

ILLINOIS POLLUTION CONTROL BOARD

August 7, 2014

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 13-41
)	(Enforcement - Land)
AMEREN ENERGY RESOURCES)	
GENERATING COMPANY, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.D. O'Leary):

On February 4, 2013, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a three-count complaint against Ameren Energy Generating Company, Inc. concerning the Duck Creek Power Generating Station located at 17751 North Cilco Road, Canton, Fulton County, Illinois. On March 7, 2013, the Board granted an unopposed motion to substitute Ameren Energy Resources Generating Company (AERG) as the respondent. On April 17, 2014, AERG and AmerenEnergy Medina Valley Cogen, L.L.C. (Medina Valley) filed a motion to substitute Medina Valley as respondent.

Below, the Board first provides the procedural history of this case before summarizing the complaint. Next, the Board summarizes the motion for substitution and the People's response. The Board then discusses the issue before reaching its conclusion to deny the motion.

PROCEDURAL HISTORY

On February 4, 2013, the People filed a three-count complaint (Comp.) against Ameren Energy Generating Company, Inc. On March 7, 2013, the Board granted an unopposed motion to substitute AERG as the respondent. On May 6, 2013, AERG filed its answer (Ans.).

On April 17, 2014, AERG and Medina Valley filed a motion (Mot.) to substitute Medina Valley as the respondent. Mot. at 1. The motion included a single exhibit, an affidavit of Craig W. Stensland (Exh. A).

On May 1, 2014, the People filed a motion for extension of the deadline to respond to the motion. In an order dated May 5, 2014, the hearing officer granted the unopposed motion and set a deadline of May 28, 2014, to file a response. In an order dated May 20, 2014, the hearing officer noted the parties' agreement to extend the People's deadline to respond to June 23, 2014.

On June 20, 2014, the People filed a response objecting to the motion (Resp.). In an order dated June 23, 2014, the hearing officer noted the parties' agreement that any reply must be filed by July 30, 2014. After a telephone status conference with the parties on July 30, 2014, the

hearing officer issued an order stating in part that “[r]espondent is discussing a technical remedy with IEPA [Illinois Environmental Protection Agency] and does not plan to file a reply to the People’s objection to the motion for substitution.” People v. Ameren Energy Resources Generating Co., PCB 13-41, slip op. at 1 (July 30, 2014).

SUMMARY OF COMPLAINT

Count I: Open Dumping

The People allege that AERG owns the Duck Creek Power Generating Station (Duck Creek or Site) located at 17751 North Cilco Road, Canton, Fulton County, Illinois. Comp. at 2 (¶5).

The People allege that a July 29, 2004 letter informed the Illinois Environmental Protection Agency (Agency or Illinois EPA) that AERG “intended to use coal ash as fill material to construct a railroad embankment and a haul road” at Duck Creek. Comp. at 2 (¶6). The People further allege that, on dates better known to AERG, “approximately 180,000 tons of coal ash were transported” to Duck Creek from the E.D. Edwards Power Generating Station, where it had been generated. *Id.* (¶7).

The People cite the statutory definition of “coal combustion by-product” and allege that it “excludes structural fill material that does not meet the Class I Groundwater Standards for metals found at 35 Ill. Adm. Code 620.410, unless a Beneficial Use Determination (“BUD”) is obtained from Illinois EPA.” Comp. at 2 (¶8); *see* 415 ILCS 5/3.135 (2012). The People allege that analytical data submitted with the July 29, 2004 letter “established that the coal ash fill material exceeded the Class I Groundwater Standards for antimony, boron and chromium when tested using test method ASTM D3987-85.” Comp. at 2 (¶9).

The People allege that the Agency inspected Duck Creek on August 8, 2006, and “observed an area of filled coal ash at the Site approximately three acres in size and approximately fifteen feet deep.” Comp. at 2 (¶10). The People further allege that the Agency sent a Violation Notice (VN) to AERG on August 6, 2006. *Id.* (¶11). The People also allege that AERG “responded to the VN on September 22, 2006 and a meeting was held on October 10, 2006.” *Id.*

The People allege that, on November 2, 2006, AERG submitted a Compliance Commitment Agreement (CCA) including “analytical data from the analysis of additional samples of coal ash.” Comp. at 2 (¶12). The People further allege that AERG’s analytical data “established that the coal ash exceeded the Class I Groundwater Standards for antimony, boron and silver when tested using ASTM D3987-85.” *Id.* at 3 (¶13). The People also allege that the Agency “rejected the proposed CCA on November 27, 2006, because the additional samples of the coal ash from the fill area exceeded the Class I Groundwater Standards” and because AERG “did not agree to remove all coal ash from the fill area” to a permitted facility. *Id.* (¶14).

The People allege that AERG “agreed to submit a request for a BUD.” Comp. at 2-3 (¶12). The People further allege that the Agency on September 30, 2008, “rejected that portion

of the BUD request dealing with the previously filled area under the haul road and railroad spur” at Duck Creek. *Id.* at 3 (¶15). The People allege that the Agency determined that AERG has “failed to establish that the constituents exceeding the groundwater standards would not negatively impact groundwater quality.” *Id.* The People further allege that AERG “did not obtain a permit or BUD from Illinois EPA before using the coal ash as fill material at the Site.” *Id.* (¶16).

The People allege in Count I that AERG violated Section 21(a) of the Act by causing or allowing the open dumping of coal combustion waste (CCW). Comp. at 5 (¶24), citing 415 ILCS 5/21(a) (2012).

Count II: Waste Storage and Waste Disposal Violations

Count II alleges that AERG violated Section 21(d)(1) of the Act by conducting “a waste-storage and waste-disposal operation at the Site without a permit granted by Illinois EPA.” Comp. at 6 (¶24), citing 415 ILCS 5/21(d)(1) (2012). The People further allege that AERG violated Section 21(d)(2) of the Act by conducting “a waste-storage and waste-disposal operation at the Site without submitting an application for a permit to Illinois EPA.” Comp. at 6 (¶25), citing 415 ILCS 5/21(d)(2) (2012). The People also allege that AERG violated Section 21(e) of the Act by conducting “a waste-storage and waste-disposal operation at the Site that did not meet the requirements of the Act and regulations.” Comp. at 6 (¶26), citing 415 ILCS 5/21(e) (2012).

Count III: Coal Combustion Waste Disposal Violation

Count III alleges that AERG violated Sections 21(r) of the Act by operating a CCW disposal site without a permit granted by the Agency. Comp. at 7 (¶24), citing 415 ILCS 5/21(r) (2012).

SUMMARY OF MOTION FOR SUBSTITUTION

The motion states that, on December 2, 2013, Ameren Corporation (Ameren) “completed a transaction which, among other things, resulted in the divestiture of its merchant generation business including the Duck Creek Energy Center.” Mot. at 1; Exh. A at 1 (¶4). The motion adds that, “[p]rior to its dissolution, Ameren Energy Resources Company, LLC, a direct wholly owned subsidiary of Ameren, was the beneficial owner of all of the issued and outstanding limited liability company interest in AERG.” Mot. at 1; Exh. A at 1 (¶5). The motion claims that, as a result of the transaction, AERG no longer exists as an Ameren subsidiary. Mot. at 2; *see id.*, Exh. A at 2 (¶7).

AERG and Medina Valley further state that, “[a]s part of the divestiture, a narrow set of liabilities, including all claims by the State of Illinois relating to the use of coal combustion material as sub-base within a rail line at Duck Creek, were retained.” Mot. at 1; *see* Exh. A at 1 (¶5). The motion states that, according to the terms of the transaction,

AERG and Medina Valley entered into an Assignment and Assumption Agreement, pursuant to which AERG assigned and Medina Valley assumed any

liabilities arising from the Complaint filed by the Attorney General of the State of Illinois on February 4, 2013 in the instant proceeding and any subsequent complaints, enforcement actions, or petitions for relief related to the underlying allegations at issue in the Complaint, as well as the right to resolve the instant proceeding and any subsequent related actions. Mot. at 2; *see* Exh. A at 2 (¶7).

The motion concludes that, as a result of the transaction, “any rights or liability arising from the instant proceeding was assumed by Medina Valley.” Mot. at 2; *see* Exh. A at 2 (¶8).

SUMMARY OF PEOPLE’S RESPONSE

The People note Mr. Stensland’s affidavit, which states that he is Assistant Secretary of Ameren and Medina Valley and former Assistant Secretary of AERG and Ameren Energy Resources Company, LLC. Resp. at 1, citing Mot., Exh. A. The People also note the affidavit’s indication that the agreement between AERG and Medina Valley caused Medina Valley to become the proper respondent. Resp. at 1, citing Mot., Exh. A.

The People argue that AERG admitted that it owned the Duck Creek Power Generating Station during the relevant time. Resp. at 1, citing Ans. at 2 (¶5). The People further argued that “AERG has admitted that is used approximately 180,000 tons of coal ash material to construct the railroad embankment and haul road at Duck Creek.” Resp. at 1, citing Ans. at 3 (¶7). The People claim that “AERG has admitted that it submitted data in July 2004 showing the coal ash material exceeded the Class I Groundwater Standards for antimony, boron and silver.” Resp. at 2; *see* Ans. at 3 (¶9). The People further claim that “AERG has admitted that is submitted data in November 2006 showing the coal ash material exceeded the Class I Groundwater Standards antimony, boron and silver.” Resp. at 2; *see* Ans. at 4 (¶13). The People add that “AERG has admitted that it did not obtain a permit of a beneficial use determination from the Illinois EPA before using the coal ash material to construct the railroad embankment and haul road at Duck Creek.” Resp. at 2, citing Ans. at 5 (¶16). The People claim that, regardless of the agreement between AERG and Medina Valley, “AERG remains liable to Complainant for its violations of the Act.” Resp. at 2.

The People cite Section 101.403 of the Board’s procedural rules, which addresses joinder of parties. Resp. at 2-3, citing 35 Ill. Adm. Code 101.403. The People suggest that Medina Valley should be joined as an additional respondent. Resp. at 3, citing 35 Ill. Adm. Code 101.403(a).

DISCUSSION

The Board has reviewed AERG’s motion for substitution and the People’s response. The Board has also considered the People’s complaint and AERG’s answer. The complaint stems from allegations that AERG used coal ash that did not meet the statutory definition of “coal combustion byproduct” as fill material at Duck Creek. The answer admits that AERG owns Duck Creek and that it used approximately 180,000 tons of CCB to construct a project there. The answer also admits that data submitted in 2004 and 2006 show that CCB material exceeded Class I groundwater standards. In light of this record and these admissions, the Board cannot

conclude that that Medina Valley is the proper respondent in this matter as claimed by AERG and Medina Valley. Accordingly, the Board denies the motion for substitution.

While the People suggest that Medina Valley should be joined as an additional respondent under Section 101.403(a) of the Board's procedural rules, the People have not filed a motion for joinder, and the Board need not address that issue in this order.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 7, 2014, by a vote of 4-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style. The first letter "D" is large and loops around the "on". The "A" is small and sits between the "on" and "Brown". The "B" is large and loops around the "rown".

Don A. Brown, Assistant Clerk
Illinois Pollution Control Board