

**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 24, 2014, I filed with the Pollution Control Board of the State of Illinois, a Reply in Support of 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

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<b>GENERATING COMPANY</b>	)	
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<b>Petitioner,</b>	)	
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<b>v.</b>	)	<b>PCB -14-41</b>
	)	<b>(Permit Appeal – Land)</b>
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<b>ILLINOIS ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
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**REPLY IN SUPPORT OF 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 and the February 24, 2014 Hearing Officer Order granting leave to reply, hereby submits this reply in support of its Motion to Strike certain materials that were improperly included in the Administrative Record, electronically filed on February 4, 2014 (“Motion to Strike”). This Reply in Support of its Motion to Strike focuses on the mischaracterizations presented by the Respondent in its response to AERG’s motion, filed on February 14, 2014. AERG states as follows:

1. As noted in AERG’s Motion to Strike, since the Illinois Environmental Protection Agency (the “Agency”) failed to issue a written decision in response to AERG’s application for a beneficial use determination (“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 Agency, however, inappropriately included supplemental materials in its filing of the Administrative Record, namely an internal Agency memorandum dated September 12, 2013. (R. 243-253).

2. In its Objection to AERG's Motion to Strike, Respondent states that the "Memorandum summarizes the Agency position." (Response Para. 4). The Objection fails to acknowledge, however, that the Agency did not take a position in this matter. AERG's BUD application was denied by operation of law due to the Agency's failure to act within the required 90-day period, pursuant to 415 ILCS 5/3.135(b).

3. Section 3.135(b) of the Act requires the Agency to issue a "decision." The approval or disapproval of an application must be the decision of *the Agency*. West Suburban Recycling & Energy Center, L.P. v. Illinois EPA, PCB 95-119 (Oct. 17, 1996). Indeed, in other matters before the Board, the Agency has argued that internal memorandums written by Agency personnel during the internal application review process simply represent the thoughts of particular personnel prior to the final decision – and that the actual decision is that the Agency makes at the time it issues its final denial or grant letter to the applicant. *Id.* (finding that it was "irrelevant whether any Agency personnel, at any time prior to the [final decision of the Agency], may have personally believed that a different outcome was appropriate.").

4. The Memorandum at issue is merely an internal staff level recommendation addressed to a superior. There is no indication that this recommendation represented the final position of the Agency regarding AERG's BUD application, because the Agency has never made a decision on the merits of AERG's BUD application. 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. There is no evidence whatsoever that the

opinion of the staff stated in the Memorandum was formally, or informally, adopted as the “Agency position.”

5. Even if the Memorandum could represent the Agency’s position on AERG’s BUD application, 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 Board’s rules clearly limit an Administrative Record to five categories of materials. 35 Ill. Adm. Code 105.212(b). The Memorandum does not meet any of these categories as it is nothing more than an internal Agency document indicating the thoughts and recommendation of one or more staff persons about the BUD application – thoughts and recommendations that were never incorporated into a final Agency written decision.

6. The Agency’s Objection plainly misrepresents the nature and use of the Memorandum by the Agency. The matters addressed in the Memorandum cannot serve to provide a rationale for a written Agency decision that was never made. 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 be inappropriate and contrary to the Board’s rules.

WHEREFORE, for the reasons set forth above and in its Motion to Strike, 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:



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Deborah Bone

Dated: February 24, 2014

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 24th day of February, 2014, I have electronically served a true and correct copy of the above Reply in Support of 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



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**SERVICE LIST**

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