

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERENENERGY RESOURCES)
GENERATING COMPANY)
))
Petitioner,)
))
v.)
))
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
))
Respondent.)

PCB - _____
(Permit Appeal – Land)

NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on November 27, 2013, I filed with the Pollution Control Board of the State of Illinois, the APPEARANCES OF DEBORAH BONE AND AMY ANTONIOLLI, and an APPEAL OF DEFAULT DISAPPROVAL OF REQUEST FOR BENEFICIAL USE DETERMINATION FOR THE USE OF COAL COMBUSTION BY-PRODUCTS UNDER SECTION 3.135(b), on behalf of AmerenEnergy Resources Generating Company, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

AMERENENERGY RESOURCES GENERATING COMPANY

By: *Amy Antonioli*
Amy Antonioli

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2013, I caused to be served a true and correct copy of the NOTICE OF FILING, APPEARANCES OF DEBORAH BONE AND AMY ANTONIOLLI, and APPEAL OF DEFAULT DISAPPROVAL OF REQUEST FOR BENEFICIAL USE DETERMINATION FOR THE USE OF COAL COMBUSTION BY-PRODUCTS UNDER SECTION 3.135(b), upon the persons on the service list below.


Amy Antoniolli

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ENTRY OF APPEARANCE

On behalf of the Petitioner, AMERENENERGY RESOURCES GENERATING COMPANY, Deborah Bone hereby enters her appearance as attorney of record.

Respectfully submitted,

AMERENENERGY RESOURCES GENERATING COMPANY



By: _____
DEBORAH BONE

Dated: November 27, 2013

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APPEAL OF DEFAULT DISAPPROVAL OF REQUEST FOR
BENEFICIAL USE DETERMINATION
FOR THE USE OF COAL COMBUSTION BY-PRODUCTS
UNDER SECTION 3.135(b)

AmerenEnergy Resources Generating Company (“Petitioner” or “AERG”), by and through its attorneys, hereby petitions the Illinois Pollution Control Board (the “Board”) for review of the disapproval, by failure of action by the Agency within the statutory timeframe, of AERG’s Request for a Beneficial Use Determination, pursuant to Section 3.135(b) of the Illinois Environmental Protection Act (the “Act”) (415 ILCS 5/3.135(b)). This petition is submitted pursuant to Sections 3.135(b) and 40 of the Act (415 ILCS 5/3.135(b) and 5/40) and in accordance with 35 Ill. Admin. Code Part 105. In support of its petition, AERG states as follows:

BACKGROUND

1. On July 29, 2004 AERG sent a Notification Letter to Illinois EPA (the “Agency”), in accordance with 415 ILCS 5/3.135, wherein AERG advised the Agency of its intent to use beneficially 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"). The July 29, 2004 Notification Letter was included as an attachment to AERG's Request for Beneficial Use Determination dated August 2, 2013, included in full herein as "Exhibit 1". Both facilities are owned by AERG. The Rail and Road Project was developed to create a transportation alternative for coal delivery to the Station and to provide access to the on-site landfill that was proposed for disposal of wastes from the Duck Creek Station. The on-site landfill was subsequently permitted by the Agency's Bureau of Land. The length of the entire rail line is five miles, and the CCB was used along the first mile passing through property that was strip mined by a previous owner. Although the project primarily consisted of the rail and road, AERG also identified the need to use CCB for grading adjacent terrain to assure proper drainage and avoiding potential erosion (the "Wedge Project"). As indicated in the 2004 notification letter, AERG began work on both of these projects in late 2004, completing the Rail and Road Project in 2005. Both the haul road and the railroad have been in operation since construction was completed and are integral to the operation of the Duck Creek Station.

2. Over two years after AERG notified Illinois EPA of its intent to use CCB as structural fill material to construct the Rail and Road Project, on August 8, 2006, the Agency conducted an inspection at the Station. The Agency's inspection occurred after construction of the Rail and Road Project was completed.

3. Based on the August 8, 2006 inspection, on September 1, 2006, Illinois EPA sent a Violation Notice to AERG alleging that the Rail and Road Project at Duck Creek violated parts of Section 21 of the Act and 35 Ill. Admin. Code 812.101(a) for unlawful dumping, littering, disposal and operation of a landfill without a permit. AERG responded to the Violation Notice

on September 22, 2006 and a meeting was held between representatives of AERG and the Agency on October 10, 2006. As a result of discussions at the October meeting, AERG submitted a proposed Compliance Commitment Agreement (“CCA”) to Illinois EPA on November 2, 2006. AERG also agreed to submit a request for a beneficial use determination (“BUD”) for the Wedge Project. (*See Exhibit 1.*)

4. Illinois EPA rejected the proposed CCA on November 27, 2006, despite the fact that, as the proposed CCA demonstrated, the Rail and Road Project did not pose a threat to human health or the environment. AERG submitted additional information regarding the Wedge Project to support its BUD request. As a result of multiple meetings and communications with the Agency about the Project, on September 30, 2008, the Agency granted AERG’s BUD request with conditions for the use of CCB to construct the Wedge Project. (*See Exhibit 1.*)

5. Almost 7 years after issuing a Violation Notice, and specifically on February 4, 2013, the State filed a Complaint against AERG alleging that the Rail and Road Project violates Section 21(a), 21(2)(d), 21(r) and 35 Ill. Adm. Code 812.101(a). The Complaint alleges that AERG did not obtain a BUD from Illinois EPA pertaining to the CCB used as fill material at the site. That matter is currently pending before this Board as a contested matter. (*See People v. AmerenEnergy Resources Generating Co.*, PCB Docket No. 13-41.)

6. In its further attempts to be responsive to the position taken by the State with respect to the Rail and Road Project and to the allegations of the Complaint, on August 7, 2013, AERG submitted a BUD request for the Rail and Road Project. In that Request, AERG once again 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. Indeed, the BUD Request and supporting documentation fully demonstrates that the beneficial use met and continues to meet the requirements for a beneficial use determination under Section 3.135(b) of the Illinois Environmental Protection Act. (*See* Exhibit 1.)

7. Despite its claims that AERG needed to obtain a BUD for the Rail and Road Project, the Agency failed to take action on AERG's request for a BUD within 90 days. In fact, the Agency did not even grant AERG's repeated requests for at least a technical discussion concerning the BUD application during the 90 day review period. Accordingly, pursuant to Section 3.135(b) of the Act, the Agency's failure to act is deemed a denial of the application.

STANDARD OF REVIEW

8. Section 3.135(b) of the Act requires the Board to adopt rules and procedures for the Agency's issuance of BUDs. 415 ILCS 5/3.135(b). Before the effective date of such Board rules, the Act authorizes the Agency to issue BUDs pursuant to Section 3.135(b). The Board has not yet adopted rules governing the Agency's issuance of determinations because no rulemaking proposal has been presented to the Board by the Agency¹. Accordingly, the Agency, by law, effectively denied AERG's August 2013 BUD application by failing to act on AERG's application within 90 days, pursuant to Section 3.135(b). Ameren appeals this determination under the procedural rules applicable to final Agency determinations. 35 Ill. Adm. Code 105.200 *et seq.*

9. Section 3.135(b) of the Act provides that "beneficial use determinations are subject to review under Section 40 of this Act," which authorizes appeals of permit denials. The

¹ It is important to note that the Act specifically requires that rules be adopted through use of the word "shall" and not "may". See 415 ILCS 5/3.135(b).

appropriate standard of review on appeal under Section 40 of the Act is whether the application to the Agency demonstrated compliance with the Act and the Board's regulations, and that the permit, if issued, would not violate the Act and Board regulations. Rock River Water Reclamation District v. Illinois EPA, PCB 13-11 (May 2, 2013); Van Zelst Landscape Compost Facility v. Illinois EPA, PCB 11-7 (Aug. 4, 2011). "The Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard," but "[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to the Agency demonstrates compliance with the Act." Illinois Ayers Oil Co. v. Illinois EPA, PCB 03-214 (Apr. 1, 2004). The scope of review is limited to the information contained in the record that the Agency relied upon when making its decision. See In the Matter of: Emissions Reduction Market System Adoption of 35 Ill Adm. Code 205, R97-13 (Oct. 2, 1997). The Agency is required to provide reasons for the denial. See Midwest Generation EME, LLC v. IEPA, PCB 04-185 (Nov. 4, 2004); see 415 ILCS 5/3.135(b). The petitioner has the burden of proving that the Agency's decision was insufficient or improper based upon the record. See id. Section 105.212(b)(1) through (5) details precisely what constitutes the appropriate record. The record must include any "permit application or other request. . .", "[c]orrespondence with the petitioner and any documents or materials submitted by the petitioner to the Agency . . .", the "permit denial letter that conforms to the requirements of section 39(a) . . .", the "hearing file of any hearing that may have been held before the Agency . . .", or "[a]ny other information the Agency relied upon in making its final decision." Id. Because the Agency failed to take action on AERG's request for a BUD within 90 days, the application for the BUD determination is deemed denied pursuant to Section 3.135(b) of the Act. And since the Agency failed to issue a written decision in response to AERG's application for a BUD, and since no hearing regarding

the BUD application was conducted before the Agency, the record must be limited to AERG's BUD application and the exhibits attached thereto.

10. Section 3.135 of the Act encourages and promotes the utilization of coal combustion by-product ("CCB"). That Section presents essentially three different paths for beneficial use. The first path in Section 3.135 (a) lists certain uses or applications that are approved without restriction, by law, if the use or application is one specifically identified in the subsection (a). A second path is set forth in Section 3.135(a-5). Subsection (a-5) also requires that certain of the subsection (a) uses or applications must also meet certain conditions. Through Section 3.135 (a-5) those "restricted" uses or applications must involve the use of CCB that (1) has not been mixed with hazardous waste; and (2) does not exceed the Class I Groundwater Standards for metals when tested utilizing Test Method ASTM D3987-85. In 2006, to further encourage and promote the utilization of CCB in productive and beneficial applications, the General Assembly enacted Section 3.135(b) and created a more specifically defined third path by which the Agency could otherwise approval beneficial use projects that may not fall within the other two paths. Indeed, had the General Assembly intended that the beneficial use determination standard set forth in subsection (b) be restricted by the same conditions set forth in subsection (a-5) it would have said so, and respectfully, to interpret the standard contained within subsection (b) any differently would render the legislative amendments meaningless in their application.

11. As discussed below, AERG's BUD application meets the requirements of Section 3.135(b). Since the Agency did not issue a disapproval letter, the Board should issue a determination that AERG's application met the requirements for a Beneficial Use Determination under Section 3.135(b).

GROUND FOR APPEAL

12. Section 3.135(b) of the Act requires the Agency to issue BUDs in writing within 90 days after the receipt of an application. 415 ILCS 5/3.135(b). The Act imposes a duty on the Agency to include in writing the Agency's reasons for the disapproval or the approval with conditions. *Id.* The Agency failed to respond to AERG's BUD application within 90 days and failed to provide any explanation whatsoever for its denial by inaction.

13. Section 3.135(b) was enacted to *encourage* the use of CCB. *Id.* (emphasis added). Section 3.135(b) provides that a beneficial use determination is to be issued if the applicant demonstrates that the following three criteria have been satisfied. AERG's application demonstrated compliance with these three elements.

- a. The use will not cause, threaten, or allow the discharge of any contaminant into the environment;
- b. The use will otherwise protect human health and safety and the environment; and
- c. The use constitutes a legitimate use of the coal-combustion waste as an ingredient or raw material that is an effective substitute for an analogous ingredient or raw material.

14. As a part of its BUD application, AERG submitted the findings of a site-specific investigation conducted by Natural Resource Technology, Inc. (*See* Exhibit 1). The investigation found that much of the fill was placed over coal mine spoils, and there are no exceedances of applicable groundwater quality standards. (*Id.*) The results of this investigation support the conclusion that this beneficial use meets the requirements for a beneficial use

determination under Section 3.135(b) of the Illinois Environmental Protection Act. (*Id.*)

Specifically, the investigation showed that:

- (1) The portion of the rail line containing coal ash fill extends nearly 4,800 feet. The northern 1,000 feet overlays native silty-clay soils, and the southern 3,800 feet overlays mine spoil. Accordingly, the applicable groundwater classification will differ depending upon whether a groundwater sample is taken in a native soil or mine spoil area.
- (2) Groundwater flows east towards the Duck Creek reservoir.
- (3) There were no exceedances of Class I groundwater quality standards for the tested constituents in groundwater samples from monitoring wells screened in native soils.
- (4) There were no exceedances of Class IV groundwater quality standards for monitoring wells screened in mine spoil fill.
- (5) There is no current or potential future groundwater usage on the property, which is owned and controlled by AERG. Background groundwater quality in the mine spoils is poor, as indicated by a sulfate concentration of 1,500 mg/L in a background monitoring well, precluding potential future potable use of this groundwater.

(*See Exhibit 1.*)

15. The record of AERG's application shows that the Rail and Road Project was a legitimate use of coal combustion waste. It was used as a structural material in the construction of the haul road and rail road as an effective substitute for analogous construction materials. Those roads continue to be used as an integral part of the Duck Creek Station's operation. The record of AERG's application shows that the Rail and Road Project complies with the Act and will not adversely impact groundwater or harm human health or safety or the environment. (*See Exhibit 1.*) The analytical results of samples taken from material that has been placed in the Rail and Road Project show that the CCB only exceeds the Class I Groundwater Standards (when tested using test method ASTM D3987-85) for boron with a concentration of 8 mg/L at one monitoring location. This monitoring well, however, is within a Class IV area of mine spoil fill. The Board promulgated Class IV standards specifically to apply to groundwater that is already

limited in its resource potential. Since this portion of the Rail and Road Project is in a Class IV area, controlled by AERG, the boron level in this one monitoring well does not pose a threat to human health or the environment. Therefore, the Board should determine that the application for a Beneficial Use Determination satisfied the requirements of Section 3.135(b).

WHEREFORE, for the reasons set forth above, Petitioner requests that the Board consider the issues raised in this appeal of the Agency's disapproval by failure of action on AERG's application for a Beneficial Use Determination and that the Board determine that the application for a Beneficial Use Determination satisfied the requirements of Section 3.135(b).

Respectfully submitted,

AMERENENERGY RESOURCES
GENERATING COMPANY

By: 

Dated: November, 27 2013

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