

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF AMEREN ENERGY) PCB 09-01
GENERATING COMPANY FOR ADJUSTED) (Adjusted Standard – Land)
STANDARDS FROM 35 ILL. ADM. CODE)
PARTS 811, 814, AND 815)

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board **AMEREN'S REPLY TO AGENCY'S RESPONSE TO BOARD ORDER OF SEPTEMBER 16, 2008**, a copy of which is herewith served upon you.

Ameren Energy Generating Company

By: 
Amy Antonioli

Dated: October 30, 2008

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 30th day of October, 2008, I have served electronically the attached, **AMEREN'S REPLY TO AGENCY'S RESPONSE TO BOARD ORDER OF SEPTEMBER 16, 2008**, upon the Illinois Pollution Control Board and the Illinois Environmental Protection Agency as the parties are identified in the Notice of Filing.


By: _____ Amy Antonioli

Dated: October 30, 2008

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GENERATING COMPANY FOR ADJUSTED) (Adjusted Standard – Land)
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**AMEREN'S REPLY TO AGENCY'S
RESPONSE TO BOARD ORDER OF SEPTEMBER 16, 2008**

I. PROCEDURAL BACKGROUND

On August 11, 2008, Ameren Energy Generating Company (“Ameren” or “the Company”) filed a petition for adjusted standards from the landfill regulations with the Illinois Pollution Control Board (the “Board”) as those regulations would apply to closure of a former ash impoundment located at the Hutsonville Power Station (the “Facility” or “Station”).

On September 16, 2008, the Board accepted Ameren’s petition. In the same order, the Board requested both Ameren and the Illinois Environmental Protection Agency (“Agency”) to file within 30 days of the date of the September 16 order, a document addressing three points: (1) the authority for applying the Board’s landfill regulations to Pond D; (2) whether any of Ameren’s applicable permits address requirements for closure of Pond D; and (3) whether a site-specific rule would perhaps be a more appropriate regulatory relief mechanism through which to define the closure requirements applicable to Pond D.

Both Ameren and the Agency filed responses to the Board’s September 16, 2008 order on October 16, 2008.¹ The Board gave the parties 14 days to reply to the other party’s filing.

¹ Ameren’s Statement of Authority for Requested Relief, filed October 16, 2008 will be referred to throughout this response as “Statement of Authority;” the Illinois Environmental Protection Agency Response to Board Order of September 16, 2008, filed October 16, 2008 will be cited to as “Agency Resp.”

II. THE PARTIES AGREE ON THE APPROPRIATE FORM OF RELIEF

Both Ameren and the Agency agree that a site-specific rulemaking is the proper form of a request for relief to seek closure of Pond D. Agency Resp. at 4, par. 11 (“It would be the Illinois EPA’s contention that [a site-specific regulation] may be more appropriate for review of Petitioner’s request.”). Both parties also acknowledge that no applicable permit currently provides requirements for the closure of Pond D. By way of background, Pond D was constructed as a surface impoundment in 1968. Ameren or its predecessor operated Pond D as a water pollution treatment facility and, while it operated, Pond D received only coal combustion by-products (“CCBs”) generated at the Station.²

III. THE AGENCY HAS NOT SHOWN THAT AUTHORITY EXISTS FOR APPLYING LANDFILL REGULATIONS TO THE CLOSURE OF POND D

The parties disagree on the question of whether there is authority for applying the landfill regulations to the closure of Pond D. Ameren maintains there is no statutory or regulatory authority for their application. The Board’s proceedings leading up to the promulgation of the landfill regulations demonstrate that pre-existing ash ponds were not intended to and, ultimately, did not come under the landfill regulations. Given the lack of specific authority for applying the landfill regulations, and the fact that these facilities are regulated throughout construction and operation under the water pollution regulations, a site-specific rulemaking logically should amend the water pollution permitting regulations. The preamble to the Subpart B permitting requirements provides: “[t]his Subpart B establishes basic rules for the issuance of permits for the construction, modification and operation of treatment works, pretreatment works, sewers, wastewater sources and other discharges which are not required to have NPDES Permits.” 35 Ill.

² For the purposes of this response, Ameren will refer to ash ponds constructed before the effective date of the landfill regulations and receiving only on-site coal combustion wastes as “pre-existing ash ponds.”

Adm. Code 309.201. Accordingly, Ameren asserts that the appropriate regulatory course should be that Ameren submit an application for permit modification under Part 309, Subpart B, to the Agency which includes the closure plan and outlines any additional requirements necessary to initiate the closure of Pond D.

A. The Agency's Grounds for Authority Has Been Rejected in the Past

The Agency argues that the landfill regulations apply to a unit such as a surface impoundment where the unit is to be closed with waste in place. Its argument rests on the definitions of "landfill" and "disposal." Agency Resp. at 2, par. 7. As discussed in Ameren's Statement of Authority, however, a review of Board proceedings leading to the promulgation of the landfill regulations shows the Board in fact considered subjecting surface impoundments *used for disposal* to the landfill regulations and ultimately did not adopt that approach.

The definition of "landfill," and what kind of units were intended to be covered by that definition, was the subject of much comment in the R88-7, the landfill regulation rulemaking. The Board's Scientific/Technical Section ("STS") noted that several definitions, including those of "landfill" and "disposal," as contained in the original proposal, created ambiguity as to whether Land Treatment Units (including surface impoundments, and specifically, ash ponds) came within the scope and intent of the landfill regulations. After recognizing that ambiguity, the STS went on to note "that the original intent and scope of the regulations in R88-7 might be changed if LTUs, used for disposal, are included in the definition for 'landfill' since the standards being proposed pertain only to 'landfills.'" See Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills ("Landfill Regulations"), R88-7,

Response to Comments on Proposed Parts 807 through 815, at 18 (“STS Response”) (emphasis in original) (Mar. 13, 1990).³

Again, in discussing the scope and applicability section of the landfill regulations, the STS noted that LTUs or surface impoundments used for disposal of solid wastes could be considered “landfills,” but that their addition would change the intent and scope of the R88-7 proposal. Landfill Regulations, STS Response at 37. Further, the STS explained that if the Board were to adopt a change to the definition of “landfill,” the proposed Section 811.101 (scope and applicability) should also include a subsection clarifying that LTUs or surface impoundments used for disposal can be considered “landfills” subject to certain minimum groundwater protection standards in the landfill regulations:

[I]t was indicated that land treatment units or surface impoundments which are used for disposal of solid wastes should be considered “landfills” . . . However, as noted earlier in the response in Part 810 regarding the definition of “landfill” and “land treatment unit,” the addition suggested below in subsection (b) is provided as an option for Board consideration since it is a change affecting the earlier intent and scope of the R88-7 proposal as developed during the hearings. Landfill Regulations, STS Response at 36-37 (emphasis in original).

The Board did not adopt either of the STS’s suggestions and instead maintained a distinction in the regulations between surface impoundments and landfills.

The issue- whether to include ash ponds *at closure*- was also considered in the proposal to amend the landfill regulations filed by Illinois utilities with a similar result. *See Amendments to the Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills: 35 Ill. Adm. Code 811 (Utility Group Amendments), R90-25 (Nov. 29, 1990).*⁴ The

³ The STS itself explained that it included land application units, surface impoundments, and ash ponds when referencing land treatment units (“LTUs”). *See Id.* at 18.

⁴ The Utility Group Amendments ultimately excluded existing ash ponds from their proposal, finding that “[t]he inclusion of existing ash ponds at closure was just simply unworkable.” Utility Group Amendments, R90-25, January 27, 1992 Tr. at 19.

Utility Group noted during the Utility Group Amendments that the cost of bringing existing ash ponds into compliance with the landfill rules was never even considered under the economic impact study performed in R88-7. See Utility Group Amendments, R90-25, Jan. 27, 1992 Tr. at 28-29.⁵ Accordingly, the record is clear that including pre-existing ash ponds used for disposal at closure within the scope of the landfill regulations was considered and not adopted by the Board in prior rulemakings. Such units simply are not meant to be included under the landfill regulations.

B. The Landfill Regulations Do Not Require Removal of The Ash in Pond D, Nor is Removal Economically Reasonable or Technically Feasible

The Agency seems to suggest the coal combustion ash lawfully placed in Pond D pursuant to an Illinois EPA permit and under Agency oversight could be moved to a waste disposal unit as opposed to remaining in place. First, the Agency's reading of the definitions of "landfill" and "disposal" fails to recognize that Pond D can be a compliant waste disposal site even if closed under a set of regulations other than the landfill rules. As the Agency notes, a "landfill" is a unit in or on which waste is placed and accumulated over time for disposal. Agency Resp. at 2; citing 35 Ill. Adm. Code 810.103. However, the definition also explicitly excludes surface impoundments from the family of units in which waste is placed and accumulated over time for disposal. 35 Ill. Adm. Code 810.103 ("Landfill' means a unit or part of a facility in or on which waste is placed and accumulated over time for disposal, and which is not a land application unit, a surface impoundment, or an underground injection well."). In this

⁵ "[T]here are quite a number of such facilities, 20 odd ash impoundments or ash ponds in the state. And the cost of bringing them into compliance with the current landfill standards was not an never has been calculated. Therefore, we have made our petition consistent with the Board's landfill rules and exempted existing ash ponds." Utility Group Amendments, R90-25, Jan. 27, 1992 Tr. at 28-29.

regard, the definitions on which the Agency rely recognize that surface impoundments such as ash ponds may accumulate waste for disposal, yet exclude them from the landfill regulations.

Second, the Agency's statement that Ameren's "assertion attributes to the Illinois EPA a conclusion that the waste must remain in place" gives the impression that removing coal combustion wastes from surface impoundments used to treat the wastes is common practice and even that it is economically reasonable and technically feasible to do so at Pond D. *See* Agency Resp. at 2, par. 5. As discussed more fully within the petition, Ameren has researched this option and found that removal and off-site disposal at Pond D is not only economically unreasonable but is also not feasible.

As a practical matter, Ameren, like most other utilities, built ash ponds like Pond D to such a size and depth that the ponds could and would act as final repositories for the coal combustion ash they received and with no intention of removing them. Importantly, again, the use of these ponds for this purpose is clearly and specifically permitted by "the Agency" through the Bureau of Water. In more recent years, recognizing the Agency's policy decision to apply the landfill regulations to the ash ponds upon closure, ash ponds have been built with more features similar to those required for landfills. Interestingly, although a company may choose to so design an ash pond compliant with the landfill regulations for purposes of closure through the Agency's Bureau of Land, the Agency's Bureau of Land will not assess nor render an opinion as to the design of the ash pond during the initial permitting process through the Bureau of Water.

Further, while it is now common practice to design a surface impoundment as a landfill, it is unreasonable and infeasible to imply that retrofitting a pre-existing pond to meet landfill standards at closure, 40 years after its construction and operation under Agency oversight and

approval, is appropriate. For all of these reasons, even implying that a possible solution is to apply the landfill regulations to require removal or retrofitting is not appropriate.

C. Policy and Illinois Law Merit Unique Consideration of Coal Combustion Byproducts

Coal combustion by-products may also merit consideration as a material different than the wastes typically put into landfills because they are independently defined under the Act and have recognized beneficial uses under Illinois law. 415 ILCS 5/3.140; 415 ILCS 5/3.135. For example, the Act itself exempts CCBs from the definition of solid waste when it is used beneficially in certain ways. 415 ILCS 5/3.135(a). Further, “to encourage and promote the use of CCB in productive and beneficial applications,” the Act allows the Agency to approve certain uses of coal CCBs so far as those uses do not harm or threaten to harm human health or the environment even if testing shows the CCB to be used may exceed Class I groundwater quality standards for metals. 415 ILCS 5/3.135(b).

IV. CLOSURE OF POND D UNDER THE WATER REGULATIONS IS A MORE APPROPRIATE SOLUTION

A. Application of the Landfill Regulations Is Unwieldy and Inappropriate

As an example of the incongruous results of applying the landfill regulations, Pond D has been subject to the Part 620 groundwater quality standards since their promulgation. 35 Ill. Adm. Code 620. Application of the landfill regulations at closure would require that Pond D meet the Part 811.320 groundwater quality standards for the first time in its existence. 35 Ill. Adm. Code 811.320. The Part 811.320 standards would require the groundwater quality around Pond D to meet stricter background concentrations of constituents despite the known impacts to groundwater at Pond D. A comparison to and ultimate compliance with background concentration levels may be theoretically possible for an unaltered site that – as envisioned by the regulations – is constructed with such features as a liner and leachate collection system. It is

a nearly impossible compliance standard, however, for ash impoundments that were not required to incorporate such features at the time of initial design and construction. This is only one example of how applying the landfill regulations, promulgated with an entirely different scope and intent than the water quality regulations, to Pond D at closure is problematic. Many more difficulties are set forth in more detail in the petition.

B. A Site-Specific Rule Under Water Pollution Regulations Will Provide for the Closure of Pond D in a Way That is Protective of the Environment

Outside of stating that authority exists under the landfill regulations because Pond D meets the definition of a landfill, the Agency otherwise focuses on potential impact to the environment. According to the Agency, “a unit such as Pond D . . . falls within the intent of applying regulations that consider its impact on the environment, and which consider techniques to be applied that are protective of the environment.” Agency Resp. at 3, par. 7. Ameren fully agrees that closure and post closure actions will be necessary and would be made part of a site-specific rule. Ameren’s proposal would consider the unit’s impact on the environment as well as include techniques that are protective of the environment. As described in more detail below, these goals can be accomplished through a site-specific rulemaking proposal amending the water pollution permitting requirements.

The Agency contends that 18 years have passed since the Board has generally considered this type of facility. This may be true, but it does not change the fact that the Board chose not to bring pre-existing ash ponds within the scope of the landfill regulations. The pre-existing ash ponds themselves have not changed, nor have the fundamental requirements and definitions of the landfill regulations. As has been true since the promulgation of the rules, ash ponds used for disposal at closure were not intended to come within the definition of “landfill” and rulemaking background shows they were not intended to be covered by the landfill regulations.

V. AMEREN'S PROPOSED FORM OF SITE-SPECIFIC RULEMAKING

As is implicit in the Board's September 16 order, it is important to identify the section of the regulations to be amended by the site-specific rulemaking so that Ameren may draft a proposal and begin to work with the Agency to resolve as many issues concerning how to execute closure as possible. The Agency has argued generally that the landfill regulations would apply to the in-place closure of Pond D, but has not specified what Section of the regulations it believes a site-specific rule might amend. As noted above, the development of the landfill rules indicates that ash ponds are not covered, in fact are excluded, from the definition of landfill. Ameren contends that a site-specific rulemaking would appropriately amend the water pollution permitting requirements of Part 309, Subpart B since this program does apply to the units in question.⁶

The general requirements outlined in section IV.B of Ameren's Statement of Authority address several of the concerns raised in the Agency's response to the Board's September 16, 2008 order. Agency Response to Board Order, at 5, par. 14. A comprehensive site-specific rule would incorporate concepts applicable to in-place closures, such as groundwater monitoring and a closure plan that would allow Ameren to close Pond D in a way that brings Pond D into compliance with Illinois groundwater quality standards. In addition, a closure plan would provide for financial assurance and post-closure care requirements where necessary and appropriate.

⁶ The proposal could add a new section to the Board's regulations that does not fall under either the solid waste or water pollution regulations. However, a site-specific rule is not a likely candidate for a new section to the Board's rules.

No matter what shape or form a site-specific rule for the closure of Pond D ultimately takes, Ameren is committed to closing Pond D in a way that protects human health and the environment. At the same time, consideration must be given that Pond D is a pre-existing ash pond with known impacts to groundwater that must be addressed in an appropriate closure plan.

VI. CONCLUSION

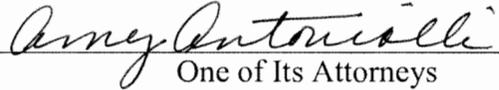
Even while acknowledging that the landfill regulations do not easily apply, the Agency concludes that should the coal combustion by-products remain in place, Pond D meets the definition of a landfill and must satisfy the landfill regulations. This is argument has already been addressed in the past by the Board. For the foregoing reasons, Ameren maintains that a site-specific rule addressing the closure of a pre-existing ash pond like Pond D should logically amend the water pollution regulations. There is no statutory or regulatory authority for applying the landfill regulations to Pond D, Pond D was constructed and has been operated during most of its life under the water pollution regulations, and closure under any site-specific rule can be equally protective of human health and the environment. Ameren asks the Board to determine whether seeking a site-specific rulemaking from the water pollution permit requirements is the more appropriate solution. Should the Board find that it is, Ameren would be prepared to file a proposal for site-specific rulemaking addressing closure requirements for Pond D by January 1, 2009.

Accordingly, for the reasons set forth above, Petitioner AMEREN ENERGY GENERATING COMPANY, respectfully requests the Board to find that a site-specific regulation amending the water pollution regulations is the appropriate form of relief through which to execute the closure of Pond D.

Respectfully submitted,

AMEREN ENERGY GENERATING
COMPANY,

by:



One of Its Attorneys

Dated: October 30, 2008

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