

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 October 3, 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 RESPONSE TO ILLINOIS-AMERICAN'S MOTION FOR LEAVE TO FILE A SUR-REPLY INSTANTER and AGENCY'S RESPONSE TO ILLINOIS-AMERICAN'S SUR-REPLY INSTANTER, a copy of which is herewith served upon you.

John Therriault, Assistant Clerk
Illinois Pollution Control Board
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 
Sanjay K. Sofat
Assistant Counsel

Dated: October 3, 2007
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

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AGENCY'S RESPONSE TO ILLINOIS-AMERICAN'S
SUR-REPLY BRIEF

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel, respectfully moves for leave under 35 Ill. Adm. Code 101.500(e) to file a response to Illinois-American Water Company's ("Illinois-American") Motion for Leave to File a Sur-Reply Instantly and its Sur-Reply (hereinafter "*IL-Amer. Sur-Reply*") to the Agency's post-hearing reply brief. In support of this motion, the Agency states as follows:

1. Pursuant to the Hearing Officer Order dated August 20, 2007, the parties were directed to file concurrent post-hearing briefs by September 10, 2007. The concurrent responses were due by September 18, 2007.
2. On September 10, 2007, both Illinois-American and the Agency electronically filed their post-hearing briefs with the Board. On the same date, Illinois-American also provided the Agency with an electronic copy of its brief.
3. Illinois-American's post-hearing brief contained email correspondence between Illinois-American's Ms. Cindy Hebenstriet and Mr. George Azevedo of USEPA, Region 5, in an attempt to contradict statements made by Mr. Toby Frevert in his deposition. See Illinois-American's Post Hearing Brief, FN 10 and Exhibit 1.
4. The Agency responded to Illinois-American's post-hearing brief by filing the Agency's post-hearing reply brief on September 18, 2007. Illinois-American also responded to the Agency's post-hearing brief on September 18, 2007.

5. In the Agency's post-hearing reply brief, the Agency responded to Illinois-American's post-hearing brief asserting that its adjusted standard (AS 99-6) is a trading project and communication with USEPA official, Mr. Azevedo, confirms this assertion. After checking the Agency's communication with Mr. Azevedo, the Agency realized it had received correspondence from USEPA concluding otherwise. *See* Agency's Post-Hearing Reply Brief, Attachments 1 and 2. As the Board will note, Mr. Frevert forwarded the email communication with Mr. Azevedo to the Agency's attorney, Sanjay Sofat, on September 11, 2007—a day after the Agency filed its Post-Hearing brief.
6. On September 28, 2007, Illinois-American electronically filed a Motion for Leave to File a Sur-Reply Instantly and its Sur-reply brief.
7. Under Section 101.500(e) of the Board's rules, a party filing a motion does not have the right to reply "except as permitted by the Board or the hearing officer to prevent material prejudice."
8. As Illinois-American failed to comply with Section 101.500(e) by not first seeking permission from either the Board or the Hearing Officer, the Agency respectfully request that this Board dismiss Illinois-American's motion.
9. If this Board accepts Illinois-American's motion, the Agency contends that filing a response to *IL-Amer. Sur-Reply* is necessary to prevent material prejudice. Illinois-American has made serious, unfounded, and inaccurate allegations about the Agency's motive for attaching the USEPA correspondence and spreadsheet.
10. Granting this motion will not result in hardship or prejudice to Illinois-American.

In order to prevent the material prejudice that would result from the inability to respond to Illinois-American's argument, the Agency requests leave to file a response to *IL-Amer. Sur-Reply*. Also, in the interest of allowing the Board to rule on Illinois-American's proposed adjusted standard at its meeting on October 4, 2007, or October 18, 2007, without delay, the Agency's response to *IL-Amer. Sur-Reply* is attached to this Motion for Leave.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

BY: 

Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

DATED: October 3, 2007

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**AGENCY'S RESPONSE TO ILLINOIS-AMERICAN'S
SUR-REPLY INSTANTER**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel, files this response in opposition to Illinois-American's sur-reply brief (Hereinafter "*IL-Amer. Sur-Reply*").

As Illinois-American has not complied with Section 101.500(e) by not first obtaining permission to file a sur-reply from either the Hearing Officer, or the Board, the Agency respectfully requests this Board to deny Illinois-American's motion for leave to file a sur-reply and memorandum in opposition of the Agency's post-hearing reply brief. In the event that this Board grants Illinois-American's motion for leave to file a sur-reply, the Agency presents the following arguments:

ARGUMENTS

Illinois-American claims that the Agency's argument regarding the USEPA email and spreadsheet should be rejected because it is misleading, without merit, and untimely. Illinois-American specifically takes issue with: 1) the timing of the Agency's

introduction of Mr. Azevedo's email communication and spreadsheet; 2) the authenticity of the email; and 3) the Agency's characterization of this email.

1. The Agency Did Not Intentionally Exclude the USEPA Email and Spreadsheet in an Attempt to "Sandbag" its Reply Brief.

Contrary to Illinois-American's belief, the Agency did not intentionally exclude the USEPA email and spreadsheet until Illinois-American had no opportunity to respond. *IL-Amer. Sur-Reply* at 6. Rather, in reality, the Agency was simply responding to Illinois-American's post-hearing brief argument, regarding correspondence with Mr. Azevedo of USEPA, Region 5. Due to the nature of the briefing schedule for this proceeding, (which required concurrent filings), inevitably both sides would not have an opportunity to respond to the other parties' post-hearing reply brief. This is a situation that is beyond the Agency's control.

Illinois-American claims that the Agency should have presented this newly discovered evidence at the August 29, 2007 Board hearing. Illinois-American further criticizes the Agency (namely Mr. Toby Fervert) for "conveniently" failing to mention either document at that time or offer either document into evidence.¹ *IL-Amer. Sur-Reply* at 6. Nevertheless, at the Board's Hearing on August 29, 2007, Mr. Toby Frevert may have received the email in his mailbox, but having an email in one's possession does not necessarily mean that one also knew the importance of the email. As one could imagine, Mr. Frevert, the Manager of the Division of the Water Pollution Control, receives many emails each day, some of which are from USEPA. Unfortunately, Mr. Frevert does not

¹ Interestingly enough, even by Illinois-American's own asserted standard, it similarly violated this unspoken rule by not offering into evidence its own correspondence with Mr. Azevedo at the Board hearing, nor did mention any such correspondence existed. Clearly, Illinois-American had their email correspondence with Mr. Azevedo in their possession at the time of the Board hearing.

have the time or the luxury to immediately open every email and dissect the relevance of the email for each of the many issues presented to Mr. Frevert on a daily basis. Clearly, Mr. Frevert has many other obligations than merely checking emails all day. Due to Mr. Frevert's busy schedule, issues of urgency get first priority. As such, Mr. Frevert was simply unaware of the importance of the USEPA correspondence at the time of the hearing.² Only when the Agency was prompted by Illinois-American's attachment of its correspondence with Mr. Azevedo in its post-hearing brief, did the Mr. Frevert recall the USEPA email regarding trading projects.

Illinois-American also argues that since the Agency did not present the emails at the Board hearing, it had a responsibility to attach the correspondence to its post-hearing brief. But, contrary to Illinois-American's belief, the purpose of a reply brief is not simply to repeat verbatim what was written in the opening brief. Further, the Agency was not under any obligation to anticipate every argument that Illinois-American might raise in its post-hearing brief and address it in the Agency's post-hearing brief. *See Oliveira v. Amoco Oil Co.*, 331 Ill.App.3d 886, 726 N.E.2d 51, 55 (4th Dist. 2000) *vacated in part & rev'd on other grounds*. Rather, the Agency's reply brief properly responded to arguments made in Illinois-American's post-hearing brief.

Again, the Agency only realized the significance of this specific email correspondence and spreadsheet after the Agency read Illinois-American's post-hearing brief detailing its correspondence with Mr. Azevedo. The Agency attached the information in order to give the Board the most up-to-date and accurate information available.

² Illinois-American repeatedly notes that Mr. Frevert had the USEPA correspondence and spreadsheet in his possession "5 days" before the Board hearing. In reality, it was only 3 days, because naturally Mr. Frevert does not check his email or dissect the prior week's email on weekends.

2. The Email Correspondence and Attached Spreadsheet is a True and Accurate Copy of the Email Mr. Frevert Received on August 23, 2007.

Illinois-American also claims that the email attached to the Agency's reply brief is not a true and accurate copy of the email Mr. Frevert received on August 23, 2007.

Illinois-American specifically identifies three flaws 1) a missing address block from Mr. Azevedo's email to "Water Quality Trade Colleagues"; 2) no recipients are listed for Mr. Keller's correspondence, as the address block proceeding his email is missing; and 3) there are "several inches of space on the second page of the email—a rather interesting gap." *IL-Amer. Sur-Reply* at 5.

After reviewing Illinois-American's identified flaws with the attached email correspondence, the Agency obtained a hard copy print out of the email correspondence directly from Mr. Frevert, rather than the print out of the forwarded email that was attached to the Agency's post-hearing reply brief. (*See* Agency's post-hearing reply brief, Attachment 1). This hard copy print out of Mr. Azevedo's email correspondence to "Water Quality Trading Colleagues," as opposed to the forwarded copy, shows the "missing address block." Notably, Mr. Frevert was a recipient of this email correspondence from Mr. Azevedo. (*See* Attachment 1). Therefore, Mr. Frevert can attest to the authenticity of the USEPA correspondence and spreadsheet.

Illinois-American also questions the missing address block from Mr. Keller's email correspondence to Mr. Frevert. Again, after printing a hard copy of the email correspondence from Mr. Frevert, as opposed to the forwarded copy, the address block appears. (*See* Attachment 2). Mr. Frevert was the only recipient of this email. The

Agency has no idea why the address blocks did not appear on forwarded copies, but nonetheless, this “flaw” was not created by someone in the Agency.

Additionally, the Agency notes that the “several inches of space on the second page of the email,” is still present on the print outs taken directly from Mr. Frevert’s computer. The fact that the “interesting gap” is on both the forwarded copy and the direct print out illustrates that the gap is not so interesting, but rather the Agency’s printer page set up format. Thus, Illinois-American’s objection to the Agency’s use of the email on the grounds that it is not the full and complete email received by Mr. Frevert is without merit.

3. Illinois-American’s NPDES Permit Does Not Contain Trading Provisions.

Illinois-American further claims that neither the spreadsheet nor the email establish that the Illinois-American’s sedimentation reduction project was removed from USEPA’s Trading Permit database because the NPDES permit does not contain trading provisions.³ In support, Illinois-American cites NPDES Permit No. IL0000299, Special Condition No. 13(b), (g). In *IL-Amer. Sur-Reply*, Illinois-American attempts to discredit the Agency’s characterization of the spreadsheet. Specifically, Illinois-American states that the entry with regards to its offset states that the project is “[n]o longer considered a trade in R5. Permit never included trading provisions?.” Illinois-American highlights the

³ Illinois-American also attacks the Agency’s typographical oversight. See *Agency’s post-hearing reply brief* at 13. The spirit of the Agency’s argument is that Illinois-American’s “trading project” was removed because there were no trading provisions and it is generally inconsistent with federal *policy* (not law, as was written in the reply brief). Without any type of prompting from Illinois EPA, the USEPA spreadsheet indicated that Illinois-American’s sedimentation reduction project is not a trading project, consistent with the structure specifically prescribed by the USEPA federal policy on trading. The Agency’s role in this spreadsheet was to merely affirm what USEPA evidently already knew—Illinois-American’s sedimentation reduction project is not a trading project.

fact that the intern added a question mark, indicating the author of the spreadsheet was “unsure of the truthfulness of the statement.” *IL-Amer. Sur-Reply* at 2. Mr. Azevedo’s email forwarding the spreadsheet to “Water Quality Trading Colleagues” asked all recipients to “review the information in the attached spreadsheet from your state and inform me of any errors.” Illinois-American specifically takes issue with the fact that the Agency failed to notify Mr. Azevedo of “this mistake” contained in the USEPA spreadsheet. *IL-Amer. Sur-Reply* at 2.

The Agency asserts that any question that the intern may have had about whether the permit included trading provisions was cleared up by the Agency’s response that the information contained in the spreadsheet is correct. Illinois-American’s sedimentation reduction project is not a trading project, neither within the context of Illinois nor in the context of federal guidance⁴.

Illinois-American also asserts that Illinois-American’s NPDES permit does contain trading provisions. Naturally, Illinois-American overlooks a very important fact. These conditions were incorporated pursuant to the Board’s Order in AS 99-6. Special Conditions 13(b) and (g) were not structured under the context of any trading policy. Illinois does not have a trading policy. On the other hand, USEPA does have a trading guidance document. Further, even by Illinois-American’s own cited definition of a trade, Illinois-American’s sedimentation reduction project is not a trading project. Specifically, a point/nonpoint source trading occurs when “a point source(s) arranges for control of pollutants from nonpoint source(s) to undertake greater-than-required pollutant

⁴ Illinois-American also argues that the USEPA compiled spreadsheet, “[i]tself acknowledges Illinois-American’s offset is a trading program,” because Illinois-American’s project is contained under the “PS-NPS” category. *IL.Amer. Sur-reply* at 3. This argument is without merit. If there is anything that is clear from that sentence is that USEPA, “[n]o longer considered [Illinois-American’s offset] a trade in R5.”

reductions in lieu of upgrading its own treatment beyond the minimum technology-based discharge standards, to achieve water quality objectives more effectively.” (*emphasis added*) *IL-Amer. Sur-Reply* at 3. As Illinois-American is intending to use the sedimentation reduction project as a substitute to meeting Illinois’ technology-based controls for TSS, the reductions achieved by the sedimentation control project are not in lieu of upgrading its own treatment beyond the minimum technology-based discharge standards. Thus, even under this federal definition Illinois-American’s project is not a trade. To conclude that these conditions are trading provision is simply unfounded.

CONCLUSION

Illinois-American construes the Agency’s use of the USEPA correspondence and spreadsheet as “sandbagging.” This is simply not true. Due to the nature of this proceeding being that concurrent post-hearing briefs and reply briefs were due on the same date, it is likely that both parties could have presented information which the other party would not have an opportunity to respond. Illinois-American’s post-hearing brief included a lengthy discussion regarding Mr. Azevedo. After reviewing the substance of Illinois-American’s post-hearing brief and specifically the information relating to Mr. Azevedo, the Agency conducted its own review of Azevedo correspondence. The Agency merely wanted to present all current and accurate information for the Board’s consideration.

For the foregoing reasons, the Agency respectfully request that this Board reject Illinois-American’s motion for leave to file a sur-reply to the Agency’s post-hearing reply brief.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

BY: 

Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

DATED: October 3, 2007

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P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON) SS

AFFIDAVIT OF TOBY FREVERT

I, Toby Frevert, after being first duly sworn upon my oath, do depose and say as follows:

1. I am employed by the Illinois Environmental Protection Agency, as the Manager of the Division of the Water Pollution Control.
2. I received an email from Mr. George Azevedo, the NPDES Nutrients and Water Quality Trading Coordinator for USEPA Region 5, on August 23, 2007.
3. The email attached to the Agency's Response to Illinois-American's Sur-Reply Brief as Attachment 1 is a true and accurate copy of that email.
4. The email attached to the Agency's Response to Illinois-American's Sur-Reply Brief as Attachment 2 is a true and accurate copy of the email I received from Mr. Al Keller.

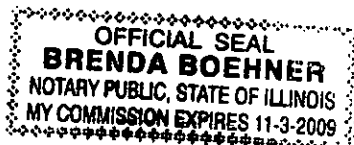
Further, Affiant sayeth not.

Toby Frevert
Toby Frevert

Subscribed and sworn to before me, a notary public in and for said County and State, this 3rd day of October 2007.

Brenda Boehner

Notary Public



My Commission Expires:

11-3-09

From: <Azevedo.George@epamail.epa.gov>
To: <lisa.mccormick@pca.state.mn.us>, <bruce.henningsgaard@pca.state.mn.us>, <duane.schuettpelz@wisconsin.gov>, <toby.frevert@illinois.gov>, <al.keller@illinois.gov>, <Gary.Stuhlfauth@epa.state.oh.us>, <chess@idem.in.gov>
Date: 8/23/2007 10:02:47 AM
Subject: Fw: Trading Permit Database Annual Update

Dear Water Quality Trade Colleagues,

HQ has asked me to confirm the water quality trade data used to track progress in the program.

Can you please review the information in the attached spreadsheet from your state and inform me of any errors. In particular, the "Region 5" tab has the number of permits featuring trading language for each program, the number of facilities covered by those permits, and the number of facilities that have actually traded.

(See attached file: permit_inventory_by region 2007 Working file.xls)

As a reminder HQ released the Water Quality Trading Toolkit recently, please forward this link to interested stakeholders in your state. The Toolkit is a web-based document available at: <http://www.epa.gov/waterqualitytrading/WQTTToolkit.html>

Regards, George.
312-886-0143

----- Forwarded by George Azevedo/R5/USEPA/US on 08/23/2007 09:35 AM -----

Kavya
Kasturi/DC/USEPA
/US

To
08/20/2007 02:44 PM Erik Beck/R1/USEPA/US@EPA, Jeff Gratz/R2/USEPA/US@EPA, Patricia Gleason/R3/USEPA/US, Curt Fehn/R4/USEPA/US@EPA, George Azevedo/R5/USEPA/US@EPA, Scott Stine/R6/USEPA/US@EPA, Mark Matthews/R7/USEPA/US@EPA, Sandra Stavnes/P2/R8/USEPA/US@EPA, Matthew Mitchell/R9/USEPA/US@EPA, Claire Schary/R10/USEPA/US@EPA
cc
Virginia Kibler/DC/USEPA/US

Subject
Trading Permit Database Annual
Update

Hi all,

It's that time of year again! I have attached the latest version the Trading Permit Database excel file. Please look at the file, verify that the information is correct, and update the table with any new information regarding trading in your region. The most important parts of the table are the number of permits featuring trading language for each program, the number of facilities covered by those permits, and the number of facilities that have actually traded.

Please return your revised tables to me by Friday, September 7. If you have any questions let me know.

Thanks everyone! Hope you're all having a great summer (and enjoying reading the Trading Toolkit!)

-Kavya

Kavya P Kasturi
ORISE Intern
US Environmental Protection Agency
Office of Wastewater Management
EPA East - Room 7146
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1200 Pennsylvania Ave., NW
Washington, DC 20460
Phone: 202-564-6635
Fax: 202-564-6384
Email: Kasturi.Kavya@epa.gov

ATTACHMENT 2

From: Al Keller
To: Frevert, Toby
Date: 8/23/2007 11:32:14 AM
Subject: Fwd: Fw: Trading Permit Database Annual Update

I am going to advise George the info is perfect for Illinois.

>>> <Azevedo.George@epamail.epa.gov> 8/23/2007 10:01:53 AM >>>

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Regards, George.
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Kavya
Kasturi/DC/USEPA
/US

To

08/20/2007 02:44 PM Erik Beck/R1/USEPA/US@EPA, Jeff
Gratz/R2/USEPA/US@EPA, Patricia
Gleason/R3/USEPA/US, Curt
Fehn/R4/USEPA/US@EPA, George
Azevedo/R5/USEPA/US@EPA, Scott
Stine/R6/USEPA/US@EPA, Mark
Matthews/R7/USEPA/US@EPA, Sandra
Stavnes/P2/R8/USEPA/US@EPA,
Matthew Mitchell/R9/USEPA/US@EPA,
Claire Schary/R10/USEPA/US@EPA

cc

Virginia Kibler/DC/USEPA/US

Subject
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-Kavya

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CERTIFICATE OF SERVICE


I, Sanjay K. Sofat, certify on October 3, 2007, I filed the above **AGENCY'S RESPONSE TO ILLINOIS-AMERICAN'S MOTION FOR LEAVE TO FILE A SUR-REPLY INSTANTER and AGENCY'S RESPONSE TO ILLINOIS-AMERICAN'S SUR-REPLY INSTANTER** 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 RESPONSE TO ILLINOIS-AMERICAN'S MOTION FOR LEAVE TO FILE A SUR-REPLY INSTANTER and AGENCY'S RESPONSE TO ILLINOIS-AMERICAN'S SUR-REPLY INSTANTER**, will be mailed on October 3, 2007, by first class mail, postage prepaid, upon the following persons:

William Richardson, Chief Legal Counsel
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, IL 62702

Matthew J. Dunn
Division Chief, Environmental Enforcement
Illinois Attorney General
100 W. Randolph Street, 12th Floor
Chicago, IL 60601

Respectively submitted,

Illinois Environmental
Protection Agency



Sanjay K. Sofat
Assistant Counsel