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 April 2, 2014, I filed with the Pollution Control Board of the State of Illinois, a MOTION FOR RECONSIDERATION BOARD ORDER DENYING MOTION TO STRIKE and LIMITED WAIVER OF DECISION DEADLINE TO SEPTEMBER 18, 2014, 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: Amy Antoniolli
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MOTION TO RECONSIDER BOARD ORDER DENYING MOTION TO STRIKE

AmerenEnergy Resources Generating Company ("AERG"), by and through its attorneys, and pursuant to 35 Ill. Admin Code 101.520 and 101.902, hereby moves the Illinois Pollution Control Board ("Board") to reconsider its March 20, 2014 order denying AERG's motion to strike an internal memorandum filed by the Illinois Environmental Protection Agency ("Agency" or "IEPA") as part of the administrative record in this Beneficial Use Determination ("BUD") appeal. In challenging the Board's AERG states as follows:

1. AERG submitted a request for a BUD to the Agency on August 7, 2013 ("Request") pursuant to Section 3.135(b) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/3.135(b). The Agency failed to make a decision on the BUD application within the statutory 90-day timeframe. Pursuant to Section 3.135(b) of the Act, failure of the Agency to issue a decision within 90 days constitutes disapproval of the request. 415 ILCS 5/3.135(b). BUDs are reviewable under Section 40 of the Act. *Id*.

2. 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") with the Board.

3. On January 22, 2014, the Agency filed the administrative record ("Record").[1] Despite the fact that the Record in this matter should only include AERG's Request for a BUD (R. 1-242), the Agency included an internal Agency memorandum dated September 12, 2013. (R. 243-253.)

4. On February 4, 2014, AERG moved to strike the internal memorandum from the record on the grounds that the Agency never shared the memorandum with AERG prior to the expiration of the 90-day statutory deadline and, more importantly, could not claim to have relied on the memorandum since no decision of any sort was made by the Agency on the BUD application ("Motion to Strike"). The Motion to Strike asserted that the internal memorandum was not properly part of the record, and should be stricken.

5. On February 14, 2014, IEPA objected to AERG's Motion to Strike ("Objection"). Citing no authority, precedent or procedural rules, IEPA argued it would be "inappropriate" not to include the memorandum in the record. Objection, p. 2. AERG replied in support of the Motion to Strike on February 24, 2014 ("Reply").

6. The Board denied AERG's Motion to Strike in a March 20, 2014 order ("Order"). The Board agreed that the internal memorandum did not fit into any of the first four categories of materials required to be filed as part of the Agency record. The Order also found that if it read the fifth category as requested by AERG (to include only information the Agency relied upon in actually making a decision), the BUD application must also be disallowed from the record, as no

[1] The Record will be cited to throughout this motion as "R. __."

decision was ever made by the Agency regarding. In its decision, the Board relied on cases it asserts interpret Section 105.212(b)(5) as allowing materials beyond those the Agency relied upon in making a decision to include materials the Agency should have relied upon in reviewing the BUD application. 35 Ill. Adm. Code 105. 212(b). The Board reasoned that Section 105.212(b) establishes five categories of materials that *must* be included in the record, but does not address what other materials *may* be included in the record. Order, p. 8.

7. AERG respectfully moves the Board to reconsider its March 20, 2014 decision denying AERG's motion to strike given that this is a matter of first impression and the Board erred in its application of existing precedent in this instance. In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence that was not available at the time of hearing, changes in the law or errors in the [Board's] previous application of existing law." *Estate of Slightom v. IEPA*, PCB 11-25, slip op. at 4 (Jan. 31, 2014); *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 92-156, slip op. at 2 (Mar. 11, 1993), *citing Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

8. Respectfully, the Board erred in applying existing law in this unique circumstance. As the Board stated in reviewing another matter of first impression involving the Agency's inaction on a permit application, "the well-settled law can offer only guidance in the Board's review of the Agency's inaction under . . . the Act." *Partylite Worldwide, Inc. v. IEPA*, PCB 08-32, slip op. at 4 (Mar. 20, 2008). In addition to the five categories of mandatory materials that must be included in an administrative record in permit appeals under Section

105.212(b), the Board's Order of March 20, 2014 noted a sixth category of permissive materials that may be included in the record – materials the Agency "reasonably should have relied upon." Order, p. 9. The Board concluded that the internal memorandum was properly included in the record because it is "a document on which the Agency relied or should have relied in its review of the BUD application." *Id.* However, the Board erred in equating materials the Agency merely relied upon in *reviewing* the BUD application where no decision was made, with materials the Agency relied upon in situations where an actual decision was made. Neither the Act nor the Board's procedural rules require that the record reflect the materials the Agency relied upon or should have relied upon in reviewing an application alone. Rather the rules require the Agency to submit the materials it relied upon in making *its decision* regarding an application. There is simply no specific Board rule that anticipates, and thus addresses, a situation quite like the one presented herein.[2]

9. Illustrating this point, each of the decisions to which the Board cites in the Order analyzes materials on which the Agency "relied or reasonably should have relied" in making a *final permit decision and that final permit decision was, in fact, made. See* Order, p. 8-9; *citing Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 279-80 (5th Dist. 1987) (appealing the Agency's denial of an application for renewal of an operating permit);

[2] Notably, the language of Board's procedural rules governing what must be included in the Agency's record on appeal before the Board has changed. The procedural rules applicable to permit appeals prior to the revisions adopted in *In the Matter of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R00-20 stated: "The Agency shall appear as respondent in the hearing and shall, within 14 days, upon notice of the petition, file with the Board the entire ***Agency record of the permit application***, including: A) The application; B) Correspondence with the applicant, and C) The denial." 35 Ill. Adm. Code 105.102(a)(4) (emphasis added). The Board has since revised the procedural rules and replaced the language of Section 105.102(a)(4) with the language now found in Section 105.212(b), which no longer references the "Agency record of the permit application." The Board demanded strict compliance with the new procedural rules in stating: "In drafting this proposal we have attempted 'to say what we mean and mean what we say.'" *In the Matter of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R00-20, slip op. at 5 (Jan. 3, 2001).

Phillips 66 Co. V. IEPA, PCB 12-101, slip op. at 8 (Mar. 21, 2013) (appealing the Agency's issuance of an NPDES permit with conditions); *ESG Watts, Inc. v. IEPA*, PCB 94-243, 306, 307, 308, 309, 133, 134 (cons.), slip op at 3 (Mar. 21, 1996); *rev'd in part on other grounds, ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3d Dist. 1997) (appealing the Agency's denial of permits under Section 39(i) of the Act); *United Disposal of Bradley, Inc., et al v. IEPA*, PCB 03-235 (Jun. 17, 2004) (appealing the Agency's denial of an application for renewal of its operating permit); *Joliet Sand and Gravel Co. v. IEPA*, PCB 86-159 (Feb. 5, 1987); *aff'd by Joliet Sand & Gravel Co. v. PCB*, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987) (appealing the Agency's denial of an application to renew an operating permit). Although Petitioner agrees with the general reasoning of the cases to which the Board cites, Petitioner does take issue with the authoritative value the Board gave these cases in rendering its decision. None of these decisions discuss what is allowed as part of a record of decision when no decision or determination was made. Indeed, none of the cases present a circumstance close to the one presented here. Decisions were made in each and every one of those decisions. In the instant case, Petitioner never received a decision regarding the BUD application from the Agency, and thus, AERG respectfully submits that the Board's reliance on these decisions as providing authority for inclusion of the subject memorandum in the record is misplaced. A denial of a BUD application by failure to approve or deny the request within the statutory timeframe should be given careful consideration due to the unique "denial by operation of law" provision found in Section 3.135(b).

10. In *United Disposal*, for example, the opinion states "It is well settled that the Agency record in a permit appeal consist of the information which the Agency considered or should have considered in making its permitting *decision*." *United Disposal*, PCB 03-235, slip op. at 2 (emphasis added). It further states "the Agency considered the documents it now seeks to add to the record when the

permitting *decision* was made." *Id*. (emphasis added). Moreover, "[t]he documents predate the Agency's final denial letter . . . and were available to the Agency when making its permit *decision*." *Id*. at 3. In *Joliet Sand and Gravel*, not only did the matter involve an actual Agency decision, but further did not allow the Agency to introduce reasons for denial of an application for the first time on appeal: "In its permit denial letter, the Agency must specify all reasons for its denial of a permit, and is precluded from raising new reasons for the first time before the Board." *Joliet Sand and Grave*l, PCB 86-159, slip op. at 5. It is reasonable in such circumstances to include in the record of decision the items outlined in Section 105.212(b), including any materials the Agency relied or should have relied upon in making its decision.

11. Assuming the Agency had made a decision on the BUD application, none of the decisions cited in the Board's Order are persuasive in this instance. In fact, each of the decisions that involved the sixth permissive category of materials on which the Agency "relied or reasonably should have relied" refers to the *applicant's* right to request that certain materials that are initially not included in the record should be included, if they were relied upon or should have been relied upon by the Agency in making a decision on an application. In each instance it was the applicant who requested that materials be included in the record, not the Agency. It should not now be the Agency's right – after failing to make a decision within the statutory timeframe – to claim after the fact that it relied or should have relied on a particular internal memorandum never before seen by the applicant. The internal memorandum does not fit within the sixth permissive category of materials, nor any of the five remaining categories establishing what materials *must* be included in an Agency record.

12. In the context of landfill siting appeals, the Board has long recognized the distinction between a "final action" and a "decision." *Clean Quality Resources, Inc. v. Marion County Board*, PCB 91-72 (Aug. 26, 1991); *Waste Management of Illinois v. PCB*, 145 Ill.2d

345, 585 N.E.2d 606 (1991). In landfill siting appeals, a vote by the governing body can constitute a "final action," but the vote itself is not enough to satisfy the requirement for a written decision specifying the reasons for that decision under Section 39.2 of the Act. 415 ILCS 5/39.2. The terms "final action" and "decision" are both present in the language of Section 39.2 of the Act, but an analogy can nonetheless be made to BUD determinations. As for landfill siting appeals, the legislature made a clear distinction. For BUD appeals there can be an appealable final action even where IEPA makes no decision or determination. Here, the final appealable Agency action was IEPA's failure to act within the statutory timeframe. The final action cannot be equated to a "decision," and there can, therefore, be no record of decision.

13. Moreover, AERG did not cite *West Suburban Recycling* for the proposition that internal memoranda cannot be made part of the record generally, but rather to emphasize that the Act requires a written determination and the memorandum cannot be considered the Agency decision on this BUD appeal. Reply, p. 2; *citing West Suburban Recycling & Energy Center, L.P. v. Illinois EPA,* PCB 95-119 (Oct. 17, 1996). Section 3.135(b) of the Act requires the Agency to issue a "decision," and the approval or disapproval of an application must be the decision of the *Agency. Id.*; *citing West Suburban Recycling & Energy Center, L.P. v. Illinois EPA*, PCB 95-119 (Oct. 17, 1996) ("This internal Memorandum cannot possibly articulate a position or decision the Agency never actually made, either before the expiration of the 90-day period, or at any time since."). Therefore, *West Suburban Recycling* is relevant to the proposition that the Agency made no decision in response to AERG's BUD application, and thus, under no circumstances should the memorandum be considered the Agency's decision.

14. The Board noted that if Section 105.212(b) were controlling, the BUD application itself would have to be excluded, and this kind of result would be absurd. Order, p. 8. Petitioner

asserts, however, that the result of including a document that was not relied on by the Agency in making a decision because a decision was never made is even more absurd. The Act provides that the Agency shall make a "written beneficial use determination" within 90 days after receipt of any request for a BUD, whether it be an approval, disapproval, or approval with conditions. 415 ILCS 5/3.135(b). While the Agency's internal memorandum may be a written document upon which it should or could have relied upon in making its decision, the fact is the Agency failed to make any decision or determination at all. Certainly to avoid punishing the Petitioner for a quandary not of its making, the Board should opt to pursue the legal course that was presented in Petitioner's Motion to Strike.[3]

15. However, should the Board continue to feel that it cannot find its way to the Petitioner's position, the Board should at least pursue an alternative that is more logical and consistent with the language of the Board's rules, thus avoiding the web of absurdities altogether. The Board could reason that when there is no decision, there can be no record of that decision under 35 Ill. Adm. Code 105.212. Should this reasoning be more palatable to the Board, the result would not leave the Board without materials to review in this appeal. The standard of review of final Agency actions under Section 40 of the Act is whether the petitioner's submittal to the Agency demonstrated compliance with the Act and Board's regulations. *Evergreen FS, Inc., v. IEPA*, PCB 11-51, 12-61, slip op. at 16 (Jun. 21, 2012); *Illinois Ayers Oil Co. v. IEPA*, PCB 03-214, slip op. at 8 (Apr. 1, 2004). Accordingly, even if there is no "record of decision" in this unique instance, the Board must review AERG's BUD application as submitted to the

[3] In this instance, the Record should certainly not include a document never seen by the applicant until after the expiration of the statutory decision deadline for BUD requests. To include this memorandum would allow the Agency to raise before the Board, for the first time, new reasons for denial of the BUD application, a result that is not permissible. *Joliet Sand and Grave*l, PCB 86-159, slip op. at 5

Agency to determine whether it complied with the Act and Board's regulations. In the *Partylite* case, which involved an appeal of the Agency's failure to take action on a permit application submitted under Section 39.5(5)(j) of the Act, the Agency failed to file the permit record. In that permit appeal, the Board nonetheless reviewed the limited available materials. *Partylite*, PCB 08-32, slip op. at 4 ("the record before the Board simply indicates that a complete application was filed . . . and was deemed complete by the Agency . . . ."). Given the applicable standard of review under Section 40 of the Act, the Board must consider AERG's application in this BUD appeal proceeding as the petitioner's submittal to the Agency. This is true whether or not the Board considers the application part of the Agency's "record of decision."

WHEREFORE, for the reasons set forth above, AERG moves the Board to reconsider its March 20, 2014 order and requests that the Board strike the internal Agency memorandum from the record and give it no consideration in reviewing AERG's BUD application.

Respectfully submitted,

AMERENENERGY RESOURCES
GENERATING COMPANY

by:

Amy Antoniolli

Dated: April 2, 2014

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LIMITED WAIVER OF DECISION DEADLINE TO SEPTEMBER 18, 2014

AmerenEnergy Resources Generating Company ("Petitioner" or "AERG"), by and through its attorneys, SCHIFF HARDIN LLP, pursuant to 35 Ill. Admin. Code 101.308(c)(2), hereby agrees to a limited waiver of the decision deadline for final action by the Illinois Pollution Control Board ("Board") in this proceeding through September 18, 2014. In support of this waiver, Petitioner states as follows:

1. On November 27, 2013, Petitioner filed a petition for review of the default disapproval, by failure to take action, of AERG's request for beneficial use determination ("BUD"), pursuant to Section 3.135(b) of the Illinois Environmental Protection Act (the "Act") and 40 of the Act (415 ILCS 5/3.135(b) and 5/40) ("Petition for Review").

2. AERG requested the BUD to apply to its use of coal combustion by-product ("CCB") as fill material for the construction of a railroad embankment and a haul road at the Duck Creek Power Generating Station.

3. The current deadline for this matter is July 10, 2014.

4. Petitioner hereby voluntarily agrees to a limited waiver of the decision deadline through September 18, 2014.

WHEREFORE, Petitioner AERG requests that the Illinois Pollution Control Board accept this limited waiver of the decision deadline for final action on the Petitioner's Petition for Review.

Respectfully submitted,

AMERENENERGY RESOURCES
GENERATING COMPANY

by:

Amy Antoniolli

Dated: April 2, 2014

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 2nd day of April, 2014, I have electronically served a true and correct copy of the attached MOTION FOR RECONSIDERATION BOARD ORDER DENYING MOTION TO STRIKE and LIMITED WAIVER OF DECISION DEADLINE TO SEPTEMBER 18, 2014, on behalf of AmerenEnergy Resources Generating Company, Inc., upon the following persons:

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and by first class mail, postage affixed, upon:

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