

## **Illinois Federal Court Dismisses Lawsuit Challenging FutureGen Air Permit**

Dave Scriven-Young  
Peckar & Abramson, P.C.  
Chicago, IL  
(312) 239-9722  
[dscriven-young@pecklaw.com](mailto:dscriven-young@pecklaw.com)

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The U.S. District Court for the Central District of Illinois recently denied an attempt by Sierra Club to challenge an air pollution control construction permit issued by the U.S. Environmental Protection Agency for the FutureGen 2.0 Project. The Court ruled in *Sierra Club Inc. v. FutureGen Industrial Alliance Inc.* that the Sierra Club could not challenge the permit in federal court; instead, the Sierra Club must file an appeal in the Illinois Pollution Control Board, as required by Illinois law.

FutureGen 2.0 is an attempt at a “near-zero emissions coal-fueled power plant”, a first-of-a-kind concept that could keep coal in our energy future. According to the FutureGen Alliance, “the FutureGen 2.0 project partners will upgrade a power plant in Meredosia, Ill. with oxy-combustion technology to capture approximately 1.1 million tons of CO<sub>2</sub> each year—more than 90 percent of the plant’s carbon emissions. Other emissions will be reduced to near-zero levels. Using safe and proven pipeline technology, the CO<sub>2</sub> will be transported and stored underground at a nearby storage site.”

The FutureGen partners submitted an initial application to authorize construction of the project to the Illinois EPA, which issued a draft construction permit and held a public comment period regarding the draft permit. During the public comment period, Sierra Club objected on the basis that the project would cause a significant net emission increase. Thus, Sierra Club argued that the project would need a Prevention of Significant Deterioration (PSD) permit, which is required for new and modified major sources of air pollution. The Illinois EPA then issued an air pollution control construction permit for construction of the project. In its decision, Illinois EPA expressly rejected Sierra Club’s argument.

Four days before the Illinois EPA issued the permit, Sierra Club filed a federal lawsuit in the Central District of Illinois, alleging that the FutureGen partners were attempting to construct a major modification to the existing Meredosia power plant without a PSD permit. The FutureGen partners filed a motion to dismiss, arguing in part that the Court should abstain (i.e., not allow the case to continue in federal court) because Illinois law established a procedure by which any party could challenge the Illinois EPA’s decision by filing an appeal with the Illinois Pollution Control Board. The Court agreed:

“This court has carefully reviewed the procedures before the IEPA and the IPCB, including an in depth study of Chapter I of Title 35 of the Illinois Administrative Code. Following this review,

it is evident that Illinois offers a clear and impartial forum, through the IPCB, where Plaintiff's claims may be litigated. Further, this court believes that Illinois cannot be expected to effectively control air pollution if it must contend with a federal district court, not as familiar with its regulatory law, second guessing its decisions under the state's regulatory scheme. Based on these findings, this court believes that dismissal is appropriate . . . because Illinois offers an appropriate forum and the exercise of federal review in this case would be disruptive of Illinois' efforts to establish a coherent policy with respect to pollution control within the state."

Although the Court dismissed that complaint, this battle is not over yet: Sierra Club has already filed a complaint for review with the Illinois Pollution Control Board. You can view that complaint [here](#).

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