

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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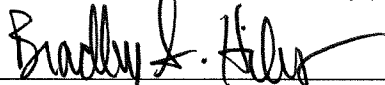
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PLEASE TAKE NOTICE that on September 28, 2007, the PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S MOTION FOR LEAVE TO FILE A SUR-REPLY *INSTANTER* and PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S SUR-REPLY TO THE AGENCY'S POST-HEARING REPLY BRIEF were filed with the Clerk of the Pollution Control Board. A copy is herewith served upon you.

Respectfully submitted,

ILLINOIS-AMERICAN WATER COMPANY

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An Attorney for Petitioner

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**PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S
MOTION FOR LEAVE TO FILE A SUR-REPLY *INSTANTER***

Petitioner Illinois-American Water Company ("Illinois-American Water"), by its attorneys Bradley S. Hiles and Alison M. Nelson, respectfully moves for leave under 35 Ill. Adm. Code 101.500(e) to file a sur-reply in opposition to the Agency's Post-Hearing Reply Brief (hereafter, the "Agency Response" or "Ag. Resp. Br."). In support of this motion, Illinois-American Water states as follows:

1. On August 28, 2007, a hearing in this matter was held at the Madison County Administration Building in Edwardsville, Illinois.
2. The Hearing Report entered August 29, 2007, provides that concurrent briefs were due by September 10, 2007, and that concurrent responses were due by September 18, 2007.
3. On September 10, 2007, Illinois-American Water filed the PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S POST-HEARING BRIEF IN SUPPORT OF ITS AMENDED PETITION FOR EXTENSION OF ADJUSTED STANDARD, and the Illinois Environmental Protection Agency (the "Agency") filed the AGENCY'S POST-HEARING BRIEF.
4. On September 18, 2007, the Agency responded to Illinois-American Water's post-hearing brief by filing the Agency Response, and Illinois-American Water responded to the Agency's post-hearing brief by filing the PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S RESPONSE TO THE AGENCY'S POST-HEARING BRIEF.
5. The Agency Response contains an argument that is both misleading, without merit, and untimely. It is an argument that could have been presented at the hearing. Specifically, the Agency Response states that "Illinois-American's 'trading project' has been removed from USEPA's Region V Trading List because there were no trading provisions and it is generally inconsistent with federal law." (Ag.

Resp. Br. at 13.) The Agency submits an e-mail from George Azevedo and a spreadsheet attached to that e-mail in support of its argument.

6. Under Section 101.500(e) of the Board's rules, a party filing a motion does not have the right to reply to a response to that motion "except as permitted by the Board or the hearing officer to prevent material prejudice." A motion for leave to file a reply must be filed with the Board within 14 days after service of the response.
7. Here, filing a reply to the Agency Response is necessary to prevent material prejudice because:
 - The documents attached to the Agency's Response (a spreadsheet and e-mail) were in the possession of Toby Frevert, (the Agency's only testifying witness), five days before the August 28, 2007 hearing. Yet, the Agency did not offer those documents into evidence or even hint of their existence. The Agency also failed to attach the documents to its Post-Hearing Brief. Instead, the Agency waited until Petitioner had no further right to present testimony or written argument to spring these documents and arguments on Petitioner and the Board;
 - Neither the spreadsheet nor the e-mail establish that Illinois-American Water's point/non-point source offset was removed from the U.S. Environmental Protection Agency's ("USEPA's") Trading Permit Database because Illinois-American Water's NPDES permit does not contain trading provisions;
 - The Agency's argument is wrong, because Illinois-American Water's NPDES permit does contain trading provisions;
 - Neither the spreadsheet nor the e-mail support the Agency's argument that Illinois-American Water's point/non-point source offset was removed from USEPA's Trading Permit Database because the offset is "generally inconsistent with federal law"; and
 - Illinois-American Water believes that the e-mail attached to the Agency Response is not a true and accurate copy of the e-mail Toby Frevert received on August 23, 2007.
8. Whether Illinois-American Water's use of an offset involving non-point source savings is consistent with federal law is an important issue in this proceeding, and the Board should consider the views of both parties on this newly-presented information before rendering its decision.
9. Granting this motion will not result in hardship or prejudice to the Agency. The Agency received the e-mail from George Azevedo and the attached spreadsheet on August 23, 2007 — before the hearing, and before the concurrent briefs were

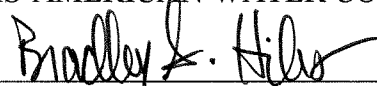
due. Further, granting this motion will ensure that this newly-presented evidence is properly addressed for the Board's consideration.

In order to prevent the material prejudice that would result from the inability to confront the Agency's argument, Illinois-American Water requests leave to file a sur-reply to the Agency Response. In the interest of allowing the Board to decide whether to grant Illinois-American Water's proposed extension of AS 99-6 at its meeting on October 4, 2007, or October 18, 2007 without delay, the proposed sur-reply is attached to this Motion for Leave.

Respectfully submitted,

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**PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S
SUR-REPLY TO THE AGENCY'S POST-HEARING REPLY BRIEF**

Petitioner Illinois-American Water Company ("Illinois-American Water"), by its attorneys Bradley S. Hiles and Alison M. Nelson, sur-replies in opposition to the Agency's Post-Hearing Reply Brief (hereafter, the "Agency Response" or "Ag. Resp. Br.").

ARGUMENT

The Agency Response states that "Illinois-American's 'trading project' has been removed from USEPA's Region V Trading List because there were no trading provisions and it is generally inconsistent with federal law." (Ag. Resp. Br. at 13.) This argument is both misleading, without merit, and untimely, should be rejected for any one of five reasons, discussed below.

1. Neither the Spreadsheet nor the E-mail Establish that Illinois-American Water's Offset was Removed from USEPA's Trading Permit Database Because the NPDES Permit Does Not Contain Trading Provisions

The Agency Response states that Illinois-American Water's offset project was removed from USEPA's Trading Permit Database because "there were no trading provisions" in Illinois-American Water's NPDES permit. (Ag. Resp. Br. at 13.) Nothing in the spreadsheet or the e-mail attached to the Agency's Reply supports this outrageous contention. Viewed in isolation, the words in the Trading Permit Database spreadsheet — listing the "Trade Status" of Illinois-American Water's offset as "[n]o longer considered a trade in R5. Permit never included trading

provisions?” — might support the Agency’s argument, but the punctuation cannot be overlooked. The statement that the permit never included trading provisions is followed by a question mark. (Ag. Resp. Br. at Attachment 2.) This clearly shows that the author of the spreadsheet, an intern, was (correctly) unsure of the truthfulness of this statement.

In addition, the intern’s correspondence forwarding the spreadsheet to USEPA’s Region heads asks all recipients to “verify that the information is correct.” (Ag. Resp. Br. at Attachment 1.) Similarly, Mr. Azevedo’s e-mail forwarding the spreadsheets to “Water Quality Trading Colleagues” asks all recipients to “review the information in the attached spreadsheet from your state and inform me of any errors.” *Id.* Illinois-American Water’s NPDES permit does contain trading provisions¹ and, not surprisingly, the Agency failed to notify Mr. Azevedo of this mistake. (Ag. Resp. Br. at Attachment 1.) The Agency’s claim that Illinois-American Water’s offset “captured the attention of USEPA” and was then removed from the Trading Permit Database because “there were no trading provisions” is therefore misleading and erroneous on its face.

2. Illinois-American Water’s NPDES Permit Does Contain Trading Provisions

In any case, the Agency’s argument is wrong because Illinois-American Water’s NPDES Permit does contain trading provisions. The Permit provides that “[t]he 1995 ‘Piasa Creek Macrosite: a Demonstration of Non-Point Source Pollution Remediation and Water Quality Improvement Plan’ (‘Piasa Creek Plan’) shall be revised to achieve by October 2010 a sustained 2:1 reduction of sediment loading in the Mississippi River when comparing control of the sediment to the Piasa Creek to the discharge of residuals from permittee’s Alton facility,” and that “[w]ithin 36 months of the effective date of this permit, permittee through the GRLPA shall

¹ This issue is discussed in Section 2, below.

begin significant implementation of the Piasa Creek Plan.” *See* NPDES Permit No. IL0000299, Special Condition No. 13(b), (g) (attached to the Petition for Extension as part of Attachment C). Together, these conditions require Illinois-American Water to implement a plan to achieve a 2:1 reduction, or “offset,” and the Scope of Services attached to the Piasa Creek Plan clearly outlines the responsibilities of Illinois-American Water and Great Rivers Land Trust (“GRLT”) to accomplish this.

Contrary to the Agency’s assertion, these “offset” permit conditions are “trading provisions.” EPA’s May 1996 Draft Framework for Watershed-Based Trading explains that “[g]enerally, the term ‘trading’ describes any agreement between parties contributing to water quality problems on the same waterbody that alters the allocation of pollutant reduction responsibilities among the sources.” *See* EPA’s Draft Framework at xiii. The framework groups “trades” into five categories, including “Point/Nonpoint Source Trading,” in which “a point source(s) arranges for control of pollutants from nonpoint source(s) to undertake greater-than-required pollutant reductions in lieu of upgrading its own treatment beyond the minimum technology-based discharge standards, to achieve water quality objectives more effectively.” *See id.* Here, Illinois-American Water (a point source) has, through its agreement with GRLT, arranged for control of pollutants from nonpoint source(s) in the Piasa Creek Watershed to achieve a 2 to 1 offset (a greater-than-required pollutant reduction).

Notably, the spreadsheet itself acknowledges that Illinois-American Water’s offset is a trading program. One of the columns of the table, titled “PS-PS or PS-NPS?”, identifies whether the listed projects are “point source/point source” projects or “point source/non-point source” projects. The entry for Illinois American Water Company’s NPDES Permit categorizes the

offset as “PS-NPS,” which is consistent with the categories of trading projects identified in EPA’s Draft Framework.

The Agency’s argument that “there were no trading provisions” in Illinois-American Water’s NPDES Permit, *see* Ag. Resp. Br. at 13, ignores the language of EPA’s Draft Framework, and ignores the sections of the Trading Permit Database spreadsheet that categorize the offset as a trade. USEPA’s misunderstanding of the specific provisions in Illinois-American Water’s NPDES permit is forgivable,² but the Agency’s failure to correct an obvious mistake simply because it served their end goal — defeating the adjusted standard at any cost — is not.

3. Neither the Spreadsheet nor the E-mail Support the Agency’s Argument that Illinois-American Water’s Offset was Removed from USEPA’s Trading Permit Database Because the Offset is “Generally Inconsistent with Federal Law”

The Agency Response also states that Illinois-American Water’s offset project was removed from USEPA’s Trading Permit Database because the offset is “generally inconsistent with federal law.” (Ag. Resp. Br. at 13.) Nothing in the spreadsheet or the e-mail supports this. The spreadsheet does not even mention consistency with federal law, much less present this as a reason that Region V would no longer consider the offset a “trade.” (Ag. Resp. Br. at Attachment 2.) Also, the correspondence from Mr. Azevedo simply forwards the spreadsheet and asks all recipients to review the information and inform him of any errors. (Ag. Resp. Br. at Attachment 1.) The Agency’s claim that Illinois-American Water’s offset “captured the attention of USEPA” and was then removed from the Trading Permit Database because “it is generally inconstant with federal law” is therefore misleading and entirely without support.

² The Trading Permit Database spreadsheet was prepared by an ORISE Intern located in EPA’s Washington, D.C. office.

4. Illinois-American Water Believes that the E-mail Attached to the Agency's Response is not a True and Accurate Copy of the E-mail Toby Frevert received on August 23, 2007

The Affidavit of Toby Frevert attached to the Agency Response states that "I received an email from Mr. George Azevedo, the NPDES Nutrients and Water Quality Trading Coordinator for USEPA Region 5, on August 23, 2007," and that "[t]he email attached to the Agency's Post-Hearing Reply Brief as Attachment 1 is a true and accurate copy of that email." (Ag. Resp. Br. at 17.) Illinois-American Water believes that these statements are untrue.

Notably, Toby Frevert is not listed as a recipient of Mr. Azevedo's August 23, 2007 e-mail, sent at 10:01:53 AM. (Ag. Resp. Br. at Attachment 1.) (In fact, no recipients are listed all.) Rather, the e-mail itself shows that Mr. Azevedo's correspondence was forwarded to Mr. Frevert by Al Keller at 11:32 AM on August 23, 2007. Illinois-American Water objects to the Agency's use of the e-mail because it does not appear that Mr. Frevert received the e-mail directly from Mr. Azevedo and thus cannot attest to its authenticity.

Also, several sections of the e-mail indicate that someone in the Agency redacted or otherwise edited portions of the e-mail before submitting it to the Board as an attachment. No recipients of Mr. Azevedo's correspondence are listed; the e-mail is addressed, "Dear Water Quality Trade Colleagues," but the address block that should precede the e-mail is missing. Also, no recipients are listed for Mr. Keller's correspondence. His brief comment is included, but the address block that should precede his comment is missing. Finally, there are several inches of space on the second page of the e-mail—a rather interesting gap—which suggests that certain content was obscured. Illinois-American Water thus objects to the Agency's use of the e-mail because it appears that e-mail submitted by the Agency is not the full and complete e-mail received by Mr. Frevert.

5. The Agency Should be Barred From Introducing the E-mail and Spreadsheet in the Last Round of Briefing

With some regret, Illinois-American Water also presents a troubling issue of timing to the Board. Toby Frevert, the Agency's only witness at the August 28, 2007 hearing, was in possession of the Azevedo e-mail and the USEPA Trading Permit Database Spreadsheet five full days before he testified. He conveniently failed to mention either document at that time or offer either document into evidence. Had he done so, he would have been subject to cross-examination, and the documents would have been objected to and perhaps excluded from evidence on authenticity, hearsay and "best evidence" grounds. Similarly, the Agency could have included the documents in its Post-Hearing Brief on September 10 – eighteen days after Mr. Frevert came into possession of the e-mail and Spreadsheet – but the Post-Hearing Brief was silent with respect to both documents. So, once again, Illinois-American Water had no chance to review, object to, or even argue against the relevance, authenticity or believability of the documents. Only now, after Illinois-American Water's time to cross-examine Mr. Frevert and submit final written arguments has passed, does the Agency elect to produce this "new evidence." Sandbagging of this variety should not be permitted by the Board. The Azevedo e-mail, the Database and all arguments and references thereto in the Agency's Reply Brief should be stricken from the record.

CONCLUSION

Fundamental notions of good faith and fair dealing dictate that a portion of the Agency's Reply Brief, and all of the attachments to that Brief, be stricken from the record. The "new information" offered by the Agency was known to the Agency's one and only witness five days before the hearing. Waiting until after the hearing and after the filing of Post-Hearing Briefs to


“spring” this information on the Petitioner and the Board is classic sandbagging and should not be allowed.

But if the Board elects to consider the Agency’s arguments and the documents the Agency submits in support, they should be seen for what they are – misleading arguments supported only by unreliable information generated by a USEPA intern, information that is loaded with conclusions which are in some cases clearly wrong. The most blatant error is that the intern concluded that Illinois-American Water’s NPDES Permit “never included trading provisions.” Exactly the opposite is true: Illinois-American Water’s permit does contain trading provisions. Yet, the Agency, when specifically invited to inform USEPA of any errors, chose not to correct that blatant error. Why not? Because the Agency saw an opportunity to have the last word in this case. In that regard, Al Keller’s final message to Toby Frevert is telling. Rather than informing USEPA that Illinois-American Water’s NPDES permit contains trading provisions, Mr. Keller said “I am going to advise George the info is perfect for Illinois.” It may be perfect for the Agency’s agenda in this case, but it is an imperfect view of the truth.

For the foregoing reasons, Illinois-American Water requests that the Board disregard the Agency’s argument and grant the proposed adjusted standards based on the remaining arguments presented by the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2007, the attached PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S MOTION FOR LEAVE TO FILE A SUR-REPLY *INSTANTER* and PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S SUR-REPLY TO THE AGENCY'S POST-HEARING REPLY BRIEF were filed by electronic transmission with the Office of the Clerk of the Illinois Pollution Control Board, and were served by first class mail, postage prepaid, upon the following persons:

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