BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that on the 10th day of November, 2008, I mailed the following document for filing with the Clerk of the Pollution Control Board of the State of Illinois:

Petitioner City of Quincy's Motion for Summary Judgment

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

CITY OF QUINCY, an Illinois municipal corporation,
Petitioner

By _____
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PETITIONER CITY OF QUINCY'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner City of Quincy, by and through its attorneys, Mohan, Alewelt, Prillaman & Adami, and respectfully submits this Motion for Summary Judgment, filed pursuant to 35 Ill. Admin. Code 101.516, for the Illinois Pollution Control Board's consideration.

I. INTRODUCTION

The City of Quincy operates a combined sewer system and a wastewater treatment facility. The combined sewer system includes six combined sewer overflows (CSOs). The Illinois Environmental Protection Agency (IEPA) issued the City of Quincy a NPDES permit effective April 1, 2008, which, in part, governs discharges from these CSOs.

Special Condition 14(7) of the NPDES permit states that the IEPA has determined that three of the CSOs discharge into "sensitive areas" (as that phrase is used in the 1994 Federal CSO Control Policy) and requires the City of Quincy, within three months of the effective date of the permit, to provide the IEPA with a schedule to relocate, control, or treat discharges from the three CSOs or provide adequate justification as to why the options are not possible. Through this appeal, the City of Quincy seeks the removal of these conditions from the NPDES permit.

II. STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

> Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Id. Summary judgment "is a drastic means of disposing of litigation," and therefore should be granted only when the movant's right to the relief "is clear and free from doubt." Id, citing Purtill v. Hess, 111 Ill.2d 299, 240, 489 N.E. 2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Jersey Sanitation Corp. vs. IEPA, PCB No. 00-82, p. 5 (June 21, 2001)(Permit Appeal-Land).

III. BURDEN OF PROOF IN PERMIT APPEAL

The Illinois Environmental Protection Act

> ...states that when granting permits, the IEPA "may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder." 415 ILCS 5/39(a) (West 2000). To prevail on its claim, the petitioner must show the IEPA's imposed modifications "were not necessary to accomplish the purposes of the Act, or stated alternatively, [the petitioner] had to establish that its plan would not result in any future violation of the Act and the modifications, therefore, were arbitrary and unnecessary." Browning-Ferris, 179 Ill. App. 3d at 603, 534 N.E.2d at 620.

IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 593 (4th Dist. 2003); see also Noveon, Inc. v. IEPA, 2004 Ill. ENV LEXIS 511 at *15 (PCB No. 91-17) (September 16, 2004).

Once a permittee establishes a prima facie case that a permit condition is unnecessary, it is incumbent upon the IEPA to refute the prima facie case. John Sexton Contractors Co. v. PCB, 201 Ill. App. 3d 415, 425 (4th Dist. 1990). The ultimate burden of proof, however, remains with the permittee. Id.

IV. UNDISPUTED FACTS

A. The City of Quincy's CSOs.

The City of Quincy's combined sewer system and wastewater treatment facility serves 49,250 people. (Record, p. 38). The combined sewer system includes six CSOs. (Record, pp. 136-147). The City of Quincy's CSOs are generally identified as follows:

Discharge Number	Location	Receiving Water
002	South Side CSO	Curtis Creek
003	Jefferson Street CSO	Mississippi River
004	Dicks-Payton CSO	Mississippi River
005	Broadway Street CSO	Mississippi River
006	Cedar Street CSO	Quincy Bay
007	Whipple Creek CSO	Whipple Creek

(Record, p. 233).

CSOs 003, 004, and 005 are not at issue in this appeal.

B. Outfall 002–South Side CSO

Outfall 002, the South Side CSO, discharges into Curtis Creek. (Record, pp. 136-137). Outfall 002 is located west of Eighth Street and south of Indian Mounds Park. (Record, pp. 148, 201, and 203). Traveling generally west, the distance from Outfall 002 to Curtis Creek's confluence with the Mississippi River is approximately 5,900 feet. (Record, pp. 306, 308 & 313).[1]

During an August, 2007, survey, the wetted stream width of Curtis Creek ranged from 7 to 60 feet, with an average width of 31.5 feet. (Record, pp. 305 & 308). The survey divided

[1]As submitted to the IEPA, certain photographs, charts, etc., were color copies. (Record, pp. 302-331 & 338-359). If this portion of the record was not submitted in color to the Board, upon notice, the City of Quincy will provide color copies to the Board.

Curtis Creek into sampling locations (T-__) spaced 300 feet apart. (Record, p. 305). The upper portion of Curtis Creek (approximately T1-T5) is densely populated by trees and shrubs, making access to the creek difficult. (Record, pp. 306, 310 & 313). The understory is composed of herbaceous vegetation dominated by poison ivy. (Record, p. 310). Over 98% of the stream bank in the creek's upper reaches was rated difficult for access to the creek, and moderate to steep for bank slope. (Record, p. 310). The upper half of Curtis Creek, having an average depth of approximately 6.5 inches, has insufficient depth and flow to support recreational watercraft. (Record, p. 309 & 310).

The lower portions of Curtis Creek (approximately T6-T20) flow through an industrial area. (Record, pp. 306, 310, 314, & 329-331.) The lower portions of Curtis Creek are channelized and lined with concrete in selected locations prior to its confluence with the Mississippi River. (Record, pp. 310-311 & 329-331). The lower reach before the confluence with the Mississippi River has steep banks that are densely vegetated with trees and shrubs. (Record, p. 311). Back flow from the Mississippi River prevented water depth measurements in the lower reaches of Curtis Creek, but the water depth in the lower reaches was considerably higher than in the upper reaches. (Record, p. 309 (compare T1 measurements to T11 measurements) & 311).

No established beaches or public access points to the creek were present along Curtis Creek. (Record, p. 310). Evidence that primary contact recreation was occurring, or had occurred, was not observed in Curtis Creek. (Record, pp. 310 & 311). Water depth is not deep enough (excluding the lower reaches of Curtis Creek) to support swimming or any other water activity that would result in full body immersion. (Record, p. 311). "Based upon the physical and hydrologic configuration of the stream channel to support primary contact recreation, the probability that the stream is accessed by the public on a routine basis is low." (Record, p. 311).

The IEPA took photos of Outfall 002 on March 28, 2007. (Record, p. 201). On October 9, 2007, the IEPA returned to take photos of a parking area to the north of Outfall 002, said

parking area having a hiking trail leading north, apparently providing a route between the parking area and Indian Mounds Park. (Record, pp. 202-203).

C. Outfall 006–Cedar Street CSO

Outfall 006, the Cedar Street CSO, is located in Riverview Park in the northwestern portion of the city. (Record, pp. 148, 204, 205 & 283). The Cedar Street Outfall 006 discharges directly into a paved channel which carries any overflow approximately 1/4 mile west to its receiving water. (Record, pp. 148, 204 & 212-215). Approximately ½ the length of the paved channel travels through Riverside Park. (Record, p. 148).

Although identified as discharging into Quincy Bay, (Record, pp. 144-145), the water discharged from the paved channel flows into the east side of the Mississippi River channel south of the Quinsippi Island Bridge. (Record, pp. 338, 339, and 343). The Mississippi River channel separates Quinsippi Island from the Illinois mainland. (Record, p. 343).

Quincy Bay itself, a backwater, shallow bay, begins approximately 1,800 feet upstream of Outfall OO6. (Record, p. 338).

The Mississippi River channel was surveyed on September 18, 2007. (Record, p. 338). The northernmost point of the survey was near Cedar Creek's confluence with the Mississippi River channel, and the southernmost point of the survey was the southern tip of Quinsippi Island. (Record, p. 339). Water depths are sufficient for boating in the western and middle portions of the channel. (Record, p. 339). The conclusions reached from this survey are that the existing uses of the channel are primarily recreational navigation and fishing. (Record, p. 340). There is a marina on Quinsippi Island with approximately 150 boats. (Record, p. 340). Fishing was observed. (Record, p. 339). Significant boating activity was observed. (Record, p. 339). There are parks along the east side of the channel, but physical features render the channel an unsuitable place for swimming. (Record, p. 340). There are no established beaches or signs of primary

contact along either bank of the channel. (Record, p. 339). During the survey, no primary contact activities were observed, and there was no evidence that they had occurred in the past. (Record, p. 340).

D. Outfall 007–Whipple Creek CSO

Outfall 007 discharges into Whipple Creek. (Record, pp. 146-147). Outfall 007 is located in the northwestern portion of the city, east of Fifth Street and north of Locust Street. (Record, p. 148). From Outfall 007 to the end of Whipple Creek is approximately 3,330 feet. (Record, p. 305).

Whipple Creek was surveyed in August, 2007. (Record, p. 305). From Outfall 007 to the creek's termination, the wetted steam width of Whipple Creek ranges from 1 to 18 feet, with an average stream width of 8.8 feet. (Record, p. 305). Its average depth is 1.5 inches. (Record, p. 305). The creek's bottom is primarily exposed bedrock, with limited areas of cobble and gravel. (Record, p. 305). Over 95% of the stream bank was rated difficult for access to the creek, and moderate to steep for bank slope; the creek's banks are densely populated by trees and shrubs, and the understory is composed of herbaceous vegetation dominated by poison ivy. (Record, p. 305). There was no visual evidence of recreation activity, past or present. (Record, p. 308). Whipple Creek is too shallow to support watercraft, and there are no beaches or public access points on the creek. (Record, p. 308).

The IEPA photographed Outfall 007 on March 28, 2007; these Spring photographs show little water in Whipple Creek. (Record, p. 206). On October 9, 2007, the IEPA took photos of a house located near Whipple Creek and downstream from Outfall 007. (Record, pp. 207-208). The caption of one photo states that Whipple Creek is 30-50 feet behind a trampoline depicted in the photo and that there is no barrier or fencing between the trampoline area and Whipple Creek. (Record, p. 208).

E. The Permitting Process

No prior NPDES permit issued to the City of Quincy has ever included a determination that any of its CSOs discharged to sensitive areas. (Record, p. 300). In July, 2006, the City of Quincy sent the IEPA a NPDES permit renewal application. (Record, p. 21).

On April 10, 2007, the IEPA mailed the City of Quincy's draft NPDES permit and public notice/fact sheet to the USEPA. (Record, p. 220). Like all previous permits, Special Condition 14(7) of the draft permit states that the IEPA had tentatively determined that none of the CSOs discharged into sensitive areas. (Record, p. 234). Special Condition 14(10) of the draft permit requires the City of Quincy to develop a Long-Term CSO Control Plan ("LTCP") within 24 months of the effective date of the permit. (Record, pp. 236-237). When developing its LTCP, the draft permit required the City of Quincy to consider sensitive areas, as required by the 1994 Federal CSO Control Policy. (Record, p. 236).

On April 20, 2007, the City of Quincy mailed IEPA a letter commenting on the draft permit. (Record, pp. 243-244).

On June 7, 2007, IEPA Field Operations Section mailed a letter to CDM, the City of Quincy's engineers, concerning its review of a September 11, 2006, CSO Assessment prepared by CDM for the City of Quincy and offering comments "...for the City consideration during the development of their CSO long-term control plan (LTCP)." (Record, p. 241). Without setting forth supporting facts, the letter states that all of the receiving streams to which the City of Quincy's CSOs discharge should be characterized as having primary contact and aquatic life designated uses. (Record, p. 241). The letter further states: "Whipple Creek, Cedar Street and South Side CSOs discharge either into or upstream from parks or public use areas. The City should consider relocating or eliminating these discharge locations." (Record, p. 241). The letter concludes by listing the elements that should be included in the City of Quincy's development of its LTCP, including the consideration of sensitive areas. (Record, p. 242).

A meeting was held between IEPA, CDM, and the City of Quincy on July 12, 2007, during which the topic of sensitive areas was discussed. (Record, p. 268). During the meeting, it was agreed that none of the City of Quincy's CSOs discharged to sensitive areas, but that the City of Quincy would place special emphasis on CSO controls for outfalls 002, 006, and 007 when developing its long-term control plan. (Record, p. 268).

On July 31, 2007, the IEPA sent a revised draft permit, public notice /fact sheet along with a cover letter to the City of Quincy. (Record, pp. 245-267). The cover letter notes that Special Condition 14(7) had been changed to state that outfalls 002, 006, and 007 discharge to sensitive areas. (Record, p. 245).

In the revised, draft permit, Section 14(7) states:

> Pursuant to Section II.C.3 of the federal CSO Control Policy of 1994, sensitive areas are any water likely to be impacted by a CSO discharge which meet one or more of the following criteria: (1) designated as an Outstanding National Resource Water; (2) found to contain shellfish beds; (3) found to contain threatened or endangered aquatic species or their habitat; (4) used for primary contact recreation; or, (5) within the protection area for a drinking water intake structure.
>
> The IEPA has determined that outfall(s) 002, 006 and 007 discharge to sensitive area(s). Within three (3) months of the effective date of this Permit, the Permittee shall submit two (2) copies of either a schedule to relocate, control, or treat discharges from these outfalls. If none of these options are possible, the Permittee shall submit adequate justification as to why these options are not possible. Such justification shall be in accordance with Section II.C.3 of the National CSO Control Policy. The IEPA has determined that none of the other outfalls listed in this Special Condition discharge to sensitive areas. However, if information becomes available that causes the IEPA to reverse this determination, the IEPA will notify the Permittee in writing. Within three (3) months of the date of notification or other date contained in the notification letter, the Permittee shall submit two (2) copies of either a schedule to relocate, control, or treat discharges from these outfalls. If none of these options are possible, the Permittee shall submit adequate justification at that time as to why these options are not possible. Such justification shall be in accordance with Section II.C.3 of the National CSO Control Policy.

(Record, p. 261).

On August 8, 2007, the City of Quincy mailed a letter to the IEPA objecting to the sensitive areas designations in the revised, draft permit. (Record, p. 268). The letter states that these designations were contrary to the agreement reached at the July 12, 2007, meeting, during which it was agreed that none of the CSOs discharged into sensitive areas, but that the City of

Quincy would place emphasis on CSO controls at CSOs 002, 006, and 007. (Record, p. 268).

On August 28, 2007, the IEPA responded to the City of Quincy's objection to the designation of the three CSOs as discharging to sensitive areas. (Record, p. 278). The IEPA did not disagree that, at the July 12, 2007, it was agreed that none of the CSOs discharged into sensitive areas, but instead stated:

> Current Agency practice is to designate streams through residential areas or public use areas as having a high probability for primary contact activity. Additionally, the 1994 CSO Control Policy lists recreational activities as primary contact in its definition of a sensitive area. The Agency modified the Permit to indicate that outfalls 002, 006 and 007 discharge to sensitive areas because of the above stated reasons. Item 7 of Special Condition 14 of the Permit gives the Permittee the right to submit evidence to challenge this determination.

(Record, p. 278)(emphasis added).

On September 13, 2007, the City of Quincy mailed a letter to the IEPA in which it repeated its objection to the IEPA's sensitive area determinations as being factually unsupportable and further, that these determinations would have disastrous financial implications for the City of Quincy. (Record, p. 300-301). Attached thereto were cost estimates for terminating discharges at CSOs 002, 006, and 007, estimates which ranged from $28 million to $139 million. (Record, p. 303). Also attached was a September 11, 2007, CDM memo describing a survey conducted to determine if any of the CSOs discharged into sensitive areas and concluding that they did not. (Record, p. 304-331). On the same date, at the City of Quincy's request, IEPA and City of Quincy representatives met to discuss the City of Quincy's continued objection to the IEPA's sensitive area determinations. (Record, p. 300, 301, and 333).

On September 26, 2007, the City of Quincy's legal counsel sent a letter with supporting documentation regarding the Mississippi River channel not being a sensitive area and revised cost estimates for eliminating the three CSOs. (Record, pp. 335-359). The cost estimate states that, if the sensitive area determinations remain in the permit, redirecting CSOs 002, 006, and 007 would not improve overall water quality, and suggests a likely resolution of either sewer separation or storage/treatment at an estimated cost of $60 million to $160 million. (Record, p.

359). If the sensitive area designations are removed from the permit, CSO controls are estimated to cost $30 million to $50 million. (Record, p. 359).

The September 26, 2007, letter requests that the IEPA take into consideration its earlier determination that none of the City of Quincy's CSOs discharged into sensitive areas. (Record, p. 336). In support of the request to remove the sensitive area determinations from the City of Quincy's permit, the letter also requests that the IEPA consider that it has not designated the waters similarly situated municipalities' (including Alton, Belleville, Wood River, LaSalle, Decatur, and Hinsdale) CSOs discharge to as sensitive areas in their NPDES permits. (Record, p. 336).

On October 15, 2007, the City of Quincy's mayor mailed a letter to the IEPA director asking him to look into the IEPA's sensitive area determinations. (Record, p. 360). The IEPA responded in a letter dated March 27, 2008. (Record, p. 363).

The IEPA's March 27, 2008, letter advises the City of Quincy's mayor that the IEPA received no comments during the public comment process (other than from the City of Quincy regarding the IEPA's sensitive area determinations) and explains the IEPA's sensitive areas determinations as follows:

> The Agency changed the classification of the outfalls in question as sensitive areas due to potential human contact because of residential and public use areas downstream of the discharges. This classification means these discharges should be studied first and any CSO controls proposed should be implemented at these locations prior to controls at CSOs that discharge directly to the Mississippi River which will receive a higher dilution. If it is determined from the CSO Long Term Control Plan (LTCP) that these discharges cannot be eliminated, treated economically or relocated, item 3.c of the 1994 CSO Control Policy states that remaining discharges can be reassessed in future permits as new techniques or financial capabilities change.

(Record, p. 363).

On March 27, 2008, the IEPA mailed the final NPDES permit to the City of Quincy. (Record, p. 369). This final permit contains the Section 14(7) here appealed. (Record, p. 380).

V. THE 1994 CSO CONTROL POLICY

The Clean Water Act requires all NPDES permits to comply with the 1994 CSO Control Policy ("1994 Policy"). 33 U.S.C.A. 1342(q)(1). The 1994 Policy establishes a consistent national approach for controlling discharges from CSOs. (1994 Policy, Section I.A). The goal of the 1994 Policy is to achieve cost effective CSO controls that ultimately meet appropriate health and environmental objectives. (1994 Policy, Section I.A). The 1994 Policy allows a phased approach to implementation of CSO controls considering a community's financial capability. (1994 Policy, Section I.A).

Initially, the 1994 Policy reiterates that dry weather discharges from CSOs are prohibited. (1994 Policy, Section I.B and V.B). Then, the 1994 Policy's CSO control focus is to insure that permittees implement the nine minimum controls for CSOs. (1994 Policy, Section II.A). The City of Quincy has satisfied these phases.

The 1994 Policy then requires the permittee to develop and implement a long term CSO control plan that will ultimately result in compliance with all Clean Water Act requirements. (1994 Policy, Section II.C). The minimum elements of the long term CSO control plan are: (1) Characterization, Monitoring, and Modeling of the Combined Sewer System; (2) Public Participation; (3) Consideration of Sensitive Areas; (4) Evaluation of Alternatives; (5) Cost/Performance Considerations; (6) Operational Plan; (7) Maximizing Treatment at the Existing POTW Treatment Plant; (8) Implementation Schedule; and (9) Post-Construction Compliance Monitoring Program. (1994 Policy, Section II.C).

The third element, Consideration of Sensitive Areas, is at the heart of this NPDES permit appeal. In regard to this element, the 1994 Policy provides:

> EPA expects a permittee's long-term CSO control plan to give the highest priority to controlling overflows to sensitive areas. Sensitive areas, as determined by the NPDES authority in coordination with State and Federal agencies, as appropriate, include designated Outstanding National Resource Waters, National Marine Sanctuaries, waters with threatened or endangered species and their habitat, <u>waters with primary contact recreation</u>, public drinking water intakes or their designated protection areas,

and shellfish beds.

(1994 Policy, Section II.C.3)(emphasis added).

When addressing the eighth element ("Implementation Schedule"), schedules for implementation of the CSO controls may be phased based on the relative importance of adverse impacts upon water quality standards and designated uses, priority projects identified in the long-term plan, and on a permittee's financial capability. (1994 Policy, Section II.8). Construction phasing, however, should consider eliminating overflows that discharge to sensitive areas as the highest priority. (1994 Policy, Section II.8.a).

NPDES authorities establish the timetable for the development of the long-term CSO control plan on a case-by-case basis dependent on the complexity of the planning process. (1994 Policy, Section II.C). In the present case, the NPDES permit requires the City of Quincy to submit its long-term control plan by August 1, 2009. (Record, p. 382). Once the long-term control plan is agreed upon, it is generally incorporated into the next issued NPDES permit for implementation. (1994 Policy, Section IV.B.2.).

VI. THE IEPA'S DECISION IS EITHER BASED ON AN IMPROPERLY PROMULGATED RULE OR AN IMPROPER INTERPRETATION OF THE PHRASE SENSITIVE AREA.

The stated basis for the IEPA changing the designation of the receiving waters of the three CSOs at issue to sensitive areas is:

(a) Current Agency practice is to designate streams through residential areas or public use areas as having a high probability for primary contact activity (Record, p. 278);

(b) The 1994 CSO Control Policy lists recreational activities as primary contact in its definition of a sensitive area (Record, p. 278); or

(c) There is potential human contact because of residential and public use areas downstream of the discharges (Record, p. 363).

An unstated basis for the IEPA's sensitive area designations, but one suggested by the Record, is that the IEPA may believe that a 1994 Policy "sensitive area" is the same as a Section 302.209(a) "protected water."

Alone or together, these bases for the IEPA's designation of the waters at issue as sensitive areas are inconsistent with the 1994 Policy and, accordingly, were improperly relied upon by the IEPA in making its sensitive area determinations.

A. There is no properly promulgated rule providing that all streams which flow through residential or public use areas are sensitive areas because they have a high probability for primary contact activity, and, thus, the IEPA cannot rely on its current practice to support its decision to designate the CSO receiving waters as sensitive areas.

To properly interpret the IEPA's statement that its current practice is to designate streams through residential areas or public use areas as having a high probability for primary contact activity, it must be recalled that the IEPA was responding to the City of Quincy's objection to the IEPA's classification of the three receiving waters as sensitive areas. Placed in its proper context, then, the IEPA's statement is that its current practice is to designate streams through residential areas or public use areas as sensitive areas. The IEPA's current practice, one directly contrary to the IEPA's earlier practice whereby none of the City of Quincy's CSOs were deemed to discharge into sensitive areas, is an improperly promulgated rule that violates the Illinois Administrative Procedure Act. 5 ILCS 100/1-100/15-10.

Under the Illinois Administrative Procedure Act, a "rule" is an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy...." 5 ILCS 100/1-70. Through its current practice statement, the IEPA is prescribing new law and policy of general applicability, and, in the City of Quincy's NPDES permit, it is applying that new law and policy to the City of Quincy. Because it is setting forth a new rule of general applicability, the IEPA was required to follow the proper procedure for the new rule's adoption, which was not done; accordingly, the rule is invalid. Sen Park Nursing Center v. Miller, 104 Ill. 2d 169, 181

(1984); Illinois Ayers Oil Company v. IEPA, 2004 Ill. ENV LEXIS 195 at *38-41 (PCB No. 03-214 (UST Appeal)(April 1, 2004). Illinois courts and the Board have repeatedly found such improperly promulgated administrative rules invalid.

For example, in Platolene 500, Inc. v. IEPA, 1992 Ill. ENV LEXIS 341 (PCB No. 92-9 (UST)(May 7, 1992)), the IEPA had published a guidance manual setting forth expenses reimbursable from the LUST fund. Id. at *5. Platolene appealed the IEPA's decision not to reimburse it for replacing concrete, an expense the guidance manual arguably allowed. Id. at *3 & *8. The IEPA, in part, countered by arguing that the replacement of concrete is not the reassembly of a structure as required by the guidance manual. Id. at *3. On its own initiative, the Board analyzed whether the guidance manual was an enforceable rule.

Looking to the Illinois Administrative Procedure Act, the Board found that the guidance manual was a rule: it was clearly an IEPA statement of general applicability; it implemented a policy of the IEPA,; it was not a statement dealing with the internal management of the IEPA; and it did affect the rights and procedures available to people and entities outside the IEPA. Id. at *7-8. As the guidance manual had not been subjected to the applicable notice and comment requirements of the Illinois Administrative Procedure Act, however, the Board found it invalid, and neither party could rely upon it. Id. at *6 & *8-9.

The IEPA's current practice of designating all streams flowing through residential or public use areas as sensitive areas is likewise an improperly promulgated rule that is invalid. Marathon Petroleum, Co. v. IEPA, 1989 Ill. ENV LEXIS 775 at *28 (PCB No. 88-179)(July 27, 1989)(IEPA may not make regulations more stringent by application of an informal policy). Accordingly, it cannot form the basis for the IEPA's determination that the three CSOs discharge to sensitive areas.

B. The 1994 CSO Control Policy does not list recreational activities as primary contact in its definition of a sensitive area.

In support of its sensitive area determination, the IEPA states that the 1994 CSO Control

Policy lists recreational activities as primary contact in its definition of a sensitive area (Record, p. 278). It does not.

The 1994 Policy states that sensitive areas are "waters with primary contact recreation." Not every recreational activity is a primary contact recreation activity. The 1994 Policy provides swimming as an example of primary contact recreation. (1994 Policy, Section III.B; see also 35 Ill. Admin. Code 301.355 (defining primary contact water use and giving swimming as an example of such use); Record, p. 7, CSO Guidance for Permit Writers, Exhibit 3-7 (giving swimming as an example of primary contact recreation)). Thus, swimming is a primary contact recreation activity, but recreational activities such as fishing, boating, and any limited contact incident to recreational shoreline activities are not primary contact recreation activities. 35 Ill. Admin. Code. 301.308 (defining secondary contact activities); (Record, p. 19, Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews ("Examples of secondary contact activities include canoeing, motor boating, and fishing.")). Accordingly, even if a CSO receiving water is used for some recreational purpose (e.g., fishing), that does not mean that the water is a sensitive area under the 1994 Policy.

Thus, the IEPA's erroneous reading of the 1994 Policy cannot support the IEPA's sensitive area determinations.

C. Potential human contact because of residential and public use areas downstream of a CSO discharges does not render a water a sensitive area under the 1994 Policy.

The IEPA states that the CSO receiving waters are sensitive areas because there is potential human contact because of residential and public use areas downstream of the discharges. (Record, p. 363). This statement is inconsistent with the 1994 Policy.

There is the potential for human contact with any water. And, it would be surprising if the likelihood of potential contact did not increase as the number of persons who could potentially touch the water increased due to the water flowing near residential areas or public use areas (leaving aside the issue of what these broad terms might mean, e.g., Is one farm house

considered a residential area under the IEPA's new practice? Is a roadway bridge over a stream a public use area under the IEPA's new practice?). Insofar as sensitive areas are concerned, however, the 1994 Policy's concern is not every potential human contact with CSO receiving waters.

When human contact with water is the issue, as here, the 1994 Policy's concern is waters with primary contact recreation, e.g., recreational use in which there is prolonged and intimate contact with the water involving considerable risk of ingesting water in quantities sufficient to pose a significant health risk, such as swimming and water skiing. 35 Ill. Admin. Code 301.355. The 1994 Policy provides swimming as an example of primary contract recreation. (1994 Policy, Section III, B). Thus, simply because people may come into contact with water while fishing from a stream bank, this is not a valid basis for declaring the stream a sensitive area. The focus of the 1994 Policy is primary contact recreation, not every conceivable activity that may result in a stream's water coming into contact with a person's skin.

The IEPA's interpretation is further improperly broad in that it states that the definition of sensitive area extends to "potential" contact, while the 1994 Policy's concern is "waters with primary contact recreation" (1994 Policy, Section II.C)(emphasis added); not waters with potential primary contact recreation. The NPDES permit itself recognizes that, pursuant to the 1994 Policy, sensitive areas are waters "used for primary contact recreation." (Record, p. 380)(emphasis added).

The 1994 Policy's plain language demonstrates that its concern is with the current use or current designation (e.g., Outstanding National Resource Waters) of receiving waters, not their possible, future use or designation. Thus, the 1994 Policy states that sensitive areas are designated Outstanding National Resource Waters; it does not state that every water that could in the future be designated an Outstanding National Resource Water is currently a sensitive area. The 1994 Policy states that sensitive areas are waters with threatened or endangered species and their habitat; it does not state that every water that could in the future become the home to

threatened or endangered species is currently a sensitive area. Similarly, the 1994 Policy states that sensitive areas are waters with primary contact recreation; it does not state that potential human contact, of any type, renders a water a sensitive area.

Finally, the IEPA's statement that residential or public use areas downstream from CSOs are sensitive areas is wholly inconsistent with the 1994 Policy's definition of sensitive area. The 1994 Policy does not even mention residential or public use areas when defining sensitive areas.

For all of these reasons, the IEPA's statement that the CSO receiving waters are sensitive areas because there is potential human contact because of residential and public use areas downstream of the discharges, a statement totally inconsistent with the 1994 Policy's definition of sensitive area, cannot support the IEPA's designation of the waters at issue as sensitive areas.

D. A 1994 Policy "sensitive area" is not the same as a Section 302.209(a) "protected water."

By stating that current IEPA practice is to designate streams through residential areas or public use areas as having a high probability for primary contact activity and, thus, rendering them sensitive areas under the 1994 Policy, and by stating that potential human contact because of residential and public use areas downstream of a CSO discharges renders the waters sensitive areas, the IEPA may be taking the position that Section 302.209(a) "protected waters" are equivalent to 1994 Policy "sensitive areas." The basis for this supposition is that the record includes portions of the Board Order amending the regulation which is now Section 302.209. (Record, pp. 1-4). Protected waters and sensitive waters, however, are not equivalent.

In relevant part, Section 302.209(a) provides:

> Protected waters are defined as waters which, due to natural characteristics, aesthetic value or environmental significance are deserving of protection from pathogenic organisms. Protected waters will meet one or both of the following conditions:
>
> 1) presently support or have the physical characteristics to support primary contact;
>
> 2) flow through or adjacent to parks or residential areas.

35 Ill. Admin. Code 302.209(a).

As is evident from reading Section 302.209, and as stated by the Board in that part of its order included in the record, "[a] protected water is [] more encompassing than the primary contact waters." (Record, p. 2). Thus, a water might be both a protected water and a sensitive area if it presently supports primary contact activities (e.g., a swimming area). But, if the water only has the physical characteristics to support primary contact activities, or if it only flows through or adjacent to parks or residential areas, it is a protected water, but not a sensitive area.

Further, if the IEPA is relying upon Section 302.209(a), it is ignoring Section 302.209(b) which provides:

> Waters unsuited to support primary contact uses because of physical, hydrologic or geographic configuration and are located in areas unlikely to be frequented by the public on a routine basis as determined by the Agency at 35 Ill. Adm. Code 309 Subpart A, are exempt from this standard.

35 Ill. Admin. Code 302.209(b).

Nothing in the record suggests that the IEPA considered the Section 302.209(b) exemption. Instead, it appears that the IEPA made its initial decision based on its belief that the waters were sensitive areas because they flowed through residential or public use areas, and the IEPA never considered that the waters were unsuited to support primary contact uses or were in areas unlikely to be frequented by the public on a routine basis. The IEPA ignored the information submitted by the City of Quincy which demonstrated that the waters are not used for primary contact recreation, were unsuited to support primary contact uses, and are located in areas unlikely to be frequented by the public on a routine basis.

Even if sensitive areas and protected waters are equivalent, which the City of Quincy does not concede, the IEPA should have considered whether the waters had the potential for primary contact activities and whether the waters were likely to be frequented by the public on a routine basis. Although not applicable to the City of Quincy's CSO discharges, Part 378 of the Board's regulations shed light on the factors to consider when attempting to determine whether a water

has the potential for primary contact uses.

Part 378, entitled "Effluent Disinfection Exemptions," allows certain NPDES permit dischargers to cease effluent disinfection on a seasonal or year-round basis. 35 Ill. Admin. Code 378.101. Under Part 378, one basis for granting an effluent disinfection exemption is that the water is an "unprotected water," one that does not presently support or have the physical characteristics to support primary contact activities. 35 Ill. Admin. Code 378.101(d).

Unprotected waters are not required to comply with the fecal coliform standards. "Characteristics of unprotected waters include but are not limited to the following, and waters must possess one or more of these characteristics to be classified as unprotected waters:

a) Waters with average depths of two feet or less and no pronounced deep pools during the summer season;

b) Waters containing physical obstacles sufficient to prevent access or primary contact activities; or

c) Waters with adjacent land uses sufficient to discourage primary contact activities."

35 Ill. Admin. Code 378.201.

To obtain an exemption, a NPDES permittee must submit a Disinfection Exemption Request to the IEPA. 35 Ill. Admin. Code 378.103. To prepare its request, the permittee must conduct surveys to determine whether the affected waters currently support or have the potential to support primary contact activities. 35 Ill. Admin. Code 378.204(a). To have the potential for primary contact use, the segment of the water body at issue must have water depths that would ordinarily permit swimming during the months of May through October. 35 Ill. Admin. Code 378(a)(1). To have the potential for primary contact activities, there must be suitable access to the streambed, and no logs, log jams, or other debris rendering the water body hazardous or unattractive to swimmers. 35 Ill. Admin. Code 378(a)(2).

The surveys conducted by CDM on behalf of the City of Quincy and provided to the

IEPA are similar to the studies required by Part 378. These surveys show that not only do Whipple Creek and Curtis Creek not presently support primary contact recreation, they do not have the potential to support primary contact recreation. Whipple Creek is a small stream, difficult to access, extremely shallow, and has no deep pools. Curtis Creek, in the areas outside the industrial area it flows through, has identical characteristics. The portion of Curtis Creek flowing through the industrial area is an unprotected water unsuitable for primary contact activities because the adjacent, industrial land use discourages primary contact activities and there is no suitable access for primary contact activities.

As to the Mississippi River channel, the survey shows that it also is not used for primary contact recreation. This Mississippi River channel, although having a depth sufficient for swimming, is used for marine traffic which renders it hazardous and unattractive to swimmers and which discourages primary contact activities. It is also a no wake zone, so the ingestion of water due to water skiing is not a possibility. Also, the IEPA has provided no explanation for treating the Cedar Street CSO 006 discharge to the Mississippi River channel differently than the Broadway Street CSO 005 discharge located a few blocks south discharging to the Mississippi River. (Record, p. 148).

Thus, if the IEPA is relying on Section 302.209's definition of protected waters to define sensitive areas, that reliance is misplaced. And, even if these very different terms did have the same meaning, the IEPA erred in not considering the information supplied by the City of Quincy which amply demonstrated that the waters are not protected waters .

VII. THE IEPA MUST ABIDE BY THE 1994 POLICY'S DEFINITION OF SENSITIVE AREA AND THE IEPA'S PREVIOUS INTERPRETATION OF THE 1994 POLICY.

The IEPA is not free to designate any CSO receiving water as a sensitive area. The 1994 Policy provides a nonexclusive list of waters that are sensitive areas. When a regulation provides a list that is not exhaustive, e.g., by using phrases such as "including but not limited to," the class

of unarticulated things is to be interpreted as those that are similar to the named things. Zekman v. Direct Amer. Marketers, 182 Ill. 2d 359, 369 (1998); East St. Louis v. East St. Louis Fin. Auth., 188 Ill. 2d 474, 484 (1999)(doctrine of ejusdem generis).

Here, the IEPA interprets the phrase sensitive area as used in the 1994 Policy to include receiving waters flowing though residential or public use areas and those that have the potential for human contact. These new classifications are not similar to the listed receiving waters in the 1994 Policy. The 1994 Policy does not mention residential areas or public use areas. The 1994 Policy's only concern with public use is when the public is engaged in primary contact recreation. Thus, the IEPA's interpretation of the 1994 Policy violates the doctrine of ejusdem generis.

Depending upon how the terms residential area and public use area are construed, the IEPA's interpretation of the phrase sensitive area might render almost every steam in Illinois in which a CSO discharges a sensitive area. A map of Illinois shows that almost every stream in the state flows through what might arguably be a residential area or public use area. and the Board is requested to take judicial notice of this fact. 5 ILCS 100/10-40(c). And, if the potential for human contact with a water results in the water being deemed a sensitive area, every water any CSO discharges to will be a sensitive area, as all waters have the potential for human contact.

If the IEPA's interpretation is adopted, then, every water a CSO discharges to will be a 1994 Policy sensitive area, and a water which is truly a sensitive area (e.g., one with threatened or endangered species) will be entitled to no greater priority under the 1994 Policy than a water the IEPA deems a sensitive area simply because it has the potential for human contact. By designating all streams sensitive areas, the IEPA eviscerates the 1994 Policy's directive to give priority to protecting truly sensitive areas.

The 1994 Policy's directive to place priority on sensitive areas is important. As the 1994 Policy recognizes, municipalities have limited funds to address CSO issues. These funds should be used first to protect waters that are truly sensitive areas. And, for municipalities with no

CSOs discharging to waters that are truly sensitive areas, the improper designation of sensitive areas wastes limited resources.

The phrase "waters with primary contact recreation" is not ambiguous. Thus, the IEPA's interpretation is entitled to little, if any, weight in the Board's determination of the meaning of the phrase sensitive area. Central Illinois Public Service Co v. PCB, 165 Ill. App. 3d 354, 363 (4th Dist. 1988). The Board is required to give the phrase "waters with primary contact recreation" its plain meaning. Piatak v. Black Hawk College Dist., 269 Ill. App. 3d 1032, 1035 (3rd Dist. 1995)(The initial source for determining legislative intent is the plain meaning of the language used, and where unambiguous, the plain meaning of the language controls.); Shell Oil Co. v. Pollution Contorl Board, 37 Ill. App. 3d 264, 273 (5th Dist. 1976)(The rules of construction applicable to statutes apply to administrative regulations.).

Even if the 1994 Policy's definition of sensitive waters insofar as primary contact recreation is concerned were ambiguous, the IEPA cannot change its earlier interpretation of the 1994 Policy absent a significant change in circumstances. The undisputed facts are that the IEPA never before deemed any of the receiving waters sensitive areas, and the record is devoid of any facts suggesting that the receiving waters have changed since the earlier permits were issued. In Illinois, administrative agencies are bound by their long-standing policies and customs of which affected parties have prior knowledge absent significant changes in circumstances. Central Illinois Public Service Co v. PCB, 165 Ill. App. 3d 354, 363 & 366 (4th Dist. 1988)("CIPS").

CIPS concerned a permit appeal. Unlike previous permits issued to CIPS, the IEPA included a condition in an operating permit limiting sulfur dioxide emission to 6.0 lbs per million btu. Id. at 355 & 358. The Board affirmed the IEPA's decision, and CIPS appealed.

The CIPS Court held that the applicable rules and regulations did not require the condition. Id. at 361. Noting that the applicable rules and regulations were ambiguous, the CIPS Court noted that the IEPA's long-standing practice in interpreting these ambiguous regulations had been to not include a 6.0 lbs per million btu condition in CIPS's permits. Id. at 362. Noting

further that there were no changed circumstances or changes in the regulations that would require inclusion of the 6.0 lbs per million btu condition in the permit, the challenged condition was stricken from the permit. Id. at 366. Here, if the Board finds the phrase "waters with primary contact recreation" ambiguous, the Board should similarly bind the IEPA to its earlier interpretation of the phrase.

For these reasons, the IEPA's interpretation of the 1994 Policy's sensitive areas definition insofar as it concerns waters with primary contact recreation must be rejected.

VIII. THE UNDISPUTED FACTS DEMONSTRATE THAT THE CSOs DO NOT DISCHARGE TO WATERS WITH PRIMARY CONTACT RECREATION.

The 1994 Policy's definition of sensitive areas includes "waters with primary contact recreation." The 1994 Policy provides swimming as an example of a primary contact recreation.

The Board's regulations make a clear distinction between primary contact activities and secondary contact activities. "Primary Contact" means any recreational or other water use in which there is prolonged and intimate contact with the water involving considerable risk of ingesting water in quantities sufficient to pose a significant health risk, such as swimming and water skiing." 35 Ill. Admin. Code 301.355. "Secondary Contact" means any recreational or other water use in which contact with the water is either incidental or accidental and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, commercial and recreational boating and any limited contact incident to shoreline activity." 35 Ill. Admin. Code. 301.308.

There is no evidence in the record suggesting that Curtis Creek, Whipple Creek, or the Mississippi River channel separating Quinsippi Island from the Illinois mainland are used for primary contact recreation. The IEPA has never suggested that it has evidence that these waters are used for primary contact recreation and that this was the basis for the IEPA's decision to designate the waters as sensitive areas. The surveys submitted by the City of Quincy to the IEPA demonstrate that the waters are not used for primary contact recreation.

Accordingly, as Curtis Creek, the Mississippi River channel, and Whipple Creek are not used for primary contact recreation, those waters are not 1994 Policy sensitive areas, and the IEPA's sensitive area designations for these waters were improper.

IX. PROPER PROCESS FOR IDENTIFYING SENSITIVE AREAS

The 1994 Policy states that a sensitive area classification is to be determined by the NPDES authority in coordination with state and federal agencies, as appropriate. (1994 Policy, Section II.C.3). These determination must be based on a correct interpretation of the meaning of sensitive area and be supported by facts. Thus, it would be inappropriate for the IEPA to declare that a water was a sensitive area because it was a water with threatened or endangered species or their habitat if the IEPA had no facts to support its declaration; however, if the U.S. Fish and Wildlife Service provided factual support for such a determination to the permittee or the IEPA, the IEPA's decision would be supportable. (Record, p. 7).

Sometimes, it is not known whether a water is a sensitive area (e.g., Does the water contained endangered species? Is the water used for primary contact recreation?), and the permittee must gather facts relevant to the determination. The Guidelines note:

(1) "The *initial* identification of sensitive areas should be made by the permittee in consultation with the NPDES permitting authority and may require coordination with local, State, and Federal agencies involved in the protection of such areas." (Record, p. 7);

(2) "As part of developing the LTCP, municipalities should be required to identify all sensitive water bodies and the CSO outfalls that discharge to them." (Record, p. 10); and

(3) "Sensitive areas should be identified as part of the CSS characterization as soon as the locations of all CSO outfalls are known." (Record, p. 7).

In the present case, as part of its efforts toward developing its long term control plan, the

City of Quincy prepared a CSO Assessment and provided it to the IEPA. (Record, 241). The IEPA reviewed the CSO Assessment, and, in its June 7, 2007, letter, offered comments "...for the City's consideration during the development of their CSO long-term control plan (LTCP)." (Record, p. 241). One of the IEPA's comments was that all six CSO discharges should be characterized as having "primary contact" and "aquatic life" designated uses." (Record, p. 241). Another IEPA comment was that Whipple Creek, Cedar Street, and South Side CSOs discharge either into or upstream from parks or public use areas, and the City should consider relocating or eliminating these discharge locations. (Record, p. 241).

The IEPA's June 7, 2007, letter did not state that all of the CSOs discharged into sensitive areas, and the City of Quincy did not interpret the IEPA's comments to mean that the IEPA had designated all of its CSOs as discharging to sensitive areas. (Record, p. 269). And, in the issued permit, even though the letter stated that all six CSOs discharges should be characterized as having primary contact, the IEPA designated only three of the six CSOs as discharging to sensitive areas. Thus, the IEPA's comments in its June 7, 2007, were not statements that the IEPA had made its sensitive area determinations.

No prior permits issued to the City of Quincy identified any CSOs as discharging into sensitive areas. The draft permit issued in April, 2007, similarly contained no sensitive area designations. The record does not indicate that these water bodies or their uses changed in any manner since earlier NPDES permits were issued. The City of Quincy and the IEPA were in agreement that none of the CSOs discharged into sensitive areas as evidenced by the draft NPDES permit issued in April, 2007, stating there were no sensitive areas identified.

In July, 2007, the IEPA apparently started implementing its new sensitive area policy (or its revised interpretation of the 1994 Policy) and issued the revised draft permit designating three sensitive areas. In response, the City of Quincy directed that primary contact recreation surveys of the waters at issue be conducted and submitted to the IEPA. The IEPA ignored the surveys, thereby leaving the City of Quincy with a permit condition requiring it, within an unrealistically

short, three-month period, to submit a plan to relocate, control, or treat the discharges or explain why it could not do so in the manner required by the 1994 Control Policy.

Although the 1994 Policy states that the IEPA has the authority to designate sensitive areas, this does not give the IEPA unfettered power to name any water a sensitive area. The IEPA's designation must comport with the 1994 Policy's definition of sensitive area and be based on facts. In the present case, the IEPA's decision did not comport with the 1994 Policy's definition of sensitive area and was not based on the facts.

In order to return to compliance with the 1994 Policy and allow the IEPA to make proper sensitive area determinations, the Board should reverse the IEPA's sensitive area determinations. The Board should clarify that a sensitive area, insofar as is relevant here, means a water with primary contact recreation. The City of Quincy, as part of the development of its long term control plan, should continue to gather information relevant to determining whether the waters at issue are used for primary contact recreation and submit this information to the IEPA in its long term control plan, due on August 1, 2009.

Then, with all relevant facts before it, the IEPA can make its sensitive area determinations and, if any waters are found to be sensitive areas due to any designation or use identified as constituting a 1994 Policy sensitive area, they can be given priority and addressed as part of the long-term control plan, all as directed by the 1994 Policy. In addition to complying with the 1994 Policy, proceeding in this manner has the added benefit of insuring that limited resources are directed to addressing any sensitive areas deemed to be of the highest priority.

For example, the City of Quincy's long-term control plan may conclude that endangered species reside in Whipple Creek, thus rendering it a sensitive area. The city of Quincy's limited funds, then, should first be applied to addressing CSO 007. Prematurely and erroneously designating waters as sensitive areas in a permit prior to the development of the long-term control plan and requiring almost immediate action, as done in the NPDES permit at issue, wastes limited resources which are then unavailable to address later identified areas which are

truly sensitive areas.

For these reasons, the IEPA's sensitive area determination should be reversed, and the parties should be directed to proceed in a manner consistent with the 1994 Policy.

X. IF ANY OF THE IEPA'S SENSITIVE AREA DETERMINATIONS ARE UPHELD, THE CITY OF QUINCY SHOULD BE GRANTED LONGER THAN THREE MONTHS TO PROVIDE THE IEPA WITH A WRITTEN RESPONSE.

After each is considered separately, if any of the IEPA's sensitive area determinations are upheld by the Board, the City of Quincy requests that the permit be revised to grant it additional time to provide a schedule to relocate, control, or treat discharges from the CSO or to provide adequate justification as to why these options are not possible. The City of Quincy is aware of no basis for the extremely short, three-month time period set forth in the permit to perform these acts.

Even the IEPA's March 27, 2008, letter states that the determination of whether CSOs 002, 006, and 007 can be eliminated, treated economically, or relocated will be determined as part of the City of Quincy's long-term control plan, which is not due until August 1, 2009. (Record, p. 369). This statement, although inconsistent with Section 14(7) of the permit, provides a reasonable time to perform the mandated acts, and the additional time will provide the additional benefits inherent in addressing all CSO concerns simultaneously, as discussed in Section IX (above).

Accordingly, if the Board upholds any of the IEPA's sensitive area determinations, the City of Quincy requests until August 1, 2009, to provide a schedule to relocate, control, or treat discharges from the CSO or to provide adequate justification as to why these options are not possible.

XI. CONCLUSION

The IEPA's sensitive area determinations were based on an invalid rule and/or an

interpretation of the phrase sensitive area inconsistent with the 1994 Policy and inconsistent with the IEPA's previous interpretation of the 1994 Policy as applied to the City of Quincy. Invalid rules are unenforceable. The NPDES permit must be consistent with the 1994 Policy. As there were no changes in the underlying streams' uses, the IEPA's interpretation of the 1994 Policy must remain consistent as applied to the City of Quincy. Thus, the IEPA's improper designation of the streams as sensitive areas was not necessary to accomplish the purposes of the Illinois Environmental Protection Act. Further, the IEPA's erroneous determinations will result in misdirecting limited funds which are needed to comply with the goals of the 1994 Policy..

As to each receiving water for CSOs 002, 006, and 007, the issue presented is whether it is a water with primary contact recreation and, thus, a sensitive area. The undisputed facts demonstrate that none of these receiving waters are waters with primary contact recreation, and, thus, none of these receiving waters are sensitive areas. Accordingly, the City of Quincy is entitled to summary judgment as a matter of law.

Wherefore, for the reasons set forth in this Motion, the City of Quincy requests that the Board grant this Motion for Summary Judgment and:

(a) Find that, based on the record, CSOs 002, 006, and 007 do not discharge into 1994 Policy sensitive areas;

(b) Direct the IEPA to remove those portions of Special Condition 14(7) of the NPDES permit setting forth the IEPA's erroneous determinations that Outfalls 002, 006, and 007 discharge into 1994 sensitive areas and imposing obligations upon the City of Quincy based upon those determinations;

(c) Find that the Agency's "current practice," as announced in its August 28, 2007, letter to the City of Quincy, is an invalid rule and direct that the IEPA cease making sensitive areas designations based upon this invalid rule; and

(d) Direct the IEPA to issue a revised NPDES permit whose conditions are consistent with the Board's order.

Alternatively, if the Board affirms the IEPA's sensitive area determination as to one or more of the CSO receiving waters at issue, the City of Quincy requests that the Board grant it until August 1, 2009, the same date the long term control plan is to be submitted to the IEPA, to submit a written plan to address the sensitive area(s) in the manner required by the 1994 Policy and direct the IEPA to revise the NPDES permit to comport with the time extension granted.

Finally, the City of Quincy requests that the Board grant it such other and further relief as is just.

Respectfully submitted,

CITY OF QUINCY, an Illinois municipal corporation,
Petitioner

By _____
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I hereby certify that I did on the 10th day of November, 2008, 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 PETITIONER CITY OF QUINCY'S MOTION FOR SUMMARY JUDGMENT

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: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, IL 60601-3218

Joel A. Benoit

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