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JUN 01 2009

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PROPOSED RULES ESTABLISHING 35 ILL.
ADM. CODE SUBCHAPTERS, PART 840
AND SUBPART A, SITE-SPECIFIC RULES
PROVIDING FOR THE CLOSURE OF ASH
POND AT THE HUTSONVILLE POWER
STATION

R09-21

(Site-Specific Rulemaking – Land)

NOTICE

John T. Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 W. Randolph
Chicago, Illinois 60601

Virginia Yang
General Counsel
Illinois Dept. of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702-1271

Matthew J. Dunn, Chief
Office of the Attorney General
Environmental Bureau, North
69 West Washington St., Suite 1800
Chicago, Illinois 60602

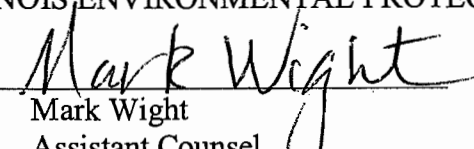
Tim Fox, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 W. Randolph
Chicago, Illinois 60601

Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **Appearances of Kyle Nash Davis and H. Mark Wight** and the Illinois Environmental Protection Agency's **Response to Motion for Expedited Review**, copies of which are herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By:


Mark Wight

Assistant Counsel

Division of Legal Counsel

DATE: May 28, 2009

1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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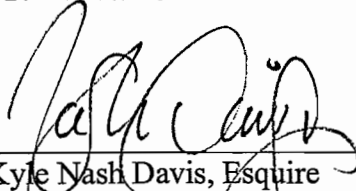
ENTRY OF APPEARANCE

NOW COMES the undersigned, as counsel for and on the behalf of the Environmental Protection Agency of the State of Illinois, and hereby enters his Appearance in the above captioned matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

By



Kyle Nash Davis, Esquire
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)

Dated: May 28, 2009

This filing submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
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IN THE MATTER OF:)

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PROVIDING FOR THE CLOSURE OF ASH)

POND AT THE HUTSONVILLE POWER)

STATION)

R09-21

(Site-Specific Rulemaking – Land)

APPEARANCE

I, the undersigned, hereby file my appearance in the above-titled proceeding on behalf of the Illinois Environmental Protection Agency.

By: _____

Mark Wight

Assistant Counsel

DATE: May 28, 2009

H. Mark Wight
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544
Fax: (217) 782-9807

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:

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(Site-Specific Rulemaking – Land)

RESPONSE TO MOTION FOR EXPEDITED REVIEW

NOW COMES the **ENVIRONMENTAL PROTECTION AGENCY** of the State of Illinois ("Illinois EPA/Agency"), by its attorneys, Kyle Nash Davis and Mark Wight, and, pursuant to 35 Ill. Adm. Code 101.500 (2006), hereby submits this **Response to Motion for Expedited Review** ("Response") in response to the **Motion for Expedited Review** filed by the Petitioner, **AMEREN ENERGY GENERATING COMPANY** ("Ameren/Petitioner"). In support of this Response, the Illinois EPA states as follows:

1. On May 19, 2009, Ameren filed its Petition with the Board for the above-captioned proceeding seeking to amend the Board's waste rules by adding a new Part 840 for the site-specific closure of certain surface impoundments for coal combustion waste ("CCW"). In particular, Ameren proposes 35 Ill. Adm. Code 840.Subpart A to govern the closure of the unlined ash impoundment designated as "Pond D" at Ameren's Hutsonville Power Station in Crawford County. The proposal includes a Motion for Expedited Review ("Motion") pursuant to 35 Ill. Adm. Code 101.512. The Illinois EPA received service of this pleading on May 21, 2009.

2. In its Motion, Petitioner offers two reasons for expediting the proceeding: 1) Ameren wishes to sell the Hutsonville facility, so the closure of the facility, or the certainty of the steps necessary to achieve closure, would make the facility more attractive to potential buyers; and 2) because "... public and regulatory interest in ash ponds at coal-fired power plants has heightened nationwide, including in Illinois." (Motion at 2, par 3 and 4). In the Agency's view, the first reason does not rise to the level of a material prejudice that would justify accelerating the Board's usual intention to proceed as soon as practicable, and the second reason is better interpreted as a reason why a more measured pace is in the public interest. In addition and as further set forth below, an expedited proceeding may prevent the Illinois EPA from providing the Board with the level of analysis that the Illinois EPA could otherwise provide if the matter proceeded under a standard rulemaking schedule.

3. Petitioner generally states that it owns a facility it intends to sell and that such a fact should be a consideration in expedition of its Petition. (Motion at 2, par 3 and 4) Petitioner claims a "material hardship so long as the parameters under which it may close Ash Pond D are undecided." (Motion at 3, par 7) Yet, if the desired regulatory certainty suggested within the above statement is to be considered, it would be noteworthy that expedited consideration is claimed upon the basis of providing for a more marketable plant. The Agency does not dispute this would be of benefit to Petitioner; however, a decision to offer the sale of its plant is, at best, a self-imposed hardship. The mere fact that a business intends to offer its facility "... on the market for sale to reduce its costs ..." and place a waste disposal area "... in a better light to a potential buyer ..." is not unique, by any means. Indeed, almost every Petitioner before the

Board may claim similar facts when a sale is considered. Such events should not, by themselves, be dispositive of a request for expedited consideration.

4. Other important considerations against expediting the proceeding include the public interest in conducting a proceeding that thoroughly and deliberately evaluates the proposal (which has implications extending beyond the Hutsonville facility) and Agency resource limitations. Matters of fact set forth below are stated on information and belief.

5. On Thursday, March 5, 2009, the Illinois Pollution Control Board ("Board") issued its final order in the proceeding *In the Matter of: Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, 815*, PCB AS 09-1. The Board found that promulgation of a site-specific rule is a more appropriate way to govern the closure of "Pond D."

6. On Tuesday, March 10, 2009, Ameren sent to the Illinois EPA via e-mail a draft of proposed legislation that would be generally applicable to closures of CCW impoundments "when such facilities are no longer operated pursuant to water pollution control permits issued by the Agency under applicable Board regulations." By Friday, March 13th, the Agency had hastily assembled a small workgroup representing the Bureaus of Water and Land and the Division of Legal Counsel to begin evaluating the proposal. The Agency had reason to believe the proposed legislation would be filed as soon as late March or early April.

7. On Sunday, March 22, 2009, Ameren sent to the Agency via e-mail the Legislative Reference Bureau draft of the legislation. By Tuesday, March 24th, the Agency workgroup had identified a list of significant questions and concerns about the legislation in the event the draft proposal was introduced in the General Assembly. In addition to specific

concerns, the two overarching concerns were: 1) that such an important piece of environmental legislation would be rushed through the legislative process with little time for deliberation by the Agency and other interested parties, and 2) that federal proposals on CCW matters would be forthcoming by the end of 2009, the subsequent adoption of which might be necessary in Illinois to maintain delegated, authorized or approved federal programs. With regard to the latter, conflicting legislation would be a significant complication.

8. Mid-afternoon on Wednesday, April 8, 2009, Ameren sent to the Agency via e-mail three documents, the generally applicable draft legislation, Ameren's draft site-specific rule for the closure of Ash Pond D, and a "Summary Document presenting the underlying elements of the approach for the closure of Ash Pond D . . . as found in the draft rule." The message reiterated that time was of the essence and that legislation would have to go forward within days if the "[Agency did not] believe we can work on developing a site-specific rule"

9. On Thursday, April 9, 2009, the Agency conveyed to Ameren via telephone message its preference to work on a site-specific rule rather than legislation. On or about April 13th, Ameren proposed a meeting at Agency headquarters in Springfield the following Thursday, April 16th, for the purpose of walking through its proposal and supporting documentation and receiving the Agency's comments on the proposal. Because of insufficient time and prior commitments, the Agency could not accommodate this schedule, but a meeting was set for Tuesday afternoon, April 21st. The Agency's list of comments on the proposal and supporting documentation was provided to Ameren on Friday, April 17th, so Ameren could at least see the nature of the Agency's concerns before the meeting. It was understood by both parties that the Agency's comments were preliminary, not a "full critique." The Agency reserved the right to

revise and extend its comments as the discussions evolved. It was further understood that Ameren had not yet ruled out proceeding with legislation.

10. As a result of the exchange at the meeting, Ameren made revisions to its proposal. On Saturday, May 2, 2009, Ameren sent to the Agency via e-mail its revised proposal for a site-specific rule. The Agency was unable to divert resources to the task of accelerated review until May 11th. On May 15th, Ameren checked on the Agency's progress via telephone, but the Agency had not yet compiled a list of comments. Ameren stated its intention to file the proposal with the Board the following week.

11. On May 19, 2009, Ameren called the Agency to see if comments were available and to confirm the filing of its site-specific proposal with the Board. Partial comments had been assembled but not reviewed by the full workgroup or management and were not ready for discussion.

12. As the foregoing chronology demonstrates, the entire process since the Board's decision in PCB AS 09-1 has been driven by haste. The Agency does not fault Ameren for proceeding in the manner it believes best protects its interests nor does it mean to diminish the importance of those interests. Nonetheless, the Agency has repeatedly been placed in a reactive mode with little time to fully evaluate the proposal and its effects, much less for deliberation about how the proposal might be improved to the extent necessary. The Agency knew these circumstances were not conducive to the optimal outcome, but it nonetheless made a good faith attempt to participate and to identify and resolve as many issues as possible before the proposal was filed with the Board. The Agency did so not only because it agrees that a site-specific rule for closure and post-closure is appropriate for the Hutsonville ash pond, but also to head off the

legislative approach, which would have provided even less time for deliberation and was of even greater concern because of its general applicability. Further, if any issues could be resolved before submission to the Board, the rulemaking might be concluded more quickly for all concerned. Ultimately, the Agency's capacity to respond did not meet Ameren's expectations. There was no "meeting of the minds" on this proposal prior to its filing with the Board.

13. Now Ameren continues to push the pace by requesting expedited review by the Board. The Agency's position is that this proposal is too important to rush. Because of significant source control and surface and groundwater contamination issues (on- and off-site), it is important that this proposal be carefully and thoroughly considered in its own context. However, the importance of the proposal extends well beyond the Hutsonville facility. Ameren itself has acknowledged that it and its affiliated companies own seven other facilities with similar ash impoundments. PCB AS 09-1 at 5. Moreover, "Ameren [has argued] that its 'closure of Pond D will likely serve as an example for the closure of other similarly-situated ash ponds in the future.'" *Id.* The Agency expects that other companies, in addition to Ameren and its affiliates, also will use the results of this proceeding as a template for similar closures. In effect, the Board may well be developing what amounts to a regulatory program albeit in the context of a site-specific rulemaking. Were the Agency the proponent of a rule with similar broad implications, preparations would begin far sooner than the ten weeks prior to filing with the Board the Agency was given to respond to Ameren's proposed legislation and site-specific rule, and full and deliberate consideration still would be required during the hearing phase. As Ameren has noted in its Motion, coal ash impoundments are a complex, high profile matter of nationally-recognized importance. The Agency believes it is not in the public interest to accelerate this proceeding.

14. The timing is further complicated by the Agency's limited capacity to respond to this proposal in the near term. Ameren cites *In the Matter of: City of Galva Site Specific Water Quality Standard for Boron Discharges to Edwards River and Mud Creek*, PCB R09-11 (February 5, 2009) as an example of setting a site-specific proposal for First Notice without first considering the merits of the proposal. PCB R09-11 at 3. What is instructive is that the Board denies Galva's motion for expedited consideration. The Board takes note of its workload of pressing cases and numerous rulemakings demanding immediate attention. The Board then states:

Due to attrition, Board staffing is at its lowest levels in some years. Even if the Board were to accept that Galva's claims amount to "material prejudice", the Board's limited resources in light of its current and future decision deadlines render the granting of a motion for expedited review unlikely in all but the most dire circumstances.

Id. Similar resource limitations afflict certain functions of the Agency. Despite diminished resources, the Agency must respond to a multitude of statutory obligations and demands from parties each of whom also believes its interests are paramount and will be compromised if the Agency does not address them immediately.

15. The Bureau of Land's Permit Section Solid Waste Groundwater Assistance Unit, the workgroup responsible for assessing the effectiveness of Ameren's groundwater monitoring, assessment and response provisions, is currently understaffed with no immediate prospect for hiring. Remaining employees average approximately 40 projects per person, nearly doubling the average since 2008. Most, if not all, of the projects are various forms of permit applications for waste management facilities (e.g., initial applications, modifications) with statutory deadlines for

completion. Reviewers with expertise and experience in key areas already are working overtime to complete reviews.

16. The Toxicity Assessment Unit, the workgroup responsible for reviewing Ameren's risk assessment document, will require at least 30 days and possibly as many as 60 days to complete a review of that document, depending on a number of variables.

17. Ameren states it "believes it has addressed most, if not all, of the Agency's requests and has prepared this proposal and supporting technical documents to facilitate prompt review." (Motion at 2, par 6) Ameren's representation apparently is based on the revisions made following the discussion of the Agency's preliminary comments on the first draft of the proposal. There have been no substantive discussions of the second draft, the one submitted to the Board. The Agency continues to have questions and significant reservations. To the extent the Agency has been able to assess the proposal, it has identified areas of concern including, but not limited to:

- Groundwater contamination monitoring, assessment and response: Several unclear, open-ended and/or inappropriate provisions; omissions such as no clear requirement to control public or private uses of contaminated off-site groundwater;
- Requirements for final slope and stabilization and final cover system;
- Time periods for initial implementation and compliance;
- Little or no Agency oversight or involvement where provisions propose the flexibility to establish or alter elements of the closure and post-closure plans, or, in the alternative, the proposal may be insufficiently prescriptive to support effective field inspections and enforcement for non-compliance.

18. Some of these issues may require resolution before others can be addressed. Further and as a part of its participation, the Agency's preference would be to offer more than criticisms of the proposal with the expectation that Ameren would offer revisions until the proposal is deemed satisfactory. The more effective, but time consuming, method of participation would be for the Agency to identify satisfactory alternatives, consider amendments to the proposal or an alternative proposal to implement the alternatives, and prepare written testimony to convey all this to the Board and participants. In the end, it may be that the differences between Ameren and the Agency are not great, but there must be sufficient time to sort and resolve them. It also should be noted that Ameren and the Illinois EPA have expressed to each other a willingness to continue informal discussions to reduce or eliminate differences of opinion. This could be a constructive alternative to expediting the proceeding.

19. The Agency's concern is that an expedited hearing schedule will compromise the Agency's capacity to fully identify, address and express its concerns and proposed solutions. This would constitute material prejudice to the Agency's ability to fully participate in the proceeding. As of the preparation of this Response, the Agency cannot say precisely when it will be ready for hearing. It is currently considering whether resources outside the Bureau of Land may be diverted to assist in reviewing and responding to Ameren's proposal. Assuming the Board accepts the proposal for hearing, the Agency expects it will be able to respond with more specific information in the hearing officer's status call for establishing a hearing schedule. Further, setting the proposal for First Notice without comment on its merits still has the effect of starting the time clock and reducing the Board's flexibility. The Agency believes this step should be delayed until the nature and extent of the issues are better understood.

WHEREFORE, the Illinois EPA respectfully requests that the Board **DENY** Petitioner's Motion for Expedited Review.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Mark Wight
Mark Wight
One of its attorneys

CERTIFICATION STATEMENT

In accordance with 35 Ill. Adm. Code 101.504 and under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

By: Mark Wight
Mark Wight

Dated: May 28, 2009

Kyle Nash Davis
H. Mark Wight
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544
Fax: (217) 782-9807

This filing submitted on recycled paper.

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **Appearances of Kyle Nash Davis and H. Mark Wight** and the Illinois Environmental Protection Agency's **Response to Motion for Expedited Review** upon the persons to whom they are directed, by placing a copy of each in an envelope addressed to:

John T. Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 W. Randolph
Chicago, Illinois 60601
(First Class Mail)

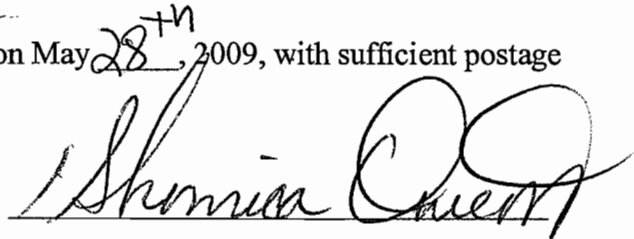
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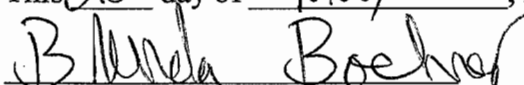
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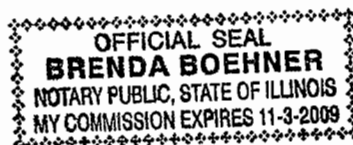
(Attached Service List -- First Class Mail)

and mailing them from Springfield, Illinois on May 28th, 2009, with sufficient postage affixed as indicated above.



SUBSCRIBED AND SWORN TO BEFORE ME

This 28th day of May, 2009.

Notary Public



Illinois Pollution Control Board

Service List Service list for case R2009-021

Party Name	Party Role	Address 1	Address 2	City	State	Zip	Phone	Fax	Person Name	Title
IEPA	Respondent	1021 North Grand Avenue East	P.O. Box 19276	Springfield	IL	62794-9276	217/782-5544	217/782-5507	*	
IEPA	Respondent	1021 North Grand Avenue East	P.O. Box 19276	Springfield	IL	62794-9276	217/782-5544	217/782-5507	John Kim	General Counsel
Illinois Department of Natural Resources	Interested Party	One Natural Resources Way		Springfield	IL	62702			Virginia Yang	
Office of the Attorney General	Interested Party	Environmental Bureau North	69 West Washington Street, Suite 1800	Chicago	IL	60602	312/814-2550	312/814-2347	Matthew J. Dunn	Chief
Schiff Hardin, LLP	Petitioner	6600 Sears Tower	233 South Wacker Drive	Chicago	IL	60606-6473	312/258-5500	312/258-5500	Renee Cipriano	
Schiff Hardin, LLP	Petitioner	6600 Sears Tower	233 South Wacker Drive	Chicago	IL	60606-6473	312/258-5500	312/258-5500	Kathleen C. Bassi	
Schiff Hardin, LLP	Petitioner	6600 Sears Tower	233 South Wacker Drive	Chicago	IL	60606-6473	312/258-5500	312/258-5500	Joshua R. More	