BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED EXTENSION OF ADJUSTED STANDARD	)	AS 2007-2
APPLICABLE TO ILLINOIS-AMERICAN	)	(Adjusted Standard)
WATER COMPANY'S ALTON PUBLIC WATER	)	
SUPPLY FACILITY DISCHARGE	)	
TO THE MISSISSIPPI RIVER	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on July 2,2007, the PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S RESPONSE TO THE RECOMMENDATION OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY was filed with the Clerk of the Pollution Control Board. A copy is herewith served upon you.

Respectfully submitted,

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PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S RESPONSE TO THE RECOMMENDATION OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Petitioner, Illinois-American Water Company ("Illinois-American Water"), by its attorneys, Bradley S. Hiles and Alison M. Nelson, submits its response to the Recommendation Of The Illinois Environmental Protection Agency (the "Agency Recommendation") pursuant to 35 Ill. Adm. Code 104.416(d). The Agency Recommendation, which was filed with the Board on June 15,2007 and served on Illinois-American Water by U.S. Mail on June 18,2007, recommends that the Illinois Pollution Control Board (the "Board") deny Illinois-American Water's request for an adjusted standard.

SUMMARY OF THE CASE AND THE ISSUE PRESENTED

Illinois-American Water's Petition for Extension of Adjusted Standard, as amended by the Amended Petition for Extension for Adjusted Standard, asks the Board to extend Adjusted Standard 99-6 to provide Illinois-American Water with relief from the effluent standard for total suspended solids at Section 304.124; the effluent standard for total iron at Section 304.124; and the effluent standard for offensive discharges at Section 304.106. The Agency Recommendation asserts that Illinois-American Water has failed to satisfy the requirements specified in Section 28.1(c) of the Illinois Environmental Protection Act (the "Act") and recommends that the Board deny Illinois-American Water's request for an extension of the adjusted standard. Essentially,

therefore, the Agency suggests that the adjusted standard terminate this year and that Illinois-American Water treat its effluent. This stands in stark contrast to the Agency's position in 2000, when it proposed that only an "insurmountable failure" of the Piasa Creek Watershed Project ("the Project") would trigger treatment of the Alton plant's effluent. ***See*** the Agency's Final Brief (June 20, 2000), AS 99-6 at 5.

The Agency's Recommendation should be rejected. Far from being an insurmountable failure, the Project has hit, and even exceeded, its target years ahead of schedule. But the Agency's Recommendation is notably silent on the Project's success. Instead, the Agency advances arguments which are fatally flawed. The Recommendation suggests, for example, that the situation at Illinois-American Water's Alton plant (the "Alton plant" or "Alton facility") must be "substantially or significantly different from [six] other facilities in the State" in order to warrant an extension. ***See*** Rec. at ¶ 31. That argument distorts the "substantially and significantly different" standard established by the Illinois legislature and should not be adopted by the Board. The other facilities mentioned by the Agency do not bear any relationship to the Alton facility, Piasa Creek or the Mississippi River. Moreover, none of those facilities have applied for adjusted standards related to soil conservation programs.

The Agency also argues that USEPA has "refined" its view on pollutant trading since AS 99-6 was issued. ***See*** Rec. at ¶ 31. But the Agency's main authority for that proposition is a "Frequently Asked Questions" publication on EPA's website. The Agency cannot cite binding legal authority, for none exists. In reality, EPA's stance on pollutant trading is the same today as it was when AS 99-6 was decided. If EPA opposed this adjusted standard, their voice would have been heard before the Board in 1999 (in connection with AS 99-6). Recent pronouncements from EPA headquarters officials are quite different from the position suggested

by the Agency. At a time when EPA is contemplating the promulgation of effluent standards for water treatment plants, EPA officials are considering offset projects in the regulatory mix. In fact, the Piasa Creek Watershed Project, in particular, is part of that analysis, according to EPA.

And it should be. Seven years ago, the Board's decision in AS 99-6 launched what many believe is the nation's most successful offset project for solids. Despite the Recommendation's silence on the issue, the Project has already exceeded expectations. As long as the 2:1 ratio is maintained (along with 6,600 tons of soil saved, at a minimum), an indefinite extension of the adjusted standard is warranted. Settlement lagoons and landfilling of dewatered solids, which is the Agency's apparent desire, cannot compare to the elimination of 6,600 tons of solids (at least) from the Piasa Creek and the Mississippi River. At its average flow of 8.99 million gallons per day, the Alton facility returns approximately 1,600 tons of TSS to the Mississippi River each year. ***See*** Amended Pet. at ¶¶ 47, 48.[1] So, the elimination of 6,600 tons represents a greater than 4:1 offset, presently. Success of this magnitude should be rewarded with an extension, not terminated.

For the reasons identified below, Illinois-American Water has satisfied all applicable requirements to justify issuance of an adjusted standard, and respectfully requests that this Board grant Illinois-American Water the relief it requests.

[1] As the Agency correctly observes, the facility's TSS and iron loading could increase if the plant increases its capacity to 16 MGD, the maximum daily flow rate for the facility. *See* Agency Rec. at 79. However, the Agency fails to mention that even at maximum capacity, the estimated tons of solids discharged from the facility would be only 2,846 — approximately *500 tons less* than the number of tons estimated at the time Adjusted Standard 99-6 was issued. *See* Amended Pet. at 747. Even at maximum flow, the soil savings would still meet the 2-to-1 ratio.

DISCUSSION

I. ILLINOIS-AMERICAN WATER'S AMENDED PETITION PROVIDES THE GENERAL LEVEL OF JUSTIFICATION REQUIRED UNDER SECTION 28.1(C)

A. The Agency Advances an Improper Interpretation of Section 28.1(c) that the Board Should Not Adopt.

1. The Board may grant an adjusted standard if it determines that Illinois-American Water meets the general level of justification required under Section 28.1(c) of the Act.[2] The essence of Section 28.1(c) is that factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the Regulations of General Applicability. Illinois-American Water's implementation of the Piasa Creek Watershed Project is substantially and significantly different from the factors relied upon by the Board in adopting the effluent standards for total suspended solids and iron. The Board has already rendered that decision when it reviewed the request for an adjusted standard in 2000. In fact, the Board rendered a final decision on this issue, and principles of res judicata and collateral estoppel prevent the Agency from retrying that decision now.

1. The Compliance Decisions Made By Other Facilities In The State Are Not Relevant To The "Substantially And Significantly Different"?Analysis

2. The Agency's Recommendation mentions the "substantially and significantly different" standard. But the Agency distorts the standard well beyond its statutory boundaries. In fact, the Agency rewrites the standard to be "substantially and significantly different from the other facilities in the State." (Agency Recommendation ¶ 31, emphasis added). The

[2] Section 28.1(c) provides that the Board may grant an adjusted standard whenever it determines that 1) "factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner; 2) the existence of those factors justifies an adjusted standard; 3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and 4) the adjusted standard is consistent with applicable federal law." (emphasis added).

underscored words do not appear in Section 28.1(c) of the Act. The Board should not accept the Agency's invitation to rewrite the statute.

3. Noticeably missing from the Agency's Recommendation is an argument addressing the actual language of the "substantially and significantly different" standard. Instead, the Agency attempts to draw attention to the treatment options employed by other facilities and the soil conservation projects undertaken by other permitted entities. Basically, it is the Agency's desire that Illinois-American Water should be on a "level playing field" with other regulated entities. However, the statute does not contemplate an industry-wide comparison. Instead, the language of Section 28.1(c) expressly limits the Board's inquiry to Illinois-American Water: "[F]actors relating to that petitioner are substantially and significantly different..." (emphasis added). Had the Illinois legislature intended for the Board to consider an entire industry sector, it would have chosen different statutory language.

4. The "level playing field" argument suggests that, because other facilities conduct soil conservation but have not received relief from the regulations of general applicability, Illinois-American Water should not receive such relief either. *See* Agency Rec. at ¶15 (observing that "[n]o relief has been granted to Springfield to allow lesser or no treatment of its water plant wastewater in exchange for soil conservation efforts"); *id.* ("Ameren receives no relief from applicable wastewater discharge control requirements for these efforts."); *id.* (noting that the table "provides additional examples of regulated facilities in the State that are conducting soil conservation projects to protect source water without requesting relief from applicable effluent standards"); *id.* at ¶16 ("In fact, these other facilities have been consistently complying with the effluent limits and requirements regarding TSS, total iron, and offensive discharges."). The water conservation practices of these other facilities are laudable, but those projects differ from

the Piasa Creek Watershed Project. (A comparison is set forth in ¶ 7 below). Even if the conservation efforts were comparable, which they are not, none of the entities identified by the Agency have applied for adjusted standards connected to their soil conservation programs.[3] It does not make sense for the Agency to compare other entities which do not have an adjusted standard when there is no evidence they ever requested an adjusted standard. More importantly, Illinois-American Water should not be denied an extension of the adjusted standard in this case just because others have not sought adjusted standards for themselves. Applying the level playing field approach will put an end to adjusted standards in Illinois. At the very least, petitioners with successful offset projects will be pulled down to the comparison level of the state's least fruitful offset project. The weakest offset project will become the least common denominator for all, discouraging innovation and success.

5. In its brief, the Agency implies that Illinois-American Water receives some sort of competitive advantage by avoiding the regulations of general applicability and "is thus seeking to avoid what other facilities in the business of providing drinking water do to achieve compliance with the State effluent standards." ***See*** Agency Rec. at ¶14. This assertion is simply wrong. Illinois-American Water does not compete with other water treatment facilities, in Illinois or elsewhere. Illinois-American Water has a defined area of service, and there are no other water treatment plants located within that area of service that could compete with it.

6. Even if the factors relating to other facilities were relevant, the Agency provides insufficient information to support the Agency's arguments. For instance, the Agency offers the City of Springfield water treatment plant, the City of Decatur treatment plant, and the City of

[3] In 1994, the City of Springfield's City Water, Light & Power facility ("CWLP") was granted a partial adjusted standard with respect to its discharge of boron from two of four outfalls into Sugar Creek. *See* AS- 94-9. The discharge at issue involved CWLP's coal-fued power plant, however, and not its water plant. That adjusted standard pertained to Sugar Creek, and was unrelated to the City's soil conservation measures in the Lake Springfield watershed.

Greenville treatment plant as examples of facilities that conduct soil conservation projects "to protect source water" without requesting relief from applicable effluent standards, *see* Agency Rec. at ¶ 15. But the Agency fails to provide facts to determine whether those projects are comparable to the Project. In reality, the are not. This is not a negative comment on the facilities identified by the Agency. Their conservation efforts are to be commended. But their projects are substantially different from the Piasa Creek Watershed Project.

7. All of the other projects identified by the Agency involve lakes, which differ from the Mississippi River as a source of drinking water. Lakes are reservoirs for water plants. Reservoirs will eventually fill with sediment without control measures. So, financial contributions connected to sediment reduction measures at these lakes, while laudable, also happen to be necessary to ensure a future source of water. Conservation measures in the Piasa Creek Watershed are not necessary to assure a lasting supply of water because the Mississippi River will never fill with sediment at the intake location of the Alton facility. These lake projects also involve other economic interests of the NPDES permit holders and their business partners. For example, the City of Springfield cares for the water quality of Lake Springfield for the beneficial use of its citizens. City Water Light & Power, which manages Lake Springfield for municipal drinking water supply purposes, also manages 735 residential lake leases on Lake Springfield. The Kinkaid Area Water System is also a multiple use management organization involved in water treatment and recreational use of Lake Kinkaid. The Otter Lake Water Commission owns Otter Lake and all of the land surrounding that lake.[4] The City of Greenville has a somewhat different motivation for sediment control. Its source water is Governor Bond

[4] American Water Company implements environmental stewardship measures at many facilities corporate-wide including some locations in Illinois, and does not intend for Paragraph 7 to be misinterpreted as criticism of the projects cited by the Agency. However, the Project was not implemented because of economic and business reasons which may have motivated, at least in part, actions taken by some of these other permit holders.

Lake, which has been listed as an impaired water for recreation, swimming and overall use. The City of Greenville should be commended for its conservation efforts (as should the other municipalities and Ameren), but Greenville is engaged in anti-deyadation efforts in connection with an impaired waterbody. The Agency has not presented any information to suggest that any of these facilities even approach the 2:1 offset achieved by Illinois-American Water. In point of fact, any comparison here is an apples-to-oranges effort.

8. The Agency's focus on other facilities draws attention away from the appropriate determination for this Board: whether the factors relating to the Alton facility are substantially and significantly different from the factors considered at the time the regulations of general applicability were promulgated. This determination does not require – or even permit – the Board to consider what other facilities do or fail to do regarding methods of conservation. If this were relevant, adjusted standards would almost never be granted.

2. The Board's Intent In 1972 To Establish A Uniform Baseline Of Technological Treatment Does Not Preclude the Board From Granting An Adjusted Standard To Illinois-American Water In These Circumstances

9. The Agency cites to a 1972 opinion by this Board to establish that "[t]he Board's basic intent in adopting the effluent requirements in [35 Ill. Adm. Code 304.1241 was to provide a uniform baseline of technological treatment provided by all facilities discharging into waters of the State." Illinois-American Water does not dispute that the Board intended to establish minimum requirements for treatment, but this does not preclude the Board from granting an adjusted standard from such minimum requirements in appropriate circumstances, like those presented in this case. In fact, the adjusted standard mechanism was created to give the Board this option when appropriate. As the Agency itself observes, the purpose of the minimum requirements is to "require[] people who are not doing that good a job to [do] what everybody

else is paying for," and to "prevent local nuisances, to avoid premature exhaustion of assimilative capacity, and to further the established federal and state policy against degradation of clean water." *See* Agency Rec. at ¶12 (citing Board orders from the 1972 proceedings). Given the incredible success of the Project, the Agency can hardly argue now that Illinois-American Water is "not doing that good a job." To the contrary, Illinois-American Water is actually increasing the assimilative capacity of the Mississippi River and enhancing the quality of the River water – the Project prevents two tons of sediment from entering the Mississippi River for every one ton of sediment that Illinois-American Water returns to the River in its discharge. Thus, application of a minimum technology-based standard in this case is unnecessary to meet the standards.

10. In addition, the 1972 proceedings also recognized that in some cases, the use of uniform minimum requirements is inappropriate. In its January 6, 1972 order, the Board determined that facilities that took in water with high levels of background concentrations of contaminants should not be required to spend money to clean up contaminants that were already in the water. The Board concluded that such facilities should be dealt with on a case-by-case basis instead of being held to a uniform standard. *See* Effluent Criteria, Water Quality Standards Revisions, Water Quality Standards Revisions for Intrastate Waters (SWB 14) (Jan. 6, 1972), R70-8, R71-14, R71-20, slip op. at 14. In other words, the orders cited by the Agency actually support the use of case-by-case standards where, as here, there is a high level of sediment in a facility's raw water source. A grant of indefinite relief from technology-based controls[5] is therefore consistent with the Board's intent.

[5] In several places throughout the Agency Recommendation, the Agency refers to the relief requested by Illinois-American Water as "permanent." However, the discussion of the requested relief in the Amended Petition, as well as the language of the proposed order itself, proposes an adjusted standard of indefinite duration but also clearly

11. Notably, the principles established in the 1972 proceedings are not newly before the Board. In the proceedings on Adjusted Standard 99-6, the Board reviewed the very orders relied upon now by the Agency and did not attach any significance to the language the Agency now highlights. **See** Order and Opinion of the Board at 9 (Sept. 7,2000). Rather, the Board cited to the 1972 orders to establish that the Board's effluent concerns with respect to TSS are increased turbidity and "harmful bottom deposits," **see** id., and that the Board's concern with respect to iron is that "excessive iron can cause a nuisance for domestic uses or undesirable bottom deposits." **See** Order of the Board at 3 (Oct. 19,2000). After its consideration of these concerns, the Board specifically stated that "[t]he factors relating to [Illinois-American Water] are substantially and significantly different than the factors which the Board relied upon in adopting the regulations at issue herein." **See** Order and Opinion of the Board at 9 (Sept. 7, 2000).

12. Also conspicuously absent from the Agency's Recommendation is any acknowledgement that the Agency itself considered the Piasa Creek Watershed Project a substantially and significantly different factor during the proceedings on Adjusted Standard AS 99-6. In its response to Illinois-American Water's 2000 Amended Petition, the Agency supported Illinois-American Water's request for relief, noting that Illinois-American Water

> "is proposing a 'treatment program' that was not contemplated in the Board's general effluent standards, whose underlying assumption was an amount of reduction in suspended solids achievable by a technology applied to the wastewater. In the present case, reductions in suspended solids in the

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provides that the relief will terminate if certain conditions are not satisfied. *See* Amended Pet. at ¶74 ("The relief granted by the adjusted standard should be indefinite in nature, and should expire if (a) the Board determines that the conditions of the Mississippi have changed such that the adjusted standard is made obsolete or infeasible; (b) the average offset for the calendar year in question and the four preceding calendar years fails to reach a 2 to 1 offset for the total suspended solids as a result of a change in the condition of the Mississippi, increased capacity of the Alton facility, or for any other reason; or (c) the soil savings of the Piasa Creek Watershed Project is reduced below 6,600 tons of soil per year."); Attachment F to Amended Petition at Section 6.

> Mississippi River are proposed to be achieved through physical methods applied in the Piasa Creek watershed; the amount of these reductions is not limited by the effectiveness of the technology that would otherwise be used to reduce the sediment loading in [Illinois-American Water]'s discharge, i.e., settling, which is the technology considered by the Board in adopting the general effluent standards."

See Agency Amended Response to Petition for Adjusted Standard at 12-13 (June 22,2000) (emphasis added). When the same program is being presented today, the Agency has not offered a single reason why the Project should not still be considered substantially and significantly different (using correct language fiom 28.1(c)). In fact, the only thing that has changed since the Agency concurred with Adjusted Standard 99-6 is that the Project has proven to be more successful than the parties anticipated.

B. No Adverse Environmental Impact Is Occurring

13. With respect to possible adverse environmental impacts, the Agency offers the following conclusory statement: "[a]n adverse incremental effect on the water quality of the Mississippi River is occurring and will continue to occur if Illinois American does not apply the technology-based treatment standards." *See* Agency Rec. at ¶16. This statement is an unsupported conclusion. The Agency presents no evidence for its assertion, and fails even to elaborate on what it means by "incremental effect." In fact, just the opposite is true. The 2 to 1 offset results in a net reduction, so that for every pound of solids entering the Mississippi (solids which came fiom the river originally), two pounds of solids are prevented fiom entering the river upstream. Also, this argument conflicts with the Board's finding in the proceedings on AS 99-6 that "the untreated discharge fiom the new facility, provided it occurs in the context of the GRLT Project, will not harm human health and will protect aquatic life immediately downstream of the discharge." *See* Order and Opinion of the Board at 19 (Sept. 7,2000). The Agency has not introduced any change that would alter the Board's conclusion in 2000. Thus, the Agency's

inaccurate and conclusory statement therefore should not be given any weight in the Board's analysis.

C. The Adjusted Standard Is Consistent **With** Federal Law

14. At the time it granted Illinois-American Water's petition for an extension in 1999-2000, this Board clearly recognized that Adjusted Standard 99-6 was consistent with federal law. *See* Opinion and Order of the Board (Sept. 7,2000) at 20 ("Standards adopted in compliance with the Board's adjusted standard procedure that do not adversely affect the designated uses of a water body are consistent with federal law. The designated uses of the Mississippi will not change pursuant to the grant of this adjusted standard."); *id.* at 20 ("The Board finds that the requested adjusted standard is consistent with existing federal law.").

15. Res judicata and collateral estoppel prevent the Agency from retrying the adjusted standard. Res judicata is the legal doctrine providing that "once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in a new proceeding." *See Cole Taylor Bank v. Rowe Industries, Inc.*, PCB 01-173 (June 6,2002) (quoting *Burke v. Village of Glenview*, 257 Ill. App. 3d 63, 69, 628 N.E.2d 465,469 (1st Dist. 1993) (quotation marks omitted). The elements of res judicata are: (1) a final judgment on the merits rendered by a court of competent jurisdiction[6]; (2) an identity of cause of action; and (3) an identity of the parties. *See People v. Jersey Sanitation Corp.*, PCB 97-2, slip op. at 4-5 (April 4,2002). Even if res judicata does not apply, collateral estoppel applies to preclude the Agency from relitigating the issue of consistency with federal law. *See People of the State of Illinois v. Community Landfill Co., Inc.*, PCB 03-191, slip op. at

[6] Although this element generally refers to a final judgment by a "court of competent jurisdiction," the same principles apply to decisions of this Board. *See People of the State of Illinois v. Community Landfill Co., Inc.*, PCB 03-191, slip op. (Feb. 16,2006) (reviewing a claim that res judicata applied to the Board's decision in a previous proceeding, but holding that res judicata did not apply "between PCB 01-170 and this proceeding" only "because there is no required identity of causes of action").

15 (Feb. 16,2006) (recognizing that collateral estoppel can apply "even where the requirements of res judicata are not met"). The elements of collateral estoppel are: (1) the issue decided in the prior adjudication is identical with the one presented in the instant matter; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party in privity with a party to the prior adjudication. *Cole Taylor Bank v. Rowe Industries, Inc.*, PCB 01-173 (June 6,2002).

16. Here, the parties before the Board are the same, and the Board issued a final judgment on the merits in Adjusted Standard 99-6. Res judicata applies because the Amended Petition in this case states an identical cause of action to that in Adjusted Standard 99-6 – Illinois-American Water must establish all of the same factors for issuance of an adjusted standard, and nothing has changed since AS 99-6 was issued (except that the Project has achieved its goal). The existing physical characteristics, the character of the area (including surrounding land uses and zoning classifications), the nature of the receiving water, and the technical feasibility and economic reasonableness of treatment are the same. The only new information available to the Agency is the proven success of the Project, which certainly does not justify retrying the appropriateness of an adjusted standard – if anything, it further supports the Board's decision to issue AS 99-6 and to extend it now. Further, if the cause of action presented in Illinois-American Water's Amended Petition is not identical to that in AS 99-6, the issue presented here is clearly identical. Collateral estoppel precludes the Agency from retrying this issue because this Board has already determined that a 2 to 1 offset for TSS and iron is consistent with federal law, and nothing about that federal law (including the U.S. Environmental Protection Agency's ("EPA's") position on trading) has changed.

17. The Agency contends that the "concepts of pollutant trading...have been refined at the federal level" since AS 99-6 was issued. *See* Rec. at ¶ 31. That is not the case. There are no provisions in the Clean Water Act regulating offset projects as either a substitute or complement for treatment. In addition, EPA has not promulgated any regulations addressing the use of offset projects instead of or in addition to treatment. Statutes and regulations comprise the body of law that is binding on this Board, and both are silent on the issue. The Agency wrongfully reads EPA's silence on the issue as prohibiting trading even though no federal technology-based effluent guidelines for water treatment facilities exist, a conclusion which is clearly not supported by federal law. When EPA decides to regulate in this area of law, it knows how to do so in order to maximize the binding effect of its regulation – by promulgating a regulation through notice and comment rulemaking. No such rulemaking has occurred since AS 99-6 was issued. The Board has unquestioned legal authority, through Section 28.1(c) of the Act, to grant an adjusted standard from Illinois effluent standards. The Board has already decided that Illinois' effluent standards for TSS and total iron (35 Ill. Adm. Code 304.124) will not apply to the effluent from the Alton facility.

18. The authority cited by the Agency falls far short of legal justification. The Agency's "authority" is a few statements on the Frequently Asked Questions page of EPA's website: not a federal statute, not a federal regulation, and not even a formally-adopted statement of federal policy. The regulated community is not bound by so-called *FAQs* pages posted on a website, as such statements have no weight as a matter of law. The source of the Agency's support in itself highlights the weakness of the Agency's argument. If a sediment offset program conducted by a water treatment facility in the absence of any federally-promulgated effluent standards were clearly inconsistent with federal law, the Agency would

certainly cite to more weighty and binding authority than this. In the absence of federal laws preempting this field for action by the Board, the issuance of an adjusted standard cannot be "inconsistent" with federal law.

19. In addition, the Agency cites the EPA webpage material out of context. For instance, the second statement cited by the Agency regarding baselines states that "[a] point source seller should meet its most stringent effluent limitation before it can generate credits." *See* Agency Rec. at ¶17. However, if this were a trading program involving credits,' Illinois-American Water would be the point source purchaser, not the seller. This statement therefore indicates only that a party generating credits (which here would be the Great Rivers Land Trust) must meet all standards applicable to it before it could sell credits to another party. This is only logical, because a party that is itself violating an applicable effluent limitation should not be permitted to sell its "excess" capacity to another entity. This attempted analogy by the Agency is clearly not the situation presented in this case.

20. The Agency also cites (without comment) to an EPA guidance document, *Final Water Quality Trading Policy*, dated January 13,2003, in further support of its position that a change in policy has occurred at the federal level. But the federal trading guidance in place at the time Adjusted Standard 99-6 was issued included the same applicable principles. *See* EPA, Effluent Trading In Watersheds Policy Statement, 61 Fed. Reg. 4,994 (Feb. 9, 1996) ("To take advantage of trading, a point source must be in compliance, and remain in compliance, with applicable technology-based limits."), available at http://www.epa.gov/fedrgstr/EPA-WATER/1996/February/Day-09/pr-230.html. Neither the Agency nor the Board interpreted this

[7] Offset programs are one of four common conceptual models for water-quality trading. Other models include managed trading, trading associations, and marketlike trading programs, each of which generally involve the exchange of credits between buyers and sellers. *See generally* Cy Jones, Lisa Bacon, Mark S. Kieser & David Sheridan, Water-Quality Trading: A Guide For The Wastewater Community at Chapter 2 (2006).

statement of policy to prohibit the issuance of Adjusted Standard 99-6. Just as the 1996 policy statement did not prohibit issuance of AS 99-6, nearly-identical statements in EPA's 2003 guidance similarly should not prohibit the extension of the adjusted standard at this time.

21. To summarize: Statutes and notice-and-comment rulemakings ought to apply in adjusted standard cases, not *FAQs* sheets and EPA guidance. But even if *FAQs* sheets and guidance could be considered, neither is applicable here, because there are no federal technology-based effluent standards for water treatment plants. Moreover, the Agency is wrong to suggest that federal policy has changed. The same principles the Agency advocates from EPA's 2003 guidance can be found in EPA's 1996 guidance.

D. The Possibility of Federal Effluent Limits for Water Treatment Plants Is Not a Basis for Denying the Extension.

22. The Agency correctly notes that USEPA is studying the development of categorical effluent limitations for water treatment plants. That should not influence the Board's decision in this case. EPA studies are just that – studies – and do not impose substantive requirements until after final rulemaking. The Agency, itself, comments that final federal action is not anticipated until December 2009 – over two years after the adjusted standard would go into effect. ***See*** Agency Rec. at ¶19. But there are no guarantees that EPA will establish an effluent limit that will affect the proposed extended adjusted standard. In addition, the Agency's prediction of December 2009 is speculative, at best. USEPA must go through notice-and-comment rulemaking in order to establish categorical effluent limits. The rulemaking will attract public comments from a host of stakeholders, environmental groups and states. EPA may need considerable time to review such a volume of comments. A second proposed rulemaking could follow, with a similar delay for the consideration of comments. Other EPA rulemakings have taken more than two years. When EPA established effluent standards for the metal products and

machinery sector, it proposed a rule on April 23, 1990. **See** 55 FR 16818-01 (April 23, 1990). Twelve years later, EPA published a final rule. **See** 67 FR 33865-01 (May 13,2002). To suggest that this Board should not act before the federal standards are promulgated, or that this Board should shape its decision on the basis of a federal action that *may* (or may not) affect the action now before the Board, is simply inappropriate. If this Board were to base its decisions on speculation regarding federal actions that might materialize years hence, no decisions could be made with any certainty.

23. There is, in fact, a more compelling reason to extend the adjusted standard while EPA ponders possible effluent limits for water treatment plants. EPA may include trading programs in its regulatory scheme. Representatives from the Agency and Illinois-American Water participated in a teleconference with officials from EPA's headquarters and Region V offices on June 15,2007. Headquarters officials advised that EPA is considering a technology-based standard that may include trading as an option. During that teleconference, an Illinois-American Water representative invited EPA to examine the Piasa Creek Watershed Project in developing such a standard. An EPA official replied "We already are." And why not? The Project may be the most successful TSS offset program in the nation. Great Rivers Land Trust representatives are invited speakers at watershed conversation programs across the country. It is no wonder EPA would consider a trading program that leaves the river cleaner than it otherwise would be if the Alton plant merely engaged in settlement lagoon treatment.

24. Notably, the very guidance document which the Agency cites in support of its "changing federal policy" argument foreshadows the likelihood that EPA will include trading in future technology-based effluent standards for water plants. The Policy observes that "EPA will consider including provisions for trading in the development of new and revised technology-

based effluent guidelines and other regulations to achieve technology-based requirements, reduce implementation costs and increase environmental benefits." ***See*** Water Quality Trading Policy at 6 at ¶ 28. At this point, no one can say for sure whether EPA will issue federal categorical effluent limits. If issued, those limits may be less stringent than Illinois' applicable limits. The limits may include an offset component consistent with, or modeled upon, the adjusted standard requested of the Board in the present case. In any case, the adjusted standard proposed by Illinois-American Water empowers the Board to terminate the adjusted standard if contrary federal regulations are promulgated. The specific provision contained in paragraph 8 of the proposed order is as follows:

> Notwithstanding the terms set forth herein, if new regulations are promulgated that limit or prohibit Illinois American Water's discharges to the Mississippi or otherwise conflict with this adjusted standard, Illinois-American Water will be bound by any such regulations, and modification or termination of the adjusted standard may be required. In the event that the adjusted standard is modified or terminated, Illinois-American Water may terminate any contracts entered pursuant to Sections 5(c) or 5(d) above.

II. THE ADDITIONAL JUSTIFICATION FACTORS ADDRESSED BY THE AGENCY HAVE ALREADY BEEN ADDRESSED BY ILLINOIS-AMERICAN WATER AND DO NOT REQUIRE SEPARATE ANALYSIS

25. The Agency also presents, as a separate argument, additional factors that this Board must consider under its analysis for issuing an adjusted standard. These factors include the existing physical conditions at the facility; the character of the area involved, including surrounding land use; zoning classifications; the nature of the receiving water body; and the technical and economic reasonableness of measuring or reducing the particular type of pollution. ***See*** Agency Rec. at 720. However, these factors are already addressed in Illinois-American Water's Amended Petition under its discussion of the informational requirements under 35 Ill.

Adm. Code 104.406. ***See*** 35 Ill. Adm. Code 104.406 (implementing 415 ILCS 27(a)). ***See*** Amended Pet., ¶¶ 30 - 48.

26. The Agency does not appear to recommend denial of the adjusted standard on the basis of the existing physical conditions at the facility and the character of the area involved, including surrounding land uses, zoning classifications,[8] and the nature of the receiving body. ***See*** Agency Rec. at ¶¶21-24, because it merely identifies facts relevant to four of the factors identified in Section 27(a) of the Act but does not present any argument against the adjusted standard on these bases. In any case, these factors were considered by the Board in the proceedings on Adjusted Standard 99-6 and did not present any barrier to issuance of the adjusted standard at that time. ***See*** Opinion and Order of the Board at 4 (Sept. 7,2000) (observing that "[t]he 22-acre site for the new facility was chosen for its... industrial zoning classification"); ***id.*** at 13 (discussing the character of surrounding land uses and noting that "18 of the 22 acres where the new facility are located are zoned 'heavy industrial'"). Nothing has changed on any of these factors since the Board's Order to suggest they need to be reconsidered.

27. The Agency argues, however, that the "technical feasibility and economic reasonableness" factor requires this Board to deny Illinois-American Water's request for an adjusted standard. The Agency further suggests that, because it believes Illinois-American Water has the option to provide necessary treatment by hauling the sludge to a landfill, issuance of an adjusted standard is inappropriate. ***See*** Agency Rec. at ¶26. ***See*** *also* ***id.*** ¶17 (suggesting that an offset program may be used only when treatment to water quality standards are technically

[8] As an aside, the Agency notes that "Illinois EPA views [increased truck traffic] as a local zoning and not an environmental compliance issue." *See* Agency Rec. at ¶23. Interestingly enough, if the City of Alton amends its zoning ordinance to prohibit trucking of solids, Illinois-American Water might be unable to operate the system using the treatment option suggested by the Agency.

infeasible or economically unreasonable). However, the Agency, once again, presents no support for this argument.

28. As the Board noted in its opinion granting Adjusted Standard 99-6, the environmental benefits of the adjusted standard clearly outweigh those that would be achieved through compliance with the state's technology-based standard. *See* Opinion and Order of the Board (Sept. 7,2000) at 20 (''The Board finds that the proposed adjusted standard, including the GRLT Project, is a much better and more cost effective way to obtain sediment loading reductions in the watershed than employing other options to remove residuals from a dilute mixture of residuals and water.''). Forcing Illinois-American Water to construct lagoons simply because it may be able to obtain a permit to do so and subsequently may pass along the cost to its customers makes no sense when the net effects of the treatment are considered. Significantly, the Board concluded in its September 7,2000 Order that "[i]n light of the substantial costs associated with treating the new facility's discharge, the Board is persuaded that treatment would be economically unreasonable and would result in little increased environmental protection." See Order and Opinion of the Board at 20 (Sept. 7,2000). The Agency presents no evidence to indicate that the economic reasonableness of the Alton facility's treatment options have changed since the Board's determination. The Agency mentions that the testimony of Illinois-American Water's Mark Johnson before the ICC in April, 2000 would indicate that treatment is ''economically feasible.'' *See* Agency Rec. at ¶ 28. But economic *feasibility* is not the issue before this Board. The applicable standard is economic *reasonableness,* which is much different and inevitably requires the Board to consider the Project option over the treatment option.[9]

[9] The Agency quoted a small portion of Mr. Johnson's testimony, the portion describing capital and operating costs for lagoon treatment. Illinois-American Water wants to make it a matter of record that Mr. Johnson also testified that the Company was in negotiations at that time (April 17,2000) with Great Rivers Land Trust with respect to the

29. The Agency also raises several points that are irrelevant to the Board's consideration of this factor. The Agency notes that Illinois-American Water has committed to funding new projects to 2010, but not beyond. **See** Agency Rec. at ¶25. The Agency has no basis on which to require Illinois-American Water to continue funding new projects beyond 2010, when the project has already achieved soil savings far beyond what the parties anticipated. In addition, the Agency points out that Illinois-American Water's commitment to maintain the soil savings achieved by the Project does not specify a level of financial commitment. **See** id. The cost of maintenance is irrelevant. What matters is that Illinois-American Water represents to the Board that it will maintain the designated 2:1 ratio and 6,600 tons saved (or lose the adjusted standard as a consequence). The cost of maintenance may fluctuate, but the obligation to maintain (or consequences of a failed obligation) will not. Already, Petitioner is negotiating with the Great Rivers Land Trust for a maintenance plan. The Proposed Order attached to the Amended Petition requires that a maintenance agreement must be finalized within six months of issuance of the Order. **See** Amended Petition, Attachment F, paragraph 5.c. Such an order will ensure that Illinois-American Water maintains soil savings sufficiently or the adjusted standard will terminate.

III. CONCLUSION

In a responsive pleading of this variety, Petitioner must, by necessity, address the contentions of the Agency. Regrettably, those contentions are mostly negative in the present case. Illinois-American Water wishes to close by reminding the Board of the positives. The Project has been remarkably successful. A fair reading of the Board's Order in Adjusted

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Project. During that rate case, additional testimony reflected that an annual expense of $415,000 would be incurred over a ten-year period for the Project in lieu of lagoon treatment. The ICC set Illinois-American Water's rates with that information.

Standard 99-6 reveals that the goal of a 2:1 offset by 2010 was an expectation, coupled with uncertainty. By the end of 2006, that expectation had become a reality. Even when using the most conservative formula for calculating soil savings, a 2:1 offset was achieved in year six of a ten year program. Using TSS effluent numbers based upon the Alton facility's actual effluent volume, the offset ratio is 4:1. Similar reductions have been achieved for iron. In 2000, the Agency noted in its Final Brief that it would require treatment of the plant's effluent "in the case of an *insurmountable failure of the program."* Far from a failure, the Project has become a model of success. Great Rivers Land Trust officials have spoken at programs across the country where attendees clamor to learn about the Project.

Illinois-American Water pledges to continue this successful program by insuring that the 2:1 offset ratio is maintained indefinitely. As a safeguard, Illinois-American Water pledges to maintain a minimum threshold of 6,600 tons of soil "saved"—a threshold which will achieve a "real" offset well in excess of 2:1.

The Board should not modify Section 28.1(c) to add a "level playing field" exception. The conservation practices of other water plants, cities and power companies are not before this Board and were never contemplated to be factors in a decision under Section 28.1(c). The Agency offers no evidence to demonstrate that these other examples bear any relationship to the Alton plant, the Piasa Creek and the Mississippi River. Federal law does not warrant denial of the Amended Petition either. The Clean Water Act does not prohibit offset projects as a means of compliance. EPA has not promulgated regulations prohibiting offset projects as a means of compliance. To the contrary, there is a possibility that EPA will include offsets in any regulatory scheme that agency some day promulgates to govern effluent limits for water plants.

Finally, federal technology-based effluent standards do not exist for water treatment plants. If EPA promulgates such standards, the adjusted standard requested herein may be modified or terminated. Illinois-American Water acknowledges this and has proposed language in the Board's order to account for such a possibility. Federal regulators are already examining the Project as they contemplate the possible promulgation of technology-based effluent standards. Through Adjusted Standard 99-6, the Board launched the Project that has captured the attention of federal regulators and water conservation programs across the nation. The adjusted standard is worthy of indefinite extension with the safeguards of maintenance as proposed by Illinois-American Water.

Therefore, Illinois-American Water respectfully requests that the Board grant the extension of the adjusted standard, as proposed in this case.

Respectfully submitted,

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED EXTENSION OF ADJUSTED STANDARD	)	AS 2007-2
APPLICABLE TO ILLINOIS-AMERICAN	)	(Adjusted Standard)
WATER COMPANY'S ALTON PUBLIC WATER	)	
SUPPLY FACILITY DISCHARGE	)	
TO THE MISSISSIPPI RIVER	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 2,2007, the attached PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S RESPONSE TO THE RECOMMENDATION OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY was filed by electronic transmission with the Office of the Clerk of the Illinois Pollution Control Board, and was served by first class mail, postage prepaid, upon the following persons:

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