

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF QUINCY,)
an Illinois municipal corporation,)
)
Petitioner,)
)
vs.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 08-86
(NPDES Permit Appeal)

NOTICE OF ELECTRONIC FILING

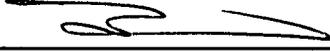
To: See Attached Service List

PLEASE TAKE NOTICE that on April 15, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION TO SUPPLEMENT REQUEST FOR RECONSIDERATION, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 
THOMAS DAVIS
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: April 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that I did on April 15, 2010, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and MOTION TO SUPPLEMENT REQUEST FOR RECONSIDERATION upon the persons listed on the Service List.



Thomas Davis
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

Fred C. Prillaman
Mohan, Allewelt, Prillaman & Adami
One North Old State Capital Plaza, Ste. 325
Springfield, IL 62701

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|---|---|------------------------------|
| CITY OF QUINCY, |) | |
| an Illinois municipal corporation, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | PCB No. 08-86 |
| |) | (NPDES Permit Appeal) |
| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |

MOTION TO SUPPLEMENT REQUEST FOR RECONSIDERATION

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by its attorney. LISA MADIGAN, Attorney General of the State of Illinois, hereby respectfully seeks to supplement its previously filed Motion for Reconsideration of the March 4, 2010 Order granting Summary Judgment, and states as follows:

At the request of Respondent, the United States Environmental Protection Agency ("EPA") has reviewed the Board's March 4, 2010 Order and the Illinois EPA's underlying permit decision regarding application of the federal CSO Policy. A letter dated April 14, 2010 from EPA's Region 5 Water Division Director is attached as an exhibit for the present purposes of seeking reconsideration of the summary judgment entered by the Board. This letter supports the State agency's permitting decisions and serves as a federal interpretation of the subject federal policy, thereby providing "new evidence" and additional support for Respondent's argument that the Board's order ought to be reviewed on the grounds of misapplication of existing law. The April 14, 2010 letter is obviously not part of the administrative record of this permit appeal, but it is tendered here for consideration in the Board's determination whether reconsideration ought to

be granted, and summary judgment set aside, thereby allowing Respondent to address the merits of the legal disputes, e.g. whether the Illinois EPA's interpretation of the CSO Policy was indeed erroneous, whether its reference to such interpretation as its "current practice" and whether its interpretation constituted any "statement of general applicability" violative of the APA.

Section 101.520 of the Board's Procedural Rules allows any motion for reconsideration or modification of a final Board order to be filed within 35 days after receipt of the order. Respondent received the order on March 10, 2010. Section 101.902 of the Board's Procedural Rules provides that the Board will consider factors including new evidence, or a change in the law, in determining whether to reconsider its order.

The courts have consistently acknowledged that parties opposing a summary judgment motion are not required to prove their case. Respondent challenged a central factual assertion by Petitioner, to wit: "During the [July 12, 2007] meeting, it was agreed that none of the City of Quincy's CSOs discharged to sensitive areas." Motion at 8. The Board improperly resolved this matter by deeming the City's assertion in its pleadings as not material factually to the controversy. The Board then basically assumed that the City was entitled to relief as a matter of law and utilized the administrative record to support such relief instead of viewing the record "strictly against the movant and in favor of the opposing party" as must be done in consideration whether to grant judgment on the pleadings. It is evident from the March 4, 2010 Order that the Board did not view the record "strictly against the movant and in favor of the opposing party" but rather improperly considered Respondent's pleading in opposition to summary judgment as having "waived" argument or objection on various issues.

The EPA letter relates to the validity of the exercise of agency discretion, the consistency

of Illinois EPA's interpretation of the policy with federal expectations, and the issue of whether the permit decision must be considered as a statement of general applicability. The EPA letter was not available prior to March 4, 2010 and may be considered for the present purposes of deciding whether to grant Respondent's Motion for Reconsideration.

WHEREFORE, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests that the April 14, 2010 EPA letter be duly considered and that the March 4, 2010 Order granting the Motion for Summary Judgment be RECONSIDERED.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,
ex rel. LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____

THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

Attorney Reg. No. 3124200
500 South Second Street
Springfield, Illinois 62706
217/782-9031

Dated: 4/14/10



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

APR 14 2010

REPLY TO THE ATTENTION OF:

WN-16J

Sanjay Sofat, Division Manager
Division of Water Pollution Control
Bureau of Water
Illinois Environmental Protection Agency
Post Office Box 19276
Springfield, Illinois 62794-9276

Re: City of Quincy; Adverse Decision in PCB NPDES Permit Appeal 08-86

Dear Mr. Sofat:

We have reviewed the above decision of the Illinois Pollution Control Board (PCB) and would like to take an opportunity to clarify the U.S. Environmental Protection Agency's *Combined Sewer Overflow (CSO) Control Policy*. As you are aware, in enacting section 402(q) of the Clean Water Act, 33 U.S.C. § 1342(q), Congress has required that permits issued to CSO communities conform to the policy.

Pursuant to the CSO Control Policy, EPA expects a permittee's CSO long-term control plan (LTCP) to give the *highest* priority to controlling overflows to sensitive areas. Permitting authorities, here the Illinois Environmental Protection Agency (Illinois EPA), include requirements to develop and implement LTCPs in wastewater discharge permits, thereby making such plans legally enforceable. The policy defines sensitive areas as those determined by the permit authority to be sensitive in coordination with state and federal agencies. Such areas include, but are not limited to, waters with primary contact recreation. Waters designated as "sensitive" by the permitting authority are subject to additional requirements to protect them. In National Pollutant Discharge Elimination System permit IL0030503, the Illinois EPA designated several waters along the Mississippi River receiving CSO discharges from Quincy as "sensitive."

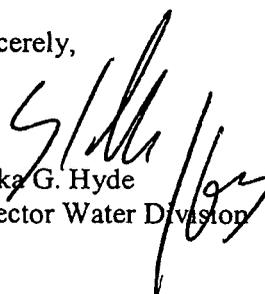
The PCB, hearing an appeal from the City of Quincy over three of these sensitive area designations, overruled the Illinois EPA, finding that the potential for or high probability of primary contact to be an inadequate basis for designating a receiving water as "sensitive" under the rubric of "waters with primary contact recreation."

The CSO Control Policy provides discretion to the permitting authority to determine which areas are sensitive, and consequently we believe the PCB construed the phrase "waters with primary contact recreation" too narrowly. To give meaning to the

phrase "highest priority," Illinois EPA must have discretion under the policy to designate waters with the potential for or high probability of human contact as sensitive. The areas listed in section II.C.3. of the policy do not constitute an exhaustive list. I am satisfied with Illinois EPA's exercise of discretion in this matter.

Please contact me if you have any questions in this matter.

Sincerely,


Tinka G. Hyde
Director Water Division