BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED EXTENSION OF ADJUSTED STANDARD	)	AS 2007-2
APPLICABLE TO ILLINOIS-AMERICAN	)	(Adjusted Standard)
WATER COMPANY'S ALTON PUBLIC WATER	)	
SUPPLY FACILITY DISCHARGE	)	
TO THE MISSISSIPPI RIVER	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on September 18, 2007, the PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S RESPONSE TO THE AGENCY'S POST-HEARING BRIEF was filed with the Clerk of the Pollution Control Board. A copy is herewith served upon you.

Respectfully submitted,

ILLINOIS-AMERICAN WATER COMPANY

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PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S RESPONSE TO THE AGENCY'S POST-HEARING BRIEF

Petitioner, Illinois-American Water Company ("Illinois-American Water"), by its attorneys, Bradley S. Hiles and Alison M. Nelson, hereby submits its response to the Illinois Environmental Protection Agency's (the "Agency's) post-hearing brief.

I. INTRODUCTION

Illinois-American Water has successfully fulfilled every requirement and condition of the adjusted standard. It has achieved remarkable soil savings, far surpassing the 2 to 1 offset required by the Board's order in case AS 99-6. It has invested millions in sediment reduction projects designed to offset the amount of solids in its effluent. Also, it has earned the trust and approval of local communities, and has become a model for trading projects across the county.

Somehow, this is not enough for the Agency. Following a changing of the guard in the Agency's water bureau, the Agency now claims that the Board should not extend the adjusted standard because it "has lost its justification." (Ag. Brief at 3.) But justification for this particular adjusted standard has not been lost. Aside from the Agency's position, the only thing that has changed since the Board granted AS 99-6 is that the PCWP is now a proven success. The facts applicable to the facility's operation are the same, the law is the same, and the state and federal policies for trading are the same. Rather, the Agency has simply changed its

interpretation of the law and policy. *See* Ag. Brief at 3 ("The Agency believes that its recommendation in AS 99-6 was inconsistent with the CWA and the NPDES program."). This alone does not merit termination of a successful trading project.

The Agency also claims that the Board's previous use of a sunset provision reveals the Board's intent to provide temporary relief only. (Ag. Brief at 5.) Illinois-American Water disagrees. Including a sunset provision in AS 99-6 was appropriate because no one knew whether the PCWP would achieve the predicted soil savings. Significantly, the Board's order stated that AS 99-6 could be extended unless the Agency's "determination of effectiveness" showed insufficient progress toward the 2 to 1 goal. *See* Opinion and Order of the Board, AS 99-6 at 5 (Oct. 19, 2000). Unfortunately, the Agency has not rendered a determination of effectiveness, and the Agency's representatives at the August 28, 2007 hearing refused to even politely acknowledge the PCWP's effectiveness. But the effectiveness of the PCWP is undisputed: The PCWP has clearly surpassed its goal years ahead of schedule. The Agency's attempt to read into the Board's order an intent to terminate the adjusted standard for any reason other than an "insurmountable failure" by the PCWP is simply unjustified.

Throughout this proceeding, Illinois-American Water has bent over backwards to satisfy the Agency's concerns. Illinois-American Water submitted the initial Petition only after extensive discussions with the Agency.[1] Then, after the Agency protested that the proposed maintenance obligation would not include a soil savings of at least 6,600 tons, Illinois-American Water prepared and submitted an Amended Petition to include this minimum level of soil savings. *See* Amended Petition at ¶¶17, 73, 74; Proposed Order at 5(c) (attached to the Amended

[1] Illinois-American Water made a number of changes to the Petition after drafts were reviewed and approved by the Agency, but believes that any changes to those drafts were to the form rather than the substance of the relief requested.

Petition as Attachment F).[2] But the Agency has responded each time with new concerns, new questions, and new justifications to support a new position.

The Agency's post-hearing brief is no different. It continues to state the Agency's basic position — that the adjusted standard is inconsistent with federal law and that the PCWP is not a "substantially and significantly different factor." The Agency also offers some new theories — conspicuously absent from its Recommendation — in a last-ditch effort to support its position. For instance, the Agency attempts to characterize Illinois-American Water's justification as a "background concentrations" argument (Ag. Brief at 9–10); argues that the term "substantially and significantly different factors" must be interpreted in accordance with the federal standard for variances (Ag. Brief at 11–13); claims that Illinois-American Water does not adequately address whether the regulations of general applicability were adopted to implement the requirements of the CWA or state NPDES programs (Ag. Brief 13–17); and alleges that the Board should consider Illinois-American Water's ability to absorb costs of compliance (Ag. Brief at 18). Each of the Agency's new arguments fail, however, for the reasons discussed below.

II. ARGUMENT

The Agency's brief presents seven arguments in support of its recommendation that Illinois-American Water's request for extension of AS 99-6 should be denied, but each of these

[2] In the Amended Petition, Illinois-American Water also deleted its request for extension of its adjusted standard from the water quality standard for offensive discharges at 35 Ill. Adm. Code 302.203 because it determined that such relief was no longer necessary. *See* Amended Petition at n.1. Also, the Agency indicated that it could not support Illinois-American Water's request for extension of the adjusted standard if relief from 35 Ill. Adm. Code 302.203 were included, because the Agency believed USEPA would require a site-specific rulemaking instead.

arguments is unsupported by the law and by the facts of this case. Each of the Agency's arguments is addressed in turn, below.[3]

A. Illinois-American Water Satisfies Section 27

For the first time in this proceeding, the Agency takes issue with Illinois-American Water's reliance on the Site Specific Impact Study (the "SSIS") to justify the adjusted standard. (Ag. Brief at 9, n.4.) In addition, the Agency argues that Illinois-American Water cannot satisfy Section 27(a) of the Act because it believes Illinois-American Water has not adequately addressed the "nature of the receiving body of water" and the "technical feasibility and economic reasonableness of measuring or reducing the particular type of pollutant." *See* Ag. Brief at 9 (stating that the Agency "takes issue" with these two factors).[4] These arguments are untimely or unsupported (or in some cases, both).

1. Illinois-American Water's Reliance on the SSIS is Sound

The Agency did not voice any opposition to Illinois-American Water's motion to incorporate the SSIS into Illinois-American Water's Petition for Extension of Adjusted Standard.[5] Then, in the Agency's Recommendation, the Agency did not voice any opposition to

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[3] For the Board's convenience, the organization of this Brief parallels the organization of the Agency's brief, generally addressing the same issues in the same order.

[4] Section 27(a) also requires consideration of the existing physical conditions, the character of the area involved (including the character of surrounding land uses), and zoning classifications, *see* 415 Ill. Comp. Stat. 5/27(a), but the Agency's post-hearing brief does not address these issues.

[5] In that motion, Illinois-American Water stated that:

> "The Site Specific Impact Study provides information regarding the environmental impact, technical feasibility, and economic reasonableness of the potential alternatives to treat discharges from the Alton facility; to satisfy state and federal requirements under various substantive and procedural statutes; and to address Illinois Environmental Protection Agency concerns about the facility. The Site Specific Impact Study was offered to and received in evidence by the Board in Docket Number AS 99-6. The Board has therefore already determined that the Site Specific Impact Study is authentic and credible. Also, the Petition for Extension of Adjusted Standard cites to the Site Specific Impact Study as the source for much of the information set forth in the Petition, and refers the Board to the Site Specific Impact Study for a detailed discussion of the justification for extension of Adjusted Standard 99-6. In addition, several affidavits submitted

Illinois-American Water's reliance on the SSIS. *See* Recommendation of the Illinois Environmental Protection Agency (June 18, 2007). The Agency was also silent on this issue at the Board's August 28, 2007 hearing. *See* Hearing Transcript (Aug. 28, 2007). But now, for the first time in this proceeding, the Agency contends that Illinois-American Water's reliance on the SSIS is unsound. *See* Ag. Brief at 9 n.4.

The Agency's opposition to the SSIS is unsupported. Rather than presenting any specific arguments (much less scientific support) for its position, the Agency states only that "[t]he study was compiled in 1999 to study the *proposed* Alton facility. While Illinois-American does make certain modifications to "update" the study, the Agency believes that in no way does a study conducted in 1999 justify the Board granting an adjusted standard eight years later." (Ag. Brief at 9 n.4.) Notably, the Agency fails to identify even one section of the SSIS that it believes is no longer relevant.

Also, the Agency's decision to wait until the eleventh hour to raise this as an issue is prejudicial to Illinois-American Water. If the Agency had even questioned the continuing validity of the SSIS after Illinois-American Water filed its motion to incorporate the SSIS by reference, Illinois-American Water may have had the time to complete a supplemental study to update any sections of the SSIS that the Agency called into question. In an abundance of caution, Illinois-American Water even sought confirmation from the Agency that the SSIS would

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> along with the Petition for Extension of Adjusted Standard also establish that the environmental conditions of the Mississippi River near the Alton facility have not changed significantly since the Site Specific Impact Study was prepared in March 1999. *See* Affidavit of Alley Ringhausen (attached to the Petition for Extension of Adjusted Standard as Attachment A), at ¶¶1-1 2; Affidavit of Howard *0.* Andrews, Jr. (attached to the Petition for Extension of Adjusted Standard as Attachment E), at ¶¶4-5. This makes the Site Specific Impact Study relevant."

See Motion To Incorporate By Reference The Petition For Adjusted Standard Filed In Docket Number AS 99-6, And The Site Specific Impact Study Accepted Into Evidence In Docket Number AS 99-6, Into Petitioner's Petition For Extension Of Adjusted Standard Pursuant to 35 Ill. Adm. Code 101.306(a) (Oct. 31, 2006). The Agency did not file a response to this motion.

be acceptable — and received that confirmation from Agency representatives in a telephone conference on August 21, 2006. Illinois-American Water's counsel participated in that conference with several Agency representatives, including Robert G. Mosher (supervisor of the Water Quality Standards Unit with the Division of Water Pollution Control), Thomas Andryk (the Agency's counsel at that time), and Amy Walkenbach (Nonpoint Source Unit Manager of the Agency's Bureau of Water). Significantly, Mr. Mosher confirmed that there would be no need to repeat the SSIS procedure. *See* Affidavit of Bradley S. Hiles (attached to this response as Attachment A). Mr. Mosher stated only that it would be helpful to the Agency to know that there are no visible effects from Illinois-American Water's discharge. In response to Mr. Mosher's statement, Illinois-American Water provided the Agency with evidence that there is no visible "muddy streak" at the point of discharge.[6] After supporting Illinois-American Water's reliance on the SSIS, it is too late for the Agency to change its position simply because it realizes that its other arguments are failing. The hearing has closed, and the evidence has already been received. The Agency's argument should be ignored because it is wrong, and also because it is untimely.

2. The Agency Misinterprets Illinois-American Water's Arguments Justifying Extension of the Adjusted Standard

The Agency takes issue with Illinois-American Water's justification "concerning the nature of the receiving body of water." (Ag. Brief at 9.) However, the Agency misconstrues Illinois-American Water's argument. Illinois-American Water does not, as the Agency suggests, argue that the "existing background concentration warrants an adjusted standard from total

[6] Illinois-American Water provided the Agency with a DVD titled "Alton Discharge Video, August 28, 2006 10:00 AM, Filter #1 after 90 hours Service, River Turbidity – 20 NTU, L&D Pool Elevation – 419.3 ft, Ryan Schuler – Paul Keck," which shows visual observations from the shore of a discharge under these conditions. No muddy plume is visible. The Agency did not request additional proof.

suspended solids." (Ag. Brief at 9.) Like the Agency, Illinois-American Water reads the "background concentrations" rule at 35 Ill. Adm. Code 304.103 to apply only to facilities that do not increase the concentration of pollutants in their influent prior to discharge. Illinois-American Water does, however, believe that the nature of the receiving body of water — a large river with significant concentrations of suspended solids — is relevant to this analysis. First, the Board is statutorily required to consider it as a factor under Section 27(a) of the Act. *See* 415 Ill. Comp. Stat. 5/27(a). Moreover, the nature of the receiving body of water is relevant to the Board's determination of whether the requested standard "will result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability," a required factor under Section 28.1(c). *See* 415 Ill. Comp. Stat. 28.1(c).[7]

B. Illinois-American Water Has Met Its Burden Under Section 28.1(c) by Establishing that the PCWP is a "Substantially and Significantly Different Factor"

Section 28.1(c) of the Act requires Illinois-American Water to prove that the factors relating to Illinois-American Water are "substantially and significantly different" from the factors relied upon by the Board in adopting the regulation of general applicability. *See* 415 Ill. Comp. Stat. 5/28.1(c). The Agency claims that Illinois-American Water has not established this. *See* Ag. Brief at 11 ("Illinois American ahs [sic] misconstrued the interpretation of 'substantially and significantly factors' [sic] by characterizing the GRLT sediment reduction projects as a 'substantially and significantly different factor.'"). To the contrary, the Agency has misconstrued the "substantially and significantly different" factors requirement by treating it the

[7] The Agency also takes issue with Illinois-American Water's justification concerning the "technical infeasibility and economic reasonableness of measuring or reducing the particular type of pollutant." (Ag. Brief at 9.) Again, the Agency misconstrues Illinois-American Water's argument. However, to keep consistent with the Agency's organization, this issue is discussed in Section II.C of this brief.

same as the "fundamentally different factors" test for a variance from a federally-promulgated national effluent limitation, and by limiting the factors that this Board may consider to those considered in previous proceedings.

"Fundamentally different factors" come into play only when federally-promulgated effluent limitation guidelines apply to the facility in question. *See* 33 U.S.C. 1331(n)(1) ("The Administrator, with the concurrence of the State, may establish an alternative [effluent limitation] for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—(a) the facility is fundamentally different with respect to the factors (other than cost) specified [in the Act] and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards.") (emphasis added). *See also* 40 C.F.R. 125.30(b) (stating that in some cases, "data which could affect these national limits as they apply to a particular discharge may not be available or may not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the national limits, and make them either more or less stringent as they apply to certain dischargers within an industrial category or subcategory") (emphasis added). When a facility's effluent guidelines are determined using the permitting authority's best professional judgment, a variance is not necessary because the best professional judgment analysis takes the facts surrounding the individual facility into account. *See* 40 C.F.R. 125.3(c)(2) (requiring the permit writer to

consider the appropriate technology for the category of point source, as well as "[a]ny unique factors relating to the applicant") (emphasis added).[8]

The Agency's assertion that the Board has previously interpreted the "substantially and significantly different factors" test in accordance with the federal interpretation of "fundamentally different factors" (Ag. Brief at 11) is incorrect. In fact, not one of the three cases cited by the Agency illustrates such an interpretation. In one case,[9] the Board granted an adjusted standard to a facility when "requiring it to now achieve the standards generally applicable to the [receiving body] would not be reasonable as a result of the environment not being significantly improved." *See* Opinion and Order of the Board, AS 95-3 at 9. The Board did not mention "fundamentally different standards" even once, nor did it focus its analysis on the factors considered under that federal test for variances. Rather, it adhered strictly to the "substantially and significantly different factors" analysis required by Section 28.1(c), focusing on differences from the factors considered by the Board in adopting the regulation of general applicability rather than on the differences between that facility and others. *See id.* (discussing factors considered in adopting the general rule of applicability).

In another case,[10] the Board focused on the quality and composition of the applicant's discharge, noting that "the Board finds that the quality and composition of the discharge that [the applicant] produces in its manufacturing process is substantially and significantly different than the wastewaters of other industries and POTWs." *See* Ag. Brief at 12 (quoting Opinion and

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[8] *See also* Section II.B, which addresses the Agency's argument that the Board should interpret "substantially and significantly different factors" for adjusted standards in accordance with the federal "fundamentally different factors" requirement for variances from national effluent standards.

[9] *See* In the Matter of: the Joint Petition of the City of Metropolis and the Illinois Environmental Protection Agency for an Adjusted Standard from 35 Ill. Adm. Code Part 304 for 5-Day Biological Oxygen Demand (BOD-5), Suspended Solids and Ammonia Nitrogen, AS 95-3 (June 6, 1966)

[10] *See* In the Matter of: Petition of Noveon, Inc. For an Adjusted Standard from 35 Ill. Adm. Code 304.122, AS 02-5 (Nov. 4, 2004).

Order of the Board, AS 02-5 at 17 (Nov. 4, 2004)). The Board concluded that the applicant's request "meets the statutory 'fundamentally different' factors set forth at Section 28.1(c) of the Act," *see* Opinion and Order of the Board, AS 02-5 at 17, but the Board's use of the words "fundamentally different" was not some sort of adoption of the federal variance standard. The Agency has handpicked language from the Board's order to make it appear that the Board compared the facility in question to other facilities, but other language omitted by the Agency suggests otherwise. *See id.* (discussing the unique characteristics of the applicant's wastewater, then noting that '[t]he Board did not anticipate the specialty chemicals manufacturing processes that [the applicant] employs... when it promulgated the ammonia effluent limit at Section 304.122(b), applicable mainly to other industrial dischargers, in 1972"). Again, the Board adhered strictly to the "substantially and significantly different factors" analysis required by Section 28.1(c), focusing on differences from the factors considered by the Board in adopting the regulation of general applicability.

Finally, in the third case,[11] the Board simply observed that the applicant had not presented any evidence or argument regarding how the applicant's situation was any different than any other Illinois utility or discharger who is discharging effluent into an Illinois waterway. *See* Ag. Brief at 13 (citing the Vermillion Power case). Considering these differences is certainly appropriate to the extent that the facts applicable to those facilities were considered by the Board in adopting the regulation of general applicability. The Board's order only considers these differences in this limited context. *See* Opinion and Order of the Board, AS 92-7 at 19-21 (Oct. 7, 1993) (discussing the factors considered by the Board in adopting the general water quality standards for boron, sulfate, and total dissolved solids). The order does not, as the

[11] *See* In the Matter of: Petition of Illinois Power Company (Vermillion Power Station) for Adjusted Standard from 35 Ill. Adm. Code 302.208(e), AS 92-7 (Oct. 7, 1993).

Agency suggests, require Illinois-American Water to draw comparisons with other water supply facilities. Also, the order does not indicate that "substantially and significantly different" requirements under Section 28.1(c) of the Act should be treated the same as the federal "fundamentally different factors" analysis for variances.

The Agency seems to suggest that only those factors considered by the Board in these few select cases can be considered in the Board's determination of whether the facts applicable to Illinois-American Water's Alton facility are "substantially and significantly different" from the facts considered by the Board in adopting the regulations of general applicability. *See* Ag. Brief at 12 (arguing that Illinois-American Water cannot argue that its facility was constructed decades ago, that it has no ability to upgrade the facility, that special conditions at the site prohibit it from meeting applicable standards, or that it has a "unique characteristic of its wastewater"). Section 28.1(c) of the Act does not, however, specify what factors may be considered by the Board. The fact that an applicant in one case addressed a specific factor discussed by the Board in another proceeding — or did not address one such specific factor, as the case may be — bears no impact on whether the Board may properly consider the PCWP to be a significantly and substantially different factor in this case.

In any event, even if the "fundamentally different factors" test were to apply, Illinois-American Water would satisfy that test because installing conventional treatment at the Alton facility is not economically reasonable.[12] Although the Agency suggests that only "factors of a Technical and Engineering nature" (rather than economic factors) may be taken into account, the very case the Agency cites, Weyerhaeuser Co. v. Costle, undermines this conclusion. In that case, the Agency's General Counsel instructed Agency personnel that the "other such factors"

[12] This issue is discussed in greater detail in Section II.C.2, below.

language in the variance provision did not envision consideration of economic factors. In response, the D.C. Circuit Court of Appeals wrote, "[i]t was this interpretation that the Fourth Circuit disapproved of in Appalachian Power Co.," and that "we, too, would be inclined to find the opinion inconsistent with the Act." *See* 590 F.2d at 1038. Moreover, economic factors are a required consideration under the federal "fundamentally different factors" test. *See* 40 C.F.R. 125.3(b)(3).

C. Illinois-American Water Has Met The Requirements Under Subpart D of Part 104 of the Board's Rules

The Agency claims that Illinois-American Water fails to meet the requirements under Section 104.406 because it does not state whether the regulation of general applicability implements the CWA or the state NPDES program as required by Section 104.406(b), and because it does not describe the efforts necessary to comply with the regulations of general applicability as required by Section 104.406(e). [13]

1. Illinois-American Water's Amended Petition Satisfies Section 104.406(b) Because It States Whether the Regulation of General Applicability Implements the CWA or the State NPDES Program

Section 104.406(b) of the Board's procedural rules requires a petition for an adjusted standard to include a statement "that indicates whether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300(f) et seq.); the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 et seq.); the CAA (42 U.S.C. 7401 et seq.); or the State programs concerning RCRA, UIC, or NPDES." The Agency falsely contends that

[13] Section 104.406 also requires a petition for an adjusted standard to include a statement of the standard from which an adjusted standard is sought; the level of justification required; a description of the petitioner's activity that is the subject of the proposed adjusted standard; a narrative description of the proposed adjusted standard; a quantitative and qualitative description of the impact of the petitioner's activity on the environment, for both compliance with the regulation of general applicability and with the adjusted standard; a statement requesting or waiving a hearing; citations to supporting documents or legal authorities; and any additional information. *See* 35 Ill. Adm. Code 104.406. The Agency does not take issue with these remaining items, in this or other sections of its brief.

Illinois-American Water has not satisfied this requirement. (Ag. Brief at 13.) Paragraph 27 of Illinois-American Water's Amended Petition contains a statement addressing this issue.[14]

The Agency claims, however, that Part 304 was adopted to implement the requirements of the Clean Water Act and the state's NPDES program. (Ag. Brief at 16–17.) The Agency has not raised these issues in any of its previous submissions to this Board. Under Illinois' Rules of Civil Procedure,[15] the Agency's failure to address this issue in its Recommendation is an admission that the regulations of general applicability were not promulgated to implement the requirements of the Clean Water Act or the state's NPDES program.[16] Also, Illinois' Rules of Civil Procedure suggest that the Agency's argument should be disregarded because it was not stated in the Agency's Recommendation and now takes Illinois-American Water by surprise.[17]

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[14] Paragraph 27 of the Amended Petition states:

> "Neither the effluent standards for total suspended solids and total iron at Section 304.124 nor the effluent standard for offensive discharges at Section 304.106 was promulgated to implement the requirements of any of the above-listed federal environmental laws or state programs. The Clean Water Act (33 U.S.C. 1251 et seq.) requires effluent standards for "discharges of pollutants from a point source or group of point sources" to be established, 33 U.S.C. 1312(a), but the effluent standards at Section 304.124 and Section 304.106 apply to all discharges to waters of the State of Illinois. *See* Illinois Institute for Environmental Quality, Evaluation of Effluent Regulations of the State of Illinois, Document No. 76121 at 4-5 (1 976) (noting that federal law "differs from Illinois law, in requiring industrial category-specific guidelines whereas the Illinois standards apply equally to all dischargers"). In addition, there are no federal categorical effluent limitations for public water supply treatment facilities. *See, e.g.*, SSIS at 1.2; Opinion & Order of the Board, In the Matter of: Petition for Site-Specific Exception to Effluent Standards for the East St. Louis Water Treatment Plant by the Illinois American Water Company, PCB 85-11 (Feb. 2, 1989) at 1. Rather, effluent limitations are developed on a site specific basis using Best Professional Judgment ("BPJ"). *Id.*"

[15] Section 101.100(b) of the Board's rules provide that "[t]he 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." *See* 35 Ill. Adm. Code 101.100(b).

[16] Illinois' Rules of Civil Procedure states that "[e]very answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates," and that "[e]very allegations... not explicitly denied is admitted, unless the party states in his or per pleading that he or she has no knowledge thereof sufficient to form a belief , and attached an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny." *See* 735 Ill. Comp. Stat. 5/2-610(a)–(b).

[17] *See* 735 Ill. Comp. Stat. 5/2-613(d) (stating that "any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply").

Due to the untimely manner in which the Agency has raised this issue, the Board should disregard it.

Even if the Agency's argument is correct, which it is not, the proper remedy is not "rejection" of Illinois-American Water's Amended Petition, as the Agency suggests. *See* Ag. Brief at 13–14. Rather, as this Board held in the City of Elgin case cited by the Agency, the proper remedy would be to require Illinois-American Water to address the informational requirements in an amended petition[18] or at the hearing.[19] Notably, if the Agency had raised this issue at any other time in this proceeding, this Board could have addressed its concern and, if necessary, asked Illinois-American Water to address it without possibly delaying the Board's ruling.

2. Illinois-American Water's Amended Petition Satisfies Section 104.406(e) Because It Describes the Effort to Comply with the Regulations of General Applicability

Section 104.406(e) requires a petition for an adjusted standard to contain a statement of "the efforts that would be necessary if the petitioner was to comply with the regulation of general applicability," including "all compliance alternatives, with the corresponding costs for each alternative." *See* 415 Ill. Comp. Stat. 104.406(e). The Agency again takes issue with Illinois-American Water's reliance on the SSIS (Ag. Brief at 18), but fails to identify any sections of the SSIS that are no longer relevant to this issue.[20] Aside from the reliability of the SSIS, however, the Agency appears to argue only that Illinois-American Water fails to satisfy Section 104.406(e) because one of the compliance efforts described (dewatering lagoons and belt filter press

[18] *See* Order of the Board, AS 01-1 at 2 (Aug. 10, 2000).

[19] *See* Order of the Board, AS 01-1 at 1 (Nov. 2, 2000).

[20] This issue is discussed in greater detail in Section II.A.1, above, and is not discussed here as well for purposes of brevity.

technology coupled with disposal of dewatered residuals in offsite landfills) is a "viable means of treating residuals."[21] The Agency takes issue with this because, in the Agency's view, a "viable means of treating residuals" must be installed unless Illinois-American Water can show that "there is a unreasonable or disproportionate economic hardship" in achieving the applicable effluent limitation using such means. (Ag. Brief at 18–19.) But Section 27(a) of the Act simply requires the Board to consider the "technical feasibility" and "economic reasonableness" of measuring or reducing the particular type of pollution. *See* 415 Ill. Comp. Stat. 27(a).

Notably, the SSIS analysis determining the best degree of treatment for the Alton facility considered the "economic reasonableness" of conventional treatment mechanisms (including dewatering lagoons and belt filter press technology coupled with disposal of dewatered residuals in offsite landfills), and determined that "considerable costs would be incurred by the proposed replacement facility to meet these effluent limitations without a clearly-defined improvement to the aquatic environment." *See* SSIS at 6.4.2.1. In its opinion granting the adjusted standard, the Board specifically determined that "[t]reating the effluent discharged into the Mississippi, which has a naturally-occurring high level of suspended solids and certain types of offensive materials, is not economically reasonable." *See id.* at 20; *see also id.* ("In light of the substantial costs associated with treating the new facility's discharge, the Board is persuaded that treatment would be economically unreasonable and would result in little increased environmental protection."). Nothing regarding the economics of using conventional treatment has changed since that time.

The Agency now asks this Board to consider Illinois-American Water's ability to "absorb any or all of the compliance costs" or "otherwise reduce that impact on the consumers." (Ag.

[21] The Agency does not take issue with the adequacy of Illinois-American Water's description of the efforts needed to comply with the regulations of general applicability, or to challenge the validity of the facts stated in the Amended Petition. Rather, the Agency appears to challenge whether the justification proffered by Illinois-American Water merits issuance of an adjusted standard.

Brief at 18.) But the case cited by the Agency[22] does not, as the Agency suggests, require Illinois-American Water to further justify its conclusion that installing conventional treatment technology would have an adverse effect on its ratepayers. In that case, the Board noted specifically that "[t]his record does not support the notion that a 10% rate increase would actually take place," and noted that "[t]he best case impact on [the area served by the facility] cannot be assessed by the Board, due to the selective manner in which data have been presented by the Company." *See id.* at 15. Here, the record adequately describes the expected effects to ratepayers,[23] and the Agency has not presented any evidence on the issue to the contrary (nor could it).[24] *See* SSIS at 6.4.2.1 (considering the rate payer and community impacts and stating the per unit cost increase); Opinion and Order of the Board, AS 99-7 at 12–13 (Sept. 7, 2000) (discussing effects to ratepayers). Accepting the Agency's argument that the facility's ability to pay for capital improvements without passing costs through to its ratepayers would make adjusted standards available only to economically underperforming companies, which is ridiculous.

The Agency also argues that "[t]he mere fact that there are several point sources on the Mississippi River that comply with Part 304 standards shows that these controls are in fact both technically feasible and economically reasonable." (Ag. Brief at 18.) However, this is

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[22] *See* In the Matter of: Petition for Site-Specific Exception to Effluent Standards for the Illinois-American Water Company, East St. Louis Treatment Plant, R85-11 (Sept. 25, 1986).

[23] Significantly, if the Agency had raised this issue at any other time in this proceeding, Illinois-American Water would have had adequate time to supplement the record with other information relevant to the economic reasonableness of conventional treatment and the potential economic effects on its customers.

[24] The comment filed by Kathy Andria, President of American Bottom Conservancy, suggests that this is not enough. She states that Illinois-American Water has given no consideration "to the cost of removal of redeposited sediment and additional discharged toxins at Illinois-American facilities downstream, including Granite City and East St. Louis, which costs must be borne by downstream rate-payers." But there is no evidence that downstream facilities have any increased costs due to Illinois-American Water's discharge. If anything, the costs to downstream facilities should be lower because the adjusted standard has a net reduction on solids loading to the Mississippi River.

unsupported by the facts. A significant portion of the costs associated with this method of treatment is transportation and disposal (*i.e.*, the cost to truck the dewatered residuals to a landfill, and the fees charged by the landfill to accept the tons of sediment for disposal). This is not a cost that facilities with space for on-site disposal — or even a closer site for disposal — would have to bear. This is precisely the situation that adjusted standards were intended to cover, *i.e.*, a situation in which a treatment option used by many facilities is not technically feasible and economically reasonable for the facility in question.

D. Illinois-American Water's Requested Relief is Consistent with Federal Law

The Agency claims that the adjusted standard is inconsistent with federal law because it does not contain technology-based controls. But contrary to the Agency's suggestion, the adjusted standard has fully accounted for technology-based controls. As the Agency has acknowledged, there are no federal effluent limits applicable to the Alton facility (Tr. 51:3–4), so the adjusted standard's controls were imposed following a best professional judgment analysis. *See* Tr. 51:13–17 (testimony of Toby Frevert) (acknowledging that when no federal effluent limitations apply, the effluent limits for a facility must be determined on a case-by-case basis). That analysis determined that "no treatment" together with completion of the PCWP was the appropriate control. Also, water quality controls apply in addition to these limits. *See* 35 Ill. Adm. Code 302.203 (providing that "[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity or other than natural origin").

The Agency also argues that the adjusted standard is inconsistent with EPA's policies on water quality trading. (Ag. Brief at 19–20.) Notably, the Agency's argument offers nothing new, and fails to respond to Illinois-American Water's arguments in its previous briefs. The Agency does not contest Illinois-American Water's explanation of why extending EPA's policy

for federal effluent limitations to state effluent limits would be inconsistent with the stated purposes of the policy. *See* Written Answers at 27–28. Also, the Agency does not offer any evidence that EPA intended its policy to apply to state effluent limits established on a case-by-case basis. In the absence of any such intent,[25] the Board should limit application of EPA's trading policy to technology-based effluent limits established by EPA.

E. Extending Illinois-American Water's Adjusted Standard Would Not Result in Bad Policy

The Agency also claims that extending the adjusted standard would result in bad policy for Illinois. Notably, as the Agency itself observes, "the simple fact is that Illinois does not have a promulgated trading policy." (Ag. Brief at 23.) But the absence of a policy cannot be grounds to deny Illinois-American Water's request for an extension of the adjusted standard. The mere possibility that the Agency will implement a policy precluding the use of non-point source control projects to comply with technology-based controls should not shape the outcome of this proceeding. Only time will tell whether the Agency will promulgate such a policy and what the terms of that policy may be.[26]

The Agency also claims that replacing technology-based controls "has many disadvantages for both the regulators and the regulated community" (Ag. Brief at 20), but fails to explain what these disadvantages might be. Rather, the Agency simply cites to a law review article that applauds technology-based controls in general terms, stating that technology-based

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[25] EPA is clearly aware of this dispute between Illinois-American Water and the Agency. If EPA's policy clearly prohibited the use of an adjusted standard in these circumstances, Illinois-American Water expects that EPA would have submitted opposing comments. The Agency's interpretation of EPA policy is no substitute for an interpretation by EPA itself.

[26] The adjusted standard already provides that "if new regulations are promulgated that limit or prohibit Illinois-American Water's discharges to the Mississippi or otherwise conflict with this adjusted standard, Illinois-American Water will be bound by any such regulation, and modification or termination of the adjusted standard may be required." *See* Proposed Order at 8 (attached to the Amended Petition as Attachment F). The proposed standard could easily be revised to also provide for modification or termination of the adjusted standard if new policies are promulgated, rendering moot the Agency's objections regarding consistency with Illinois trading policy.

standards are "generally" the first and best answer to pollution control, and that technology-based standards are more enforceable and predictable than "most" alternative approaches to pollution control. *See id.* The Agency also implies that technology-based controls are superior to the adjusted standard because of "the ease by which regulators can ensure that compliance obligations are met" and because technology-based requirements are "easy to reflect in permit requirements." *See id.* This ignores the many reporting obligations already built into the permit's requirements. *See* NPDES Permit No. IL0000299 at Special Condition 14 (attached to the initial Petition as part of Attachment C) (requiring submission of quarterly and annual reports).

Also, the Agency states that technology-based standards are "uniformly and expeditiously applied across all industries and geographic locations." (Ag. Brief at 21.) This is simply untrue. Technology-based standards are not applied across all industries. Rather, EPA promulgates technology-based effluent limitations for specific industrial categories. *See* 40 C.F.R. 401.10 (referring to federal effluent limitations under Parts 402 to 699 as "regulations issued concerning specific classes and categories of point sources") (emphasis added). Also, in the absence of such a federal limit, it is wrong to say that technology-based limits apply uniformly across all geographic locations. When no federal limits apply, each permitting authority sets effluent limits under 40 C.F.R. 125.3 using that authority's best professional judgment, which can vary widely from state to state.

Missouri, for one, has determined that no treatment is appropriate, even in the absence of an offset project. Like the Alton facility, water supply facilities on the Missouri side of the Mississippi River draw water from the Mississippi — a large and powerful river with significant solids loading — and discharge their effluent back into the Mississippi. Significantly, the Missouri Department of Natural Resources (MDNR) has not included numerical effluent

limitations in the NPDES permits for those facilities. Instead, it requires only that water supply facilities discharging to the Mississippi River monitor the level of solids in the incoming water and in the finished water, and report a calculated monthly discharge amount for river solids and water treatment plant additives. This is simply one example of the variety of controls imposed by different permitting authorities across the country, as the controls vary by state and even by receiving water. The Agency's view that technology-based effluent limits are uniformly applied to ensure consistent regulation of TSS loading is therefore overly simplistic and ignores reality.

The Agency then asks this Board to believe that under the adjusted standard, "**Illinois-American wins and the State of Illinois loses**." (Ag. Brief at 21.) That position is preposterous. How can Illinois "lose" when the adjusted standard achieves a net reduction in solids loading to the Mississippi River, particularly when a study establishes that there is no adverse environmental effect (even at the point of discharge) from the facility's discharge of untreated effluent? The Agency ignores all of the environmental benefits achieved by the PCWP's non-point reductions, based on its apparent belief that these benefits would have been achieved even without Illinois-American Water's efforts.[27] The Agency may invest a significant amount in non-point source projects each year, and funds may be available through various local, state, and federal sources, but the Agency ignores the opportunity cost associated with funding the PCWP from those sources — every dollar spent on the PCWP is a dollar that is not available for some other project. Stated differently, Illinois-American Water's annual contribution of $415,000 allows the Agency to direct its funds to other projects in the state.

Using the Agency's "win-lose" argument, the Board ought to consider the long list of "losers" if it adopts the Agency's position and declines to extend the adjusted standard:

[27] Incredulously, the Agency argues that the PCWP "can be sustained with or without Illinois-American's assistance." (Ag. Brief at 22 n.9.)

- The Mississippi River loses, because the River's water quality will suffer when it takes on a net gain of over 5,000 tons of solids per year.
- Aquatic life in the river loses, because TSS and iron loading in the River will increase.
- The City of Alton loses, because its residents, bicyclists, and park patrons will start sharing their park entrance and scenic roadway with heavy haulage trucks.
- Neighboring landowners lose, because prairie lands will be converted to lagoons and their property values will drop.
- One or more landfills in Southwestern Illinois lose, because their capacity will decrease in proportion to the soil deposits dredged from the lagoons at the Alton facility.
- Farmers ready to implement soil-savings projects on their properties lose, because GRLT will not have sufficient funding from outside sources to meet the demand for new projects.
- Water company customers in the Alton and Godfrey region lose, because their water bills will increase.
- The GRLT loses, because its major source of funding will disappear. It will lose again when potential grant givers look upon the Trust less favorably as a result.
- The Board loses, because at least some of its credibility with the regulated community will suffer when it terminates one of the most successful offset trading programs in the country, especially when the point source did everything the Board and the Agency initially asked to be done.

Contrary to the Agency's position, the Board ought to consider the benefits that might be achieved by implementing more projects like the PCWP. Extending the adjusted standard will not "open the floodgates" for similar relief by other point sources along the Mississippi as the agency contends (without a shred of evidence)[28] In fact, the environmental effect would be positive. For instance, if just 12 facilities came to the Board to propose a similar type of offset project, the amounts those facilities invested in non-point source controls around the state would completely displace the $4.7 million the Agency spends every year, allowing the Agency to spend this amount on other projects. The practical effect of this would be to double the Agency's budget for non-point source controls. If Illinois-American Water's adjusted standard is any indication, this additional $4.7 million could, over time, save approximately 75,800 tons of soil savings each year.[29] Stated differently, the volume of soil that these projects could prevent from entering the Mississippi River would fill over 4,000 tractor trailers. Lined end to end, these trailers would reach over 93 miles along the Great River Road.

If the Board adopts the Agency's position, the gates of innovation will slam shut. No point source in the state will implement offset trading projects in Illinois if this project is killed. Unlike 7 years ago when the Agency supported the adjusted standard, the Agency's current position is to keep projects like this under padlock indefinitely — or, at least until the next change in position at the Agency.

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[28] The Agency's concern that extending the adjusted standard would "open the floodgates" for similar relief ignores that Illinois-American Water was required to complete a comprehensive study of the effects of discharging untreated effluent into the Mississippi River. Such a study is time-consuming and costly. Also, the results of that study show that there is no adverse environmental effect associated with the facility's discharge. Other facilities that are willing to invest the time and expense of completing such a study and that can similarly establish that there are no adverse environmental effects associated with their discharge may be entitled to relief, assuming that all of the factors at Sections 27(a) and 28.1 of the Act and at 35 Ill. Adm. Code 104.406 are satisfied. Also, AS 99-6 was granted approximately 7 years ago, and the Agency has not presented any evidence that it has received a drastic increase in adjusted standard petitions since that time.

[29] As of October 2006, Illinois-American Water's $415,000 annual contribution had achieved a savings of 6,691 tons per year, or approximately 1 ton for every $62 spent.

The Agency's "winners & losers" argument and "floodgates" argument are inconsistent with the purpose of the Clean Water Act — "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[30] A compelling comment was offered at the hearing by Jim Bensman, the conservation chair for the Piasa Palisades group of the Sierra Club. After reading the Agency's brief, Mr. Bensman said he "left failing to understand how... what's being done here doesn't accomplish that." *See* Tr. 98:17–99:6; *see also* Tr. 99:8–14 (stating that he talked to the Agency's counsel "and tried to get an understanding of... the environmental problem with what is going on" and "left that conversation still not knowing what the environmental problem was").

The Agency has time and again refused to acknowledge the net environmental benefit achieved by Illinois-American Water's discharge of untreated effluent together with the offset trading project, and has even argued that the State "forever loses the ability to achieve reductions equivalent to those achievable from the point source" if non-point source controls are used instead because the point source control program "loses it [sic] reductions." (Ag. Brief at 21–22.) But nothing in the Clean Water Act requires reductions to be achieved by the point source program. The Agency cannot ignore that reductions achieved by the PCWP are "equivalent to" those achievable using conventional treatment technology — in fact, they are far greater. Also, nothing is "lost" by using non-point source controls in this case. The State can always implement more non-point source projects. This is not, as the Agency implies, a case where the non-point source controls are tapped out, or where the savings reductions from non-point sources have hit a wall and can achieve no more. In reality, the environmental benefit achieved by the adjusted standard fulfills the very purposes of the Clean Water Act by preventing the very

[30] *See* 33 U.S.C. 1251(a).

pollutants that would be captured using conventional treatment from entering the River in the first place.[31]

F. The Board Has Already Determined that Consideration of the Factors in Section 28.3 of the Illinois Environmental Protection Act is Appropriate

The Agency also argues that "there is no reason for the Board to consider factors under Section 28.3 of the Act in this decision," and that the Board should not rely on the rationale of adjusted standards that it granted pursuant to Section 28.3 of the Act. (Ag. Brief at 23–24.) The Agency made this argument to the Board during the proceedings on AS 99-6. *See* Opinion & Order of the Board, AS 99-6 at 5-6 (Sept. 7, 2000). This is yet another issue that has previously been decided. In AS 99-6, the Board determined that "[e]ven though the deadline for filing an adjusted standard pursuant to Section 28.3 of the Act has long since passed, the Board still finds that Section 28.3 is relevant to the instant petition." *See id.* at 17 (emphasis added). Specifically, the Board determined that examination of the factors under Section 28.3 is appropriate "to the extent that those factors may be relevant to an examination of the factors at Section 28.1(c)." *See id.* at 6.

Section 28.3 provides that "[a]n adjusted standard granted by the Board in an adjusted standard proceeding shall be based upon water quality effects, actual and potential stream uses, and economic considerations, including those of the discharger and those affected by the

[31] The comment filed by Kathy Andria, President of American Bottom Conservancy, suggests that Illinois-American Water is focusing only on the beneficial reduction in solids loading to the Mississippi River and is ignoring adverse environmental effects. *See* Ltr. from Kathy Andria, President, American Bottom Conservancy (stating that "it is our understanding that not only is Illinois-American redepositing sediment it has removed from the river, it is also discharging additional material used in the water treatment process," and stating that no consideration is given to downstream facilities' cost of removing "additional discharged toxins"). But there are no such adverse environmental effects. The amount of treatment residuals deposited by Illinois-American Water is small (66 tons). In any event, the PCWP saves 2 tons of soil for every one of these tons, so the result is a net reduction in solids loading. Also, these residuals can hardly be considered "toxins." Under EPA regulations, a material can only be considered "toxic" if the material contains certain listed contaminants at concentrations about the regulatory level. *See* 40 C.F.R. 261.24. The coagulant used in Illinois-American Water's treatment process, "Clar+Ion," is made of aluminum sulfate, and aluminum sulfate is not a listed contaminant.

discharge." *See* 415 Ill. Comp. Stat. 5/28.3(a). That Section also states that justification based upon the impact of the discharge "shall include, as a minimum, an evaluation of receiving stream ratios, known stream uses, accessibility to stream and side land use activities (residential, commercial, agricultural, industrial, recreational), frequency and extent of discharges, inspections of unnatural bottom deposits, odors, unnatural floating material or color, stream morphology and results of stream chemical analyses"). *See* 415 Ill. Comp. Stat. 5/28.3(c). These factors are clearly relevant to the Board's consideration of factors under Section 28.1(c), which include:

(1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
(2) the existence of those factors justifies an adjusted standard;
(3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
(4) the adjusted standard is consistent with any applicable federal law.

See also 415 Ill. Comp. Stat. 5/28.1(c). The Board cannot consider whether the requested standard will result in substantially and significantly more adverse health effects, for instance, without considering the "water quality effects" of the discharge and the factors under Section 5/28.3(c) relevant to justification based on impact of the discharge. Here, the Board has already concluded that the adjusted standard "will not harm the environment." *See* Opinion and Order of the Board, AS 99-6 at 19 (Sept. 7, 2000). This conclusion should not be ignored in the present case simply because Section 28.3 no longer governs this analysis. It was relevant to the Board's consideration of AS 99-6 under Section 28.1 in 2000, and it remains relevant today.

G. Collateral Estoppel Applies Because the Board has Already Made A Final Decision On the Merits

The Board has already determined that the PCWP "is significantly and substantially different from any factor that the Board relied on in adopting the regulations at issue herein."

See Opinion and Order of the Board, AS 99-6 at 18 (Sept. 7, 2000); *id.* (concluding that "[t]he factors relating to IAWC" are substantially and significantly different); *id.* at 20 (concluding that "the factors surrounding the request for the adjusted standard" are substantially and significantly different).[32] Also, the Board has already determined that the adjusted standard is consistent with federal law. *See id.* at 20. The Agency now contends that the Board made a mistake and should reverse itself. (Ag. Brief at 24–25.) The doctrine of collateral estoppel prohibits the Board from doing so.

The Agency argues that the doctrine of collateral estoppel does not apply because, in the Agency's view, the Board's earlier decision was not a "final decision on the merits."[33] This misconstrues the "final judgment" requirements of the collateral estoppel doctrine. As the Supreme Court of Illinois has recognized, certain agency actions "affect[] the legal rights, duties or privileges of the parties," including those agency actions which "determine the applicability of certain rules or regulations," and such actions are "final judgments" for purposes of collateral estoppel. *See* O'Rourke v. Access Health, Inc., 668 N.E.2d 214, 219 (Ill. App. 1st Dist. 1996). The previous adjusted standard proceeding clearly affected Illinois-American Water's legal rights or privileges when it determined that the regulations of general applicability for TSS and iron did not apply to the Alton facility.

The Agency also suggests that the Board's use of a sunset provision is evidence that the

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[32] The Agency has also made this determination. *See id.* at 9.

[33] *See* Ag. Brief at 24–25. The Agency does not argue that "the issue decided in the prior adjudication was identical to the one presented in the suit in question"; that the Agency is not "a party or a party in privity with a party to the prior adjudication"; or that "the factual issue[s] against which the doctrine is interposed [have] actually and necessarily been litigation and determined in the prior action." *See* Boelkes v. Harlem Consol. School Dist. No. 122, 842 N.E.2d 790, 795 (Ill. App. 2nd Dist. 2006) (listing these as other necessary factors in this determination). Illinois-American Water's response to the Agency's Recommendation clearly addresses the identity of issues and parties. *See* Response to Ag. Rec. at ¶16. Also, the Board's September 7, 2000 order shows that these issues were actually litigated, and the determination of these issues was necessary because each is an element of the required justification for an adjusted standard. *See* Opinion and Order of the Board, AS 99-7 at 9, 20 (Sept. 7, 2000); 415 Ill. Comp. Stat. 5/28.1.

Board's earlier decision was not intended to be a final judgment on the merits. (Ag. Brief at 25.) However, this argument is unsupported by any Board decisions or case law. At most, the Board's use of a sunset provision to ensure that the PCWP would achieve the anticipated soil savings simply treats the adjusted standard the same as an NPDES permit, which expires after 5 years. The Board has applied the doctrine of collateral estoppel to prevent parties from relitigating issues decided in permitting decisions,[34] and should apply the doctrine here as well.

Even if collateral estoppel does not apply, the Board should not reverse its earlier decision simply because the Agency has changed its mind. The adjusted standard contains only one condition: Achieve a 2 to 1 offset. There is no second condition (*i.e.*, that there is no change of heart at the Agency). When AS 99-6 was granted, everyone assumed that it would be extended beyond the sunset provision if only this condition were satisfied. Illinois-American Water spent millions of dollars in reliance on this understanding. The City of Alton relied on this understanding in partnering with Illinois-American Water to construct a driveway into Piasa Park and its parking facilities for bicyclists riding along the Great River Road — an action it likely would not have taken if it even suspected that truck traffic across the driveway and through the parking lot would increase significantly less than seven years later. Also, the residents living near the Alton facility relied on this understanding in deciding not to sell their homes, as termination of the adjusted standard and construction of lagoons could result in a drastic decrease in property values. Each of these interests will be detrimentally affected if the Agency's newfound position is adopted and the adjusted standard is terminated.

[34] *See* Interim Opinion and Order of the Board, People of the State of Illinois v. Community Landfill Company, Inc. & the City of Morris, PCB 03-191 at 14 (Feb. 16, 2006).

III. CONCLUSION

The Agency has raised seven arguments in its Post-Hearing Brief. Five of them were conspicuously absent from the Agency's Recommendation and hearing testimony, casting doubt on the strength of those arguments from the start. The first such argument — that Illinois-American Water does not address the "nature of the receiving body of water" and the "technical feasibility and economic reasonableness of measuring or reducing the particular type of pollutant" — is easily refuted. Illinois-American Water addressed these issues in the SSIS, and the Agency does not offer any evidence that the SSIS is deficient. Simply calling it deficient is not evidence. In addition, the Agency voiced no objection when the SSIS was offered into the record early in this proceeding. In fact, the Agency was specifically asked for its position, and told Illinois-American Water to go ahead and put it in the record. The SSIS concludes that "no treatment" is BPJ for the Alton facility, and that is now an undisputed fact.

The Agency's second argument is that the Board should use USEPA's "fundamentally different factors" test for variances in place of Illinois' "substantially and significantly different factor" test for adjusted standards. The Board cannot and should not do that, because "fundamentally different factors" come into play only with federally-promulgated effluent limitations, according to 33 U.S.C. 1331(n)(1). None of the cases cited by the Agency are applicable to the present case, and none of them could be even remotely construed as an adoption of the fundamentally different factors test. Illinois has a clear legal standard for deciding adjusted standard cases: Does the petitioner's situation raise factors that are substantially and significantly different from the factors considered by the Board in adopting the regulations of general applicability? The offset trading policy in this case meets that standard. The Board

already made that decision in AS 99-6, and nothing (aside from the Agency's opinion) has changed since that time.

The Agency's third argument is a hyper-technical one — contending that the petition fails to satisfy two procedural prerequisites in Part 104 of the Board's procedural rules. That allegation is just wrong. For the first point (requiring that the petition state whether the regulation of general applicability implements the CWA or the State NPDES program), Illinois-American did make such a statement, and it is found in paragraph 27 of the Amended Petition. For the second point (requiring that the petition describe efforts that would be necessary to comply with the regulation of general applicability), Illinois-American Water met its burden through the SSIS (which is now a matter of record, by consent) and through numerous paragraphs in the Amended Petition which analyzed the alternatives for compliance.

Argument number four ("inconsistent with federal law") is simply wrong. USEPA does not have effluent limits that apply to the Alton facility. The only BPJ analysis any party or commentator has offered in this case is the SSIS, which concludes that "no treatment" together with the PCWP is the appropriate control. USEPA's water quality trading policy does not somehow trump the adjusted standard because it applies to federal (not state) effluent limits and does not even have the force and effect of law.

The Agency's fifth argument ("this is bad policy") gave rise to the preposterous contention: "**Illinois-American wins and the State of Illinois loses.**" If the Agency "wins" and the adjusted standard is not extended, the list of losers will be extensive: water quality in the Mississippi River; aquatic life; the City of Alton; neighboring landowners; one or more landfills in Southwestern Illinois; farmers ready to implement soil-savings projects on their properties;

water company customers in the Alton and Godfrey region; GRLT; and the Board.[35] The Agency's cost of "winning" is too high.

Argument number six is that the Board should not consider the factors in Section 28.3 of the Act. That argument was made to, and rejected by, the Board in AS 99-6. Illinois-American Water has always contended, and the Board has agreed, that Section 28.3 can be considered to the extent those factors may be relevant to an examination of the factors in Section 28.1(c). Contrary to the Agency's implication, the Board need not base its decision on Section 28.3, and Illinois-American has never suggested that the Board do so.

Finally, the Agency argues that collateral estoppel should not apply in this case. That is wrong as a matter of law. When the Board decided case AS 99-6, it clearly and unequivocally decided that the PCWP is a "substantially and significantly different factor" than those considered by the Board in adopting the regulations of general applicability. It also decided that the adjusted standard is consistent with federal law. Nothing has changed in the facts or the law since that decision. The parties are the same, the issues are the same, and the Board made a final decision on these issues. These facts fit squarely within the doctrine of collateral estoppel in a way that must ban the Agency from now re-litigating an issue that was fully vetted and decided seven years ago between the same parties. Fairness should also prevent the Agency from relitigating these issues, because Illinois-American Water relied on the Board's decision (to its apparent detriment, if the Agency prevails), as did neighbors, the City of Alton, GRLT, and others.

For all of these reasons, the adjusted standard should be extended as requested in the Amended Petition and with the safeguards proposed in Illinois-American's Proposed Order.

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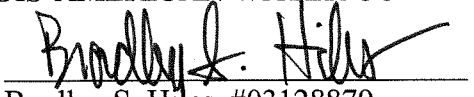
[35] These "losers" are discussed in greater detail on page 21.

Respectfully submitted,

ILLINOIS-AMERICAN WATER COMPANY

By: 

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED EXTENSION OF ADJUSTED STANDARD	)	AS 2007-2
APPLICABLE TO ILLINOIS-AMERICAN	)	(Adjusted Standard)
WATER COMPANY'S ALTON PUBLIC WATER	)	
SUPPLY FACILITY DISCHARGE	)	
TO THE MISSISSIPPI RIVER	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2007, the attached PETITIONER ILLINOIS-AMERICAN WATER COMPANY'S RESPONSE TO THE AGENCY'S POST-HEARING BRIEF was filed by electronic transmission with the Office of the Clerk of the Illinois Pollution Control Board, and was served by first class mail, postage prepaid, upon the following persons:

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IN THE MATTER OF:	)	
	)	
PROPOSED EXTENSION OF ADJUSTED STANDARD	)	AS 2007-2
APPLICABLE TO ILLINOIS-AMERICAN	)	(Adjusted Standard)
WATER COMPANY'S ALTON PUBLIC WATER	)	
SUPPLY FACILITY DISCHARGE	)	
TO THE MISSISSIPPI RIVER	)	

AFFIDAVIT OF BRADLEY S. HILES

I, Bradley S. Hiles, after being first duly sworn upon my oath, do depose and say as follows:

1. I am one of the attorneys representing Illinois-American Water Company ("Illinois-American Water") in its request for extension of Adjusted Standard 99-6.

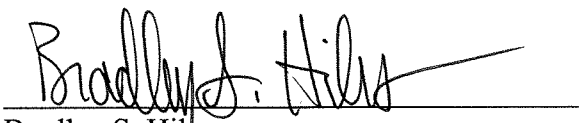
2. During my representation of Illinois-American Water, I have participated in numerous calls with the Illinois Environmental Protection Agency (the "Agency"). In these calls, we discussed the Agency's views on various aspects of the adjusted standard, including the reliability of the Site Specific Impact Study prepared by ENSR in March of 1999 (the "SSIS").

3. During a teleconference on August 21, 2006, I asked the Agency to agree that the SSIS was still reliable today, and to confirm that it was not necessary to prepare a new or updated study. Robert G. Mosher (supervisor of the Water Quality Standards Unit with the Division of Water Pollution Control), Thomas Andryk (the Agency's counsel at that time), and Amy Walkenbach (Nonpoint Source Unit Manager of the Agency's Bureau of Water) participated in that call. Mr. Mosher confirmed that there was no need to repeat the SSIS procedure.

4. Mr. Mosher asked Illinois-American Water to confirm that there are no visible effects from Illinois-American Water's discharge. In response to Mr. Mosher's request, Illinois-American Water representatives observed the Mississippi River during a discharge, and noticed no visible effects. Illinois-American Water's observations were video recorded, and Illinois-American Water provided the Agency with a copy of that recording.

5. Following this teleconference, I believed the Agency's position was that there was no need to complete another SSIS.

Further, Affiant sayeth not.



Bradley S. Hiles

ATTACHMENT A

State of Missouri)
) ss
City of St. Louis)

Subscribed and sworn to before me this 18th day of September, 2007.

Paula Chamberlain
Notary Public

My Commission Expires:

May 5, 2009

[SEAL]

PAULA J. CHAMBERLAIN
Notary Public — Notary Seal
STATE OF MISSOURI
Jefferson County
My Commission Expires: May 5, 2009
Commission # 05405140