BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:

Don Brown
Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren St.
Suite 630
Chicago, IL 60605
Don.Brown@illinois.gov

Ann Marie A. Hanohano
Assistant Attorney General
Environmental Bureau
Office of the Illinois Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
annmarie.hanohano@ilag.gov

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St.
Suite 630
Chicago, IL 60605
Brad.Halloran@illinois.gov

Christopher Grant
Senior Assistant Attorney General
Environmental Bureau
Office of the Illinois Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
Christopher.Grant@ilag.gov

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

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**

RESPONSE BRIEF and **CERTIFICATE OF SERVICE**, copies are which are herewith served upon you.

Dated: November 9, 2022

/s/ Sarah L. Lode
One of its Attorneys

Daniel J. Deeb
Alex Garel-Frantzen
Sarah L. Lode
ARENTFOX SCHIFF LLP
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Dan.Deeb@afslaw.com
Alex.Garel-Frantzen@afslaw.com
Sarah.Lode@afslaw.com

Attorneys for Aqua Illinois, Inc.

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PETITIONER'S
POST-HEARING RESPONSE BRIEF

Petitioner Aqua Illinois, Inc. ("Aqua"), by and through its counsel, ArentFox Schiff, LLP, and pursuant to the Hearing Officer's Order of October 6, 2022, hereby submits its Post-Hearing Response Brief to the Illinois Pollution Control Board (the "Board") regarding the Illinois Environmental Protection Agency's ("Respondent's" or the "Agency's") decision to deny Aqua's request to allow lead compliance sampling for the University Park Public Water System at the frequency contemplated by the Board's Lead and Copper Rule of 35 Ill. Admin. Code § 611.356(c) and (d).

Aqua's Post-Hearing Brief ("Aqua's Brief") explained that resolution of this appeal in favor of Aqua is simple and straightforward because the Agency based its denial on a single reason and the Board's Order and Opinion of September 22, 2022, decided that the Agency's single reason for denial was improper. *Aqua Ill., Inc. v. IEPA*, PCB No. 23-12, Opinion and Order of the Board at pp. 9–10 (Sept. 22, 2022). Respondent's Post-Hearing Brief ("Respondent's Brief") attempts to obfuscate that obvious outcome by (I) offering a dubious claim that Aqua somehow failed to establish its *prima facie* case by not producing evidence at the hearing held on September 28, 2022,

(the "Hearing") and (II) asserting new, post-hoc bases for denial. As explained herein, Respondent's untimely and improper assertions are without merit.

ARGUMENT

I. Although Aqua Did Present Evidence at Hearing, No Authority Required It Do So in Order to Maintain this Appeal.

Respondent's Brief first argues that Aqua has somehow failed to establish a *prima facie* case by not presenting evidence at the Hearing. (Respondent's Brief at p. 8.) Putting aside the fact that Aqua did present evidence at Hearing,[1] Respondent's argument is baseless for multiple reasons. First, Respondent's argument seems to forget that, in a permit appeal, the scope of evidence is limited to the administrative record. 35 Ill. Admin. Code § 105.214(a). While witnesses may be called at hearing to help explain the administrative record, no authority mandates that petitioner must call witnesses or enter non-record documents at hearing. Second, Respondent conflates the obligation to make a *prima facie* case with a need to present evidence at hearing. Aqua has, in fact, plainly established its *prima face* case through its pleadings, which cite record documents. This fact is perhaps most evident via Aqua's pleadings filed in response to Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition 6. There, Aqua argued that the Agency's sole basis for its denial (the Agency's mistaken position that the Agreed Interim Order precluded the lead sampling frequency changes sought by the Aqua Requests)[2] was erroneous. The Board's Opinion and Order of September 22, 2022, agreed with Aqua's position and determined that the Agreed Interim Order could not be a basis for a denial of the Aqua

[1] Aqua cross examined Mr. Cook. (*See* Hearing Transcript at 82:8–88:21). Aqua also explained in its opening statement that because the Board's Opinion and Order of September 22, 2022, resolved the relevant issue in this case, witness testimony was unnecessary. (*Id.* at 11:10–21.)

[2] "As the Agreed Interim Order requires monthly monitoring, Aqua's request to modify additional condition #6 is denied." (*See* 2022 Permit, R 000016.)

Requests. *Aqua Ill., Inc. v. IEPA*, PCB No. 23-12, Opinion and Order of the Board at pp. 9–10 (Sept. 22, 2022) ("[T]he Agreed Interim Order contemplates that the Agency may modify the monthly sampling requirement. . . . That 'written approval' by the Agency would logically come in the form of a permit determination, which is what Aqua applied for here."). In doing so, the Board fully resolved the central issue in this appeal in favor of Aqua. That fact alone shows that the Board was provided sufficient evidence by Aqua to enable the Board to find for Aqua.[3] Respondent's argument is thus not credible and a distraction from the merits of this appeal.

II. Aqua Has Demonstrated that the Agency's Actual Basis of Denial Was Inadequate and that It Is Entitled to the Requested Lead Sampling Frequency Modification.

As explained in Aqua's Brief, the 2022 Permit clearly states only one basis for Respondent's denial of the Aqua Requests; Respondent's mistaken position that the Agreed Interim Order precluded the lead sampling frequency changes sought by the Aqua Requests.[4] (Aqua's Brief at pp. 8–11.) Interestingly, the Argument section of Respondent's Brief makes no mention of its sole basis for denial whatsoever. Instead, Respondent attempts, post hoc, to craft entirely new bases for its denial. Specifically, Respondent now argues anew that the Agency's denial was proper based on several new rationales that can be fairly summarized as follows:

- The Aqua Requests failed to show that the water was assuredly safe, *see* Respondent's Brief at pp. 9–10 (the "Assuredly Safe Basis").
- The Aqua Requests did not show that the UP System had met the Lead Action Level for two consecutive six-month periods, *see id.* at p. 9 (the "Lead Action Level Basis").

[3] A *prima facie* case is generally described as "evidence which, when viewed in the light most favorable to the burdened party, is sufficient to enable to the trier of fact to find the issue for him." *Anderson v. Dep't of Pub. Prop.*, 140 Ill. App. 3d 772, 778 (4th Dist. 1986); *see also City of Quincy v. IEPA*, PCB No. 08-86, 2010 WL 2018736, at *2 (Mar. 4, 2010) (describing a *prima facie* case in a permit appeal as evidence showing that "the IEPA's imposed modifications 'were not necessary to accomplish the purposes of the Act, or, stated alternatively, [the petitioner] had to establish that its [request] would not result in any future violation of the Act and . . ., therefore, were arbitrary and unnecessary'").

[4] "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 had not yet approved the optimal corrosion control treatment recommendation Aqua submitted on February 15, 2022, *see id.* at pp. 9–10 (the "OCCT Basis").
- The Aqua Requests failed to set forth adequate bases for the Agency to find, as required by the Agreed Interim Order, that "additional sampling [was] no longer necessary", *see id.* at pp. 10–11 (the "No Longer Necessary Basis").

Collectively, these new rationales are referred to herein as the "Post-Appeal Bases." Respondent asks the Board to uphold its denial on these Post-Appeal Bases. The Board should decline Respondent's request to do so for two independent reasons: (A) the Post-Appeal Bases are precluded from this appeal and (B) even if the Post-Appeal Bases somehow were not precluded, none of them support denial of the monitoring frequency change sought by the Aqua Requests. These reasons are fully explained at subparts II.A and II.B below.

A. ***The Post-Appeal Bases Are Precluded from this Appeal.***

First, it is black-letter law that Respondent simply cannot raise a new basis for denial for the first time in an appeal before the Board. *Joliet Sand & Gravel Co. v. IEPA*, No. PCB 86-159, 1987 WL 55908, at *4 (Feb. 5, 1987) ("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." (citing *IEPA v. IPCB*, 86 Ill. 2d 390, 404–05 (1981))). Indeed, "[t]he 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, at p. 4 (Sept. 22, 2022); *KCBX Terminals Co. v. IEPA*, PCB No. 14-110, 2014 WL 2871721, at *45 (June 19, 2014). "Implicit" denial grounds are not permissible. *Midwest Generation EME v. IEPA*, PCB No. 04-185, 2007 WL 1339898, at *12 (Apr. 19, 2007) ("Nor are 'implicit' denial grounds permissible."). As the Board has recognized, "an applicant's right to a review of the Agency's decision before this Board would be rendered empty were the applicant denied knowledge of the reasons why a permit application was denied." *West Suburban Recycling & Energy Ctr. v. IEPA*, PCB Nos. 95-119 and 95-125, 1996 WL 633368, at *12 (Oct. 17, 1996).

With this authority in mind, it is very clear that the Post-Appeal Bases cannot be considered in this appeal.

The need for a complete statement of all reasons for denial at the onset is further plainly stated by the Environmental Protection Act (the "Act"), which provides as follows at Section 39(a) (with added emphasis):

> If the Agency denies any permit under this Section, the Agency shall transmit to the applicant within the time limitations of this Section specific, detailed statements as to the reasons the permit application was denied. Such statements shall include, but not be limited to, the following:
>
> > (i) the Sections of this Act which may be violated if the permit were granted;
> > (ii) the provision of the regulations, promulgated under this Act, which may be violated if the permit were granted;
> > (iii) the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and
> > (iv) a statement of specific reasons why the Act and the regulations might not be met if the permit were granted.

415 ILCS 5/39(a) (emphasis added).[5] Here, the Agency's denial of the Aqua Requests failed to accomplish items (i), (ii), (iii), and (iv). That is, in denying the lead monitoring frequency request of the Aqua Requests, the Agency failed to identify any provision of the Act or Board rules that would be violated or any specific reason why an Act provision or Board rule might not be met if the monitoring request of the Aqua Requests was granted. The Agency also failed to state any specific information the Agency found to be lacking in the Aqua Requests. Only now, in arrears

[5] See *IEPA v. IPCB*, 86 Ill. 2d 390, 405–06 (1981) ("We believe that the Agency had a duty, reading sections 39 and 40 of the Act together, to specify reasons for the denial, including, if it intended to raise the issue before the Board, the lack of compliance with Rule 203(f), or be precluded from raising that issue."); *Brickyard Disposal & Recycling, Inc. v. IEPA*, PCB No. 16-66, 2016 WL 6901282, at *8 (Nov. 17, 2016) ("Section 39(a)(iv) of the Act requires the Agency to give specific reasons why the permit would violate the Act or regulations. The determination letter contains these specific reasons that frame the scope of the appeal. The Illinois Supreme Court has held that, in denying a permit, the Agency must specify reasons for the denial. The Agency is precluded from raising any reason before the Board that was not a part of the denial." (internal citations omitted)).

via its Post-Appeal Bases, does the Agency attempt to satisfy its denial obligations under Section 39(a) of the Act. It cannot be allowed to do so at this late date.

There are strong due process and policy reasons supporting Act Section 39(a), and the above-cited prior decisions that preclude the Agency from first raising the Post-Appeal Bases with the Board. For example, the reasons stated in a denial letter predictably shape a proposed permittee's conduct, guiding what the permittee must address in order to gain an approval. If an agency is not required to state all reasons for the denial within a denial letter, the permittee would be left in the dark as to how to obtain an approval and face the prospect of serial denials, each predicated on another basis. That cannot be the case, and the Board previously has found that such cannot be the case. *West Suburban Recycling & Energy Ctr.*, 1996 WL 633368, at *12 ("[A]n applicant's right to a review of the Agency's decision before this Board would be rendered empty were the applicant denied knowledge of the reasons why a permit application was denied."). Nor should a permittee have to appeal a permit denial first in order to learn of an alternate unstated basis for a denial. Yet that is precisely what has happened here. Aqua first learned that the Agency believed there were alternative bases supporting denial during a deposition of the Agency permit writer, Mr. Cook, on September 19, 2022, just days before the hearing.[6]

Respondent's Brief seems to attempt to circumvent this black letter law through an inappropriate application of the standard of review. That is, in an effort to avoid a need for the Agency to state all reasons for denial within its denial letter, Respondent presents the Post-Appeal Bases and immediately contends that, "[a]s shown above, Aqua failed to show 'that it would not violate the [A]ct or the Board regulations" if Additional Condition No. 6 were changed to allow lead compliance sampling at the frequency contemplated by the Board's Lead and Copper Rule.

[6] *See* Transcript of Deposition of David Cook at 76:5–19, attached hereto as Exhibit A.

(Respondent's Brief at p. 11.) That argument inherently posits that Aqua's burden extends to all provisions of the Act and Board Rules, regardless of the reasons stated in the Agency's written denial determination. If the Board accepted the position, the effect would be to completely obviate the aforementioned authority—there would no longer be a need for the Agency state all reasons for a denial in its permitting decision as required by Act Section 39(a).

B. The Agency's Post-Appeal Bases Are Inadequate to Support the Agency's Denial of Aqua's Request to Allow Lead Compliance Sampling at the Frequency Allowed by the Board's Lead and Copper Rule.

Aqua's Brief explained that the basis for denial stated in the 2022 Permit was wholly inadequate and that such has been firmly determined by the Board's Order and Opinion of September 22, 2022. (Aqua's Post-Hearing Brief at pp. 8–11.) Aqua's Brief also demonstrated that Aqua's requested modification of Additional Condition No. 6 would not, and could not, result in a violation of the Act or rules under the Act or Board rules because the lead sampling frequency sought by the Aqua Requests exactly align with the sampling posited by the Board's Lead and Copper Rule. (*Id.* at 10–11.) In other words, 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 frequency required by the Board's Lead and Copper Rule. Stated still differently, one cannot violate the Act or Board rules by doing exactly what is required by a Board rule, especially one that mirrors a federal rule. Aqua's burden to show the inadequacy of the Agency's actual basis for denial, including the absence of a violation of the Act or Board rule, is fully satisfied by this inescapable conclusion alone.

Respondent seems to attempt to argue otherwise by crafting the Post-Appeal Bases. As explained above, these Post-Appeal Bases must be completely excluded from this appeal.[7] But

[7] All portions of Mr. Cook's testimony concerning the Post-Appeal Bases should, in fact, be stricken from the record.

the result would be no different were that not the case because the Assuredly Safe Basis, the Lead Action Level Basis, the OCCT Basis, and the No Longer Necessary Basis are not adequate to support the Agency's denial. Nor do any of the Post-Appeal Bases pose a possible violation of the Act or Board rules. Such is unsurprising because one should expect that sampling at the frequency required by the Board's Lead and Copper Rule would not result in a violation of another requirement.

1. The Assuredly Safe Basis Does Not Support the Agency's Denial Because the Board's Lead and Copper Rule Trumps the Assuredly Safe Provision with Respect to Lead in Drinking Water.

The only purported violation of the Act or Board rules alleged by Respondent's Post-Appeal Bases is 35 Ill. Admin. Code § 601.101(a) (the "Assuredly Safe Provision"). Specifically, Respondent's Brief argues that "Aqua had not demonstrated through the [Aqua Requests][8] that it would comply with the 'assuredly safe' requirement of 35 Ill. Adm. Code 601.101." (Respondent's Brief at p. 10.) That argument fails to recognize that, with respect to lead in drinking water, the specific lead standard of the Board's Lead and Copper Rule completely trumps the general and subjective narrative standard of the Assuredly Safe Provision. Further explanation follows.

Mr. Cook's Hearing testimony included multiple references by Mr. Cook to the Assuredly Safe Provision of the Board's rules, 35 Ill. Admin. Code § 601.101(a) entitled "General Requirements." (*See, e.g.*, Hearing Transcript at 52:13–53:8, 55:10–23, 55:24–56:4, 57:11–21, 57:22–58:9, 59:13–60:4, 60:5–14, 60:15–24). Mr. Cook affirmed that the Assuredly Safe

[8] For the first time in this case and often throughout Respondent's Brief, the Agency refers to the Aqua Requests as letters from Aqua. (*See* Respondent's Brief at pp. 2, 6, 8, 9, 10, 11.) That description appears to be an attempt to suggest that the Aqua Requests were something less than permit applications. That is not the case. In fact, the Aqua Requests were robust applications containing all information required by the Board's rules. This is made clear by the fact that the Agency accepted and acted upon them as permit applications.

Provision is a narrative standard that does not speak to lead in particular and testified that no specific level of lead is assuredly safe. (*Id.* at 87:9–11 ("Q. What level of lead is assuredly safe? A. That's a narrative standard, so there's not a specific level of lead that's assuredly safe.").) Mr. Cook's testimony also included many references to the specific 15 ppm standard of the Lead Action Level of the Board's Lead and Copper Rule. (*See, e.g.*, *id.* at 32:10–21, 34:10–14, 38:20–24, 40:4–11, 41:1–4, 49:13–17, 87:3–5).

It is well-established that a general provision must yield to a specific provision. The Board stated exactly that in *McAfee v. IEPA.* PCB 15-84 (UST Appeal), 2015 Ill. ENV LEXIS 110, *42–43 (Mar. 5, 2015) ("The Board also relies on the well-settled axiom of statutory interpretation that the general must yield to the specific. *See Illinois Bell Telephone*, 362 Ill. App. 3d at 661, 840 N.E.2d at 713 ("If a general statutory provision and a specific statutory provision relate to the same subject, the specific provision prevails")); *see also Shepard v. IPCB*, 272 Ill. App. 3d 764, 771 (1995); *EPA v. IPCB*, 86 Ill. 2d. 390, 403 (1981) ("The Board's reading parallels our rule of statutory construction, that a more specific or particular provision prevails over the more general."); *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 217 (D.D.C. 2016) ("[T]he well-established statutory maxim that 'the specific governs the general' also applies to the regulatory context.").

A "general" regulation is "one that applies to cases generally" while a "specific" regulation is "particular and relates to only one subject." *Vill. of Chatham v. Cnty. of Sangamon*, 351 Ill. App. 3d 889, 896 (2005). This rule of construction "serves 'as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision.'" *N.C. Coastal Fisheries Reform Grp. v. Captain Gaston LLC*, 560 F. Supp. 3d 979, 1000 (E.D.N.C. 2021) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996)).

There can be no reasonable question that, with respect to lead in drinking water, the Assuredly Safe Provision is a general standard and the Lead Action Level of the Board's Lead and Copper Rule is a specific standard.[9] Accordingly, compliance with the Lead Action Level of the Lead and Copper Rule must be viewed to also fully comply with the Assuredly Safe Provision with respect to lead.[10] This important and inescapable conclusion is further reinforced by the following:

- The Agency's Preliminary Report on Lead in Public Water Systems (Sept. 2016) includes the following acknowledgment affirming that lead monitoring under the Lead and Copper Rule addresses the Assuredly Safe Provision: *"[Public water systems] are required to provide continuous operation and maintenance of public water supply facilities so that water shall be assuredly safe in quality, clean, adequate in quantity and of satisfactory mineral characteristics for ordinary domestic consumption. 35 Ill. Adm. Code 601.101. To ensure continued compliance with this requirement, the [IEPA] is requiring. . . [p]rompt notification of lead action level exceedances."*[11] The stated purpose of this report was "to comply with the Ninety-Ninth General Assembly's request in House Joint Resolution 153 to make a preliminary formal report on lead in public water systems." Ill. Env't Prot. Agency & Ill. Dep't of Pub. Health, Preliminary Report on Lead in Public Water Systems at p. 2 (Sept. 2016).

- In issuing the federal Lead and Copper Rule, U.S. EPA noted that the 15ppm Lead Action Level is "sufficiently protective of public health." *National Primary Drinking Water Regulations for Lead and Copper*, 65 Fed. Reg. 1950, 1976 (Jan. 12, 2000). It simply cannot be the case then that a public water supply that meets the Lead Action Level (thus providing water that has been deemed to be sufficiently protective of public health) could concurrently be deemed to violate the Assuredly Safe Provision for lead. Interpreting

[9] The Board adopted the Lead and Copper Rule on May 5, 1993. *See* Adopted Rule, Final Order, & Opinion of the Board, *In the Matter of: Safe Drinking Water Act Update, Phase IIB and Lead and Copper Rules*, PCB No. R92-3 (May 5, 1993).

[10] This is true for lead in all respects, including under varying levels of alkalinity, pH, temperature, calcium, silicate, orthophosphate, nitrates, etc. That is, nothing in the specific Lead and Copper Rule requires an increased lead compliance monitoring frequency during high or low conditions for any water chemistry parameter. Moreover, Mr. Cook's Hearing testimony acknowledged the monthly lead compliance samples currently required by the Agreed Interim Order can be done at any time during a month regardless of nitrate levels. (Hearing Transcript at 86:1–10.) Given that point—that monthly lead compliance sampling under the Agreed Interim Order is agnostic regarding nitrate levels—monthly sampling cannot credibly be viewed to be related the Assuredly Safe Provision.

[11] Ill. Env't Prot. Agency & Ill. Dep't of Pub. Health, Preliminary Report on Lead in Public Water Systems at p. 6 (Sept. 2016), https://dph.illinois.gov/content/dam/soi/en/web/idph/files/publications/publicationsohpiepa-preliminary-report-lead-pws-0.pdf (last visited Nov. 9, 2022).

Sections 611.350 and 601.101 in such a way would undermine the specific limitations of the Lead and Copper Rule. *See Captain Gaston LLC*, 560 F. Supp. 3d at 1000.

- The initial Section of Part 611 explains that the regulations of Part 611 are intended to include all drinking water requirements applicable to public water systems in Illinois and that such requirements were identical to those of the federal Safe Drinking Water Act with the exception of regulatory provisions imposing more stringent state requirements specifically marked as "additional state requirements." 35 Ill. Admin. Code § 611.100(b) ("This Part establishes primary drinking water regulations (NPDWRs) pursuant to the SDWA, and also includes additional, related State requirements that are consistent with and more stringent than the USEPA regulations (Section 7.2(a)(6) of the Act). The latter provisions are specifically marked as 'additional State requirements.'"). Given that the Board has not designated the Assuredly Safe Provision as an "additional State requirement," the Assuredly Safe Provision cannot be interpreted to impose requirements beyond the requirements of Part 611.[12]

- Neither the federal Lead and Copper Rule, its regulatory history, nor the Board's Lead and Copper Rule support a monthly compliance sampling regime. In promulgating the federal rule, U.S. EPA, after considering many factors and comments provided during the rulemaking process, specifically contemplated ***and rejected*** other sampling frequencies, including quarterly sampling. In fact, in promulgating the final federal rule in 1991, U.S. EPA specifically stated: "EPA's approach is fully consistent with the letter and intent of the SWDA." *See* 56 Fed. Reg. 26,460, 26,513 (June 7, 1991). U.S. EPA also considered both customer inconvenience and exhaustion and cost to the supplier when promulgating its approach to compliance sampling frequency. When deciding on the regulatory approach to compliance sampling (with the highest frequency being once every six months), U.S. EPA already considered variability in results and confirmed its approach of not requiring more frequent sampling. Further, in so mandating the number of samples, U.S. EPA specifically found that "the number of samples required in the final rule sufficiently accounts for the variability in lead and copper levels . . . ." *See id.* at 26,523.

Aqua further notes that Section 39 of the Act provides that the Agency may impose permit conditions "as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board thereunder." (415 ILCS 5/39(a) (emphasis added)). As demonstrated by the above points, it would be inconsistent with the Board's Lead and Copper Rule to allow the Agency to additionally regulate lead in drinking water via permitting decisions predicated upon the general Assuredly Safe Provision.

[12] The provisions that were specifically marked as "additional state requirements" were 35 Ill. Admin. Code §§ 611.300 and 611.310.

It is thus clear that, with respect to lead, a public water supplier's compliance with the Board's Lead and Copper Rule, including meeting the Lead Action Level, assures that drinking water is assuredly safe. The Agency cannot, in effect, increase lead monitoring requirements of the Lead and Copper Rule via permit decisions that purport to apply the Assuredly Safe Provision regarding lead. Therefore, even were it considered by the Board, the Assuredly Safe Basis would be inadequate to support the Agency's denial of Aqua's request to conduct lead sampling at the frequency allowed by the Board's Lead and Copper Rule.

2. The Lead Action Level Basis Is Inadequate to Support the Agency's Denial.

At Hearing, Respondent's opening argument asserted that Aqua had not, as of the date of issuance of the 2022 Permit, "provided sufficient justification for its request" and provided an example as follows: "For example, Aqua had not met the lead action level for two consecutive six-month sampling periods." (Hearing Transcript at 15:17–21.) Respondent's Brief echoes that claim.[13] While Aqua strongly disagrees with Respondent's claim that it was unaware that the Lead Action Level had been met for a second consecutive time at the time of its permitting decision,[14] the disagreement is ultimately not material as nothing in the Act or Board's rules identifies a need for a permittee to achieve the Lead Action Level for two consecutive six-month periods as a

[13] In full, the Lead Action Level Basis argument of Respondent's Brief on page 9 states as follows, excluding internal citations.

> First, in [the Aqua Requests], Aqua contended that the monthly compliance sampling requirement should be eliminated as of March 31, 2022, due to its meeting the lead action level for the July 1 – December 31, 2021 compliance sampling period. Yet, Aqua had already once before selected a corrosion control treatment; then had one six-month compliance sampling period below the lead action level; and then had a lead action level exceedance in the next six-month compliance sampling period in its UP Water System. In addition, contrary to Aqua's allegations, Aqua had not produced results for its UP Water System below the lead action level for two consecutive six-month compliance sampling periods as of June 29, 2022.

[14] The Aqua Requests did not suggest that the requested lead compliance monitoring change was based on meeting the Lead Action Level for two consecutive periods. But, as explained in the Petition for Review, Respondent was in fact advised that the Lead Action Level had been met for a second consecutive period prior to issuance of the 2022 Permit. (*See* Petition for Review at ¶¶ 18, 38.)

requisite to monitor at the frequency required by the Board's Lead and Copper Rule. This is the case because nothing in the Act or Board's rules states a requirement for lead compliance monitoring at a frequency greater than that required by the Board's Lead and Copper Rule. The Lead Action Level Basis thus does not support the Agency's denial.

3. The OCCT Basis is Inadequate to Support the Agency's Denial.

Respondent also appears to incorrectly believe that the fact that it had not yet approved the optimal corrosion control treatment, or "OCCT," recommendation submitted by Aqua on February 15, 2022, supports its denial of the Aqua Requests. More specifically, Respondent contends that Aqua's submission of the OCCT recommendation did not (a) show that "the water was assuredly safe by testing during periods when nitrate was high to see the effect on lead levels" or (b) support grant of the Aqua Requests because it had not yet been approved by the Agency. (Respondent's Brief at pp. 9–10.)[15] These claims are wrong for at least three reasons.

First, as explained at Part II.B.1, the Board's lead-specific Lead and Copper Rule fully states all requirements applicable to lead in drinking water. The Assuredly Safe Provision cannot be used to impose additional lead-related monitoring requirements. Second, Section 611.352 of the Board's Lead and Copper Rule states the requirements for an OCCT submission. Nowhere does Section 611.352 state that an OCCT submission must include lead testing relative to nitrates. In fact, Section 611.352 is very specific as to the parameters that must be measured: namely, lead, copper, pH, alkalinity, calcium, conductivity, orthophosphate, silicate, and water temperature. 35

[15] In full, Respondent's OCCT Basis argument on pages 9–10 states as follows, excluding internal citations.

> Second, Aqua argues that because it submitted its Final Optimal Corrosion Control Treatment Recommendation to Illinois EPA on February 15, 2022, the monthly compliance sampling requirement should have been eliminated as of March 31, 2022. However, "Aqua had to show that the water was assuredly safe by testing during periods when nitrate was high to see the effect on lead levels". Moreover, as of June 29, 2022, Illinois EPA had not approved the fourth corrosion control treatment that Aqua submitted on February 15, 2022, for consideration for its UP Water System. 35 Ill. Adm. Code 611.351(e)(4) (setting forth the six-month review period).

Ill. Admin. Code § 611.352(c)(3). In other words, there is no nexus between an OCCT submission and lead levels relative to nitrate levels.[16] Third, the fact that the Agency had not yet approved Aqua's OCCT submission at the time it issued the 2022 Permit is wholly irrelevant. Simply put, no authority requires an OCCT approval as a requisite to allow lead sampling at the frequency posited by the Board's Lead and Copper Rule. Individually and collectively, these three reasons make it clear that the OCCT Basis does not support the Agency's denial of Aqua's request to conduct lead sampling at the frequency contemplated by the Board's Lead and Copper Rule.

4. The No Longer Necessary Basis Does Not Support the Agency's Denial.

Respondent's final post-hoc rationalization for the denial contends, without merit, that "Aqua failed to set forth adequate bases in [the Aqua Requests] to warrant Illinois EPA finding that 'such additional sampling [was] no longer necessary.'" (Respondent's Brief at p. 11.) This claim ignores the fact that the Aqua Requests included unrebutted statements supporting the sampling frequency sought by Aqua. For example, the Aqua Requests explain that Aqua's requested sampling frequency "meets and is consistent with requirements of the Act and Board regulations, specifically, those found in the [Lead and Copper Rule]" and that "[t]he compliance sampling regime mandated by 35 Ill Adm. Code 611.356 has as its most aggressive sampling frequency, the collection of samples once during each six month compliance monitoring period." (Aqua Requests, R 000004, R 000010.) Nothing in the Record disputes the accuracy of any of the contents of the numbered items of the Aqua Requests. And the sufficiency of the numbered items 1–6 of the Aqua Requests is challenged only for one mistaken reason.

[16] That lack of a nexus is affirmed by the fact that the Agency approved Aqua's OCCT recommendation on August 8, 2022. (*See* IEPA, Special Exception Permit (June 29, 2022), attached as Exhibit A to Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 3 (filed Aug. 8, 2022)).

When asked to address the sufficiency of numbered items 1–6 of the Aqua Requests, Mr. Cook testified that each was deficient for the same single reason, his incorrect application of the Assuredly Safe Provision with respect to lead in drinking water. (Hearing Transcript at 57:3–58:9, 59:13–60:24 (each stating, either verbatim or in effect, that "[i]n order to ensure the water's assuredly safe, we need Aqua to monitor for lead during periods of high nitrate.")). Respondent's Brief parrots that testimony by incorrectly asserting that "Aqua did not submit any nitrate results to the Illinois EPA over 5.0 mg/L to show that zinc orthophosphate worked in the UP Water System when nitrate levels were high" and, "[a]s a result, Aqua had not demonstrated through the [Aqua Requests] that it would comply with the [Assuredly Safe Provision]." (Respondent's Brief at p. 10.) But, as demonstrated at Part II.B.1, *supra*, the general Assuredly Safe Provision cannot properly be used to override the lead-specific terms of the Board's Lead and Copper Rule. Respondent's basis for rejecting numbered items 1–6 of the Aqua Requests is thus invalid.[17]

CONCLUSION

While the parties may disagree about the date of achievement, it is clear Petitioner and Respondent agree that the UP System has met the Lead Action Level for two-consecutive six month periods (more than a full calendar year) and achieved optimal corrosion control. In other words, the UP System fully complies with all requirements of the Board's Lead and Copper Rule. Also clear is the fact that the Lead and Copper Rule comprehensively regulates lead in drinking water. U.S. EPA has explained just that: "The purpose of the Lead and Copper Rule (LCR) is to

[17] Respondent's claim that "Aqua did not submit an nitrate results to the Illinois EPA over 5.0 mg/L to show that zinc orthophosphate worked in the UP Water System when nitrate levels were high" is also factually inaccurate. In his testimony, Mr. Cook discussed an October 29, 2021 presentation from Dr. Edwards, Aqua's expert. (*See* Hearing Transcript at 77:11–79:2). The fourth slide of that presentation is a graph titled "University Park Coupon Experiment: High Nitrate Conditions" which used marron triangles to show 20 nitrate concentrations, all over 5.0 mg/L. (*See* R 000455; *see also* R 000461–66 (showing high nitrate data on slides 10–15 of the October 2021 presentation)). Respondent is therefore simply wrong to claim the absence of any provided high nitrate data.

protect populations from exposure to lead and copper in drinking water and reduce potential health risks associated with lead and copper." 72 Fed. Reg. 57,781, 57,784 (Oct. 10, 2007). Accordingly, it is not, and cannot be, necessary to require lead sampling at a frequency beyond that of the Board's Lead and Copper Rule.

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: November 9, 2022

/s/ Daniel J. Deeb
One of its Attorneys

Daniel J. Deeb
Alex Garel-Frantzen
Sarah L. Lode
ARENTFOX SCHIFF LLP
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Dan.Deeb@afslaw.com
Alex.Garel-Frantzen@afslaw.com
Sarah.Lode@afslaw.com

Attorneys for Aqua Illinois, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 9th day of November, 2022:

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

To:

Don Brown
Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren St.
Suite 630
Chicago, IL 60605
Don.Brown@illinois.gov

Ann Marie A. Hanohano
Assistant Attorney General
Environmental Bureau
Office of the Illinois Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
annmarie.hanohano@ilag.gov

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St.
Suite 630
Chicago, IL 60605
Brad.Halloran@illinois.gov

Christopher Grant
Senior Assistant Attorney General
Environmental Bureau
Office of the Illinois Attorney General
69 W. Washington St., 18th Floor
Chicago, IL 60602
Christopher.Grant@ilag.gov

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

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

number of pages in the e-mail transmission is 25.

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

/s/ *Sarah L. Lode*
Sarah L. Lode

Dated: November 9, 2022

Daniel J. Deeb
Alex Garel-Frantzen
Sarah L. Lode
ARENTFOX SCHIFF LLP

233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Dan.Deeb@afslaw.com
Alex.Garel-Frantzen@afslaw.com
Sarah.Lode@afslaw.com

Attorneys for Aqua Illinois, Inc.

CH2:26526835.1

EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AQUA ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. PCB 2023-012
	)	(Permit Appeal-Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

TRANSCRIPT OF ZOOM TELECONFERENCE PROCEEDINGS had in the above-entitled cause on the 19th day of September, A.D. 2022, at 1:00 o'clock p.m.

REMOTE APPEARANCES:

ARENTFOX SCHIFF, LLP
233 South Wacker Drive
Suite 7100
Chicago, Illinois 60606
312-258-5500
BY: MR. ALEX GAREL-FRANTZEN
alex.garel-frantzen@afslaw.com

appeared on behalf of the Petitioner;

OFFICE OF THE ILLINOIS ATTORNEY GENERAL
69 West Washington Street
Chicago, Illinois 60602
773-590-7824
BY: MS. KATHRYN A. PAMENTER
kathryn.pamenter@ilag.gov

appeared on behalf of the Respondent.

ALSO PRESENT: JERRY CURRAN - THE CONCIERGE
ANNE MARIE HANOHANO
AMANDA KIMMEL

REPORTED BY: TRUDY G. GORDON, C.S.R.
CERTIFICATE NO. 084-004077

I N D E X

E X H I B I T S

Order, please take a look again at that next paragraph in the first sentence. Let me know when you've had a chance to review.

A. (Witness looking at document.) Okay.

Q. What -- On what basis did the Illinois EPA deny Aqua's request to modify additional Condition No. 6 of the 2022 -- 2021 Permit?

MS. PAMENTER: Objection. Calls for a legal conclusion.

You may answer if you can.

BY THE WITNESS:

A. The basis is that due to the uncertainty with respect to nitrate on lead monitoring results that the water may not be assuredly safe.

BY MR. GAREL-FRANTZEN:

Q. Are there any other bases for the Illinois EPA's denial of the request to modify additional Condition No. 6 of the 2021 Permit?

A. No.

Q. When did you first learn of the variability in nitrate in the UP System?

MS. PAMENTER: Objection. Asked and answered. And to the extent it's outside the scope of the Permit Appeal.