BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF 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.	)	

NOTICE OF FILING

To: Thomas Davis
Division of Legal Counsel
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Springfield, IL 62706

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Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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Springfield, IL 62794-9274

PLEASE TAKE NOTICE that on the 26th day of April, 2010, I mailed the following document for filing with the Clerk of the Pollution Control Board of the State of Illinois:

RESPONSE TO THE RESPONDENT'S MOTION FOR RECONSIDERATION AND TO THE RESPONDENT'S MOTION TO SUPPLEMENT REQUEST FOR RECONSIDERATION

a copy of which is attached hereto and herewith served upon you.

CITY OF QUINCY, an Illinois municipal corporation, Petitioner

By: MOHAN, ALEWELT, PRILLAMAN & ADAMI, its attorneys

By Joel A. Benoit
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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NOW COMES Petitioner City of Quincy, by and through its attorneys, Mohan, Alewelt, Prillaman & Adami, and for its Response to the Respondent's Motion for Reconsideration and to Respondent's Motion to Supplement Request for Reconsideration, states as follows:

I. Background

Quincy filed this NPDES permit appeal to challenge that portion of its NPDES permit identifying three of its CSO discharge points as1994 Federal CSO Control Policy "sensitive areas." Quincy filed a detailed motion for summary judgment setting forth the undisputed facts, pertinent law, and its arguments and analysis as to each issue raised.

The IEPA's Response to Motion for Summary Judgment challenged one fact set forth in Quincy's Motion for Summary Judgment, i.e., whether the IEPA agreed at a July 12, 2007, meeting that none of Quincy's CSOs discharged into sensitive areas (hereinafter, the "Sole Disputed Fact"). The IEPA's Response challenged no other aspect of Quincy's Motion for Summary Judgment.

In its March 4, 2010, Order, the Board held that the disputed fact identified by the IEPA was not material to the issues presented. (Order, pp. 20-21). In that same Order, the Board granted summary judgment in Quincy's favor and ordered the sensitive area determinations removed from the permit.

The IEPA now asks that the Board reconsider its March 4, 2010, Order.

II. The IEPA waived the right to request reconsideration of those issues which the IEPA did not address in its Response to Motion for Summary Judgment.

With the exception of newly discovered evidence, which is not presented by the IEPA here, "...to raise arguments in a motion for reconsideration for the first time when such arguments could have been raised prior to the Board's original decision is improper. In Illinois, the general rule is that failure to raise an issue results in a waiver of that issue. (See 735 ILCS 5/3-110.)." Shaw v. Board of Trustees of the Village of Dolton, 1997 Ill. ENV LEXIS 171 at * 4 (PCB No. 97-68)(April 3, 1997)(Pollution Control Facility Siting Appeal).

Accordingly, the IEPA waived the right to seek reconsideration of all issues now raised except those concerning the Sole Disputed Fact. In the event the Board chooses to address all issues raised by the IEPA, however, Quincy responds to those issues below.

III. The IEPA has not met it burden of demonstrating that the Board should reconsider its earlier order.

The purpose of motions for reconsideration is to provide tribunals, including the Board, with the opportunity to revise earlier orders that may be inaccurate. The orders may be inaccurate due to existing facts not being discovered until after the order was entered, facts

overlooked by the tribunal, changes in the law since the order was entered, or the misapplication of existing law. Board of Trustees of Southern Illinois University v. IEPA, PCB No. 02-105, p. 2 (NPDES Permit Appeal)(October 6, 2005).

"The party seeking reconsideration must establish due diligence and demonstrate that real justice has been denied." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8 (1st Dist. 1993). It is the movant's burden to specify the facts the tribunal should have considered and the law the tribunal should have applied. The Board has repeatedly denied motions for reconsideration because the movant failed to meet this burden. Id.; see, e.g., Des Plaines River Watershed Alliance v. IEPA. 2007 Ill. ENV LEXIS 289 at *2 (PCB No. 04-88)(July 12, 2007)(Third-Party NPDES Permit Appeal); American Bottom Conservancy v. IEPA, 2007 Ill. ENV Lexis 183 at *3-4 (PCB No. 06-171 (May 3, 2007)(Third-Party NPDES Permit Appeal); Village of Robbins v. IEPA, 2004 Ill. ENV LEXIS 636 at * 2 (PCB No. 04-48)(Nov. 18, 2004)(Permit Appeal-Land); Jersey Sanitation Corporation v. IEPA, 2001 Ill. ENV LEXIS 437 at * 4 (PCB No. 00-82)(Sept. 20, 2001)(Permit Appeal-Land);

As discussed more fully below, the IEPA cannot be found to have acted diligently when, in response to the Motion for Summary Judgment, it failed to set forth any law or facts demonstrating that the entry of summary judgment was not warranted. Additionally, in its request for reconsideration, the IEPA still does not set forth any law or facts demonstrating that summary judgment should not have been granted in Quincy's favor.

The IEPA's hinting that it will present the Board with facts and law supporting its position after a hearing is conducted does not satisfy the IEPA's current burden, and the request for reconsideration should be denied.

IV. The IEPA has failed to identify any newly discovered facts or facts overlooked by the Board to warrant reconsideration.

The Motion for Reconsideration does not claim that there are newly discovered facts that warrant the Board reconsidering its order. The Motion for Reconsideration does state that the Board overlooked facts in the record (Motion, pp. 2 & 4), but the Motion never identifies any fact the Board overlooked.

Accordingly, reconsideration is not warranted on the ground the Board failed to consider any relevant fact.

V. The IEPA has failed to identify any recent changes in the law that warrant the Board reconsidering its decision.

The Motion for Reconsideration does not suggest that there have been any changes to the law since the Board made its decision.

Accordingly, reconsideration is not warranted on the ground of recent changes to the law.

VI. The Board applied the correct standard of review and burden of burden of proof.

After quoting a portion of page 3 of the March 4, 2010, Order, concerning the standard of review and the burden of proof, the Motion for Reconsideration states that there is a legitimate question as to whether the Board applied the proper standard of review and burden of proof. (Motion, p. 3). The basis raised by the IEPA for its concern is that the opinions cited by the Board do not concern NPDES permit appeals or summary judgments. (Motion, p. 3). The IEPA does not state what alternate standard of review or burden of proof the Board should have applied when the issue before the Board is the challenge of permit conditions in an NPDES permit.

Because the IEPA does not provide any alternate standard of review or alternate burden of proof (or cite to any legal authority supporting these alternates), this argument should be rejected. Further supporting the rejection of the IEPA's unsupported argument is that the Board applied the same standard of review and burden of proof as it had in earlier NPDES permit appeals. Des Plaines River Watershed Alliance v. IEPA. 2007 Ill. ENV LEXIS 149 at *28-31 (PCB No. 04-88)(April 19, 2007)(Third-Party NPDES Permit Appeal); Board of Trustees of Southern Illinois University v. IEPA, PCB No. 02-105, p. 7 (NPDES Permit Appeal)(August 4, 2005).

Accordingly, as there is nothing to support the IEPA's suggestion that the Board may have applied the incorrect standard of review or the incorrect burden of proof, reconsideration on this basis is unwarranted.

VII. The Board correctly applied the procedural law governing motions for summary judgment, the process was fair, and, in light of the closed record and the failure of the IEPA to identify any facts overlooked by the Board, there is no reason to allow the IEPA another opportunity to present its case.

The IEPA contends that by granting summary judgment in favor of Quincy, the Board denied the IEPA the opportunity to refute the law and facts presented by Quincy. (Motion, pp. 3 and 12). The IEPA states that it "... must be afforded an opportunity to refute petitioner's showing by providing a justification based upon the record for the challenged conditions...." and that the IEPA "...is simply asking for a fair opportunity to articulate its legal and factual justification." (Motion, p. 4).

Regarding the IEPA having a fair opportunity to present its factual and legal arguments to the Board, the procedure employed afforded fairness. The IEPA had a full opportunity to present

its position regarding the applicable law and whether any material facts were in dispute.

The only law set forth in the IEPA's Response to Motion for Summary Judgment is law concerning summary judgments generally. The IEPA's Response contains no citation to legal authority supporting what appears to be its new position regarding summary judgement, i.e., that summary judgment motions are not allowed in NPDES permit appeals. The IEPA's new position is not only inconsistent with its Response (i.e., why would the IEPA's Response discuss the summary judgment standard if the IEPA's position was that summary judgment motions were not allowed in NPDES permit appeals?), it is without merit. Summary judgment motions are regularly entertained in NPDES permit appeals. Des Plaines River Watershed Alliance v. IEPA. 2007 Ill. ENV LEXIS 149 at *45-47 (PCB No. 04-88)(April 19, 2007)(Third-Party NPDES Permit Appeal)(denying petitioner's motion for summary judgment); Board of Trustees of Southern Illinois University v. IEPA, PCB No. 02-105 (NPDES Permit Appeal)(August 4, 2005)(granting and denying, in part, university's and IEPA's motions for summary judgment).

Nothing prevented the IEPA from, as it refers to it, "refut[ing] petitioner's showing by providing justification based upon the record for the challenged conditions...." (Motion, p. 4) (emphasis added). Once the IEPA issued the permit, the record could not be changed; it was fixed. 415 ILCS 5/40(e). "The Board's review in permit appeals is limited to information before the IEPA during the IEPA's statutory review period, and is not based on information developed by the permit applicant, or the IEPA, after the IEPA's decision." Des Plaines River Watershed Alliance v. IEPA. 2007 Ill. ENV LEXIS 149 at *46 (PCB No. 04-88)(April 19, 2007)(Third-Party NPDES Permit Appeal). If material issues of disputed facts exist (and Quincy is aware of none), the IEPA had a full and complete opportunity to make the Board aware

of these disputed, material facts during the summary judgment process.

The IEPA's Response to Motion for Summary Judgment contains no citation to legal authority challenging any of the substantive law presented by Quincy, no challenge to the undisputed material facts presented by Quincy (except for the Sole Disputed Fact, discussed in Section VIII), and no challenge to the analysis presented by Quincy.

No one is arguing, as the IEPA suggests, that the IEPA was required to prove its case at the summary judgment stage.(Motion to Supplement, p. 2). When responding to the Motion for Summary Judgment establishing Quincy's prima facie case, however, the IEPA was required to present a factual basis which would arguably entitle it to a judgment; the IEPA was not required to show that it would prevail, only that it might. Des Plaines River Watershed Alliance v. IEPA, 2007 Ill. ENV LEXIS 149 at *46 (PCB No. 04-88)(April 19, 2007)(Third-Party NPDES Permit Appeal)(citing Gauthier v. Westfall, 266 Ill. App. 3d 213, 219 (2nd Dist. 1994). The IEPA did not do so and, thus, summary judgment was properly entered in Quincy's favor. In re Estate of Sewart, 236 Ill. App. 3d 1, 8 (1st Dist. 1992).

Accordingly, the IEPA's argument that the summary judgment process was somehow unfair and that it should be given another opportunity to present its arguments based on the closed record is without merit and does not support the Board reconsidering its earlier order.

VIII. The Hahn Affidavit is not part of the record, but even if it were, it does not create a genuine issue of material fact.

The IEPA wishes to use the Hahn Affidavit to create the Sole Disputed Fact. The Hahn Affidavit is not part of the record and may not be considered by the Board. IEPA v. Illinois PCB, 386 Ill. App. 3d 375, 390 (3rd Dist. 2008).

If the Board chooses to consider the Hahn Affidavit, Quincy adopts and incorporates herein its Reply to Respondent Illinois Environmental Protection Agency's Response to Motion for Summary Judgment.

In further response, Quincy notes that the IEPA argues that the Sole Disputed Fact is material because, if the parties were not in agreement on July 12, Quincy's argument that the IEPA cannot change its prior finding of no sensitive areas absent a significant change in circumstances will fail. (Motion, p. 5). Quincy disagrees with the IEPA's premise, but even if the IEPA's premise were correct, the Sole Disputed Fact is not material to the outcome of this permit appeal because the Board found that it was unnecessary to address Quincy's significant change in circumstances argument in light of the other grounds for granting summary judgment. (Order, p. 29, fn. 13). Thus, if the resolution of the significant change in circumstances argument itself was unnecessary to the resolution of the permit appeal, whether the parties were in agreement on July 12 is necessarily immaterial to the resolution of the permit appeal. A dispute over an immaterial fact does not prevent the granting of summary judgment.

Finally, and contrary to IEPA's argument, Quincy's invalid rule making argument is not contingent on the resolution of the Sole Disputed Fact. (Motion, p. 8). Regardless of whether the parties were in agreement on July 12, the IEPA's current policy is an invalid rule.

Accordingly, neither the Hahn Affidavit nor the Sole Disputed Fact are a valid basis for the Board to reconsider its order.

IX. The IEPA's miscellaneous arguments do not warrant the Board reconsidering its Order.

The IEPA faults the Board for making factual findings. (Motion, p. 11). The Board's Order merely set forth the undisputed facts.

The IEPA faults the Board for substituting its judgment for that of the IEPA. (Motion, p. 11). The appeal process is in place for this reason. 415 ILCS 5/40(a)(1).

The IEPA "...respectfully suggests that the Board needs to appreciate the crucial distinction between judgment on the pleadings and a contested adjudication." (Motion, pp. 11-12). As the motion at issue is one for summary judgment, Quincy assumes the IEPA used the phrase "judgment on the pleadings" mistakenly, as it did on occasion throughout its Motions. Even with this correction, however, Quincy does not agree with the IEPA's statement. Summary judgments are regularly entered in contested adjudications where the material facts are undisputed.

The IEPA states that even if the IEPA misinterpreted the1994 CSO Policy, that does not necessarily mean that Quincy was entitled to summary judgment. (Motion, p. 12). This would be true if the IEPA misinterpreted the 1994 CSO Policy, but the undisputed facts showed that under a correct interpretation of the 1994 CSO Policy, certain discharge points were sensitive areas. However, in the present case, the undisputed facts show that the discharge points at issue were not sensitive areas under a correct interpretation of the 1994 CSO Policy and, thus, Quincy was entitled to summary judgment in its favor.

Accordingly, none of the IEPA's miscellaneous arguments constitute a valid basis for the Board to reconsider its March 4, 2010, Order.

X. **The Board correctly determined that the IEPA's current practice was an unpromulgated rule which could not be invoked to impose the sensitive area designations in the permit.**

The IEPA, relying upon Alternate Fuels, Inc. v. Director of IEPA, 215 Ill. 2d 219 (2004), contends that the Board erred in holding that the IEPA's current practice was a rule. (Motion, p. 12-13). The IEPA asserts that the current practice statement was merely the IEPA's interpretation of the 1994 CSO Policy, albeit a possibly incorrect interpretation. (Motion, p. 13).

In Alternative Fuels, Inc., the Illinois Supreme Court found that the IEPA had merely provided an interpretation of the phrase "discarded material"based on a particular set of facts and that there was no evidence that the IEPA's interpretation was a statement of general applicability. Id. at 247-248. In contrast, in the present case, in response to Quincy's inquiry regarding why the IEPA was changing the designation of three discharge points to sensitive areas, the IEPA explained its sensitive area determinations by specifically referring to its current practice, a current practice that had nothing to do with facts unique to Quincy. Standing alone, the use of the phrase "current practice" suggests that the IEPA was referring to a rule of general applicability. (The word "practice" has several definitions, including: (a) to do something customarily; (b) a repeated or customary action; and (c) the usual way of doing something. Webster's Seventh New Collegiate Dictionary, p. 667 (1972)). The IEPA's response, read in its proper context, was that the IEPA's current practice was to designate streams that flowed through residential areas or public use areas as sensitive areas. (Order, p. 22; Motion for Summary Judgment, p. 13).

Accordingly, reconsideration is not warranted on the ground the that IEPA's current practice was not an unpromulgated rule.

XI. Even if the IEPA's current practice were not an unenforceable rule, the IEPA improperly interpreted the phrase "sensitive area" as used in the 1994 CSO Control Policy.

The IEPA concedes that its interpretation of the phrase "sensitive area" as used in the 1994 CSO Control Policy may have been incorrect. (Motion, p. 13). The IEPA's Response to the Motion for Summary Judgment did not challenge Quincy's arguments in support of a finding that the IEPA's interpretation was incorrect. In its present Motion, the IEPA's presents no facts or legal argument suggesting that the Board's alternative finding (i.e., if the IEPA's current practice is not a rule, summary judgment is warranted because the IEPA improperly interpreted the 1994 CSO Control Policy) is incorrect (Order, p. 22-28).

Accordingly, even if the IEPA has not formally conceded the point, because the IEPA has failed to present any reason for the Board to reconsider its finding that the IEPA misinterpreted the 1994 CSO Control Policy, the Board should not reconsider this issue.

XII. No arguments set forth in the IEPA's Motion to Supplement Request for Reconsideration warrant the Board reconsidering its Order.

After the deadline for filing its motion for reconsideration, the IEPA filed a Motion to Supplement Request for Reconsideration. Attached thereto, unsupported by an affidavit as to authenticity, is a letter purportedly from Tinka G. Hyde, Director, Water Division, USEPA, Region 5, to the IEPA. The IEPA states that it requested that the USEPA review the Board's March 4, 2010, Order. (Motion to Supplement, p. 1).

As the IEPA recognizes, Director Hyde's letter is not part of the record. (Motion to Supplement, p. 2). Accordingly, like the Hahn Affidavit, it may not be considered in this permit

appeal. IEPA v. Illinois PCB, 386 Ill. App. 3d 375, 390 (3rd Dist. 2008).

Additionally, because Director Hyde's letter was not filed prior to the motion for reconsideration deadline and because it is not authenticated, it should not be considered by the Board.

If the Board considers Director Hyde's letter, it should not be deemed "new evidence," as suggested by the IEPA. It did not exist when the IEPA issued the permit. It is not evidence. If anything, it is simply Director Hyde's legal opinion, provided at the request of the IEPA, regarding the correctness of the Board's March 4, 2010, Order. The IEPA refers to it as a "federal interpretation of the subject federal policy" purportedly tending to shed light on the Board's "misapplication of existing law." (Motion to Supplement, p. 1).

Nothing in the letter suggests the basis for Director Hyde's authority, or Director Hyde's qualifications, to offer federal interpretation of any law or policy. The IEPA offers no reason why the Board should abandon its reasoned opinion based upon Director Hyde's letter. The letter is truly an extraordinarily odd and bold exhibit to present to the Board. Further, the reasoning set forth in the letter does not withstand scrutiny.

Director Hyde's letter states that "we" reviewed the Board's March 4, 2010, Order and believe that the Board construed the phrase "waters with primary contact recreation" too narrowly. According to Director Hyde's letter, pursuant to the 1994 CSO Control Policy, the USEPA expects permitees' long-term control plans (LTCP) to give the highest priority to controlling overflows to sensitive areas (Letter, para. 2). Thus, the letter continues, to give meaning to the phrase highest priority, the IEPA must have discretion under the policy to designate waters with the potential for or high probability of human contact as sensitive areas.

(Letter, para. 4).

With all due respect to Director Hyde, it simply does not follow that because LTCPs must give the highest priority to protecting sensitive areas, the IEPA must have discretion to designate waters with the potential for or high probability of human contact as "waters with primary contact recreation" so that they fall within the 1994 CSO Policy's definition of sensitive areas. The 1994 CSO Control Policy simply does not give the IEPA the authority to designate areas that are not sensitive areas as sensitive areas.

The remainder of the Motion to Supplement Request for Reconsideration is simply a restatement of the IEPA's earlier arguments, none of which present a valid ground for reconsideration.

Thus, the Board should not reconsider its March 4, 2010, Order based on Director Hyde's letter or based on any arguments presented in the Motion to Supplement Request for Reconsideration.

XIII. Conclusion

WHEREFORE, for all the reasons set forth in its Motion for Summary Judgment, its Reply to IEPA's Response, and this Response, Petitioner City of Quincy prays that both the IEPA's Motion for Reconsideration and the IEPA's Motion to Supplement Request for Reconsideration be denied.

CITY OF QUINCY, an Illinois municipal corporation, Petitioner

By: MOHAN, ALEWELT, PRILLAMAN & ADAMI, its attorneys

By _____
Joel A. Benoit

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CERTIFICATE OF SERVICE

I hereby certify that I did on the 21st day of April, 2010, send 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 instrument entitled **RESPONSE TO THE RESPONDENT'S MOTION FOR RECONSIDERATION AND TO THE RESPONDENT'S MOTION TO SUPPLEMENT REQUEST FOR RECONSIDERATION**

To: Thomas Davis
Division of Legal Counsel
Illinois Attorney General's Office
500 South Second Street
Springfield, IL 62706

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

and the original and nine copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

To: James Therriault, Clerk
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Joel A. Benoit

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