

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**AMERENENERGY RESOURCES )  
GENERATING COMPANY )**

**Petitioner, )**

**v. )**

**PCB 14-41  
(Permit Appeal – Land)**

**ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )**

**Respondent. )**

**NOTICE OF FILING**

TO: Attached Service List

PLEASE TAKE NOTICE that on February 4, 2014, I filed with the Pollution Control Board of the State of Illinois, a Motion to Strike Supplemental Materials Included in the Administrative Record, on behalf of AmerenEnergy Resources Generating Company, Inc., copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

AMERENENERGY RESOURCES GENERATING  
COMPANY, INC.



By: \_\_\_\_\_

Deborah Bone

Amy Antonioli  
Deborah Bone  
SCHIFF HARDIN LLP  
233 S. Wacker Drive, Suite 6600  
Chicago, Illinois 60606  
Phone: (312) 258-5500  
Facsimile: (312) 258-5600

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>AMERENENERGY RESOURCES</b>	)	
<b>GENERATING COMPANY</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>PCB -14-41</b>
	)	<b>(Permit Appeal – Land)</b>
	)	
<b>ILLINOIS ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
<b>Respondent.</b>	)	

**MOTION TO STRIKE SUPPLEMENTAL MATERIALS INCLUDED IN THE ADMINISTRATED RECORD**

AmerenEnergy Resources Generating Company (“AERG”), by and through its attorneys, and pursuant to 35 Ill. Admin Code 101.500 and 101.502, hereby moves the Illinois Pollution Control Board (the “Board”) or hearing officer to strike certain materials that were improperly included in the Administrative Record (the “Record”) filed by the Illinois Environmental Protection Agency (the “Agency”) in this matter. In support of its petition, AERG states as follows:

**BACKGROUND**

1. On August 7, 2013, AERG submitted a request for a beneficial use determination (“BUD Request”) for the beneficial use of coal combustion by-product (“CCB”) from the E.D. Edwards Power Generating Station as structural fill material to construct a railroad embankment and a haul road (the “Rail and Road Project”) at the Duck Creek Power Generating Station (the “Duck Creek Station”). In the BUD Request, AERG explained how the application of CCB as

part of the Rail and Road Project was used in such a manner as to be protective of human health and the environment and further explained that AERG's site-specific investigation found that much of the fill was placed over coal mine spoils and that there are no exceedances of applicable groundwater quality standards. The BUD Request and supporting documentation fully demonstrated that the beneficial use of CCB at the Rail and Road Project met and continues to meet the requirements for a beneficial use determination under the Illinois Environmental Protection Act, 415 ILCS 5/3.135(b) ("the Act"). (R. 1-242.)

2. Section 3.135(b) of the Act provides, in part, that within 90 days after receipt of a request for a beneficial use determination, "the Agency shall, in writing, approve, disapprove, or approve with conditions the beneficial use." Despite its claims that AERG needed to obtain an approval for the Rail and Road Project to be considered in compliance with the law, the Agency failed to take any action on AERG's request for a BUD within the mandated 90 day statutory period, which ended on November 5, 2013. Accordingly, the BUD is considered denied as a matter of law, pursuant to Section 3.135(b) of the Act. Not only did the Agency fail to take action on the BUD within the 90 day period, it also failed to grant AERG's repeated requests for at least a technical discussion concerning the BUD application during the 90 day review period. Further, the Agency made no request to extend the 90 day period either before the expiration of this period, or after the fact. Indeed, as of the date of this filing, the Agency has not issued a written decision regarding the BUD application.

3. On November 27, 2013, AERG filed an Appeal of the Agency's Default Disapproval of its Request for Beneficial Use Determination for the Use of Coal Combustion By-Products pursuant to Section 3.135(b) of the Act (the "Appeal").

4. The Agency was directed by the Hearing Officer to file the Administrative Record with the Board by December 27, 2013. The Agency failed to meet this deadline.

5. On January 22, 2014, the Agency filed the Administrative Record with the Board. Despite the fact that the Record in this matter should only include AERG's Request for a Beneficial Use Determination (R. 1-242), the Agency included supplemental materials in its filing, namely an internal Agency memorandum dated September 12, 2013. (R. 243-253.) Indeed, this internal memorandum is not styled as a decision document. Furthermore, it was never shared with AERG and the Agency did not in any way cite to it when it failed to act resulting in the denial of the BUD Application. These supplemental materials are not properly part of the Administrative Record, and should thus be stricken from the Record.

### **ARGUMENT**

6. It is the Agency's responsibility to file the complete record that was before it at the time a decision was made. KCBX Terminals Co. v. Illinois Env'tl Protection Agency, PCB 10-110 (May 19, 2011); *see also* 35 Ill. Adm. Code 105.116 (IEPA "must file with the Board the entire record of its decision"). Section 105.212(b) of the Board's rules addresses the required contents of an Agency permit record:

b) The record must include:

- 1) Any permit application or other request that resulted in the Agency's final decision;
- 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
- 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;
- 4) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and
- 5) Any other information the Agency relied upon in making its final decision.

35 Ill. Adm. Code 105.212(b).

7. As noted in AERG's Appeal, since the Agency failed to issue a written decision in response to AERG's request for a BUD, and since no hearing regarding the BUD application was conducted before the Agency, the Record in this matter must be limited to AERG's August 7, 2013 BUD application and the exhibits attached thereto. The fact that the Agency's internal memorandum was apparently created a full 54 days before the expiration of the statutory 90 day period is not a factor that weighs in favor of inclusion of the memorandum into the Record. Although the memorandum apparently was drafted within the 90 day period, there is no written Agency decision regarding the BUD application, so the memorandum itself, and the date of its creation, is irrelevant as to the true basis of the BUD denial – the expiration of the 90 day period.

8. Further, the internal memorandum does not meet any of the five categories of materials that may make up an administrative record as outlined in Section 105.212(b). The memorandum is not a part of the application or request submitted by AERG. 35 Ill. Adm. Code 105.212(b)(1). The memorandum is not correspondence with AERG. *Id.* § 105.212(b)(2). The memorandum is not a permit denial letter and is not a part of a hearing file. *Id.* § 105.212(b)(3)-(4). And, finally, the memorandum was not relied upon in making a final determination in this matter. *Id.* § 105.212(b)(5). The memorandum is nothing more than an internal Agency memorandum indicating the thoughts and recommendation of one or more Agency staff persons about the BUD application – thoughts and recommendations that were never incorporated into a final Agency written decision.

9. For the reasons stated herein, this internal Agency memorandum is not properly part of the Record, and the Hearing Officer and Board should strike the memorandum from the Record, and disregard it entirely. Furthermore, even though the memorandum is not properly part of the record, it is important to point out to the Board that the internal Agency memorandum

contains significant erroneous statements of fact and law in matters crucial to the underlying rationale of the memorandum, such that these errors undercut the underlying rationale. For example, 35 Ill. Admin. Code 620.240(a)(3) contains an exclusion for certain listed inorganic chemicals, including boron, from Class II groundwater standards for groundwater located within fill material or within the upper 10 feet of parent material, so long as the site is “not within the rural property class . . . .” The property class designation is determined by how the property is identified by property record card maintained by the county tax assessor. 35 Ill. Admin. Code 620.110. As stated in the BUD application, CCB samples demonstrate that CCB only exceeds Class I groundwater standards for one contaminant, boron, at one monitoring well location, located within a Class IV area of mine spoil fill. The internal Agency memorandum concludes that the exclusion contained in 35 Ill. Admin. Code 620.240(a)(3) is inapplicable to the Rail and Road Project site, because in its BUD application, AERG described the site as being located “in a sparsely populated rural area . . . .”. (R. 251-252). Yet AERG did not use the term “rural” in the BUD application in a regulatory context, but simply in a descriptive context. In the regulatory context, the site is not located within a “rural property class” as determined by the tax assessor, pursuant to 35 Ill. Admin. Code 620.110. Rather, the site is classified by the Fulton County Assessor as property class 0080, which is industrial, nor rural. Accordingly, denial of the applicability of the exclusion of Class II groundwater standards for this site is an erroneous application of the relevant standards.

10. And the incorrect application of relevant standards stated in the internal Agency memorandum is not limited to the error described above. The memorandum cites the general prohibition of use of CCB for beneficial use if analytical lab results demonstrate that the CCB exceed the Class I groundwater standards for metals. 415 ILCS 5/3.135(a-5)(B). (R. 251-252).

Yet the Illinois General Assembly amended the Illinois Environmental Protection Act to add Section 3.135(b). Specifically, Section 3.135(b) of the Act allows for the use of the CCB in a manner such as that at the Rail and Road project “without the CCB being subject to the restrictions . . .” contained in Section 5/3.135(a-5) cited in the internal Agency memorandum. There is therefore no absolute prohibition as indicated throughout the Agency’s internal memorandum<sup>1</sup>.

11. The situation presented to the Board through this appeal is one of first impression. AERG is not aware of any case involving facts such as the current case, in which the Agency sought to include in the Record documents related to a decision that it never made. There are, certainly, a number cases wherein the Board considered the request of one party or another to supplement the record with documents that either were not created at the time of the Agency decision or were in existence but may not have been relied on by the Agency when it rendered its decision. In those cases, the Board has determined that the record is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. *See Community Landfill Company v. Illinois Env'tl Protection Agency*, PCB 01-48 (Apr. 5, 2001). The Board has also found that evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board. *Id.*; 35 Ill. Adm. Code 105.214(a); *see also Jackson v. Dep't of Labor, Bd. of Review*, 168 Ill. App. 3d 494, 500, 523 N.E.2d 5, 9 (Ill. App.

---

<sup>1</sup> AERG has pointed to but two examples of errors presented in the internal Agency memorandum but will refrain from critiquing the memorandum in its entirety since the memorandum as a whole should be stricken. However, by including this Agency memorandum within its filing of the Administrative Record, the Agency has improperly put the information contained therein before the Board and the Hearing Officer. For this reason, Petitioner is now compelled to inform the Board and Hearing Officer of two of the more significant errors contained in this memorandum.

Ct. 4th Dist. 1988) (holding that, on administrative review, the reviewing body is limited to considering only evidence that is a part of the administrative record); Hall v. Illinois Dep't of Employment Sec., Case No. 1-10-0619, 2011 WL 10068878 (Ill. App. Ct. 1st Dist. Mar. 2, 2011) (refusing to consider evidence outside of the administrative record).

12. Importantly, though, the precedent AERG cites to in this Motion regarding what is permitted into the record involves instances of disputes between the parties over what is properly included in the record *where the Agency has made a decision*. And ultimately, those disputes were resolved by adherence to the principle that if the documents were relied upon by the deciding authority in making its final decision, the documents were properly included, and if not, they were excluded. Only information the Agency relied upon while making its final decision should be included in the record. American Bottom Conservancy v. Illinois Env'tl Protection Agency, PCB 06-171 (Sept. 21, 2006). The Agency did not and could not have “relied upon” the internal Agency memorandum when “making its final decision,” as the Agency failed to make any final decision in this matter at all. The request was disapproved by operation of law due to a lack of action by the Agency.

13. Having failed to grant AERG’s repeated requests for at least a technical discussion concerning the BUD application during the 90 day review period, having failed to issue a written decision regarding the BUD application within the statutorily required 90 day time frame, having failed to file the Administrative Record by December 27, 2013, as directed by the Hearing Officer, and inexplicably waiting to file such Record until January 22, 2014, almost a full month late, the Agency cannot now insert into the Record materials that purport to provide a rationale for an Agency decision that was never made. The Agency respectfully should be required to approach this matter under the facts as they exist and not be allowed to change the

facts properly before the Board and Hearing Officer by corrupting the Record with extraneous materials that were not the basis of the BUD application denial. AERG has a right to proceed with its appeal based on an Administrative Record that reflects the actual reason for the denial of the BUD application – the expiration of the statutorily mandated 90 day decision deadline, rather than an actual written decision of the of the Agency, a written decision that was never issued. The Agency’s attempt to include this September 12, 2013 internal memorandum in the Administrative Record is an obvious attempt provide an after the fact legal and technical rationale for denial of the BUD application. This effort should be rejected by the Board. The matters addressed in the memorandum cannot serve to provide a rationale for a written Agency decision that was never made. The BUD application was denied as a result of Agency inaction on the application, resulting in expiration of the 90 day statutory decision period. The Agency had its chance to provide a written decision regarding the BUD application, but failed to do so. To allow inclusion of this material into the Administrative Record would only serve to deny Petitioner substantive and procedural due process regarding proper consideration of the technical and legal merits of its BUD application.

WHEREFORE, for the reasons set forth above, AERG requests that the Board or Hearing Officer strike the internal Agency memorandum, and give it no consideration whatsoever, as its inclusion as a part of the Administrative Record in this matter is not appropriate.

Respectfully submitted,

AMERENENERGY RESOURCES  
GENERATING COMPANY

by:



---

Deborah Bone

Dated: February 4, 2014

SCHIFF HARDIN, LLP  
Amy Antonioli  
Deborah Bone  
233 South Wacker Drive  
Suite 6600  
Chicago, Illinois 60606  
312-258-5500  
Fax: 312-258-2600

**CERTIFICATE OF SERVICE**

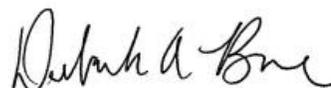
I, the undersigned, certify that on this 4th day of February, 2014, I have electronically served a true and correct copy of the above Motion to Strike Supplemental Materials Included in the Administrative Record on behalf of AmerenEnergy Resources Generating Company, Inc., upon the following persons:

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

and by first class mail, postage affixed, upon:

Raymond J. Callery  
Assistant Attorney General  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, Illinois 62794



---

Deborah Bone

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 4th day of February, 2014, I have electronically served a true and correct copy of the above Notice of Filing, on behalf of AmerenEnergy Resources Generating Company, Inc., upon the following persons:

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

and by first class mail, postage affixed, upon:

Raymond J. Callery  
Assistant Attorney General  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, Illinois 62794



---

Deborah Bone

**SERVICE LIST**

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

Raymond J. Callery  
Assistant Attorney General  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, Illinois 62794

26787-0045

CH2\14159699.1