

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF ELECTRONIC FILING**

To: *See Attached Service List*

PLEASE TAKE NOTICE that on the 31st day of October, 2022, I caused to be filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the attached Respondent Illinois Environmental Protection Agency's Response to Petitioner's Motion for Interlocutory Appeal of Hearing Officer's Order on Petitioner's Motion in Limine, a true and correct copy of which is attached hereto and hereby served upon you.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

/s/ Kathryn A. Pamenter  
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**CERTIFICATE OF SERVICE**

I, Kathryn A. Pamenter, a Senior Assistant Attorney General, hereby certify that on the 31st day of October, 2022, I caused to be served the foregoing Notice of Electronic Filing and Respondent Illinois Environmental Protection Agency's Response to Petitioner's Motion for Interlocutory Appeal of Hearing Officer's Order on Petitioner's Motion in Limine upon the parties named on the attached Service List, via e-mail or electronic filing as indicated.

/s/ Kathryn A. Pamenter  
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<b>Petitioner,</b>	)	
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<b>v.</b>	)	<b>PCB 2023-012</b>
	)	<b>(Permit Appeal - Public Water Supply)</b>
<b>ILLINOIS ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
<b>Respondent.</b>	)	

**RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S  
RESPONSE TO PETITIONER'S MOTION FOR INTERLOCUTORY APPEAL OF  
HEARING OFFICER'S ORDER ON PETITIONER'S MOTION IN LIMINE**

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Respondent"), by and through the Attorney General of the State of Illinois, KWAME RAOUL, and for its Response to Petitioner's Motion for Interlocutory Appeal of Hearing Officer's Order on Petitioner's Motion in Limine, hereby states as follows:

1. On July 8, 2022, Petitioner Aqua Illinois, Inc. ("Petitioner") filed its Petition for Review of an Illinois Environmental Protection Agency's Special Exception Permit Decision, in which it appealed only Additional Condition Nos. 3, 4, 5, and 6 in the June 29, 2022 Special Exception Permit.

2. In accordance with the Hearing Officer Order dated August 19, 2022, on August 26, 2022, Respondent filed the "Certificate of Record on Appeal" and "Record on Appeal". In footnote 1 therein, Respondent disclosed that it did not include documents concerning Additional Condition No. 3 in its Record on Appeal, as Petitioner had filed its Motion to Voluntarily Withdraw Petition for Review as to Additional Condition No. 3 on August 12, 2022.

3. On September 2, 2022, Respondent filed its Motion for Permission to File Amended Record on Appeal, because Petitioner's Permit Appeal as to Additional Condition Nos. 4

and 5 became moot on August 30, 2022. Thereafter, through its Response as to Additional Condition Nos. 4 and 5 filed on September 14, 2022, Petitioner admitted that Additional Condition Nos. 4 and 5 had expired and voluntarily moved to withdraw the Permit Appeal as to such conditions.

4. On September 19, 2022, the Hearing Officer denied Respondent's Motion for Permission to File Amended Record on Appeal and ordered Respondent to "file the entire record on appeal, including documents concerning Additional Condition No. 3, on or before September 23, 2022". In doing so, the Hearing Officer interpreted the phrase "its entire Agency record of decision", 35 Ill. Adm. Code 105.116(a) and 105.212(a), to require the inclusion of "[a]ny other information the Agency relied upon in making its final decision", 35 Ill. Adm. Code 105.212(b), regardless of whether such documents concern the condition(s) on appeal.<sup>1</sup>

5. On September 22, 2022, the Illinois Pollution Control Board ("Board") issued an Opinion and Order, granting Petitioner's motions to voluntarily withdraw its Permit Appeal as to Additional Condition Nos. 3, 4 and 5, denying as moot Respondent's motions to dismiss those conditions, and denying Respondent's motion to dismiss the Permit Appeal as to Additional Condition No. 6, the remaining condition on appeal.

6. On September 23, 2022, Respondent filed the "Certificate of Record on Appeal Filed on 9.23.22" and "Record on Appeal Filed on 9.23.22".

7. On September 27, 2022, Petitioner filed its Motion in Limine, seeking to "exclude any references, testimony, or argument at hearing relating to the following two documents relative

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<sup>1</sup> Section 105.116(a) of the Board's regulations provides, in pertinent part, that "[t]he State agency must file with the Board the entire record of the Agency's or OSFM's decision, as applicable, within 30 days after the filing of the petition for review, unless this Part provides otherwise, or the Board or hearing officer orders a different filing date." 35 Ill. Adm. Code 105.116(a). Similarly, Section 105.212(a) of the Board's regulations provides that, "[t]he Agency must file its entire Agency record of decision with the Clerk in accordance with Section 105.116." 35 Ill. Adm. Code 105.212(a).

to Additional Condition No. 6: (1) ‘Email from David Cook dated November 5, 2021 with Kankakee and Iroquois River nitrate data and related emails,’ R 000581-000600, and (2) ‘Kankakee WTP TP01 Nitrate,’ R 000601. . . .’ (Motion in Limine at p. 3; *see also id.* at p. 6.)

8. At the start of the September 28, 2022 hearing, Petitioner argued its Motion in Limine, during which it indicated, among other things, that it has no objection to the inclusion in the record of the documents bates-labeled R000581-R000601 (which Petitioner referred to as the “Nitrate Documents” in its Motion in Limine). (Transcript of September 28, 2022 Hearing (Dkt. Entry dated Oct. 3, 2022) (“Tr.”) at p. 7, lines 15-17 (“Petitioner has no objection whatsoever to the inclusion of those [sic] additional information in the record”).)

9. In response to Petitioner’s Motion in Limine, Respondent explained that:

during [Mr. Cook’s] deposition[,] questions were asked by the petitioner that elicited the information with respect to the nitrate data. We felt that if we had excluded those from the record, that we were required to file [on] September 23, 2022[,] [w]e submit that we may be here on a motion to have them included,<sup>2</sup> and as such we did, in fact, include them in the record in support – in accordance with the September 19 order and as a result of the questioning during the depositions that occurred. At this time we do not know if we will need to utilize those documents until we hear what [Petitioner’s] case in chief is that is presented, and as such we would reserve the ability to ask questions depending upon what case in chief is presented. But at this point in time we do not intend to utilize those documents should we have to call a witness in this matter.

(Tr. at p. 9, line 11 – p. 10, line 5.)

10. Thereafter, the Hearing Officer denied Petitioner’s Motion in Limine. (Tr. at p. 10,

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<sup>2</sup> *See, e.g.*, Petitioner’s Response in Opposition to Respondent’s Motion for Extension of Time to File the Record filed on August 3, 2022 at ¶¶ 4, 9 (accusing Respondent of “elect[ing] to wait to file its Motion for Extension until the 30-day period of Section 105.116(a) has nearly lapsed. . .” and engaging in a “strategy of obfuscation and delay”, without any support required by 35 Ill. Adm. Code 101.504); Petitioner’s Memorandum in Response in Opposition to Respondent’s Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 filed on August 16, 2022 at pp. 1, 8 (accusing Respondent of “tilting at windmills” and “[a]ppearing either unaware of these authorities, or aware that it cannot meet its burden to establish the Four Elements, . . . instead ask[ing] the Board to plow new ground and grant partial dismissal for alleged duplicity based on the Civil Procedure Rule 619(a)(3). . .”); Petitioner’s Response as to Additional Condition Nos. 4 and 5 filed on September 14, 2022 at ¶ 3 (accusing Respondent of “implicitly acknowledg[ing] the correctness of Aqua’s position . . .”, again without any support pursuant to 35 Ill. Adm. Code 101.504).

line 21 – p. 11, line 4.)

11. Petitioner did not present any evidence during its case-in-chief at the September 28, 2022 hearing. (Tr. at p. 11, lines 10-21.) As such, consistent with its argument on the Motion in Limine, Respondent did not utilize the documents bates-labeled R000581-R000601 during its case-in-chief.

12. On October 17, 2022, Petitioner filed its Motion for Interlocutory Appeal of Hearing Officer's Order on Petitioner's Motion in Limine ("Interlocutory Appeal"), in which it seeks to "overturn the Hearing Officer's order denying Aqua's Motion in Limine [and] enter an order excluding any references, testimony, or argument in this matter relating to the Nitrate Documents relative to Additional Condition No. 6. . . ." (Interlocutory Appeal at p. 7; *compare supra* ¶ 7; *see also* Tr. at p. 8, lines 13-19.)

13. In seeking such relief, Petitioner contends that it was "deprived . . . of the rights to question Respondent's personnel on the Nitrate Documents at deposition and to prepare a rebuttal witness regarding the Nitrate Documents for Hearing. . . ." (Interlocutory Appeal at ¶ 7.) Yet, Petitioner had the opportunity to (a) waive the decision deadline and seek a rescheduled hearing date, Tr. at p. 10, line 21 – p. 11, line 3, (b) recall any of the four deponents on September 26 or 27, 2022 for further questioning, (c) ask questions of Mr. Cook during the September 28, 2022 hearing, or (d) ask that the second scheduled hearing day, September 29, 2022 – *see* Hearing Officer Orders dated August 19 and 26, 2022 -- be utilized for any additional witness(es). In fact, on September 26, 2022, Petitioner filed a Request to Cancel or Reschedule Hearing, which request it then moved to withdraw on September 27, 2022.

14. On October 21, 2022, Petitioner filed its Post-Hearing Brief, which contained no reference to the Nitrate Documents.

15. On October 21, 2022, Respondent filed its Post-Hearing Opening Brief, in which it did not utilize such documents.

16. Pursuant to the Hearing Officer Order dated August 26, 2022, the parties' respective Post-Hearing Response Briefs are due on November 9, 2022.

Based upon the foregoing, Respondent has no position on Petitioner's Interlocutory Appeal.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

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