

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

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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 TO DISMISS THE PERMIT APPEAL AS TO ADDITIONAL CONDITION NO. 6** and **CERTIFICATE OF SERVICE**, copies are which are herewith served upon you.

Dated: August 16, 2022

/s/ Sarah L. Lode

One of its Attorneys

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**PETITIONER’S MEMORANDUM IN RESPONSE IN OPPOSITION TO
RESPONDENT’S MOTION TO DISMISS THE PERMIT APPEAL AS TO
ADDITIONAL CONDITION NO. 6**

Petitioner Aqua Illinois, Inc. (“Aqua”), by and through its counsel, ArentFox Schiff, LLP, responds in opposition to Respondent the Illinois Environmental Protection Agency’s (“IEPA” or the “Agency”) Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 (“Motion for Partial Dismissal”). The Illinois Pollution Control Board (the “Board”) should deny Respondent’s Motion for Partial Dismissal for two reasons. First, Respondent’s Motion for Partial Dismissal is improperly predicated on 35 Ill. Admin. Code § 105.108(e) and 735 ILCS 5/2-619(a)(3). Second, contrary to Respondent’s assertion, neither the Agreed Interim Order nor any other order entered by the Will County Circuit Court in *Illinois v. Aqua Illinois, Inc.*, No. 19-CH-1208 (the “State Court Case”), in any way impedes IEPA’s permitting authority or the Board’s ability to consider the merits of the Petition for Review relative to Respondent’s denial of Aqua’s request to modify Additional Condition No. 6. That is, the instant permit appeal is not duplicative of the State Court Case because the two matters involve different claims, different time frames, different requested relief, and different parties. Respondent is tilting at windmills to argue otherwise. In further support of its Response in Opposition, Aqua states as follows:

I. FACTUAL BACKGROUND

Aqua owns and operates the Aqua Illinois-University Park public water system, which serves approximately 1,975 connections in the Village of University Park, Illinois (the “UP System”). (Petition for Review of an Illinois Environmental Protection Agency’s Special Exception Permit Decision, PCB No. 2023-012 (July 8, 2022) (“Petition for Review”) at ¶ 2). Following a source water switch from groundwater to Kankakee River surface water as the source of drinking water for the UP System, the lead action level of 35 Ill. Admin. Code § 611.350(c) (the “Lead Action Level”) was exceeded for the UP System for the first six-month compliance period of 2019. Thereafter, Aqua voluntarily issued a “do not consume” notice (a notice not required by law) and a lead advisory to UP System customers. (*Id.* at ¶ 3). Aqua subsequently worked extensively with the foremost scientific experts, provided bottled water, filters and filter devices to Village residents, and, among other things, completed extraordinary additional compliance sampling. (*Id.* at ¶ 4).

On August 16, 2019, the Office of the Illinois Attorney General and State’s Attorney for Will County initiated civil enforcement litigation against Aqua in the name of the People of the State of Illinois by filing the Complaint (*see* Exhibit 1 to IEPA Motion for Partial Dismissal) against Aqua with the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois (the “State Court Case”). Through its Complaint, the People seek injunctive and monetary relief and allege that Aqua purportedly 1) failed to provide assuredly safe water, 2) violated drinking water monitoring requirements when collecting samples for an August 2018 testing event, 3) failed to obtain a construction permit before constructing certain improvements to the Central Booster Station that would allow for the introduction of blended phosphate into the public water system, 4) failed to obtain an operating permit before putting a newly constructed water transmission main

into service in December 2017 and putting the Central Avenue Booster Station into service as the point at which Aqua introduced blended phosphate into the public water system, and 5) caused and maintained a public nuisance under Illinois common law. (*See* Complaint at pp. 11-28).

On November 1, 2019, Aqua voluntarily entered into an Agreed Interim Order with the People. (Agreed Interim Order, Exhibit C to Petition for Review). With respect to compliance sampling frequency, the Agreed Interim Order requires Aqua to collect an unspecified number of additional compliance samples each month “until such time as Aqua receives written approval from Illinois EPA that such additional sampling is no longer necessary.” (*Id.* at p. 8, ¶ 14).

On July 30, 2021, as a result of its extraordinary compliance sampling and work with foremost experts, Aqua sought and obtained Public Water Supply Construction Permit No. 007-FY2022 (the “2021 Permit”) from the IEPA for the UP System. (2021 Permit, Exhibit B to Petition for Review; *see also* Petition for Review at ¶ 5). On August 3, 2021, the IEPA also issued Operation Permit No. 0071-FY2022 for the UP System. (*See* Operating Permit No. 0071-FY2022, attached hereto as Exhibit A). Collectively, these permits allowed Aqua to employ new corrosion control treatment means for the UP System. Both permits were issued by the IEPA without reference to and notwithstanding the fact that the Agreed Interim Order had already been entered into in the State Court Case. Aqua subsequently achieved the Lead Action Level for the UP System for the July-December 2021 six-month compliance period. (Petition for Review at ¶ 17).

On January 18, 2022, after achieving the Lead Action Level, Aqua filed a motion in the State Court Case asking to change certain terms of the Agreed Interim Order, including the requirement of Agreed Interim Order Paragraph 14 for monthly monitoring. (*See* Exhibit 3 to IEPA Motion for Partial Dismissal (the “Motion to Modify”). Specifically, with respect to monthly monitoring, the Motion to Modify asked the Court to revise the Agreed Interim Order to

require sampling at the frequency required by 35 Ill. Admin. Code Part 611, Subpart G (the “Lead and Copper Rule”). (*Id.* at ¶ 12). The People responded to the Motion to Modify generally by advising the Court that it would need discovery to respond. On January 25, 2022, the Court then issued an order stating “to the extent Aqua is seeking a modification of the [Agreed Interim Order], the Court finds the government is entitled to discovery” (*See* Exhibit 4 to Motion for Partial Dismissal at p. 3 (the “Injunction Modification Order”)).

On April 1, 2022, the IEPA received requests from Aqua to modify aspects of the 2021 Permit. (Aqua Requests, Exhibit D to Petition for Review (the “Aqua Requests”)). With respect to monthly monitoring, the Aqua Requests sought to modify Additional Condition No. 6 of the 2021 Permit to allow sampling at the frequency required by the Board’s Lead and Copper Rule. (Petition for Review at ¶ 12; Aqua Requests, Exhibit D to Petition for Review). The Aqua Requests did not seek to alter the text of the Agreed Interim Order in any way.

On or about June 26, 2022, the IEPA was advised that Aqua achieved the Lead Action Level for the January-June 2022 six-month compliance period, the second consecutive period in which Aqua achieved the Lead Action Level. (Petition for Review at ¶ 38).

On June 29, 2022, the IEPA issued a Special Exception Permit to Aqua (the “2022 Permit”). Via the last paragraph of the 2022 Permit, the IEPA denied Aqua’s request to modify Additional Condition No. 6 to remove the requirement for monthly compliance monitoring purportedly because the Agreed Interim Order precluded the IEPA from doing so. (*Id.* at ¶ 13).

On July 8, 2022, Aqua filed the instant Petition for Review of the 2022 Permit, contesting, among other things, the IEPA’s denial of Aqua’s request to modify Additional Condition No. 6. (*See id.* at ¶¶ 22-27). In relevant part, the Petition for Review requests that the Board remand the 2022 Permit to the IEPA and direct the IEPA to review the 2022 Permit to require compliance

sampling at the frequencies provided by 35 Ill. Admin. Code § 611.356(c) and (d), and not monthly. (*Id.* at ¶ 27).

On August 2, 2022, Respondent filed its Motion for Partial Dismissal seeking to dismiss the Petition for Review as to Additional Condition No. 6 under 35 Ill. Admin. Code § 105.108 and 735 ILCS 5/2-619(a)(3) (“Civil Procedure Rule 619(a)(3)”). Respondent therein claims that such a motion is permissible when a pending case is “duplicative” of another. (Motion for Partial Dismissal at p. 4).

II. ARGUMENT

In deciding a motion to dismiss, the Board must take all well-pled allegations as true. *E.g.*, *U.S. Steel Corp. v. IEPA*, PCB No. 10-23, 2012 WL 458562, at *10 (Feb. 2, 2012). “[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.” *Id.*

As set forth further below, the Board should deny Respondent’s Motion for Partial Dismissal for two independent reasons. First, Respondent’s Motion for Partial Dismissal is improperly predicated on Board Rule 105.108(e) and Civil Procedure Rule 619(a)(3). Second, the instant permit appeal as to Additional Condition No. 6 is in no way duplicative of the enforcement action of the State Court Case as the two matters involve different claims, different time frames, different requested relief, and different parties. These differences are unsurprising given that the two matter are, respectively, an enforcement action and a permit appeal challenging the Agency’s approach to a permit decision.

A. **RESPONDENT’S MOTION FOR PARTIAL DISMISSAL IS PREMISED ON IMPROPER AUTHORITY.**

Respondent’s argument for partial dismissal under Board Rule 105.108(e) and Civil Procedure Rule 619(a)(3) is unprecedented: no prior respondent is known to have argued to the

Board that a matter should be dismissed on these authorities.¹ There are good reasons as to why the Board has not heard Respondent's argument before. Foremost among those reasons is the fact that the Board's first rule, 35 Ill. Admin. Code § 101.100(b), provides that the Code of Civil Procedure may apply only when the Board's rules are silent on a matter.

The provisions of the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent.²

The Board rules are, of course, not silent as to allegations of duplicative matters.³ To the contrary, as the Board is aware, 35 Ill. Admin. Code § 103.212(a) provides that, "[u]nless the Board determines that [a] complaint is duplicative or frivolous, it shall schedule a hearing."⁴ And 35 Ill. Admin. Code § 101.202 explains that a complaint is "duplicative" if it is "identical or substantially similar to one brought before the Board or another forum."

Because the Board's rules are not silent with respect to alleged duplicity, Respondent's motion under Civil Procedure Rule 619(a)(3) must fail. That is, because the Board's rules are

¹ The only instance in which the Board has granted a motion to dismiss based on Board Rule 105.108(e) occurred in 2007 via an unopposed motion by petitioner. In full, the Board's order of dismissal for that matter states:

On November 6, 2007, Russ Taylor, d/b/a Mahomet Hen House (Mahomet) filed a "Motion to Dismiss the Appeal" (Mot.). In the motion, "Mahomet states that the issues raised in this appeal have been resolved with the filing and approval of an amended High Priority Corrective Action Plan." Mot. at 1, citing 35 Ill. Adm. Code 105.108(e). The Board grants Mahomet's motion to dismiss the appeal, dismisses the case, and closes the docket.

Russ Taylor, D/b/a/ Mahomet Hen House v. IEPA, PCB No. 07-80, 2007 WL 4305454, at *1 (Dec. 6, 2007).

² Petitioner also points out that Section 105.108 presents five bases to dismiss a petition. (See 35 Ill. Admin. Code § 105.108 ("A petition is subject to dismissal if . . .")). Nothing in 35 Ill. Admin. Code § 105.108 suggests that it may be used to dismiss part of a petition as Respondent seeks to do here. Nor does any Board precedent on 35 Ill. Admin. Code § 105.108. That is, every Board decision based on Section 105.108 has concerned the complete dismissal of a petition.

³ Respondent's motion does not argue to the contrary. Respondent does not assert that the Board's rules are somehow silent, and, should Respondent do so in reply, Petitioner will seek leave to respond.

⁴ The Board rule mirrors the Environmental Protection Act, 415 ILCS 5/31(d)(1).

clear that dismissal based on alleged duplicity is to be based on the standard of 35 Ill. Admin. Code § 101.202, Respondent cannot instead apply the standard of Civil Procedure Rule 619(a)(3).

Importantly, Board precedent establishes that, in determining whether a matter is “identical or substantially similar as the one brought before the Board” under 35 Ill. Admin. Code § 101.202, the Board is to consider the following elements: whether (1) the parties to the two matters are the same; (2) the proceedings are based on the same legal theories; (3) the violations alleged in the two matters occurred over the same time period; and (4) the same relief is sought in the two proceedings.” *Sierra Club v. Midwest Generation, LLC*, PCB No. 13-15, 2013 WL 5524474, at *22 (Oct. 3, 2013); *see also United City of Yorkville v. Hamman Farms*, PCB No. 08-96, slip op. at 5-6 (Apr. 2, 2009). Hereinafter, these four elements are sometimes collectively referred to as the “Four Elements.”

A failure to meet any one of the Four Elements is sufficient to establish that a matter is not duplicative. *See, e.g., League of Women Voters v. N. Shore Sanitary Dist.*, PCB No. 70-7, 1970 WL 3665, at *2 (Oct. 8, 1970) (the plaintiffs’ complaint before the Board not was duplicative of Attorney General’s civil suit against North Shore Sanitary District where violations of different laws are claimed but the same relief is sought); *People v. Freeman United Coal Mining Co., LLC*, PCB Nos. 2010-061, 2011-002, 2010 WL 2816605, at *13 (July 15, 2010) (State’s complaint against Freeman United and Springfield Coal Co. before Board not duplicative of ELPC’s complaint against Freeman United and Springfield Coal Co. before the Board where different claims, time frames, and requested relief were implicated in each case); *Lake Cnty. Forest Pres. Dist. v. Neil Ostro*, PCB No. 92-80, 1992 WL 196684, at *1 (July 30, 1992) (“Although the complaint [in federal court] involves the same parties (and one more), the same time frame, and the same actions, it is based on statutes and legal theories other than the [Illinois Environmental

Protection] Act. . . . On the other hand, the complaint [before the Board] is strictly based on the Act. Moreover, this complaint asks for an order directing respondents to cease and desist from violating the Act, and requests a statutory penalty, which would be payable to the State. None of this relief is available in the District Court action.”). “The reason for the ban on ‘duplicitous’ complaints was the fear that allowing private complaints might flood the Board with too many cases raising the same issue and unduly harass a respondent.” *League of Women Voters*, 1970 WL 3665, at *2.

Respondent’s Motion for Partial Dismissal makes no mention of the Four Elements, 35 Ill. Admin. Code § 103.212(a), or 415 ILCS 5/31(d)(1). Appearing either unaware of these authorities, or aware that it cannot meet its burden to establish the Four Elements, Respondent instead asks the Board to plow new ground and grant partial dismissal for alleged duplicity based on the Civil Procedure Rule 619(a)(3), which posits a differing standard for dismissal (*i.e.*, “another action pending between the same parties for the same cause”) and a differing associated body of case law. Petitioner respectfully submits that the Board should not take Respondent’s bait to abandon application of its Four Elements. Thus, Respondent’s Motion for Partial Dismissal should be denied.

B. THIS MATTER AND THE STATE COURT CASE ARE FAR FROM DUPLICATIVE.

To the extent Respondent attempts to argue that its Motion for Partial Dismissal somehow demonstrates satisfaction of the Four Elements, Aqua respectfully submits (as outlined at Subparts B.1-4 *infra*) that all Four Elements weigh heavily against dismissal. Moreover, Aqua submits that no legitimate purpose would be served by dismissing Aqua’s challenge as to Additional Condition No. 6. As the Board has previously stated, “[t]he reason for the ban on ‘duplicitous’ complaints was the fear that allowing private complaints might flood the Board with too many cases raising

the same issue and unduly harass a respondent.” *League of Women Voters*, PCB No. 70-7, 1970 WL 3665, at *2. That concern is not at play in the present case.

Before addressing each of the Four Factors, some background is helpful regarding the Agreed Interim Order and Injunction Modification Order. Such will demonstrate another incurable flaw of Respondent’s argument—its failure to recognize that the Agreed Interim Order allows Aqua two independent routes to achieve a monitoring change. One independent route, and the one reflected by the Motion to Modify filed by Aqua in the State Court Case, is to ask the Court to change the terms of the Agreed Interim Order. The second independent route is to seek approval from the IEPA under the terms of Agreed Interim Order Paragraph 14. Nothing limits Aqua’s ability to seek relief using either or both routes. Moreover, no order in the State Court Case at all limits the IEPA’s permitting authority, or the Board’s ability to review IEPA decisions.

Agreed Interim Order Background

The Agreed Interim Order includes requirements for Aqua to (A) provide its customers with bottled water and filters, (B) maintain a lead advisory area, (C) submit a corrosion control recommendation for IEPA action, (D) participate in activities of a public-private response team, (E) refrain from corrosion control treatment modification prior to IEPA approval, (F) conduct monthly monitoring and reporting beyond the most stringent requirements of the Lead and Copper Rule until the IEPA says otherwise (under Paragraph 14 of the Agreed Interim Order), (G) collect and test additional samples requested by customers, (H) maintain a customer complaint center and log, (I) continue to provide public educational materials and maintain a dedicated public website, (J) continue to provide blood testing for customers until December 31, 2019, (K) conduct a material service line inventory, and (L) submit progress reports every two weeks. (*See* Agreed Interim Order, Exhibit C to Petition for Review at §§ II(A)-(L)).

With respect to item (F) concerning monthly monitoring, Paragraph 14 of the Agreed Interim Order (“Paragraph 14”) expressly provides that the IEPA may control when monthly monitoring will end:

Upon entry of this Order, and unless or until further directed in writing by Illinois EPA, Aqua shall remain subject to the six-month lead compliance monitoring periods and reporting requirements, and shall continue to conduct compliance sampling of the Public Water System in accordance with all requirements of Section 611.356 of the Board PWS Regulations, 35 Ill. Adm. Code 611.356; provided, however, that (a) Aqua shall collect additional compliance samples on a monthly basis until such time as Aqua receives written approval from Illinois EPA that such additional sampling is no longer necessary

(Exhibit C to Petition for Review at p. 8, ¶ 14).

Injunction Modification Order Background

After meeting the Lead Action Level for the six-month monitoring period ending in December 2021, Aqua filed the Motion to Modify to attempt to change aspects of three Agreed Interim Order requirements – items (A) (to provide customers with bottled water and filters), (B) (to maintain a lead advisory area) and (F) (to reduce monitoring frequency). A key difference among items (A), (B), and (F) is that only item (F) contains Paragraph 14 which unmistakably allows a monitoring change to occur upon IEPA approval alone. (*See supra* discussion on pp. 11-12).

Respondent correctly states that the Court responded to the Motion to Modify with the Injunction Modification Order allowing discovery. However, Respondent neglects to also mention that, in issuing the Injunction Modification Order, the Court was clear that its discovery finding was limited “to the extent Aqua is seeking a modification to the [Agreed Interim Order].” (Injunction Modification Order, Exhibit 4 to Respondent’s Motion for Partial Dismissal at p. 3). Obviously, nothing in the instant permit appeal even remotely seeks to modify the Agreed Interim

Order. Instead, this permit appeal concerns an Aqua request for an approval from the IEPA for a sampling change which is expressly permissible under Paragraph 14 of the Agreed Interim Order.

Because nothing in this permit appeal seeks to modify the Agreed Interim Order, it inherently follows that nothing in this permit appeal can viably be viewed to present a conflict of any kind with the Court's Injunction Modification Order.⁵ Respondent's claim that this permit appeal somehow seeks to "circumvent" the Agreed Interim Order, Injunction Modification Order, or any other aspect of the State Court Case, is thus simply untrue.

Having provided background regarding the Agreed Interim Order and Injunction Modification Order, and have addressed Respondent's misplaced claim of circumvention, Petitioner turns back to each of the Four Elements.

1. The Petition for Review's Request Concerning Additional Condition No. 6 and the Complaint Are Based on Wholly Different Legal Theories.

In the State Court Case, the Plaintiff brought five counts against Aqua for alleged violations of Illinois law in 2017, 2018, and 2019 that have nothing to do with the 2022 Permit. Specifically, the Complaint alleges that Aqua purportedly:

- failed to provide assuredly safe water in violation of 35 Ill. Adm. Code 601.101 (Count I);
- failed to collect a sufficient number of compliance samples in August 2018 contrary to 35 Ill. Adm. Code 611.356(a) and (c) (Count II);
- failed to satisfy construction permit requirements of 35 Ill. Adm. Code 602.101, 602.116, and 602.200 (Count III);
- failed to satisfy operating permit requirements of 35 Ill. Adm. Code 602.101 and 602.300 (Count IV); and
- created a common law public nuisance (Count V)

⁵ Although Aqua does not expect responsive action by the Court regarding Respondent's Motion for Partial Dismissal, Aqua has advised the Court of that motion. (See Defendant Aqua Illinois, Inc.'s Motion for Mediation at ¶¶ 12-13, *People v. Aqua Ill., Inc.*, No. 19CH1208 (Cir. Ct.) (filed Aug. 15, 2022) attached hereto sans exhibits as Exhibit B).

(See Complaint, Exhibit 1 to Respondent's Motion for Partial Dismissal at pp. 11-28).⁶

Aqua's permit appeal before the Board, by contrast, does not concern any authorities stated for any of the State's five claims. Instead, the Petition for Review challenges the 2022 Permit which was issued by Respondent pursuant to 35 Ill. Admin. Code 602.600 (Special Exception Permits). With respect to Additional Condition No. 6, the Petition for Review challenges Respondent's denial of an Aqua request to alter a monthly monitoring requirement. In denying Aqua's request, Respondent did not cite any of the facts or regulatory authorities alleged by the Complaint (*i.e.*, 35 Ill. Adm. Code 601.101, 602.101, 602.116, 602.200, or 603.300). That alone makes it clear that the matters are not duplicative.

Nothing in the Agreed Interim Order or Injunction Modification Order leads to a different result. That is, as detailed within the background discussion of this Subpart II.B, *supra*, nothing in the Agreed Interim Order, Injunction Modification Order, or any other order of the Circuit Court at all impedes, or even hints at impeding, IEPA's permitting authority or the Board's authority to review an IEPA permitting decision. Nor should it. The Environmental Protection Act respectively gives the IEPA and the Board—not the courts—the authority to issue (415 ILCS 5/18(a)(3)) and initially review (*id.* 5/40(a)(1)) permits concerning drinking water for public water systems in Illinois. Not surprisingly then, neither the Agreed Interim Order nor the Injunction Modification Order has prevented the Agency from taking many other permitting actions with respect to Aqua's UP System.⁷

⁶ As explained in the Petition for Review, Aqua has now met the Lead Action Level of the Board's Lead and Copper Rule for two consecutive six-month monitoring periods and has optimized corrosion control. (See Petition for Review at ¶ 17).

⁷ It is, and has long been, Aqua's expectation that the written direction from the IEPA contemplated by Agreed Interim Order Paragraph 14 would come via an IEPA permitting decision. That expectation is supported by the IEPA's actions throughout this matter—the IEPA has consistently used its permitting processes to address requirements of the Agreed Interim Order. For example, to address a requirement for IEPA approval under Paragraph 12 of Agreed Interim Order § II(E), the IEPA issued the 2021 Permit on July 30, 2021 (*see* Exhibit B to Petition for Review) and an operation permit on August 3, 2021 (*see* Exhibit A), allowing the UP System to change the method of corrosion control treatment

2. The Complaint and Petition for Review Seek Entirely Different Relief.

In the State Court Complaint, the People seeks statutory injunctive and declaratory relief and monetary penalties against Aqua, whereas Aqua has asked the Board to grant review of the IEPA's issuance of the 2022 Permit and, after doing so, remand the 2022 Permit to the IEPA with instructions for reissuance. (Petition for Review at p. 17). There simply is no overlap between the requested relief in these two matters. For that additional reason, the Motion for Partial Dismissal should be denied. *See, e.g., Lake Cnty. Forest Preserve Dist.*, PCB No. 92-80, 1992 WL 196684, at *1-2 (complaints before Board and U.S. District Court for the Northern District of Illinois not duplicative where different relief is sought).

The requested relief is also different with respect to monthly monitoring. While the Motion to Modify and Aqua Requests sought to achieve similar ultimate ends—approval to accomplish monitoring for the UP System as contemplated by the Board's Lead and Copper Rule rather than monthly—the requested relief is very different. As detailed above, Aqua's Motion to Modify sought Court action to change certain terms of the Agreed Interim Order. In contrast, the Aqua Requests sought to obtain a permit from the IEPA consistent with the terms of the Agreed Interim Order which expressly allow the IEPA to make a sampling frequency change. And the instant permit appeal seeks Board review of Respondent's denial of the Aqua Requests. These are very, very different forms of relief.⁸

3. The Petition for Review and Complaint Do Not Concern Alleged Violations Over the Same Time Period.

to zinc orthophosphate. Similarly, to address an Agreed Interim Order requirement for IEPA approval or denial of an Aqua corrosion control treatment recommendation (*see* Agreed Interim Order at ¶ 8), the IEPA issued a Special Exception Permit on August 8, 2022 (*see* Exhibit B.1. to Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 3).

⁸ The People responded to the Motion to Modify by asking for discovery. Interestingly, the IEPA did not respond to the Aqua Requests with any communications seeking additional information from Aqua to help with its consideration. The IEPA certainly could have done so.

Respondent cannot demonstrate that the Petition for Review and Complaint concern alleged violations over the same time period for two reasons. First, the People's allegations in the Complaint concern non-compliance alleged to exist in 2017, 2018, and 2019. (*See* Complaint, Exhibit 1 to Respondent's Motion for Partial Dismissal). By contrast, Aqua's allegations in the Petition for Review (including its request concerning Additional Condition 6) exclusively concern the IEPA's issuance of the 2022 Permit on June 29, 2022. (*See* Petition for Review). The difference in time frames warrants firmly in favor of denying Respondent's Motion for Partial Dismissal. *See, e.g., Freeman United Coal Mining Co., LLC*, PCB Nos. 2010-061, 2011-002, 2010 WL 2816605, at *13 (ELPC's complaint not duplicative of State's complaint where "the two complaints do not involve the same time frame"). Second, the two matters do not both concern alleged violations; violations are alleged only by the Complaint.

The only commonality of any arguable relevance is the fact that both this permit appeal and the State Court Case partly involve monthly monitoring for the UP System.⁹ For the State Court Case, the issue of monthly monitoring arises under the Agreed Interim Order and the Injunction Modification Order. But, as explained at pages 11-13 *supra*, nothing in those orders precludes actions requested of the Board by the Petition for Review. To the contrary, the Petition for Review concerns an Aqua request for an IEPA permit permissible under the terms of Agreed

⁹ Respondent's Motion for Partial Dismissal alleges that the State Court Case and this permit appeal concern the same set of facts. (*See* Motion for Partial Dismissal at Argument, ¶ 4). Aqua respectfully submits that any factual comparison should be done based on more than pleadings selected by Respondent. For this permit appeal, any factual comparison should be done against the administrative record. To date, Aqua is unable to do such a comparison because Respondent has not yet provided the record. Stated differently, it is improper for Respondent to concurrently (1) allege that the two matters concern the same facts and (2) shield Aqua from the full facts. Accordingly, a partial dismissal of the Petition for Review due to allegedly identical facts would be inappropriate. *U.S. Steel Corp. v. IEPA*, PCB No. 10-23, 2012 WL 458562, at *10 (Feb. 2, 2012) ("[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.").

Interim Order Paragraph 14 while Aqua's Motion to Modify (and the Injunction Modification Order) concerns an Aqua request to the Court to change terms of the Agreed Interim Order.

4. The Petition for Review and Complaint Have Different Named Parties.

While Petitioner is the defendant in the Complaint, the inverse is not true for Respondent—the IEPA is not a named party in the State Court Case. There, the plaintiff is the People of the State of Illinois represented by the Attorney General and State's Attorney for Will County.¹⁰ Aqua notes the established principle that “the Attorney General serves the broader interests of the State rather than the particular interest of any agency.” *People ex rel. Sklodowski v. State*, 162 Ill. 2d 117, 127 (1994), *as modified on denial of reh'g* (Nov. 15, 1994); *see also Env't Prot. Agency v. Pollution Control Bd.*, 69 Ill. 2d 394, 401 (1977) (“The Attorney General’s responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State.); *Cebertowicz v. Madigan*, 2016 IL App (4th) 140917, ¶ 20 (“[T]he AG’s website for the Civil Rights Bureau provides the following caveat: ‘The [AG] represents the People of the State of Illinois, not the individual making a complaint.’”).

It is not disputed that Respondent may be among the “People of the State of Illinois” being represented in the State Court Case, in the same way as every person and agency in Illinois. It is also recognized that the IEPA requested enforcement by the Attorney General. At the same time, the above-cited case law makes it very clear that the Attorney General’s representation of the “People of the State of Illinois” nonetheless does not include representation of Respondent more than anyone else. That point is further supported by the Complaint’s clear statements that it was

¹⁰ Respondent could have elected in 2019 to pursue an enforcement action before the Board. It instead elected to refer enforcement to the Attorney General under 415 ILCS 5/42. In doing so, the IEPA relinquished its ability to, on its own accord, choose to be a named party to an enforcement action.

filed by the Attorney General both “on his own motion and at the request of the [IEPA]” and by the State’s Attorney exclusively “on his own motion.” (*See* Complaint, Exhibit 1 to Respondent’s Motion for Partial Dismissal at introductory paragraph). But that need not have been so. As it made clear by many other cases, the Attorney General has often initiated environmental enforcement litigation in the name of both the People and the IEPA. *See, e.g., People of the State of Ill. & IEPA v. NL Indus., Inc.*, 297 Ill. App. 3d (1998); *People of the State of Ill. & IEPA v. Van Tran Elec. Corp.*, 152 Ill. App. 3d 175 (1987); and *People of the State of Ill. & IEPA v. Archer Daniels Midland Corp.*, PCB No. 83-226 (Mar. 22, 1985). That longstanding practice of naming the People and the IEPA as plaintiffs appears to demonstrate that the IEPA is different from the People. Moreover, the fact that the Attorney General could have named the IEPA as a party to the State Court Case but chose not to do so, underscores that the IEPA is not a party to the State Court Case. The Attorney General should not be permitted to have it both ways—it cannot decide to omit the IEPA as a named party in the State Court Case and still argue that the IEPA is a party to that case.

Under these facts, and given that IEPA alone is the permitting authority, Aqua believes that Respondent is incorrect to argue that the parties are the same in both this appeal and the State Court Case. But even assuming otherwise, *arguendo*, the remaining Four Factors preclude dismissal based on alleged duplicity.

III. CONCLUSION

Through the Aqua Requests, Aqua asked the IEPA to modify Additional Condition No. 6 of the 2021 Permit to require monitoring to occur as allowed by the Board’s Lead and Copper Rule. Paragraph 14 of the Agreed Interim Order plainly does not prohibit the Agency from acting on that request. Nor does the fact that Aqua, in the State Court Case, independently asked the

Court (not the IEPA) to modify the terms of a judicial order (not a permit), the Agreed Interim Order. Respondent's arguments to the contrary are without merit.

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

Respectfully submitted,

Aqua Illinois, Inc.

Dated: August 16, 2022

/s/ Daniel J. Deeb
One of its Attorneys

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Attorneys for Aqua Illinois, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 16th day of August, 2022:

I have electronically served a true and correct copy of Petitioner's Response in Opposition to Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 6, by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

To: Kathryn A. Pamenter Senior Assistant Attorney General Environmental Bureau Office of the Illinois Attorney General 69 W. Washington St., 18th Floor Chicago, IL 60602 Kathryn.Pamenter@ilag.gov	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	Brad Halloran Hearing Officer Illinois Pollution Control Board 60 E. Van Buren St., Suite 630 Chicago, IL 60605 Brad.Halloran@illinois.gov

My e-mail address is Sarah.Lode@afslaw.com.

The number of pages in the e-mail transmission is 30.

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

/s/ Sarah L. Lode

Sarah L. Lode

Dated: August 16, 2022

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Attorneys for Aqua Illinois, Inc.

EXHIBIT A



Illinois Environmental Protection Agency

1021 North Grand Avenue East • P.O. Box 19276 • Springfield • Illinois • 62794-9276 • (217) 782-3397

Division of Public Water Supplies, Permit Section Application for Operating Permit

This form may be completed online, a copy saved locally and printed before it is signed. You may also complete a printed copy manually. Submit the completed and signed form to the Illinois EPA, Division of Public Water Supplies, Permit Section at the address listed above.

Facility Name: Aqua Illinois - University Park Facility ID: IL1975030
 Address 1: 1000 S. Schuyler Construction Permit No.: 0071-FY2022
 Address 2: _____ Permit Type: Plant Improvement
 City: Kankakee State: IL Zip Code: 60901 Date Permit Issued: July 30, 2021
 County: Will

Project Title: University Park Booster Station - Chemical Feed Change

Firm Name: Cornwell Engineering Group

Project Status: Final
 Partial

Application Requirements (check when complete):

- Permit Number, Facility Number, and Facility Name identified on the Lab Report(s).
- Sample results attached to the Application.
(If a new well was constructed, provide a copy of the sample results as required by Section II, Part g of the C-I application).

Partial A, B, C, etc.

If you select Partial, you must also submit the following items:

- Cover letter describing which sections were completed.
- General project layout plans.
- For water main projects, identify the length the Partial: _____ LF

Date of Project Completion: 8-2-21 (Provide the date construction was completed on the project or partial)

Certified Operator in Responsible Charge:

Name: *DM Denault* Classification: Class A Number: 203131918
 Telephone: 815-791-7180 Email (optional): DMDenault@aquamerica.com

Owner of the Completed Project:

Name: Aqua Illinois - Melissa Kahoun Title: Compliance Manager Telephone: 815.614.2632
 Address: 1000 S. Schuyler Ave City: Kankakee State: IL Zip Code: 60901

The Owner hereby certifies that the project named and described has been constructed in accordance with plans and specifications approved by the Illinois EPA. See instructions for further information. For Verbal Approvals please call 217-782-1724.

Melissa Kah _____ 8-2-21 _____
 Owner/Authorized Personnel Signature Date

Any person who knowingly makes a false, fictitious, or fraudulent material statement, orally or in writing, to the Illinois EPA commits a Class 4 felony. A second or subsequent offense after conviction is a Class 3 felony. (415 ILCS 5/44(h))

FOR IEPA USE ONLY

This operating permit 0071-FY2022 issued on AUG 03 2021 is valid until revoked.
 This permit is valid only for the work completed under the Construction Permit of the same number.

David C. Cook
 David C. Cook, P.E.
 Manager, Permit Section
 Division of Public Water Supplies

RECEIVED

AUG 03 2021

EXHIBIT B

**IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS
CHANCERY DIVISION**

PEOPLE OF THE STATE OF ILLINOIS)	
<i>ex rel.</i> KWAME RAOUL, Attorney)	
General of the State of Illinois, and <i>ex rel.</i>)	
JAMES W. GLASGOW, State's Attorney)	
for Will County, Illinois,)	
)	
Plaintiff,)	
)	
v.)	No. 19CH1208
)	
AQUA ILLINOIS, INC., an Illinois)	
domestic corporation,)	
)	
Defendant.)	

Defendant Aqua Illinois, Inc.'s Motion for Mediation

Defendant Aqua Illinois, Inc. ("Aqua") respectfully asks this Court to order mediation under Local Rule 17.01A. Alternatively, Aqua asks this Court to require Plaintiff to provide a status report to the Court. In support of this motion, Aqua states as follows:

1. At the June 30, 2022 status hearing, Aqua understood the Court to admonish the parties to work cooperatively to promptly resolve this long-outstanding matter, stating that resolution should be achieved by people in "white lab coats." Counsel for Plaintiff then orally acknowledged to the Court that she heard the Court's admonishment clearly.

2. Aqua fully agrees that a prompt science-based resolution of this matter should be reached and has tirelessly been working do to so, including by engaging the nation's top scientific experts concerning lead and drinking water.

3. Among the top scientific experts engaged by Aqua is Dr. Marc Edwards, the highly-decorated former McArthur Foundation Fellow scientist credited as the co-whistleblower whose

work uncovered the drinking water problems in Flint, Michigan in 2015.¹

4. Following advice provided by Dr. Edwards to both Aqua and the Illinois Environmental Protection Agency (“IEPA”), Aqua employed new treatment methods and successfully achieved the “lead action level” of both the federal and Illinois Lead and Copper Drinking Water Rules (collectively, the “LCR”)² for the last two six-month compliance periods.³ Aqua did so while collecting 537 compliance samples, an extraordinary sum, far more than the 40 samples required for each six-month period by the LCR, and has achieved optimal corrosion control for the University Park Water System under 35 Ill. Admin. Code § 611.351(b)(1). The IEPA further recognized Aqua’s achievement of optimal corrosion control by letter dated August 8, 2022.⁴

5. There are no applicable regulatory criteria for lead in drinking water beyond the lead action level. In fact, in issuing the LCR, the U.S. Environmental Protection Agency specifically explained that it was intentionally not setting further numeric standards for lead beyond the lead action level. *See* U.S. EPA, Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26460, 26476-78 (June 7, 1991).⁵

¹ Dr. Edward’s CV is attached as Exhibit A. *See also* *Marc Edwards (professor)*, Wikipedia, [https://en.wikipedia.org/wiki/Marc_Edwards_\(professor\)](https://en.wikipedia.org/wiki/Marc_Edwards_(professor)) (last modified May 27, 2022).

² The federal rule is codified at 40 C.F.R. Pt. 141, Subpt. I. Illinois subsequently adopted the same substantive rule at 35 Ill. Admin. Code Pt. 611, Subpt. G.

³ To Aqua’s understanding, this sampling makes the UP Water System the most studied public water supply system in the country.

⁴ *See* Letter from David C. Cook, Manager Permit Section, IEPA, to David Carter, President, Aqua (Aug. 8, 2022), attached hereto as Exhibit B. Moreover, Aqua as fully resolved all monitoring and permitting non-compliance alleged by the Complaint (*i.e.*, Counts II, III and IV). Plaintiff cannot accurately allege otherwise.

⁵ In general terms, the LCR requires, for a system the size of the UP Water System, a minimum of 40 compliance samples during a six-month period. 35 Ill. Admin. Code § 611.356(c). If the 90th percentile of the sampling results are above the lead action level (15 parts per billion), *id.* § 611.350(b), (c)(1), then the rule requires the public water system to do certain corrosion control, source water treatment, lead service line replacement, and public education activities. *Id.* § 611.350(d), (f), (g). When there is no lead action level exceedance for two consecutive periods, the LCR imposes no corrective requirements and allows reduced sampling activity. *Id.* § 611.356(d)(1)(B)(ii), (d)(4)(E).

6. Unfortunately, Aqua's achievement of the lead action level (the only applicable technical standard) for consecutive six-month periods has been met with a wall of unexplained resistance from Plaintiff. That is, notwithstanding Plaintiff counsel's affirmative response to the Court's admonishment at the June 30, 2022 status hearing, Plaintiff has actively thwarted all efforts to involve "white lab coats" and achieve resolution. This is not hyperbole. In 2022 alone, Plaintiff's efforts to stonewall progress have included:

- Denial of an Aqua request for a technical meeting, *i.e.*, a meeting among white lab coats;⁶
- Refusal to provide reasonable responses to discovery requests (*See Exhibits C & D*, with examples listed immediately below of Interrogatories and a Request for Admission which Plaintiff has thus far refused to answer);
 - "Identify and describe with particularity the conditions under which You would agree to modify the Interim Order (under its Article IX) to allow Aqua Illinois to cease providing Alternative Sources of Water as required by Article II, Section A of the Interim Order."
 - "Identify and describe with particularity all violations alleged in Counts II, III, IV, and V of the Complaint that are ongoing as of the present date."
 - "The Illinois PWS Lead Rules do not require a PWS that exceeds the Lead Action Level for a six-month sampling period under 35

⁶ Counsel for Plaintiff denied Aqua's technical meeting request for the stated reason that the meeting would effectively provide Aqua with "free discovery." That response made it clear to Aqua that Plaintiff is more concerned with "winning" litigation than most promptly achieving the best technical outcome for the community.

Ill. Admin. Code 611.356 to provide its customers with free bottled water or filters.

- The unexplained (and thus entirely unhelpful) oral assertion to the Court on June 30, 2022 that it was “too soon to say if the community has clean water,” notwithstanding Aqua’s consecutive achievement of the lead action level;
- Refusal to engage in settlement discussions regarding a final consent order for nearly six months;⁷ and
- Unexplained refusal to mediate voluntarily.

7. In short, Plaintiff is refusing to provide (a) access to the State’s scientists either directly or via written discovery, (b) any meaningful information as to what Plaintiff believes to be outstanding to achieve resolution, and (c) any discernable path to prompt resolution.⁸

8. Perhaps most egregiously, Plaintiff is now attempting to use this Court as an excuse to prevent the IEPA from permitting activity. Put another way, the IEPA and Attorney General’s Office are attempting to use this litigation to prevent permitting action by the IEPA’s scientists. Aqua believes this to be the antithesis of the Court’s June 30, 2022 admonishment for a prompt science-based resolution.

9. More specifically, the IEPA recently (on June 29, 2022) denied an Aqua request to modify a 2021 permit for the University Park Water System to change the requirement for monthly monitoring and to instead allow sampling to occur at the lessor frequency required by the LCR.⁹ In denying the Aqua request, the IEPA alleged that it could not eliminate monthly monitoring

⁷ Following settlement discussions in December 2021, Plaintiff provided an initial draft final consent order in January 2022. Aqua promptly provided a responsive revised draft final consent order in February 2022. Plaintiff has inexplicably not provided any comments or input in reply.

⁸ Plaintiff and Aqua are, however, productively working together on an ESI agreement and discovery scheduling issues.

⁹ Aqua submitted its permit application with the Court’s prior words for prompt scientific resolution in mind.

because such monitoring is required by the Agreed Interim Order entered by this Court on November 1, 2019:

As the Agreed Interim Order requires monthly monitoring, Aqua's request to modify additional condition #6 is denied.¹⁰

10. Nothing in the Agreed Interim Order, however, inhibits any permitting action by the IEPA. To the contrary, the Agreed Interim Order expressly posits that monthly sampling is required only until the IEPA directs otherwise. In relevant part, Paragraph 14 of the Agreed Interim Order provides:

Upon entry of this Order, and unless or until further directed in writing by Illinois EPA, Aqua shall remain subject to the six-month lead compliance monitoring periods and reporting requirements, and shall continue to conduct compliance sampling of the Public Water System in accordance with all requirements of Section 611.356 of the Board PWS Regulations, 35 Ill. Adm. Code 611.356; provided, however, that (a) Aqua shall collect additional compliance samples on a monthly basis until such time as Aqua receives written approval from Illinois EPA that such additional sampling is no longer necessary

Thus, the Agreed Interim Order cannot be a basis for the IEPA to refuse to consider appropriate modifications to existing permit requirements.

11. Aqua appealed the IEPA's permit denial to the Illinois Pollution Control Board (the "Board").¹¹ In that proceeding, the IEPA, represented by the Attorney General's Office, moved to dismiss Aqua's challenges to the monthly monitoring requirement on the purported basis that Aqua's claim is duplicative of the litigation before this Court.¹²

12. If the IEPA's motion to dismiss is successful, the issue of monthly monitoring will

¹⁰ See Petition for Review of an Illinois Environmental Protection Agency's Special Exception Permit Decision and Motion for Partial Stay at Exhibit A, p. 2, *Aqua Ill., Inc. v. IEPA*, PCB No. 2023-12 (July 8, 2022), available at <https://pcb.illinois.gov/documents/dsweb/Get/Document-106151> ("Petition for Review").

¹¹ In addition to denying Aqua's modification request, the IEPA, *sua sponte*, modified the permit to add several additional onerous provisions which Aqua has also appealed. See Ex A of Petition for Review.

¹² See Respondent's Motion to Dismiss the Permit Appeal as to Additional Condition No. 6, *Aqua Ill., Inc. v. IEPA*, PCB No. 2023-12 (Aug. 2, 2022), available at <https://pcb.illinois.gov/documents/dsweb/Get/Document-106312>.

be exclusively controlled by the Court, not the technical experts of the Board nor the IEPA's technical permitting process. Aqua understands this to be directly contrary to the Court's wish for resolution by technical experts.

13. Plaintiff's actions and inactions make it unmistakably clear that no resolution of this matter will be reached, perhaps for years, unless the Court intervenes.

14. Defendant believes that a Court-ordered mediation involving scientists from both sides and using a qualified mediator will facilitate the resolution of this matter.

15. Aqua is prepared to fully mediate this matter promptly, as soon as the Court-appointed mediator's schedule allows.

16. Alternatively, if this Court does not require mediation, Aqua believes that it would be appropriate for the Court to require Plaintiff to submit a status report to this Court within the next 10 days explaining (a) the statement Plaintiff's counsel made to this Court on June 30, 2022 that it is now "too soon to say if the community has clean water," (b) the information Plaintiff believes to be necessary to do so, and (c) the reasons why such information is necessary. A Court-ordered status report from Plaintiff with this information would greatly facilitate progress towards case resolution.

Prayer for Relief

Defendant Aqua Illinois, Inc. respectfully requests that the Court order mediation under Local Rule 17.01A for the reasons set forth above. Alternatively, Defendant respectfully requests that the Court order Plaintiff's to provide a status report as outlined above.

Date: August 15, 2022

Respectfully submitted,

AQUA ILLINOIS, INC.

By: /s/ Daniel Deeb

Daniel Deeb

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