

ILLINOIS POLLUTION CONTROL BOARD  
September 22, 2022

AQUA ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 23-12
	)	(Permit Appeal - Water)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by A. Palivos):

Aqua Illinois, Inc. (Aqua) petitions the Board for review of a June 29, 2022 determination of the Illinois Environmental Protection Agency (Agency). In that determination, the Agency issued a Special Exception Permit (SEP) in which it denied Aqua's request to modify a condition of Public Water Supply Construction Permit No. 0071-FY2022, issued by the Agency on July 30, 2021 (Permit). *See* 415 ILCS 5/40(a)(1) (2020); 35 Ill. Adm. Code 105.206. The determination concerns Aqua's Aqua Illinois-University Park public water system (UP System) located in the Village of University Park, in both Will and Cook Counties. Aqua's petition contests the Agency's denial of the request to modify Additional Condition 6 of the Permit, as well as the Agency's inclusion of Additional Conditions 3, 4, and 5 in the SEP.

After the Board accepted Aqua's petition for review, the Agency filed a motion to dismiss the permit appeal as to Additional Condition 6. The Agency then filed a motion to dismiss the permit appeal as to Additional Condition 3. Thereafter, Aqua filed a motion to voluntarily withdraw the permit appeal as to Additional Condition 3. The Agency later filed a motion to dismiss the permit appeal as to Additional Conditions 4 and 5. Aqua filed a response as to Additional Conditions 4 and 5 in which it moved to voluntarily withdraw the permit appeal as to those two conditions. Accordingly, the only remaining contested permit condition is Additional Condition 6.

Based on the reasons below, the Board denies the Agency's motion to dismiss the permit appeal as to Additional Condition 6. The Board also grants Aqua's motions to voluntarily withdraw the permit appeal as to Additional Conditions 3, 4, and 5.

In this opinion, the Board first provides procedural background on the permit appeal, emphasizing contested Additional Condition 6. There, the Board addresses Aqua's motions to voluntarily withdraw Additional Conditions 3, 4, and 5. Next, the Board discusses the applicable legal framework, including the standards that apply to motions to dismiss. The Board then analyzes the parties' arguments on Additional Condition 6, after which it explains why it denies the Agency's motion to dismiss that condition.

## **PROCEDURAL BACKGROUND**

### **Procedural History**

#### **Petition and Partial Stay**

On July 8, 2022, Aqua filed a petition for review, which included a motion to stay Additional Conditions 3, 4, and 5 during this permit appeal. On July 21, 2022, the Board accepted the petition for hearing but reserved ruling on the motion for partial stay. On July 29, 2022, the Agency filed a response to the motion. On August 11, 2022, the Board granted Aqua's motion for partial stay, to remain in effect until the Board takes final action on the permit appeal or until the Board orders otherwise.

#### **The Agency's Record**

On August 2, 2022, the Agency filed a motion for extension of time to file the record of its June 29, 2022 determination. On August 3, 2022, Aqua filed a response opposing the Agency's motion. On August 8, 2022, the Agency filed a motion for leave to reply to Aqua's response. On August 18, 2022, the Agency's motion for extension was granted in part and denied in part by hearing officer order, with the deadline extended to August 26, 2022.

On August 25, 2022, the Agency filed its record on appeal, leaving out some documents. On September 2, 2022, the Agency filed a motion for leave to file an amended record to exclude more documents. On September 16, 2022, Aqua filed its response. By order of September 19, 2022, the hearing officer denied the Agency's motion for leave to file an amended record and directed the Agency to file the entire record of its permit determination by September 23, 2022.

#### **Additional Conditions 3, 4, and 5**

The Agency, on August 8, 2022, filed a motion to dismiss the permit appeal as to Additional Condition 3. On August 12, 2022, Aqua filed a motion to voluntarily withdraw the permit appeal as to Additional Condition 3.

On August 31, 2022, the Agency filed a motion to dismiss the appeal as to Additional Conditions 4 and 5. On September 14, 2022, Aqua filed its response in which it moved to voluntarily withdraw its appeal as to Additional Conditions 4 and 5.

#### **Additional Condition 6**

On August 2, 2022, the Agency filed a motion to dismiss the permit appeal as to Additional Condition 6. On August 16, 2022, Aqua filed a response opposing the Agency's motion. On August 22, 2022, the Agency filed a motion for leave to reply in support of its motion to dismiss, to which it attached its reply. On September 6, 2022, Aqua filed as response opposing that Agency motion. The Board grants the Agency's motion for leave to reply and accepts its reply. See 35 Ill. Adm. Code 101.500(e).

On August 30, 2022, the Agency filed a motion for leave to supplement its reply in support of its motion to dismiss the appeal as to Additional Condition 6, to which it attached its supplemental reply. On September 13, 2022, Aqua filed its response opposing the Agency's motion. The Board grants the Agency's motion for leave to supplement its reply and accepts the supplement to its reply. *See* 35 Ill. Adm. Code 101.500(e).

### **Discovery, Hearing, and Decision Deadline**

Discovery is set to conclude on September 21, 2022. Hearing dates have been set for September 28 and 29, 2022. Notices of hearing were provided in the *Daily Southtown* on August 25, 2022 and in the *Chicago Sun-Times* on August 26, 2022. On August 22, 2022, Aqua filed a waiver of the Board's statutory decision deadline in the permit appeal to December 15, 2022.

### **Uncontested Dismissal Motions**

The Agency's motion to dismiss the appeal as to Additional Condition 3 states that on August 8, 2022, the Agency issued a Special Exception Permit (August 8 SEP) to Aqua setting optimal water quality (OWQP) ranges for the UP System, making Aqua's requested relief as to Additional Condition 3 unnecessary, and rendering the appeal as to Additional Condition 3 moot. Agency Mot. at 5, 6. In turn, Aqua filed a motion to voluntarily withdraw the appeal as to Additional Condition 3, also on the basis that the OWQP ranges set by the August 8 SEP satisfy the relief requested in its petition as to Additional Condition 3. Aqua Mot. at 4.

Because Aqua no longer wishes to pursue its appeal as to Additional Condition 3, the Board grants Aqua's motion for voluntary withdrawal and therefore denies as moot the Agency's motion to dismiss the appeal as to Additional Condition 3. The Board also terminates its stay of Additional Condition 3.

On August 31, 2022, the Agency filed a motion to dismiss the appeal as to Additional Conditions 4 and 5. The motion states that on August 30, 2022, the Agency issued a Special Exception Permit (August 30 SEP) to Aqua setting OWQP ranges for the UP System, causing Additional Conditions 4 and 5 to expire and rendering the appeal as to Additional Conditions 4 and 5 moot. Agency Mot. at 9-11. On September 14, 2022, Aqua filed a response that includes a motion to voluntarily withdraw its appeal as to Additional Conditions 4 and 5. Aqua's motion also relied upon the basis that the OWQP ranges set by the August 30 SEP satisfy the relief requested in its petition as to Additional Conditions 4 and 5. Aqua Mot. at 4.

Because Aqua no longer wishes to pursue its appeal as to Additional Conditions 4 and 5, the Board grants Aqua's motion for voluntary withdrawal and therefore denies as moot the Agency's motion to dismiss the appeal as to Additional Conditions 4 and 5. The Board also terminates its stay of Additional Conditions 4 and 5.

## **DISCUSSION**

### **Legal Framework**

## **Permit Appeals**

If the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act, a permit applicant “may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency.” 415 ILCS 5/39, 40(a)(1) (2020); 35 Ill. Adm. Code 105.204, 602.118. In a permit appeal, the burden of proof is on the petitioner. 415 ILCS 5/40(a)(1) (2020); 35 Ill. Adm. Code 105.112(a). The petitioner must prove that the application, as submitted to the Agency, demonstrated that no violation of the Act or Board regulations would have occurred if the requested permit had been issued. *See Joliet Sand & Gravel Co. v. PCB*, 163 Ill. App. 3d 830, 833 (3rd Dist. 1987). The Agency’s denial letter frames the issues on appeal. *ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d 325 (3rd Dist. 1997).

The Board’s review of permit appeals is limited to information before the Agency during the Agency’s statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency’s decision. *Prairie Rivers Network v. IEPA and Black Beauty Coal Company*, PCB 01-112 (Aug. 9, 2001), *aff’d*, 335 Ill. App. 3d 391, 401 (4th Dist. 2002); *Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, (5th Dist. 1987).

## **Motions to Dismiss**

The Board has often looked to Illinois civil practice law for guidance when considering motions to dismiss. *See, e.g., People v. The Highlands, LLC*, PCB 00-104, slip op. at 4 (Oct. 20, 2005); *Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental*, PCB 98-43, slip op. at 2 (Nov. 6, 1997); *Loschen v. Grist Mill Confections, Inc.*, PCB 97-174, slip op. at 3-4 (June 5, 1997). In deciding a motion to dismiss, the Board considers all well-pled facts as true and draws all reasonable inferences in favor of the non-movant. *Timber Creek Homes v. Vill. of Round Lake Park*, PCB 14-99, slip op. at 10 (Mar. 20, 2014) (citations omitted); *see also In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997) (“[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party.”).

### **Aqua’s Permit Appeal as to Additional Condition 6**

Additional Condition 6 of the Permit states that Aqua must:

Collect between 40 and 60 lead compliance samples from approved individual sample site locations each month beginning 30 days after the issuance of the operating permit for this project. Consideration should be given based upon highest past lead results and geographic representation. Consideration should also be given to sampling when CSMR and nitrate results are the highest for the month, typically following rain events. (Section 18 and 19 of the Act 415 ILCS 5/ 18 & 19, 35 Ill. Adm. Code 602.114, 601.101. 611.352(f) and the Chemical Change Description dated July 15, 2021). Permit at 6.

In the SEP, the Agency eliminated Additional Condition 6 for being “duplicative” of a monitoring requirement in an “Agreed Interim Order” entered in a civil action (No. 19 CH 1208)

brought by the People of the State of Illinois against Aqua, which is pending before the Will County Circuit Court (Circuit Court Action). SEP at 6. The SEP requires Aqua to continue monthly monitoring pursuant to the Agreed Interim Order. *Id.* In pertinent part, the Agreed Interim Order requires Aqua to conduct monthly sampling to determine its compliance with Lead Action Level requirements. Agr. Int. Ord. at 8, ¶ 14 (Oct. 29, 2019). The Agreed Interim Order requires Aqua to comply with this condition until the Agency gives Aqua written approval that the monthly sampling is no longer necessary. *Id.*

The SEP states that the Agency denied Aqua’s request to modify Additional Condition 6 of the Permit based on the Agreed Interim Order’s requirement of monthly monitoring. SEP at 3.

Aqua asserts that the requirements of Additional Condition 6 are not necessary to accomplish the purpose of the Environmental Protection Act (Act) or Board regulations, and are otherwise arbitrary and capricious. Pet. at 26. Aqua argues that the Agency improperly relied on the Agreed Interim Order as the basis for setting the monthly monitoring requirements of Additional Condition 6. According to Aqua, the proper authority is the Board’s Lead and Copper Rule rather than the Agreed Interim Order. Pet. at 23. Aqua asserts it has shown monthly sampling is no longer necessary by its March 24, 2022 letter to the Agency, where Aqua indicates it has met the Lead Action Level for two six-month compliance monitoring periods in accordance with the Lead and Copper Rule requirements following a Lead Action Level Exceedance. Pet., Exh. D; Pet. at 25.

#### **Agency’s Motion to Dismiss**

The Agency moves to dismiss this permit appeal as to Additional Condition 6 on the grounds that it is duplicative of matters at issue in the pending Circuit Court Action. Relying on Section 105.108(e) of the Board’s procedural rules (35 Ill. Adm. Code 105.108(e)), the Agency claims that Section 2-619(a)(3) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (2020)) bars Aqua from proceeding with its permit appeal. Agency Mot. at Argument, ¶ 1, 6.

The Agency contends that the pending Circuit Court Action and this appeal are duplicative because they involve the same parties, the same set of facts, and, in part, the same monthly compliance monitoring requirement in Additional Condition 6. Agency Mot. at Argument, ¶¶ 3-5. Specifically, according to the Agency’s motion, an Aqua “Motion to Modify” the Agreed Interim Order in the Circuit Court Action is duplicative of this permit appeal because the Motion to Modify and the appeal of Additional Condition 6 both seek to eliminate the same monthly compliance monitoring requirement in the Agreed Interim Order. Agency Mot. at Argument, ¶ 6.

#### **Aqua’s Response to Motion to Dismiss**

In its response, Aqua first argues that the Agency improperly relied on the Code of Civil Procedure as a basis for its motion to dismiss because the Board’s procedural rules address dismissals based on “duplicative” proceedings. Resp. at 6-7. Aqua contends that the Agency’s motion fails to meet any of the four factors evaluated by the Board to determine whether a

proceeding before the Board is “duplicative” of a pending court case. For the first factor, whether the parties are the same, Aqua maintains they are not because the Agency is not a named party in the Circuit Court Action. Resp. at 15.

For the second factor, whether the same legal theories are being advanced, Aqua contends that the permit appeal and the Circuit Court Action rely on different legal theories. Aqua identifies the violations of the Act and Board regulations alleged by the People in their circuit court complaint as distinct from the SEP, which the Agency issued under 35 Ill. Adm. Code 602.600 (Special Exception Permits). Resp. at 11-12. Aqua further contends that the Agreed Interim Order does not have any bearing on the Board’s authority to review the Agency’s permitting decision with regard to the UP System. *Id.*

Regarding the third factor of substantially similar requested relief, Aqua asserts that the relief it requests in the Circuit Court Action (that the Court modify the monitoring and sampling terms in the Agreed Interim Order) and the relief it requests in the permit appeal (that the Agency change the monitoring and sampling frequency in Aqua’s Permit, which the Agreed Interim Order expressly allows) are not the same. Resp. at 13.

Regarding the fourth and final factor, Aqua asserts that the two actions do not concern alleged violations over the same time period. Aqua states that the alleged violations in the Circuit Court Action occurred prior to the Agency’s issuance of the SEP on June 29, 2022. Resp. at 14. Aqua contends that its permit appeal, by contrast, pertains only to the requirements set by the Agency in the SEP, which was issued after the UP System met the Lead Action Level for the two consecutive six-month compliance monitoring periods (following the Lead Action Level Exceedance that is the subject of the Circuit Court Action) as required by the Lead and Copper Rule. Resp. at 14.

### **Agency Replies in Support of Its Motion to Dismiss**

The Agency reports that on August 22, 2022, Aqua withdrew its Motion to Modify the Agreed Interim Order in the Circuit Court Action. Mot. Supp. Reply at 3. However, the Agency maintains that its arguments based on Section 2-619(a)(3) of the Code of Civil Procedure still apply. First, “the Agreed Interim Order’s requirement that [Aqua] continue to conduct monthly compliance sampling in University Park remains in effect and is enforceable by the Circuit Court.” *Id.* Second, Aqua, on August 15, 2022, filed a “Motion for Mediation” in the Circuit Court Action—if that motion is granted, “the monthly compliance sampling requirement will be the subject of such mediation”; and if that motion is denied, “the requirement will be the subject of dispositive motions and/or a trial following the completion of the discovery schedule.” *Id.* at 3-4.

According to the Agency, contrary to Section 2-619(a)(3) of the Code of Civil Procedure, Aqua seeks to circumvent the Circuit Court Action:

nothing in the Agreed Interim Order or other Circuit Court orders provides for [Aqua] seeking relief as to the monthly compliance sampling requirement in the Circuit Court and then, upon the Circuit Court granting discovery and thereby

lengthening the time within which [Aqua] will obtain a decision, turning to the Board to attempt to get a faster result as to the same requested relief. Reply at 6.

The Agency also argues that Aqua has improperly relied on Part 103 of the Board's procedural rules for the premise that a "duplicative" analysis applies instead of the one called for by Section 2-619(a)(3) of the Code of Civil Procedure. Part 103 concerns enforcement proceedings before the Board, not permit appeals. The Agency maintains that it may rely on the Code of Civil Procedure as the Board's procedural rules for permit appeals are silent on moving for dismissal where "another action [is] pending between the same parties for the same cause." Reply at 5.

### **Aqua's Responses to Agency Replies**

Aqua contends that its voluntarily withdrawal of the Motion to Modify the Agreed Interim Order removes any alleged similarities between the Circuit Court Action and this permit appeal. Resp. to Reply at 5. Without that motion pending, the Agency has had to pivot, now effectively arguing "the existence of a pending enforcement action shields IEPA permitting decisions from Board review." Resp. to Supp. Reply at 6.

### **Ruling on the Agency's Motion to Dismiss**

The Board agrees with the Agency that this permit appeal is not subject to the provisions of the Board's procedural rules that use the term "duplicative." *See, e.g.*, 35 Ill. Adm. Code 103 (enforcement actions); 35 Ill. Adm. Code 105.214(c), (d) (appeals of permit determinations for surface water discharges and specified hazardous waste activities). Moreover, the Board's procedural rules provide that a permit appeal, like this one, is subject to dismissal if the Board finds "[o]ther grounds exist that bar the petitioner from proceeding." 35 Ill. Adm. Code 105.108(e). Therefore, the Board may look to the Code of Civil procedure for guidance, as the Agency proposes. 35 Ill. Adm. Code 101.100(b) ("the Board may look to the Code of Civil Procedure . . . for guidance when the Board's procedural rules are silent").

The Agency's dismissal motion relies on Section 2-619(a) of the Code of Civil procedure, which authorizes motions for involuntary dismissal:

- (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

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- (3) That there is another action pending between the same parties for the same cause. 735 ILCS 5/2-619(a)(3) (2020).

"Section 2-619(a)(3) is designed to avoid duplicative litigation and is to be applied to carry out that purpose." Section 2-619(a)(3) "further judicial economy by avoiding duplicative

litigation.” Combined Insur. Co. v. Certain Underwriters, 356 Ill. App. 3d 749, 754 (1st Dist. 2005). Section 2-619(a)(3) “furthers judicial economy by avoiding duplicative litigation” (Combined Insur., 356 Ill. App. 3d at 753” and “it should be construed liberally” (Schmidt v. Gaynor, 2019 IL App (2d) 180426), ¶ 9).

Here, the parties to the respective proceedings differ. Although Aqua is a party to the Circuit Court Action, the Agency is not. The plaintiff in that case is the People of the State of Illinois. The complaint was filed by the Illinois Attorney General and the Will County State’s Attorney. As Aqua states, “[t]he Illinois Attorney General serves the broader interests of the State rather than the particular interests of any agency.” Resp. at 15, citing People ex rel. Sklodowski v. State, 162 Ill. 2d 117, 127 (1994); see also Env’t Prot. Agency v. PCB, 69 Ill. 2d 394, 401 (1977) (“The Attorney General’s responsibility is not limited to serving or representing the particular interests of State agencies . . . but embraces serving or representing the broader interests of the State.”). That the Agency’s interests may be included in the “broader interests of the State” does not make the Agency a party to the Circuit Court Action. See United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 5 (Apr. 2, 2009) (complainant municipality in action before Board not a “party” to state court action brought by Attorney General against Hamman).

The “same parties” requirement of Section 2-619(a)(3), however, is met “where the litigants’ interests are sufficiently similar, even though the litigants differ in name or number.” Doutt v. Ford Motor Co., 276 Ill. App. 3d 785, 788 (1st Dist. 1995). The Illinois Attorney General filed the complaint not only on his own motion but also at the Agency’s request. Dism. Mot, Exh. 1. And the Agreed Interim Order, which was signed by the Agency, refers to “the Illinois Attorney General’s Office, the Will County State’s Attorney’s Office, and the Illinois EPA” as “collectively, the ‘State.’” For this Section 2-619(a)(3) motion only, the Board finds that the Circuit Court Action and this permit appeal involve the “same parties.”

To determine whether actions involve the “same cause” within the meaning of Section 2-619(a)(3), “the central inquiry, which is guided by common sense, is whether the relief requested rests on substantially the same facts.” Combined Insur., 356 Ill. App. 3d at 753. “[T]he crucial inquiry is whether the two actions arise out of the same transaction or occurrence [citation], not whether the legal theory, issues, burden of proof or relief sought materially differ between the two actions.” Terracom Dev. Grp., Inc v. Westhaven, 209 Ill. App. 3d 758, 762 (1st Dist. 1991), quoting Tambone v. Simpson, 91 Ill. App. 3d 865, 867 (2d Dist. 1980). “[I]t is not necessary that the purpose of the two actions be identical; rather, section 2-619(a)(3) may be invoked where there is a substantial similarity of issues between the two actions.” Combined Insur., 356 Ill. App. 3d at 753.

The People’s August 2019 circuit court complaint is based on alleged violations by Aqua ranging from March 2013 to August 16, 2019. Aqua’s permit appeal before the Board is based on the SEP of June 2022, which denied Aqua’s March 2022 application to modify permitted sampling requirements. Aqua’s application maintained that the UP System met the Lead Action Level for the two consecutive six-month compliance monitoring periods (following the Lead Action Level Exceedance that is the subject of the Circuit Court Action), July-December 2021 and January-June 2022. Resp. at 3-4. The Board finds that the People’s Circuit Court Action



and Aqua's permit appeal before the Board do not rest on substantially the same facts and therefore are not the "same cause."

The Agency's claims for duplicative proceedings center not on the People's action but on Aqua's requests that the Will County Circuit Court modify the sampling requirement of the Agreed Interim Order. In the SEP, the Agency terminated Additional Condition 6 of the Permit based on it being duplicative to the compliance monitoring requirement in the Agreed Interim Order. Although Aqua withdrew its Motion to Modify, it has since filed with the court its Motion for Mediation. In it, Aqua states:

If the IEPA's motion to dismiss [Additional Condition 6 before the Board] is successful, the issue of monthly monitoring will 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.

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[Aqua] believes that a Court-ordered mediation involving scientists from both sides and using a qualified mediator will facilitate the resolution of this matter. Resp., Exh. B, ¶¶ 12, 14.

Even if the Motion for Mediation and this permit appeal may be considered the "same cause," the Board declines to exercise its discretion to dismiss this permit appeal. "[E]ven when the same cause' and same parties' requirements are met, section 2-619(a)(3) does not mandate automatic dismissal. Rather, the decision to grant or deny defendant's section 2-619(a)(3) motion is discretionary with the trial court." Combined Insur., 356 Ill. App. 3d at 753.

The Motion for Mediation has not been ruled on by the court. The Motion for Mediation will not be heard by the court until October 4, 2022. Supp. Reply, Exh. 3. Aqua filed the Motion for Mediation six weeks after filing this permit appeal. Even if the court grants the Motion for Mediation, the Agency has given the Board no sense of whether or approximately when mediation would lead to resolution of the disputed sampling requirement.

Discovery in the court case is scheduled through July 31, 2023. Supp. Reply, Exh. 3. In this permit appeal, discovery closed yesterday and the Board is holding a hearing on the matter next week. The Board's deadline for taking final action is in less than three months. And as Additional Condition 6 is the only remaining contested condition in this permit appeal, and Aqua's 35-day appeal period has expired, granting the Agency's dismissal motion would necessarily be with prejudice.

Moreover, the Agreed Interim Order contemplates that the Agency may modify the monthly sampling requirement: "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 . . ." Pet., Exh. C at 8, ¶ 14. That "written approval" by the Agency would logically come in the form of a permit determination, which is what Aqua applied

for here. And on denial of the requested permit determination, Aqua has exercised its right of appeal to the Board under Section 40(a)(1) of the Act.

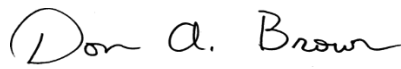
“Our task under section 2- 619(a)(3) is not to go behind the face of the [petition] and consider the merits, or lack thereof, of a party's allegations. Instead, we will take all well-pled allegations as true.” Midas Int’l Corp. v. Mesa S.p.A., 2013 IL App (1st) 122048, ¶ 16. Construing the filings “in the light most favorable to [Aqua as] the nonmoving party” (Chicago Flood, 176 Ill. 2d at 189), the Board denies the Agency’s motion to dismiss the permit appeal as to Additional Condition 6.

### **CONCLUSION**

The Board grants Aqua’s motions to voluntarily withdraw its permit appeal as to Additional Conditions 3, 4, and 5, and therefore denies as moot the Agency’s motions to dismiss as to those conditions. The Board also denies the Agency’s motion to dismiss the appeal as to Additional Condition 6. The Board directs the parties to proceed to hearing as set by the hearing officer.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 22, 2022, by a vote of 5-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board