

**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**

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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 POST-HEARING BRIEF** and **CERTIFICATE OF SERVICE**, copies are which are herewith served upon you.

Dated: October 21, 2022

/s/ Sarah L. Lode  
One of its Attorneys

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**PETITIONER'S  
POST-HEARING BRIEF**

Petitioner Aqua Illinois, Inc. (“Aqua”), by and through its counsel, ArentFox Schiff, LLP, and pursuant to the Hearing Officer’s October 6, 2022, Order, hereby submits its Post-Hearing Brief to the Illinois Pollution Control Board (the “Board”). For the reasons explained herein, the Board should find that the decision of Respondent, the Illinois Environmental Protection Agency (the “Agency”), to deny Aqua’s request to modify the lead sampling frequency terms of Additional Condition No. 6 of the 2021 Permit<sup>1</sup> was not necessary to accomplish the purpose of the Illinois Environmental Protection Act (the “Act”) or the regulations of the Board and was otherwise arbitrary and capricious. More specifically, Aqua asks that the Board find that the sole basis for the Agency’s denial was improper and that issuance of the permit requested by Aqua would not cause a violation of the Act or rules under the Act. Accordingly, the Board should remand the 2022 Permit<sup>2</sup> and direct the Agency to grant Aqua’s request to modify Additional Condition No.

<sup>1</sup> IEPA, Public Water Supply Construction Permit No. 0071-FY2022 (issued on July 30, 2021), R 000383-000434.

<sup>2</sup> IEPA, Special Exception Permit (issued June 29, 2022), R 000014–16.

6 to allow lead sampling at the frequency contemplated by 35 Ill. Admin. Code § 611.356(c) and (d).

I. **BACKGROUND**

Aqua owns and operates the Aqua Illinois-University Park public water system, which serves approximately 1,975 connections in the Village of University Park, Illinois (the “UP System”). (*See* Hearing Transcript at 28:2–14 (Sept. 28, 2022)).

Following a source water switch from groundwater to Kankakee River surface water as the source of drinking water for the UP System, the lead action level of 35 Ill. Admin. Code § 611.350(c) (the “Lead Action Level”) was exceeded for the UP System for the first six-month compliance period of 2019. (Hearing Transcript at 34:10–14). Thereafter, Aqua voluntarily issued a “do not consume” notice (a notice not required by law) and a lead advisory to UP System customers. (Petition for Review of an Illinois Environmental Protection Agency’s Special Exception Permit Decision, PCB No. 2023-012 (July 8, 2022) (“Petition for Review”) at ¶ 3). Aqua subsequently worked extensively with agencies and the foremost scientific experts, provided bottled water, filters, and filter devices to Village residents, and, among other things, completed extraordinary additional compliance sampling. (*Id.* at ¶ 4).

On August 16, 2019, the Office of the Illinois Attorney General and State’s Attorney for Will County initiated civil enforcement litigation against Aqua in the name of the People of the State of Illinois by filing a Complaint against Aqua with the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois (the “State Court Case”). On November 1, 2019, Aqua voluntarily entered into an Agreed Interim Order with the People. (R 000602–21). With respect to lead compliance sampling frequency, the Agreed Interim Order requires Aqua to “continue to conduct compliance sampling . . . in accordance with all requirements of Section 611.356 of the Board PWS Regulations, 35 Ill. Adm. Code 611.356,” and to also collect an unspecified number of

“additional compliance samples” each month “until such time as Aqua receives written approval from Illinois EPA that such additional sampling is no longer necessary.” (Agreed Interim Order at 8, ¶ II.F.14., R 000609).

On July 30, 2021, as a result of its extraordinary compliance sampling and work with agencies and foremost experts, Aqua sought and obtained the 2021 Permit from the Agency for the UP System. (R 000383–434). On August 3, 2021, the Agency also issued Operation Permit No. 0071-FY2022 for the UP System. (R 00435–42). Collectively, these permits allowed Aqua to employ new corrosion control treatment means for the UP System. Both permits were issued by the Agency without reference to and notwithstanding the fact that the Agreed Interim Order had already been entered into in the State Court Case. Aqua subsequently achieved the Lead Action Level for the UP System for the July–December 2021 six-month compliance period. (R 000001, R 000008).

On April 1, 2022, the Agency received requests from Aqua to modify aspects of the 2021 Permit. (R 000001, R 000008 (the “Aqua Requests”); Hearing Transcript at 67:11–20). With respect to monthly sampling, the Aqua Requests sought to modify Additional Condition No. 6 to allow lead compliance sampling at the frequency contemplated by the Board’s Lead and Copper Rule. (Aqua Requests, R 000003–7, R 000009–13). Specifically, in relevant part, the Aqua Requests asked that the lead sampling frequency text of Additional Condition No. 6 be modified to state as follows:

Collect between 40 and 60 lead compliance samples from the kitchen tap of compliance pool approved individual sample site locations for the month of March, 2022, as the final month of monthly compliance sampling. Thereafter, the supplier shall be required to collect no fewer than 40 lead compliance samples<sup>3</sup> from

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<sup>3</sup> This proposed requirement for at least 40 compliance samples during a six-month period exactly mirrors what the Lead and Copper Rule requires of all public water suppliers the size of the University Park public water system. (See Ill. Admin. Code § 611.356(c), 611.Table D.)

compliance pool sample site locations only once in each subsequent six-month compliance sampling period and may then reduce monitoring consistent with Section 35 Ill. Adm. Code 611.356(d)(4).<sup>4</sup>

(R 000003, R000009 (footnotes added).) In practical terms, this text of the Aqua Requests sought to achieve two goals. First, the requested modification would eliminate the substantial extra compliance sampling required by the 2021 Permit (i.e., 40–60 compliance samples per month rather than the minimum of 40 compliance samples per six-month period contemplated by the Board’s Lead and Copper Rule) and inherently obtain the Agency’s concurrence that the additional monthly sampling beyond Lead and Copper Rule requirements was not necessary. Second, the text proposed by the Aqua Requests would also allow Aqua to further reduce its lead sampling frequency to 40 samples annually once the Lead Action Level was achieved for two consecutive six-month periods, again consistent with Section 611.356(d)(4) of the Board’s Lead and Copper Rule, 35 Ill. Admin. Code § 611.356(d)(4).

On or about June 20, 2022, the Agency was advised that Aqua achieved the Lead Action Level for the January–June 2022 six-month compliance period, the second consecutive period in which Aqua achieved the Lead Action Level. (Petition for Review at ¶ 38.)

On June 29, 2022, the Agency issued the 2022 Permit to Aqua.<sup>5</sup> (R 000014–16.) Via the last paragraph of the 2022 Permit, the Agency denied Aqua’s request to modify Additional Condition No. 6 to remove the requirement for monthly compliance sampling purportedly because the Agreed Interim Order precluded the Agency from doing so. (R 000016.)

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<sup>4</sup> The cited provision of the Lead and Copper Rule, 35 Ill. Admin. Code § 611.356(d)(4), provides that a public water supply that meets the Lead Action Level for two consecutive six-month compliance periods may reduce the frequency of its lead compliance sampling to once per year. *Id.* § 611.356(d)(4).

<sup>5</sup> IEPA, Special Exception Permit (issued June 29, 2022), R 000014–16.

On July 8, 2022, Aqua filed the instant Petition for Review of the 2022 Permit, contesting, among other things, the Agency's denial of Aqua's request to modify Additional Condition No. 6. (Petition for Review at ¶¶ 22–27.)

On August 2, 2022, the Agency moved to dismiss the Petition for Review as to Additional Condition No. 6, which Aqua contested. In the Opinion and Order dated September 22, 2022, the Board denied the Agency's motion. In doing so, the Board reasoned, in part, as follows:

[T]he Agreed Interim Order contemplates that the Agency may modify monthly sampling requirement: “Aqua shall collect additional compliance samples on a monthly basis until such time as Aqua receives written approval from Illinois EPA that such additional sampling is no longer necessary . . . .” Pet., Exh. C at 8, ¶ 14. That “written approval” by the Agency would logically come in the form of a permit determination, which is what Aqua applied for here.

*Aqua Ill., Inc. v. IEPA*, PCB No. 23-12, Opinion and Order of the Board at 9–10 (Sept. 22, 2022).

At the September 28, 2022, hearing before the Board, Mr. David Cook of the IEPA—the writer of the 2022 Permit<sup>6</sup>—confirmed that there was no written reason for the Agency's denial of Aqua's request to modify Additional Condition No. 6 other than the Agreed Interim Order:

Q. Does [the 2022 Permit] state any other reason for denial of Aqua's request to modify [A]dditional Condition 6?

A. **No.**

Q. Did you provide any other writing to Aqua Illinois explaining a reason or reasons for the denial that was referenced in this 2022 [P]ermit?

A. **No.**

(Hearing Transcript at 83:9–16 (emphasis added).)

## II. **STANDARD OF REVIEW**

It is well settled that the Agency's “denial letter frames the issues on appeal” in a permit appeal before the Board. *Aqua Ill., Inc. v. IEPA*, PCB No. 23-12, Opinion and Order of the Board at 4 (Sept. 22, 2022); *KCBX Terminals Co. v. IEPA*, PCB No. 14-110, 2014 WL 2871721, at \*45

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<sup>6</sup> See Hearing Transcript at 62:12–14 (“Q. Who prepared the [2022 Permit]? A. I [David Cook] did.”).

(June 19, 2014). Thus, “[i]n 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 & Gravel Co. v. IEPA*, No. PCB 86-159, 1987 WL 55908, at \*4 (Feb. 5, 1987) (citing *IEPA v. IPCB*, 86 Ill. 2d 390, 404-05 (1981)). “Implicit” denial grounds are not permissible. *Midwest Generation EME v. IEPA*, PCB No. 04-185, 2007 WL 1339898, at \*11–12 (Apr. 19, 2007) (“Nor are ‘implicit’ denial grounds permissible.”). “[I]t is the applicant who has the burden of proof before the Board to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support permit denial.” *Midwest Generation EME, LLC v. IEPA*, PCB No. 04-185, 2004 WL 2578734, at \*29 (Nov. 4, 2004).

In addition to demonstrating that the Agency’s basis of denial are inadequate, a permit applicant must show that it is entitled to the requested permit. *KCBX Terminals Co.*, 2014 WL 2871721, at \*45 (citing 35 Ill. Admin. Code § 105.112(a) and quoting *ESG Watts, Inc. v. IPCB*, 286 Ill. App. 3d 325, 331 (3rd Dist. 1997)). The standard of review in a permit appeal is preponderance of the evidence. *Rock River Water Reclamation Dist. v. IEPA*, PCB No. 13-11, 2013 WL 1890226, at \*11 (May 2, 2013).

### III. **ARGUMENT**

The Agency’s sole basis for its denial of the Aqua Requests was straightforward: its mistaken position that the Agreed Interim Order precluded the lead sampling frequency changes sought by the Aqua Requests.<sup>7</sup> That the Agency’s position was mistaken was made clear by the Board’s Opinion and Order of September 22, 2022, which determined that the Agreed Interim Order could not be a basis for a denial of the Aqua Requests. As a result, the outcome of this appeal is also straightforward: the Board should remand the 2022 Permit to the Agency and direct

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<sup>7</sup> “As the Agreed Interim Order requires monthly monitoring, Aqua’s request to modify additional condition #6 is denied.” (See 2022 Permit, R 000016.)



the Agency to grant Aqua's request to modify Additional Condition No. 6 to require lead compliance sampling at the frequencies provided by 35 Ill. Admin. Code § 611.356(c) and (d), and not monthly. Further explanation follows.

Mr. David Cook of the Agency—the writer of the 2022 Permit<sup>8</sup>—confirmed at the Hearing that the only basis stated within the 2022 Permit for the Agency's denial of the Aqua Requests is the Agreed Interim Order. (Hearing Transcript at 82:14–83:16.) Mr. Cook further testified that no document other than the 2022 Permit was provided to Aqua expressing a different reason for the Agency's denial of the Aqua Requests other than the monitoring requirements of the Agreed Interim order:

Q. Does [the 2022 Permit] state any other reason for denial of Aqua's request to modify [A]dditional Condition 6?

A. **No.**

Q. Did you provide any other writing to Aqua Illinois explaining a reason or reasons for the denial that was referenced in this 2022 [P]ermit?

A. **No.**

(*Id.* at 83:9–16 (emphasis added).) With this testimony in mind, there can be no dispute that Respondent's denial of the Aqua Requests is exclusively predicated upon the Agency's view of the Agreed Interim Order.

There can also be no dispute that the Board has already determined that the Agreed Interim Order cannot be used as a basis to deny the lead sampling frequency changes sought by the Aqua Requests. That determination was made very clear by the Board's Opinion and Order of September 22, 2022, which denied Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 because the Agreed Interim Order does not prohibit—but rather

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<sup>8</sup> See Ex. A, Hearing Transcript at 62:12-14 (“Q. Who prepared the [2022 Permit]? A. I [David Cook] did.”).

explicitly contemplates—the Agency’s consideration of the monitoring frequency changes sought by the Aqua Requests.

[T]he Agreed Interim Order contemplates that the Agency may modify monthly sampling requirement: “Aqua shall collect additional compliance samples on a monthly basis until such time as Aqua receives written approval from Illinois EPA that such additional sampling is no longer necessary . . . .” Pet., Exh. C at 8, ¶ 14. That “written approval” by the Agency would logically come in the form of a permit determination, which is what Aqua applied for here.

*Aqua Ill., Inc. v. IEPA*, PCB No. 23-12, Opinion and Order of the Board at 9–10 (Sept. 22, 2022).

Aqua agrees. As the Board noted, the Agreed Interim Order expressly allows, and does not prohibit, the lead sampling frequency changes sought by Aqua Requests. Accordingly, Aqua has very clearly met its burden to demonstrate that the Agency’s sole reason for denial—monitoring requirements of the Agreed Interim Order—is wholly insufficient and improper.

Aqua also very clearly has met its burden to demonstrate that it is entitled to the sampling frequency changes sought by the Aqua Requests. Importantly, nothing in the last paragraph of the 2022 Permit identifies or even suggests that the requested modification of Additional Condition No. 6 would result in a violation of the Act or rules under the Act. Nor could it, because the lead sampling frequency sought by the Aqua Requests exactly align with the sampling posited by the Board’s Lead and Copper Rule. In other words, a grant of the lead sampling frequency proposal of the Aqua Requests would inherently not violate the Act or rules under the Act because the proposed lead sampling frequency is the same as that required by the Board’s Lead and Copper Rule. This point is made plain by the Aqua Requests, particularly its numbered items 1, 2, 3, and 7. (Aqua Requests, R 000004–7, R 000010–13.) Nothing in the record at all refutes these items of the Aqua Requests, nor did the Agency’s denial of the Aqua Requests identify a possible violation of the Act or rules under the Act as a basis for its denial. Respondent is precluded from now arguing otherwise. *Joliet Sand & Gravel Co. v. IEPA*, No. PCB 86-159, 1987 WL 55908, at

\*4 (Feb. 5, 1987) (citing *IEPA v. IPCB*, 86 Ill. 2d 390, 404-05 (1981)) (“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.”).

WHEREFORE, for the above-stated reasons, Petitioner Aqua Illinois, Inc. respectfully requests that the Board, based upon its review of the record, testimony at Hearing, and arguments presented herein, find that the Agency erred in denying the Aqua Requests and remand the 2022 Permit with directions for the Agency to grant Aqua’s request to modify the lead compliance sampling frequency of Additional Condition No. 6 and award such other relief as the Board deems appropriate.

Respectfully submitted,

Aqua Illinois, Inc.

Dated: October 21, 2022

/s/ Daniel J. Deeb  
One of its Attorneys

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 21st day of October, 2022:

I have electronically served a true and correct copy of Petitioner's Post-Hearing Brief, by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

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My e-mail address is Sarah.Lode@afslaw.com.

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/s/ Sarah L. Lode

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Dated: October 21, 2022

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