

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	AC 09-49
	)	(Administrative Citation)
	)	(IEPA No. 103-09-AC)
AMEREN ENERGY GENERATING COMPANY, AMEREN CORPORATION, and JERRY SIMPSON,	)	
	)	
Respondents.	)	
	)	

**NOTICE OF FILING**

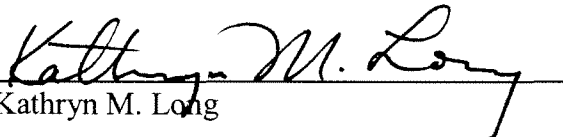
TO:

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

Michelle Ryan  
Illinois Environmental Protection Agency  
Assistant Counsel  
1021 North Grand Avenue, East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that I have electronically filed with the Office of the Clerk of the Pollution Control Board, **MOTION TO DISMISS RESPONDENTS AND SUBSTITUTE PARTIES AND APPEARANCE**, copies of which are herewith served upon you.

Ameren Energy Generating Company, Ameren Corporation and Jerry Simpson

  
Kathryn M. Long

Dated: June 29, 2009

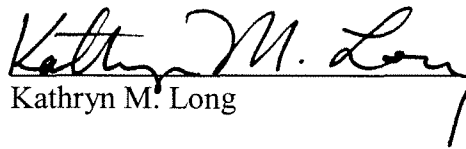
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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 29<sup>th</sup> day of June, 2009, I have served electronically the attached **MOTION TO DISMISS RESPONDENTS AND SUBSTITUTE PARTIES AND APPEARANCE**, upon the following persons:

John Therriault, Assistant Clerk  
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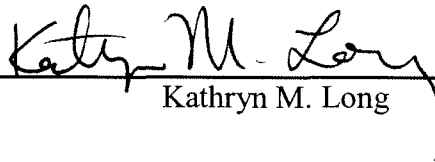
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COMPANY, AMEREN CORPORATION and	)	
JERRY SIMPSON,	)	
	)	
Respondents.	)	
	)	

**APPEARANCE**

I, Kathryn M. Long, hereby file my appearance in this proceeding, on behalf of Ameren Energy Generating Company, Ameren Corporation and Jerry Simpson.

  
\_\_\_\_\_  
Kathryn M. Long

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Respondents.	)	

**MOTION TO DISMISS RESPONDENTS AND SUBSTITUTE PARTIES**

Respondents Ameren Corporation, Ameren Energy Generating Company and Jerry Simpson, by and through their attorneys Schiff Hardin, LLP, move to dismiss themselves as parties to this proceeding, substitute new parties and, in support, state as follows:

**I. Introduction**

The Complainant has misidentified the proper parties to this matter. Respondents Ameren Corporation, Ameren Energy Generating Company (AEG) and Jerry Simpson should be dismissed as parties to this proceeding because the administrative citation does not allege that the named parties actively participated in or were personally involved with the acts resulting in liability. The allegations in the administrative citation improperly name Ameren Corporation, AEG and Mr. Simpson as parties and are insufficient to establish a cause of action against them. The proper respondent in this matter is AmerenEnergy Resources Generating Company (AERG) which is a subsidiary of Central Illinois light Company (CILCO), Inc. Both AERG and CILCO are subsidiaries of Ameren Corporation. AERG operates the Duck Creek Power Station, the facility at issue, on behalf of CILCO. Furthermore, with the proposed substitution of parties,

Ameren Corporation, Mr. Simpson, an officer of a variety of Ameren-affiliated companies, and AEG are not necessary parties for the Board's complete determination of these proceedings.

## **II. Standard of Review**

In rendering a decision on a motion to dismiss, the Illinois Pollution Control Board must take all well pled facts contained in the pleading as true and all inferences from them must be drawn in favor of the nonmovant. People v. Skokie Valley Asphalt, Co., Inc., PCB 96-98 slip op. at 6 (Jun. 5, 2003); People v. Stein Steel Mills Services, Inc., PCB 02-01, (Nov. 15, 2001).

## **III. Background**

AERG is the operator of a facility located at 17751 North Cilco Road, Canton, Fulton County, Illinois (the "Duck Creek Facility"). CILCO is the owner of the Duck Creek Facility. Ameren Corporation a holding company which is the parent of a number of entities that operate regulated utilities and non-rate regulated generation businesses in Illinois. Mr. Simpson is an officer of a number of Ameren-affiliated companies, including AERG and AEG, and as such is responsible for a variety of administrative and executive responsibilities. However, Mr. Simpson does not have personal knowledge or responsibility for the day-to-day operations of the Duck Creek Facility. In addition to the power station, AERG operates ancillary facilities at the site including an ash pond and landfill both duly permitted by the Illinois Environmental Protection Agency.

In February 2007, in accordance with Illinois Environmental Protection Agency requirements, AERG initiated the installation of new pollution control equipment at its power generating plant. Pursuant to the requirements of 35 Ill. Adm. Code 225.233(e)(3) (Amendments to 35 Ill. Adm. Code 225: Control of Emissions from Large Combustion Sources (Mercury Monitoring)), R09-10 (Jun. 18, 2009) (*pending publication in the Illinois Register*)), Ameren

must have the Duck Creek scrubber in operation by 2010 in order to comply with Illinois' mercury regulations. In connection with the installation of the new scrubbers, AERG planned to construct a landfill to handle the coal combustion byproduct ("CCB") from the power generating plant in place of the ash ponds. Ameren and the Agency have been in discussion for years regarding environmental conditions and the proper closure of the ash ponds. NPDES permits to operate the ash ponds expire in July 2010 and the Agency has indicated that such permits may not be renewed. Ameren Services Company, which provides a variety of administrative and business services for the Ameren entities including environmental permitting, submitted an initial construction permit application to develop the new landfill to the Illinois Environmental Protection Agency on May 18, 2005. The landfill is intended to replace the ash ponds as a repository for coal combustion byproduct following the installation of the scrubber systems. AERG proceeded to design and construct the landfill in accordance with a construction permit issued by the Agency.

Despite AERG's diligence and cooperation with Illinois Environmental Protection Agency requests, four years later, Illinois Environmental Protection Agency had still not issued a permit to AERG to operate the new landfill. On March 6, 2009, Ameren notified Illinois Environmental Protection Agency that the Duck Creek scrubber replacement project was nearing completion and that, upon completion, coal combustion waste handling processes at the plant will change, requiring AERG to change its management of CCB. Ameren advised Illinois Environmental Protection Agency that it would like to begin utilizing the new landfill, for which the design and construction standards had already been approved and implemented.

On March 10, 2009, Steve Nightingale of Illinois Environmental Protection Agency informed Ameren he requested that AERG's permit be given top priority and hoped that a permit would be issued shortly. Subsequently, AERG began to utilize the new landfill, believing that to be environmentally preferable to temporarily stacking CCB on the ground or in the ash ponds,

a source of groundwater impacts. Accordingly, AERG began stacking ash within a small portion of the landfill, the facility designed and constructed for such purposes. On April 9, 2009, Robert J. Wagner of Illinois Environmental Protection Agency conducted an inspection of the Duck Creek Facility and noted that AERG had placed CCB into the landfill prior to the issuance of the operating permit.

On May 27, 2009, Complainant, Illinois Environmental Protection Agency, filed the above-captioned administrative citation. The administrative citation named Ameren Corporation, as owner, AEG, as operator, and Mr. Jerry Simpson, as "Chief Operator," as respondents. The administrative citation alleged three violations of Section 21(o) of the Act: (1) conducting a sanitary landfill without the necessary permits; (2) conducting a sanitary landfill which resulted in deposition of refuse in an unpermitted portion of the landfill; and (3) conducting a sanitary landfill in a manner resulting in the failure to submit reports required by permits or Board regulations. 415 ILCS 5/21(o)(7), (9), (11) (2007).

#### **IV. Discussion**

Ameren has no desire to needlessly prolong or engage in an extensive factual dispute as to the circumstances giving rise to this matter. Rather, Ameren's objective is to have the administrative citation directed to the proper entity and to explain the circumstances under which the citation was issued. Nevertheless, the Agency has failed to meet its burden to show that Respondents Ameren Corporation, AEG and Mr. Simpson had personal involvement or active participation in the acts resulting in liability. People v. Tang, 346 Ill.App3d 277, 289, 805 N.E.2d 243, 253-54 (1<sup>st</sup> Dist. 2004). The Board should dismiss AEG, Ameren Corporation and Mr. Simpson as respondents in this proceeding. AERG, not AEG, is the operator of the Duck Creek Facility and should be named in AEG's place. As the mere parent of AERG, Ameren Corporation had no control over the day to day operations of the Duck Creek Facility. Likewise,

Mr. Simpson had no personal involvement or active participation in the day to day operations of the Duck Creek Facility. Accordingly, the Agency has failed to meet its burden under Illinois law to allege facts establishing that Ameren Corporation, AEG, or Mr. Simpson had personal involvement or active participation in the acts resulting in liability. The administrative citation should instead, name AERG as the proper respondent.

The Board has adopted the principle established by Illinois case law that, “in order to state a claim for personal liability against a corporate officer under the Act, a plaintiff must do more than allege corporate wrongdoing.” People v. Community Landfill Corporation, et. al, PCB 97-193, PCB 04-207 (consol.) slip op. at 7 (Nov. 4, 2004) (citing Tang, 805 N.E.2d at 253). Personal involvement or active participation in the management of a corporation is not enough. Rather, a plaintiff must demonstrate that a corporate officer had personal involvement or active participation *in the acts resulting in liability*. Id. (citing Tang, 805 N.E.2d at 253-54 (emphasis added)). In the case at hand, the administrative citation does not contain any allegations that Mr. Simpson was personally involved or actively participated in the acts resulting in liability. Likewise, while the administrative citation refers to Robert Wagner’s inspection report as listing specific acts and omissions in support of the violations alleged against the named parties, the inspection report does not state that Mr. Simpson had any specific involvement in the alleged violation.

In Community Landfill, the Board found that allegations that corporate officers signed and submitted permit applications and reports related to the landfill at issue were sufficient to state a claim that the individual corporate officers were personally involved and actively participated in the acts resulting in liability. Community Landfill, PCB 04-207, slip op. at 7. However, unlike Community Landfill, the administrative citation in this case does not allege that Mr. Simpson was personally involved or actively participated in any acts resulting in liability.



As for Ameren Corporation, the United States Supreme Court has held that “a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may [not], without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary [unless the corporate veil may be pierced].” United States v. Bestfoods, 524 U.S. 51, 55, 118 S.Ct. 1876, 1881 (1998). However, the administrative citation does not allege that Ameren Corporation has misused the corporate form to accomplish any wrongful purposes on its own behalf which could serve as a basis for piercing the corporate veil or that Ameren Corporation directly participated in the operation of the Duck Creek Facility. See id., 524 U.S. at 62, 66, 118 S.Ct. at 1885, 1887. Therefore, the administrative citation fails to allege sufficient facts to establish a cause of action against Ameren Corporation.

The same analysis that applies to Ameren Corporation also applies in the case of AEG. Although AEG is an affiliate of AERG, it is not the owner or operator of the Duck Creek Facility. Because the administrative citation does not allege any facts which could serve as a basis for piercing the corporate veil or that AEG directly participated in the operation of the Duck Creek Facility, the administrative citation fails to allege sufficient facts to establish a cause of action against AEG. See id.

It is AERG, not AEG, Ameren Corporation or Mr. Simpson, that manages the day to day operations of the Duck Creek facility. There are no specific allegations in the administrative citation or the inspection report that show Ameren Corporation, AEG, or Mr. Simpson actively participated in the alleged violations. Therefore, the Agency has failed to meet its burden to show that the named respondents could be liable for the alleged violation.

#### **V. Conclusion**

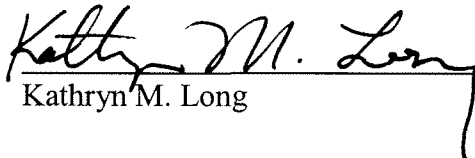
AERG has discontinued the conduct that is the subject matter of this Administrative Citation is in ongoing discussions with the Agency as to the issuance of a permit to operate the

duly constructed and designed landfill. Moreover, in order to fully and completely resolve this matter, AERG has submitted the penalty requested by the Agency herein. However, the allegations in the administrative citation improperly name AEG, Ameren Corporation and Mr. Simpson as parties and are insufficient to establish a cause of action against them. None of the respondents is alleged to have actively participated in or been personally involved in the acts resulting in liability nor has any party been involved with the day-to-day operations at the Duck Creek Facility.

WHEREFORE, Respondents Ameren Corporation, Ameren Energy Generating Company and Mr. Jerry Simpson respectfully request that the Board grant their motion to dismiss with prejudice and that AmerenEnergy Resources Generating Company be substituted as the proper party in this matter.

Dated: June 29, 2009

Respectfully submitted,

  
Kathryn M. Long

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