BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that on September 10, 2007, there was electronically filed with the Office of the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of the **AGENCY'S POST-HEARING BRIEF** , a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By:_____

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Dated: September 10, 2007
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AGENCY'S POST-HEARING BRIEF

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel, pursuant to the Hearing Officer Order dated July 23, 2007, hereby submits this post-hearing brief in response to Illinois-American Water Company's ("Illinois-American") petition for an adjusted standard for its Alton Public Water Supply facility. Illinois-American seeks an adjusted standard from the Illinois Pollution Control Board's ("Board") regulations at 35 Ill. Adm. Code 306.124 and 304.106 for its discharge to the Mississippi River. In support, Illinois-American argues that since it is funding the GRLT sedimentation reduction project that has been successful in providing a 2 to 1 offset of solids, the Board should grant an "extension" to its adjusted standard in AS 99-6.[1]

The Agency, however, requests the Board to deny Illinois-American's relief for the following specific reasons: i) Illinois-American's requested relief from effluent standards by funding a sedimentation reduction project is inconsistent with the Clean Water Act ("CWA"); ii) Illinois-American has not met its burden under Section 28.1(c)

[1] There is no Board procedure for an "extension" to an adjusted standard. Therefore, Illinois-American must file a new petition that meets the requirements under Section 28.1(c) of the Act.

of the Illinois Environmental Protection Act (the "Act") and the Board regulations; and iii) Illinois-American's trading project is bad policy for Illinois.

I. Introduction

On March 19, 1999, Illinois-American petitioned for an adjusted standard, docketed as AS 99-6, for its proposed public water supply treatment facility located along the Mississippi River near River Mile 204, in Madison County ("the Alton facility"). Illinois-American requested that the Board adopt an adjusted standard from Section 304.124, Section 304.106, and Section 302.203. Initially, the Agency recommended that the Board deny Illinois-American's requested adjusted standard and raised a number of flaws with Illinois-American's petition. Most notably, the Agency asserted that unlike other facilities which were built in the "pre-regulatory era" Illinois-American is "[c]onstructing its new facility with full knowledge of State and federal effluent and water quality requirements." *Agency's Recommendatio*n, AS 99-6, p. 9-10, September 16, 1999. Essentially, the Agency sought to highlight the fact that it was technically feasible and economically reasonable for Illinois-American to meet the effluent standards of general applicability given it was building a new facility.

Later, the Agency abandoned its position and supported Illinois-American's proposed funding of a sedimentation reduction project, in lieu of technology-based standards.[2] The Board granted Illinois-American an adjusted standard from Sections 302.203, 304.106, and 304.124. *Board Order*, AS 99-6, October 19, 2000. The Board

[2] In *In the matter of: Site-specific Rulemaking for the Sanitary District of Decatur, Illinois*, R85-15, slip op. at 7, January 23, 1986, the Board noted a problem with site-specific rulemakings being that, "[s]ome of which will inevitably become obsolete and others which will lose their justification with time. The Agency believes that this is the case here—that funding of a sedimentation reduction project in lieu of technology-based controls has lost its justification. The Agency believes that its recommendation in AS 99-6 was inconsistent with the CWA and the NPDES program.

ordered Illinois-American to provide a minimum of $4,150,000 in year 2000 dollars to GRLT for a sediment loading reduction project over the next ten years. *Id.* at 2. Additionally, the Board exercised authority under Section 27(a) of the Act by implementing a seven-year sunset provision into Illinois-American's adjusted standard. Specifically, the Board's order provided for a sunset date of October 16, 2007, at which time relief would end unless renewed by the Board.[3]

Since the Board granted Illinois-American relief under AS 99-6, Illinois-American's Alton facility has been constructed without the equipment necessary to treat TSS or total iron. The Alton facility began operations on December 31, 2000, which consists of a raw water intake and pumping station, clarification and filtration units, filtered water storage, and chemical feed facilities.

On October 31, 2006, Illinois-American petitioned the Board for extended relief for its Alton facility. In its petition, Illinois-American proposed to continue funding GRLT's sedimentation reduction project in exchange for relief from 35 Ill. Adm. Code 304.106, 304.124, and 302.203. Then on April 3, 2007, Illinois-American amended its petition, requesting relief from Section 304.124 for TSS and total iron and 304.106 for offensive discharges. In its amended petition, Illinois-American conveniently offers only two ways for the Board to review its request for relief: 1) if the project is effective, the Board should grant permanent relief from the effluent standards or 2) only "in the case of insurmountable failure" should the Board deny Illinois-American permanent relief. Yet, the Agency asserts that the issue before the Board is not whether the sedimentation

[3] Illinois-American emphasizes that the Agency itself stated that only "in the case of an insurmountable failure of the program" would the Agency require treatment of the water plant's effluent. First, this language is not binding on this proceeding, because the Board never adopted the Agency's language into the Adjusted Standard. Further, it is the Board, not the Agency that makes decision regarding whether Illinois-American will continue to receive relief under an adjusted standard.

reduction project is successful, but rather whether Illinois-American has met their statutory burden under Section 28.1 of the Act and Part 104 of the Board's rules.

Typically, when the Board grants adjusted standards, the relief is permanent. However, the Board has implemented sunset provisions to provide a facility with temporary relief. In *In the matter of: Site-specific Rulemaking for the Sanitary District of Decatur, Illinois*, R85-15, slip op. at 7, January 23, 1986, the Board justified the necessity of sunset provisions as to "[r]equire the holder of an exception to bear the burden of justification for continuing the exception." Additionally, the Board noted, as "the relief could only emanate from the Board initially, it is appropriate that the Board determine the continuing validity of that relief in the future," and a sunset provision is a product of such a determination. *Id.*

Here, the Board specifically ordered Illinois-American to reapply for an adjusted standard for the GRLT project past its seventh year. *Board Order*, PCB 99-6, slip op. at 5, October 19, 2000. Since, there is not a separate Board procedure for applying for an extension to adjusted standards, Illinois-American must submit a new petition establishing that it has met all the requirements under Section 28.1(c) of the Act (415 ILCS 5/28.1(c) (2006)). Thus, the Board must conduct a *de novo* review of the Illinois-American's petition, based on the record in this proceeding.

II. Background on CWA

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251(a). Further, Congress declared a national goal of eliminating the discharge of pollutants into the navigable waters by 1985. 33 USC § 1251(a)(1). In passing the CWA of 1972, Congress made an

intentional shift from the focus of general water quality standards, to specific effluent limitations. *See Peabody Coal Co. v. Illinois Pollution Control*, 36 Ill.App.3d 5, 344 N.E.2d 279, 286 (5th Dist. 1976). Yet, Congress retained water quality standards as a *supplementary* basis for effluent limitations. *See EPA v. California ex rel*, 426 US 200, 205, 96 S.Ct. 2022 (1976) (*emphasis added*).

By changing the focus to effluent limitations, the CWA places restrictions on the amount of pollutants that a facility can discharge through technology-based control. *See Delaware Co. Safe Drinking Water Coalition, Inc. v. McGinty,* 2007 WL 2213516, slip op. at 4, (E.D. Pa. July 31, 2007). Unlike water quality standards, which are based on physical attributes of a particular water segment, technology-based limitations are based on an evaluation of the capability of water pollution control technologies. *Id.*

The primary mechanism for achieving the national goal is through a system of effluent limitations guidelines and the National Pollutant Discharge Elimination System ("NPDES") permits that set technology-based discharge limits for point sources. *See Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 927 (5th Cir.1998). Section 301(a) of the CWA prohibits the discharge of any pollutant except those that are limited by an NPDES permit. 33 U.S.C. § 1311(a). The statute gives the United States Environmental Protection Agency ("EPA") the authority to issue permits to point sources; and those permits must establish technology-based effluent limitations that incorporate increasingly stringent levels of pollution control technology over time. 33 U.S.C. §§ 1311(b)(1)(A), (B), (b)(2).

An additional purpose for the permit program is to allow imposition of effluent limitations prior to their formal adoption by the federal EPA. *See* 33 U.S.C. § 1342(a)(1).

Peabody Coal Co. v. Illinois Pollution Control Bd., 36 Ill.App.3d 5, 344 N.E.2d 279, 286 (5th Dist. 1976). The discharger, however, may avoid the incorporation of applicable effluent limitations into an NPDES permit where the EPA grants the discharger a variance based on the discharger's demonstration that it is "fundamentally different" from other dischargers in the category or subcategory. 33 USC 1311(n); 40 CFR 122.21(m)(1), 125.30-125.32. *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 928, (5th Cir.1998).

The enactment of CWA 1972 amendments have thus made the technology-based control effluent limitations the central focus of the overall mechanism of water pollution control under the CWA. The technology-based effluent limitations still remain the primary mechanism for controlling water pollution, at both the Federal and State levels.

III. Board's Authority to Review Adjusted Standard Petitions Under the Act

In adjusted standard proceedings, the Board is charged to "determine, define, and implement environmental control standards applicable in the State of Illinois" (415 ILCS 5/5(b) (2006)), and to "grant… adjusted standard for persons who can justify such an adjustment." 415 ILCS 5/28.1(a) (2006).

In both a general rulemaking and a site-specific rulemaking, the Board is required to take the following factors into consideration: the existing physical conditions; the character of the area involved, including the character of surrounding land uses; zoning classifications; the nature of the receiving body of water; and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. 415 ILCS 5/27(a)(2006). The general procedures that govern an adjusted standard proceeding are found at Section 28.1 of the Act (415 ILCS 5/28.1(2006)), and the Board's procedural

rules at 35 Ill. Adm. Code Part 106. Section 28.1 also requires that the adjusted standard procedure be consistent with Section 27(a).

Illinois-American seeks an adjusted standard from the rules of general applicability. These regulations do not specify a level of justification that is required for a petition to qualify for an adjusted standard. In determining whether an adjusted standard should be granted from a regulation of general applicability where no level of justification is specified, the Board must consider, and the petitioner has the burden to prove, the factors at Section 28.1(c) of the Act (415 ILCS 5/28.1(c) (2006)). Those factors are:

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 any applicable federal law.

Further, Section 28.1 of the Act provides that the Board shall adopt procedures applicable to adjusted standard determinations. The applicable standards are contained within Subpart D of Part 104 of the Board's procedural rules.

IV. Arguments

The Agency cannot support Illinois-American's petition for an adjusted standard for the reasons stated below.

A. Illinois-American Cannot Satisfy Section 27 of the Act.

Illinois-American relies on the Site-Specific Analysis of Impacts of Potential Alternatives for Handling Public Water Supply Residuals at Proposed Alton, Illinois

Facility (the "Site Specific Impact Study") prepared by ENSR, an environmental consulting and engineering firm, dated March 1999.[4] The purpose of this study was to provide the Board with sufficient information regarding the environmental impact, technical feasibility, and economic reasonableness of the potential alternatives to treat discharges from the Alton facility; to satisfy state and federal requirements under various substantive and procedural statutes; and to address the Agency's concerns about the new facility. *Illinois-American Amended Petition*, AS 07-2, April 2, 2007 at 6. The Agency takes issue with Illinois-American's justification concerning the nature of the receiving body of water, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollutant.[5]

First, Illinois-American argues that it deserves relief from the effluent standards based on the nature of the receiving body of water. Specifically, Illinois-American asserts that this existing background concentration warrants an adjusted standard from total suspended solids ("TSS"). Illinois-American's understanding of the background concentration rule (Section 304.103) is inconsistent with the Board's interpretation of this rule in *In the matter of: Petition for Site-Specific Exception to Effluent Standards for the Illinois-American Water Company, East St. Louis Treatment Plant*, R85-11, slip op. at 16, September 25, 1986. In that proceeding, the Board found that Section 304.103 does not apply in cases where the "[c]oncentration of suspended solids in …[the] effluent is not a result of either influent contamination, evaporation, or the addition of trace amounts

[4] The Agency would like to note that Illinois-American still relies upon the Site Specific Impact Study that was complied in 1999 to justify the reasons for its adjusted standard. The Agency believes this is unsound. The study was compiled in 1999 to study the *proposed* Alton facility. While Illinois-American does make certain modifications to "update" the study, the Agency believes that in no way does a study conducted in 1999 justify the Board granting an adjusted standard eight years later.

[5] The Agency's discussions regarding "technical feasibility and economic reasonableness will be discussed under Subheading Illinois-American cannot meet its burden under Section 104.406(e).

of materials, and that Rule 401(b) [now Section 304.103] did not intend to exempt effluents in which contaminants were deliberately concentrated." *Id.* Illinois-American's Alton facility deliberately concentrates the effluent prior to discharge, so Section 306.103 does not apply. If the Board grants Illinois-American's request solely based on this factor, than the remaining, approximately 47 facilities[6] along the Mississippi River could also seek relief from the TSS and total iron effluent standards.

Also, when Congress enacted technology-based controls, "[t]he new approach reflected developing views on practicality and rights. Congress concluded that water pollution seriously harmed the environment, and that although the costs of control would be heavy, the nation would benefit from controlling that pollution." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C., 1978). Further, the "[r]ight of the public to a clean environment would be pre-eminent, unless pollution treatment was impractical or unachievable." *Id.* at 1043. The Board should deny Illinois-American's request because it directly conflicts with Congress's declaration that, "'[t]he use of any river, lake, stream, or ocean as a waste treatment system is unacceptable' regardless of the measurable impact of the waste on the body of water in question. Legislative History at 1425 (Senate Report)." *Id.*

B. Illinois-American Has Not Met Its Burden Under Section 28.1(c) of the Act.

All factors under Section 28.1(c) must be met in order for the Board to grant Illinois-American its requested adjusted standard. The first factor that Illinois-American must prove is the "[f]actors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation

[6] The Agency conducted a search on the EPA's website http://www.epa.gov/enviro/html/pcs/adhoc.html, to find the number of point sources with TSS limitations that are directly discharging into the Mississippi River.

applicable to that petitioner." 415 ILCS 5/28.1(c) (2006). Illinois-American asserts that their funding of the GRLT sedimentation reduction project is a "substantially and significantly different factor." *Illinois-American Amended Petition*, AS 07-2, April 2, 2007. However, Illinois American ahs misconstrued the interpretation of "substantially and significantly factors."

To interpret the meaning of "significantly and substantially different" factors, the Board should consider the federal interpretation of "fundamentally different factors," and the Board's interpretation in previous orders.

At the Federal level, EPA defines "fundamentally different factors" as, "factors of a Technical and Engineering Nature." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1038 (D.C.C. 1978) (citing Memorandum to Regional Administrators of EPA, 39 Fed.Rg. 300073 (1974)). A variance at the federal level is granted only "the overall situation facing an individual operator differs from the overall situation of the industry." *Id.* at 1040.

In prior cases, the Board has previously interpreted the "substantially and significantly different factors" in accordance with the federal interpretations of the "fundamentally different factors." In *In the Matter of: The Joint Petition of the City of Metropolis and the Illinois Environmental Protection Agency For an Adjusted Standard from 35 Ill. Adm. Code Part 304 for 5-day Biological Oxygen Demand (BOD-5), Suspended Solids and Ammonia Nitrogen*, AS 95-3, slip op. at 9-10, June 6, 1996, the City requested an adjusted standard and evidenced that its discharge was "substantially and significantly" different because "[i]t is currently meet[ing] the general standards applicable to dischargers to the Ohio River." *Id.* at 9. The Board concluded that "given

the City's recent expenditures to achieve compliance with the Ohio River standards, requiring it to now achieve the standards generally applicable to discharges to the Kidd Creek would not be reasonable...." *Id.* The Board further noted that,

> The purpose of the adjusted standard is to allow the City wastewater treatment plant, constructed in 1970 and upgraded in 1989, to continue to operate and discharge according to the standards for which it was designed, all in the accordance with agreements reached between USEPA, the Agency, and the City. The quality of the effluent from the plant more than meets the standards necessary, for the condition at the site, and for which the plant was designed and constructed. *Id.*

Here, Illinois-American cannot argue that its Alton facility was constructed three decades ago, and that it has no ability to upgrade the facility to include necessary technology controls. Nor can Illinois American argue that special conditions at site prohibit it from meeting the applicable effluent standards.

In *In the matter of: Petition of Noveon, Inc. For an Adjusted Standard from 35 Ill. Adm. Code 304.122*, AS 02-5, slip op. at 2, November 4, 2004, the Board discussed the "substantially and significantly" different factors consistent with the Agency asserted interpretation. Specifically,

> The Board finds that the quality and composition of the discharge that Noveon produces in its manufacturing process is substantially and significantly different than wastewaters of other industries and POTWs. [Further,]... although Noveon's wastewater treatment plant is designed, constructed, and operated similarly to a POTW that achieves nitrification, the Henry plant is unable to achieve nitrification because of the unique characteristics of Noveon's wastewater. *Id.* at 2.

Again, Illinois American cannot assert such a "unique characteristic of its wastewater." Accordingly, there is no reason for this Board to grant Illinois-American an adjusted standard when it has not convincingly evidenced that its facility's discharge is unique.

Furthermore, although Illinois-American asserts that it does not have to justify that it is different from any other point sources that are discharging effluent into an Illinois waterway, past Board adjusted standards conclude otherwise. In *In the Matter of: Petition for Illinois Power Company (Vermillion Power Station) for Adjusted Standard from 35 Ill. Adm. Code 302.208(e)*, AS 92-7, October 7, 1993, the Board noted that the facility's argument was not sufficient to grant an adjusted standard under its facility's conditions. Specifically,

> No evidence or argument was presented regarding how IP's situation was any different than any other Illinois utility or discharger who is discharging effluent into an Illinois waterway.... IP presents no evidence concerning the ability or inability of other electric utilities in the state to comply with the standards and why the IP plant is different. It presents no evidence as to why the technology at its Vermilion plant is different than any other plants which presumably comply. *Id.* at 18.

Based on the discussions above, Illinois-American cannot assert that funding a sedimentation reduction project constitutes a "substantially and significantly" different factor. Therefore, the Agency requests that the Board deny Illinois-American's requested relief.

C. Illinois-American Has Not Met the Requirements Under Subpart D of Part 104 of the Board's Rules.

Illinois-American has not satisfied the requirements under Section 104.406(b) of the Board's procedural rules. This Section provides that the Petitioner must provide a statement that indicates "[w]hether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the CWA (33 USC 1251 *et seq.*) ... or the State NPDES programs." 35 Ill. Adm. Code 104.406(b). Illinois-American has not satisfied this requirement. In the past, the Board has rejected adjusted

standard petitions for not adequately satisfying this requirement. *See In the Matter of: Petition of City of Elgin for an Adjusted Standard from 35 Ill. Adm. Code 304.125 and 35 Ill. Adm. Code 302.204*, AS 01-01, slip op. at 2, August 20, 2000 (Holding that the adjusted standard petition had not adequately addressed certain proof, by failing to address the regulation of general applicability was promulgated to implement the requirements of the state NPDES program.).

In its Amended Petition, Illinois-American asserts that Part 304 of the Board's regulations was not promulgated in whole or in part to implement the requirements of the CWA. Illinois-American assertion is without basis as: 1) Part 304 was adopted to implement the requirements of the State's NPDES program, and 2) Part 304 was clearly adopted at least in part to implement the requirements of the CWA.

Part 304 was Adopted to Implement the Requirement of the NPDES Program

The CWA allows a State to administer its own NPDES program for discharges into the waters of the State, provided that the State's program meets federal standards. 33 U.S.C. § 1342 (b). Further, the CWA requires that approved states' NPDES permitting programs be consistent with minimum federal requirements. 33 U.S.C. § 1314 (i).

Under the CWA, a state may submit a description of a proposed program along with a statement from the state attorney general that state law provides adequate authority to carry out the program. To enable the State of Illinois to administer its NPDES program, Illinois enacted the Illinois Environmental Protection Act and adopted the Board's NPDES permit related regulations[7], including 35 Ill. Adm. Code Part 304. On

[7] The Board regulations R73-11 and R73-12 were adopted by the Board to enable the State of Illinois to administer, upon approval by the United States Environmental Protection Agency, the National Pollutant Discharge Elimination System (NPDES). The Board adopted the regulations in question in an attempt to satisfy the requirements of section 402(b) of the Federal Water Pollution Control Act Amendments of

October 23, 1977, Illinois received approval for its National Pollutant Discharge Elimination System ("NPDES") program, as the State's proposal met the minimum federal requirements. Like most states, Illinois administers the NPDES program subject to EPA oversight of the State's permit issuing procedures.

The Illinois Environmental Protection Act prohibits the Agency from issuing permits which do not contain terms and conditions consistent with the federal and State law. Section 39(b) of the Act specifically "allows the Agency to issue NPDES permits as defined in Federal Water Pollution Control Act [FWCPA, now known as Clean Water Act] Amendments of 1972, and further allows for conditions to be imposed to accomplish the purposes of this Act, including effluent limitations." *City of East Moline v. Illinois Pollution Control Bd.*, 188 Ill.App.3d 349, 544 N.E. 2d 82, 84 (3rd Dist., 1989).

Section 309.141(f) gives the Agency the authority consistent with Section 39(b) to set standards and conditions necessary to carry out the provisions of the Act "prior to promulgation by the Administrator of the US EPA of applicable effluent standards, and limitations pursuant to sections 301, 302, 306, and 307 of the FWPCA." *U.S. Steel Corp. v. Illinois Pollution Control Bd.*, 52 Ill.App.3d 1, 376 N.E.2d 327, 335, 9 Ill.Dec. 893 (2d Dist. 1977). Without such interpretation, "the Agency would not be able to set conditions and standards which are necessary to carry out the provisions of the FWPCA prior to their promulgation by the Administrator. Such a result would not be in keeping with the Agency's permit granting power and purpose of the Act." *U.S. Steel Corp. v. Illinois*

1972, 33 U.S.C. s 1342 (FWPCA), and thereby enable the State to assume permit granting authority for all dischargers of pollutants from point sources into navigable waters within the State. *Peabody Coal Co. v. Illinois Pollution Control Bd.*, 36 Ill.App.3d 5, 344 N.E.2d 279, 282 (5th Dist. 1976).

Pollution Control Bd., 52 Ill.App.3d 1, 376 N.E.2d 327, 335, 9 Ill.Dec. 893 (2d Dist. 1977).

Part 304 was adopted to ensure Illinois' permitting program is consistent with the minimum federal requirements as required by 33 U.S.C. §1314(i). Also, Part 304 was adopted to allow the Agency to set conditions that are necessary to carry out the provisions of the CWA, prior to their promulgation by the Administrator.

Part 304 was Adopted to Implement the Requirements of the CWA

Under the CWA, it is both the State and EPA's obligations to adopt effluent standards. The CWA defines "effluent standards" as,

> Any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 USC § 1362(11).

These effluent standards must be included in all NPDES permits. 33 U.S.C. § 1342(a)(1). The federal regulations provide that where the federal standards and limitations have not been adopted, state agencies may promulgate these standards. 40 C.F.R. §§ 124.42(a), (b). In the absence of EPA promulgated standards, effluent standards are to be established under a case-by-case basis, under Section 402(a)(1) of the CWA. Permits containing case-by-case effluent limitations are to be based on the permit writer's Best Professional Judgment ("BPJ").

Section 309.141(f) of the Board regulations grants the Agency authority to, "impose such conditions as the Agency determines are necessary to carry out the provisions of the FWPCA." 35 Ill. Adm. Code 309.141(f). This directive from the Board allows the Agency to establish effluent standards on a case-by-case basis, if no Federal

standards have been adopted. *Peabody Coal Co. v. Illinois Pollution Control Bd.*, 36 Ill.App.3d 5, 344 N.E. 2d 279, 290 (5th Dist. 1976).

Instead of requiring the Agency to establish effluent limitations on a case-by-case basis, the Board adopted Part 304, which is applicable to all point sources in Illinois. Unlike the Federal effluent standards, the Part 304 standards do not distinguish between categories and subcategories of industries. The Board chose to adopt Part 304 standards, instead of BPJ approach, to avoid an overwhelming task of obtaining the necessary case-by-case information to determine what limits are readily achievable in a given case. *See In The Matter Of: Effluent Criteria, R70-8; In The Matter Of: Water Quality Standards, R71-14; In The Matter Of: Water Quality Standards Revisions For Interstate Waters (SWB-14)*, R71-20, slip op. at 1, January 6, 1972.

Therefore, in cases where only state effluent standards exist, such standards stand in place of the federal effluent standards and must be incorporated in the issued NPDES permits in order for such permits to be considered consistent with the CWA and the federal NPDES regulations. 40 C.F.R. §§ 124.42(a), (b). NPDES permits granted by a state agency would only be considered consistent with the CWA and NPDES regulations if it contains enforceable effluent limitations.

Illinois-American Cannot Meet its Burden Under Section 104.406(e)

Further, under Section 104.406(e) of the Board rules provides that the petition must contain a description of the effort that would be necessary if the petitioner were to comply with the regulations of general applicability. All compliance alternatives, with the corresponding costs for each alternative, must be discussed.

Again, Illinois-American relies on the Site Specific study conducted in 1999, before the current Alton facility was even constructed, to demonstrate the effort that would be necessary to comply with the regulations. Illinois-American evaluates five (5) different alternatives. Most notably, Illinois-American concedes that "a combination of non-mechanical and mechanical dewatering techniques was a viable means of treating residuals, [however] this option is nevertheless a less preferable option than direct discharge to the Mississippi coupled with completion of a sedimentation reduction program." *Illinois-American Amended Petition*, AS 07-2, April 2, 2007 at 29. Again, the standard is not whether an alternative is "less preferable," rather the standard was promulgated to grant relief for facilities where it was not technically feasible or economically reasonable to treat effluent.

Illinois-American asserts that treating TSS and total iron is economically unreasonable. The Agency believes otherwise. For a financially strong company such as Illinois-American, it is not financially unreasonable for the company to be able to treat to the degree necessary to come into compliance with technology-based standards. Consistent with *In the matter of: Petition for Site-Specific Exception to Effluent Standards for the Illinois-American Water Company, East St. Louis Treatment Plant*, R85-11, slip op. at 15, September 25, 1986, the Board, here too should also consider whether there is any data in the record indicating that Illinois-American does not have the ability a) to absorb any or all of the compliance costs, or b) otherwise reduce that impact on the consumers. The mere fact that there are several point sources on the Mississippi River that comply with Part 304 standards shows that these controls are in fact both technically feasible and economically reasonable. Since the Part 304 standards apply to

all sources, irrespective of the type of industry, Illinois-American must show there is a unreasonable or disproportionate economic hardship in achieving these standards. The Agency believes that Illinois-American cannot make such a showing.

D. Illinois-American's Requested Adjusted Standard is Inconsistent with Federal Law

Illinois-American fails to cite to any CWA provision or Federal regulations governing the NPDES program that allows it to fund a sedimentation reduction program in lieu of achieving technology-based standards. The CWA places limitations on the amount of pollutant that point sources can discharge through technology-based and water quality based controls. Both technology-based controls and water quality based controls are implemented through the NPDES permitting process. Illinois-American's request for the Board to grant it relief from TSS and iron effluent limitations on the basis that it is funding a sedimentation control project contradicts the CWA's mandate that technology-based controls must be incorporated into all NPDES permits. 33 U.S.C. § 1311(b)(2); 40 C.F.R. 125.3; 122.41; 122.42; 122.44. The NPDES permits without technology-based controls is neither consistent with the intent, nor the language of the CWA.

Additionally, Illinois-American's sediment reduction program is inconsistent with EPA's Trading Policy. First, the Trading Policy specifically states that water quality trading and other market-based programs must be consistent with the CWA. Further, EPA has issued a policy stating that pollution trading is not an acceptable method to meet technology-based controls. USEPA, *Water Trading Policy*, 6 (January 13, 2003) ("EPA does not support trading to comply with existing technology-based effluent limitations.)

Further, in the new *Water Quality Trading Toolkit for Permit Writers,*[8] EPA reiterates that "[t]rading cannot be used to meet technology-based effluent limitations." One of the stated purposes of EPA Trading policy is "to encourage stakeholders to find innovative, supplementary ways to achieve federal, state, or local water quality goals." Thus, the policy encourages use of trading when it will provide additional or supplement reductions, not as a substitution to the minimum levels of controls, as Illinois-American would like to do here.

E. Granting Illinois-American an Adjusted Standard Would Result in Bad Policy

Replacing technology-based controls has many disadvantages for both the regulators and the regulated community. Technology-based standards are generally the first and best answer to pollution control. Wendy R. Wagner, *The Triumph of Technology-based Standards*, 2000 U.Ill.L.Rev. 83, 88. Technology-based standards are more enforceable and predictable than most alternative approaches to pollution control. *Id.* at 100. From the standpoint of the regulated entities, technology-based standards provide unparalleled predictability with respect to compliance obligations. *Id.* Further, technology-based standards are superior in their predictability because of the ease by which regulators can ensure that compliance obligations are met. *Id.* at 101. Most importantly, because the reference point is a definable technology for which numerical standards have been developed, technology-based requirements are almost always clear, easy to codify, and easy to reflect in permit requirements. *Id.* This is of further importance in an environment where the state agencies have to perform their obligations with limited resources. Since technology- based standards are uniformly and

[8] USEPA, *Water Quality Trading Toolkit*, p. 6 (August 2007), available at: http://www.epa.gov/owow/watershed/trading/WQTToolkit.html.

expeditiously applied across all industries and geographic locations, they can be used to ensure environmental protection is in place if a pollution market does not work or is slow to become operational.

Illinois-American portrays this project a win-win situation; however, it is not. In this case, Illinois is losing TSS and iron reduction from the Alton facility. In fact, Illinois-American wins and the State of Illinois loses. There are two water pollution control programs under the CWA—point source controls and non-point source management programs. These two programs are independent of each other. In other words, point source controls cannot be used to achieve non-point source management programs, or vice versa. To achieve pollution reductions at a point source, the Agency incorporates effluent limitations into all NPDES permits. On the other hand, for non-point sources, since the CWA does not have a mechanism or permitting structure to achieve pollution reduction from non-point sources, the Agency provides financial assistance under Section 319 of the CWA. Each year, the Agency has set aside approximately $4.7 million dollars for non-point source projects and has invested approximately $50 million dollars since 1990 in non-point source control projects across the State. Most notably, the Agency has never funded a non-point source control project that has been used in place of applying technology-based controls.

The goal of the CWA anticipates the restoration of the Nation's waters by applying technology-based controls and non-point source programs. When a point source substitutes technology-based controls for non-point source control projects, the goals of the CWA are not met, as the State forever loses the ability to achieve reductions equivalent to those achievable from the point source. The Agency can always fund non-

point source projects. Therefore, effluent reductions achieved from the point source controls cannot be substituted for reductions implemented through non-point source control projects. The CWA simply does not allow for this scenario because when one program is used to "achieve" reductions for the other, one program loses it reductions. Each program must contribute real pollutant reductions in order to achieve the goals of the CWA.

Further, should the Board grant the Illinois-American's requested relief from technology-based standards, it would risk "opening the floodgates" for similar relief by point sources along the Illinois side of the Mississippi River, as well as the rest of the State. *See In The Matter Of: Petition for Site Specific Exception to Effluent Standards for the Illinois American Water Company, East St. Louis Treatment Plant*, R85-11, slip op. at 12, September 25, 1986.

GRLT Project

The Agency considers Piasa Watershed Project a successful nonpoint source sedimentation control project. Historically, the Agency has funded non-point source control projects under Section 319 of the CWA, and will continue to do so to "restore, protect, and enhance the quality of the environment...." However, use of a project like GRLT as a substitute for technology-based controls is inconsistent with the basic intent of the CWA. Illinois-American goes to great lengths to describe the sedimentation reduction project[9] and also proposed methods for which the Agency could track the successes of the project.[10]

[9] Although Illinois-American would like this Board to believe that the GRLT project will likely die without its financial support, in reality, this project can be sustained with or without Illinois-American's assistance. GRLT can be continued with local, State, and/or Federal support. Further, this argument is not relevant to whether Illinois-American can demonstrated that it has justified and fulfilled the requirement for an

Illinois-American over and over again argues that the GRLT project is consistent with the federal trading policy, and therefore, the Board should grant the requested relief. However, the simple fact is that Illinois does not have a promulgated trading policy. Further, the Agency does not intend to ever propose a policy that will allow point sources to meet the CWA's requirement of complying with technology-based controls by funding non-point source control projects. One day the state of Illinois may decide to have some form of a trading policy; however, this adjusted standard proceeding is definitely not the proper forum to discuss the details of that policy. However, the lack of an Illinois' trading policy is not at issue here, nor should it be. For the Board to grant Illinois-American's requested relief, it must show that it has met the statutory burden as well as Board requirements for an adjusted standard.

F. The Board Should Not Consider the Factors in 28.3 of the Act.

Illinois-American requests that the Board consider factors at Section 28.3 of the Act in deciding its adjusted standard petition. However, the legislature specifically directed the Board to consider Section 28.3 factors in regard to petitions filed before January 1, 1992. Public Act 86-1363, effective September 7, 1990; codified as 415 ILCS 5/28.3 (1998). By limiting the applicability of Section 28.3, it is clear that the legislature did not intend for relief under this Section beyond 1992. Accordingly, there is no reason for the Board to consider factors under Section 28.3 of the Act in this decision. Nor should the

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adjusted standard under Section 28.1(c) of the Act. Therefore, the Board should ignore Illinois-American's attempt to deflect the focus from the proper issue in this proceeding.

[10] The Agency asserts that discussions related to the GRLT project are irrelevant to the question of whether the Board should grant the requested adjusted standard. Also, this proceeding is neither about what is the appropriate method of calculating soil savings, nor about determining the most appropriate offset ratio for this project.

Board rely on the rationale of adjusted standards that it granted pursuant to Section 28.3 of the Act.

G. *Res Judicata*/Collateral Estoppel are Not Applicable to this Proceeding.

Illinois-American asserts that the Agency's recommendation to deny the extension for an adjusted standard is barred by *res judicata* and collateral estoppel. These doctrines are not applicable to this proceeding. The doctrine of *res judicata* states 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 new proceedings. The doctrine has three essential elements to its application, all of which must be met: (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties, or privity between subsequent parties and the original parties. *People ex rel. Burris v. Progressive Land Developers, Inc.* 151 Ill.2d 285, 294 (Ill. 1992). In the case of collateral estoppel, there are also three elements: (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; (3) the party against whom estoppel is asserted was a party or a party in privity with a party to the prior adjudication. *Jersey Sanitation*, PCB 97-2, slip op. at 5; *ESG Watts*, PCB 96-181 and 97-210, slip op. at 2-3, citing *Talarico v. Dunlap*, 177 Ill.2d 185, 191, 685 N.E.2d 325, 328 (1997). Further, the "[p]arty claiming [collateral] estoppel has the burden of proving by clear and convincing evidence that it applies. *Boelkes v. Harlem Consolidated School Dist. No. 122*, 363 Ill.App.3d 551, 842 N.E.2d 790, (Ill.App.2d Dist. 2006) (*Citing Geddes v. Mill Creek Country Club, Inc.*, 196 Ill.2d 302, 324, 256 Ill.Dec 313, 751 N.E.2d 1150 (2001)).

One of the essential elements under both doctrines is that there was a final judgment on the merits rendered by a court of competent jurisdiction. Illinois-American fails to prove this element has been met. Here, the Board never intended for AS 99-6 to be the final judgment on the merits of Illinois-American's funding of the GRLT project (indefinitely) in lieu of technology-based standards for its Alton facility. Indeed, in AS-99 there was only a judgment regarding Illinois-American's adjusted standard through October 16, 2007. Because of the Board's mandated seven(7)-year sunset provision, Illinois-American cannot claim that the Board has reached a "final judgment" regarding this current proceeding. The Board required the sunset provision so that it would have the authority to revisit Illinois-American's adjusted standard. In order for Illinois-American to continue to receive relief from the effluent standards, it must obtain another adjusted standard. Further, the Agency is required under Section 104.416(a) of the Board's regulations to submit a recommendation for every proposed adjusted standard. Also, the fact that Illinois-American has to re-apply for an adjusted standard is a scenario solely created by the Board and out of the hands of the Agency. In short, the doctrines of *res judicata* and collateral estoppel do not apply to this proceeding because an essential element, one of the respective and required, cannot be met.

V. Conclusion

Pursuant to 415 ILCS 5/28.1 and consistent with 415 ILCS 5/27(a), the Agency recommends that the Board should not grant Petitioner, Illinois-American's, requested relief from the total suspended solids and total iron discharges limitations and requirements contained in 35 Ill. Adm. Code 304.124, for its public water supply treatment plant on the Mississippi River, located in the City of Alton, Madison County.

The Part 304 effluent standards are the absolute minimum standards for point sources; therefore, the Board should grant an adjusted standard from these standards only in rare and most extraordinary circumstances. These standards are the backbone of the CWA and the Illinois' water pollution control mechanism. In the past, the Board cautioned the regulated community that the Board will rarely grant relief from Part 304 effluent standards, and the Board's grant of such relief should not be viewed as a valid precedent. *See In The Matter Of: Petition for Site Specific Exception to Effluent Standards for the Illinois-American Water Company, East St. Louis Treatment Plant*, R85-11, slip op. at 11, February 2, 1989. Without such policy, the Mississippi River would become a stream where most of the 47 point sources would dump their untreated TSS and total iron. In turn, the condition of the Mississippi River that is already stressed by the actions of man would only worsen over time. To "restore, protect, and enhance the quality of the Mississippi River," the Board should firmly establish in this proceeding that no treatment is an unacceptable option when the technology is economically reasonable and technically feasible.

Fairness also requires that Illinois-American's request for relief be reviewed in context with the fact that there are approximately 47 point sources who are complying with the same TSS and total iron requirements prior to discharging into the Mississippi River. Illinois-American has failed to show that its economic hardship is unreasonable or disproportionate to other dischargers. Like other businesses in the State, Illinois-American is in the business of providing a finished product, drinking water. Like other businesses, Illinois-American should also be subject to the same regulations so that we

can accomplish the stated purpose of the CWA, "to restore, protect, and enhance the quality of the environment."

The Agency believes that the requested relief is inconsistent with applicable federal and state law. The Agency urges the Board to deny the Petitioner's request for extending this relief. Like all other point sources in the State, Illinois-American should be required to meet the State's effluent standards.

WHEREFORE, for the reasons stated herein, the Agency recommends that the Pollution Control Board **DENY** the adjusted standard Petition of Illinois-American Water Company.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

BY: _____

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Assistant Counsel
Division of Legal Counsel

DATED: September 10, 2007

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

CERTIFICATE OF SERVICE

I, Sanjay K. Sofat, certify on September 10, 2007, I filed the above **AGENCY'S POST-HEARING BRIEF** electronically with the Clerk of the Pollution Control Board and with Carol Webb, Hearing Officer, at webbc@illinois.gov. In addition, I served copies of the foregoing electronically upon Bradley S. Hiles and Alison M. Nelson, counsel for petitioner Illinois-American, at bhiles@Blackwellsanders.com and anelson@Blackwellsanders.com. An executed copy of the **AGENCY'S POST-HEARING BRIEF**, will be mailed on September 11, 2007, by first class mail, postage prepaid, upon the following persons:

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Respectively submitted,

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