

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AQUA ILLINOIS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 2023-012
)	(Permit Appeal - Public Water Supply)
ILLINOIS ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

NOTICE OF ELECTRONIC FILING

To: *See Attached Service List*

PLEASE TAKE NOTICE that on the 22nd day of August, 2022, I caused to be filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the attached Respondent's Motion for Permission to File Reply to Petitioner's Memorandum in Response in Opposition to Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 6, a true and correct copy of which is attached hereto and hereby served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

/s/ Kathryn A. Pamenter

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CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, a Senior Assistant Attorney General, hereby certify that on the 22nd day of August, 2022, I caused to be served the foregoing Notice of Electronic Filing and Respondent's Motion for Permission to File Reply to Petitioner's Memorandum in Response in Opposition to Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 upon the parties named on the attached Service List, via e-mail or electronic filing as indicated.

/s/ Kathryn A. Pamenter _____
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RESPONDENT’S MOTION FOR PERMISSION TO FILE REPLY TO PETITIONER’S MEMORANDUM IN RESPONSE IN OPPOSITION TO RESPONDENT’S MOTION TO DISMISS THE PERMIT APPEAL AS TO ADDITIONAL CONDITION NO. 6

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Respondent”), by and through the Attorney General of the State of Illinois, KWAME RAOUL, and pursuant to 35 Ill. Adm. Code 101.500(e), hereby moves for permission to file a reply to Petitioner’s Memorandum in Response in Opposition to Respondent’s Motion to Dismiss the Permit Appeal as to Additional Condition No. 6. In support of this motion, Respondent states as follows:

1. On June 29, 2022, Respondent issued a Special Exception Permit to Petitioner (the “June 2022 Permit”).
2. On July 8, 2022, Petitioner filed its Petition for Review of the Illinois Environmental Protection Agency’s Special Exception Permit Decision and Motion for Partial Stay, PCB 2023-12 (the “Permit Appeal”).
3. On August 2, 2022, Respondent filed its Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (“Motion to Dismiss”) and its Motion for Extension of Time to File the Record, which incorporated such Motion to Dismiss by reference.

4. On August 16, 2022, Petitioner filed its Memorandum in Response in Opposition to Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 ("Response"), in which Petitioner contends that Respondent is "tilting at windmills". (Response at p. 1.)

5. Section 101.500(e) of the Illinois Pollution Control Board's ("Board") Procedural Rules states, "[t]he moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response." 35 Ill. Adm. Code 101.500(e). In this matter, Respondent has timely filed this Motion for Permission, as the 14-day deadline ends on August 30, 2022.

6. In the absence of an opportunity to file a Reply to Petitioner's Response, Respondent will be materially prejudiced. Specifically, Respondent must be permitted to reply to Petitioner's incorrect arguments that (a) Part 103 of the Board's Rules concerning enforcement actions and corresponding cases apply in this Permit Appeal, instead of Part 105 governing Appeals of Final Decisions of State Agencies, and (b) Petitioner may proceed simultaneously in two forums for the same purpose.

7. Respondent has prepared a Reply that responds to Petitioner's Response. A copy of such Reply is attached hereto as Exhibit A. By this motion, Respondent seeks permission to file its Reply to avoid material prejudice.

WHEREFORE, Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board or the hearing officer grant it permission to file its

Reply to Petitioner's Response and such other relief as the Board or the hearing officer deems appropriate.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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EXHIBIT A

RESPONDENT’S REPLY TO PETITIONER’S MEMORANDUM IN RESPONSE IN OPPOSITION TO RESPONDENT’S MOTION TO DISMISS THE PERMIT APPEAL AS TO ADDITIONAL CONDITION NO. 6

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**RESPONDENT’S REPLY TO PETITIONER’S MEMORANDUM IN RESPONSE
IN OPPOSITION TO RESPONDENT’S MOTION TO DISMISS THE PERMIT APPEAL
AS TO ADDITIONAL CONDITION NO. 6**

Part 103 of the Illinois Pollution Control Board’s (“Board”) Rules applies to Enforcement matters, while Part 105 governs Appeals of Final Decisions of State Agencies, with Part 101 supplementing both. In filing its Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (“Motion to Dismiss”), Respondent properly cited Parts 101 and 105 of the Board’s Rules regarding permit appeals. In addition, Respondent demonstrated that Petitioner’s appeal (PCB 23-12, the “Permit Appeal”) of Respondent’s final decision regarding Additional Condition No. 6 satisfies the same parties/same cause standard, in that Petitioner’s Revised Motion to Modify before the Will County Circuit Court (the “Circuit Court”) and its Permit Appeal both seek the elimination of monthly compliance sampling. (*See* Motion to Dismiss at Argument, ¶¶ 2-6.)

In its Memorandum in Response in Opposition to Respondent’s Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (“Response”), Petitioner insists that dismissal is not warranted pursuant to Section 103.212 of the Board’s Rules and corresponding cases. (Response at pp. 6, 8.) Yet, Petitioner did not file an enforcement complaint under Part 103 of the Board’s Rules against Respondent, let alone a citizen’s complaint needed to invoke Section 103.212. Moreover, Petitioner is not permitted to utilize two forums simultaneously to

seek the same relief. 735 ILCS 5/2-619(a)(3). Because Respondent correctly relied upon Parts 101 and 105 of the Board's Rules in this Permit Appeal and has met the standard under 35 Ill. Adm. Code 101.500(a), 105.108 and 735 ILCS 5/2-619(a)(3), its Motion to Dismiss should be granted.

I. Respondent Properly Moved for Dismissal of the Permit Appeal as to Additional Condition No. 6 in Accordance with the Board's Rules.

Sections 105.100(a) and (b) of the Board's Rules provide that:

[t]his Part applies to appeals of final decisions of the Agency and the OSFM to the Board as described in this part. . . . This Part must be read in conjunction with 35 Ill. Adm. Code 101, which contains procedures generally applicable to all of the Board's adjudicatory proceedings. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Part, the provisions of this Part apply.

35 Ill. Adm. Code 105.100(a), (b). Section 105.108 of the Board's Rules sets forth five bases for dismissal including, as pertinent to this Permit Appeal, "[o]ther grounds exist[ing] that bar the petitioner from proceeding." 35 Ill. Adm. Code 105.108(e).¹ In addition, Section 101.500(a) of the Board's Rules, which applies in permit appeals, states that "[t]he Board may entertain any motion the parties wish to file *that is permissible under the Act or other applicable law, this Part, or the Code of Civil Procedure.*" 35 Ill. Adm. Code 101.500(a) (emphasis added); 35 Ill. Adm. Code 105.100(b). As such, a respondent in an appeal of a final agency decision may file a dismissal motion in accordance with 35 Ill. Adm. Code 101.500(a) and 105.108, as well as Section 2-619(a) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a).

Notwithstanding the foregoing, Petitioner asserts that 35 Ill Adm. Code 101.100(b) and 103.212(a) control in this Permit Appeal. (Response at p. 6.) As to the former regulation, though,

¹ Petitioner contends that 35 Ill. Adm. Code 105.108 should only apply to motions seeking to dismiss an entire petition. (Response at p. 6, fn. 2.) Such a narrow reading of the Rule would deprive respondents of procedural rights and limit the ability to narrow the issues for the Board's decision. *Cf. Aqua Illinois, Inc. v. IEPA*, PCB 23-12, slip op. at p. 2 (Aug. 11, 2022) (finding that the Board has authority to grant a discretionary stay of a permit condition).

the Board's Rules expressly authorize the filing in a permit appeal of a motion to dismiss that is "permissible under . . . the Code of Civil Procedure." 35 Ill. Adm. Code 101.500(a). Similarly, the Board's Rules are silent as to whether an appeal of conditions within a Special Exception Permit may be dismissed as duplicative of a matter pending in another forum, thereby permitting the Board to "look to the Code of Civil Procedure . . . for guidance." 35 Ill. Adm. Code 101.100(b).²

As to the latter of Petitioner's cited regulations, Part 103 only "applies to proceedings before the Board concerning *complaints alleging violations* of the Act, regulations, and orders of the Board under Section 31 of the Act [415 ILCS 5/31]." 35 Ill. Adm. Code 103.100(a) (emphasis added); *see also* 35 Ill. Adm. Code 101.202 ("'[c]omplaint' means the initial filing that begins an enforcement proceeding under Section 31 of the Act and 35 Ill. Adm. Code 103"). Similarly, Section 103.212(a) of the Board's Rules states, in its entirety, that:

*Any person may file with the Board a complaint against any person allegedly violating the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order. When the Board receives a **citizen's complaint**, unless the Board determines that **such complaint** is duplicative or frivolous, it shall schedule a hearing. [415 ILCS 5/31(d)(1).] The definitions for duplicative and frivolous can be found at 35 Ill. Adm. Code 101.Subpart B.*

35 Ill. Adm. Code 103.212(a) (italics in original; emphasis added); *compare* Response at p. 6 (Petitioner changed "such complaint" to "a complaint" in its quotation of this provision); *see also* 415 ILCS 5/31(c)(1), (d)(1). Petitioner's Petition for Review of an Illinois Environmental Protection Agency's Special Exception Permit Decision filed in the Permit Appeal does not

² Neither Petitioner, nor Respondent cited 35 Ill. Adm. Code 105.214(c)(1) or (d), which include the "duplicative or frivolous" language. Such provisions concern whether the Board will hold a hearing on a petition for review, not the issue of dismissal, and only apply to a National Pollutant Discharge Elimination System (NPDES) permit, a Resource Conservation and Recovery Act (RCRA) Permit for a Hazardous Waste Disposal Site, or a Hazardous Waste Permit.

constitute a “complaint” alleging enforcement violations, much less a citizen’s complaint, to render Section 103.212(a) of the Board’s Rules applicable in this matter.

Each of Petitioner’s cited cases is equally inapposite. For example, in *United City of Yorkville v. Hamman Farms*, PCB 08-96, slip op. (April 2, 2009), the Board found that United City of Yorkville’s citizen’s complaint against Hamman Farms was not duplicative of the Illinois Attorney General’s Office’s circuit court complaint against Hamman Farms pursuant to 415 ILCS 5/31(d)(1) and 35 Ill. Adm. Code 103.212(a). Similarly, in *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, slip op. at pp. 21-23 (Oct. 3, 2013), the Board determined that a citizen’s complaint, alleging certain of the same violations underlying several Compliance Commitment Agreements that Midwest Generation, LLC entered into during the Agency’s pre-enforcement process, was not duplicative of those agreements. *See also People v. Freeman United Coal Mining Co., LLC*, PCB 10-61, 11-2, slip. op. at pp. 14-15 (July 15, 2010) (intervenor environmental group’s citizen’s complaint, the initial pleading accompanying the motion to intervene, was not duplicative of Attorney General’s complaint filed in the same action before the Board); *Lake County Forest Preserve District v. Neil Ostro*, PCB 92-80, slip op. (July 30, 1992) (citizen’s complaint was not duplicative of federal district court complaint); *League of Women Voters v. N. Shore Sanitary Dist.*, PCB 70-7, slip op. (Oct. 8, 1970) (citizen’s complaint before the Board was not duplicative of Attorney General’s circuit court complaint).³

Petitioner’s citation to Part 103’s Enforcement Rules generally, and Section 103.212(a) specifically, is misplaced. As this matter concerns an appeal of a final Agency decision, the Board

³ In its Motion to Dismiss, Respondent acknowledged the definition of “duplicative” set forth in 35 Ill. Adm. Code 101.202. (Motion to Dismiss at ¶ 1.) As no Board Rule utilizing this term applies in this Permit Appeal, Respondent did not rely upon the cases corresponding to such definition in its argument. As noted above, Petitioner’s cases citing 35 Ill. Adm. Code 101.202 compare pending complaints each alleging enforcement-related violations.

should hold that Respondent properly relied upon 35 Ill. Adm. Code 101.500(a) and 105.108, as well as Section 2-619(a)(3) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a)(3), as the bases for its Motion to Dismiss.

II. Petitioner's Permit Appeal as to Additional Condition No. 6 Should be Dismissed.

Section 2-619(a)(3) of the Illinois Code of Civil Procedure authorizes the filing of a dismissal motion when “there is another action pending between the same parties for the same cause.” 735 ILCS 5/2-619(a)(3). As to the “same parties” element of the standard, Aqua Illinois, Inc. is the defendant in the Circuit Court action and the Petitioner in this Permit Appeal, while the Illinois Environmental Protection Agency is a party in the Circuit Court action and the Respondent in this Permit Appeal. As Petitioner notes, the caption of the Circuit Court complaint does not include Respondent. (Response at pp. 15-16.) Such caption, though, comports with Section 42(f) of the Illinois Environmental Protection Act. 735 ILCS 5/42(f) (“the Attorney General[] shall bring such actions in the name of the people of the State of Illinois”); *see also* Motion to Dismiss at Exhibit A, p. 1) (the preamble of the Circuit Court complaint indicates that its filing was “at the request of the Illinois Environmental Protection Agency. . .”). Moreover, *Env't Protection Agency v. Ill. Pollution Control Bd.*, to which Petitioner cites, Response at p. 15, recognizes that “[a]s the chief legal officer of the State, the Attorney General has the constitutional duty of acting as legal adviser to and legal representative of State agencies”. 69 Ill.2d 394, 398-399 (1977) (finding State agency may not independently employ private counsel); *see also* *People ex. rel. Sklodowski v. State of Illinois*, 162 Ill.2d 117, 127 (1994) (same) (cited in Response at p. 15).⁴

⁴ Petitioner's citation to *People & IEPA v. NL Indus., Inc.*, 297 Ill. App. 3d 297 (1998); *People & IEPA v. Van Tran. Elec. Corp.*, 152 Ill. App. 3d 175 (1987); and *People & IEPA v. Archer Daniels Midland Corp.*, PCB 83-226 (March 22, 1985), does not establish a “longstanding practice” of naming Respondent in case captions, Response at p. 16, particularly given that the earliest cited case is from 1998.

As to the “same cause” element, Defendant/Petitioner is asking both the Circuit Court and the Board, at the same time, to decide whether Defendant/Petitioner should be required to continue compliance sampling on a monthly basis. Specifically, in its Revised Motion to Modify pending before the Circuit Court, Petitioner “requests that the heightened testing requirements (of monthly compliance testing) be concluded”, while in its Permit Appeal, Petitioner requests that the Board remand the June 29, 2022 Special Exception Permit to eliminate the “monthly” compliance sampling requirement. (*Compare* Motion to Dismiss at Exhibit 3, p. 3, *with* Motion to Dismiss at Background, ¶ 8 and Permit Appeal at ¶ 27.)

In response, Petitioner first asserts that it may utilize “two independent routes to achieve a monitoring change”. (Response at p. 9.) Yet, 735 ILCS 5/2-619(a)(3) expressly precludes such action. In addition, nothing in the Agreed Interim Order or other Circuit Court orders provides for Petitioner seeking relief as to the monthly compliance sampling requirement in the Circuit Court and then, upon the Circuit Court granting discovery and thereby lengthening the time within which Petitioner will obtain a decision, turning to the Board to attempt to get a faster result as to the same requested relief. (*Compare* Response at p. 9, *with* Motion to Dismiss at Background, ¶¶ 4-6, 8.)

Second, relying upon the Circuit Court’s phrase “to the extent Aqua is seeking a modification to the [Agreed Interim Order]”, Petitioner contends that its Permit Appeal does not “even remotely seek[] to modify the Agreed Interim Order”, thereby preventing the Board from finding “a conflict of any kind” between the two matters. (Response at pp. 10-11). Such argument ignores Petitioner’s express requests simultaneously pending before the Circuit Court and the Board to eliminate monthly compliance sampling. (*See supra* p. 6.) In addition, on August 16, 2022, during the pendency of this Permit Appeal, Petitioner filed a motion with the Circuit Court seeking Court-ordered mediation, including as to the monthly compliance sampling requirement,

thereby further evidencing that the issue is properly before the Circuit Court. (Response at Exhibit B.)⁵ Accordingly, Respondent has shown that the Revised Motion to Modify pending before the Circuit Court and this Permit Appeal involve the same parties and the same cause.

III. Conclusion.

Based upon the foregoing, 35 Ill. Adm. Code 101.500(a) and 105.108, as well as Section 2-619(a) of the Illinois Code of Civil Procedure govern Respondent's Motion to Dismiss. In addition, Section 2-619(a)(3) of the Illinois Code of Civil Procedure precludes Petitioner's attempt to utilize two forums for the same purpose. 735 ILCS 5/2-619(a)(3). Therefore, Petitioner's Permit Appeal as to Additional Condition No. 6 should be dismissed.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

/s/ Kathryn A. Pamenter _____

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⁵ All unsupported statements set forth in such motion should be disregarded. 35 Ill. Adm. Code 101.504.