BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on April 8, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION FOR RECONSIDERATION, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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

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

BY: James L Morgan
JAMES L. MORGAN
for THOMAS DAVIS
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: April 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that I did on April 8, 2010, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and MOTION FOR RECONSIDERATION upon the persons listed on the Service List.

James L. Morgan
for Thomas Davis
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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

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

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Petitioner,	)	
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	)	**(NPDES Permit Appeal)**
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MOTION FOR RECONSIDERATION

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

Section 101.520 of the Board's Procedural Rules allows any motion for reconsideration or modification of a final Board order to be filed within 35 days after receipt of the order. Respondent received the order on March 10, 2010. Section 101.902 of the Board's Procedural Rules provides that the Board will consider factors including new evidence, or a change in the law, in determining whether to reconsider its order. In practice, the Board often cites to *Korogluvan v. Chicago Title & Trust Co.*, 231 Ill. App. 3d 622 (1st Dist. 1991), regarding the purpose of reconsideration:

> The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law. [citation omitted] As a general rule a motion to reconsider is addressed to the trial court's sound discretion. [citation omitted] But a motion to reconsider an order granting summary judgment raises the question of whether the judge erred in his previous application of existing law. Whether a court has erred in the application of existing law is not reviewed under an abuse-of-discretion standard.

Id. at 627. In addition, a motion to reconsider may specify "facts in the record which were overlooked." *Wei Enterprises v. IEPA*, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

Respondent seeks reconsideration of the March 4, 2010 Order granting Summary Judgment to the City of Quincy in this NPDES permit appeal on the grounds that the Board's previous application of existing law was in error and the Board's substantive rulings overlooked facts in the record. Respondent also challenges the ruling that the Agency violated the Illinois Administrative Procedure Act.

In finding that there are no genuine issues of material fact and that Quincy is entitled to judgment as a matter of law, the Board provided this summary of its decision:

> Based on its "current practice," IEPA designated the receiving waters for three of Quincy's CSOs as "sensitive areas" in Special Condition 14(7) of Quincy's NPDES permit. The Board finds that this IEPA practice is both an unpromulgated "rule" and inconsistent with the 1994 Federal CSO Control Policy. An unpromulgated rule is invalid and cannot be invoked by IEPA to impose a permit condition. Further, under the Federal Water Pollution Control Act (33 U.S.C. §1342(q)(1)) and, in turn, the Environmental Protection Act (Act) (415 ILCS 5/11(a), 39(b) (2008)), NPDES permit conditions for municipal CSOs must conform to the 1994 CSO Policy. Accordingly, the sensitive area designations and related obligations, as set forth by IEPA in Special Condition 14(7) of Quincy's NPDES permit, are not required to accomplish the purposes of the Act.

Order at 2. In reaching these results, the Board duly noted the legal constraints of summary judgment. Summary judgment is only appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Dowd & Dowd, Ltd. v. Gleason* (1998), 181 Ill. 2d 460, 483. In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* In opposing summary judgment, Respondent also argued that, when ruling on motion

for summary judgment, it is not the Board's function to resolve disputed factual question, but to determine whether one exists. A genuine issue of material fact exists not only when facts are in dispute, but also where reasonable persons could draw different inferences from undisputed facts; the different inferences drawn from the facts may depend upon the interests of the parties.

The Board also briefly discussed the legal framework for NPDES permit appeals and the petitioner's burdens of proof. First and foremost, the Board acknowledges the Agency's authority under Section 39(b) of the Act to impose terms and conditions in a permit as "may be required to accomplish the purposes and provisions of this Act." A petitioner must either show that the challenged permit conditions were not necessary to accomplish the statutory purposes or, in the alternative, "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 (4th Dist 2003), quoting *Browning-Ferris Industries of Illinois, Inc. v. IPCB*, 179 Ill. App. 3d 598, 603 (2nd Dist. 1989). If a petitioner may establish a *prima facie* case that a permit condition is unnecessary, the 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. IPCB*, 201 Ill. App. 3d 415, 425-26 (1st Dist. 1990). Order at 3. The imposition of summary judgment does not allow the Agency an opportunity to refute the petitioner's showing that the sensitive area designations are unnecessary. The Board's reliance upon these three cases cited in its Order (as quoted and cited in the City's motion) raises a legitimate question whether it properly applied existing law, since none of these cases involved an NPDES permit appeal or summary judgment. 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, especially since the Board is concerned with the exercise of the Agency's authority.

The Board's misapplication of existing law regarding the consideration of summary judgment may not be readily apparent. The Board spent more than a year to render its view of the issues relating to the protection of sensitive areas under the CSO policy and provide an extensive analysis thereof in the March 4th Order. The Agency is simply asking for a *fair* opportunity to articulate its legal and factual justification. After all, it is legally undisputed that any conditions imposed for Quincy's municipal CSOs must conform to the 1994 CSO Policy. The question then is whether the designation of certain receiving waters as sensitive areas is necessary from a technical standpoint. Respondent respectfully argues that the Board's substantive rulings overlooked facts in the record and that this matter ought to proceed to hearing and written argument. The fairness of this suggested approach is not only supported by the issue being one of first impression for the Board but also that an appellate court may well find that the Board has too easily dispensed with a disputed factual question raised by the City.

The Agency's Response to the Motion for Summary Judgment attempted to contradict a key factual representation by this Petitioner upon which its request for judgment on the pleadings is premised. Special Condition 14(7) of the final permit requires the City, within three months of the effective date of the permit, to provide the Agency with a schedule to relocate, control, or treat discharges from the three CSOs or provide adequate justification as to why the options of relocation, control, or treatment are not possible. However, the April 2007 draft permit had initially indicated the Agency's tentative determination that none of these CSOs discharged into

sensitive areas. Subsequent correspondence from the Agency revealed that this was indeed merely a tentative determination and requested the City to consider termination or moving three of the CSOs. A meeting was held on July 12, 2007 and the City has represented the following in its Motion for Summary Judgment: "During the meeting, it was agreed that none of the City of Quincy's CSOs discharged to sensitive areas. . . . (Record, p. 268)." Motion at 8. This purported agreement of the meeting participants is contradicted by what happened next. On July 31, 2007 the Agency issued a revised draft permit designating as sensitive areas the waters to which outfalls 002, 006, and 007 discharge. The City objected with an August 8, 2007 letter stating that "these designations were contrary to the agreement reached at the July 12, 2007, meeting, during which it was agreed that none of the CSOs discharged into sensitive areas. . . . (Record, p. 268)." Motion at 8-9. Page 268 of the Record is the August 8, 2007 letter from the City and is cited as factual support for the purported agreement. Moreover, Petitioner argues that the Agency's reply to the City's letter failed to dispute this purported agreement.

The purported agreement at the July 12, 2007 meeting is a key factual representation because it is the basis for Petitioner's challenge to the Agency's permit decision as inconsistent with the Agency's prior interpretation of the CSO Policy. The motion contends that "the IEPA cannot change its earlier interpretation of the 1994 Policy absent a significant change in circumstances." Motion at 22. Assuming for the sake of argument that this contention is legally supported, it does not follow the Agency did in fact change its interpretation or that any change in circumstances were not significant. Petitioner's argument focuses on the correspondence and discussions following the initial draft permit in April 2007 and again represents that the City and the Agency "were in agreement that none of the CSOs discharged into sensitive areas. . . ."

Motion at 25. The purported agreement is presented by the Petitioner in its request for judgment on the pleadings as the basis for Petitioner's conclusion that the "undisputed facts demonstrate that none of these receiving waters . . . are sensitive areas. Accordingly, the City of Quincy is entitled to summary judgment as a matter of law." Motion at 28. The purported agreement is portrayed as the Agency's prior interpretation of the CSO Policy.

Respondent argues that there is a genuine issue of material fact regarding this purported agreement. First of all, it is the prerogative of a party to frame the issues in its pleadings. The contention that the Agency's prior interpretation of the CSO Policy is reflected by this purported agreement is front and center in the Motion for Summary Judgment which alleges: "During the [July 12, 2007] meeting, it was agreed that none of the City of Quincy's CSOs discharged to sensitive areas. . . ." Motion at 8. The letter dated August 8, 2007, from the City of Quincy, which was addressed to Richard Pinneo of the IEPA, 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. In the affidavit of Ralph Hahn, he states with direct and personal knowledge that the IEPA 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. Respondent has addressed the purported agreement as an issue of material fact and rebutted the contention of an agreement through the Hahn affidavit. In reply, the City objects to the affidavit as not being a part of the administrative record. Reply at 3. Petitioner basically argues that, because the City's August 8, 2007 letter is in the record, the facts contained therein must be accepted as true. Petitioner then suggests in its Reply that the purported agreement is

not material to any issue raised in its request for summary judgment. Reply at 9. This conclusion is tendered only after the City argues the affidavit is ambiguous and speculates as to what the affidavit does not say and might have said. Reply at 5. For instance, Mr. Hahn "does not state that he advised anyone at the July 12, 2007, meeting that he did not agree that none of the CSOs discharged into sensitive areas" and, therefore, "his silence might be construed as acquiescence." *Ibid.* This is conjecture. The affidavit states in pertinent part the following:

> 4. 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.

Mr. Hahn unequivocally states that neither the representation in the motion nor the statement in the City's letter is true. To be clear, the representation that the IEPA agreed with the City is false. There was no "consensus"[1] either. "Neither factual statement is accurate." Mr. Hahn also states that he did not personally agree that the receiving waters are not sensitive areas. Mr. Hahn's statements must be considered in the context of the representations being rebutted. Since in its Reply the City elects to characterize the affidavit as "ambiguous" instead of submitting a counter-affidavit to attempt to contradict Mr. Hahn, the affidavit must stand. On this issue in particular, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Dowd & Dowd, Ltd. v. Gleason* (1998), 181 Ill. 2d

[1] Consensus is commonly defined as a "position reached by a group as a whole" and a "general agreement or accord."

460, 483.

While the City tries (with its Reply) to marginalize its reliance on the purported agreement as factual support for its argument that the Agency improperly changed its interpretation of the CSO Policy, the Board endeavors to resolve disputed factual question. First, the Board adopts Petitioner's suggestion that nothing else is disputed by the IEPA's Response to the Motion for Summary Judgment: "IEPA's sole argument against summary judgment is that there is one genuine issue of material fact: contrary to Quincy's representation that the parties reached a consensus at a July 2007 meeting, IEPA, or at least one of the IEPA representatives at the meeting, actually did not agree that none of Quincy's CSOs discharged to sensitive areas." Order at 20. Without any explicit rationale, the Board concludes that "whether any such consensus was reached is immaterial to the issues on appeal" and "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." Order at 20-21. The first conclusion is a mere tautology: the fact of any purported agreement is not material because it is "immaterial." The second conclusion is worse. Quincy's motion is *explicitly* premised upon the Agency's purported agreement and (as discussed more fully *infra*) the relief it seeks as to an allegedly invalid rulemaking is thoroughly contingent upon this change in position. Additionally, any reference to estoppel in any of the pleadings (or administrative record) is a misapplication of existing law. If the Board *sua sponte* injects this totally inapplicable legal concept into its consideration, then the invited errors are compounded. One of Petitioner's invitations to error concerns the propriety of the Agency's affidavit. Despite Section 101.504 of the Board's Procedural Rules ("Facts asserted that are not of record in the proceeding must be supported by

oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure."), which the Petitioner quotes in its Reply (at 4), the Board (because of the City's argument) finds that the affidavit "is outside of the IEPA administrative record and therefore not a proper consideration for the Board on review." Order at 21. This is another misapplication of existing law. The rules in Part 101 are "generally applicable to all of the Board's adjudicatory proceedings," including permit appeals according to Section 105.100(b). The Board cannot exclude an affidavit rebutting factual assertions in a motion for summary judgment. The case cited in conjunction with the preceding quote from the Order is *Alton Packaging v. IPCB*, 162 Ill. App. 3d 731, 738 (5th Dist. 1987), but it involved the actual introduction of evidence at hearing and not a summary judgment affidavit.[2] Since the Board considers improper the Respondent's affidavit denying factual representations and arguments raised in the Motion for Summary Judgment, this mistake of law taints the Board's analysis of the materiality of the purported agreement.

The larger flaws in the Board's grant of summary judgment reside with the issues of legal entitlement to relief and validity of the IEPA's "current practice" regarding the CSO Policy. These issues are intertwined in the Board's discussion and are premised upon a "waiver of objection" approach by the Board. According to the March 4th Order, "IEPA has provided the Board with no arguments concerning whether Quincy is entitled to judgment as a matter of law." Slip op. at 21. It is, of course, Petitioner's burden to demonstrate such entitlement regardless of any countervailing arguments. The City must show that it is entitled to judgment as a matter of

[2] This opinion was also distinguished by *City of East Moline v. IPCB*, 188 Ill. Sapp. 3d 349, 358 (3rd Dist. 1989), on the grounds that *Alton Packaging* did not pertain to NPDES permit appeals.

law. The purpose of the summary judgment procedure is to render expeditious judgment on a question of law, but only after first deciding that no genuine issue as to any material fact exists between the parties.

It is well settled that the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, must clearly show that the movant is entitled to judgment as a matter of law. Here, the Board has set forth a comprehensive rationale based upon the administrative record for the reversal of the Agency's designation of the three CSOs but this result is at best premature. The question remains as to whether this result may be achieved through judgment on the pleadings. If reasonable persons could draw divergent inferences from undisputed facts, the issues should be decided by trier of fact and the summary judgment motion should be denied. If, however, the controversy is solely a matter of law, then the party seeking judgment must still demonstrate it is entitled to judgment based upon the pleadings (and, as here, the administrative record).

The Agency's application of the CSO Policy is the central issue. In particular, the controversy is framed by the Petitioner's motion in its quotation of two letters from the IEPA; the Board also quoted the letters in the Order. Slip op. at 21. The statement at the issuance of the final permit provides the crux of this matter: "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 at 363. The context within which to consider this permitting decision is, according to the Board, an "invalid rule" under the APA: "Current Agency practice is to designate streams through residential areas or public use areas as having a high probability for primary contact activity." AR at 278.

After satisfying itself that this "current practice" statement is an unpromulgated rule of general applicability, the Board resolves the permit appeal with the following:

> 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.
>
> Quincy has presented a *prima facie* case that the provisions of Special Condition 14(7) designating the CSO receiving waters as "sensitive areas," and imposing corresponding obligations, are not required to further the purposes of the Act. 415 ILCS 5/39(b) (2008). IEPA has not pointed out any deficiency in Quincy's surveys or in any way refuted Quincy's *prima facie* case. The Board finds that Quincy has met its burden of proof with respect to each of the three CSO receiving waters.

Slip op. at 29. The Board then concludes by characterizing its ruling as "narrow" as follows: "The Board is finding, however, that in this particular case, the evidence in the record before IEPA at the time of NPDES permit issuance demonstrated that these CSO receiving waters are not 'waters with primary contact recreation.'" Slip op. at 30.

The simplest response to these conclusions may be that the end does not justify the means. The Board adjudicates this permit appeal through factual findings and substitutes its judgment for that of the Agency. The Board repeatedly insists that, absent objection by Respondent to the City's contentions, it is justified in its findings. For instance, 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.

Lastly, the Board's finding that the IEPA's permitting decision regarding Quincy is premised upon an improper rule and thus violated the APA is not supported by applicable law and not appropriately rendered through summary judgment. The Board has misapplied existing law. The Illinois Supreme Court considered a similar substantive and procedural situation in *Alternate Fuels, Inc. v. Director of Illinois E.P.A.* (2004), 215 Ill.2d 219. This case involved an interpretation of statutory language (the meaning of "discarded material" in the definition of "waste") by the IEPA and a finding of APA violation through summary judgment by the trial court. The Supreme Court reversed the finding that the IEPA's erroneous interpretation was also an improper rule:

> AFI has failed to demonstrate that the Agency's interpretation of "discarded material" as "any material which is not being utilized for its intended purpose" is "a statement of general applicability." AFI cites intraagency memoranda, and remarks taken from the depositions of Ed Bakowski and Kenneth Mensing that this interpretation was to provide "guidance" to the regulated community. Such statements do not affect private rights or procedures available to specific entities outside the Agency. . . . However, further details of the Agency's application of this interpretation to this business are not available in the record. Given the paucity of information pertaining to the second business, as well as the lack of any information in the record concerning Agency action pertaining to the business community at large, we find the record is devoid of any

> indication that the Agency's interpretation of "discarded material" was a statement of general applicability.
>
> Additionally, nowhere in the record has AFI demonstrated that the Agency exceeded its statutory authority in merely interpreting the Act and issuing a notice of violations premised upon that interpretation, nor could it. The Agency here was interpreting a statutory term, "discarded material," based on a particular set of facts, and it was entitled to do so. . . . While the Agency's interpretation of the Act was ultimately incorrect, no statutory provision prevents the Agency from making a mere interpretation.

215 Ill.2d at 247-48. The federal CSO Policy is also not equivalent to statutory language but rather is itself an interpretation of federal regulations and the Clean Water Act.

Respondent's interpretation of the CSO Policy may have been incorrect but the record does not demonstrate that the Agency's permitting action constituted any "statement of general applicability" violative of the APA.

WHEREFORE, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests that the March 4, 2010 Order granting the Motion for Summary Judgment be RECONSIDERED.

Respectfully submitted,

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

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

BY: _____

THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

Attorney Reg. No. 3124200
500 South Second Street
Springfield, Illinois 62706

217/782-9031
Dated: 4/08/10