

ILLINOIS POLLUTION CONTROL BOARD

March 5, 2009

IN THE MATTER OF:)
)
PETITION OF AMEREN ENERGY) AS 09-1
GENERATING COMPANY FOR) (Adjusted Standard – Land)
ADJUSTED STANDARDS FROM 35 ILL.)
ADM. CODE PARTS 811, 814, 815)

ORDER OF THE BOARD (by A.S. Moore):

On August 11, 2008, Ameren Energy Generating Company (Ameren) filed a petition for an adjusted standard for its Hutsonville Power Station (Station) located near Hutsonville, Crawford County. In its petition, Ameren indicates that it seeks regulatory relief in order to close an unlined ash impoundment at the Station designated as “Pond D.” Ameren’s petition states that the Illinois Environmental Protection Agency (Agency) has taken the position that the pond must be closed according to landfill regulations as those regulations apply to it. *See* 35 Ill. Adm. Code Parts 811-815. Generally, Ameren questions the applicability of landfill regulations to a site of this nature.

In an order dated September 16, 2008, the Board directed both Ameren and the Agency to file a document specifying the authority to apply the Board’s landfill regulations to Pond D. The same order allowed Ameren and the Agency to file a response to one another. After reviewing those filings, the Board dismisses this petition for an adjusted standard, finding that it is an inappropriate mechanism for granting the relief sought by Ameren. The Board finds that a site-specific rule is the appropriate regulatory relief mechanism under which to close Ameren’s Pond D. In its conclusion below, the Board directs Ameren in any petition for a site-specific rule to propose an amendment to the Board’s Subtitle G solid waste regulations.

In the order below, the Board will first review the procedural history of this proceeding, Ameren’s petition for an adjusted standard, and the Board’s September 16, 2008, order. The Board then summarizes Ameren’s statement of authority, the Agency’s response to the Board’s September 16, 2008, order, and Ameren’s reply. The Board then discusses the issues raised in those filings and reaches its conclusion on them.

PROCEDURAL BACKGROUND

On August 11, 2008, Ameren filed a petition for an adjusted standard (Pet.). Ameren requested that the Board adopt adjusted standards from specified solid waste landfill regulations as they apply to closure of Pond D at the Station. The petition included twelve exhibits (Exh.).

On September 9, 2008, Ameren timely filed with the Board proof of publication indicating that the *Robinson Daily News* on August 22, 2008, published notice of filing the petition. *See* 35 Ill. Adm. Code 104.410 (requiring filing of certificate of publication within 30 days after filing petition).

In an order dated September 16, 2008, the Board accepted Ameren's petition without making any determination regarding its informational sufficiency or its substantive merits. In the same order, the Board directed Ameren and the Agency each to file within 30 days a document specifying the authority for applying the Board's landfill regulations to Pond D. The Board also directed Ameren and the Agency to address whether any permit applicable to the Station contains requirements to close Pond D. Finally, the Board also directed Ameren and the Agency to address whether a site-specific rule is the appropriate regulatory relief for Ameren to pursue in seeking to close Pond D. The Board provided that, within 14 days after Ameren's and the Agency's filings, both Ameren and the Agency may file a response to one another.

On October 16, 2008, Ameren filed its "Statement of Authority for Requested Relief" (Ameren Statement). Also on October 16, 2008, the Agency filed its response to the Board's September 16, 2008, order (Agency Response). On October 30, 2008, Ameren filed its reply to the Agency's response (Ameren Reply).

AMEREN'S PETITION

The petition states that Ameren generates electricity at the Station on a site approximately 205 acres in size. Pet. at 5; *see* Pet., Exh. 1 (Site Location Map). The Station employs 58 persons, and its principal equipment "includes coal-fired boilers for steam production and steam driven turbine generators." Pet. at 5. The Station includes a circulating water system that draws water from the Wabash River for use in the boiler and turbine equipment systems. *Id.* at 5-6. The system removes ash, a byproduct of coal combustion, and sluices it through pipelines to an ash impoundment system. *Id.* at 6. That system consists of a series of ponds "in which solids settle and sluicewater decants from pond to pond before discharging to the Wabash River via an NPDES [National Pollutant Discharge Elimination System] permitted outfall." *Id.*; *see id.*, Exh. 2 (Site Plan). The ponds accept only coal combustion waste, both bottom ash and fly ash, and low-volume waste from the Station. *Id.* at 6.

Ameren's petition addresses an unlined ash impoundment designated as Pond D. Pet. at 1, 6. "Pond D was constructed from indigenous earthen materials in 1968 and operated as the Station's wastewater treatment unit (receiving bottom and fly ash transport water and miscellaneous low-volume wastes) until the construction of a synthetically-lined pond ("Pond A") in 1986." *Id.* at 6. Pond D covers approximately 22 acres and comes as close as 100 feet to the west bank of the Wabash River, which forms the eastern border of the Station. *Id.* 5, 6. In 2000, Ameren constructed two additional lined ponds, Ponds B and C, in order to "supplement the ash management capabilities and to improve surface water management at the property." *Id.* at 5. Ameren then removed Pond D from service and allowed it to dewater. *Id.* "Ameren estimates that, during its 30 years of active operation, Pond D accumulated approximately 750,000 cubic yards of ash and approximately one-third of this volume (280,000 cubic yards) lies below the water table." *Id.*, citing Pet., Exh. 3, Table 3-2 (Areal Extent and Volumes of Unsaturated and Saturated Ash in Pond D). Ameren states that "[a]n additional 200,000 cubic yards of ash were added to Pond D since it was taken out of service (with Illinois Environmental Protection Agency approval) to establish an acceptable grade in anticipation of constructing the proposed cap at closure." Pet. at 6-7.

Ameren states that it seeks regulatory relief “in order to complete closure of Pond D.” Pet. at 1. Ameren further states that the Agency has taken the position that “the pond must now be closed consistent with the landfill regulations contained in 35 Ill. Adm. Code Parts 811 through 815, as they apply to the closure of Pond D.” *Id.*

Ameren argues that, “[b]ecause Pond D was created, operated, and managed throughout its operating life as a surface impoundment, no landfill permit was required pursuant to Section 21(d) of the [Environmental Protection] Act” (Act). *Id.* at 1-2, citing 415 ILCS 5/21(d) (2006), 35 Ill. Adm. Code 810.103; In the Matter of: Petition of Conversion System, Inc. for Adjusted Standard from 35 Ill. Adm. Code Part 811 (Liner), AS 93-4, slip op. at 1 n.3 (Aug. 26, 1993). Ameren further argues that, “[b]ecause Ameren operated Pond D as a water pollution treatment facility and Pond D has received only wastes generated by Ameren within the Site, no landfill permit is required pursuant to Section 21(d) of the Act at closure.” *Id.* at 2, citing 415 ILCS 5/21(d) (2006), 35 Ill. Adm. Code 810.103 (Definitions).

Ameren argues that many of the solid waste landfill regulations do not apply to a previously-operated surface impoundment permitted as a water pollution control facility. Pet. at 2. Ameren further argues that “[p]lainly, the circumstances applicable to this ash pond are very different from those contemplated by the Board in adopting Parts 811 through 815.” *Id.*; see 35 Ill. Adm. Code 811 (Standards for New Solid Waste Landfills), 812 (Information to Be Submitted in a Permit Application), 813 (Procedural Requirements for Permitted Landfills), 814 (Standards for Existing Landfills and Units), 815 (Procedural Requirements for All Landfills Exempt from Permits). Ameren suggests that, if Pond D is to be subject to the landfill regulations and is considered as an existing facility exempt from permitting under Section 21(d)(1)(i) of the Act, then “Pond D is subject to 35 Ill. Adm. Code 814.302(a) and (b), as well as the applicable Part 811 and Part 815 requirements, at closure.” Pet. at 2, citing 415 ILCS 5/21(d)(1)(i) (2006); 35 Ill. Adm. Code 810.103 (Definitions); Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7 (Aug. 17, 1990) (final Board adoption of landfill regulations).

Accordingly, Ameren seeks adjusted standards from a number of regulations: final cover requirements (35 Ill. Adm. Code 811.314(b)(3)); leachate collection and management systems standards (35 Ill. Adm. Code 814.302(b), 811.309); groundwater impact assessment requirements (35 Ill. Adm. Code 811.317, 811.319(c)); maximum allowable predicted concentration requirements (35 Ill. Adm. Code 811.318, 811.319); various groundwater quality standards (35 Ill. Adm. Code 811.320); various groundwater monitoring requirements (35 Ill. Adm. Code 811.319); and monitoring well location requirements (35 Ill. Adm. Code 811.318(b)). Pet. at 3, 37-38.

In addition, Ameren argues that, as it seeks to close Pond D, a number of landfill operating standards in Parts 811, 814, and 815 do not apply to it. Pet. at 36-37, citing 35 Ill. Adm. Code 811, 814, 815; In the Matter of: Petition of Midwest Generation, L.L.C. (formerly petition of Commonwealth Edison Company) for an Adjusted Standard from 35 Ill. Adm. Code 811.814, AS 96-9, slip op. at 19 (Aug. 15, 1996); see Pet. at 3-4. Ameren claims that “[t]hese rules were intended to apply to a working landfill handling putrescible waste which would create

issues regarding vectors and landfill gas to be addressed by cover, vector control and landfill gas management.” Pet. at 37. “Accordingly, Ameren requests an adjustment from these standards or a determination from the Board that these regulations do not apply.” *Id.* at 37. Specifically, Ameren claims that the following operating conditions do not apply to closure of Pond D: compaction of waste (35 Ill. Adm. Code 811.105); daily cover (35 Ill. Adm. Code 811.106); phasing of operations (35 Ill. Adm. Code 811.107(a)); working face (35 Ill. Adm. Code 811.107(b)); vector control (35 Ill. Adm. Code 811.107(i)); landfill gas monitoring and management (35 Ill. Adm. Code 811.310, 811.311, 811.312); intermediate cover (35 Ill. Adm. Code 811.313); waste placement (35 Ill. Adm. Code 811.321); final slopes and stabilization (35 Ill. Adm. Code 811.322); initial facility report filing deadline (35 Ill. Adm. Code 815.202(a)); permit information requirements (35 Ill. Adm. Code 815.302(b)); and annual report information requirements (35 Ill. Adm. Code 815.303(a)). *See* Pet. at 3-4, 36-37.

BOARD’S OCTOBER 16, 2008, ORDER

In its October 16, 2008, order, the Board accepted Ameren’s petition for an adjusted standard without making any determination on the informational sufficiency or the substantive merits of the petition. As a threshold issue, however, the Board noted that the general provisions of its solid waste disposal regulations define “landfill” in pertinent part as “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.” 35 Ill. Adm. Code 810.103. The Board also noted that the same provisions define a “surface impoundment” in pertinent part as “a natural topographic depression, a man-made excavation, or a diked area into which flowing wastes, such as liquid wastes or wastes containing free liquids, are placed. For the purposes of this Part [810] and 35 Ill. Adm. Code 811 through 815, a surface impoundment is not a landfill.” *Id.*

In the same order, the Board directed Ameren and the Agency each to file with the Board within 30 days a document specifying the authority for applying the Board’s landfill regulations to Pond D. The Board also directed both Ameren and the Agency to address in that filing whether requirements for closure of Pond D are addressed in the facility’s National Pollutant Discharge Elimination System (NPDES) permit or any other applicable permit. The Board also directed both Ameren and the Agency to address in that filing the issue of whether, under the facts and circumstances described in the petition, a site-specific rule is the appropriate regulatory relief for Ameren in seeking to close Pond D. The Board provided that, within 14 days after Ameren and the Agency file such a document, both Ameren and the Agency may file a response to one another.

Also in that order, the Board noted that, “[u]nless otherwise ordered by the hearing officer or the Board, the [Agency’s] recommendation must be filed with the Board within 45 days after the filing of the petition or amended petition” 35 Ill. Adm. Code 104.416(a). The Board stayed the Agency’s deadline for filing its recommendation on the petition and stated that it would set any deadline necessary for filing the recommendation after Ameren and the Agency addressed the threshold issue regarding applicability of the landfill regulations to Pond D.

AMEREN'S STATEMENT OF AUTHORITY

Ameren states that it filed its petition for an adjusted standard after years of discussion with the Agency about the proper procedure for closing Pond D. Ameren Statement at 2. Ameren further states that both it and its predecessors have maintained that neither the Act nor Board regulations “provide explicit authority for how pre-existing ash ponds like Pond D must be regulated at closure.” *Id.* Ameren argues that, “[b]ecause these pre-existing ash ponds were designed, developed and operated before the promulgation of the existing landfill standards, application of these standards to these units proves unwieldy and ineffectual. . . .” *Id.*

Ameren states that, in spite of the misgivings summarized in the preceding paragraph, it filed a petition for an adjusted standard from the landfill regulations based on the Agency’s belief that an adjusted standard was the appropriate mechanism for closing Pond D. Ameren Statement at 2-3. Ameren believes that a site-specific rule is the more appropriate mechanism. *Id.* at 3. “Ameren contends that a site-specific rulemaking regulating the closure of Pond D should amend the water pollution permit requirements, yet incorporate concepts applicable to in-place closures, such as groundwater monitoring and a closure plan.” *Id.*

Ameren emphasizes that “Pond D is not unique.” Ameren Statement at 3; *see also* Pet. at 2 n.1 (“Many more coal combustion electric generating facilities throughout Illinois will face a similar need for relief as their on-site ash ponds reach capacity and are taken out of operation.”). Ameren indicates that it and its affiliated companies own seven other Illinois facilities with similar ash impoundments that are expected to reach capacity and require closure within five to seven years. *Id.* Ameren suggests that many of these other ash impoundments also predate adoption of the Board’s landfill regulations. *Id.* Ameren argues 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.*

Below, the Board summarizes Ameren’s arguments regarding the three issues raised in the Board’s September 16, 2008 order.

Authority to Apply Landfill Regulations to Pond D

Ameren argues that “the Board has not adopted rules that would regulate pre-existing ash ponds under the landfill regulations.” Ameren Statement at 4. Ameren states that, in the rulemaking adopting the non-hazardous solid waste landfill regulations, the Board confronted the issue of whether to regulate ash ponds as landfills by including them in the definition of “landfill.” *Id.* at 4-5, citing In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7 (Mar. 13, 1990) (Scientific/Technical Staff Response to Comments). Ameren argues that “[t]he Board ultimately chose not to include ash ponds in the definition of landfill.” Ameren Statement at 5, citing In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7, slip op. at 16-18 (Mar. 13, 1990); *see* 35 Ill. Adm. Code 810.103 (Definitions). Ameren further argues that the Board included ash ponds in the definition of “land application unit.” Ameren Statement at 5, citing In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7, slip op. at 17 (Mar. 13, 1990); *see* 35 Ill. Adm. Code 810.103. Ameren claims that the definition of “land application unit” refers to the Board’s water

pollution permit requirements in order to indicate that those units may require discharge permits. Ameren Statement at 5, citing In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7, slip op. at 17 (Mar. 13, 1990); *see* 35 Ill. Adm. Code 309 (Permits), 810.103 (Definitions).

Ameren states that, in 1990, six utilities “jointly proposed amendments to the landfill regulations that would apply to facilities receiving coal combustion wastes generated by electric utilities.” Ameren Statement at 6, citing 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). Ultimately, however, the Board granted the utilities’ motion to withdraw their proposal in its entirety and dismissed the rulemaking proceeding. Amendments to the Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills: 35 Ill. Adm. Code 811 (Utility Group Amendments), R90-25, slip op. at 1 (Apr. 9, 1992).

In addition, Ameren claims that the Agency “has changed policy over the years on how it addresses the closure of pre-existing ash ponds.” Ameren Statement at 7. Specifically, Ameren compares the terms of a 1989 consent decree addressing the closure of ash ponds by Illinois Power Company with the Agency’s current position that ash ponds must be closed under landfill regulations. *Id.*, citing *id.*, Exh. 1 (consent decree and modifications). Ameren suggests that the Agency’s position on this issue should result from a procedure including public participation. *See id.*

Ameren states that, at least since 2001, it has discussed with the Agency the suitability of an adjusted standard from the landfill regulations as the appropriate mechanism to close Pond D. Ameren Statement at 7, *see id.*, Exh 2 (meeting records). Ameren argues that the scope of its requested relief demonstrates the difficulty of applying those requirements to Pond D. Ameren Statement at 7. Particularly when the Board has itself questioned the applicability of those regulations, “Ameren asks the Board to determine the appropriate environmental standards applicable to Pond D.” *Id.* at 7-8.

Permit Requirements

As noted above, the Board requested that both Ameren and the Agency address whether the facility’s NPDES permit or any other applicable permit addresses requirements for closure of Pond D. Ameren states that “[n]either the most recently applicable National Pollutant Discharge Elimination System (NPDES) permit, nor the current 35 Ill. Adm. Code Part 309, Subpart B State Operating Permit provide instruction on how to close Pond D.” Ameren Statement at 8, citing *id.*, Exh 3 (NPDES Permit No. IL0004120), Exh. 4 (Water Pollution Control Permit No. 2005-EO-3689).

Mechanism for Regulatory Relief

Ameren states that a site-specific rulemaking is the appropriate regulatory relief for closing Pond D. Ameren Statement at 8; *see generally* 415 ILCS 5/27, 28 (2006); 35 Ill. Adm. Code 102.208 (Proposal for Site-Specific Regulations), 102.210 (Proposal Contents for Site-

Specific Regulations). Noting that Pond D has been subject to permits under both NPDES and Subpart B of Part 309, Ameren argues that “a site-specific rulemaking for the closure of Pond D would logically amend Part 309 of the Water Pollution regulations regarding permits.” Ameren Statement at 8, citing 35 Ill. Adm. Code 309; *see* Ameren Statement, Exhs, 3, 4 (permits). Ameren cites the Illinois Power consent decree as an instance in which the Agency’s Bureau of Water has overseen ash pond closure. Ameren Statement at 8; *see id.*, Exh. 1 (consent decree and modifications). Ameren indicates that other states’ water pollution statutes and regulations address the closure of ash ponds. *Id.* at 8-9, citing *id.*, Exh. 5 (N.C. GEN. STAT. § 143-215.1), Exh. 6 (N.C. ADMIN. CODE tit. 15A, r. 02T .1100 (eff. Sept. 1, 2006) (Residuals Management)), Exh. 7 (Guidelines for the Closure of Treatment Ponds and Lagoons), Exh. 8 (Ohio statutes and regulations).

Ameren states that “[a]ll pre-existing ash ponds share certain qualities that must be addressed in closure requirements.” Ameren Statement at 9. Ameren proposes a general outline of rules that might address those units “in a way that protects human health and the environment.” *Id.* Specifically, that outline includes language defining “ash pond”, setting groundwater quality standards, establishing zones of attenuation, requiring closure plans including various elements, describing reporting requirements, and establishing post-closure obligations. *See id.* at 9-10. Ameren states that, in addition to these general requirements, “[a] site-specific regulation must take into consideration the unique aspects of Pond D.” *Id.* at 10. As examples of those aspects, Ameren cites its original petition including both a proposed cover system (Pet., Exh 10) and a groundwater monitoring plan (Pet., Exh. 11). Ameren argues that these aspects “could easily be adapted into a site-specific rule.” Ameren Statement at 11.

Summary

Ameren argues that “there is no statutory or regulatory authority for applying the landfill regulations to Pond D” and that an adjusted standard from those regulations is not the appropriate avenue to closing Pond D. Ameren Statement at 11. Instead, Ameren “asks the Board to determine whether seeking a site-specific rulemaking from the water pollution control requirements is a more appropriate solution.” *Id.*

AGENCY RESPONSE

Authority to Apply Landfill Regulations to Pond D

The Agency argues that Ameren can only dispose of the waste in Pond D in a permitted waste disposal site, whether at the Station or at another site. Agency Response at 2. The Agency states that Pond D does not qualify as such a site. *Id.* The Agency claims that, if Ameren seeks final disposal of those waste in Pond D, “then Pond D would have to satisfy the requirements for proper environmental control of potential contaminants.” *Id.*

The Agency argues that the Board’s definition of “surface impoundment” clearly excludes active surface impoundments from the Board’s landfill regulations. Agency Response at 2, citing 35 Ill. Adm. Code 810.103. The Agency further argues that the active surface impoundment would be subject to the Board’s water regulations and NPDES permit

requirements in order to protect the waters of the State from injurious discharges. Agency Response at 2. The Agency claims, however, that Pond D is a previously-operated surface impoundment where waste has accumulated over time and entered the environment. *Id.* at 2-3, citing 415 ICLS 5/3.185 (2006) (defining “disposal”). Stating that Ameren has no plan to dispose of that waste at any other location, the Agency argues that Pond D has become a disposal site and, as such, subject to the Board’s landfill regulations. Agency Response at 2-3, citing 35 Ill. Adm. Code 810.103.

Permit Requirements

The Agency states that “[t]he NPDES permit issued for this facility does not contain closure requirements relative to final disposal of the waste in place.” Agency Response at 3. The Agency further states that it “is unaware of any other permit issued for this unit which provides for closure of the waste in place.” *Id.*

Mechanism for Regulatory Relief

The Agency argues that petitions for an adjusted standard seek relief from generally-applicable rules. Agency Response at 3-4. “A facility or person seeks relief, through [an] Adjusted Standard, from regulations that were intended to apply to them, which regulations do not contemplate fully the specific facts or circumstances that effect their situation.” *Id.*; see 415 ILCS 5/28.1(c) (2006). The Agency claims that Ameren effectively seeks to reclassify a waste treatment facility as a non-compliant closed landfill. Agency Response at 4. The Agency suggests that it is not appropriate to achieve this reclassification through an adjusted standard because the generally-applicable landfill regulations “were not meant to apply to units not intending to be regulated as a final disposal unit in the first place.” *Id.*

Noting that the Board’s regulations provide for site-specific rules, the Agency contends that “this procedure may be more appropriate for review of Petitioner’s request.” Agency Response at 4, citing 35 Ill. Adm. Code 102.210 (Proposal Contents for Site-Specific Regulations). The Agency notes, however, that the Board has not generally considered facilities such as Pond D. Agency Response at 4. The Agency argues that, “[i]n that time, considerable review has been had on the national level regarding coal ash disposal and environmental and health impacts from such activity.” *Id.* Noting that there may be a significant number of similar units, the Agency suggests that it may be more appropriate to adopt a rule addressing all of those units than to adopt a number of site-specific rules. *Id.*

Summary

The Agency argues that “[t]he constructed and closed facility that would result from the requested relief does not fit within the spirit nor intent of the solid waste landfill disposal regulations from which relief is sought. . . .” Agency Response at 5. The Agency further argues that it is not appropriate to strain to fit Pond D into those landfill regulations or to allow for disposal in Pond D without applying standards for “proper construction, operation and maintenance of final disposal units.” *Id.* The Agency suggests that it may not be appropriate to draft generally-applicable regulations for a distinct type of disposal site through an adjusted

standard proceeding. *Id.* The Agency further suggests that the relief sought by Ameren may require a new generally rule applicable to sites such as Pond D. *Id.*

AMEREN'S REPLY

Authority to Apply Landfill Regulations to Pond D

In its reply, “Ameren maintains there is no authority for applying the landfill regulations to the closure of Pond D.” Ameren Reply at 2. Ameren disputes the Agency’s argument that, based on the definitions of “landfill” and “disposal,” the Board’s landfill regulations become applicable to a unit such as Pond D when “the unit is to be closed with waste in place.” *Id.*; see 35 Ill. Adm. Code 810.103 (definitions).

Ameren argues that, during the landfill rulemaking, the Board addressed the definition of “landfill” and the types of units included within its terms. Ameren Reply at 3; see In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7. Ameren states that the Board’s Scientific/Technical Section (STS) noted that definitions such as “landfill” and “disposal” arguably included a Land Treatment Unit (LTU) such as an ash pond and thus brought LTUs within the scope of proposed landfill regulations. Ameren Reply at 3; see In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7 (Mar. 13, 1990) (STS Response). Ameren emphasizes the STS’s observation “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 of ‘landfill’ since the standards being proposed pertain only to ‘landfills.’” Ameren Reply at 3-4 (emphasis in original), citing In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7, slip op. at 18, 37 (Mar. 13, 1990). Ameren also emphasizes the STS’s view that, if the definition of “landfill” includes LTUs, then the scope and applicability provision should clarify that “LTU’s or surface impoundments used for disposal can be considered ‘landfills’ subject to certain minimum groundwater protection standards in the landfill regulations.” Ameren Reply at 4, citing 35 Ill. Adm. Code 811.101; In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7, slip op. at 36-37 (Mar. 13, 1990). Ameren argues that the Board addressed the STS’s response in the landfill regulations by maintaining a distinction between landfills and LTUs. Ameren Reply at 4.

Ameren argues that, during the subsequent rulemaking filed by utilities, the Board also considered whether to include ash ponds at closure in the landfill regulations. Ameren Reply at 4, citing Amendments to the Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills: 35 Ill. Adm. Code 811 (Utility Group Amendments), R90-25. Ameren argues that, during that rulemaking, the proponents claimed “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.” Ameren Reply at 5, citing Amendments to the Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills: 35 Ill. Adm. Code 811 (Utility Group Amendments), R90-25 at 28-29 (Feb. 21, 1992) (transcript of Jan. 27, 1992 hearing). Ameren claims that “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.” Ameren Reply at 5.

Noting an apparent suggestion by the Agency that ash in Pond D could be moved to a waste disposal unit, Ameren responds with two arguments. Ameren Reply at 5. First, Ameren claims that a misreading of the definitions of “landfill” and “disposal” prevents the Agency from recognizing “that Pond D can be a compliant waste disposal site even if closed under a set of regulations other than the landfill rules.” *Id.*, citing Agency Resp. at 2. Specifically, Ameren argues that the definition of “landfill” explicitly excludes surface impoundments such as Pond D. Ameren Reply at 5, citing 35 Ill. Adm. Code 810.103. Ameren further argues that, under these definitions, Pond D can accumulate waste for disposal without becoming subject to landfill regulations. Ameren Reply at 5. Second, Ameren claims that its petition considered removal and off-site disposal of ash in Pond D and determined that it is neither economically reasonable nor feasible. *Id.* at 6; *see* Pet. at 21-22 (Ash Removal and On vs. Off-Site Disposal).

Ameren also argues that the landfill regulations also do not require retrofitting units such as Pond D. Ameren states that it built ash ponds such as Pond D to serve as final repositories of coal combustion ash and that the Agency’s Bureau of Water permitted this use. Ameren Reply at 6. While Ameren acknowledges that a surface impoundment can now be constructed according to landfill standards, Ameren argues that “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.” *Id.* at 6-7.

Finally, Ameren argues that the landfill regulations should not apply to Pond D because the coal combustion by-product (CCB) in it differs from typical landfill waste. Ameren Reply at 7. Ameren further argues that those by-products “are independently defined under the Act and have recognized beneficial uses under Illinois law.” *Id.*, citing 415 ILCS 5/3.135 (defining “coal combustion by-product”), 3.140 (defining “coal combustion waste”) (2006). Ameren suggests that these factors distinguish Pond D from sites regulated as a landfill and justify a site-specific rule.

Mechanism for Regulatory Relief

Ameren claims that there are numerous difficulties in applying landfill regulations to the closure of Pond D. Ameren Reply at 7-8; *see generally* Pet. at 13-36 (Description of Efforts to Comply). Ameren argues that these landfill regulations have “an entirely different scope and intent than the water quality regulations.” Ameren Reply at 8. Noting the Agency’s focus on the potential effect on the environment of closing Pond D, Ameren states that it “fully agrees that closure and post-closure actions will be necessary and would be made part of a site-specific rule.” *Id.* Ameren expresses the view that “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.” *Id.* at 9. Ameren argues that a site-specific rule amending the Board’s water pollution permit regulations would both consider environmental impacts and include measures that protect the environment. *Id.*

Specifically, “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.” Ameren Reply at 9. Ameren notes that its Statement of Authority proposes a general outline of rules that might regulate ash ponds to protect human health and the environment and address the Agency’s concerns. *Id.* citing Agency Resp. at 5; *see* Ameren Statement at 9-11 (proposed closure requirements). Specifically, Ameren states that

“[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.” *Id.*

Summary

Ameren urges that closing Pond D should be addressed by a site-specific rule amending the Board’s water pollution regulations. Toward this end, Ameren first “asks the board to determine whether a site-specific rulemaking from the water pollution permit requirements is the most 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.” Ameren Reply at 10.

BOARD’S DISCUSSION AND CONCLUSION

Based on its review of the record, the Board finds that a site-specific rule is the appropriate source of regulatory relief under which to close Ameren's Pond D. Accordingly, the Board dismisses Ameren’s petition for an adjusted standard and closes this docket. Upon receiving from Ameren a petition for site-specific rule addressing the closure of Pond D, the Board will review it under applicable provisions of the Act and procedural rules. *See, e.g.*, 415 ILCS 5/27, 28 (2006); 35 Ill. Adm. Code Part 102.

Ameren argues that such a site-specific rule should amend the Board’s water pollution regulations. The Board notes that Ameren expresses no intent to relocate the materials in Pond D and in fact concludes that such relocation is both economically unreasonable and not feasible. Ameren plainly intends to leave those materials in place in Pond D for disposal there. Ameren has persuasively argued that Pond D accumulated waste for final disposal without automatically becoming subject to the landfill regulations. Nonetheless, Ameren’s original petition proposed requirements relating to cap and cover, groundwater monitoring, and a zone of attenuation that relate more closely to the Board’s general land regulations regarding waste disposal. Accordingly, the Board directs Ameren in any petition for a site-specific rule to propose an amendment to the Board’s Subtitle G solid waste regulations.

In its response to the Board’s order, the Agency has suggested that closing ash ponds such as Pond D may best be addressed by a new class of generally-applicable rule. Should the

Agency or any other person develop a proposal for such a rule, the Board envisions that it would consider such a proposal as an addition to the Board's Subtitle G waste disposal regulations.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 5, 2009, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board