

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>AQUA ILLINOIS, INC.,</b>	)	
	)	
Petitioner,	)	
	)	
v.	)	<b>PCB 2023-012</b>
	)	<b>(Permit Appeal - Water)</b>
<b>ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,</b>	)	
	)	
Respondent.	)	
	)	

**NOTICE OF FILING**

To:	Kathryn A. Pamenter	Don Brown
	Senior Assistant Attorney General	Clerk of the Board
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PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE THE RECORD and CERTIFICATE OF SERVICE**, copies are which are herewith served upon you.

Dated: August 3, 2022

/s/ Sarah L. Lode  
One of its Attorneys

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*Attorneys for Aqua Illinois, Inc.*

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Petitioner,	)	
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	)	<b>(Permit Appeal - Water)</b>
<b>ILLINOIS ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
Respondent.	)	
	)	

**PETITIONER’S RESPONSE IN OPPOSITION TO  
RESPONDENT’S MOTION FOR EXTENSION OF TIME TO FILE THE RECORD**

Petitioner Aqua Illinois, Inc. (“Aqua”), by and through its counsel, ArentFox Schiff, LLP, responds in opposition to Respondent the Illinois Environmental Protection Agency’s (“IEPA” or the “Agency”) Motion for Extension of Time to File the Record (“Motion for Extension”). For multiple reasons, the Illinois Pollution Control Board (the “Board”) should deny Respondent’s Motion for Extension and continue to require IEPA to file the entire record of its decision on the July 29, 2022 Special Exception Permit issued to Aqua (the “2022 Permit”) by August 8, 2022, as posited by both 35 Ill. Admin. Code 105.116 and this Board’s order of July 21, 2022. First, grant of the IEPA’s Motion for Extension would impair the Board’s ability to timely take action by the decision deadline. Second, the IEPA’s Motion for Extension is without reasonable basis. The IEPA’s Motion for Extension is an obvious and insincere attempt to stall this appeal; the Agency’s pending and partial motion to dismiss just one of the four issues of Aqua’s Petition for Review is a nonsensical predicate to delay the Agency’s assembly of the record. In further support of its Response in Opposition, Aqua states as follows:

1. When a permitting decision of the Agency is appealed, the Board requires IEPA to file with the Board the entire record of the Agency's decision "within 30 days after the filing of the petition for review, unless [Part 105] provides otherwise, or the Board or hearing officer orders a different filing date." 35 Ill. Admin. Code 105.116(a). On July 21, 2022, the Board affirmed that the regulatory imposed timeframe applied and ordered IEPA to file the entire record of the Agency's 2022 Permit decision by August 8, 2022. (Order of the Board at p. 2 (July 21, 2022).) Although Section 105.116 permits the Agency to seek extensions, the establishment of the 30-day timeframe in Section 105.116(a) was based on the Board's belief, which "the Agency did not contradict . . . that such a timeframe was realistic." *E & L Trucking Co. v. IEPA*, PCB 02-53, 2002 WL 745631, at \*2 (IPCB Apr. 18, 2002). It was also based on the recognition that "since permit appeals carry with them a statutory 120-day decision deadline, these cases must move quickly." *Id.* at \*1 (internal citation omitted).

2. Because the IEPA permitting decisions reflected within the 2022 Permit impose unprecedented and highly onerous requirements beyond the IEPA's authority and what has been required of any other public water supply in Illinois, prompt resolution of the issues raised in the Petition for Review is paramount to Aqua and consistent with Aqua's rights under 40 ILCS 5/40(a) of the Illinois Environmental Protection Act.

3. Consistent with its desire for prompt resolution, Aqua crafted and filed its Petition for Review within six business days of the IEPA's issuance of the 2022 Permit and denial of Aqua's permit modification request.<sup>1</sup>

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<sup>1</sup> The Petition for Review would have been filed even sooner but for previously scheduled vacations associated with the intervening July 4<sup>th</sup> holiday.

4. The IEPA elected to wait to file its Motion for Extension until the 30-day period of Section 105.116(a) has nearly lapsed and then asks for a further full 30 days in addition to whatever time the Board requires to decide Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (the "Partial Motion to Dismiss").

5. The Board's order of July 21, 2022 states that the decision deadline for this matter is November 7, 2022. Because a timely decision is critical, Aqua respectfully does not intend to extend that deadline by waiver. Grant of Respondent's request for delay could therefore significantly hinder the Board's ability to take final action by November 7, 2022.<sup>2</sup>

6. Nothing in the IEPA's Motion for Extension suggests that the 30-day timeframe of Section 105.116(a) is an unrealistic period in which to assemble and file the entire administrative record. Indeed, the IEPA's Motion for Extension does not suggest the administrative record to be at all unusual or that more time is needed for assembly. Rather, the sole basis of IEPA's motion is stated to be a purported desire to avoid including too much information in the record. (*See* Motion for Extension at ¶ 5 ("Granting such an extension of time will ensure that the Illinois EPA files the appropriate record based upon the Board's determination of the scope of the Permit Appeal.")) That purported desire for brevity is a red herring, especially given that 2022 Permit explains that the IEPA's decision to deny Aqua's request to modify Additional Condition 6 was based on one document, the Interim Agreed Order. *See* Petition for Review at ¶ 22.

7. Moreover, as will become even more clear through the forthcoming Aqua response to IEPA's Partial Motion to Dismiss, no order of the Will County Circuit Court at all impedes, or even hints at impeding, the IEPA's permitting authority. To the contrary, as explained in the

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<sup>2</sup> Among other relief, if final action is not taken by November 7, 2022, Aqua's denied permit modification requests will be deemed issued. *See* Order of the Board at p. 2 (July 21, 2022) ("If the Board fails to take final action by the decision deadline, Aqua may deem the requested permit issued. 415 ILCS 5/40(a)(2) (2020).").

Petition for Review, the Interim Agreed Order unambiguously provides that monthly sampling is required only until the IEPA determines otherwise. (See Petition for Review at ¶ 24.) The IEPA's Motion for Extension is simply a transparent (and unsupported) attempt to use one aspect of the Petition for Review as a strawman to delay any progress on any aspect of the appeal.

8. The IEPA's Motion for Extension should be denied. There is simply no reason to delay IEPA's assembly of its record based on a motion to dismiss one of the four issues raised by the Petition for Review, particularly when (a) the issue that the Agency seeks to dismiss is as unsupported as it is here and (b) such delay would adversely affect the Board's ability for final action before the decision deadline.

9. This is already the second time that the Agency has moved the Board for an extension of time.<sup>3</sup> As will likely become clear through this appeal, repeated requests for more time and frivolously-reasoned motions are part of an ongoing Agency strategy of obfuscation and delay.<sup>4</sup> This pattern of behavior will surely continue without the Board's intervention and denial of the IEPA's Motion for Extension.

For these reasons, Aqua respectfully requests that the Board or the hearing office enter an order denying IEPA's Motion for Extension and granting such other relief as the Board or the hearing officer deems appropriate.

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<sup>3</sup> The first time being Respondent's Motion for Extension of Time to Respond to Petitioner's Motion for Partial Stay (July 19, 2022). Petitioner did not object to that one small extension request as a professional courtesy that would not delay other aspects of the appeal.

<sup>4</sup> Unfortunately, this pattern is consistent with recalcitrance displayed in the Will County Circuit Court litigation. There the Attorney General's Office is thus far refusing to engage in the discovery process in good faith. The pattern is clear, the IEPA and/or the Attorney General's Office does not want to explain or justify their unreasonable actions concerning the UP Water System to Aqua, the Will County Circuit Court, or the Board.

Respectfully submitted,

Aqua Illinois, Inc.

Dated: August 3, 2022

/s/ Daniel J. Deeb  
One of its Attorneys

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 3rd day of August, 2022:

I have electronically served a true and correct copy of Petitioner's Response in Opposition to Respondent's Motion for Extension of Time to File the Record, by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

To: Kathryn A. Pamenter Senior Assistant Attorney General Environmental Bureau Office of the Illinois Attorney General 69 W. Washington St., 18th Floor Chicago, IL 60602 <a href="mailto:Kathryn.Pamenter@ilag.gov">Kathryn.Pamenter@ilag.gov</a>	Don Brown Clerk of the Board Illinois Pollution Control Board 60 E. Van Buren St., Suite 630 Chicago, IL 60605 <a href="mailto:Don.Brown@illinois.gov">Don.Brown@illinois.gov</a>
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My e-mail address is [Sarah.Lode@afslaw.com](mailto:Sarah.Lode@afslaw.com).

The number of pages in the e-mail transmission is 8.

The e-mail transmission took place before 5:00 p.m.

          /s/ Sarah L. Lode            
Sarah L. Lode

Dated: August 3, 2022

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