

**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</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
Respondent.	)	
	)	

**NOTICE OF FILING**

To:	Kathryn A. Pamerter	Don Brown
	Senior Assistant Attorney General	Clerk of the Board
	Environmental Bureau	Illinois Pollution Control Board
	Office of the Illinois Attorney General	60 E. Van Buren St., Suite 630
	69 W. Washington St., 18th Floor	Chicago, IL 60605
	Chicago, IL 60602	Don.Brown@illinois.gov
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Brad Halloran  
Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren St., Suite 630  
Chicago, IL 60605  
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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 PERMISSION TO FILE REPLY** and **CERTIFICATE OF SERVICE**, copies are which are herewith served upon you.

Dated: September 6, 2022

/s/ Sarah L. Lode  
One of its Attorneys

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

**PETITIONER’S  
RESPONSE IN OPPOSITION TO RESPONDENT’S  
MOTION FOR PERMISSION TO FILE REPLY**

Petitioner Aqua Illinois, Inc. (“Aqua”), by and through its counsel, ArentFox Schiff, LLP, respectfully responds in opposition to Respondent, the Illinois Environmental Protection Agency’s (“IEPA” or the “Agency”), August 22, 2022 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 (“Motion for Leave”).<sup>1</sup> The Illinois Pollution Control Board (the “Board”) should deny Respondent’s Motion for Leave because it is neither needed to prevent a material prejudice nor offers any assistance. In further support of its Response in Opposition, Aqua states as follows:

1. Section 101.500(e) provides that “[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice.” 35

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<sup>1</sup> Respondent filed another motion for leave on August 30, 2022 (the third of four such motions for leave Respondent has filed in this case within the last month) to attempt to further supplement its incorrect argument regarding Additional Condition No. 6. Petitioner intends to timely file a separate response to that motion within the 14-day period provided for under 35 Ill. Admin. Code § 101.500(d).

Ill. Admin. Code § 101.500(e). When the Board determines that a reply “offers no assistance” to the Board, it will deny a motion for leave to reply. *E.g., Commonwealth Edison Co. v. IEPA*, PCB No. 04-215, 2007 WL 1266937, at \*2 (Apr. 26, 2007) (denying motion for leave to file reply).

2. In its Motion for Partial Dismissal and Proposed Reply,<sup>2</sup> Respondent seeks to dismiss the Petition for Review as to Additional Condition No. 6 as duplicative of the State Court Case solely because of Aqua’s pending Motion to Modify before the Circuit Court, which asked the Circuit Court to change, among other terms, the monthly monitoring requirement of the Agreed Interim Order. Respondent has affirmed throughout its motion papers filed in this case that its Motion for Partial Dismiss is predicated entirely upon the existence of Aqua’s Motion to Modify before the Circuit Court:

Petitioner has already moved to eliminate the monthly sampling requirement through its [Motion to Modify] in the State Court Complaint case, and the Circuit Court determined that the government is entitled to discovery and briefing on that issue. *See supra* at Background, ¶¶ 4-5. Petitioner is impermissibly seeking to circumvent the pending State Court Complaint case through this Permit Appeal regarding Additional Condition No. 6, as the matters are substantially similar. (Motion for Partial Dismissal, Argument at ¶ 6).

In addition, Respondent demonstrated that Petitioner’s appeal . . . of Respondent’s final decision regarding Additional Condition No. 6 satisfies the same parties/same cause standard, in that Petitioner’s [Motion to Modify] before the . . . Circuit Court . . . and its Permit Appeal both seek the elimination of monthly compliance sampling. (Proposed Reply, Exhibit A to Motion for Leave at p.1).

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 [Motion to Modify] 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. . . . **Accordingly, Respondent has shown that the [Motion**

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<sup>2</sup> See 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, attached as Exhibit A to Respondent’s Motion to Leave (“Proposed Reply”).

**to Modify] pending before the Circuit Court and this Permit Appeal involve the same parties and the same cause.”** (*Id.* at pp. 6-7 (emphasis added)).

3. On August 22, 2022, Aqua filed a Notice of Withdrawal of Revised Motion to Modify Agreed Interim Order (“Notice of Withdrawal”) in *Illinois v. Aqua Illinois, Inc.*, No. 19-CH-1208 (the “State Court Case”).

4. The Notice of Withdrawal informed the Circuit Court that Aqua was withdrawing its Motion to Modify because, as stated in that motion, Aqua determined that the issues raised by the State Court Case will be more efficiently and completely disposed of via dispositive motions rather than through the limited relief sought in the Motion to Modify. (*See* Exhibit 2 to Respondent’s August 30, 2022 Motion for Permission to Supplement Reply).

5. Because the sole basis upon which Respondent’s Motion for Partial Dismissal and Proposed Reply rest—the Motion to Modify—has been withdrawn by Aqua and no longer exists, the Motion for Leave “offers no assistance” and is not necessary to prevent purported material prejudice and should be denied.

6. That is, given that (a) the stated purpose of the Motion for Leave is to allow the filing of Respondent’s Proposed Reply, (b) the Proposed Reply (like Respondent’s Motion for Partial Dismissal) is predicated exclusively on the existence of the former Motion to Modify of the State Court Case, and (c) that Motion to Modify no longer exists, Respondent’s Motion for Leave is wholly unnecessary and unhelpful to the Board’s consideration of the Motion for Partial Dismissal.

7. Moreover, the Motion for Leave should also be denied because Respondent's Proposed Reply simply restates the incorrect basis for its Motion for Partial Dismissal and can be of no assistance to the Board in deciding that motion.<sup>3</sup>

For the foregoing reasons, Aqua respectfully requests that the Board deny the IEPA's Motion for Leave and grant such other relief as the Board deems appropriate.

Respectfully submitted,

Aqua Illinois, Inc.

Dated: September 6, 2022

/s/ Daniel J. Deeb  
One of its Attorneys

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<sup>3</sup> The Proposed Reply incorrectly contends that the Board authority cited by Petitioner interpreting the definition of the term “duplicative” in 35 Ill. Admin. Code § 101.202—which is “generally applicable to proceedings before the [Board],” *id.* § 101.100(a)—are somehow inapplicable to permit appeals, even though Respondent seeks partial dismissal of the Petition for Review on the ground that it is “duplicative” of the State Court Case. (*See* Proposed Reply, Exhibit A to Motion for Leave, at 2–5.) Petitioner is unaware of any authority—and Respondent cites to none—that would suggest the Board's established analytical framework for duplicitousness under Section 101.202 to be inapplicable to the present case. And while Respondent laments Petitioner's reliance on the Board's decisions in enforcement matters, Respondent itself cites solely to enforcement matters in its Motion for Partial Dismissal. (*See* Motion for Partial Dismissal at 5 (citing *Village of Addison v. City of Wood Dale*, PCB No. 98-104 (Mar. 5, 1998) (enforcement matter) and *Brandle v. Ropp*, PCB No. 85-68, 1985 WL 21380 (June 13, 1985) (enforcement matter))).

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 6th day of September, 2022:

I have electronically served a true and correct copy of Petitioner's Response in Opposition to Respondent's Motion for Permission to File Reply, 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 Kathryn.Pamenter@ilag.gov	Don Brown Clerk of the Board Illinois Pollution Control Board 60 E. Van Buren St., Suite 630 Chicago, IL 60605 Don.Brown@illinois.gov
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Brad Halloran  
Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren St., Suite 630  
Chicago, IL 60605  
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My e-mail address is Sarah.Lode@afslaw.com.

The number of pages in the e-mail transmission is 7.

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

          /s/ Sarah L. Lode            
Sarah L. Lode

Dated: September 6, 2022

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