

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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DEC 31 2008

STATE OF 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

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
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Springfield, IL 62794-9274

PLEASE TAKE NOTICE that on the 29th day of December, 2008, I mailed the following document for filing with the Clerk of the Pollution Control Board of the State of Illinois:

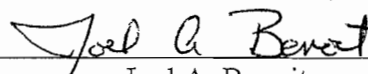
**PETITIONER CITY OF QUINCY'S REPLY TO RESPONDENT ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MOTION FOR
SUMMARY JUDGMENT**

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

CITY OF QUINCY, an Illinois municipal
corporation, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
Its attorneys

BY:



Joel A. Benoit

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**PETITIONER CITY OF QUINCY'S REPLY TO RESPONDENT
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION.

Except for one fact, the IEPA's Response does not contest the facts, law, and arguments set forth in the City of Quincy's Motion for Summary Judgment. The disputed fact identified by the IEPA is whether, at a meeting among the parties' representatives held on July 12, 2007, all attendees agreed that the City of Quincy's CSOs did not discharge into sensitive areas. The Motion for Summary Judgment sets forth this fact as true, but attached to the IEPA's Response is the affidavit of Ralph Hahn, an employee of the IEPA who attended the meeting, which states the fact is untrue because Ralph Hahn did not so agree.

Apparently, the IEPA's position is that the disputed fact is material, and, thus, prevents the Board from otherwise granting the City of Quincy's Motion for Summary Judgment because "[t]he Motion for Summary Judgment is premised upon the allegation that the Illinois IEPA had agreed, prior to the issuance of the NPDES permit, that none of the City of Quincy's CSOs discharged to sensitive areas." (Response, para. 5). In addition to identifying the disputed fact,

the IEPA faults the City of Quincy for not providing an affidavit supporting the Motion for Summary Judgment stating that the disputed fact was true. (Response, para. 5).

For the reasons set forth below, assuming arguendo that the disputed fact identified by the IEPA is in dispute, this alone does not prevent the Board from granting the City of Quincy's Motion for Summary Judgment. Further, as the undisputed facts set forth in the Motion for Summary Judgment are taken from the record, the City of Quincy is not required to provide a supporting affidavit.

II. THE RALPH HAHN AFFIDAVIT IS NOT PART OF THE RECORD AND MAY NOT BE CONSIDERED BY THE BOARD.

Ralph Hahn's affidavit is inadmissible in this proceeding. In relevant part, Section 105.214(a) of the Board's Regulations provides: "The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act." 35 Ill. Admin. Code 105.214(a). The NPDES permit under appeal was mailed to the City of Quincy on July 31, 2007; Ralph Hahn's affidavit is dated December 16, 2008. Thus, it is not possible for the Ralph Hahn affidavit to be part of the record before the IEPA at the time the permit was issued. Further, the City of Quincy has not agreed to supplement the record, nor does the IEPA so argue. Accordingly, Ralph Hahn's affidavit is not part of the record and may not be considered by the Board. Peoria Disposal Company v. Peoria County Board, 2007 Ill. ENV LEXIS 250 at *8-10 (PCB No. 06-184 (Siting Appeal)) (June 21, 2007)(Section 101.504 prevents Board from considering exhibits not included in the record).

III. THE CITY OF QUINCY IS NOT REQUIRED TO PROVIDE AFFIDAVITS TO ESTABLISH THAT FACTS SET FORTH IN THE RECORD ARE TRUE.

The IEPA filed its entire record of its decision in this case with the Clerk, as it was required to do by 35 Ill. Adm. Code 105.212. That record, which was not authenticated by affidavit (no rule requires that the record be authenticated by affidavit), contains correspondence related to the permit application, as required by 35 Ill. Adm. Code 105.212 (b) (2) . The IEPA, who filed the record, now takes issue with a particular letter, dated August 8, 2007, claiming that although the IEPA itself included it in the record, and did not authenticate it by affidavit, the City of Quincy cannot rely upon it, or upon the truth of the contents therein, unless it is authenticated by an affidavit. There is no rule that requires such authentication by affidavit.

The Board's regulations provide: "Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109]." 35 Ill. Admin. Code 101.504 (emphasis added). The corollary of the rule, then, is that facts of record need not be supported by affidavit. The facts set forth in the Motion for Summary Judgment are included in the record. Thus, the IEPA's argument is without merit.

IV. RALPH HAHN'S AFFIDAVIT IS AMBIGUOUS AND DOES NOT NECESSARILY RAISE A DISPUTED FACT.

If Ralph Hahn's affidavit is considered by the Board, the Board should recognize that it is ambiguous and does not necessarily create a disputed fact. The IEPA's Response gives the affidavit the following meaning: "...he states with direct and personal knowledge that the Illinois EPA did not agree at the meeting with the City and its consultants on July 12, 2007, that none of

the City of Quincy's CSOs discharged to sensitive areas." (Response, para 4).

In Paragraph 4 of his affidavit, however, Ralph Hahn actually states that the following statements are inaccurate: (i) "During the [July 12, 2007] meeting it was agreed that none of the City of Quincy's CSOs discharged to sensitive areas....," and (ii) "The consensus of meeting attendees was that none of the combined sewer overflows (CSOs) impacted receiving waters in Quincy's systems were identified as sensitive areas." In paragraph 4 of his affidavit, Ralph Hahn supports his statement that these statements are inaccurate by stating only that "he did not agree" that the CSOs did not discharge to sensitive areas.

Ralph Hahn's affidavit does not state that he advised anyone at the July 12, 2007, meeting that he did not agree that none of the CSOs discharged into sensitive areas. Ralph Hahn's affidavit does not state that any other IEPA representative advised anyone at the July 12, 2007, meeting that they did not agree that none of the CSOs discharged into sensitive areas. Thus, insofar as is pertinent to the IEPA's material issue of disputed fact argument, the only fact established by the Ralph Hahn affidavit is that Ralph Hahn, at least internally, did not agree that none of the CSOs discharged into sensitive areas.

However, if Ralph Hahn remained silent while everyone else voiced their agreement that the disputed fact was true, his silence might be construed as acquiescence. Agreements and consensuses can be reached without every meeting attendee verbally acknowledging agreement. Sometimes silence is deemed agreement. First Nat. Bank v. Atlantic Tele-Network, 946 F.2d 516, 519 (7th Cir. 1991)(applying Illinois law).

Thus, Ralph Hahn's ambiguous affidavit does not necessarily raise a disputed fact.

V. TO PRECLUDE THE GRANTING OF SUMMARY JUDGMENT, THE DISPUTED FACT MUST BE MATERIAL.

If the Board considers Ralph Hahn's affidavit, and if the Board determines that it does raise the factual dispute identified by the IEPA, that factual dispute does not prevent the granting of summary judgment if it is immaterial to the issues raised in this permit appeal.

The existence of factual questions will not preclude summary judgment unless these facts are material to the litigation. Facts unrelated to the essential elements of the plaintiff's cause of action are immaterial, and no matter how sharply controverted, their presence in the record will not warrant denial of a motion for summary judgment. Whether there is any material issue to present to the trier of fact is, in the first instance, a question of law to be determined by the court.

Equity General Insurance Co. v. Patis, 119 Ill. App. 3d 232, 236 (1st Dist. 1983)(Summary judgment granted in favor of insurer whose insured failed to timely notify it of a loss; irrelevant that factual dispute existed as to whether insured prejudiced by untimely notice because prejudice is not a condition that dispenses with the timely notice requirement.).

Thus, the City of Quincy's Motion for Summary Judgment cannot be defeated by the IEPA raising one immaterial issue of fact and ignoring the relevant and undisputed facts. Disputed facts that do not affect the outcome of a case do not preclude the granting of summary judgment. Only the existence of a genuine issue of material fact which is the basis of at least one of the essential elements of the case precludes the granting of summary judgment.

VI. THE DISPUTED FACT IDENTIFIED BY THE IEPA IS NOT MATERIAL TO THIS PERMIT APPEAL AND DOES NOT PRECLUDE THE ENTRY OF SUMMARY JUDGMENT.

Even if the disputed fact identified by the IEPA exists and is recognized by the Board, it

is immaterial to the issues raised in this permit appeal. Such recognition would only establish that there is a dispute as to whether the people at the July 12, 2007, meeting agreed that the CSOs did not discharge into sensitive areas. This disputed fact is immaterial to every issue raised in the City of Quincy's Motion for Summary Judgment.

It is undisputed that no prior NPDES permit issued to the City of Quincy ever included a determination that any of its CSOs discharged to sensitive areas. (Record, p. 300). It is undisputed that on April 10, 2007, the IEPA mailed the City of Quincy a draft NPDES permit stating that the IEPA had tentatively determined that the City of Quincy's CSOs did not discharge into sensitive areas. (Record, pp. 220 & 234). It is undisputed that on July 31, 2007, the IEPA sent a revised draft NPDES permit to the City of Quincy stating that outfalls 002, 006, and 007 did discharge to sensitive areas. (Record, pp. 245 & 261). Obviously, then, sometime between April 10, 2007, and July 31, 2007, the IEPA changed its position on the sensitive area issue.

Further narrowing the time period in which the IEPA changed its position on the sensitive area issue is the IEPA's July 31, 2007, letter, which states: "The Permit was revised as a result of the meeting at the Agency on July 12, 2007." (Record, p. 245). This statement means that the IEPA changed its position on the sensitive area issue sometime between the beginning of the July 12, 2007, meeting and the drafting of the July 31, 2007, letter; this statement sheds no light on whether the disputed fact identified by the IEPA is true or false.

It is irrelevant to the issues presented in the Motion for Summary Judgment, however, as to whether the IEPA changed its position at the July 12, 2007, meeting and so advised the City of Quincy at the meeting, or if the IEPA changed its position seconds before mailing the second,

draft permit to the City of Quincy on July 31, 2007. The City of Quincy's Motion for Summary Judgment is in no way premised on the exact time the IEPA changed its position or the exact time the IEPA informed the City of Quincy of its changed position.

Pages 7-11 of the Motion for Summary Judgment are devoted to setting forth facts explaining the history of the City of Quincy's efforts to obtain the NPDES permit under appeal. Every fact set forth therein is not essential to the City of Quincy's appeal. For example, it is not material to the City of Quincy's arguments that, on April 20, 2007, it mailed a letter to the IEPA commenting on the draft permit, (Record, pp. 243-244); the inclusion of this fact in the Motion for Summary Judgment at page 7 merely aids the narrative summary.

Similarly, exactly when the IEPA changed its mind on the sensitive areas issue during the time period of July 12-31, 2007, and exactly when the IEPA informed the City of Quincy of its changed position (during the meeting or when the City of Quincy received the IEPA's July 31, 2007, mailing) are not material facts. The exact dates of these events might be interesting to know, but they are not material facts.

For example, if the disputed fact were true, the City of Quincy's receipt of the second draft permit listing sensitive areas would certainly come as shock, but would likely not aid the City of Quincy's legal position. Generally, the State of Illinois is not bound by the representations of its employees. 18 I.L. P. Estoppel Sec. 42, p. 159 (2003 and 2008 Supp.).

And, if the disputed fact were false, the IEPA might be surprised by the City of Quincy's letter setting forth what it believed was agreed upon at the July 31, 2007, meeting. (Record, pp. 268-269). But, this does not aid the IEPA's defense of the permit. It is irrelevant to the IEPA's defense of the permit whether the City of Quincy representatives correctly interpreted IEPA

meeting attendees' statements (or lack of statements) made at the meeting.

In short, when the IEPA changed its position on the sensitive area issues and whether it informed the City of Quincy of its changed position at the July 12, 2007, meeting are irrelevant to the issues presented in the Motion for Summary Judgment. Indeed, the issues presented in this permit appeal would not be affected had no meeting been held on July 12, 2007.

It is the material facts which are relevant to this appeal, and the IEPA's Response not only does not dispute the material facts, it ignores them. The undisputed material facts establish that the City of Quincy is entitled to summary judgment as a matter of law.

Accordingly, even if the disputed fact identified by the IEPA exists and is recognized by the Board, it is immaterial to the issues raised in this permit appeal and does not prevent the Board from granting the City of Quincy's Motion for Summary Judgment.

VII. CONCLUSION.

The IEPA's Response states that the NPDES permit issued to the City of Quincy represents the best professional judgment of the IEPA regarding the application of federal policy and Illinois regulations. The City of Quincy does not challenge this statement, but, instead, challenges only the IEPA's identification of three sensitive areas in the NPDES permit and the permit requirements tied to those identifications when the facts and law do not support these changes from previously issued NPDES permits.

For the reasons set forth above, the disputed fact identified by the IEPA in its Response in no way precludes the granting of the City of Quincy's Motion for Summary Judgment. The IEPA's Response sets forth no other basis to deny the Motion.

Wherefore, as the undisputed material facts and law demonstrate that the City of Quincy is entitled to summary judgment as a matter of law, the City of Quincy requests that the Board grant it the relief requested in its Motion for Summary Judgment .

Respectfully submitted,

CITY OF QUINCY, an Illinois municipal
corporation, Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I hereby certify that I did on the 29th day of December, 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 REPLY TO RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO 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: James Therriault, Clerk
Illinois Pollution Control Board
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