ILLINOIS POLLUTION CONTROL BOARD
June 17, 2010

CITY OF QUINCY, an Illinois municipal corporation,	)	
Petitioner,	)	
v.	)	PCB 08-86
	)	(Permit Appeal - NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

The City of Quincy (Quincy) appealed a condition of a National Pollutant Discharge Elimination System (NPDES) permit. The Illinois Environmental Protection Agency (IEPA) issued the NPDES permit, No. IL0030503, to Quincy for Quincy's wastewater treatment facility, which is located at 700 West Lock & Dam Road in Quincy, Adams County. The contested condition of the permit, Special Condition 14(7), concerns IEPA's designation of certain surface water bodies as "sensitive areas." Each of the three designated waters receives a combined sewer overflow (CSO) discharge from Quincy's combined sewer system: CSO outfalls 002, 006, and 007.

On March 4, 2010, the Board issued an opinion and order granting Quincy's motion for summary judgment, striking the sensitive area designations and associated requirements from the permit condition, and remanding the matter to IEPA with instructions. IEPA has since filed a motion for reconsideration and a motion to supplement the motion for reconsideration. Quincy filed a response opposing both motions and each party thereafter made further filings.

Today the Board grants in part and denies in part IEPA's motion to reconsider, denies IEPA's motion to supplement, and affirms the Board's March 4, 2010 decision. In doing so, the Board addresses the merits of the parties' arguments for and against reconsideration. The Board also alternatively addresses IEPA's proposed supplemental material as if the motion to supplement were granted.

In this order, the Board first provides the procedural history of the case and rules on IEPA's motion for leave to file a reply. Next, the Board summarizes IEPA's motion to reconsider; IEPA's motion to supplement; Quincy's response to the motions; IEPA's reply; and Quincy's surreply. The Board then discusses each of the issues and renders its conclusions.

PROCEDURAL MATERS

Procedural History

On May 15, 2008, at the parties' request, the Board extended until July 30, 2008, the time period for Quincy to appeal IEPA's issuance of the NPDES permit with conditions. On July 16, 2008, Quincy timely filed a petition asking the Board to review IEPA's determination. On July 21, 2008, the Board accepted Quincy's petition for hearing. On August 18, 2008, IEPA filed the administrative record of its determination (AR). On November 17, 2008, Quincy filed a motion for summary judgment (Mot. SJ). IEPA filed a response to the motion (Resp. SJ) on December 22, 2008, along with a motion for leave to file the response *instanter*, which the Board granted. The Board timely received Quincy's reply (Reply SJ) on December 31, 2008.

The Board issued its opinion and order granting Quincy's motion for summary judgment on March 4, 2010. On April 8, 2010, IEPA timely filed a motion to reconsider (Mot. Rec.) the March 4, 2010 decision. On April 15, 2010, IEPA filed a motion to supplement its motion for reconsideration (Mot. Supp.). Quincy filed a response to both IEPA motions on April 23, 2010 (Q Resp.). On April 27, 2010, IEPA filed a motion for leave to reply (Mot. Lv. Reply), attaching the reply. On May 7, 2010, Quincy filed a response (Resp. Mot. Lv.) to IEPA's motion for leave to reply.

IEPA's Motion for Leave to Reply

IEPA moves for leave to file a reply to Quincy's response to IEPA's motions to reconsider and supplement. Mot. Lv. Reply at 1. According to IEPA, Quincy's response "raise[s] issues and concerns that warrant clarification by the Attorney General on behalf of the Illinois EPA." *Id*. IEPA concludes:

> As one example of several, the City mistakenly characterizes one of the arguments in the Motion for Reconsideration as a contention by the Illinois EPA that "summary judgment motions are not allowed in NPDES permit appeals." Response to Motion for Reconsideration at page 7. This is certainly not a fair reading of any statement within the State's pleadings and prejudice might result absent the ability to dispute this counter-argument in a formal reply. *Id*.

Quincy opposes IEPA's motion for leave to file a reply. Resp. Mot. Lv. at 2. Quincy notes that under the Board's procedural rules, IEPA does not have the right to file a reply in support of its pending motions "'except as permitted by the Board or the hearing officer to prevent *material prejudice*.'" *Id*., quoting 35 Ill. Adm. Code 101.500(e) (emphasis added by Quincy). Quincy argues that because IEPA has not contended that IEPA will suffer material prejudice if the filing of the reply is not allowed, "there is no basis" for the Board to grant IEPA's motion for leave to reply. *Id*. According to Quincy, IEPA:

> merely desires to clarify certain "issues and concerns." (Motion for Leave, p.

> 1). The IEPA asserts that "prejudice might result" if the IEPA is not allowed to file a reply. The IEPA's desires and speculations are insufficient to support a finding that allowing a reply will prevent material prejudice. *Id*.

Quincy maintains therefore that IEPA's motion for leave to reply should be denied and the attached reply stricken. *Id*. However, if the Board allows IEPA's reply, Quincy offers a response.

The Board agrees with Quincy that IEPA's motion for leave does not use the specific language of Section 101.500(e): "The moving person will not have the right to reply, except as permitted by the Board or the hearing officer *to prevent material prejudice*." 35 Ill. Adm. Code 101.500(e) (emphasis added). However, the motion does claim multiple mischaracterizations by Quincy of IEPA arguments and alleges the prospect of resulting prejudice absent formal reply. The Board finds that allowing a reply is warranted here to prevent material prejudice within the meaning of Section 101.500(e). Accordingly, the Board grants IEPA's motion for leave to file a reply and accepts the reply (Reply).

As the Board is allowing IEPA's reply, the Board will address Quincy's offer of a response in what amounts to a surreply. Quincy did not include a formal motion for leave to file a surreply. There is no Board procedural rule specifically concerning surreplies, but the Board has sometimes entertained them. When ruling upon motions for leave to file surreplies, the Board has considered the "prevent material prejudice" standard from Section 101.500(e). *See, e.g.*, People v. Peabody Coal Co., PCB 99-134, slip op. at 1 (June 5, 2003). Quincy's offered response includes allegations that IEPA's reply mischaracterizes earlier filings and misstates the administrative record. Consistent with Section 101.500(e) and as IEPA has not opposed Quincy's offer or moved to strike Quincy's additional arguments, which are responsive to the reply, the Board will accept them as a surreply (Surr.).

IEPA MOTION TO RECONSIDER

IEPA moves the Board to reconsider the Board's March 4, 2010 grant of summary judgment to Quincy. Mot. Rec. at 2. IEPA argues that the Board erred in its application of the law, including the ruling that IEPA violated the Administrative Procedure Act (APA) (5 ILCS 100 (2008)), and that the Board "overlooked facts in the record." *Id*.; *see also id*. at 4 ("the Board's substantive rulings overlooked facts in the record").

IEPA Argues That It Did Not Have an Opportunity to Refute Quincy's Showing and Questions Whether the Board Properly Applied the Burden of Proof

IEPA asserts that imposing summary judgment "does not allow the Agency an opportunity to refute the petitioner's showing that the sensitive area designations are unnecessary." Mot. Rec. at 3. IEPA maintains that "a legitimate question" is raised by the Board's citation to the appellate court decisions of Jersey Sanitation, Browning-Ferris, and John

Sexton as "none of these cases involved an NPDES permit appeal or summary judgment." *Id.*[1] IEPA elaborates as follows:

> It should be clear that a petitioner might be able to establish a *prima facie* case that a permit condition is unnecessary, yet still not be entitled to judgment *as a matter of law*. In other words, the Agency must be afforded an opportunity to refute petitioner's showing by providing a justification based upon the record for the challenged conditions . . . . *Id*. at 3-4 (emphasis in original).

IEPA emphasizes that the case "ought to proceed to hearing and written argument" as a matter of "fairness," especially because the issue of "sensitive areas" under the 1994 Federal CSO Control Policy (59 Fed. Reg. 18688-98 (Apr. 19, 1994)) is "one of first impression for the Board" and because "an appellate court may well find that the Board has too easily dispensed with a disputed factual question." Mot. Rec. at 4.

IEPA Argues That There Is a Genuine Issue of Material Fact

The "disputed factual question," according to IEPA, is Quincy's statement that representatives of Quincy and IEPA agreed at a July 12, 2007 meeting that none of Quincy's CSOs discharged to sensitive areas. Mot. Rec. at 5. IEPA describes this as a "key factual representation" upon which Quincy's motion for summary judgment "is premised." *Id*. at 4.

IEPA explains that this "purported agreement" at the July 12, 2007 meeting is the basis for Quincy's contention that "'the IEPA cannot change its earlier interpretation of the 1994 Policy absent a significant change in circumstances.'" Mot. Rec. at 4, quoting Mot. SJ at 22. IEPA maintains that in Quincy's motion for summary judgment, the purported agreement is "portrayed as the Agency's prior interpretation of the CSO Policy." *Id*. at 6. IEPA also attests to the materiality of the purported agreement by asserting that Quincy's APA argument about an invalid rulemaking is "thoroughly contingent upon" the alleged change in position by IEPA between the meeting and permit issuance. *Id*. at 8.

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[1] As part of the Board's description of the legal framework for permit appeals, the Board stated:

> To prevail in its appeal of a permit condition, 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.'" IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 593, 784 N.E.2d 867, 876 (4th Dist 2003), quoting Browning-Ferris Industries of Illinois, Inc. v. IPCB, 179 Ill. App. 3d 598, 603, 534 N.E.2d 616, 620 (2nd Dist. 1989). Once a permittee establishes a *prima facie* case that a permit condition is unnecessary, IEPA must refute the *prima facie* case, though the ultimate burden of proof that the condition is unnecessary rests with the permittee. John Sexton Contractors Co. v. PCB, 201 Ill. App. 3d 415, 425-26, 558 N.E.2d 1222, 1229 (1st Dist. 1990). City of Quincy v. IEPA, PCB 08-86, slip op. at 3 (Mar. 4, 2010).

IEPA argues that "there is a genuine issue of material fact regarding this purported agreement." Mot. Rec. at 6. IEPA states that it rebutted Quincy's contention of an agreement through the affidavit of Ralph Hahn, an IEPA employee and meeting attendee. *Id*. IEPA quotes from Mr. Hahn's affidavit:

> The City's Motion for Summary Judgment alleges: "During the [July 12, 2007] meeting, it was agreed that none of the City of Quincy's CSOs discharged to sensitive areas ...." (Motion, page 8). The letter dated August 8, 2007, from the City of Quincy, stated in pertinent part: "The consensus of meeting attendees was that none of the combined sewer overflows (CSOs) impacted receiving waters in Quincy's system were identified as sensitive areas." (IEPA Exhibit 22; Record, page 268). Neither factual statement is accurate. I state with direct and personal knowledge that I 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. *Id*. at 7.

Based on this passage of Mr. Hahn's affidavit, IEPA asserts that (1) Quincy's representation about an agreement is "false" (*id*.); (2) there was no "consensus" (*id*.), a term which IEPA notes is defined as a "'position reached by a group as a whole' and a 'general agreement or accord'" (*id*. n.1); and (3) Mr. Hahn "did not personally agree that the receiving waters are not sensitive areas" (Mot. Rec. at 7).

IEPA Argues That the Board Tried to Resolve the Disputed Question of Fact

IEPA maintains that the Board "endeavors to resolve [the] disputed factual question" of whether there was agreement at the July 12, 2007 meeting about Quincy's CSOs not discharging to sensitive areas. Mot. Rec. at 8. In support of this proposition, IEPA makes several observations. First, IEPA notes that the Board found that IEPA's response to Quincy's motion made only this one argument against summary judgment, *i.e.*, that there is a genuine issue of material fact because there was no agreement at the meeting. *Id*. Second, IEPA observes that the Board found that any meeting consensus is immaterial. *Id*. On this point, IEPA suggests that the Board "*sua sponte* inject[ed]" the "totally inapplicable legal concept" of "estoppel" into its consideration. *Id*.[2]

Third and finally, IEPA continues, the Board found that Mr. Hahn's affidavit is outside of the IEPA administrative record and therefore not properly considered by the Board on review. Mot. Rec. at 8. IEPA observes that Section 101.504 of the Board procedural rules requires that

[2] The Board stated: "Quincy's case does not rely upon a consensus having been reached at the meeting with IEPA. For example, Quincy's motion is not premised on the alleged meeting consensus somehow estopping IEPA from making the sensitive area designations when the final permit issued in March 2008." City of Quincy, PCB 08-86, slip op. at 20-21. Quincy's reply cites estoppel in noting that "[g]enerally, the State of Illinois is not bound by the representations of its employees." Reply SJ at 8.

when facts not of record in the proceeding are asserted, they must be supported by oath, affidavit, or certification. *Id*. at 8-9, citing 35 Ill. Adm. Code 101.504. IEPA notes that Part 101 of the procedural rules generally applies to all Board adjudicatory proceedings, like permit appeals, and argues that the Board "cannot exclude an affidavit rebutting factual assertions in a motion for summary judgment." *Id*. at 9. IEPA also suggests that the Board's citation to Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987) is unpersuasive because that case was not an NPDES permit appeal and it concerned hearing evidence, not an affidavit. *Id*. IEPA adds that Alton Packaging was distinguished by City of East Moline v. PCB, 188 Ill. App. 3d 349, 358 (3rd Dist. 1989) because the former "did not pertain to NPDES permit appeals." *Id*. n.2.

IEPA Argues That the Board Erred in Finding That IEPA's "Current Practice" Is an Unpromulgated "Rule"

IEPA advances several thoughts in arguing that the Board should not have found IEPA's "current practice" regarding the CSO Policy violative of the APA. Mot. Rec. at 9-13. First, IEPA claims that the Board improperly used a "waiver of objection" approach: "The Board repeatedly insists that, absent objection by Respondent to the City's contentions, it is justified in its findings." *Id*. at 9, 11. IEPA reminds that Quincy has the burden to show that it is entitled to judgment as a matter of law "regardless of any countervailing arguments" and that the pleadings and record must be viewed in the light most favorable to the nonmovant. *Id*. at 9-10.

Second, IEPA criticizes that the Board "adjudicates this permit appeal through factual findings and substitutes its judgment for that of the Agency." Mot. Rec. at 11. IEPA suggests that the claimed "waiver of objection" approach led the Board to improperly try questions of fact:

> IEPA did not defend its "current practice" or even explain the meaning and import of the phrase. The Board's conclusion is that a *prima facie* showing without explicit rebuttal allows a finding that the Petitioner "has met its burden of proof." In seeking reconsideration, the Agency respectfully suggests that the Board needs to appreciate the crucial distinction between judgment on the pleadings and a contested adjudication. The Agency has a right to present the factual basis of the permitting decision and this right is necessarily preempted through summary judgment.
>
> The finding that IEPA misinterpreted the phrase "waters with primary contact recreation" from the definition of "sensitive area" in the CSO Policy would not entitle the City to summary judgment *as a matter of law*. The construction of regulatory language is a question of law but the application of any such construction is a factually dependent issue. The purpose of summary judgment is not to try an issue of fact, but, inter alia, to determine whether an issue of fact exists within the legal meaning of the case. *Id*. at 11-12 (emphasis in original).

Third, IEPA argues that the Board's APA ruling conflicts with the Illinois Supreme Court's decision in Alternate Fuels, Inc. v. Director of Illinois E.P.A., 215 Ill. 2d 219, 247-48

(2004). Mot. Rec. at 12. IEPA notes that Alternate Fuels involved IEPA interpreting the meaning of "discarded material" in the statutory definition of "waste." *Id*. The Supreme Court reversed the trial court's summary judgment ruling that IEPA's erroneous interpretation was an improper rule. IEPA maintains that while its "interpretation of the CSO Policy may have been incorrect," this record, like the record in Alternate Fuels, does not demonstrate a "'statement of general applicability' violative of the APA." *Id*. at 13.

IEPA MOTION TO SUPPLEMENT

IEPA also moves the Board to allow for IEPA to supplement the motion for reconsideration. IEPA states that at its request, "the United States Environmental Protection Agency [USEPA] has reviewed the Board's March 4, 2010 Order and the Illinois EPA's underlying permit decision regarding application of the federal CSO Policy." Mot. Supp. at 1. Attached as an exhibit to this motion (Mot. Supp. Exh.) is an April 14, 2010 letter from Tinka G. Hyde, USEPA Region 5 Water Division Director, to Sanjay Sofat, Manager of IEPA's Division of Water Pollution Control. Mot. Supp. at 1, Mot. Supp. Exh. at 1, 2.

IEPA seeks to supplement its motion to reconsider with Director Hyde's letter and argues that this letter "supports the State agency's permitting decisions and serves as a federal interpretation of the subject federal policy," constituting "'new evidence'" and providing "additional support for Respondent's argument that the Board's order ought to be reviewed on the grounds of misapplication of existing law." Mot. Supp. at 1. IEPA acknowledges that the letter is not part of the administrative record in this permit appeal. IEPA asserts, however, that the letter, which "was not available prior to March 4, 2010," should be considered by the Board in determining whether reconsideration should be granted and summary judgment set aside. *Id*. at 1-2. By setting aside the summary judgment decision, according to IEPA, the Board would be "allowing Respondent to address the merits of the legal disputes." *Id*. at 2.

After noting that parties opposing summary judgment motions are not required to "prove their case" and that IEPA's response challenged "a central factual assertion" by Quincy (*i.e.*, the purported meeting consensus), IEPA offers its view of the Board's decision:

> The Board improperly resolved this matter [the dispute over any meeting consensus] by deeming the City's assertion in its pleadings as not material factually to the controversy. The Board then basically assumed that the City was entitled to relief as a matter of law and utilized the administrative record to support such relief instead of viewing the record "strictly against the movant and in favor of the opposing party" as must be done in consideration whether to grant judgment on the pleadings. It is evident from the March 4, 2010 Order that the Board did not view the record "strictly against the movant and in favor of the opposing party" but rather improperly considered Respondent's pleading in opposition to summary judgment as having "waived" argument or objection on various issues. Mot. Supp. at 2.

IEPA states that Director Hyde's letter "relates to the validity of the exercise of agency discretion, the consistency of Illinois EPA's interpretation of the policy with federal

expectations, and the issue of whether the permit decision must be considered as a statement of general applicability." Mot. Supp. at 2-3. The entirety of Director Hyde's April 14, 2010 letter to Mr. Sofat reads as follows:

> Re: City of Quincy; Adverse Decision in PCB NPDES Permit Appeal 08-86
>
> Dear Mr. Sofat:
>
> We have reviewed the above decision of the Illinois Pollution Control Board (PCB) and would like to take an opportunity to clarify the U.S. Environmental Protection Agency's *Combined Sewer Overflow (CSO) Control Policy.* As you are aware, in enacting section 402(q) of the Clean Water Act, 33 U.S.C. § 1342(q), Congress has required that permits issued to CSO communities conform to the policy.
>
> Pursuant to the CSO Control Policy, EPA expects a permitee's CSO long-term control plan (LTCP) to give the *highest* priority to controlling overflows to sensitive areas. Permitting authorities, here the Illinois Environmental Protection Agency (Illinois EPA), include requirements to develop and implement LCTPs in wastewater discharge permits, thereby making such plans legally enforceable. The policy defines sensitive areas as those determined by the permit authority to be sensitive in coordination with state and federal agencies. Such areas include, but are not limited to, waters with primary contact recreation. Waters designated as "sensitive" by the permitting authority are subject to additional requirements to protect them. In National Pollutant Discharge Elimination System permit IL0030503, the Illinois EPA designated several waters along the Mississippi River receiving CSO discharges from Quincy as "sensitive."
>
> The PCB, hearing an appeal from the City of Quincy over three of these sensitive area designations, overruled the Illinois EPA, finding that the potential for or high probability of primary contact to be an inadequate basis for designating a receiving water as "sensitive" under the rubric of "waters with primary contact recreation."
>
> The CSO Control Policy provides discretion to the permitting authority to determine which areas are sensitive, and consequently we believe the PCB construed the phrase "waters with primary contact recreation" too narrowly. To give meaning to the phrase "highest priority," Illinois EPA must have discretion under the policy to designate waters with the potential for or high probability of human contact as sensitive. The areas listed in section II.C.3. of the policy do not constitute an exhaustive list. I am satisfied with Illinois EPA's exercise of discretion in this matter.
>
> Please contact me if you have any questions in this matter. Mot. Supp. Exh. at 1-2 (emphasis in original).

QUINCY RESPONSE TO IEPA MOTIONS TO RECONSIDER AND SUPPLEMENT

Quincy opposes IEPA's motions to reconsider and supplement. Q Resp. at 14. Quincy first argues that IEPA waived the right to request reconsideration of the issues that IEPA did not raise in its response to the motion for summary judgment. *Id*. at 2-3. Should the Board nevertheless decide to address those issues, Quincy presents responsive arguments. *Id*. at 3-14.

Quincy Argues That IEPA Waived Its Right to Move for Reconsideration of All But One Issue

Quincy states that it filed "a detailed motion for summary judgment setting forth the undisputed facts, pertinent law, and its arguments and analysis as to each issue raised." Q Resp. at 2. IEPA's response to the motion "challenged one fact" set forth in the motion, that is, "whether the IEPA agreed at a July 12, 2007, meeting that none of Quincy's CSOs discharged into sensitive areas." *Id*. Quincy refers to this as the "Sole Disputed Fact." *Id*. Quincy asserts that IEPA's response challenged "no other aspect" of Quincy's motion for summary judgment. *Id*.

According to Quincy, except for newly-discovered evidence, which IEPA does not present, "'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.).'" Q Resp. at 3, quoting Shaw v. Board of Trustees of the Village of Dolton, 1997 Ill. ENV LEXIS 171 at * 4 (PCB 97-68) (Apr. 3, 1997). Quincy argues that IEPA has therefore "waived the right to seek reconsideration of all issues now raised except those concerning the Sole Disputed Fact." *Id*.

Quincy Argues That IEPA Has Not Met the Burden for Reconsideration

Quincy asserts that the purpose of a motion for reconsideration is to give the tribunal an opportunity to revise an earlier order that may be inaccurate due to (1) existing facts undiscovered until after the order issued, (2) facts overlooked by the tribunal, (3) changes in the law since the order issued, or (4) the tribunal's misapplication of current law. Q Resp. at 3-4. Quincy further argues that the movant seeking reconsideration "'must establish due diligence and demonstrate that real justice has been denied.'" *Id*. at 4, quoting Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8 (1st Dist. 1993). The movant, Quincy continues, has the "burden to specify the facts the tribunal should have considered and the law the tribunal should have applied." *Id*.

According to Quincy, IEPA cannot be found to have acted diligently when its response "failed to set forth any law or facts demonstrating that the entry of summary judgment was not warranted." Q Resp. at 4. Quincy further maintains that with the motion for reconsideration, IEPA still does not set forth any such law or facts, adding that "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." *Id*.

Quincy Argues That IEPA Has Not Identified Any Newly Discovered Facts, Facts Overlooked by the Board, or Recent Changes in the Law That Warrant Reconsideration

According to Quincy, IEPA's motion for reconsideration does not identify any newly discovered facts to warrant the Board reconsidering its order. Q Resp. at 5. Quincy observes that while IEPA's motion states that the Board overlooked facts in the record, IEPA "never identifies any fact the Board overlooked." *Id*. Quincy reasons that reconsideration is therefore not warranted on the asserted ground that the Board "failed to consider any relevant fact." *Id*. Quincy further notes that there is no suggestion in IEPA's motion that there have been any changes to the law since the Board's decision. *Id*.

Quincy Argues That the Board Applied the Correct Standard of Review and Burden of Proof

Quincy notes IEPA's statement that a "legitimate question" is raised by the Board's reference to court decisions in permit appeals that were not NPDES permit appeals or summary judgment dispositions. Q Resp. at 5. Quincy asserts that IEPA's statement should be rejected because IEPA fails to provide "any alternate standard of review or alternate burden of proof (or cite to any legal authority supporting these alternates)" that the Board should have applied when the issue is a challenge to conditions in an NPDES permit. *Id*. at 5-6. Moreover, Quincy continues, the Board applied the same standard of review and burden of proof as it had in earlier NPDES permit appeals at summary judgment. Resp. at 6, citing Des Plaines River Watershed Alliance v. IEPA, 2007 Ill. ENV LEXIS 149 at *2831 (PCB 04-88) (Apr. 19, 2007) (third-party NPDES permit appeal) and Board of Trustees of Southern Illinois University v. IEPA, PCB 02-105, p. 7 (NPDES permit appeal) (Aug. 4, 2005).

Quincy Argues That the Board Correctly Applied the Procedural Law Governing Motions for Summary Judgment and There Is No Reason to Allow IEPA Another Opportunity To Present Its Case

Quincy argues that the summary judgment procedure gave IEPA a fair opportunity "to present its position regarding the applicable law and whether any material facts were in dispute." Q Resp. at 6-7. According to Quincy, "[n]othing 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 . . . .'" *Id*. at 7, quoting Mot. Rec. at 4 (emphasis added by Quincy). Quincy states that once IEPA issued the permit, "the record could not be changed; it was fixed." *Id*. Quincy observes that 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.'" *Id*., quoting Des Plaines River Watershed Alliance v. IEPA, 2007 Ill. ENV LEXIS 149 at *46 (PCB 04-88) (Apr. 19, 2007) (third-party NPDES permit appeal).

According to Quincy, if material issues of disputed fact exist, "and Quincy is aware of none," IEPA "had a full and complete opportunity to make the Board aware of these disputed, material facts during the summary judgment process." Q Resp. at 7-8. Despite this opportunity, continues Quincy, IEPA's response to Quincy's 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 . . .), 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). *Id*. at 8.

Quincy adds that IEPA has cited no legal authority for "what appears to be its new position" on motions for summary judgment: "that summary judgment motions are not allowed in NPDES permit appeals." Q Resp. at 7. Quincy notes that motions for summary judgment are "regularly entertained in NPDES permit appeals." *Id*., citing Des Plaines River Watershed Alliance and Board of Trustees of Southern Illinois University.

Quincy Argues That the Hahn Affidavit Is Not Part of the Record and Does Not Create a Genuine Issue of Material Fact

Quincy maintains that despite IEPA's attempts to use the Hahn affidavit for the Sole Disputed Fact, the affidavit is not part of the IEPA record and therefore may not be considered by the Board. Q Resp. at 8, citing IEPA v. Illinois PCB, 386 Ill. App. 3d 375, 390 (3rd Dist. 2008). If, however, the Board chooses to consider the Hahn affidavit, Quincy adopts and incorporates its reply to IEPA's response to the motion for summary judgment and further responds as described below. *Id*. at 9.

Quincy observes that it is IEPA's position that the Sole Disputed Fact is material for the following reason: Quincy's argument that IEPA cannot change its prior finding of no sensitive areas absent a significant change in circumstances will fail if the parties were not in agreement on July 12, 2007. Q Resp. at 9, citing Mot. Rec. at 5. Quincy disagrees with the IEPA's premise, but argues that even if IEPA's premise is 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. *Id*.

Quincy reiterates that a dispute over an immaterial fact cannot prevent the grant of summary judgment. *Id*.

Quincy concludes by asserting that its invalid rulemaking argument is not contingent on resolving the Sole Disputed Fact, despite IEPA's contrary statement. Q Resp. at 9. Quincy states that "[r]egardless of whether the parties were in agreement on July 12, the IEPA's current policy is an invalid rule." *Id*.

Quincy Argues That IEPA's "Miscellaneous Arguments" Do Not Warrant Reconsideration

In response to IEPA faulting the Board for making factual findings, Quincy states that "[t]he Board's Order merely set forth the undisputed facts." Q Resp. at 10. In response to IEPA blaming the Board for substituting its judgment for that of IEPA, Quincy asserts that "[t]he appeal process is in place for this reason." *Id*., citing 415 ILCS 5/40(a)(1). Responding to IEPA's suggestion that the Board needs to appreciate the distinction between a judgment on the pleadings and a contested adjudication, Quincy states that "summary judgments are regularly entered in contested adjudications where the material facts are undisputed." *Id*.[3]

In response to IEPA's statement that even if IEPA misinterpreted the CSO Policy, that does not necessarily mean Quincy was entitled to summary judgment, Quincy explains:

> 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. Q Resp. at 10.

Quincy Argues That the Board Correctly Determined That IEPA's "Current Practice" Is an Unpromulgated "Rule"

Quincy observes that it is IEPA's position that IEPA's current practice statement was just IEPA's interpretation of the 1994 CSO Policy. Resp. at 11. Quincy states that in Alternative Fuels, the Illinois Supreme Court found that IEPA had merely interpreted the phrase "discarded

[3] Quincy correctly notes that in this case, IEPA has often referred to Quincy's motion for summary judgment as being a motion for "judgment on the pleadings." Q Resp. at 10; Surreply at 3. The two types of motions, while similar, are distinct. *See* 735 ILCS 5/2-615(e) (motion for judgment on the pleadings), 2-1005 (motion for summary judgment); *see also* Mitchell v. Wadell, 189 Ill. App. 3d 179, 182-83, 544 N.E.2d 1261, 1263-64 (4th Dist. 1989).

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*., citing Alternative Fuels, 215 Ill. 2d at 247-248. Here, in contrast, according to Quincy:

> 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). *Id*.

Quincy Argues That Even If IEPA's "Current Practice" Is Not an Unenforceable "Rule," IEPA Misinterpreted the Phrase "Sensitive Area"

Quincy notes IEPA's concession that IEPA's interpretation of the phrase "sensitive area" as used in the 1994 CSO Control Policy may have been incorrect. Resp. at 12. IEPA's response to the motion for summary judgment, Quincy continues, "did not challenge Quincy's arguments in support of a finding that the IEPA's interpretation was incorrect." *Id*. Additionally, according to Quincy, IEPA's motion to reconsider "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)." *Id*. Quincy therefore reasons that even if IEPA has not "formally conceded the point," the Board should not reconsider this issue because IEPA has "failed to present any reason for the Board to reconsider its finding that the IEPA misinterpreted the 1994 CSO Control Policy." *Id*.

Quincy Argues That Nothing in IEPA's Motion to Supplement Warrants Reconsideration

Initially, Quincy posits three reasons why the Board should not consider Director Hyde's letter, which is attached to and the object of IEPA's motion to supplement. Q Resp. at 12-13. First, Quincy states that Director Hyde's letter is not part of the IEPA administrative record and therefore, like the Hahn affidavit, may not be considered in this permit appeal. *Id*. at 13. Second, Quincy asserts that IEPA filed the letter after the deadline for filing a motion for reconsideration.[4] Third and lastly, Quincy notes that Director Hyde's letter has not been authenticated. *Id*.

[4] *See* 35 Ill. Adm. Code 101.520(a) (any motion for reconsideration must be filed within 35 days after receipt of the Board order).

If the Board considers Director Hyde's letter, however, Quincy maintains that it should not be deemed "'new evidence'" because the letter did not exist when IEPA issued the permit and the letter is not evidence. Resp. at 13. "If anything," according to Quincy, the letter 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." *Id*. Quincy asserts that the letter suggests no "basis for Director Hyde's authority, or Director Hyde's qualifications, to offer federal interpretation of any law or policy." *Id*. Further, Quincy continues, IEPA "offers no reason why the Board should abandon its reasoned opinion based upon Director Hyde's letter." *Id*.

Director Hyde's letter, which Quincy describes as "truly an extraordinarily odd and bold exhibit to present to the Board," sets forth reasoning that does not withstand scrutiny, according to Quincy:

> 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. Resp. at 13-14.

Quincy argues that the remainder of IEPA's motion to supplement simply restates IEPA's earlier arguments, "none of which present a valid ground for reconsideration." Resp. at 14.

IEPA REPLY

In its reply, IEPA places its arguments into the following categories: "waiver" (Reply at 1-5); "burden of seeking reconsideration" (*id*. at 5); "use of affidavit" (*id*. at 6-7); and "legal standards" (*id*. at 11). The Board summarizes IEPA's arguments in turn.

IEPA Arguments About Waiver

IEPA concedes that its response to Quincy's motion for summary judgment challenged only one fact set forth in the motion, *i.e.*, whether IEPA agreed at a July 12, 2007 meeting that none of Quincy's CSOs discharged to sensitive areas. Reply at 1. However, according to IEPA, Quincy is not "entirely correct" when Quincy represents that the disputed fact was identified by

IEPA. *Id*. Rather, continues IEPA, while the purported agreement and its veracity are "certainly disputed":

> it was *identified* by the City in the City's pleadings. It is disputed because it is not true. The purported agreement was alleged by the Petitioner in order to attempt to show that the Illinois EPA vacillated between designating the three outfalls as discharging to sensitive areas or not. If true, this factual contention would support the City's claim that the designation of the CSOs in the permit was arbitrary in general and legally unwarranted under the federal CSO Policy in particular. The purported agreement was also alleged to support the City's claim that the "current practice" of the Illinois EPA constituted an improperly promulgated rule of general applicability under the APA. *Id*. at 1-2.

IEPA next notes that Quincy's reply to IEPA's response to Quincy's motion for summary judgment "suggests" that this disputed fact is immaterial. Reply at 2. According to IEPA:

> The Board obviously acted upon this suggestion even though the City's Reply discussed the purported agreement as lacking materiality - raising a "new" issue in a reply while the Illinois EPA had in good faith challenged the veracity of the City's factual contention, not the materiality of the disputed fact. *Id*.

With these observations made, IEPA notes that Quincy now argues that the issues raised in IEPA's motion for reconsideration have been waived. Reply at 2. IEPA further notes that the case cited by Quincy for the "general rule" of waiver was a siting appeal adjudicated after a hearing on the merits, not through summary judgment. IEPA argues that "the applicability of any rule depends upon the substance and posture of a given cause of action." *Id*. "Any party," continues IEPA, "opposing [a] motion for summary judgment need not conclusively disprove facts presented by the movant, but must merely show that a contrary version of events exist, thereby creating a disputed issue for trial." *Id*. at 4, citing Winston & Strawn v. Nosal, 279 Ill. App. 3d 231 (1st Dist. 1996). IEPA therefore asserts that the party opposing a motion for summary judgment "may rely solely upon his pleadings to create [a] material question of fact until the movant supplies facts that would clearly entitle him to judgment as matter of law." *Id*., citing Malone v. American Cyanamid Co., 271 Ill. App. 3d 843 (4th Dist. 1995). IEPA concludes:

> The Illinois EPA elected to rely upon the administrative record to support its permitting decision and upon the fundamental rule as to summary judgment that all pleadings and evidence be construed "strictly against the movant and liberally in favor of the opponent." Adams v. Northern Illinois Gas Co. (2004), 211 Ill. 2d at 43. Hence, the "general rule" regarding waiver is not applicable to the opposition or rebuttal of a summary judgment request in a permit appeal before the Board. *Id*. at 4-5.

IEPA Arguments About the Burden of Seeking Reconsideration

IEPA argues that its failure to specify, in the motion for reconsideration, the facts that the Board allegedly overlooked is not a "flaw" supported by the cases cited by Quincy. Reply 5. IEPA quotes Board of Trustees of Southern Illinois University v. IEPA, PCB 02-105, slip op. at 2 (Oct. 6, 2005), where the Board denied reconsideration and stated that a motion to reconsider "may" specify facts in the record that were overlooked. *Id*. IEPA therefore argues that "the effort to specify facts that may have been 'overlooked' is optional." *Id*.

IEPA then states its reasons for requesting reconsideration: (1) the purported agreement is material; (2) IEPA's "interpretation and implementation of federal policy were consistent with applicable law"; and (3) IEPA "seeks to hold the Petitioner to its burden to show that it is legally entitled to judgment." Reply at 5.

IEPA Arguments About Use of the Hahn Affidavit

IEPA distinguishes IEPA v. IPCB, 386 Ill. App. 3d 375, 390 (3rd Dist. 2008) by noting that the Board denied summary judgment in the underlying permit appeal and that the court was upholding the Board's denial of additional discovery. Reply at 6. Here, IEPA continues, the Hahn affidavit was not disclosed through discovery, but instead "exists merely to oppose the summary judgment request." *Id*.

IEPA argues that the purported agreement was pled in the motion for summary judgment as a material fact and is:

> diametrically opposed to clearly documented positions expressed by the Illinois EPA to the City prior and subsequent to the meeting (which are also raised by the motion). The relevance and materiality of the affidavit pertain most directly to rebutting the contentions of the Motion for Summary Judgment and do not relate to the technical or legal grounds in justification of the permitting decision. Reply at 6.

According to IEPA, "[a]ny factual contention in a motion for judgment on the pleadings may be responded to by either demonstrating (e.g., via an affidavit or counter-affidavit) that there is a genuine issue regarding such fact or by showing that such fact, while disputed or not, lacks materiality." Reply at 8. IEPA then states that it "did not challenge the materiality of the purported agreement in the context of the Petitioner's claims but rather showed through the affidavit that this factual contention was untrue." *Id*.

IEPA Arguments About Legal Standards

IEPA argues that Quincy "overreaches" in claiming that IEPA has apparently adopted a new position, *i.e.*, that summary judgment motions are not allowed in NPDES permit appeals. Reply at 7. IEPA states that this is an inaccurate characterization of its concerns, "which pertain to the process utilized in this matter being inconsistent with the law concerning summary judgments generally." *Id*. IEPA then adds that it is "explicitly relying upon the procedural and

substantive safeguards adopted by the Board in the consideration of summary judgment motions." *Id*.

It is IEPA's position, in the reply, that a motion for summary judgment in a permit appeal is "constrained by the factual information in the administrative record and the statutory and case law governing summary judgment in general and the Boards review of permit challenges in particular." Reply at 9. Noting that Quincy has the burden of proof under Section 40 of the Environmental Protection Act (Act) (415 ILCS 5/40 (2008)) in contesting the condition of the NPDES permit, IEPA argues that it, in opposition, may rely upon the administrative record "whether at hearing or on a summary judgment motion." *Id*. at 7. IEPA continues:

> The point is that a hearing provides a full and complete opportunity to articulate the factual support of that record for the permit decisions while a motion for summary judgment requires something less than a comprehensive evidentiary or argumentative response. Where a summary judgment movant provides relatively few factual contentions in support of the requested relief, the response may appropriately be narrowly focused on such contentions. This is the situation here. *Id*. at 7-8.

IEPA states that Quincy requested summary judgment on the APA allegation "even though the administrative record in this permit appeal pertains only to the Illinois EPA's actions regarding this one NPDES permit." Reply at 10. According to IEPA, Quincy "invited the Board to speculate" about an unpromulgated rule:

> and its alleged general applicability when the only information in the record consists of statements *in regards only to the Quincy CSOs* as to the Illinois EPA's "current practice" of implementing the federal policy. The Board engaged in conjecture on this important issue and this is patently unfair. Summary judgment should not be granted unless the right of the moving party is clear and free from doubt. *Id*. (emphasis in original).

Finally, IEPA asserts that the April 14, 2010 letter from Director Hyde of the USEPA Region 5 Water Division was submitted in support of "the misapplication of law argument to justify reconsideration of the findings that 1) the permit terms are invalid and 2) the Illinois EPA's interpretation and implementation of federal policy are invalid." Reply at 10. As for Quincy's objections about Director Hyde's letter not being timely submitted, not being authenticated, and not being a part of the administrative record, IEPA states:

> The Board does possess discretion to allow the supplementation of a *timely* filed motion and, if necessary, to presumably require authentication as a condition of supplementation. The Board will also presumably appreciate that the April 14, 2010 letter is tendered in support of reconsideration, did not exist prior to the filing of the Motion for Reconsideration, and pertains to legal issues such as regulatory discretion and priority. *Id*.at 10-11 (emphasis in original).

QUINCY SURREPLY

Quincy Argues That It Did Not Raise a New Issue in Its reply

Quincy addresses IEPA's contention that by arguing the immateriality of the purported agreement, Quincy improperly raised a new issue in the reply to IEPA's response to the motion for summary judgment. Surr. at 3. Quincy states that IEPA now claims that IEPA's response to the motion for summary judgment "was challenging the veracity of the City of Quincy's factual contention concerning the Sole Disputed Fact, not the materiality of the disputed fact." *Id*. According to Quincy:

> As only a material issue of disputed fact would prevent the granting of the summary judgment motion (the IEPA did not challenge the City of Quincy's legal arguments), by raising the Sole Disputed Fact, the IEPA necessarily was contending it was material. It would be improper for the IEPA to intentionally raise immaterial factual disputes if its sole reason for doing so was to attempt to impugn the City of Quincy's veracity. Thus, when the IEPA contended in its Response that the Sole Disputed Fact was material, it was entirely proper for the City of Quincy to refute that contention in its December, 2008, Reply, and the City of Quincy did not raise a "new issue" by doing so. *Id*. at 3-4.

Quincy Argues That IEPA Failed to Show That There Was a Genuine Issue of Material Fact

Quincy argues that once it presented facts and law showing that it was entitled to summary judgment, IEPA "had the burden of production to show that the City of Quincy was not entitled to summary judgment." Surr. at 4, citing Environmental Site Developers, Inc. v. White & Brewer Trucking. Inc., 1997 Ill. ENV LEXIS 649 at *36 (PCB 96-180) (Nov. 20, 1997) (citizens enforcement - water). Quincy maintains that IEPA "needed to clearly identify disputed issues of material fact from the record." *Id*., citing Sexton Environmental Systems, Inc. v. IEPA, 1991 Ill. ENV LEXIS 162 at *2 (PCB 91-4) (permit appeal). According to Quincy, because the only fact challenged by IEPA was the purported agreement, and that factual dispute is immaterial, IEPA "failed to meet its burden of production," and summary judgment was properly entered in favor of Quincy. *Id*.

Quincy Argues That IEPA Has Misstated the Record

In response to IEPA's statement that the purported agreement is "'diametrically opposed to clearly documented positions expressed by the Illinois EPA to the City prior and subsequent to the meeting (which are also raised by the motion),'" Quincy asserts that no previous permit issued to Quincy identified sensitive areas and that the April 10, 2007 draft permit did not identify sensitive areas. Surr. at 4, quoting Reply at 6.

Quincy Argues That The Board Regularly Denies Motions for Reconsideration When the Purportedly Overlooked Facts Are Not Identified

Quincy maintains that the Board decisions cited by Quincy do show that the Board "regularly denies motions for reconsideration when the movant fails to specify the facts the Board purportedly overlooked." Surr. at 4.

Quincy Argues That Every Fact Set forth in a Motion for Summary Judgment Is Not Necessarily a Material Fact

Quincy notes that IEPA does not identify the "pleading" to which IEPA is referring when IEPA alleges that Quincy "'pleaded *as a material fact* the Illinois EPA's alleged concurrence during the meeting'" and that "'the Attorney General . . . requested and filed the [Hahn] affidavit to rebut the factual contentions *in the City's pleadings*.'" Surr. at 5, quoting Reply at 6 (emphasis by IEPA). If IEPA is referring to the motion for summary judgment, Quincy continues, a motion for summary judgment is not a "pleading" and even if it were, every fact alleged in a pleading is not necessarily a material fact. *Id*.

Quincy asserts that as with the purported agreement, not every fact set forth in its motion for summary judgment is a material fact, "e.g., that the system serves 49,250 people is not material to the issues presented." Surr. at 5. Quincy claims that IEPA does not reveal how IEPA determined that the purported agreement was pled by Quincy as a material fact. *Id*. According to Quincy:

> A review of the Motion for Summary Judgment shows that the Sole Disputed Fact is set forth twice in Section IV, Undisputed Facts, p. 8, and not mentioned again in support of the City of Quincy's arguments. (Insofar as the IEPA changing its position, the City of Quincy's argument's focus is on the identification of sensitive areas in the new permit when no earlier permit, including the April, 2007, draft permit, identified sensitive areas. (Motion for Summary Judgment, pp. 22 & 25)). Surr. at 5-6.

Quincy emphasizes that IEPA now admits that the Hahn affidavit "'do[es] not relate to the technical or legal grounds in justification of the permitting decision.'" Surr. at 6, quoting Reply at 6. Accordingly, even if the Hahn affidavit were part of the record, the affidavit does not create a material issue of disputed fact and "the existence of the Sole Disputed Fact in the motion for summary judgment is not a ground for reconsidering the Board's order." *Id*.

Quincy Argues That Summary Judgment Motions May Be Granted in NPDES Permit Appeals and That IEPA Had an Opportunity to Set Forth Facts in the Record Supporting its Permit Decision

Quincy acknowledges that IEPA's reply clarified that IEPA's position is not that summary judgment cannot be entered in an NPDES permit appeal, but rather that the incorrect process was used here. Surr. at 6. Nevertheless, Quincy argues that the Board employed the correct process as "[n]othing prevented the IEPA from making the Board aware of all facts in the

record supporting its permit decision when it was responding to the motion for summary judgment." *Id.*

DISCUSSION

Motions to Reconsider and Supplement

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may also specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

In its motion to reconsider, IEPA does not claim any change in the law, but does claim that the Board erred in applying existing law by improperly: (1) imposing burdens and construing the record for purposes of a summary judgment motion; (2) declining to consider the Hahn affidavit attached to IEPA's response to Quincy's motion for summary judgment; (3) finding that the disputed issue of fact identified by IEPA is immaterial; (4) finding that IEPA's "current practice" of designating "sensitive areas" is an unpromulgated "rule"; and (5) finding that IEPA misinterpreted the definition of "sensitive areas" in USEPA's 1994 CSO Control Policy.

In its motion to supplement, IEPA also refers to the letter of Director Hyde of the USEPA Region 5 Water Division as "'new evidence'" (Mot. Supp. at 1), but the letter is not evidentiary material and IEPA's reply clarifies that the Hyde letter is offered to show that the Board erred in applying existing law (Reply at 10).

Finally, IEPA claims that the Board overlooked facts in the record but IEPA does not identify any such facts. Mot. Rec. 2, 4. It is true that a motion to reconsider "may" identify overlooked facts. Wei Enterprises, PCB 04-23, slip op. at 3. This means that the identification of overlooked facts is a *permissible* ground for reconsideration. A motion to reconsider is not *required* to claim this ground. If, however, a motion to reconsider claims that facts in the record were overlooked, the motion *must* specify those facts. Because IEPA fails to identify any such overlooked facts, the Board disregards this ground.

Below, after providing an overview of today's rulings, the Board addresses in turn each of the errors allegedly committed by the Board in applying existing law. The Board takes up the issue of waiver and IEPA's motion to supplement the motion to reconsider as they become relevant to the discussion.

Overview of Today's Rulings

The Board finds that its March 4, 2010 opinion properly imposed burdens and construed the record for purposes of ruling upon Quincy's motion for summary judgment. The Board therefore denies reconsideration on these grounds. Next, the Board determines that it should have considered the Hahn affidavit and grants reconsideration on that point. The Board finds, however, that the affidavit merely repeats the IEPA response's factual assertion about the lack of a meeting agreement, which the Board considered in the March 4, 2010 decision. The Board further finds that its March 4, 2010 opinion correctly found the meeting agreement dispute to be immaterial because it is unrelated to Quincy's claims. Accordingly, the Board denies reconsideration on the materiality ground.

The Board finds that the March 4, 2010 decision properly ruled that the basis for IEPA's "sensitive area" designations is an unpromulgated statement of general applicability violative of the APA. The Board therefore denies reconsideration on the APA ground. Lastly, the Board determines that its March 4, 2010 opinion correctly interpreted the CSO Policy's "sensitive area" definition. Accordingly, the Board denies reconsideration on this ground as well.

Imposition of Burdens and Construction of the Record

As the Board stated in its March 4, 2010 opinion, summary judgment will be entered if the record, including pleadings, depositions, and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. City of Quincy, PCB 08-86, slip op. at 3, citing 35 Ill. Adm. Code 101.516(b). Further, the Board recognized that summary judgment is a drastic means of resolving litigation and accordingly should be granted only when the right of the movant is clear and free from doubt. City of Quincy, PCB 08-86, slip op. at 3.

In determining whether there was a genuine issue of material fact, the Board construed the record "strictly against Quincy as the movant and liberally in favor of IEPA as the opponent of the motion." City of Quincy, PCB 08-86, slip op. at 29. The Board stated that summary judgment could not be entered if a material fact was disputed or, if the material facts were undisputed, reasonable persons might draw different inferences from those undisputed facts. *Id*. at 3, 21; *see also* Cuthbert v. Stempin, 78 Ill. App. 3d 562, 566-67, 396 N.E.2d 1197, 1201 (1st Dist. 1979) (where "the facts are undisputed, if fair-minded persons may draw differing inferences from those undisputed facts, summary judgment cannot be granted, *assuming, of course, that the disputed issue of fact is material*." (emphasis added, citations omitted)).

Quincy appealed a condition in its NPDES permit designating certain CSO receiving waters as "sensitive areas." City of Quincy, PCB 08-86, slip op. at 1, 20. As the Board stated, the issue in an appeal of a permit condition is whether the permit condition is required to accomplish the purposes of the Act or regulations or, stated alternately, whether petitioner demonstrated that its permit application would not result in a violation of the Act or regulations absent the condition. *Id*. at 3; *see also* IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 593, 784 N.E.2d 867, 876 (4th Dist 2003); 415 ILCS 5/39(a), (b) (2008). Petitioners before the Board have the burden of proof in permit appeals. City of Quincy, PCB 08-86, slip op. at 2-3;

see also John Sexton Contractors Co. v. PCB, 201 Ill. App. 3d 415, 425-26, 558 N.E.2d 1222, 1229 (1st Dist. 1990); 415 ILCS 5/40(a)(1) (2008); 35 Ill. Adm. Code 105.112(a).

The Board further stated that the Act calls for contaminant discharges to comport with the Clean Water Act (415 ILCS 5/11(a), 39(b) (2008)), and that the Clean Water Act requires NPDES permits for municipal CSOs to comply with the 1994 CSO Control Policy (33 U.S.C. §1342(q)(1)). City of Quincy, PCB 08-86, slip op. at 4. Central to this permit appeal is the interpretation of the 1994 CSO Policy's definition of "sensitive areas" and, more specifically, the meaning of "waters with primary contact recreation" within the definition. *Id*. at 5, 23.

The Board found that Quincy, as the summary judgment movant, established a *prima facie* case that the permit condition is not required to accomplish the purposes of the Act, *i.e.*, that issuance of the permit without the condition would not result in a violation of the Act. City of Quincy, PCB 08-86, slip op. at 28-29. IEPA reads the Board's use of the phrase "*prima facie*" out of the context in which the Board employed it: ruling on a motion for summary judgment. Where a summary judgment movant meets its burden "by presenting facts which, if uncontradicted, entitle it to judgment," the Board turns to the nonmovant's response "to determine whether [the nonmovant] has come forth with facts establishing a material issue of fact," *i.e.*, "[t]o avoid summary judgment, [the nonmovant] must provide some evidence at this point to overcome [the movant's] *prima facie* case." Environmental Site Developers, Inc. v. White & Brewer Trucking, Inc., PCB 96-180, slip op. at 10 (Nov. 20, 1997) (granting in part complainant's motion for partial summary judgment); *see also id*. at 2-3, quoting Estate of Sewart, 236 Ill. App. 3d 1, 8, 602 N.E.2d 1277, 1281-82 (1st Dist. 1992) (stating these principles); BLACK'S LAW DICTIONARY 1071 (5th ed. 1979) ("*prima facie* case" means "not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it.").

IEPA's response to Quincy's motion did not raise any genuine issues of material fact, nor did the Board find any genuine issues of material fact after reviewing the administrative record. City of Quincy, PCB 08-86, slip op. at 18-21, 29; *see also* Jersey Sanitation Corp. v. IEPA, PCB 00-82, slip op. at 5-6 (June 21, 2001) (stating standards for considering motions for summary judgment and burden of proof in appeals of permit conditions; granting petitioner's motion for summary judgment in appeal of NPDES permit conditions), *aff'd sub nom*. IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 784 N.E.2d 867 (4th Dist. 2003).

Quincy's motion for summary judgment provided eight pages of allegedly undisputed facts, with citations directing the Board to the IEPA administrative record. Mot. SJ at 3-10. Quincy set forth facts concerning the use surveys conducted for each of the three CSO receiving waters at issue (*id*. at 3-6), including the conclusions of Camp Dresser & McKee (CDM), Quincy's consultant, that none of the waters displayed any evidence of past or present primary contact recreation and further that various features of the waters prevented or discouraged their use for primary contact recreation (*id*. at 4-6). Quincy noted the IEPA photographs and associated IEPA comments in the record. *Id*. Quincy also provided facts from the record regarding each significant exchange in the permitting process (*id*. at 7-10), including IEPA's

explanation for its decision (*id*. at 9, 10), as well as CDM's differing cost estimates for addressing the CSO receiving waters as sensitive areas and as non-sensitive areas (*id*. at 9-10).

After identifying and describing these evidentiary materials, Quincy's motion for summary judgment advanced legal arguments, providing citations to and analysis of case law and the CSO Policy, along with further citations to the administrative record. Mot. SJ at 12-28. Quincy argued that IEPA's "current practice" of designating sensitive areas is an unpromulgated statement of general applicability and therefore an invalid rule that cannot be invoked to form the basis for imposing the sensitive area designations. *Id*. at 13-14. Quincy also argued that IEPA misinterpreted the language of the "sensitive area" definition, maintaining that the plain language of "waters with primary contact recreation" meant waters used for primary contact recreation. Quincy further asserted that IEPA's more expansive interpretation is unlike any of the listed examples in the non-exhaustive list within the federal definition and therefore not covered by the definition. *Id*. at 14-22. Quincy maintained that the undisputed facts demonstrated that none of the three CSOs discharge to waters that are used for primary contact recreation. Quincy argued that because IEPA's "sensitive area" determinations were based on an invalid rule and a misinterpretation of the 1994 Policy, the contested permit condition is not necessary to accomplish the purposes of the Act. *Id*. at 19-20, 23-24, 27-28.

The Board agreed with Quincy's construction of the "sensitive area" definition and its arguments that IEPA's "current practice" is an unpromulgated rule that also misinterprets the federal definition. City of Quincy, PCB 08-86, slip op. at 21-29. The Board further agreed with Quincy that the CDM surveys demonstrated that the receiving waters for CSOs 002, 006, and 007 are not used for primary contact recreation. *Id*. at 18-21, 28-29. The Board therefore ruled that Quincy established a *prima facie* case, *i.e.*, Quincy met "the burden of coming forward with competent evidentiary material which, if uncontradicted, entitles [it] to judgment as a matter of law." Groce v. South Chicago Community Hospital, 282 Ill. App. 3d 1004, 1010-11, 669 N.E.2d 596, 601 (1st Dist. 1996). Had Quincy not met that burden, summary judgment would not have been awarded, even if IEPA filed no response. *See, e.g.*, Levitt v. Hammonds, 256 Ill. App. 3d 62, 66, 628 N.E.2d 280, 283-84 (1st Dist. 1993) (where no evidence provided in support of motion for summary judgment, nonmovant is under no obligation to present evidentiary material that establishes a genuine issue of material fact); McBride v. Commercial Bank, 101 Ill. App. 3d 760, 764, 428 N.E.2d 739, 741 (4th Dist. 1981) (failure to file counter-affidavits to motion for summary judgment does not automatically entitle movant to summary judgment). However, once Quincy met its burden, the burden shifted to IEPA to raise a genuine issue of material fact to survive the motion for summary judgment. *See, e.g.*, Estate of Sewart, 236 Ill. App. 3d at 8, 602 N.E.2d at 1281-82.

In appeals where the Board's review is limited to the IEPA administrative record, as here, IEPA has moved for summary judgment in like fashion, providing citation to the administrative record without affidavit, and has prevailed. *See, e.g.*, Village of Wilmette v. IEPA, PCB 07-27 (Nov. 22, 2006 IEPA motion for summary judgment in underground storage tank appeal, granted by Board on July 12, 2007); Board of Trustees of Southern Illinois University v. IEPA, PCB 02-105 (Apr. 26, 2005 IEPA motion for summary judgment in NPDES permit appeal, granted in part by Board on Aug. 4, 2005). Board regulations specify what the administrative record must include and require that IEPA file the administrative record with the Board within 30 days after

the filing of the petition for review. *See, e.g.*, 35 Ill. Adm. Code 105.116, 105.212. Both IEPA and the Board have considered the IEPA administrative record filed with the Board to be a source of "evidentiary facts" for purposes of summary judgment. Carruthers v. B.C. Christopher & Co., 57 Ill. 2d 376, 380, 313 N.E.2d 457, 460 (1974) (For summary judgment motion, "[t]he facts to be considered by the court are evidentiary facts" through "affidavits or such"); *see also* 735 ILCS 5/2-1005(a), (b) (2008) (motions for summary judgment may be filed "with or without supporting affidavits").

IEPA's response to Quincy's motion for summary judgment identified a single disputed fact: according to IEPA, at the July 12, 2007 meeting between Quincy and IEPA, there was no agreement that Quincy's CSOs did not discharge to sensitive areas. Resp. SJ at 2. The Board considered IEPA's factual assertion and found that whether there was a meeting consensus was immaterial to the issues on appeal. City of Quincy, PCB 08-86, slip op. at 20-21, 29. The Board also agreed with Quincy that there is no record evidence that any of the three receiving waters is used for primary contact recreation. City of Quincy, PCB 08-86, slip op. at 29; Mot. SJ at 23.

The case IEPA relies upon, Malone v. American Cyanamid Co., 271 Ill. App. 3d 843, 649 N.E.2d 493 (4th Dist. 1995), is in accord with the summary judgment principles described above and supports the Board's decision. The Malone court stated:

> If the party moving for summary judgment supplies facts which, if uncontradicted, would entitle it to judgment as a matter of law, the opponent to the motion cannot rely solely on his pleadings to raise issues of material fact. Thus, uncontradicted facts contained in the movant's affidavit are admitted and must be taken as true for purposes of the motion. However, the party opposing the motion need not file any counteraffidavits to create a material question of fact unless the moving party presents evidence that precludes any possible liability. Accordingly, *a party opposing a motion for summary judgment may rely solely upon his pleadings to create a material question of fact until the movant supplies facts that would clearly entitle him to judgment as a matter of law*. Malone, 271 Ill. App. 3d at 845-46, 649 N.E.2d at 495 (citations omitted & emphasis added).

Malone involved the defendant's motion for summary judgment filed in response to the plaintiffs' complaint. Malone, 271 Ill. App. 3d at 845, 649 N.E.2d at 495. IEPA cites Malone to argue that IEPA was relying on the administrative record to create a genuine issue of material fact. Reply at 4.

The Board finds IEPA's argument unpersuasive. Even if Malone supports the proposition that IEPA could rely upon its administrative record to create a genuine issue of material fact,[5] IEPA could so rely only "*until* the movant supplies facts that would clearly entitle him to judgment as a matter of law." Malone, 271 Ill. App. 3d at 846, 649 N.E.2d at 495 (emphasis added). Here, Quincy's summary judgment motion supplied facts from the

[5] The Board is not finding that the IEPA administrative record is a "pleading." *See* 735 ILCS 5/2-601 *et seq*. (2008).

administrative record that would clearly entitle Quincy to judgment as a matter of law. Therefore, to preclude summary judgment, it was incumbent upon IEPA to "come forth" with a genuine issue of material fact in its response. Estate of Sewart, 236 Ill. App. 3d at 8, 602 N.E.2d at 1281-82; Salinas v. Chicago Park District, 189 Ill. App. 3d 55, 59, 545 N.E.2d 184, 186 (1st Dist. 1989) ("In order to withstand a motion for summary judgment, the nonmoving party must come forward with evidentiary material that establishes a genuine issue of fact."). IEPA failed to do so. The Board required nothing more of IEPA. City of Quincy, PCB 08-86, slip op. at 29 ("IEPA has not pointed out *any deficiency* in Quincy's surveys or *in any way* refuted Quincy's *prima facie* case." (emphasis added)).

IEPA's response, which is two pages long, as is the attached Hahn affidavit, raised just one disputed fact, the lack of meeting consensus, and then stated "[t]herefore, there exists a genuine issue of material fact precluding the Board from granting judgment on the pleadings." Resp. SJ at 2. IEPA's response did not state that IEPA was relying upon its administrative record to create a genuine issue of material fact. Nor did IEPA's response describe or cite any other allegedly disputed fact based on its administrative record. *Cf.* Sexton Environmental Systems, Inc. v. IEPA, PCB 91-4, slip op. at 1 (Feb. 28, 1991) (response to motion for summary judgment in permit appeal must "clearly identify disputed issues of fact"); Warren v. Darnell, 164 Ill. App. 3d 273, 283, 517 N.E.2d 636, 643 (5th Dist. 1987) ("As a general rule, 'when a motion for summary judgment is made, the opponent cannot sit quietly by but is required to raise any defenses and produce evidence tending to show a question of fact exists.'"); Robidoux v. Oliphant, 201 Ill. 2d 324, 336, 775 N.E.2d 987, 994 (2002) (noting similarity between Illinois Supreme Court Rule 191(a) and Rule 56(e) of the Federal Rules of Civil Procedure, which requires that the nonmoving party set forth specific facts showing that there is a genuine issue for trial).

Nevertheless, the Board, as it is must, reviewed the entire 386-page administrative record to determine whether there were any genuine issues of material fact. City of Quincy, PCB 08-86, slip op. at 5-16; *see also, e.g.*, Village of Glenview v. Northfield Woods Water and Utility Co., 216 Ill. App. 3d 40, 46, 576 N.E.2d 238, 243 ("When ruling on a motion for summary judgment, the trial court must consider the entire record."); Des Plaines River Watershed Alliance v. IEPA and New Lenox, PCB 04-88, slip op. at 7, 21, 28, 33 (Nov. 17, 2005) (record must show no genuine issue of material fact before Board will turn to whether summary judgment movant is entitled to judgment as a matter of law), *aff'd sub nom.* IEPA and Village of New Lenox v. PCB, 386 Ill. App. 3d 375, 896 N.E.2d 479 (3rd Dist. 2008); Jersey Sanitation Corp. v. IEPA, PCB 00-82, slip op. at 5-6 (June 21, 2001) (finding no genuine issues of material fact after "reviewing the pleadings and the record"), *aff'd sub nom.* IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 784 N.E.2d 867 (4th Dist. 2003). The Board found no genuine issue of material fact (City of Quincy, PCB 08-86, slip op. at 18-21, 29) and IEPA still does not point to one.

Contrary to IEPA's assertions (Mot. Supp at 2; Reply at 7), IEPA was not required to prove its case in its response to Quincy's motion. *See, e.g.*, T-Town Drive Thru, Inc. v. IEPA, PCB 07-85, slip op. at 16 (Apr. 3, 2008) (nonmovant not required to prove its case in response to motion for summary judgment); Des Plaines River Watershed Alliance v. IEPA and New Lenox, PCB 04-88, slip op. at 2, 12, 15, 17 (Apr. 19, 2007) ("when ruling on a motion for summary

judgment the Board is reviewing the pleadings and facts to determine if there are facts that establish that the nonmoving party might prevail"), *aff'd sub nom.* IEPA and Village of New Lenox v. PCB, 386 Ill. App. 3d 375, 896 N.E.2d 479 (3rd Dist. 2008). To preclude summary judgment, IEPA was only required to identify a genuine issue of material fact, and for that reason, the Board finds that the general rule of waiver, cited by Quincy, does not apply in this procedural context to issues addressed in the Board's opinion but not raised in IEPA's response. *Cf.* Senator William Shaw v. Board of Trustees of the Village of Dolton, PCB 97-68, slip op. at 2 (Apr. 3, 1997) (where party failed to timely object to allowance of opponent's additional post-hearing brief, Board observed that under general waiver rule, "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").

The response to Quincy's motion, however, was no less a fair opportunity for IEPA to identify all genuine issues of material fact, based upon its administrative record, and present legal arguments responsive to the merits of Quincy's claims. IEPA argues both that it "elected to rely upon the administrative record" (Reply at 4) and that it was denied an opportunity to provide a justification "based upon the record" (Mot. Rec. at 4). In the past, IEPA has responded to motions for summary judgment in permit appeals by filing responses that not only allege genuine issues of material fact, with references to the administrative record, but also provide legal arguments to counter those of the movants. *See, e.g.*, Des Plaines River Watershed Alliance v. IEPA and New Lenox, PCB 04-88 (IEPA's 36-page response of May 25, 2005 opposing petitioners' motion for summary judgment in NPDES permit appeal; Board denied motion on November 17, 2005). IEPA chose not to do so here. Moreover, IEPA never sought an extension of time to file its response to Quincy's motion for summary judgment; never sought to supplement its response; and never sought to file a surreply. Further, as IEPA's response asserted that the purported meeting consensus is a genuine issue of material fact, Quincy's reply, in arguing that the disputed fact is immaterial (Reply SJ at 6-9), did not raise a "'new' issue," contrary to IEPA's argument (Reply at 2). Also, IEPA could have but did not move to strike that portion of Quincy's reply as allegedly beyond the scope of IEPA's response.

IEPA states that it would prefer a hearing to resolution of the case on the summary judgment motion because "a hearing provides a full and complete opportunity to articulate the factual support of that [IEPA administrative] record for the permit decisions." Reply at 7-8. IEPA does not identify any facts in the record supporting the sensitive area designations or explain why IEPA's response to Quincy's motion could not have identified any such facts, but IEPA's mere preference for a hearing is not a valid reason to deny Quincy's motion for summary judgment. *Cf.* Roth v. Carlyle Real Estate Limited Partnership VII, 129 Ill. App. 3d 433, 437, 472 N.E.2d 836, 839 (1st Dist. 1984) (merely alleging that a genuine issue of material fact exists does not thereby create such an issue).

IEPA suggests that the Board resolved the factual dispute over whether a consensus was reached at the July 12, 2007 meeting. Mot. Rec. at 8. However, finding the question of the purported meeting agreement immaterial, as the Board did, does not constitute resolving the factual dispute. The Board did not weigh the competing evidence and make a finding of fact that there was or was not a meeting consensus. On no occasion did the Board find conflicting material facts, weigh them, and then rule that Quincy's version of those facts was better

established. *See* IEPA and Village of New Lenox v. PCB, 386 Ill. App. 3d 375, 390-92, 896 N.E.2d 479, 493-94 (3rd Dist. 2008) (finding the Board correctly applied "very different legal standards" when ruling on a summary judgment motion versus deciding the case on the merits after a hearing in NPDES permit appeal). On the contrary, the Board weighed no evidence and resolved no factual disputes in this case. In short, the Board did not try any questions of fact.

Other than the Board's determination that the issue of the purported agreement is immaterial, IEPA identifies no other instance where the Board allegedly resolved a factual dispute. Mot. Rec. at 8. Aside the Board's refusal to consider the Hahn affidavit itself, which is likewise immaterial as discussed below, IEPA points to no other occasion where the Board allegedly failed to construe the record in a light most favorable to IEPA. *Id*. at 7.

The Board found that "[t]he material facts are undisputed and it would be unreasonable to infer from those facts that any of the receiving waters *is* used for primary contact recreation." City of Quincy, PCB 08-86, slip op. at at 21 (emphasis in original)). IEPA does not argue that there is a factual dispute over whether any of the receiving waters is used for primary contact recreation, or that the Board should have inferred from the undisputed facts that one or more of the receiving waters is used for primary contact recreation. The Board found that "[n]owhere in the record is there evidence that any of the three receiving waters is used for primary contact recreation." *Id*. at 29. IEPA does not dispute this finding.

Motions for summary judgment are potentially dispositive and, by definition, may be awarded without hearing. As the Board's procedural rules state:

> "'Summary judgment' means the *disposition of an adjudicatory proceeding without hearing* when the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." 35 Ill. Adm. Code 101.202 (emphasis added).
>
> If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board *will* enter summary judgment. 35 Ill. Adm. Code 101.516(b) (emphasis added); *see also* 415 ILCS 5/26 (2008) (authorizing Board to adopt summary judgment procedural rule) and Procedural Rules Revision 35 Ill. Adm. Code 101, 106 (Subpart G), and 107, R88-5(A) (June 8, 1989) (adopting summary judgment procedural rule).

Quincy's right to summary judgment was clear and free from doubt. Section 101.516(b) of the Board procedural rules required the Board to award summary judgment to Quincy. The Board used the proper procedures and standards in considering and ruling upon the motion for summary judgment.

Hahn Affidavit

In its March 4, 2010 opinion, the Board considered the IEPA response's factual assertion that there was no meeting consensus, but not the Hahn affidavit attached to that response. City of Quincy, PCB 08-86, slip op. at 20-21. When construing the record in a light most favorable to IEPA, the response's factual assertion, which simply contradicts Quincy's record statements about having reached an agreement, is arguably based on the administrative record. The record documents both the pre-meeting IEPA concerns about relocating or eliminating the three CSOs (June 7, 2007), though not explicitly identifying sensitive areas, and the post-meeting draft permit with the sensitive area designations (July 31, 2007), the cover letter of which noted that "[t]he Permit was revised as a result of the meeting at the Agency on July 12, 2007." AR 241, 245. However, after considering IEPA's factual assertion that there was no agreement, the Board found the disputed fact immaterial. City of Quincy, PCB 08-86, slip op. at 20-21, 29.

The Board next found that it could not properly consider the Hahn affidavit itself because it is outside of the IEPA administrative record and was issued after IEPA's permit determination. City of Quincy, PCB 08-86, slip op. at 21, citing Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280. Whether ruling on a motion for summary judgment or issuing a final decision after a contested case hearing, Board review in a permit appeal must be based on the administrative record before IEPA at the time of the permitting determination. *See, e.g.*, Board of Trustees of Southern Illinois University v. IEPA, PCB 02-105, slip op. at 6 (Aug. 4, 2005) ("Board is limited to the record before the Agency when it made the decision"; partially granting and partially denying cross motions for summary judgment in appeal of NPDES permit conditions); Jersey Sanitation Corp. v. IEPA, PCB 00-82, slip op. at 5-6 (June 21, 2001), *aff'd sub nom.* IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 784 N.E.2d 867 (4th Dist. 2003); Prairie Rivers Network v. IEPA, PCB 01-112, slip op. at 10 (Aug. 9, 2001), *aff'd sub nom.* Prairie Rivers Network v. PCB, 335 Ill. App. 3d 391, 781 N.E.2d 372 (4th Dist. 2002).

To the extent IEPA suggests that this principle does not apply in NPDES permit appeals (Mot. Rec. at 9 n.2), it is mistaken, as the "*de novo* hearing" procedural rule for NPDES permit appeals, cited in City of East Moline to distinguish Alton Packaging, was repealed and replaced, effective January 1, 2001. The replacement procedural rule provides that the Board "hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a). Any supplementation of the administrative record under the rule is limited to certain air permit appeals. Community Landfill Co. & City of Morris v. IEPA, PCB 01-170, slip op. at 9 (Dec. 6, 2001), *aff'd sub nom.* Community Landfill Co. & City of Morris v. PCB & IEPA, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002); Prairie Rivers Network v. IEPA, PCB 01-112, slip op. at 10 (Aug. 9, 2001), *aff'd sub nom.* Prairie Rivers Network v. PCB, 335 Ill. App. 3d 391, 781 N.E.2d 372 (4th Dist. 2002).

Because Board review in a permit appeal must be based on the IEPA record, the Board generally cannot consider information developed by the permit applicant or IEPA after IEPA's final decision is issued. *See, e.g.*, Des Plaines River Watershed Alliance v. IEPA and New Lenox, PCB 04-88, slip op. at 12 (Apr. 19, 2007) ("The Board's review of 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."), *aff'd sub nom.* IEPA and Village of New Lenox v. PCB, 386 Ill. App. 3d 375, 896 N.E.2d 479 (3rd Dist. 2008); Sutter Sanitation, Inc. v. IEPA, PCB 04-187, slip op. at 5 (Sept. 16, 2004) (granting IEPA's motion to strike exhibits attached to petitioner's motion for partial summary judgment as exhibits "were not part of the record before the Agency at the time of permit denial"); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 2 (Jan. 21, 1999) (rejecting offers of proof because each of the exhibits was prepared after date of IEPA's permit denial and thus IEPA could not have considered them when it made its permit determination), *aff'd sub nom.* Panhandle Eastern Pipe Line Co. v. PCB and IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000).

However, in this procedural context, the Hahn affidavit, though outside of the record and post-decisional, is better viewed as being based on the IEPA record, like the response's factual assertion. The Board will consider the affidavit for that reason. On reconsideration, the Board finds that the affidavit merely repeats the IEPA factual assertion already considered by the Board in the March 4, 2010 decision. The affidavit does not make the factual assertion material. Quincy's case on appeal in no way relies upon a meeting consensus, as explained below. Further, IEPA concedes that "[t]he relevance and materiality of the affidavit . . . do not relate to the technical or legal grounds in justification of the permitting decision." Reply at 6. With or without the Hahn affidavit, IEPA has raised only an immaterial fact.

Finally, the Board cited Alton Packaging in support of the Board's conclusion that Mr. Hahn's December 2008 affidavit is outside of the IEPA administrative record and therefore not a proper consideration for the Board on review. City of Quincy, PCB 08-86, slip op. at 21. IEPA questions this citation because Alton Packaging "involved the actual introduction of evidence at hearing and not a summary judgment affidavit." Mot. Rec. at 9. However, "[i]n determining the genuineness of a fact for summary judgment, a court should consider only facts admissible in evidence." Gardner v. Navistar International Transportation Corp., 213 Ill. App. 3d 242, 247, 571 N.E.2d 1107, 1110 (4th Dist. 1991). Generally, immaterial evidence is inadmissible. 35 Ill. Adm. Code 101.626, 101.626(a); 5 ILCS 100/10-40(a) (2008). Though immaterial, the facts asserted in the Hahn affidavit are admissible because IEPA now relies upon them in making good faith arguments "as to the interpretation of substantive law." 35 Ill. Adm. Code 101.626(b); *see* Mot. Rec. at 5-8; Reply at 2, 6-9.

Materiality

IEPA still claims only one genuine issue of material fact: the lack of a meeting agreement. Mot. Rec. at 6; Reply at 5-7. As the Illinois Supreme Court held, "[a]n issue of fact is not material, even if disputed, unless it has legal probative force as to the controlling issue." First of America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165, 178, 651 N.E.2d 1105, 1111 (1995) (factual disputes did not preclude trial court from granting motion for summary judgment); *see also* Coleman v. Windy City Ballon Port, Ltd., 160 Ill. App. 3d 408, 416, 513 N.E.2d 506, 511 (2nd Dist. 1987) ("A fact is material to the claim in issue when the success of the claim is dependent upon the existence of that fact"). Accordingly, the Board found in its March 4, 2010 opinion that whether a fact is material depends on whether it bears upon Quincy's particular claims. City of Quincy, PCB 08-86, slip op. at 20.

Quincy's motion for summary judgment made three overarching legal claims: (1) IEPA's current practice of designating "sensitive areas" is an unpromulgated "rule" and therefore cannot be invoked; (2) IEPA misinterpreted the "sensitive area" definition; and (3) IEPA is bound by its prior interpretation of the definition as there have been no changed circumstances to warrant altering that interpretation. Mot. SJ at 12-23.

The reason the Board found the meeting consensus issue immaterial is not because the Board did not consider the Hahn affidavit in the March 4, 2010 decision. The Board found the meeting consensus issue immaterial because it is has no bearing upon Quincy's claims. None of Quincy's claims depend upon the existence of the purported meeting agreement. In fact, none of Quincy's arguments even mention the meeting agreement. Mot. SJ at 12-23.

Quincy's first argument, about IEPA applying an unpromulgated rule, is based only on IEPA's use of its "current practice" to designate the sensitive areas. Mot. SJ at 13-14. IEPA's statement that Quincy's APA argument is "thoroughly contingent upon" the meeting consensus is made without citation or explanation. Mot. Rec. at 8. Quincy's second argument, about IEPA's misinterpretation of the CSO Policy's "sensitive area" definition, is based on basic principles of statutory and regulatory construction and does not rely upon the purported agreement. Mot. SJ at 14-22. IEPA does not argue otherwise.

As for Quincy's third argument, IEPA claims that in Quincy's motion for summary judgment, "[t]he purported agreement is portrayed as the Agency's prior interpretation of the CSO Policy." Mot. Rec. at 6; *see also id*. at 5. IEPA's claim is not supported by citation to or review of Quincy's motion for summary judgment, where Quincy stated:

> 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. Mot. SJ at 22 (emphasis added).

Accordingly, Quincy's third argument, about no change in circumstances, is premised upon IEPA's determination *in prior permits* that there were no sensitive areas, not upon any meeting consensus. Moreover, the Board did not need to and did not reach this ground of appeal:

> Quincy asserts that absent significantly changed circumstances in the receiving waters, IEPA cannot alter its interpretation of "sensitive areas" *from that reflected in previous NPDES permits issued to Quincy*. Mot. at 22-23. In light of the Board's rulings, the Board need not reach this issue. City of Quincy, PCB 08-86, slip op. at 29 n.13 (emphasis added).

As Quincy points out, not every fact set forth in its motion for summary judgment is a material fact. For example, Quincy's motion set forth the location and receiving water for CSOs 003, 004, and 005. Mot. SJ at 3. None of those CSOs is at issue in this appeal and their mention among the facts of the motion does not make them material. As the Board found, a dispute over an immaterial fact does not preclude granting an otherwise properly supported motion for summary judgment. City of Quincy, PCB 08-86, slip op. at 20, citing Connor v. Merrill Lynch Realty, Inc., 220 Ill. App. 3d 522, 528, 581 N.E.2d 196, 200 (1st Dist. 1991) ("Facts which are unrelated to the essential elements of a 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."); *see also, e.g.*, Marcon v. First Federal Savings and Loan Assoc., 58 Ill. App. 3d 811, 814-15, 374 N.E.2d 1028,1031 (1st Dist. 1978) ("In order to warrant the denial of a summary judgment, disputed factual issues must be material to the essential elements of the cause of action or defense.").

As there was no genuine issue of *material* fact, the Board correctly turned to whether Quincy was entitled to judgment as a matter of law. Questions of law are properly resolved through summary judgment. *See* Allegis Realty Investors v. Novak, 223 Ill. 2d 318, 330, 860 N.E.2d 246, 252 (2006) ("The interpretation and applicability of legislation present questions of law resolvable through summary judgment."); Granite City Div. of Nat'l Steel Co. v. PCB, 155 Ill. 2d 149, 162, 613 N.E.2d 719, 724 (1993) (rules governing the interpretation of regulatory language are the same as those applied in the construction of statutes); Manning v. Hazekamp, 211 Ill. App. 3d 119, 123, 569 N.E.2d 1168, 1170 (4th Dist. 1991) ("Summary judgment is proper when only a question of law is involved."). As discussed in the next two sections of this order, the Board held:

> IEPA's "sensitive area" designations in Special Condition 14(7) of the NPDES permit are legally flawed on two grounds, either of which dictates that Quincy is entitled to judgment as a matter of law. First, IEPA's "current practice" of designating sensitive areas is an unpromulgated "rule," which, under the APA, is invalid and cannot be invoked by IEPA against any party for any purpose. Second, IEPA's "current practice" misinterprets the phrase "waters with primary contact recreation" from the "sensitive area" definition in USEPA's 1994 CSO Control Policy, with which all NPDES permits must comply. City of Quincy, PCB 08-86, slip op. at 29.

Whether IEPA's "Current Practice" is an Unpromulgated "Rule"

Other than the draft and final permits, IEPA discusses the language of the 1994 CSO Policy's "sensitive area" definition only once in the administrative record, and that was in an August 28, 2007 letter responding to an August 8, 2007 letter from Quincy. Specifically, the Quincy letter objected to the "sensitive area" designations in the July 31, 2007 revised draft permit. AR at 268-69. Quincy stated:

> [T]he federal CSO Control Policy of 1994 defines a sensitive area as meeting one or more of the following criteria:

- ◊ Designated as an Outstanding National Resource Water
- ◊ National Marine Sanctuaries
- ◊ Waters with threatened or endangered species or their habitat
- ◊ Waters with primary contact recreation
- ◊ Public drinking water intakes or their designated protection areas, and
- ◊ Shellfish beds

> *The City of Quincy does not agree that CSO's 002, 006 and 007 meet any one of the above-mentioned criteria. Id*. (emphasis in original).

IEPA's response letter 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*. AR at 278 (emphasis added).

The Board found these IEPA terms to be a statement of general applicability that implements policy affecting the rights of persons or entities outside the agency and therefore a "rule" under the APA (5 ILCS 100/1-70 (2008)). City of Quincy, PCB 08-86, slip op. at 22. As the "rule" is unpromulgated, the Board held that it is invalid and cannot be invoked to impose the "sensitive area" designations in Quincy's NPDES permit. *Id*.

As the Board set forth in its opinion, the APA defines a "rule" as follows:

> each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda, (iv) the prescription of standardized forms, or (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act. City of Quincy, PCB 08-86, slip op. at 21-22, quoting 5 ILCS 100/1-70 (2008).

IEPA now relies upon Alternate Fuels, 215 Ill. 2d 219, 247, 830 N.E.2d 444, 459 (2004), in which the Illinois Supreme Court determined that IEPA's interpretation of a statutory term was not demonstrated to be a statement of general applicability. The Board finds Alternate Fuels distinguishable. In that case, IEPA's statutory interpretation was set forth in intra-agency memoranda. Alternate Fuels, 215 Ill. 2d at 247, 830 N.E.2d at 459. In depositions, IEPA employees stated that the statutory interpretation "was to provide 'guidance' to the regulated community." *Id*. The Supreme Court held that "[s]uch statements do not affect private rights or procedures available to specific entities outside the Agency." Alternate Fuels, 215 Ill. 2d at 247, 830 N.E.2d at 459-60. For its holding, the Supreme Court cited one of the statutory exceptions

to the APA definition of "rule," which provides that the term "rule" does not include "statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency" (5 ILCS 100/1-70(i) (2008)). Alternate Fuels, 215 Ill. 2d at 247, 830 N.E.2d at 460; *see also* 5 ILCS 100/1-70(iii) (2008) (another exception to the definition of "rule" is "intra-agency memoranda").

Unlike Alternate Fuels, IEPA's statement here of its "current practice" was not just an interpretation set forth in an internal agency memo. Nor was it made to provide mere "guidance" to the regulated community. Rather, IEPA's statement was cited to a permit applicant as the basis for imposing a contested permit condition, one that could cost Quincy an estimated additional $10 million to $130 million. City of Quincy, PCB 08-86, slip op. at 19, 21-22. As the Board found, IEPA's statement "implements . . . policy" within the meaning of the definition of "rule" (5 ILCS 100/1-70 (2008)). City of Quincy, PCB 08-86, slip op. at 22. IEPA does not dispute this specific finding. Nor does IEPA maintain that any of the exclusions in the definition of "rule" apply. Instead, IEPA argues that its "current practice" statement is not a "statement of general applicability" (5 ILCS 100/1-70 (2008)).

IEPA's rationale for modifying the sensitive area designations of the three CSO receiving waters is plain in its statement, quoted above. IEPA's first sentence is unqualified (IEPA's "practice is to designate") and not limited to the receiving waters at issue here ("streams through residential or public use areas"). AR at 278. The second sentence, IEPA's interpretation of USEPA's "sensitive area" definition (the "Policy lists recreational activities as primary contact in its definition"), is not specific to Quincy and logically would not change from permit application to permit application. *Id*. It was therefore IEPA's custom that the sensitive area designation would apply whenever a stream receiving a CSO discharge runs through a residential or public use area, *i.e.*, a statement of general applicability. City of Quincy, PCB 08-86, slip op. at 22.

IEPA was not interpreting the federal language *as it applies to this particular set of facts*. *Cf*. Kaufman Grain Co. v. Director of Dept. of Agriculture, 179 Ill. App. 3d 1040, 1047, 534 N.E.2d 1259, 1264 (4th Dist. 1989). Indeed, IEPA made the sensitive area modification to the permit, and stated its basis for doing so, *before* receiving Quincy's August and September 2007 surveys of the receiving waters. AR 278, 300-31, 335-59. IEPA never mentioned these surveys in the administrative record. City of Quincy, PCB 08-86, slip op. at 19. In fact, IEPA has still not addressed them.

Further, contrary to IEPA's suggestion, the Alternate Fuels holding does not require that multiple applications of an agency statement must be established before it can be considered a statement of general applicability. Reply at 10. With an internal agency document and some deposition remarks about guidance as its only evidence of allegedly impermissible rulemaking, the company in Alternate Fuels also argued that IEPA had applied its interpretation to other businesses. Alternate Fuels, 215 Ill. 2d at 247, 830 N.E.2d at 460. As the company raised this point, the Supreme Court addressed it, stating that the record lacked information to substantiate the argument. *Id*. The Supreme Court concluded that "the record is devoid of any indication that the Agency's interpretation of 'discarded material' was a statement of general applicability." *Id*. As discussed, the record of this permit appeal is not so devoid.

Inferences drawn at summary judgment must be reasonable. Estate of Sewart, 236 Ill. App. 3d at 7, 602 N.E.2d at 1281. Construing the record in a light most favorable to the nonmovant does not entail misconstruing the record. The word "practice" is defined as a "habitual or customary performance." THE RANDOM HOUSE COLLEGE DICTIONARY 1040 (Revised ed. 1980). IEPA never explains how its use of this commonly understood term could mean anything else. IEPA's articulated "practice" is no less a "statement of general applicability" just because the record of Quincy's permit application happens only to have evidence about IEPA applying the statement to Quincy. That the administrative record's evidence of the statement's actual application is limited to the permit applicant does not preclude finding a statement of general applicability in a permit appeal. *See* City of Joliet v. IEPA, PCB 09-25, slip op. at 21-23 (May 7, 2009); *see also* Kaufman Grain, 179 Ill. App. 3d at 1049, 534 N.E.2d at 1265 ("the Department's *initiating the practice* of adjudicating disputes of this type amounted to the promulgation of administrative rules within the meaning of the APA") (emphasis added).

Finally, IEPA's motion to reconsider states, without explanation, that the following sentence from a March 27, 2008 IEPA letter to Quincy Mayor John Spring "provides the crux of this matter" (Mot. Rec. at 10): "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." AR 363. The Board's opinion noted this quoted language (City of Quincy, PCB 08-86, slip op. at 21-22), which was provided in response to an October 15, 2007 request of Quincy Mayor John Spring to IEPA Director Doug Scott ("Doug, would you have time to check into this situation for me?") (AR 360, 363). It is unclear whether IEPA's motion for reconsideration is suggesting that IEPA's March 27, 2008 sentence contradicts IEPA's August 28, 2007 "current practice" statement. At bottom, IEPA did not state in the administrative record or in its post-judgment filings that IEPA was disavowing its August 28, 2007 statement as the basis for making the sensitive area designations. In fact, IEPA admits that its decision was based on its "current practice." Mot. Supp. at 2; Reply at 10. The Board properly found that IEPA relied upon an unpromulgated rule.

Whether the Board Misinterpreted the Definition of "Sensitive Areas" in the CSO Policy

IEPA's claim that the Board erred in its interpretation of the 1994 Policy's "sensitive area" definition is based upon the April 14, 2010 letter of Tinka G. Hyde, Water Division Director of USEPA Region 5. The Board finds that the Hyde letter is not properly before the Board and therefore denies IEPA's motion to supplement, but not for any of the reasons given by Quincy. In the alternative, even if the Board were to grant the motion to supplement, the Board stands by its reading of the definition.

The submission of new matter with a motion to reconsider summary judgment lies in the discretion of the Board and will not be allowed absent a reasonable explanation of why such matter was not available at the time of the original summary judgment filing. *See, e.g.*, Delgatto v. Brandon Associates, Ltd., 131 Ill. 2d 183, 195, 545 N.E.2d 689, 695 (1989); Woolums v. Huss, 323 Ill. App. 3d 628, 640, 752 N.E.2d 1219, 1229 (4th Dist. 2001). New matter includes additional facts and new legal theories not presented during the pendency of the original motion for summary judgment. O'Shield v. Lakeside Bank, 335 Ill. App. 3d 834, 838, 781 N.E.2d 1114,

1117 (1st Dist. 2002); Kyles v. Maryville Academy, 359 Ill. App. 3d 423, 433, 834 N.E.2d 441, 449 (1st Dist. 2005).

The Hyde letter is not part of the administrative record and did not form the basis for IEPA's determination. However, the Hyde letter presents no additional facts and, obviously, its comments specific to the Board's decision were unavailable before that decision. IEPA offers the Hyde letter not as evidence but rather "in support of the misapplication of law argument." Reply at 10-11 (the letter "pertains to legal issues"). This argument does stand apart from IEPA's other legal arguments in the motion to reconsider, which "in effect, ask[] the [Board] to rethink what it already thought." O'Shield, 335 Ill. App. 3d at 838, 781 N.E.2d at 1118. The Hyde letter and corresponding motion to supplement raise a legal theory new to this proceeding, namely, that IEPA has "discretion" on a substantive permitting matter. Mot. Supp at 2; Mot. Supp Exh. at 2-3. Director Hyde's remarks hinge on IEPA's purported discretion in designating sensitive areas. Mot. Supp Exh. at 1-2. Having failed to make this claim in its response, IEPA now seeks a "'second bite at the apple.'" O'Shield, 335 Ill. App. 3d at 838, 781 N.E.2d at 1118.

In Riney v. Weiss and Neuman Shoe Co., 217 Ill. App. 3d 435, 442, 649 N.E.2d 465, 509 (4th Dist. 1991), which affirmed the grant of the defendant's motion for summary judgment, the Fourth District Appellate Court found the plaintiffs' argument "waived" because it was presented for the first time in a motion to reconsider. The court explained that the purpose of a motion for reconsideration is not "'to excuse [a] failure to present' previously available evidence or issues which were not brought to the court's attention prior to the challenged ruling." Riney, 217 Ill. App. 3d at 442, 649 N.E.2d at 509, quoting Gliwa v. Washington Polish Loan & Building Assoc., 310 Ill. App. 465, 478, 34 N.E.2d 736, 743 (1st Dist. 1941). The court further stated that "'[i]t is not intended [that] cases should be heard piecemeal under this [summary judgment] procedure,'" adding that the plaintiffs already had an ample opportunity to submit their new argument to the trial court. Riney, 217 Ill. App. 3d at 442, 649 N.E.2d at 509, quoting Gliwa, 310 Ill. App. at 478, 34 N.E.2d at 743.

Under the Board's procedural rules, responses to summary judgment motions are due within 14 days after service of the motion, but extensions of this time period may be granted. 35 Ill. Adm. Code 101.516(a). Quincy's motion for summary judgment was filed on November 17, 2008. IEPA sought and received an extension of the response time to December 15, 2008. IEPA did not file its response until December 22, 2008, accompanied by a motion for leave to file *instanter*, which was granted.

Now it is asserted for the first time in this permit appeal that IEPA's sensitive area determination is within IEPA's "discretion." Mot. Supp at 2; Mot. Supp Exh. at 1-2. IEPA offers no explanation, let alone a reasonable one, of why IEPA could not have made this assertion, or included what it describes as Director Hyde's "federal interpretation of the subject federal policy" (Mot. Supp. at 1), when IEPA filed its response to Quincy's motion for summary judgment. Accordingly, the Board denies IEPA's motion to supplement the motion to reconsider and declines to consider any IEPA assertions premised upon the Hyde letter. Delgatto, 131 Ill. 2d at 195, 545 N.E.2d at 695; John Alden Life Insurance Co. v. Propp, 255 Ill. App. 3d 1005, 1011, 627 N.E.2d 703, 707 (2nd Dist. 1994) (parties should make a full presentation of evidence and arguments at the initial summary judgment hearing rather than at a later hearing on a motion

to reconsider); McCullough v. Gallaher & Speck, 254 Ill. App. 3d 941, 947, 627 N.E.2d 202, 207 (1st Dist. 1993) ("a trial court is not required to consider documents attached to a plaintiff's motion for reconsideration of a summary judgment ruling where the plaintiff had failed to file the documents in his response to the defendant's motion for summary judgment"); *see also* Gardner v. Navistar International Transportation Corp., 213 Ill. App. 3d 242, 248-49, 571 N.E.2d 1107, 1111 (4th Dist. 1991) ("Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling.").

There is another ground for denying IEPA's motion to supplement. In IEPA's view, the 1994 CSO Policy "lists" "recreational activities as primary contact" in the "definition" of sensitive areas. AR at 278. This can only refer to "waters with primary contact recreation," which is the only listed item in the "sensitive area" definition that mentions "primary contact" and "recreation." 59 Fed. Reg. at 18692. In its March 4, 2010 opinion, the Board found "no ambiguity in the phrase 'waters with primary contact recreation' as used in the 1994 Policy's definition of 'sensitive areas.'" City of Quincy, PCB 08-86, slip op. at 27. The Board applied well-settled principles of statutory and regulatory interpretation by reading this plain language; reviewing other provisions of, and the objectives of, the 1994 CSO Policy; and taking into account whether construing the language one way or another would result in an unjust or unreasonable result. *Id*. at 22-28; *see* People v. Cyrns, 203 Ill. 2d 264, 279-80, 786 N.E.2d 139, 150-51 (2003) (describing these well-settled principles of statutory construction); *see also* Granite City, 155 Ill. 2d at 162, 613 N.E.2d at 724 (rules governing interpretation of regulatory language are same as those applied in statutory construction).

Resort to extrinsic sources to construe the phrase "water with primary contact recreation" would be appropriate only if the language is ambiguous. *See* Land v. Board of Education of the City of Chicago, 202 Ill. 2d 414, 426, 781 N.E.2d 249, 257 (2002). IEPA offers the Hyde letter, a source extrinsic to the Policy, "as a federal interpretation of the subject federal policy." Mot. Supp. at 1. Because resort to such an extrinsic source is inappropriate to aid in construing the unambiguous definitional language, the Board denies IEPA's motion to supplement on this ground too.

Alternatively, even if the Board addresses the substance of Hyde letter, the Board cannot find that the Board's March 4, 2010 opinion reflects a misinterpretation of the "sensitive area" definition from the 1994 CSO Policy, as it applies in Illinois. Before turning to the letter presented by IEPA, the Board briefly describes the relevant federal and State roles.

Under the Act, IEPA permitting determinations are appealable to the Board and final decisions of the Board are reviewable directly in the appellate court of the State of Illinois. 415 ILCS 5/40, 41(a) (2008). USEPA does not hear appeals of Board decisions. Under Section 402(b) of the Clean Water Act (33 U.S.C. § 1342(b)), USEPA delegated authority to Illinois to implement the NPDES program in this State. Responsibilities that, under federally-administered NPDES programs, rest solely with USEPA, are divided in Illinois between IEPA and the Board. Even after delegation occurs, however, the USEPA Regional Administrator, under federal regulations, has the right to receive, review, and object to a "proposed permit" and, ultimately, to issue the permit if the state does not resubmit a permit revised to meet the Regional

Administrator's objection. 40 C.F.R. §§ 123.43, 123.44. A "proposed permit" is "a State NPDES 'permit' prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to [US]EPA for review before final issuance by the State." 40 C.F.R. § 122.2.

The Hyde letter, which appears to be the Director's legal opinion, does not cite, in support of its conclusions, any decision of the USEPA Environmental Appeals Board or any USEPA guidance concerning the CSO Policy. The Hyde letter states that the Board found:

> the potential for or high probability of primary contact to be an inadequate basis for designating a receiving water as "sensitive" under the rubric of "waters with primary contact recreation."
>
> The CSO Control Policy provides *discretion* to the permitting authority to determine which areas are sensitive, and *consequently* we believe the PCB construed the phrase "waters with primary contact recreation" too narrowly. *To give meaning* to the phrase "highest priority," Illinois EPA must have *discretion* under the policy to designate waters with the potential for or high probability of human contact as sensitive. The areas listed in section II.C.3. of the policy do not constitute an exhaustive list. I am satisfied with Illinois EPA's exercise of *discretion* in this matter. Mot. Supp. Exh. at 1-2 (emphasis added).
>
> The Board notes that in the 1994 CSO Policy, USEPA states:
>
> [US]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, waters with primary contact recreation, public drinking water intakes or their designated protection areas, and shellfish beds. 59 Fed. Reg. at 18692.

The Board found the language "waters with primary contact recreation" to be unambiguous, meaning waters used for primary contact recreation. City of Quincy, PCB 08-86, slip op. at 27; *see also* AR 380 (Special Condition 14(7) of the permit paraphrases the operative language as waters "used for primary contact recreation"). This was the language of the federal definition relied upon by IEPA for imposing the contested permit condition. *See supra* p. 36; *see also* AR 380 (Special Condition 14(7) of the permit describes sensitive area definition as providing an exhaustive list).

The Hyde letter does not address the ordinary meaning of the words "waters with primary contact recreation," but instead maintains that the Board's interpretation of the phrase was too narrow *because* the CSO Policy provides "discretion" to the permitting authority to determine which areas are sensitive. Mot. Supp. Exh. at 1. Undoubtedly, it is the NPDES authority, and not the permit applicant, who determines what is a sensitive area, but the determination cannot be divorced from the plain language of the definition. Reading "waters with primary contact

recreation" to mean "waters with *the potential for or high probability of* primary contact recreation" departs from the plain language. *See* Land, 202 Ill. 2d at 426, 781 N.E.2d at 257 ("where the language of a statute is clear and unambiguous, a court must give it effect as written, without reading into it exceptions, limitations, or conditions that the legislature did not express").

Next, and with the utmost respect for Director Hyde, the Board agrees with Quincy that it does not follow that IEPA must have discretion to designate waters with the "potential" for or "high probability" of "human contact" as sensitive *in order to give meaning* to the phrase "highest priority" under the Policy. Mot. Supp. Exh. at 1-2. As the Board found, such an overbroad interpretation could render almost every CSO receiving water a sensitive area, which would undermine the Policy's objective of prioritizing the limited resources of municipalities. City of Quincy, PCB 08-86, slip op. at 28. The Hyde letter is silent on the financial impact that IEPA's interpretation would have on Quincy or other municipalities, though the Policy emphasized that such financial consequences were to be taken into account. *Id*. If nearly every receiving water is a sensitive area, then all of those waters must be given the highest priority in dischargers' long-term control plans (LTCPs), which deprives the phrase "highest priority" of meaning. The Board respectfully submits that its interpretation of "waters with primary contact recreation" gives proper meaning to the phrase "highest priority." The Board adds, as was made clear in its opinion, that Quincy has not yet submitted its LTCP and that any of the CSO-receiving waters could still be designated sensitive areas and given the highest priority. City of Quincy, PCB 08-86, slip op. at 30.

The Hyde letter observes that "[t]he areas listed in section II.C.3. of the policy do not constitute an exhaustive list." Mot. Supp. Exh. 2. The Board also found the definitional list, introduced by the word "include," to be non-exhaustive. City of Quincy, PCB 08-86, slip op. at 23. The Board recognized, however, that the examples in a definition limit the class of unstated items covered by the definition to others of a like kind, *i.e.*, unstated items not similar to the stated items do not fall within the definition. *Id*. None of the examples in the USEPA definition constitute the mere prospect of that matter occurring. *Id*. at 24. The Board found that "an area with merely the 'potential' for or a 'high probability' of primary contact recreation is fundamentally different from an area 'with' primary contact recreation and, therefore, is *outside the scope of the federal definition of sensitive area*." *Id*. (emphasis added).

Accordingly, though the Board found that IEPA relied upon the "waters with primary contact recreation" language of the definition, the Board addressed the non-exhaustive nature of the list to determine whether IEPA's interpretation could nevertheless fit within the definition. Director Hyde's observation, that the list is non-exhaustive, is undisputed. The Hyde letter does not account for the limiting effect of the definitional examples given by USEPA. The letter states, without qualification, that "[t]he policy *defines sensitive areas as those determined* by the permit authority *to be sensitive* in coordination with state and federal agencies." Mot. Supp. Exh. at 1 (emphasis added).

Next, the Board notes the Hyde letter's use of the term "discretion." Mot. Supp. Exh. at 1-2. IEPA echoes, without explanation, that the letter "relates to the validity of the exercise of agency discretion." Mot. Supp. at 1. The 1994 CSO Policy, however, does not state that it provides *discretion* to the NPDES authority in determining what constitutes a sensitive area. *See*

59 Fed. Reg. at 18692. Elsewhere in the Policy, when USEPA intended that the NPDES authority was to have "discretion," USEPA said so. 59 Fed. Reg. at 18690 ("At the discretion of the NPDES Authority, jurisdictions with populations under 75,000 may not need to complete each of the formal steps . . . .").

The Illinois Supreme Court explained that:

> The difficulty with such terms as "discretion" and "abuse of discretion" is that they are sometimes used in connection with reviewability and sometimes in connection with the standard of review. Discretion is sometimes used to mean "[u]nreviewable discretion encompass[ing] only those decisions which cannot by their nature be evaluated for correctness." At other times it is used to mean discretion which can only be reviewed with great circumspection, using the lowest and least demanding standards of review. Greer v. Illinois Housing Development Authority, 122 Ill. 2d 462, 496, 524 N.E.2d 561, 576(1988) (citation omitted).

IEPA's imposition of a permit condition is, of course, reviewable. 415 ILCS 5/40 (2008). If the Hyde letter is suggesting that IEPA's sensitive area determinations should be subject to an "abuse of discretion" standard of review, it contradicts well-settled Illinois case law.

As IEPA acknowledges, the Illinois Supreme Court has ruled that "[t]he Illinois EPA's decision is not awarded any special deference by the Board." Reply at 9, citing IEPA v. PCB, 115 Ill. 2d 65, 70 (1986). With appeals, the *de novo* standard of review applied by the Board to IEPA permitting decisions contrasts with the "clearly erroneous" standard of review applied by the USEPA Environmental Appeals Board to USEPA Regional Administrator permitting decisions. *E.g.*, *compare* Des Plaines River Watershed Alliance v. IEPA and New Lenox, PCB 04-88, slip op. at 12 (Apr. 19, 2007), *aff'd sub nom.* IEPA and Village of New Lenox v. PCB, 386 Ill. App. 3d 375, 896 N.E.2d 479 (3rd Dist. 2008) *with* *In re* Dominion Energy Brayton Point, LLC, 12 E.A.D 490, 509 (EAB, Feb. 1, 2006). The Board finds that it properly interpreted the federal definition as it applies in Illinois.

Finally, IEPA also states that Director Hyde's letter "relates to . . . the issue of whether the permit decision must be considered as a statement of general applicability." Mot. Supp. at 2-3. It is unclear whether IEPA is suggesting that whenever CSO-receiving waters run through public use or residential areas, IEPA's "current practice" is actually to designate the waters as sensitive areas *unless IEPA determines, in its discretion, not to do so*. In any event, such a recast practice statement, aside from not being supported by the plain language of the administrative record, is no less a statement of general applicability that implements policy and affects rights outside of the agency. Nor is it apparent why interested persons should not have "the opportunity to submit their views and comments" before IEPA adopts such a statement of general applicability. Senn Park Nursing Center v. Miller, 104 Ill. 2d 169, 179, 470 N.E.2d 1029, 1034 (1984) (intent of APA rulemaking provision requiring agency to consider all submissions received). However, as IEPA provides no explanation of the legal significance, if any, of the Hyde letter to the APA issue, the Board does not further consider IEPA's claim.

CONCLUSION

The Board grants in part and denies in part IEPA's motion to reconsider. In its March 4, 2010 opinion, the Board considered IEPA's factual assertion that no consensus was reached at the July 12, 2007 meeting over whether Quincy's CSOs discharged to "sensitive areas." The Board declined, however, to consider the affidavit of IEPA employee Ralph Hahn supporting that factual assertion. On reconsideration, the Board takes the affidavit into account, and to that extent, grants IEPA's motion to reconsider. However, the Board still finds that there is no genuine issue of material fact to preclude summary judgment in favor of Quincy. The Board otherwise denies IEPA's motion to reconsider.

In addition, the Board denies IEPA's motion to supplement the motion to reconsider with new matter. Even if the Board were to grant the motion to supplement, however, consideration of IEPA's proposed supplemental material would not cause the Board to grant reconsideration and alter its decision of March 4, 2010.

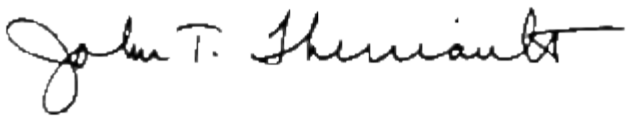
The Board incorporates by reference its findings of fact and conclusions of law from its opinion and order of March 4, 2010, as modified by this order. The Board therefore affirms its March 4, 2010 decision, in which the Board: (1) granted Quincy's motion for summary judgment; (2) struck the provisions of Special Condition 14(7) of the permit that designate the receiving waters of CSO outfalls 002, 006, and 007 as "sensitive areas" and impose corresponding requirements; and (3) remanded the matter to IEPA to reissue the NPDES permit to Quincy in accordance with the Board's opinion.

IEPA's timely-filed motion for reconsideration automatically stayed the effect of the Board's March 4, 2010 order. 35 Ill. Adm. Code 101.520(c). Today's "final disposition of the motion" terminates the stay. *Id*.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 17, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board