

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AQUA ILLINOIS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 2023-012
)	(Permit Appeal - Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	
)	

NOTICE OF FILING

To: Don Brown Clerk of the Board Illinois Pollution Control Board 60 E. Van Buren St. Suite 630 Chicago, IL 60605 Don.Brown@illinois.gov	Ann Marie A. Hanohano Assistant Attorney General Environmental Bureau Office of the Illinois Attorney General 69 W. Washington St., 18th Floor Chicago, IL 60602 annmarie.hanohano@ilag.gov
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PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **PETITIONER'S RESPONSE IN**

**OPPOSITION TO RESPONDENT'S MOTION FOR PERMISSION TO SUPPLEMENT
REPLY and CERTIFICATE OF SERVICE**, copies are which are herewith served upon you.

Dated: September 13, 2022

/s/ Sarah L. Lode
One of its Attorneys

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**PETITIONER'S
RESPONSE IN OPPOSITION TO RESPONDENT'S
MOTION FOR PERMISSION TO SUPPLEMENT REPLY**

Petitioner Aqua Illinois, Inc. (“Aqua”), by and through its counsel, ArentFox Schiff, LLP, respectfully responds in opposition to Respondent, the Illinois Environmental Protection Agency’s (“IEPA” or the “Agency”), August 30, 2022 Motion for Permission to Supplement Reply to Petitioner’s Memorandum in Response in Opposition to Respondent’s Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (“Motion to Supplement”). The Illinois Pollution Control Board (the “Board”) should deny Respondent’s Motion for Permission to Supplement because it impermissibly raises an entirely new argument on reply to attempt to support its assertion that its permitting decision is somehow immune from Board review. Moreover, the proposed supplement is neither needed to prevent a material prejudice nor offers any assistance to the Board. In further support of its Response in Opposition, Aqua states as follows, using terms defined in Petitioner’s Memorandum in Opposition to Respondent’s Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (the “Response to Motion for Partial Dismissal”):

1. Section 101.500(e) provides that “[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice.” 35 Ill. Admin. Code § 101.500(e).

2. As explained below, grant of the Motion to Supplement would result in material prejudice.

Respondent’s Motion for Partial Dismissal is Predicated Upon the Motion to Modify Previously Pending in the State Court Case

3. Up until the filing of this Motion to Supplement, Respondent’s Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (“Motion for Partial Dismissal”) was unequivocally predicated on Respondent’s argument that this appeal was duplicative of the State Court Case solely because of Aqua’s then-pending Motion to Modify before the Circuit Court, which asked the Circuit Court to change, among other terms, the monthly monitoring requirement of the Agreed Interim Order. That Respondent’s Motion for Partial Dismissal is based upon the existence of Aqua’s Motion to Modify¹ before the Circuit Court is made clear by its short Motion for Partial Dismissal (with added emphasis):

Petitioner has already moved to eliminate the monthly sampling requirement through its Revised Motion to Modify in the State Court Complaint case, and the Circuit Court determined that the government is entitled to discovery and briefing on that issue. See supra at Background, ¶¶ 4-5. Petitioner is impermissibly seeking to circumvent the pending State Court Complaint case through this Permit Appeal regarding Additional Condition No. 6, as the matters are substantially similar. (Motion for Partial Dismissal, Argument at ¶ 6).

¹ Respondent’s pleadings refer to the Motion to Modify as the Revised Motion to Modify.

4. Aqua's Response to Motion for Partial Dismissal demonstrated that Respondent's novel² Motion for Partial Dismissal should be denied because, in part, no aspect of the State Court Case is duplicative of this Permit Appeal.³

***Respondent's Original Proposed Reply Is Also Clearly
Predicated Upon the Previously Pending Motion to Modify***

5. Respondent's original Proposed Reply repeats its reliance on the Motion to Modify.

In filing its Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 ("Motion to Dismiss"), Respondent properly cited Parts 101 and 105 of the Board's Rules regarding permit appeals. In addition, Respondent demonstrated that Petitioner's appeal (PCB 23-12, the "Permit Appeal") of Respondent's final decision regarding Additional Condition No. 6 satisfies the same parties/same cause standard, in that Petitioner's Revised Motion to Modify before the Will County Circuit Court (the "Circuit Court") and its Permit Appeal both seek the elimination of monthly compliance sampling.

As to the "same cause" element, Defendant/Petitioner is asking both the Circuit Court and the Board, at the same time, to decide whether Defendant/Petitioner should be required to continue compliance sampling on a monthly basis. Specifically, in its Revised Motion to Modify pending before the Circuit Court, Petitioner "requests that the heightened testing requirements (of monthly compliance testing) be concluded", while in its Permit Appeal, Petitioner requests that the Board remand the June 29, 2022 Special Exception Permit to eliminate the "monthly" compliance sampling requirement.

Accordingly, Respondent has shown that the Revised Motion to Modify pending before the Circuit Court and this Permit Appeal involve the same parties and the same cause.

(See Proposed Reply at pp. 1, 6, 7 (with added emphasis)).

² As explained in the Response to Motion for Partial Dismissal, no prior respondent is known to have made a similar argument to the Board under Section 105.108(e), and the Board has never before acted on such a motion. (*See* Response to Motion for Partial Dismissal at pp. 5-6, n.1). Respondent's motion is simply unprecedented.

³ Neither the IEPA's Proposed Reply nor its proposed supplement attempt to argue that the State Court Case and Petition for Review of the 2022 Permit are "duplicative" under 35 Ill. Admin. Code § 103.212(a).

***Respondent's Motion to Supplement Seeks to Advance New Arguments
Now that the Motion to Modify Is No Longer Pending***

6. For reasons unrelated to the Permit Appeal, Aqua withdrew the Motion to Modify.⁴ Respondent can therefore no longer claim that Respondent has pending attempts to alter monitoring requirements in two forums.

7. With the basis of its Motion for Partial Dismissal gone, Respondent's Motion to Supplement improperly attempts to pivot to entirely new arguments. (*See* Motion to Supplement at ¶ 11).⁵

8. Indeed, the Motion to Supplement seeks to argue, for the first time in these proceedings, that the Motion to Modify did not matter after all. (*See* Motion to Supplement at ¶ 11 (“Petitioner’s withdrawal of its Revised Motion to Modify does not alter the same cause analysis in this matter.”)).

9. Respondent's Motion to Supplement then goes on to argue that its Motion for Partial Dismissal is instead supported by three new bases – the Interim Agreed Order, the Motion for Mediation, and the possibility of a later trial or dispositive motions. In other words, Respondent is effectively now arguing that the existence of a pending enforcement action shields IEPA permitting decisions from Board review. Specifically, Respondent now wishes to argue as follows:

First, the Agreed Interim Order's requirement that Defendant/Petitioner continue to conduct monthly compliance sampling in University Park remains in effect and is enforceable by the Circuit Court.⁶

⁴ *See* Notice of Withdrawal at pp. 1-2, attached as Exhibit 2 to Respondent's Motion to Supplement.

⁵ While Respondent's Motion to Supplement seeks to add new text to the Proposed Reply, it does not ask that any text of the Proposed Reply be revised or removed.

⁶ This statement by Respondent distorts the Agreed Interim Order's requirement which actually states that Aqua is to “collect additional compliance samples on a monthly basis until such time as Aqua receives written approval from the Illinois EPA that such additional sampling is no longer necessary. . . .” (*See* Agreed Interim Order at p. 8, ¶ 14, Exhibit C to Petition for Review). Respondent cannot credibly argue that this text of the Agreed Interim Order, which expressly allows the IEPA to remove the requirement for additional monthly compliance samples, also somehow prohibits the IEPA from doing so as asked by the Aqua Requests.

Second, Petitioner filed a Motion for Mediation in the Circuit Court case that seeks mediation of “this matter”. On August 17, 2022, the Circuit Court entered an Order setting forth a briefing schedule on such Motion for Mediation. A true and correct copy of the August 17, 2022 Order is attached hereto as Exhibit 3. To the extent such motion is granted, the monthly compliance sampling requirement will be the subject of such mediation.⁷ To the extent such motion is denied, the requirement will be the subject of dispositive motions and/or a trial following the completion of the discovery schedule as also set forth in the August 17, 2022 Order.⁸

(*Id.* (internal citations omitted) (emphasis in original) (footnotes added)).

10. The Motion for Partial Dismissal did not make remotely similar claims.⁹ The Motion to Supplement is thus, effectively, a wholly new motion to dismiss.

***Allowing New Arguments in Reply
Would Cause, Not Prevent, Material Prejudice***

11. The Board’s rules do not speak to the scope of a reply. In such instances, the Board’s rules allow the Board to look to the Supreme Court Rules for guidance. 35 Ill. Admin. Code § 101.100(b). Thus, the Board should look to Supreme Court Rule 341(j), which limits the scope of a movant’s reply to the non-movant’s response. *See* Ill. Sup. Ct. R. 341(j) (“The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee

⁷ The People’s request for a briefing schedule in the State Court Case concerning the Motion for Mediation affirms that the People will oppose the motion. Respondent here nonetheless speculates that the motion will be granted and guesses that the mediation will include the topic of monthly monitoring even though the Motion for Mediation does suggest mediation topics and more likely would concern the Complaint rather than individual requirements of the Agreed Interim Order. Respondent also fails to recognize that any requirement for mediation would not ensure a resolution of any issue. That is, any mediation would, by definition, be non-binding absent a mutually acceptable outcome. Surely, the possibility of a future mutual agreement on an issue is not sufficient to prevent the Board from review of a permitting decision.

⁸ This sentence might be the most extraordinary of all of Respondent’s claims. Here, Respondent asserts (for the first time) that, if the Motion for Mediation is denied, “the requirement [for additional compliance samples] will be the subject of dispositive motions and/or a trial.” That contention is without merit for at least two reasons. First, any dispositive motion or trial would concern allegations of the Complaint (which does not purport to state a monitoring requirement), not a monitoring condition of the Agreed Interim Order. (*See* State Court Complaint, Exhibit 1 to Respondent’s Motion for Partial Dismissal). Second, implicit in Respondent’s claim is the position that the mere presence of an enforcement action—which inherently could result in a trial or dispositive motion—is enough to preclude Board review of a permitting action. Obviously, the Illinois Environmental Protection Act does not state such a preclusion.

⁹ Nor could it have done so given that the Motion for Mediation post-dated the Motion for Partial Dismissal. Petitioner provided the Motion for Mediation with its Response to Motion for Partial Dismissal only to advise the Board that the State Court was made aware of the position the IEPA has taken with its Motion for Partial Dismissal.

and need contain only Argument.”). The basis for the Supreme Court’s Rule is obvious—a reply is not the place to assert new argument. Accordingly, many Illinois courts have agreed with that rationale in a variety of contexts and limited reply briefs to issues raised in the responses. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 717 (2009) (“Points not raised in a brief are waived and cannot be argued for the first time in a reply brief.”); *Ill. Health Maint. Organization v. Ass’n of Dep’t of Ins.*, 372 Ill. App. 3d 24, 45 (2009) (“Under Supreme Court Rule 341, arguments raised for the first time in a reply brief are deemed waived.”); *The Film & Tape Works, Inc. v. Junetwenty Films, Inc.*, 368 Ill. App. 3d 462, 471 (2006) (same); *People ex rel. Vill. of Vernon Hills v. Vill. of Lincolnshire*, 283 Ill. App. 3d 266, 271 (1996) (same); *Lake Bluff Heating & Air Conditioning Supply, Inc. v. Harris Trust & Sav. Bank*, 117 Ill. App. 3d 284, 291 (1983) (same); *In re Woodshank’s Estate*, 27 Ill. App. 3d 444, 449 (1975) (same); *Dep’t of Pub. Works & Buildings v. An Assoc. of Franciscan Fathers*, 3 Ill. App. 3d 503, 506 (1972) (“We do not consider these arguments which were made for the first time in the Reply Brief.”).

12. Respondent’s Motion to Supplement should be denied because it would *cause*—not prevent—material prejudice by allowing entirely new arguments to be raised for the time by Respondent in reply, in contradiction of 35 Ill. Admin. Code § 101.500(e) and Supreme Court Rule 341(j). For the same reason, the Motion to Supplement should be denied because it can be of no assistance to the Board in deciding that motion. *See, e.g., Commonwealth Edison Co. v. IEPA*, PCB No. 04-215, 2007 WL 1266937, at *2 (Apr. 26, 2007)

13. Material prejudice would also result because the Board’s rules do not allow Petitioner an opportunity to rebut Respondent’s new arguments (which are fatally flawed and wholly erroneous for multiple reasons not presented in the current pleadings). That is, Petitioner acknowledges that Board’s rules do not state a means to seek or allow a sur-reply. Petitioner

presumes that to be the case because a sur-reply is unnecessary when a reply does not raise a new argument.

For the foregoing reasons, Aqua respectfully requests that the Board deny the IEPA's Motion to Supplement and grant such other relief as the Board deems appropriate.

Respectfully submitted,

Aqua Illinois, Inc.

Dated: September 13, 2022

/s/ Daniel J. Deeb
One of its Attorneys

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 13th day of September, 2022:

I have electronically served a true and correct copy of Petitioner's Response in Opposition to Respondent's Motion for Permission to Supplement Reply, by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

To: Don Brown Clerk of the Board Illinois Pollution Control Board 60 E. Van Buren St. Suite 630 Chicago, IL 60605 Don.Brown@illinois.gov	Ann Marie A. Hanohano Assistant Attorney General Environmental Bureau Office of the Illinois Attorney General 69 W. Washington St., 18th Floor Chicago, IL 60602 annmarie.hanohano@ilag.gov
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My e-mail address is Sarah.Lode@afslaw.com.

The number of pages in the e-mail transmission is 11.

The e-mail transmission took place before 5:00 p.m.

/s/ Sarah L. Lode

Sarah L. Lode

Dated: September 13, 2022

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