

ILLINOIS POLLUTION CONTROL BOARD  
October 18, 2007

IN THE MATTER OF: )  
)  
PROPOSED EXTENSION OF ADJUSTED ) AS 07-2  
STANDARD APPLICABLE TO ILLINOIS- ) (Adjusted Standard-Water)  
AMERICAN WATER COMPANY'S ALTON )  
PUBLIC WATER SUPPLY FACILITY )  
DISCHARGE TO THE MISSISSIPPI RIVER )  
UNDER 35 ILL. ADM. CODE 304.124, and )  
304.106 )

BRADLEY S. HILES AND ALISON M. NELSON, BLACKWELL, SANDERS, PEPPER,  
MARTIN LLP, APPEARED ON BEHALF OF PETITIONER; and

SANJAY K. SOFAT, ASSISTANT COUNSEL, DIVISION OF LEGAL COUNSEL, ILLINOIS  
ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF  
RESPONDENT.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

**SUMMARY OF DECISION**

The Board today grants petitioner, Illinois-American Water Company (Illinois-American or IAWC), a new adjusted standard to replace the expiring one first granted in 2000 concerning discharges from Illinois-American's public water supply treatment facility in Alton, Madison County. Petition of Illinois-American Water Company's Alton Public Water Supply Replacement Facility Discharge to the Mississippi River for Adjusted Standard From 35 Ill. Adm. Code 304.124, 304.106, and 302.203, AS 99-6 (Sept. 7, 2000 as modified on reconsideration Oct. 19, 2000).

The original adjusted standard, granted with the affirmative recommendation of the Illinois Environmental Protection Agency (Agency or IEPA), required Illinois-American to finance and demonstrate its achievement of a sustained 2:1 reduction of sediment loading to the Mississippi River, at a project cost of roughly \$4,150,000 over ten years. IAWC financed this sediment reduction project in exchange for permission not to treat plant discharges to remove total suspended solids and total iron. In 1999, IAWC estimated installation of control equipment and settling lagoons would involve \$7.4 to \$20 million in capital costs and \$420,000 to \$1.3 million in annual operating costs for the treatment of the effluent IAWC discharges at approximately River Mile 204.

The Agency has recommended that IAWC's current request be denied. In granting this request over the Agency's objection, the Board finds that IAWC has provided the justification required by Section 28.1 of the Environmental Protection Act (Act), 415 ILCS 5/28.1 (2006). Among other things, the Board finds that the relief granted is consistent with federal law, which

has not changed since 2000 when the adjusted standard was granted. The crux of the parties' dispute is whether federal law requires Illinois' IAWC to install treatment technology (a point source control) prior to, rather than in lieu of, investment in any nonpoint source controls sediment reduction program. IAWC continues to believe its adjusted standard is consistent with federal law. The Agency believes it is not, notwithstanding its position when the adjusted standard was originally granted. The Agency now contends that IAWC cannot be lawfully granted an adjusted standard, and that IAWC's installation of treatment technology is absolutely required. The United States Environmental Protection Agency (USEPA) has not filed a comment in this proceeding, although the parties have submitted to the Board e-mail communications between their employees and USEPA which each has argued supports its own position. Given USEPA's silence here, the Board sees no reason to retreat from its previous position.

The Board also finds that petitioner's sediment reduction program, know as the Piasa Creek Watershed Project, has more than fulfilled the expectations leading the Board to grant the original adjusted standard. As a condition of AS 99-6, petitioner agreed to expend \$4,150,000 over the course of 10 years. The Piasa Creek Watershed Project, administered under contract by the Great Rivers Land Trust (GRLT), has won various awards, as well as national recognition and community approval and support. As detailed later in this opinion, by the ninth year into the 10-year project, petitioner hoped to document the prevention of sediment from entering the Mississippi by a 2 to 1 ratio of sediment prevented to total suspended solids (TSS) discharged by IAWC. In AS 99-6, IAWC predicted that the new facility would discharge approximately 3,360 tons of residual solids per year back into the Mississippi. Based on actual conditions of the facility, IAWC currently estimates only 1,600 tons of TSS per year are discharged. According to IAWC and the GRLT, by the fifth year, the Piasa Creek Watershed Project had achieved a savings of approximately 6,487 tons of soil per year. By the sixth year, the Project had saved 6,691 tons of soil per year, representing a 4.2 to 1 offset ratio. In addition to soil savings, sediment reductions have also prevented approximately 79 tons of total iron per year from entering the Mississippi, offsetting the estimated 21 tons per year that IAWC discharges by a ratio of 3.8 to 1. *See infra*, p. 13.

Illinois-American has satisfied all conditions of the original adjusted standard, and has justified grant of a permanent one given the unique circumstances involved. While not finding that the formal legal principles of *res judicata* or collateral estoppel apply here, the Board finds that Illinois-American has reasonably relied on the professional and legal judgment of the Board and the Agency in making its decision not to install treatment facilities at the Alton plant and to instead pursue sediment reduction. In extending IAWC's adjusted standard, the Board is not here granting blanket permission for similar offset projects in lieu of installation of control technology, or establishing principles of any yet-to-be codified Illinois water quality trading policy. Today's action has little precedential effect, as no other Illinois source can claim occurrence of similar events or circumstances.

The Board has expedited its decision consistent with its order of July 26, 2007. The new adjusted standard granted today is effective beginning October 17, 2007 (so that there is no gap between adjusted standards) and has no sunset date. As a result, the Board's effluent standards

for offensive discharges, total suspended solids (TSS), and total iron do not apply to the discharges from the petitioner's Alton facility to the Mississippi River.

The adjusted standard is granted subject to conditions, to insure that the 2:1 sediment offset ratio is maintained as long as the adjusted standard is in effect. The adjusted standard is subject to modification or termination under various circumstances, including any failure by Illinois-American to comply with the adjusted standard's conditions and adoption of new state or federal regulations applicable to Illinois-American's discharges, such as drinking water treatment effluent guidelines.

### **LEGAL FRAMEWORK**

The Act and Board rules provide that a petitioner may request, and the Board may grant, an environmental standard that is different from the generally applicable regulation that otherwise applies to that petitioner. *See* 415 ILCS 5/28.1(a) (2006); 35 Ill. Adm. Code 104.400(a), 104.402. This form of regulatory relief is called an adjusted standard.

The procedures that govern an adjusted standard proceeding are found in Section 28.1 of the Act<sup>1</sup> and Part 104, Subpart D of the Board's procedural rules. *See* 415 ILCS 5/28.1 (2006); 35 Ill. Adm. Code 104.400-104.428. The adjusted standard proceeding is adjudicatory in nature and therefore not subject to the rulemaking provisions of the Act or the Illinois Administrative Procedure Act (5 ILCS 100 (2006)). *See* 415 ILCS 5/28.1(a) (2006); 35 Ill. Adm. Code 101.202. Once a petition for an adjusted standard is filed, the Agency must file its recommendation with the Board. *See* 415 ILCS 5/28.1(d)(3) (2006); 35 Ill. Adm. Code 104.416. The Board's procedural rules specify the required contents for the adjusted standard petition and the Agency recommendation. *See* 35 Ill. Adm. Code 104.406, 104.416.

Section 28.1(d)(1) of the Act (415 ILCS 5/28.1 (2006)) and Section 104.408(a) of the Board's procedural rules (35 Ill. Adm. Code 104.408(a) (quoting the Act)) require the adjusted standard petitioner to publish notice of the petition's filing by advertisement in a newspaper of general circulation in the area likely to be affected by the proposed adjusted standard. Under those provisions, publication must take place within 14 days after the petition is filed. The newspaper notice must indicate that any person may cause a public hearing to be held on the proposed adjusted standard by filing a hearing request with the Board within 21 days after publication. *See* 415 ILCS 5/28.1(d)(1) (2006); 35 Ill. Adm. Code 104.408(b).

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<sup>1</sup> As the parties remark in their briefs, there also exists, in Section 28.3 of the Act an adjusted standard provision specifically addressing the subject of adjusted standards for "direct discharge of waste solids to the Mississippi or Ohio Rivers from clarifier sludge and filter backwash generated in the water purification process". 415 ILCS 5/28.3(a) (2006). While that provision has never been repealed, Section 28.3 sunsetted by its own terms, providing that

No petition for an adjusted standard filed under this Section shall be accepted by the Board after January 1, 1992. 415 ILCS 5/28.3(d)(4) (2006).

The burden of proof in an adjusted standard proceeding is on petitioner. *See* 415 ILCS 5/28.1(b), (c) (2006); 35 Ill. Adm. Code 104.426. Once granted, the adjusted standard applies to petitioner instead of the rule of general applicability. *See* 415 ILCS 5/28.1(a) (2004); 35 Ill. Adm. Code 101.202, 104.400(a). In granting adjusted standards, the Board may impose conditions as may be necessary to accomplish the purposes of the Act. *See* 415 ILCS 5/28.1(a) (2006); 35 Ill. Adm. Code 104.428(a).

### **General Level of Justification Required**

The regulations of general applicability at issue here do not specify a level of justification required to qualify for an adjusted standard. Accordingly, under Section 28.1(c) of the Act, a petitioner must demonstrate that:

1. Factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
2. The existence of those factors justifies an adjusted standard;
3. The requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
4. The adjusted standard is consistent with any applicable federal law. 415 ILCS 5/28.1(c) (2006); *see also* 35 Ill. Adm. Code 104.426(a).

Further, Section 28.1(a) of the Act (415 ILCS 5/28.1(a) (2006)) provides that the Board may grant an adjusted standard “for persons who can justify such an adjustment consistent with subsection (a) of Section 27 of this Act.” Section 27(a) (415 ILCS 5/27(a) (2006)) is a rulemaking provision that requires the Board to “take into account,” among other things, “the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.”

### **Relevant Issues in This Particular Case**

In its opinion in AS 99-6, the Board ordered a termination of the original adjusted standard to allow for a formal determination as to the success of the GRLT Project:

The Board notes that the Agency plans to study the GRLT Project in five years to determine its effectiveness. If the GRLT Project is on schedule, it will be halfway complete in five years. *See In re Petition of Illinois American Water Company* (September 7, 2000), AS 99-6, slip op. at 22. In order for the Board to consider the results of the Agency’s determination of effectiveness, IAWC must request an extension of this adjusted standard for the GRLT Project past its seventh year. The seven-year sunset provision should provide enough time for the Agency to conduct its determination

of effectiveness and enough time for IAWC to apply for the extension to the adjusted standard. Illinois-American, AS 99-6, slip op at 4-5 (Oct. 19, 2000).

In requiring petitioner to update the Board on information concerning the projects results, the Board did not imply that it intended to re-examine or re-weigh the merits of the adjusted standard in all of its particulars. But, consistency with federal law of course remains a relevant factor.

### **PROCEDURAL HISTORY**

On October 31, 2006, Illinois-American Water Company (Illinois-American) filed a petition for extension of an existing adjusted standard applicable to Illinois-American's public water supply treatment facility in Alton, Illinois (Alton facility). Illinois-American, AS 99-6 (Sept. 7, 2000 as modified on reconsideration Oct. 19, 2000). AS 99-6, scheduled to expire by its terms on October 16, 2007, provides that the effluent standards for offensive discharges, TSS, and total iron do not apply to the discharges from the Alton facility. *See* 35 Ill. Adm. Code 304.106, 304.124. Also pursuant to AS 99-6, the general use water quality standard for offensive discharges shall not apply to a one-mile stretch of the Mississippi River that receives effluent from the Alton facility and is immediately downstream from the Alton facility's discharge. *See* 35 Ill. Adm. Code 304.203.

In AS 99-6, the Board granted Illinois-American an adjusted standard so that it could implement a sediment reduction project in the Piasa Creek watershed known as Piasa Creek Watershed Project (PCWP or Project), expected to reduce soil loading into the Mississippi River by two tons for every ton of solids in the Alton facility's effluent. In granting the AS 99-6 petition, the Board required Illinois-American to assess the effectiveness of the project at the October 2005 five-year mark, and imposed a seven-year sunset provision in case the project failed to meet expectations.

The Board accepted the AS 07-2 petition by order of December 7, 2006. Petition of Illinois-American Water Company's Alton Public Water Supply Replacement Facility Discharge to the Mississippi River for Adjusted Standard From 35 Ill. Adm. Code 304.124, 304.106, and 302.203, AS 07-2 (Dec. 7, 2006). Illinois-American stated that the project had already achieved its goal, saving 6,600 tons of soil, four years ahead of schedule. Illinois-American also observed that the project has won awards and exceeded its goals in reducing total iron loading from the Piasa Creek watershed. Illinois-American asked the Board to extend the current adjusted standard indefinitely. *Id.*, slip op. at 1.

The Agency sought and received two extensions of time to file its Recommendation to the petition. *See* 415 ILCS 5/28.1 and 35 Ill. Adm. Code 104.416. Illinois-American filed an amended petition for adjusted standard on April 2, 2007, which by its terms superseded the original petition.<sup>2</sup> In the amended petition, Illinois-American Water stated it "waives a hearing on its request for extension of its adjusted standard, except to the extent that the Petition is opposed

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<sup>2</sup> Among other amendments, the amended petition eliminated the request for relief from 35 Ill. Adm. Code 302.203 as it relates to offensive discharges. *See infra*, at p. 5.

and the relief requested herein by Illinois-American Water may be granted in part only or denied". Am. Pet. at para. 120, p. 45.

The Agency sought and received a third extension of time to file its Recommendation. The Recommendation in opposition to grant of the petition was timely filed on June 18, 2007. The Agency stated it had reversed its position since AS 99-6, and now considers the relief request to be insufficiently justified and contrary to federal law. Petitioner timely filed its response in support of grant of its petition on July 2, 2007. Petitioner did not include a specific request for hearing in its response. By order of July 26, 2007, the Board directed that the matter be set for hearing.

Hearing was held in Edwardsville on August 28, 2007 by Board Hearing Officer Carol Webb. Each of the parties presented witness testimony and exhibits, and three members of the public made oral comments. Pursuant to schedule, each of the parties filed opening briefs on September 10, 2007 and reply briefs on September 18, 2007. During the course of the proceeding, the Board received 10 written public comments<sup>3</sup>, expressing both support and opposition to the grant of a new adjusted standard.

Finally, on September 28, 2007, the petitioner filed a sur-reply accompanied by a motion for leave to file. In its motion, Illinois-American stated that the sur-reply was necessary to address factual matters that the Agency could have raised at hearing but that it raised only in its reply brief. IAWC also requested that Agency's portions of the Agency's closing briefs and attachments be stricken. On October 3, 2007, the Agency filed a response in opposition, accompanied by a motion for leave to file. Illinois-American's motion for leave to file a sur-reply is hereby granted, as is the Agency's motion for leave to file a response.<sup>4</sup> But, the motion to strike portions of the Agency's reply brief and its attachments (Pet. Sur-Rep. at 5-6) is denied.

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<sup>3</sup> The following public comments were filed in support of continuation of the adjusted standard: PC 1, Donald E. Sandidge, Mayor of the City of Alton (Alton) ; PC 2 by Michael Campion, Mayor of the Village of Godfrey (Godfrey), PC 3; James E. Schrempf, adjoining landowner and attorney for Alton and Godfrey; PC 4 Alan J. Dunstan, Chairman of the Madison County Board; PC 5 Alley Ringhausen, Executive Director of the Great Rivers Land Trust. The public comments in opposition to the adjusted standard were filed by: PC 6 Environmental Law and Policy Center; PC 8 Joyce Blumenshine, Conservation Chairperson of the Illinois Chapter, Sierra Club; PC 9 American Bottom Conservancy, PC 10 Harry R. Walton. One public comment noted the "problems with granting the adjusted standard and the problems with the consequences of not granting it". PC 7 Jim Bensman, Conservation Chair Piasa Palisades Group, Sierra Club. (*But see also* PC 8)

<sup>4</sup>The Board cites the components of the record as follows: amended petition (Am. Pet); Agency recommendation (Ag. Rec.); IAWC's response (Pet. Resp.), the hearing transcript (Tr.), exhibits (Exh.), appendices and attachments within exhibits or other documents (App.) and (Attach.) respectively; the parties' opening briefs (Pet. Br.) and (Ag. Br.) respectively; their response briefs as ( Pet. Resp. Br.) and (Ag. Resp. Br.) respectively; and IAWC's sur-reply (Pet. Sur-Rep.) and the Agency's response (Ag. Resp. Sur-Rep.) respectively.

In summary, the Board has reviewed all filings, documents, and attachments submitted by the parties. The documents and attachments speak for themselves, and the Board will determine the appropriate weight to be given them.

### **SITE HISTORY**

The Illinois-American public water treatment facility has been the subject of site-specific treatment for some time. As the Board noted its last order in AS 99-6, granting Illinois-American an adjusted standard set to sunset on October 16, 2007:

IAWC's [previously-] existing public water treatment facility ([previously-] existing facility) in Alton had been subject to a site specific rule that allowed untreated effluent into the Mississippi. However, parts of the [previously-] existing facility were over 100 years old, and it was prone to flooding which caused a service disruption to customers in 1993. IAWC constructed its new facility in approximately the same area as the existing facility, albeit 50 to 60 feet higher in order to avoid flooding. IAWC's new facility will serve the same customer base as the old facility, and the new facility's effluent is similar to the [previously-] existing facility's effluent. Nov. Pet. Exh. 2 at 2; Nov. Pet. Exh. 4 at 12; Pet. at 2, 12, 13, 16, Attach. B at 1-1, 3-3; In re Site-Specific Exception to Effluent Standards for Alton Water Treatment Plant (March 8, 1984), R82-3; codified as 35 Ill. Adm. Code 304.206.

In its September 7, 2000 opinion and order, the Board found that IAWC demonstrated that the factors surrounding the request for the adjusted standard . . . substantially and significantly different than the factors considered by the Board in adopting these regulations. In light of the substantial costs associated with treating the new facility's effluent, the Board was persuaded that treatment would be economically unreasonable and would result in little increased environmental protection. The Board granted IAWC an adjusted standard from Sections 302.203, 304.106, and 304.124 as Section 304.124 applies to TSS. The Board did not grant an adjusted standard from Section 304.124 as it applies to iron because it deemed the relief unnecessary. The Board found that IAWC's estimated dissolved iron effluent concentration of .009 mg/L was far less than the total iron standard of 2 mg/L standard at 35 Ill. Adm. Code 304.124. In re Petition of Illinois American Water Company (September 7, 2000), AS 99-6.

The Board also ordered that IAWC enter into a contract to provide a minimum of \$4,150,000 in year 2000 dollars to GRLT [Great Rivers Land Trust, a local land conservancy] for a sediment loading reduction project (GRLT Project) over the next ten years. GRLT estimated that the project would offset sediment discharges from the new facility by a ratio of two to one. Illinois-American, Water Company's Alton Public Water Supply Replacement Facility Discharge to the Mississippi River for Adjusted Standard From 35 Ill. Adm. Code 304.124, 304.106, and 302.203, AS 07-2 (Oct. 19, 2000, slip op at 1-2.)

In its order on reconsideration, the Board also proceeded to grant the requested AS from the effluent standard for total iron at 35 Ill. Adm. Code 304.124. The Board also specifically addressed the sunset provision, which it had not done in its original opinion and order, as follows:

The Board notes that the Agency plans to study the GRLT Project in five years to determine its effectiveness. If the GRLT Project is on schedule, it will be halfway complete in five years. *See In re Petition of Illinois American Water Company* (September 7, 2000), AS 99-6, slip op. at 22. In order for the Board to consider the results of the Agency's determination of effectiveness, IAWC must request an extension of this adjusted standard for the GRLT Project past its seventh year. The seven-year sunset provision should provide enough time for the Agency to conduct its determination of effectiveness and enough time for IAWC to apply for the extension to the adjusted standard. *Illinois-American*, AS 07-2, slip op at 4-5 (Oct. 19, 2000).

### **ILLINOIS-AMERICAN'S PRESENTATION**

Illinois American's factual presentation consists of its April 2, 2007 amended petition and attachments<sup>5</sup>, August 21, 2007 answers to questions contained in the Board hearing officer's August 6, 2007 order, pre-filed testimony, and its presentation at the Board's August 28, 2007 hearing, and attachments to its post-hearing briefs.

At the beginning of the hearing, IAWC's counsel requested that, if the Board could not render a decision on its request for a new adjusted standard prior to the expiration of AS 99-6 on October 16, 2007, any new adjusted standard be granted retroactive to AS 99-6's expiration date. Tr. at 7. Witnesses whose testimony was presented at hearing are listed by name in order of their presentation, followed by title or other description, followed by the exhibit number given their pre-filed testimony

- Cindy Hebenstreit, American Water Works Service Co., Inc. as Central Region Director, Environmental Management and Compliance (Exh. 1, Tr. 18);
- Paul Keck, Illinois American Water, Environmental Management and Compliance Group, Water Supervisor for Southern Illinois (Exh. 2, Tr. 19-21);
- Jeffrey T. Kaiser, Black & Veatch, Project Manager in Water Division whose group produced the report Evaluation of Residuals Discharged from Illinois-American Water Company's Alton Water Treatment Plant (October 2006) (Am. Pet. Attach C) (Exh. 3 Tr. 21-29);

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<sup>5</sup> The attachments are Attachment A: Affidavit of Alley Ringhausen, Executive Director of Great Rivers Land Trust; Attachment B: Great Rivers Land Trust, Piasa Creek Watershed Project Report (October 2006); Attachment C: Black & Veatch Corporation, Evaluation of Residuals Discharged from Illinois-American Water Company's Alton Water Treatment Plant (October 2006); Attachment D: Affidavit of Paul Keck, the water quality supervisor at Illinois-American Water Company's Alton facility; Attachment E: Affidavit of Howard O. Andrews, Jr., an engineer at Black & Veatch Corporation; and Attachment F: Proposed Order of the Board.



- Alley Ringhausen, Executive Director of Great Rivers Land Trust, administrator of Piasa Creek Watershed Project (Exh. 5, Tr. 30-34);
- Terry L. Gloriod, American Water Works Service Co., Inc., Central Region President (Exh. 6, Tr. 36-38);
- Donald E. Sandidge, Mayor of the City of Alton (Exh. 7, Tr. 38-39; *see also* PC 3);
- Michael J. Campion, Mayor of the Village of Godfrey (Exh. 8, Tr. 39; *see also* PC 1);
- Mr. James Schrempf, Attorney for the City of Alton and Village of Godfrey, and homeowner adjacent to Alton plant (Exh. 9, Tr. 40-44; *see also* PC 3).

Illinois-American also presented various other exhibits not mentioned above:

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| Exh. 4      | IEPA Illinois Clean Lakes Program Project Summary dated August 6, 2007   |
| Am. Exh. 10 | AS 07-2 Deposition Testimony Taken by Petitioner August 16, 2007 of Scott A. Tomkins, IEPA, Division of Water Pollution Control, Environmental Protection Specialist, Watershed Management Section, Nonpoint Source Pollution Unit |
| Am. Exh. 11 | AS 07-2 Deposition Testimony Taken by Petitioner August 16, 2007 of Robert G. Moser, IEPA, Division of Water Pollution Control, Supervisor of Water Quality Standards Unit   |
| Exh. 12     | 40 C.F.R. Section 125.1-125.11   |
| Exh. 13     | AS 99-6 Testimony of Thomas G. McSwiggin, IEPA, Bureau of Water, then-Manager of Permit Section  |
| Exh. 14     | United States Environmental Protection Agency (USEPA), Office of Water, Water Quality Trading Policy, January 13, 2003   |

Also testifying at hearing, in response to questions contained in the August 6, 2007 hearing officer order, and in response to questions from Illinois-American, was

- Toby Frevert, IEPA, Bureau of Water, Manager, Division of Water Pollution Control (Tr. 56-96)

Persons making oral public comment, all in favor of continuation of the adjusted standard, were

- Jim Bensman, Conservation Chair Piasa Palisades Group, Sierra Club (Tr. 98-101, *see also* PC 7);
- Anita Cooper, Godfrey resident and GRLT volunteer (Tr. 102);
- Tim Garber, Executive Director, Trails West Council, Boy Scouts of America (Tr.103-104).

Finally, in its reply briefs, Illinois-American attached e-mail between its employees and USEPA employees concerning the renewal of permits for the Piasa Creek facility. Pet. Br. Exh. 1A, 1B, 1C.

### **Repeal of Section 304.206**

In the 1980's, the Board granted a site-specific rule for the Alton Water Company, the predecessor to IAWC, from the effluent requirements of 35 Ill. Adm. Code 304.124. The site-specific rule provides that:

#### Section 304.206 Alton Water Company Treatment Plant Discharges

This Section applies to the existing 18.3 million gallons per day potable drinking water treatment plant owned by the Alton Water Company that is located at, and discharges into, river mile 204.4 on the Mississippi River. Such discharges shall not be subject to the effluent standards for total suspended solids and total iron of 35 Ill. Adm. Code 304.124. (Source: Added at 8 Ill. Reg. 3687, effective March 14, 1984)

In AS 99-6, the Board noted that since the Alton Water Company facility would be replaced by the new facility, the site-specific rule at Section 304.206 would no longer be necessary. Illinois-American, AS 99-6, slip op. at 4 (Sept. 7, 2000). IAWC agrees Section 304.206 is no longer necessary and would not oppose an action to repeal it. IAWC Written Answers to Board Questions at 21.

### **AGENCY PRESENTATION**

The Agency's presentation consists of its 18-page June 18, 2007 Recommendation, Toby Frevert's hearing testimony, and attachments to its post hearing briefs. The Recommendation, in summary, urges the Board to deny the requested relief:

In the intervening years since relief was granted, concepts of pollutant trading and the importance of providing reasonable treatment have been refined at the federal level. The Agency thus believes that the requested relief is no longer consistent with applicable federal law. Moreover, Illinois American has not established that factors relating to its Alton facility are substantially and significantly different from the other facilities in the State. In fact, these other facilities have been consistently complying with the effluent limits and requirements regarding TSS, total iron, and offensive discharges. Further, many of these facilities find it economically beneficial to conduct soil conservation programs to ensure a good quality water source for their operation. Consequently, the Illinois American's requested relief does not meet the requirements established under 35 Ill. Adm. Code Section 104 .426 as well as Sections 27(a) and 28 .1 of the Act. The Agency urges the Board to deny the Petitioner's request for extending this relief. Like other facilities in the State, Illinois American should be required to meet the State effluent standards. Rec. at 15-16.

The Agency further explained that the granting of an adjusted standard is no longer consistent with federal law, because:

USEPA allows pollution trading to help facilities that may otherwise find compliance with water quality standards or total maximum daily load (“TMDL”) limits impossible. While Illinois EPA believes that trading may be appropriate when treatment to meet water quality standards is technically infeasible or economically unreasonable, the State effluent standards for which Illinois American seeks relief have long been considered technically feasible and economically reasonable. As these State effluent standards are technology based rather than water quality based, USEPA policy supports our position that trading in this case is not permissible . . . (citing Final Water Quality Trading Policy, US EPA, Office of Water (January 13<sup>th</sup>, 2003)[Exh.14]). Illinois American does not meet the USEPA’s criteria for allowable pollutant trading, and therefore, must be required to provide necessary treatment of its wastewater. Illinois American traded pollution in order to be relieved from a technology-based effluent limit, *i.e.*, the 35 Ill. Adm. Code Part 304 limits. Pollutant trading for technology-based limits that a vast majority of other similar businesses must adhere to is inconsistent with the central intent of the Clean Water Act and USEPA’s trading policy. Contrary to Petitioner’s belief, pollutant trading must not be defined as the most economical way to remove a given amount of pollution normally regulated by technology based limits, but rather as a last resort for those entities that cannot meet WQBELs or TMDL limits. In the case of Illinois American and the Piasa Creek Watershed, no TMDL exists and relief from a WQBEL is not involved. Ag. Rec. at 9.

As an additional reason to deny the petition, the Agency also referenced USEPA’s efforts to develop categorical effluent limits for water supply treatment plant effluents in federal regulations. The Agency stated that, as of the time of its Recommendation, the federal timeline for publishing the draft rules is July 2008 with rule adoption projected by December 2009. The Agency commented that

Adoption of federal categorical effluent limits would supersede any limits previously adopted by states unless the state limits were more stringent. Federal action would therefore negate any continued relief granted by the Board regarding Illinois American’s petition for extended relief. Rec. at 10-11.

In its reply brief, and in its response to IAWC’s sur-reply, the Agency also provided e-mail between various IEPA and USEPA personnel concerning the USEPA Trading Permit Database. Ag. Rep. Br. Attach 1-2, Ag. Resp. Sur-Rep. Attach 1-2. The Agency argues that this information demonstrates that USEPA would not approve of the grant of AS 07-2.

The hearing record makes it clear that the Agency has been of two minds concerning IAWC’s “no treatment, sediment offset” proposal since its inception. Then IEPA Manager of the Bureau of Water Permit Section, Thomas G. McSwiggin, initially “signed off” on an Agency Recommendation to deny the AS 99-6 request. But, he changed his mind and recommended a grant; based on his review of USEPA’s August 1999 TMDL-related regulations, he stated his “opinion that the implementation of the Piasa Creek sediment reduction program through Illinois

American's NPDES permit is consistent with the Illinois and federal regulations for the National Pollutant Discharge Elimination System (NPDES). Exh. 14 at 1, 3. Mr. Frevert testified that he disagreed with Mr. McSwigggin's opinion in 1999 and "that [there] were some fairly strong differences of opinion back then". Tr. at 72. Mr. Frevert testified that

in the year 2007, my agency and my testimony is this [adjusted standard] is not good policy and it is not consistent with what we believe the Clean Water Act is intended. . . . The point here is for the State of Illinois to reach its environmental goals, [so] we need both point source control programs and nonpoint source control programs, not one in lieu of the other. Tr. at 77-78.

### **UNDISPUTED FACTS CONCERNING SUCCESS OF PIASA CREEK WATERSHED PROJECT**

The Agency does not dispute the facts concerning the success of the Project, considering it a successful one. Ag. Br. at 22. The Agency believes, however, that the Project's success or failure is irrelevant to the issue of whether Illinois-American is required to treat its discharges into the Mississippi River. The uncontested facts are laid out below.

In assessing compliance options in its AS 99-6 petition, IAWC identified technically feasible treatment options ranging from \$7.4 to \$20 million in capital and \$420,00 to \$1.3 million in annual operating costs. By the end of the ten-year contract, IAWC will have invested \$4.15 million in the Piasa Creek Watershed Project. Mr. Gloriod testified, "I would never have been able to convince my Board to spend an 'extra' \$4 million on the PCWP merely to postpone the construction of solids handling facilities, some seven years later." Exh. 6 at 6. Mr. Gloriod acknowledged risk was involved in the decision, but IAWC "decided the benefits of the project justified taking that risk" *Id.* According to IAWC, the Agency did not advise the company that it was no longer willing to support the adjusted standard extension until February 2007. Am. Pet. at 4.

In AS 99-6, the Board ordered IAWC to enter into a contract with GRLT for a sediment loading reduction project. AS 99-6, slip op. at 5 (Oct. 19, 2000). GRLT proposed to IAWC a watershed project to reduce silt loadings from Piasa Creek into the Mississippi. The Piasa Creek watershed is approximately 121 square miles (78,000 acres). *Id.* at 14, Am. Pet. at 7. Piasa Creek empties into the Mississippi near Godfrey 5.5 miles upstream of the IAWC discharge. This area is known as the Great Rivers Confluence, where the Missouri and Illinois Rivers also meet the Mississippi. AS 99-6, slip op. at 4 (Oct. 19, 2000).

In 2000 when IAWC and GRLT proposed the project in connection with the adjusted standard, the waters of the Piasa Creek had a foul odor, were loaded with sediment, and were impacted by severe stream bank erosion. *Id.* at 14. GRLT attributed the condition of Piasa Creek to increased urbanization, and noted that urban growth in the watershed was expected to continue. *Id.* at 14. Years of wetland loss and urban development hampered the ability of the watershed to absorb floodwaters, trap pollutants, and mitigate erosion and had lead to increased sediment loading in the creek. *Id.* at 14.

GRLT had already been working with the Piasa Creek Watershed Conservancy for the five years prior to 2000, but IAWC provided a new source of funding to manage the project. *Id.* at 14. As a condition of AS 99-6, IAWC entered into a contract with GRLT to provide \$415,000 per year for 10 years for the Piasa Creek Watershed Project. *Id.* at 15.

The Piasa Creek Watershed Project was to involve acquisition of land and easements, as well as educating local landowners and civic organizations. *Id.* at 15. With the acquisition of land and easements, stream bank stabilization measures would be implemented using such measures as peak stone protection, debris removal, tree planting, and willow post plantings in eroded areas. *Id.* at 16. Water basins, wet ponds, and water retention structures would be constructed to reduce flow rates and sedimentation during storm events. More than 50 silt dams would be built, and sediments would be dredged. *Id.* at 16.

By the ninth year into the 10-year project, GRLT hoped to document the prevention of sediment from entering the Mississippi by a 2 to 1 ratio of sediment prevented to TSS discharged by IAWC. *Id.* at 16. In AS 99-6, IAWC predicted that the new facility would discharge approximately 3,360 tons of residual solids per year back into the Mississippi. *Id.* at 3. Based on actual conditions of the facility, IAWC currently estimates only 1600 tons of TSS per year are discharged. *Am. Pet.* at 10. According to IAWC and the GRLT, by the fifth year, the Piasa Creek Watershed Project had achieved a savings of approximately 6,487 tons of soil per year. *Am. Pet.* at 8. By the sixth year, the Project had saved 6691 tons of soil per year, representing a 4.2 to 1 offset ratio. *Am. Pet.* at 9-10. The GRLT's Mr. Ringhausen estimated that the Project would achieve a savings of no less than 10,000 tons per year by the tenth year. *Am. Pet.* at 9. In addition to soil savings, sediment reductions have also prevented approximately 79 tons of total iron per year from entering the Mississippi, offsetting the estimated 21 tons per year that IAWC discharges by a ratio of 3.8 to 1. *Am. Pet.* at 10-11.

Mr. Ringhausen explained the Project is implemented through the construction of rural sediment basins, retention basins, and urban water detention/retention basins. GRLT has implemented riparian treatment measures that involve riparian corridor protection and restoration, stream bank stabilization, sedimentation reduction, and wetland restoration. To date, over 200 erosion reduction structures have been completed throughout the watershed, and GRLT is continuing to work on other soil conservation projects to benefit the watershed. *PC 5* at 2. In addition, GRLT provides educational outreach on watershed planning to area residents, students, landowners, farmers, and community leaders. *PC 5* at 2.

Mr. Ringhausen explained that the erosion reductions achieved by the Project will continue year after year with proper stewardship. *PC 5* at 3. Mr. Ringhausen and Mayor Champion characterized the funds received from IAWC as "seed money to attract funding from other sources". *Exh. 5* at 6, *Exh. 8* at 3. Although Mr. Ringhausen stated that additional funding by IAWC will be needed beyond 2010, the Project is expected to eventually be sustained without future outside funding. *PC 5* at 3. Mr. Ringhausen estimated that beyond 2010, maintenance of the soil savings will cost approximately \$136,800 per year for 10 years. *Exh. 5* at 8.

Beyond the soil savings, Mr. Ringhausen added

benefits of the Project include reduced erosion, improved water quality, storm water control, reduction of flash flooding, enhanced fish and wildlife habitat, protection of sensitive ecosystems, public education on watershed management, and financial incentives to farmers and landowners to implement conservation practices.” PC 5 at 4.

Mr. Ringhausen noted that the Project has also resulted in employment opportunities and purchase of local materials. Exh. 5 at 5-6.

Tim Garber, along with Mr. Ringhausen, highlighted one of the achievements of the PCWP: restoration of the 40-acre Boy Scout Lake of Camp Warren Levis in Godfrey. Tr. at 31-32,104. Mr. Garber commented that, “thanks to this project and the Great Rivers Land Trust, we now have a working body of water and a wetland at our camp that literally close to 1,000 people [kids] in one year have already had the opportunity to enjoy.” Tr. at 31, 104. As Mr. Ringhausen described, a “ripple effect” of the restoration work on Boy Scout Lake and the wetland was the archaeological discovery of remains relating to the history of the Underground Railroad in the area. The GRLT helped the area to receive recognition as one of the seven designated Underground Railroad sites in Illinois by the National Park Service. Tr. at 31-32.

Mr. Ringhausen listed several awards<sup>6</sup> that GRLT has received in recognition of the Project from State and federal government agencies, as well as private entities. Mr. Ringhausen also noted some of the Statewide and nationwide events as well as publications where the Project has been discussed. PC 5 at 4, Exh. 5 at 6-7.

### **Availability of Alternative Funding for Non-Point Source Programs**

At hearing, witnesses discussed the availability of funding for sediment reduction programs such as the Project, other than from sources such as Illinois-American. Mr. Frevert voiced the support of the Agency and USEPA for nonpoint source programs, saying “We provide funding, all sorts of support for those programs.” Tr. at 59.

Mr. Kaiser presented a summary of IEPA’s Clean Lakes Program Projects as of August 6, 2007. Exh. 4, Tr. at 25. The summary lists 51 projects receiving grant money from the Illinois Clean Lakes Program totaling \$6,199,690. Exh. 4. But, none of the projects listed received a grant from the Clean Lakes Program approaching the \$415,000 per year that IAWC invests in the GRLT. The list indicates the highest amount awarded to a single project from the

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<sup>6</sup> These include the Illinois Governor’s Pollution Prevention Award for the Community Group Category; the Innovate Illinois Award; the Illinois Buffer Partnership Award; a National Resource Conservation Service’s Conservation Academy Award; a United States Department of Agriculture’s Earth Team Volunteer Program Award; one of three Soil and Water Conservation Society’s National Merit Awards, and an award from the National Parks Service identifying Rocky Fork, a stream in the Piasa Creek Watershed, as a site that makes a significant contribution to an understanding of the underground railroad. Am. Pet. Attach. A.

Clean Lakes Program was \$300,000 for FY 2006. As for matching funds provided by other sources, the number of projects receiving more than \$415,000 was two out of 51. Ex. 4.

During her comment in support of IAWC's petition, Alton resident and GLTC volunteer Ms. Anita Cooper stated

It is important to remember that this wonderful project did not exist before the funding by Illinois-American Water. It is grossly unfair to assume that if the funding by the Water Company should go away that the community would somehow come up with the missing funding and continue the project.  
Tr. at 103.

### **REQUIREMENTS OF FEDERAL LAW**

In AS 99-6, concerning federal law, the Board found that:

There are no federal categorical effluent regulations for drinking water facilities. 33 U.S.C. § 1314(b) (1998). In place of these regulations, the Agency issues National Pollutant Discharge Elimination System (NPDES) permits to public water supplies on a case-by-case basis pursuant to the Clean Water Act. 33 U.S.C. § 1342 (1998); 40 C.F.R. §§ 125.3(c)(2) and 125.3(d) (1998). The Board has stated previously that federal directives give [the Board] "broad discretion in determining the appropriate standard of control to apply to discharges from water treatment plants." Site Specific Exception to Effluent Standards for the Illinois American Water Company, East St. Louis Treatment Plant (February 2, 1989), R85-11, slip op. at 10. Illinois American, AS 99-6, slip op. at 4-5 (Oct.19, 2000).

Federal law issues were discussed by the Center for Environmental Law and Policy (PC 6), in addition to being addressed by the Agency. The parties dispute whether there has been a change in federal law since 2000 or only in the Agency's interpretation of it. They also dispute whether USEPA approves, or would continue to approve, the Project as being consistent whether federal law.

### **Technology-Based Effluent Limitations and Standards**

Section 104.406(b) of the Board's procedural rules for adjusted standards, requires the petition to address:

whether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the [Clean Water Act or] CWA (33 USC 1251 *et seq.*), Safe Drinking Water Act (42 USC 300(f) *et seq.*), Comprehensive Environmental Response, Compensation and Liability Act (42 USC 9601 *et seq.*), CAA (42 USC 7401 *et seq.*), or the State programs concerning RCRA, UIC, or [National Pollutant Discharge Elimination System or] NPDES [415 ILCS 5/28.1];

While explaining during the hearing that the federal effluent guidelines under 40 C.F.R. Subchapter N regulations do not apply to drinking water treatment plants discharging their wastewater directly to waters of the nation, Mr. Frevert quoted provisions from 40 C.F.R. 122.44 relating to the NPDES program and the federal Clean Water Act (CWA). Tr. at 47-48.

40 C.F.R. 122.44 (a)(1) requires each NPDES permit to include, as conditions,

Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of the CWA, or case-by-case effluent limitations determined under section 402(a)(1)<sup>7</sup> of CWA, or a combination of the three. 40 C.F.R. 122.44(a)(1).

Since there are presently no federal effluent guidelines that apply to IAWC, Mr. Frevert explained that “the only remaining applicable component of this three-tiered approach” is case-by-case effluent limitations. Tr. at 48.

40 C.F.R. 125.3(c)(2)(Exh. 12) provides that, in issuing individual NPDES permits, the permitting authority must consider

- i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information, and
- ii) Any unique factors relating to the applicant.

To meet the Agency’s NPDES permitting responsibilities, Mr. Frevert stated the Agency has historically relied upon effluent limitations contained in the Board’s regulations as part of the case-by-case determination of technology-based effluent limits determined case-by-case under section 402(a)(1) of the CWA are a necessary part of the NPDES permitting. *Id.*; *see also* Ag. Br. at 4-5. The Agency contends that the effluent standards must be applied to the IAWC facility, as compliance with them is both technically feasible and economically reasonable as demonstrated during the rulemaking process. The Agency contends that it need not perform a site-specific Best Professional Judgment (BPJ) analysis when technology-based effluent standards exist in 35 Ill. Adm. Code Part 304. Ag. Re. Br. at 4-5.

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<sup>7</sup> Section 402(a)(1) of the CWA, 33 U.S.C. 1251 *et seq.*, states

(a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or (B) prior to taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.



The Agency contends that the Project is not a “substantially and significantly different factor” (within the meaning of Section 28.1) than those considered by the Board in the general rulemakings underlying the effluent standards. The Agency also contends that the Project is not a “unique factor” within the meaning of 40 C.F.R. 125.3(c)(2)(ii).

In its comments, citing the applicable federal and state law, the Environmental Law and Policy Center (ELPC) articulates a position similar to that of the Agency. ELPC believes that

The granting of [IAWC’s] request would allow [IAWC] to avoid satisfying TBELs by implementing sedimentation controls at the Great Rivers Land Trust, a secondary location. However beneficial such an arrangement may be, trading or organizing offsets to avoid TBELs is unacceptable under the Clean Water Act. PC 6 at 1; *see also* PC 8.

ELPC’s sentiments were echoed by two other commenters. The American Bottom Conservancy comments that “[o]nce sediment is removed from the river it should not be returned.” PC 9 at 1. Mr. Harry Walton closes his comment with the rhetorical question and answer

Is it acceptable for a point source to discharge wastewater into surface water without Treatment? There can only [be] one answer: NO! PC 10 at 1, emphasis in original.

IAWC, for its part, contends that the Project has been previously found by the Board in AS 99-6 to be both a Section 28.1 “substantially and significantly different factor” and a 40 C.F.R. 125.3(c) (2)(ii) “unique factor”. IAWC points out that it commissioned its environmental consultant to perform a BPJ analysis in 1999 as part of its proof in AS 99-6, and that the report concluded that “no effluent limitation is the appropriate control technology under BPT [Best Practicable Technology] and BCT [Best Conventional Technology]. IAWC. Br. at 5. IAWC urges that, as a matter of collateral estoppel and good public policy, that the Board should not now re-examine these issues that were not explicit reasons for the imposition of sunset provisions in AS99-6. IAWC Resp. Br. at 25-30.

### **Potential Drinking Water Treatment Effluent Guidelines**

In its recommendation to deny the proposed adjusted standard, the Agency referenced USEPA’s stated intentions to potentially establish drinking water treatment effluent guidelines that would apply to discharges from IAWC. Tr. at 11. Mr. Frevert testified that USEPA would be developing categorical effluent guidelines for sources that do not discharge to a POTW. Tr. at 49.

USEPA announced the potential drinking water treatment guidelines in its 2004 Effluent Guidelines Program Plan.<sup>8</sup> 69 Fed. Reg. 53705 (Sept. 2, 2004). The announcement indicated

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<sup>8</sup> Section 304(m) of the CWA provides for a schedule of review for the effluent guidelines. This provision prompts the USEPA to identify categories of sources not previously published and to establish effluent guidelines for those sources. To this end, USEPA publishes a Effluent Guidelines Program Plan every two years. *See* <http://www.epa.gov/guide/plan.html>. Section

that data suggest that some drinking water treatment and supply facilities may be discharging non-trivial amounts of toxic and non-conventional pollutants, stating

[US]EPA has decided to identify the drinking water supply and treatment industry sector in this final Plan and to complete an effluent guidelines rule-making for this industry within three years.” 69 Fed. Reg. at 53720.

In its conversations with USEPA, the Agency intimated USEPA’s schedule for promulgating effluent guidelines would be to publish the draft rules by July 2008 and adopt final rules by December 2009<sup>9</sup>. Tr. at 11.

The Agency notes that if federal categorical effluent limits were to be adopted, they would supersede limits adopted by states unless the state limits were more stringent. Rec. at 11. Although USEPA has not issued a draft rule, IAWC notes that USEPA’s Water Quality Trading Policy states, “[US]EPA will consider including provisions for trading in the development of new and revised technology-based effluent guidelines and other regulations to achieve technology-based requirements, reduce implementation costs and increase environmental benefits.” Exh. 14 at 6, IAWC Resp. Br. at 17-18.

IAWC acknowledges that if USEPA does promulgate effluent standards for drinking water treatment, the adjusted standard may be modified or terminated, and the petition proposes language to account for such a possibility. IAWC Resp. Br. at 23.

### **USEPA’s Water Quality Trading Policy**

In support of its petition, IAWC included in its post hearing brief e-mail between IAWC’s Cindy Hebenstreit and USEPA’s George Acevedo, who identifies himself as USEPA Region 5 NPDES Nutrients and Water Quality Trading Coordinator. IAWC Br. Ex.1A, 1B, 1C. In Exhibit 1A, among other things, Mr. Acevedo references a discussion about “concerns you have on the permit re-issuance of the Piasa Creek facility”. Mr. Acevedo provides Ms. Hebenstreit with a link to the trading policy (Exh. 14), and states in closing “I think you may get some use out the (sic) these materials to understand that we want this program [the Project] to be successful”. In Exhibit 1B, Ms. Hebenstreit reports IEPA’s opposition to renewal of IAWC’s adjusted standard, based on the “explanation that a ‘philosophical change’ has occurred in how the [IEPA] views this issue. Ms. Hebenstreit seeks advice on how to get USEPA input into this matter, attaching a Piasa Creek Watershed Project Fact Sheet. Exhibit 1C is an e-mail from Mr. Acevedo to Ms. Hebenstreit stating in part

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304(m)(1)(c) of the CWA requires promulgation of effluent guidelines no later than 3 years after the publication of the plan.

<sup>9</sup> The Board notes that, as of today, it has been more than 3 years since publication of the 2004 Effluent Guidelines Program Plan. Review of the USEPA rulemaking docket EPA-HQ-OW-2004-0035 does not indicate a draft rule for comment. The last notice issued in the docket was on July 19, 2006 and the last entry in the docket was August 21, 2006. EPA-HQ-OW-2004-0035, <http://www.regulations.gov>.

I understand that your NPDES permit is up for renewal and that you are concerned about the process. However, I encourage you to continue working with the [IEPA] in this matter, as they are the designated permitting authority. The NPDES permit and variance from water quality standards you are seeking for this facility are issued by the State of Illinois.

I believe that the situation is salvageable and I will work with the State to that end. IAWC Br. Ex.1C.

In recommending against grant of a continued adjusted standard in AS 07-2, the Agency argues that current USEPA policy would not allow the offset proposed. In discussing USEPA's 2003 Water Quality Trading Policy (Ex. 14), the Agency points to a statement in the frequently asked questions section of USEPA's web site:

When can trading occur? . . . the Trading Policy does not allow trading to meet a technology-based effluent limit (TBEL). Ag. Rec. at 10 (citing <http://www.epa.gov/owow/watershed/trading/tradingfaq.html>)

USEPA's 2003 Water Quality Trading Policy also states "[US]EPA does not support trading to comply with existing technology-based effluent limitations except as expressly authorized by federal regulations." Exh. 14, 68 Fed. Reg. 1610-1611. This approach is consistent with USEPA's 1996 "Effluent Trading in Watersheds Policy Statement" providing that "[t]o take advantage of trading, a point source must be in compliance, and remain in compliance, with applicable technology-based limits." 61 Fed. Reg. 4995 (Feb. 9, 1996).

In his opening remarks at hearing, IEPA's counsel stated, "The simple fact is that Illinois does not have a promulgated trading policy." Tr. at 17. Mr. Frevert testified, "At this time, the Agency is not considering water quality trading as an option for point source discharges in waterways with TMDLs. An analysis of the applicability of trading has not been evaluated by the EPA yet." Tr. at 49.

The Agency believes that e-mail between its employees and USEPA employees clearly indicates that USEPA would not approve of the "trading" authorized in AS 99-6 or proposed for continuation in the AS07-2 petition. The Agency enclosed e-mail between USEPA's Mr. Acevedo and IEPA's Mr. Frevert addressed to "Water Quality Trade Colleagues" and asking for confirmation of water quality data. Mr. Acevedo requested recipients to review an attached spreadsheet apparently prepared by USEPA's Kavya P. Kasturi "ORISE Intern" as part of USEPA's Trading Permit Database Annual Update. USEPA's Region V Trading List from August 20, 2007 noted that IAWC's NPDES Permit IL 0000299 is:

No longer considered a trade in R5. Permit never included trading provisions? Issued Jan 1, 2001, Expired Dec 31; Will be reissued at

some point.” Ag. Rep. Br. at 13, Attach. 2.<sup>10</sup>

Besides the single reference for Illinois to IAWC’s NPDES permit, USEPA’s Region 5 Trading List includes permits with active trading in four of the other five Region 5 states: Michigan, Minnesota, Ohio, and Wisconsin. Ag. Rep. Br. at Attach. 2. In a review of eight of the other NPDES permits listed in the USEPA’s Region 5 Trading List, permits included the term “trading” directly or referenced “alternative load reduction projects” where “loading reductions achieved by one stakeholder may be credited to it or to any other stakeholder(s)”. See NPDES Permits: WI0020354, OH0007960, OH0028207, OH0028193, OH0026590, OH0040592, OH0025381, OH0021644 referenced in “Water Quality Trading Toolkit for Permit Writers,” Appendix A, August 2007, EPA-833-R-07-004 and/or <http://www.epa.state.oh.us/dsw/permits/permits.html>.

### **BOARD DISCUSSION AND DETERMINATION**

As previously stated in its opinion in AS 99-6, the Board ordered a termination of the original adjusted standard to allow for a formal determination as to the success of the GRLT Project. See Illinois American, AS 99-6, slip op. at 22 (Sept. 7, 2000). Based on the uncontested facts, the Board finds that the Piasa Creek Watershed Project has more than fulfilled the expectations leading the Board to grant the original adjusted standard. IAWC currently estimates the Alton facility discharges 1600 tons of TSS per year. According to IAWC and the GRLT, by the fifth year, the Piasa Creek Watershed Project had achieved a savings of approximately 6,487 tons of soil per year. By the sixth year, the Project had saved 6691 tons of soil per year, representing a 4.2 to 1 offset ratio. In addition to soil savings, sediment reductions have also prevented approximately 79 tons of total iron per year from entering the Mississippi, offsetting the estimated 21 tons per year that IAWC discharges by a ratio of 3.8 to 1. See *supra*, p. 13.

The Board finds that Illinois-American has satisfied all of the conditions of the original adjusted standard. In creating a sunset of AS 99-6 and requiring petitioner to update the Board on information concerning the projects results, the Board did not intend to embark upon a *de novo* re-examination or re-weighing of the merits of the adjusted standard in all of its particulars. Only one of the original Section 28.1(c) factors is again at issue here: whether or not federal law prohibits renewal of the adjusted standard. The Board finds that federal law has not changed since the grant of AS 99-6. For the reasons outlined below, the Board finds that the adjusted standard can be lawfully extended.

The Board finds that IAWC’s discharge meets the applicable requirements under sections 301, 302, 306, 307, 308, and 403 of the CWA. There presently are no federal effluent guidelines for TSS or iron applicable to IAWC under 40 C.F.R. Chapter I, Subchapter N. Since there is no toxic effluent standard or prohibition for TSS or iron, the only other category of effluent limitations and standards under 40 C.F.R. 122.44 are technology-based ones. Under 40 C.F.R.

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<sup>10</sup> In its response to IAWC’s sur-reply and IAWC’s motion to strike, the Agency filed replacement hard copies of e-mail containing previously missing information. See Ag. Resp. Sur-Rep. Attach. 1-2.

122.44, the technology-based effluent limitations and standards for TSS and iron would be determined on a case-by-case basis under Section 402(a)(1).

Although the Board's regulations under Part 304 provide the basis for the Agency's determination of the NPDES permitting requirements, the effluent regulations for TSS and iron are not federal law or part of the Board's "identical-in-substance" rules mandated under Section 7.2 of the Act. Accordingly, the Board's Part 304 effluent standards are amenable to change by the Board in a case-by-case determination and a potential adjusted standard. Any adjusted standard granted by the Board therefore becomes the technology-based, case-by-case effluent limitations for IAWC's TSS and iron discharges within the meaning of 40 C.F.R. 122.44 and Section 402(a)(1) of the CWA. And Illinois-American has complied with all requirements of its adjusted standard.

The pendency of USEPA rulemaking to set federal categorical effluent limits does not persuade the Board to reach a different result. This record indicates that USEPA's current schedule for promulgating effluent guidelines is to publish the draft rules by July 2008 and adopt final rules by December 2009. This schedule is subject to slippage due to resource constraints or other priority imperatives. And, in any event, all parties agree that if such standards were to be adopted, they would supersede limits adopted by states, including any Board adjusted standard.

As to issues of compliance with the USEPA Water Quality Trading Policy, the best evidence would be a comment in this proceeding by USEPA. But, no such comment was filed here. The materials presented by the Agency concerning USEPA's Trading Permit Database Annual Update are insufficient to allow the Board to reach any conclusions. While it appears that IAWC's permit has been taken off the USEPA current list, the reason for the action is unclear. The record does not shed light on why USEPA noted "Permit never included trading provisions?" as a question. IAWC's NPDES Permit No. IL0000299 shows the conditions for the GRLT contact, monitoring, and reporting were included in the final permit, however, the permit language did not include the terms "trading" or "credit". Pet. Attach. C. Without additional explication from USEPA, the Board can surmise that the permit was taken off the list because of the wording of AS 99-6.<sup>11</sup>

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<sup>11</sup> In AS 99-6, the terms "trading" or "credit" are not used in the Board's discussion or the conditions of Illinois-American's adjusted standard. In the instant petition, the proposed adjusted standard language also does not use the terms "trading" or "credit". Am. Pet. Attach. F. The Board has used the term "offsetting" when discussing past projects similar to the GRLT Project for East Moline and Rock Island water treatment plants.

The Board has approved projects similar to the GRLT Project in the past. In adjusted standards for both the East Moline and Rock Island water treatment plants, the Board required both facilities to remove erodible farmland from cultivation. The Board then ordered both facilities to maintain the land as fallow, thereby offsetting any potential increase of solids in their discharges. Petition of City of East Moline and IEPA (May 19, 1994), AS 91- 9, slip op. at 6-7, 9; Petition of City of Rock Island (October 19, 1995), AS 91-13, slip op. at 6, 10." AS 99-6 (September 7, 2000) slip op. at 17.

While also not determinative, the e-mail presented by IAWC from USEPA's Mr. Acevedo would tend to indicate that USEPA is in favor of the project. Although in the context of a response to IAWC's NPDES permit concerns, Mr. Acevedo does state that "we want this program [the Project] to be successful". IAWC Br. Ex.1C.

The Illinois-American Alton facility has long been a unique one; as the Agency puts it, the facility "has not had to meet the State's effluent standards in over 100 years". Ag. Rep. Br. at 4, n. 1. The facility has not been a scofflaw, but has sought regulatory relief specific to its site and situation. In adjudicating AS 07-2, the Board is not writing on a blank slate. The State of Illinois, through its environmental agencies, has made decisions that cannot and should not be lightly be undone. While not finding that the formal legal principles of *res judicata* or collateral estoppel apply here, the Board finds that Illinois-American has reasonably relied on the professional and legal judgment of the Board and the Agency in making its decision not to install treatment facilities at the Alton plant and to instead pursue sediment reduction. The company presented its offset plan, received state approvals, and reached the project goals. Under the current state of federal and state law, the Board will not ask IAWC to do more.

The Board does not disagree with the opponents of the adjusted standard that, as a matter of general policy, the purposes of the environment and the CWA are best served by control of point source and non-point source pollution. The Board agrees that if IAWC had first installed point source control equipment and then embarked on the non-point source sediment reduction program, the sediment loading to the Mississippi River would have been decreased by an additional 1,600 tons. But, the record also makes clear that IAWC would not have embarked on the Project if it had also been required to install control equipment: As IAWC's Mr. Gloriod stated

I would never have been able to convince my Board to spend an "extra" \$4 million on the PCWP merely to postpone the construction of solids handling facilities, some seven years later.

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[I]f someone had told me in 2000 that the adjusted standard would terminate in 2007, irrespective of demonstrated success, we would not have gone forward.

We made a permanent commitment in exchange for a permanent solution.

Tr. at 6.

But, the Board also finds that, if the Project had not gone forward, the environmental and community "ripple effect" benefits testified to by Mr. Ringhausen and others would not have gone forward either.

The Board also agrees with the Agency that in adjudicating this adjusted standard the Board has no business setting what is best established by rule: the contours of any Illinois water quality trading policy. But, in responding to Illinois-American's request, the Board does not

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intend to establish general policy or to establish any generally applicable precedent; at this juncture, no other Illinois source can claim occurrence of similar events or circumstances.

The Board has expedited its decision consistent with its order of July 26, 2007. The new adjusted standard granted today is effective beginning October 17, 2007 (so that there is no gap between adjusted standards) and has no sunset date.<sup>12</sup> As a result, the Board's effluent standards for offensive discharges, TSS, and total iron do not apply to the discharges from the petitioner's Alton facility to the Mississippi River.

The adjusted standard is granted subject to conditions. The conditions are similar to those suggested by IAWC, but have been modified to comport with the usual style of Board order language, and to eliminate potential enforcement problems that can be caused by use of ambiguous language. The primary condition is intended to insure that the 2:1 sediment offset ratio is maintained as long as the adjusted standard is in effect. The adjusted standard is subject to modification or termination under various circumstances, including any failure by Illinois-American to comply with the adjusted standard's conditions and adoption of new state or federal regulations applicable to Illinois-American's discharges, such as federal drinking water treatment effluent guidelines.

Finally, the Board will propose repeal of the no-longer-necessary Section 304.206. Due to resource constraints, the Board will not open a repealer docket today but will include the repealer in some future docket opening Section 304.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

### **ORDER**

The Board grants the following adjusted standard, pursuant to the authority of Section 28.1 of the Environmental Protection Act, 415 ILCS 5/1 *et seq*, for the Illinois-American Water Company's Alton Public Water Supply Facility Discharge to the Mississippi River at approximately River Mile 204:

1. Standards Adjusted. The effluent standard for total suspended solids and total iron at 35 Ill. Adm. Code 304.124, and for offensive discharges 35 Ill. Adm. Code 304.106 do not apply to the effluent discharged by Illinois-American from the Alton facility. This adjusted standard does not apply to any other facilities with outfalls or discharges to the Mississippi except for the Alton facility.
2. Duration.

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<sup>12</sup> The Board has occasionally granted retroactive adjusted standard relief in unusual circumstances. *See e.g. Petition of Central Can Company for An Adjusted Standard from 35 Ill. Adm. Code Part 218, AS 94-18 (August 6, 1998).*

- A. This adjusted standard begins on October 17, 2007 to prevent any gap between termination of AS 99-6 and the beginning of AS 07-2.
  - B. i) This adjusted standard will expire only if any of the following events occur:
    - a) The Board determines, in an enforcement action under Title VIII of the Act, or in any proceeding brought by the parties to terminate the adjusted standard, that the conditions of the Mississippi have changed to make the adjusted standard obsolete or infeasible;
    - b) The average offset for the calendar year in question and the four preceding calendar years fails to reach a 2 to 1 offset for total suspended solids as a result of a change in the conditions of the Mississippi, increased capacity of the Alton facility, or for any other reason; or
    - c) The savings of the Piasa Creek Watershed Project is reduced to below 6,600 tons of soil per year.
  - ii) In the event that any of the above events occur, this adjusted standard will expire upon the date that is three years from the occurrence of such event. Illinois-American may petition the Board for a new adjusted standard, and may include a request for delay of the expiration of this adjusted standard.
3. Compliance Conditions. In lieu of compliance with the effluent standards listed in paragraph 1, Illinois-American must comply with all of the following conditions:
- A. Discharge Point. Illinois-American must send all of discharges from its Alton facility only to the Mississippi at River Mile 204. Illinois-American Water must not send discharges from its Alton facility to tributaries of the Mississippi, to any other body of water, or to land.
  - B. Required Contracts and Performance.
    - i) Illinois-American must comply with the terms of the Consulting and Performance Agreement between Illinois-American and Great Rivers Land Trust (GRLT) existing as of the date of this order throughout the term of that Agreement.
    - ii) No later than six (6) months after the adoption of this order, *i.e.* on or before April 15, 2008, Illinois-American must enter into a contract for maintenance of the soil savings achieved by the Piasa



Creek Watershed Project at or above 6,600 tons per year. Such contract must be entered between Illinois-American Water and GRLT or such other nonprofit corporation, soil and water conservation district, or other person or entity selected by Illinois-American and approved by the Illinois Environmental Protection Agency (Agency). Denial of Agency approval is appealable to the Board as a final determination under the procedures of Section 40(a) of the Act and 35 Ill. Adm. Code 105.

- iii) If Illinois-American determines that the amount of solids in its discharge is likely to exceed 3,300 tons per year and its contract for maintenance under paragraph 3(B)(ii) above does not provide for additional savings, Illinois-American Water will enter into a contract or contracts for additional soil savings to ensure that a 2 to 1 offset ratio is achieved. Additional savings may be attained by the Piasa Creek Watershed Project or by other projects in the watershed. Such contract must be entered between Illinois-American Water and GRLT or such other nonprofit corporation, soil and water conservation district, or other person or entity selected by Illinois-American and approved by the Agency. Denial of Agency approval is appealable to the Board as a final determination under the procedures of Section 40(a) of the Act and 35 Ill. Adm. Code 105.
- iv) In the event that any of the contracts entered into pursuant to this subsection are terminated by either party, or Illinois-American determines that entry into a substitute or additional contract for maintenance is necessary or desirable, Illinois-American Water may enter into a contract for maintenance of the Piasa Creek Watershed Project with a person or entity selected by Illinois-American Water and approved by the Agency. Denial of Agency approval is appealable to the Board as a final determination under the procedures of Section 40(a) of the Act and 35 Ill. Adm. Code 105.
- v) At a minimum, such contracts must specify that:
  - a) Illinois-American must provide funds needed to ensure that the soil savings achieved by the Piasa Creek Watershed Project are not reduced below 6,600 tons of soil per year, and that the 2 to 1 offset ratio is maintained by the Project or by other projects in the watershed.
  - b) GRLT, or such other nonprofit corporation, soil and water conservation district, or other person or entity selected by Illinois-American, shall submit to the Agency annual

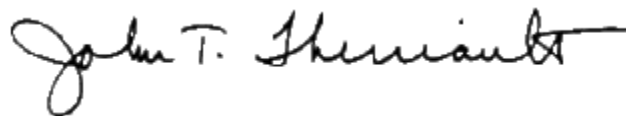
reports detailing the reductions achieved by implementation of the sediment reduction measures and describing the sediment load reductions achieved for each measure or practice implemented.

- c) Within ten (10) days of entering into any such contract for maintenance, Illinois-American must provide a copy of the contract to the appropriate personnel at the Agency.
4. Change in Regulations. Notwithstanding any other terms of this adjusted standard, if new state or federal regulations are promulgated that limit or prohibit Illinois-American's discharges to the Mississippi or otherwise conflict with this adjusted standard, Illinois-American will be bound by any such regulations, and this adjusted standard terminates on the compliance date of the new regulations. The Agency or Illinois-American may petition the Board for modification or termination of this adjusted standard, including authorization for Illinois-American to terminate any contracts entered pursuant to this adjusted standard.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 18, 2007, by a vote of 4-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board