

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 9th day of November, 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 Post-Hearing Response Brief, a true and correct copy of which is attached hereto and hereby served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, a Senior Assistant Attorney General, hereby certify that on the 9th day of November, 2022, I caused to be served the foregoing Notice of Electronic Filing and Respondent Illinois Environmental Protection Agency's Post-Hearing Response Brief upon the parties named on the attached Service List, via e-mail or electronic filing as indicated.

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**RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
POST-HEARING RESPONSE BRIEF**

In its Opening Brief, Aqua Illinois, Inc. (“Aqua”) contends that its March 24 and 28, 2022 letter requests “sought to modify Additional Condition No. 6 to allow lead compliance sampling at the frequency contemplated by the Board’s Lead and Copper Rule.” (Petitioner’s Post-Hearing Brief at p. 5 (emphasis in original); *see also id.* at pp. 8-10.) In doing so, Aqua improperly attempts to re-write its permit applications to remove the date that it requested for the elimination of the monthly compliance sampling requirement, namely March 31, 2022. (R000003; R000009.)¹ Yet, to prevail in its Permit Appeal, Aqua must demonstrate that approval of its letter requests as of March 31, 2022, would not violate the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (the “Act”), or the Illinois Pollution Control Board’s (“Board”) regulations, *see* Respondent’s Post-Hearing Opening Brief at p. 7, and the Illinois Environmental Protection Agency’s (“Respondent”) reason for denying Aqua’s March 24 and 28, 2022 letter requests was inadequate, *see infra* at Part II. Aqua has offered no evidence to meet this burden, despite requiring expedited depositions and indicating that it “intend[ed] to proceed with the hearing set to begin on September 28, 2022. . . .” (*See* Transcript of Sept. 28, 2022 hearing (“Tr.”) at p. 11, lines 10-23 and p. 89, lines 7-8

¹ *See* Respondent’s Post-Hearing Opening Brief at p. 4, fn. 3, which is incorporated herein by reference.

(Aqua elected not to submit a case-in-chief); Amended Hearing Report dated Oct. 27, 2022 at Exhibit List (Aqua did not to seek to offer any documents, including Petition Exhibits A-E or deposition transcripts, as hearing exhibits); Petitioner’s Motion to Withdraw Petitioner’s Request to Cancel or Reschedule Hearing dated Sept. 27, 2022.)

Specifically, Aqua has failed to provide any support for changing the monthly monitoring requirements contained in the Will County Circuit Court Agreed Interim Order (“Agreed Interim Order”), R000609, as incorporated by reference in the June 29, 2022 Special Exception Permit, R000014-R00016 (the “2022 Permit”). In fact, monthly compliance sampling of Aqua’s UP Water System (as defined in Respondent’s Post-Hearing Opening Brief) has remained “necessary” under the Agreed Interim Order to safeguard residents of University Park and ensure they receive “assuredly safe” drinking water, particularly given Aqua’s expressed nitrate concerns. (R000609; Respondent’s Post-Hearing Opening Brief at pp. 9-11.) Accordingly, Respondent’s June 29, 2022 denial of Aqua’s letter requests to eliminate the monthly compliance sampling requirement as of March 31, 2022, must be affirmed.

ARGUMENT

I. Aqua Ignored Its Burden to Substantiate That Its Requested Permit Would Not Violate the Act or Board Regulations.

In a permit appeal, the petitioner must prove that the sought operational change set forth in the submitted permit application “will not cause a violation of this Act or of regulations hereunder.” 415 ILCS 5/39(a); *see also* Respondent’s Post-Hearing Opening Brief at p. 7 (citing *Community Landfill Co. et al. v. Illinois Env’tl. Prot. Agency*, PCB 01-170, slip op. at p. 4 (Dec. 6, 2001); *Alton Packaging Corp. v. Pollution Control Bd.*, 162 Ill. App. 3d 731, 736-37 (5th Dist. 1987)). As such, *Joliet Sand and Gravel Co. v. Illinois Env’tl. Prot. Agency*, to which Aqua cited in its Opening Brief, recognizes that, “[i]n a hearing on a Section 40 petition, the applicant must

verify the facts of [its] application as submitted to the Agency, and, having done so, must persuade the Board that the activity will comply with the Act and regulations.” PCB 86-159, slip op. at p. 5 (Feb. 5, 1987) (quoting *Oscar Mayer and Co. v. IEPA*, PCB 78-14, 30 PCB 397, 398 (1978)), *aff'd*, 163 Ill. App. 3d 830 (3d Dist. 1987); *see also Community Landfill*, PCB 01-170, slip op. at p. 4 (“. . . it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit if granted would not violate the Act or regulations”).

Aqua has failed to satisfy its burden. Specifically, Aqua elected not to submit any evidence at the September 28, 2022 hearing to (a) “verify the facts” of its March 24 and 28, 2022 letters, *Joliet Sand and Gravel*, PCB 86-159, slip op. at p. 5 (Feb. 5, 1987) (quoting *Oscar Mayer*, 30 PCB at 398), and (b) demonstrate that elimination of the monthly compliance sampling requirement as of March 31, 2022, would not violate the Act or Board regulations, *see supra* pp. 2-3. (*See also* Tr. at p. 11, lines 10-23; Tr. at p. 89, lines 7-8.) Similarly, in its Opening Brief, Aqua simply referenced its letter requests -- “[t]his point is made plain by the Aqua Requests, particularly its numbered items 1, 2, 3, and 7. . .” -- and baldly asserted that, “[n]othing in the record at all refutes these items of the Aqua Requests. . . .” (Petitioner’s Post-Hearing Brief at p. 10.)

Yet, during the hearing and in its Opening Brief, Respondent demonstrated that Aqua’s claimed bases for its letter requests were insufficient. (Respondent’s Post-Hearing Opening Brief at pp. 8-11 (citing Record pages and Sept. 28, 2022 transcript).) As further support, Respondent states in response to each numbered, alleged justification within the March 24 and 28, 2022 letters as follows:

No. 1 – Aqua notes that as of the date of its letter requests, the UP Water System met the lead action level for the period July 1-December 31, 2021. (R000004; R000010.) While true, Aqua had already shown that its UP Water System may exceed the lead action

level for a six-month compliance sampling period even though it had met the lead action level for the immediately preceding six-month period. (Tr. at p. 52, line 13 – p. 53, line 23; *see also* Tr. at p. 39, line 1 – p. 41, line 4.) In addition, the existence of compliance sampling results as of the date of Respondent’s issuance of the 2022 Permit, namely June 29, 2022, could not be dispositive of whether Aqua had achieved two consecutive six-month sampling periods below the lead action level. (*See* Tr. at p. 73, line 24 – p. 75, line 17 (citing R000609 (citing 35 Ill. Adm. Code 611.360(a)).) No determination could be made as of June 29, 2022, as to whether Aqua had met the lead action level for two consecutive six-month compliance sampling periods, as (a) the regulatory period did not end until June 30, 2022, (b) public water suppliers have ten days following the end of the six-month period to submit sampling results, and (c) Respondent could not have known as of June 29, 2022, that no additional UP Water System sampling results for the six-month period ending June 30, 2022, would be uploaded to the Safe Drinking Water Information System (“SDWIS”) between June 30, 2022 and July 10, 2022.² (*Id.*; *see also* Tr. at p. 33, lines 15-19.) Further, as Aqua confirmed through cross-examination during the September 28, 2022 hearing, satisfying the lead action level for a six-month compliance period does not equate to drinking water being “assuredly safe” under 35 Ill. Adm. Code 601.101. (Tr. at p. 88, lines 11-20.)

² Aqua contends that “[o]n or about June 20, 2022, the Agency was advised that Aqua achieved the Lead Action Level for the January-June 2022 six-month compliance period. . . .” (Petitioner’s Post-Hearing Brief at p. 6.) Aqua’s citation to Paragraph 38 of the Petition for this contention, which did not include a supporting affidavit, is insufficient. 35 Ill. Adm. Code 101.504. Similarly, Aqua offered no evidence, including Petition Exhibits A-E, at the September 28, 2022 hearing in support. (Tr. at p. 11, lines 10-23; Tr. at p. 89, lines 7-8; Amended Hearing Report dated Oct. 27, 2022 at Exhibit List.) Even if it had provided evidence regarding such allegation, whether Aqua met the lead action level for the January 1-June 30, 2022 period could not be determined until after July 10, 2022. *See supra* pp. 3-4.

Nos. 2 and 3 – Aqua, respectively, (i) stated that neither the federal Lead and Copper Rule, nor Illinois’ counterpart provide for monthly compliance sampling, R000004 and R000010, and (ii) set forth the Section 611.Table D, indicated that the UP Water System serves 3,301 to 10,000 persons which generally corresponds to 40 sample sites, and admitted the number of compliance samples that Aqua had taken to date, R000004-R000005 and R000010-R000011. While such specific statements are also true,³ purported justification Nos. 2 and 3 fail to address the Agreed Interim Order’s monthly compliance sampling requirement, R000609, which Aqua expressly agreed would govern its compliance sampling for the UP Water System. (*Compare* R000609, ¶ 14, first sentence (setting forth the general method for determining compliance with the lead action level), *with* R000609, ¶ 14, second sentence (setting forth the parties’ agreed-upon monthly compliance sampling requirement for Aqua’s UP Water System which applies until such sampling is “no longer necessary”).) Nothing in Nos. 2-3 supported a finding that monthly compliance sampling was “no longer necessary” as of March 31, 2022, Aqua’s requested date, or even the date of issuance of the 2022 Permit. (*See, e.g.*, Tr. at p. 56, line 9 – p. 58, line 9.) Rather, the Agreed Interim Order’s monthly compliance sampling requirement has ensured, and continues to ensure, that all residents of University Park – not simply the approximately 80 homes in Aqua’s compliance sampling pool – are receiving “assuredly safe” drinking water. (*See* Tr. at p. 38, lines 12-15; p. 47, line 24 – p. 48, line 5; p. 55,

³ Aqua set forth no citation for several assertions in alleged justification No. 2, as well as alleged justifications 4, 5, 6, and 7. (*See* R000004-R000006; R000010-R000013.) Similarly, in its Opening Brief, Aqua either cited to allegations within the Petition or provided no citation for several contentions, including the two “goals” that Aqua’s requests allegedly sought to achieve. (Petitioner’s Post-Hearing Brief at pp. 4-6.) At the September 28, 2022 hearing, Aqua offered no evidence for any of the foregoing. (Tr. at p. 11, lines 10-23; Tr. at p. 89, lines 7-8.) All such unsupported statements must be disregarded. *See, e.g.*, 35 Ill. Adm. Code 101.504, 105.112, 105.214(a).

line 24 – p. 56, line 4; p. 65, line 2 - p. 66, line 23; p. 72, line 20 – p. 73, line 7; p. 81, lines 5 – 18; p. 86, lines 11-17; p. 88, lines 11-20.)

Nos. 4-6 – Aqua did not expressly cite to Nos. 4-6 in its Opening Brief. (*See* Petitioner’s Post-Hearing Brief at p. 10.) In fact, contrary to Aqua’s contention in Nos. 4-5, Respondent did not mandate the sampling procedures discussed therein. (Tr. at p. 72, line 2 – p. 73, line 23 (testimony that the “consideration should be given” language of the 2021 permit was not mandatory) (citing R000384).) In addition, No. 5 refers to the “find and fix” revisions to the federal Lead and Copper Rule, without providing any citation that such revisions have been adopted in Illinois. (R000005-R000006; R000012.) Further, No. 6 indicates that, “Aqua Illinois is not currently seeking alteration to the water quality parameter monitoring conditions included in the Construction/Operating Permit”, R000006 and R000012, thereby failing to set forth a basis for the elimination of the monthly compliance sampling requirement. (*See* Tr. at p. 59, line 19 – p. 60, line 24.)

No. 7 - Aqua generally refers to other public water suppliers’ sampling. (R000006; R000012-R000013.) Yet, Aqua has offered no evidence in support of such contentions. (Tr. at p. 11, lines 10-23; Tr. at p. 89, lines 7-8.) Even if it had, compliance sampling that other public water suppliers conduct is irrelevant to the sampling requirements for Aqua’s UP Water System, particularly given the pending Circuit Court action and the Agreed Interim Order. (*See* Tr. at p. 61, lines 1-14.)

Aqua is required to prove that no violation of the Act or Board regulations would occur if its permit applications were granted as of March 31, 2022, which burden Aqua has not met. Any attempt to remedy the lack of evidentiary support through Aqua’s Post-Hearing Response Brief must be disregarded. (*See supra* at pp. 2-3 (citing *Joliet Sand and Gravel*, PCB 86-159, slip op. at

p. 5 (Feb. 5, 1987); *Community Landfill*, PCB 01-170, slip op. at p. 4 (Dec. 6, 2001)); *see also* 35 Ill. Adm. Code 105.214(a.) Based upon the foregoing, Aqua's Permit Appeal should be denied.

II. Aqua Has Not Shown that the Agency's Reason for Denial was Inadequate.

A permit denial letter must specify the basis for such decision. *See Joliet Sand and Gravel*, PCB 86-159, slip op. at p. 5. Generally, in making its determination regarding an administrative agency's reasoning, the Board does not apply an arbitrary and capricious standard:

To require the Board to review the Agency decision under an arbitrary and capricious standard in this case would essentially remove the procedural safeguards of the administrative appeal process. . . . it is essential that the Board provide hearings and allow the petitioner an opportunity to challenge the validity of the decision made by the Agency. To require another standard of review would interrupt the administrative continuum which becomes complete after the ruling of the Board.

ESG Watts v. Pollution Control Bd., 286 Ill. App. 3d 325, 331 (3d Dist. 1997) (citing *Illinois Env'tl. Protection Agency v. Illinois Pollution Control Bd.*, 138 Ill. App. 3d 550 (3d Dist. 1985), *aff'd*, 115 Ill.2d 65 (1986)). Rather, Aqua must prove that Respondent's basis for denying Aqua's March 24 and 28, 2022 letter requests to eliminate the monthly compliance sampling requirement as of March 31, 2022, was "either insufficient or improper". *Id.* (citing *ESG Watts, Inc. v. Illinois Env'tl. Protection Agency*, PCB 94-243 (Consolidated), slip op. at p. 6 (March 21, 1996).)

In the 2022 Permit, Respondent denied Aqua's requests to eliminate the monthly compliance sampling requirement as of March 31, 2022, due to the duplicative sampling requirement in the incorporated-by-reference Agreed Interim Order. (R000016; Tr. at p. 61, line 15 – p. 73, line 23.) Respondent properly concluded that monthly compliance sampling remained "necessary" as of March 31, 2022, particularly due to the nitrate issue that Aqua and its consultants raised with Respondent. (R000609 (" . . . 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. . . .")); Respondent's Post-Hearing Opening Brief at

pp. 10-11 (citing Sept. 28, 2022 transcript); *see also* R000352; R000404-R000405; Tr. at p. 85, lines 7-16; Tr. at p. 86, lines 11-17; Tr. at p. 88, lines 11-20.)

In its Opening Brief, Aqua states that Respondent is “precluded from raising new reasons for the first time before the Board . . . [i]mplicit” or otherwise. (Petitioner’s Post-Hearing Brief at pp. 7-8 (quoting *Joliet Sand and Gravel Co.*, PCB 86-159, slip op. at p. 4 (Feb. 5, 1987) and *Midwest Generation EME v. IEPA*, PCB 04-185, slip op. at pp. 11-12 (April 19, 2007) (ruling on motion to strike prior to trade secret appeal hearing).) Respondent does not disagree. Rather than providing a new basis for Respondent’s denial of Aqua’s requests to eliminate the monthly compliance sampling requirement as of March 31, 2022, Mr. Cook explained during the September 28, 2022 hearing, that the additional sampling continued to be necessary under the Agreed Interim Order. (*See* Respondent’s Post-Hearing Opening Brief at pp. 10-11 (citing Sept. 28, 2022 Transcript); *supra* pp. 3-6 (citing same); *see also Joliet Sand and Gravel Co.*, PCB 86-159, slip op. at p. 5 (Feb. 5, 1987) (“[a]t hearing, the Agency may attempt to controvert the applicant’s facts by cross-examination or direct testimony; may submit argument on the applicable law and regulations and may urge conclusions therefrom; or, it may choose to do either; or, it may choose to present nothing”) (quoting *Oscar Mayer*, 30 PCB at 398)).

Aqua also argues that the Board’s Opinion and Order dated September 22, 2022 (the “September 22 Order”),⁴ is determinative of whether Respondent’s basis for denying Aqua’s

⁴ The September 22 Order incorrectly states that (a) Aqua asserted through its March 24, 2022 letter that “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”, and (b) “Aqua’s application maintained that the UP System met the Lead Action Level for the two consecutive six-month compliance monitoring periods” (*Compare* September 22 Order at pp. 5, 8 *with* R000001-R000013 (discussing only the six-month period ending December 31, 2021).) Similarly, such Order improperly focused on the Permit Appeal’s shorter schedule versus that of the Circuit Court action, though the latter was first-filed. (September 22 Order at p. 9.) Further, without any citation, the September 22 Order placed an impossible burden upon Respondent to “give[] the Board [a] sense of whether or approximately when

requests was improper. (Petitioner's Post-Hearing Brief at pp. 8-10.) Yet, the standard of review for the motion to dismiss underlying the September 22 Order does not apply to the Board's ultimate decision-making in this Permit Appeal following the September 28, 2022 hearing. (*Compare* September 22 Order at p. 10 (“[o]ur 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”) (quoting *Midas Int'l Corp. v. Mesa S.p.A.*, 2013 IL App (1st) 122048, ¶ 16)), *with* 35 Ill. Adm. Code 105.112(a) and Petitioner's Post-Hearing Brief at p. 8 (the petitioner's burden of proof is a preponderance of the evidence).) Moreover, contrary to Aqua's contention, “the Agreed Interim Order can[] be used as a basis to deny the lead sampling frequency changes sought by the Aqua Requests.” (Petitioner's Post-Hearing Brief at p. 9.) First, the Board's Order simply indicated its belief that the ““written approval’ . . . would logically come in the form of a permit determination”, though respectfully, an amended Order would be an equivalent, if not more logical, form for such writing given the pending Circuit Court action.⁵ (September 22 Order at pp. 9-10.) Second, the Agreed Interim Order, as Aqua agreed, provides that a lead sampling frequency change can only occur if Respondent determines the additional sampling “is no longer necessary”. (R000609.) As shown during the September 28, 2022 hearing, in Respondent's Opening Brief, and herein, monthly compliance sampling has remained necessary for Aqua's UP

mediation would lead to resolution of the disputed sampling requirement” if the Circuit Court granted Aqua's pending Motion for Mediation. (*Id.*)

⁵ Respondent incorporates by reference herein its Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 filed on August 2, 2022, as supplemented by Respondent's Motion for Permission to File Reply to 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 22, 2022, and Respondent's 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 filed on August 30, 2022, which argued for dismissal due to the pending Circuit Court action. Respondent was unable to seek a stay, as only a petitioner may grant an extension of the decision deadline. 35 Ill. Adm. Code 105.114.

Water System. Because Aqua has failed to satisfy its burden of showing that Respondent's denial reason was insufficient or improper, Aqua's Permit Appeal should be denied.

CONCLUSION

Through its March 24 and 28, 2022 letter requests, Aqua sought the elimination of the monthly compliance sampling requirement as of March 31, 2022, which Respondent denied. To succeed in its Permit Appeal, Aqua bears the burden to prove that (i) its requests to eliminate the monthly compliance sampling requirement as of March 31, 2022, would not violate the Act and the Board regulations, and (ii) Respondent's permit denial reason was insufficient or improper. Aqua elected not to submit any evidence during the September 28, 2022 hearing and has otherwise failed to meet its burden. Accordingly, Respondent's June 29, 2022 denial of Aqua's March 24 and 28, 2022 letter requests must be affirmed.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

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