

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 )

**COMMENTS OF THE ENVIRONMENTAL LAW & POLICY CENTER**

The Environmental Law & Policy Center ("ELPC") respectfully submits the following comments in response to the above proposal. While ELPC recognizes the need for Illinois-American's Alton water supply treatment plant and applauds its efforts generally, the present proposal to bypass technology based effluent limits (TBELs) through trading is unsupportable, as it runs counter to the role of such limits as an absolute minimum standard to control toxic wastewater discharges.

The granting of Illinois-American's request would allow Illinois-American to avoid satisfying TBELs by implementing sedimentation controls at the Great Rivers Land Trust, a secondary location. However beneficial such an arrangement may be, trading or organizing offsets to avoid TBELs is unacceptable under the Clean Water Act.

Under the Clean Water Act, USEPA sets TBELs as the minimum national standard for water pollution discharge. 33 U.S.C. §1311(b)(2); 40 C.F.R. §125.3(a) ("Technology-based treatment requirements under section 301(b) of the Act represent the *minimum* level of control that *must* be imposed in a permit issued under section 402 of the Act." [emphasis added]). See also *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) and *Texas Oil & Gas*

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*Ass'n v. United States EPA*, 161 F.3d 923, 928 (5th Cir. 1998) (discussing a “technology-based floor”).

If USEPA has not yet promulgated TBELs for a particular category or subcategory, permit writers must set comparable limits using their best professional judgment (BPJ). 33 U.S.C. § 1342 (a) (1) (B); 40 C.F.R. § 125.3 (c). *See also Texas Oil & Gas Ass'n* at 928-29 (“In practice, this means that [the permit-writer] must determine on a case-by-case basis what effluent limitations represent the BAT level, using its “best professional judgment.” 40 C.F.R. § 125.3 (c)-(d). Individual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same.”) In this case, USEPA is in the process of developing several categorical effluent limits that would apply to the Alton plant, but none have yet been issued. (IEPA Recommendation to IPCB of 15 June 2007, p.11.). Until such standards are passed, IPCB must employ its Best Professional Judgment to consider the factors in 40 C.F.R. §124.3 (c) and (d) and set permit limits to stand in the place of federal TBELs.

Importantly, since the Board issued its AS 99-6 order granting an Adjusted Standard to Illinois-American in 2000, the USEPA has issued a policy stating specifically that pollution trading is not an acceptable method to meet TBELs. USEPA, *Water Trading Policy*, 6 (January 13, 2003), available at [www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf](http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf) (“EPA does not support trading to comply with existing technology-based effluent limitations[.]”)<sup>1</sup> USEPA reiterated that “[t]rading cannot be used to meet TBELs” just a few weeks ago in the new Water Quality Trading Toolkit for Permit Writers. USEPA, *Water Quality Trading Toolkit*, p. 6

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<sup>1</sup> Contrary to Illinois-American’s assertions, the EPA’s Water Trading Policy is not simply “a few statements on the ... EPA’s website.” *Petitioner Illinois-American Water Company’s Response to the Recommendation of the Illinois Environmental Protection Agency*, 14. The EPA’s Water Quality Trading Policy was subjected to a formal comment period and was published in the Federal Register in 2003 as a “final policy” of the EPA. 68 Fed. Reg. 1608.

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(August 2007), available at <http://www.epa.gov/owow/watershed/trading/WQTToolkit.html>. In other words, trading can only be employed to satisfy a water-quality based limit (WQBEL), which is a higher limit set when a TBEL is insufficient to meet water quality standards. TBELs remain the absolute minimum standards for discharges. ELPC agrees with this aspect of USEPA's interpretation of the Clean Water Act. TBELs are set as economically achievable minimum limits that all dischargers are expected to meet. 33 U.S.C. §1311(b)(2) As such, there should be no exceptions from this baseline. In situations such as this one, limits based upon BPJ must stand in the place of TBELs and should be treated no differently. *NRDC v. United States EPA*, 863 F.2d 1420, 1425 (9<sup>th</sup> Cir. 1988)("[C]ourts reviewing permits issued on a BPJ basis hold EPA to the same factors that must be considered in establishing the national effluent limitations.")

The Trading Policy also specifically states that water quality trading and other market-based programs must be consistent with the Clean Water Act. Certainly, placing no effluent limits for these substances in the permit at all is not consistent with the intent or the text of the Act. TBELs are intended to become increasingly stringent as technology develops over time; *Sierra Club v. Meiburg*, 296 F.3d 1021, 1024 (11th Cir. 2002). They are not meant to be weakened or abandoned at the convenience of dischargers, however sympathetic their case may be.

Although continuing a reputedly successful pollution trading program may be appealing to Illinois-American and other interested parties, using trading or offsetting procedures to satisfy TBELs is not permissible under the Clean Water Act. Illinois-American's request for the extension of the adjusted standard granted in AS 99-6 should be denied.

Respectfully Submitted,



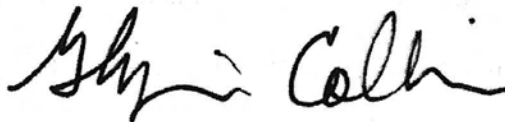
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