that the Board has ever considered any prior third-party enforcement action alleging a violation of federal law through the pass-through provision, Section 9.1 of the Act,[3] a section ordinarily enforced by the state agencies. Through its Complaint, 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*. In this case of first impression, the Board should not allow Sierra Club the opportunity to use an enforcement action to overturn the Agency's permitting decision. As is further demonstrated below, Sierra Club's claims necessarily fail and Respondents should be awarded summary judgment.

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commenced prior to the deadline specified in Section 1.2(a) of the construction permit. (*See* Letter from Steven Whitworth of Ameren and Mark Williford of FutureGen to Ray Pilapil, IL EPA dated August 29, 2014, attached to the Mark Williford Declaration filed in support of Respondent's Reply – Motion for Expedited Review as Exhibit A.) Furthermore, as explained below in fn. 7, construction also commenced within the applicable five-year netting period, as required under the federal PSD regulations.

[2] Throughout this and the related federal litigation, Sierra Club's attorneys have repeatedly taken the position that "they are not Illinois attorneys" and need additional time to formulate their positions accordingly. It is important to note that Sierra Club's evidentiary objections in this matter have no basis in the laws of any jurisdiction, and appear to be interposed in this matter only to increase the cost to Respondents, and amount of time to the Board, to dispose of Sierra Club's baseless claims.

[3] In *Joseph Bogacz v. Commonwealth Edison Co.*, PCB 96-47 (Jun. 5, 1997), the third-party complainant alleged a violation of Section 9.1(d), but the Board found the claim improperly alleged.

I. RESPONDENTS ARE ENTITLED TO AN AWARD OF SUMMARY JUDGMENT ON SIERRA CLUB'S FUNDAMENTALLY FLAWED CLAIMS.

Respondents contend that there are "genuine" issues of material fact which preclude issuance of summary judgment. Response at 8. "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.[4] The Board may evaluate whether or not there is a genuine issue of material fact from affidavits, depositions, admissions, exhibits, and pleadings. *First of Am. Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 176 (1995). In determining the "genuineness" of a factual issue, a court must ignore personal conclusions and self-serving statements and consider only facts which are admissible in evidence. *Baier v. State Farm Ins. Co.*, 28 Ill. App. 3d 917, 920 (Ill. Ct. App. 1st Dist. 1975). Issues of fact are not material for these purposes unless they have legal, probative force on a controlling issue. *Netsch*, 166 Ill. 2d at 176. Non-material issues do not provide a sufficient basis to defeat a summary judgment motion. *Id.*

While it is somewhat unclear from the Response, Sierra Club does not appear to factually contest what happened in the FutureGen permitting proceeding. *See* Response at 3. Sierra Club concedes, for instance, that Respondents have an air permit. Instead, Sierra Club appears to argue that IEPA's determination in this matter was either potentially legally incorrect or is not binding on Sierra Club. *See* Response at 29-40. As is further discussed below, IEPA – not the Board – issues permits. IEPA's factual determinations as embodied in the permit, coupled with the deference due IEPA, foreclose Sierra Club from having any "genuine" issues of material fact.

[4] Sierra Club's response appears premised on a lengthy exegesis on the Illinois summary judgment standard. (Response at 8-14.) Over six pages, Sierra Club ignores the key issue present here, *i.e.* that Respondents' motion relies upon a legally valid determination by the relevant regulator that Sierra Club's arguments are meritless. While Sierra Club attempts to portray these documents as "hearsay," they are clearly admissible as public records pursuant to Ill. R. Evid. 803(8) and 1005. The Cipriano Declaration merely provides a basis to authenticate them under Ill. R. Evid. 901.

If allowed to proceed, Sierra Club's claims would essentially gut the carefully balanced approach U.S. EPA and IEPA have created for issuance of air permits in Illinois.

A. IEPA, Not the Board, Issues Permits.

The Complaint effectively asks the Board to review and issue what Sierra club believes is the "right" permit. Response at 39. The Board, however, does not issue permits, U.S. EPA and IEPA do. Because Sierra Club does not agree with IEPA's permit decision in this instance, it is attempting to circumvent IEPA's authority and ask the Board to arrive at a different conclusion. Sierra Club's challenge in this matter constitutes a fundamental challenge to Illinois administrative law, precedent, and policy.

Sierra Club can participate in such rulemakings, voice its views, and appeal any rule with which it disagrees. 35 Ill. Adm. Code §§ 102.108, 102.412, and 102.706. Sierra Club can, in circumstances limited by state law, appeal certain types of permits. *See e.g.* 415 ILCS 5/40(e) (allowing third party appeals of National Pollutant Discharge Elimination System permits). Sierra Club can also participate in the underlying permitting process by submitting written comments or offering testimony, both of which it did in relation to the FutureGen project. But, Sierra Club should not be allowed to usurp the Illinois regulatory and permitting processes and effectively appeal a permit decision through enforcement action, when state law has not provided a direct right of appeal. This is especially the case when 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, *see* Response at 33-40, which are clearly delegated to IEPA, the regulator. This is as true before the Board as it would be before Sierra Club's preferred venue of the federal Environmental Appeals Board. *In re BP Cherry Point*, 12 EAD 209, at *16 (EAB 2005) ("[T]he burden is on

the Petitioner to demonstrate clear error on the part of the permitting authority. Additionally, where the dispute involves matters of a technical nature, the burden on petitioners is particularly heavy. . . . This demanding standard serves an important function within the framework of the Agency's administrative process; it ensures that the locus of responsibility for important technical decisionmaking rests primarily with the permitting authority, which has the relevant specialized expertise and experience."); *In re Peabody W. Coal Co.*, 12 EAD 22, *8-9 (EAB 2005) (same); *In re Ash Grove Cement Co.*, 7 EAD 387, *4 (EAB 1997) (same).

Under Illinois law, this Board does not issue permits, IEPA does.[5] IEPA's duties under the Act include to "determine whether specific applicants are entitled to permits." *Illinois Power Co. v. IPCB*, 100 Ill. App. 3d 528, 426 N.E.2d 1258 (1981). In *Illinois Power*, the Appellate Court of Illinois for the Third District stated: "[q]uite clearly, the Board and the Agency have separate functions in the permit application procedure. Just as the Board is not the permit granting authority, neither is the Agency the Board's retainer in the interpretation of Board regulations." *Illinois Power Co.*, 100 Ill. App. 3d at 531.

Sierra Club's confusion regarding the roles of Illinois environmental entities continues. Instead of deferring to IEPA's determination that no PSD permit was required for this Project, Sierra Club believes the Board should make its own determination without giving any deference to IEPA's pre-existing evaluation of the very same facts. Sierra Club's citizen enforcement suit therefore fails because Respondents have the proper permit, as determined by IEPA, and

[5] Sierra Club's Motion to Strike argues that IEPA's Responsiveness Summary "is filled with IEPA's legal conclusions and hearsay, all of which is inadmissible." (Sierra Club Motion to Strike ¶¶ 8-9.) The permit, the responsiveness summary, and the other documents attached in support of Respondents' motion are all public records which memorialize IEPA's determination on the merits of Sierra Club's arguments. *See, supra* fn. 4. As is further discussed in Respondents' response to Sierra Club's Motion to Strike, they are not hearsay.

consequently Respondents are not in violation of Section 9.1(d) of the Illinois Environmental Protection Act (the "Act"). 415 ILCS 5/9.1(d). To hold otherwise would be to discredit the very agency tasked with upholding the Act.[6]

In reaching this conclusion – a conclusion which was expressly permitted both by the federal Environmental Protection Agency ("U.S. EPA") as well as under Illinois law – IEPA considered, and explicitly rejected, two of the three arguments Sierra Club now claim preclude an award of summary judgment to Respondents. The third argument, related to the ownership of the FutureGen project, is baseless given Ameren's continuing ownership of the Project through the initiation of construction.[7] (*See* Williford's Decl. at 2-3.) Sierra Club now asks the Board to attack IEPA outside of the agency's presence to overturn these findings. The Board should not sanction this effort.

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[6] While Sierra Club somehow claims that it "is not challenging the issuance of the FutureGen minor source permit," *see* Response at 6, its fundamental claim is premised on Sierra Club's determination that IEPA erred in concluding that a PSD permit was not required for the Project. The various federal cases Sierra Club cites, *see* Response at 18-25, are not germane to the issue pending before the Board, *i.e.* whether Respondents' construction of the FutureGen facility is lawful given IEPA's issuance of what it has determined to be the appropriate permit. Many of the cases cited by Sierra Club involve agency participation unlike this matter. *See, e.g.*, *Weiler v. Chatham Forest Prods.*, 392 F.3d 532, 539 n.9 (2d Cir. 2004); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1129-34 (D. Colo. 1987).

[7] Specifically, Sierra Club claims for the first time that discovery is necessary to determine whether the PSD netting requirement for common control has been met by raising questions as to whether the Meredosia Energy Center has in fact been under the common control of the same owner or operator during the applicable netting period. Response to Motion for Summary Judgment, pp. 30-33. Construction of the FutureGen 2.0 Project commenced prior to the August 31, 2104 deadline established in the air construction permit for the Project. Declaration of Mark Williford (Williford's Decl.") in support of Respondents' Reply – Motion for Expedited Review at 2-3. Ameren owned the Meredosia Energy Center at the time construction commenced. *Id.* No transfer of ownership of the Meredosia Energy Center from Ameren to the Alliance has occurred. *Id.* As a result, the "common control" requirement of the federal PSD netting regulations was fully satisfied because Ameren was in fact the owner of the entire Meredosia facility, including the portion upon which the Project is located, during the "contemporaneous" five-year period used for performing the PSD netting analysis. *See* 40 C.F.R. §52.21(b)(3) (providing that the emissions reductions are creditable if they occurred "five years before *construction* on the particular change *commences*.") (emphasis added).

B. Respondents Are Entitled to Summary Judgment Because the' IEPA-Issued Permit Precludes Sierra Club's Critiques of the Permit from Constituting "Genuine Issues".

Illinois regulations provide that "[n]o person shall cause or allow the construction of any new emission source or any new air pollution control equipment, or allow the modification of any existing emission source or air pollution control equipment, without first obtaining a construction permit from the Agency . . . . " 35 Ill. Adm. Code § 201.142. Here, Respondents have both a permit and a legal determination from the relevant agency fundamentally rejecting Sierra Club's claims in this proceeding. Accordingly, Sierra Club's claims – which relate to permitting and not enforcement – relate directly to IEPA, which is not a party to this matter.

1. Sierra Club's claims question IEPA's choice of permit, a decision IEPA is legally authorized to make; this decision cannot be questioned here.

The purpose of allowing citizen suit actions, such as those filed under Section 31.1(d) of the Act, is to assist the government in enforcing laws, and not to collaterally attack decisions that have already been made by regulators through a thorough and legally adequate process without regulatory participation. *See, e.g., Goodman v. Pa. Dep't Envt'l Prot.*, No. 07-4779, 2008 WL 2682698 (E.D. Pa. June 30, 2008) (granting defendants' motion to dismiss a CAA citizen suit action against both the agency and the permit-holder because the lawsuit was a "collateral attack[] to a facially valid permit[]."); *Ecological Rights Found. v. Pac. Gas & Elec.*, Case No. 2:10-121, 2013 WL 1124089 at *6 (N.D. Cal. March 1, 2013) ("This action has been brought as a citizen's suit to enforce the regulations, not to alter them or how the agencies apply them.").

In this case, IEPA awarded the appropriate construction permit for this Project through a permitting process that was overseen by U.S. EPA.[8] Sierra Club took full advantage of all the opportunities for input as provided by IEPA. IEPA considered Sierra Club's comments, and subsequently rejected them.[9] Sierra Club participated in the permitting process, IEPA issued the appropriate permit, and now Respondents are entitled to a measure of finality that allows them to proceed with the Project.[10]

Because U.S. EPA delegated the authority for making PSD determinations to IEPA and IEPA has now made a final determination that a PSD permit is not required, IEPA's determination merits the same deference as would be afforded to U.S. EPA in this situation. *See, e.g., Independent Nursing Home v. Simmons*, 732 F. Supp. 684, 688 (D. Miss. 1990) (quoting *Mississippi Hospital Ass'n v. Heckler*, 701 F.2d 511, 516 (5th Cir. 1983) (state agency that is administering a federal program is entitled to the same deference due to the federal agency). *See also U.S. v. Alcoa, Inc.*, Case No. 1:03-cv-222, 2007 WL 5272187, at *7 (W.D. Tex. Mar. 14, 2007) ("a district court reviews the actions of a state agency administering federal programs as it would review the actions of a federal agency, including deference to reasoned administrative action."). U.S. EPA's PSD determination would clearly be entitled to *Chevron* deference; thus,

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[8] Without a doubt, U.S. EPA has informally approved many aspects of this project and formally approved various other aspects.

[9] Sierra Club argues that IEPA's factual findings are inadmissible and hearsay in front of the IPCB. As further outlined in Defendants' Response to Sierra Club's Motion to Strike, IEPA's factual findings are a matter of the public record. *See* Ill. R. Evid. 803(8) and 1005. Sierra Club's argument that these materials are hearsay is legally baseless.

[10] *United States v. Solar Turbines, Inc.*, 732 F. Supp. 535, 540 (M.D. Pa.1989) (where U.S. EPA disagreed with a state agency's permitting decision, the appropriate avenue was for U.S. EPA and the state agency to resolve their differences, rather than for U.S. EPA to bring an enforcement action against the permit holder because to allow U.S. EPA to sue the permit holder "would . . . lay waste to a source's ability to rely on a permit it has been issued by an authorized state permitting agency.").

IEPA's determination that no PSD permit is required for this Project is also afforded the same deference.[11] *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

Respondents' permit cannot be questioned in this enforcement proceeding and the legality of it should be taken as a given. U.S. EPA has delegated IEPA authority to administer the PSD permitting program in Illinois and IEPA has the technical expertise to issue such permits.[12] IEPA has already determined that Respondents' construction of the project is legal without any objection from U.S. EPA. The Board simply does not have the authority to substitute its judgment for the agencies authorized to implement the CAA. With Respondents' permit out-of-play and Sierra Club having made no demonstration as to how the permitted construction of a facility may be illegal, Sierra Club's claims necessarily fail.

2. Sierra Club's claims run the risk of fundamentally altering the process for permitting in Illinois.

Sierra Club's position assumes it is entitled to unlimited appeals on every permitting decision. This is not the case. The Act does not grant a direct right of appeal for a construction permit, and the state **is not required** to provide an opportunity for direct appeal of an

[11] Sierra Club laments the fact that the Environmental Appeals Board ("EAB") does not have jurisdiction to review IEPA's decision not to issue a PSD permit. Yet, if IEPA had issued a PSD permit for the Project, even the EAB would have given IEPA "broad deference . . . with respect to issues . . . requiring the exercise of technical judgment and expertise." *In re Prairie State Generating Co.*, 2006 WL 2847225 (EAB Aug. 24, 2006). IEPA's determination should be given no less deference here.

[12] 415 ILCS 5/4(g) ("The Agency shall have the duty to administer in accord with Title X of this Act, such permit and certification systems as may be established by this Act or by regulations adopted thereunder.")

environmental permit. *See, e.g.*, Letter from Stephen Rothblatt, U.S. EPA Region 5 Director of Air and Radiation Division, to Dr. Keith Harley, August 20, 2007 (concluding that U.S. EPA cannot require IEPA to allow a third party appeal of a state-issued permit); *see also City of Elgin v. County of Cook*, 169 Ill.2d 53, 60 (Ill. 1995) (affirming trial court's dismissal because third party's "collateral attack" on IEPA's permitting decision was improper where third party did not have authority to directly appeal permitting decision by IEPA). In fact, a court has recently held that Sierra Club's bad faith and "groundless" pursuit of citizen enforcement actions claiming violations of the CAA where no such violations existed subjected it to extensive liability for attorney's fees.[13]

This proceeding is a permit appeal disguised as an enforcement action. To the extent Sierra Club quibbles with the process Illinois has constructed – under the oversight of U.S. EPA – its air permitting regime, this is not the appropriate forum for these disputes. As the Supreme Court stated in *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976), there is no constitutional right to raise every challenge in every venue, instead "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard." (internal citations omitted)). Sierra Club is permitted to submit comments as part of a permitting proceeding; once those comments were rejected, it is not entitled to unilaterally obstruct Respondents from lawfully constructing pursuant to the permit issued by IEPA. To the extent Sierra Club is dissatisfied with IEPA's overall implementation of the PSD permitting program, Sierra Club should seek U.S. EPA's help in challenging IEPA's administration of the

[13] *Sierra Club v. Energy Future Holdings, Corp.*, No. 6:12-cv-00108, p. 12 (W.D. Tex. Aug. 29, 2014) (holding Sierra Club liable for $6.4M in attorneys' fees for the filing of a "frivolous, unreasonable, or groundless" lawsuit claiming Clean Air Act violations where no such violations existed and where the state agency, "who are experts in this field, had previously documented . . . that there were no . . . violations of the CAA.").

federal program. However, the argument that Sierra Club's due process rights are violated by the rejection of its claims here is meritless.

3. Sierra Club is not entitled to discovery.

Respondents' Motion for Summary Judgment was supported by various documents which were properly authenticated public records admissible under the Illinois Rules of Evidence. *See, e.g.*, *Barker v. Eagle Food Ctrs., Inc.*, 261 Ill. App. 3d 1068, 1034 (Ill. Ct. App. 2d 1994). Instead of responding directly to the merits of Respondents' motion, Sierra Club raised three issues, one of which is factually barred by the ongoing construction of the FutureGen project, and two of which Sierra Club cannot prevail on without the presence of IEPA in the matter given the level of deference due to the Agency in making its permitting decision. These issues are discussed in turn above.

Sierra Club presents no compelling case as to why it should be permitted discovery. IEPA, the relevant permitting agency, made a technical decision explicitly within its competence rejecting Sierra Club's arguments. Even if IEPA were before the Board in this matter, given the deference due to IEPA under state and federal law, Sierra Club's claims necessarily fail. Sierra Club seeks license to audit the agency's decisions outside of its presence and effectively re-write the balanced permitting process which the State of Illinois, under U.S. EPA's oversight, long ago created.

Despite its participation in the permitting process, Sierra Club argues that it still needs four more months of discovery in order to respond to Respondents' Motion for Summary

Judgment.[14] As further outlined in Respondents' Opposition to Sierra Club's Motion for Extension of Time, discovery is unnecessary in this case.

Sierra Club further claims that Respondents' "assertions in federal court were disingenuous" because Respondents provided details about the extent of discovery available in an IPCB proceeding, as requested by the Court. *See* Sierra Club's Memorandum in Opposition to Respondents' Motion for Summary Judgment at 8. The briefing Sierra Club now attaches resulted from its counsel's choice to come ill-prepared to a federal court hearing and did not result from Respondents' actions. Accordingly, the briefing provides no basis for discovery.[15]

[14] *See* Sierra Club's Motion for Extension of Time and a Continuance to Allow for Discovery Necessary to Respond to Summary Judgment and Incorporated Memorandum in Support at 1.

[15] In fact, Respondents clearly stated in their brief that "[b]y submitting this supplemental briefing, Respondents do not concede that discovery is necessary, whether this matter proceeds in a federal district court or before the IPCB." *See* Defendants' Supplemental Briefing in Support of their Motion to Dismiss and Motion for Judgment on the Pleadings, *Sierra Club v. AmerenEnergy Medina Valley Cogen, LLC, et al.*, No. 3:13-cv-03408, n. 2 (May 30, 2014). The federal court opinion dismissing the case noted: "At oral arguments, [Sierra Club] admitted that it had not sought review of the decision before the IPCB. In explaining its decision to bring a case before this court instead of the IPCB, [Sierra Club's] attorney stated that he 'did not know the procedure in front of the [Board].' While the lack of an appropriate state forum may prevent abstention, an attorney's ignorance of the procedures before the state agency has never been found to be a bar to abstention by a federal court."

II. CONCLUSION

Sierra Club's claims here are baseless and have not raised any genuine issue of material fact, and should be rejected expeditiously. Respondents' motion for summary judgment should be granted.

DATED this 8th day of September, 2014.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB,	)	
	)	
Complainant,	)	**PCB 2014-134**
	)	**(Enforcement-Air)**
v.	)	
	)	
AMERENENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE, INC.,	)	
	)	
Respondents.	)	

ENTRY OF APPEARANCE

On behalf of the Respondent, AMERENENERGY MEDINA VALLEY COGEN, LLC, Amy Antoniolli hereby enters her appearance.

Respectfully submitted,

AMERENENERGY MEDINA VALLEY COGEN, LLC

By: Amy Antoniolli
Amy Antoniolli

Dated: September 8, 2014

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB,	)	
	)	
Complainant,	)	**PCB 2014-134**
	)	**(Enforcement-Air)**
v.	)	
	)	
AMERENENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE, INC.,	)	
	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached NOTICE OF FILING; RESPONDENTS' RESPONSE TO MOTION TO STRIKE AND MEMORANDUM IN SUPPORT; RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION FOR EXTENSION OF TIME AND A CONTINUANCE TO ALLOW FOR DISCOVERY NECESSARY TO RESPOND TO SUMMARY JUDGMENT; RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY; RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO EXPEDITE; RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT; APPEARANCE; and this CERTIFICATE OF SERVICE by FedEx and e-mail upon the following persons:

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