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 27, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION FOR LEAVE TO REPLY and ILLINOIS EPA'S REPLY TO PETITIONERS RESPONSES TO MOTIONS FOR RECONSIDERATION AND TO SUPPLEMENT REQUEST 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: _____
THOMAS DAVIS
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: April 27, 2010

CERTIFICATE OF SERVICE

I hereby certify that I did on April 27, 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, MOTION FOR LEAVE TO REPLY and ILLINOIS EPA'S REPLY TO PETITIONERS RESPONSES TO MOTIONS FOR RECONSIDERATION AND TO SUPPLEMENT REQUEST FOR RECONSIDERATION upon the persons listed on the Service List.

Thomas Davis
Assistant Attorney General

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MOTION FOR LEAVE TO REPLY

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by its attorney LISA MADIGAN, Attorney General of the State of Illinois, hereby respectfully seeks to file a Reply to the Petitioner's Responses to the Motion for Reconsideration of the March 4, 2010 Order granting Summary Judgment and the Motion to Supplement the Request for Reconsideration, and states as follows:

Section 101.501(e) of the Board's Procedural Rules allows a reply by a movant in order to avoid prejudice. The City's Responses raise issues and concerns that warrant clarification by the Attorney General on behalf of the Illinois EPA. 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.

WHEREFORE, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests

that the Board GRANT leave to reply in support of the request that 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: _____
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Springfield, Illinois 62706
217/782-9031
Dated: 4/27/10

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ILLINOIS EPA'S REPLY TO PETITIONER'S RESPONSES TO MOTIONS FOR RECONSIDERATION AND TO SUPPLEMENT REQUEST FOR RECONSIDERATION

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by its attorney LISA MADIGAN, Attorney General of the State of Illinois, hereby respectfully replies to the Petitioner's Responses to the Motion for Reconsideration of the March 4, 2010 Order granting Summary Judgment and the Motion to Supplement the Request for Reconsideration, and states as follows in reply to certain matters:

Waiver

The Petitioner's responsive argument correctly notes that the Illinois EPA's response "challenged one fact set forth in Quincy's Motion for Summary Judgment, i.e., whether the IEPA agreed at a July 12, 2007, meeting that none of Quincy's CSOs discharged into sensitive areas." Response to Motion for Reconsideration at page 2. It is not however, entirely correct that the Board held "the disputed fact *identified* by the IEPA was not material to the issues presented." Response to Motion for Reconsideration at page 3 (emphasis added). This "purported agreement" (referred to as the "Sole Disputed Fact" by the City) and its veracity are certainly

disputed but 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.

The City's Reply to the Illinois EPA's Response to the Motion for Summary Judgment suggests that "this disputed fact is immaterial to every issue raised" in the motion. Petitioner's Reply to Response to the Motion for Summary Judgment at page 7. 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.

Now, the City objects on the grounds of waiver the issues raised in the Motion for Reconsideration, citing the "general rule" mentioned in a Board case relating to a siting appeal (which was adjudicated after a hearing on the merits and not through summary judgment). The applicability of any rule depends upon the substance and posture of a given cause of action. The general rule regarding relief via judgment on the pleadings, and as codified in Section 2-1005(c) of the Civil Practice Act, 735 ILCS 5/2-1005(c), is that summary judgment should be granted if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." The general rule regarding any adjudication of a request for judgment on the pleadings, and as interpreted by the Illinois Supreme Court in *Adams v. Northern Illinois Gas Co.* (2004), 211 Ill.2d 32, 43, is well settled: "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent."

In addition to these fundamentals, it is axiomatic that the mechanics of adjudicating a summary judgment motion depend upon which party is seeking to avail itself of this drastic remedy. Where a defendant is seeking judgment on the pleadings through a Section 2-1005 motion, the courts have held that, while not required to prove its case at the summary judgment stage, a plaintiff must present (in opposition to the motion) evidentiary facts to support the elements of the cause of action. See *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881 (1st Dist. 2009). In other words, when a defendant files motion for summary judgment, plaintiff must then come forward with evidence to support each and every element of each cause of action pled in order to resist motion for summary judgment. A defendant who moves for summary judgment may meet its initial burden of production in at least two ways: (1) by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law, or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action. *Williams v. Covenant Medical Cent*, 316 Ill. App. 3d 682, 688-89 (4th Dist. 2000).

It is well settled that, where the movant is a plaintiff, the materials relied on must establish the validity of the plaintiff's factual position on all the contested essential elements of the cause of action, and on all the affirmative defenses raised by the defendant. The movant in a

summary judgment proceeding bears the burden of coming forward with competent evidentiary material which, if uncontradicted, entitles him to judgment as a matter of law. See *Groce v. South Chicago Community Hospital*, 282 Ill. App. 3d 1004, 1010-11 (1st Dist. 1996). 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. See *Salinas v. Chicago Park Dist.*, 189 Ill. App. 3d 55, 59 (1st Dist. 1989). "An issue should be decided by the trier of fact and summary judgment denied where reasonable persons could draw divergent inferences from the undisputed facts." *Pyne v. Witmer* (1989), 129 Ill.2d 351, 358.

The controlling difference in rebutting the factual contentions of a motion for summary judgment is the underlying burden of proof which resides with the cause of action. A plaintiff may not resist a motion for summary judgment, on an issue on which he has the burden of proof, by arguing that it is up to the movant to negate his case. See *Heiden v. Cummings*, 337 Ill. App. 3d 548 (2nd Dist. 2003). Any party opposing 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. See *Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231 (1st Dist. 1996). Accordingly, the party opposing motion for summary judgment may rely solely upon his pleadings to create material question of fact until the movant supplies facts that would clearly entitle him to judgment as matter of law. See *Malone v. American Cyanamid Co.*, 271 Ill. App. 3d 843 (4th Dist. 1995). 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.

Burden of Seeking Reconsideration

The City's argument opposing reconsideration is premised upon the assertion that "it is the movant's burden to specify the facts the tribunal should have considered and the law the tribunal should have applied." Response to Motion for Reconsideration at page 4. In particular, the Petitioner's Response objects to reconsideration because "the Motion never identifies any fact the Board overlooked." Response to Motion for Reconsideration at page 5. The lack of any specification of overlooked facts is not a flaw supported by any of the cases cited by the City. For instance, the Board states in its denial of reconsideration in the case of *Board of Trustees of Southern Illinois University v. IEPA*, PCB 02-105 (October 6, 2005), that "a motion to reconsider *may* specify 'facts in the record which were overlooked.' *Wei Enterprises v. IEPA*, PCB 04-23, slip op. at 5 (Feb. 19, 2004)." Slip. op. at 2, emphasis added. Therefore, the effort to specify facts that may have been "overlooked" is optional.

The reasons for the requested reconsideration are that the Board erred in finding the purported agreement alleged by the Petitioner to be immaterial and that the State's interpretation and implementation of federal policy were consistent with applicable law. The State also seeks to hold the Petitioner to its burden to show that it is legally entitled to judgment and respectfully suggests that the Board also erred in this aspect. The discussion of the State's alleged failure to justify reconsideration by a specification of overlooked facts is merely another spin on the previous waiver argument.

Use of Affidavit

The Petitioner contends that the Hahn affidavit is not part of the record and may not be considered by the Board, citing *IEPA v. IPCB*, 386 Ill. App. 3d 375, 390 (3rd Dist. 2008). Response to Motion for Reconsideration at page 8. This portion of the New Lenox appellate decision consists of the following holding: "we agree the Board could not properly consider additional evidence or testimony that might be disclosed through additional discovery, and conclude the Board did not abuse its discretion in denying the requests for additional discovery." *Ibid.* However, the resolution of permit appeal underlying the New Lenox decision involved the denial of summary judgment. The Respondent's summary judgment response exhibit is an affidavit from a participant in a meeting at which the Petitioner's summary judgment motion contends the Illinois EPA expressed its agreement with the City regarding the contested CSOs. This 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). 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. If the City had not relied explicitly upon the purported agreement in seeking summary judgment – if the Petitioner had not pleaded *as a material fact* the Illinois EPA's alleged concurrence during the meeting – the Attorney General would not have requested and filed the affidavit to rebut the factual contentions *in the City's pleadings*. The affidavit was not "disclosed through additional discovery" as in the New Lenox matter; it exists merely to oppose the summary judgment request.

As noted above, the error in the Board's approach to the materiality of the Petitioner's

factual contention as to the purported agreement is one of the reasons for reconsideration. This error is respectfully alleged to be a misapplication of existing law.

Legal Standards

As the prevailing party, the City contends that the summary judgment process employed by the Board and the resulting decision are fair and consistent with Board practice. The City overreaches, however, in its attempt to characterize the Illinois EPA's concerns as a "new position regarding summary judgement, i.e., that summary judgment motions are not allowed in NPDES permit appeals." Response to Motion for Reconsideration at page 7. This is not an accurate characterization of the Respondent's concerns which pertain to the process utilized in this matter being inconsistent with the law concerning summary judgments generally.

In fact, the Illinois EPA is explicitly relying upon the procedural and substantive safeguards adopted by the Board in the consideration of summary judgment motions. The movant in a permit appeal must demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. As a respondent for such request, the Illinois EPA is entitled to contest the factual contentions the movant chooses to plead as well as any statement regarding legal entitlement to a favorable judgment.

As a respondent and not a plaintiff, the Illinois EPA is not obligated to prove its case in opposition to summary judgment. The City of Quincy has the statutory burdens set forth in Section 40 of the Act in contesting the terms and conditions of the NPDES permit. In opposition, whether at hearing or on a summary judgment motion, the Illinois EPA may rely upon the administrative record. 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.

Any 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. The issues in play are framed by the pleadings seeking relief. The relief requested here is twofold: 1) to vacate the sensitive areas designation and 2) to invalidate the Illinois EPA's designation as violative of the APA. As noted above, the State 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.

Summary judgment must be considered in the context of the underlying pleadings, i.e., the permit appeal. The question before the Board in permit appeal proceedings is: (1) whether the applicant proves that the application, as submitted to the IEPA, demonstrated that no violation of the Act would have occurred if the requested permit had been issued; or (2) whether the third party proves that the permit as issued will violate the Act or Board regulations. *Joliet Sand & Gravel Co. v. PCB*, 163 Ill. App. 3d 830, 833 (3rd Dist. 1987); *Prairie Rivers v. PCB*, 335 Ill. App. 3d 391, 401 (4th Dist. 2002). The Illinois EPA's denial letter frames the issues on appeal and the burden of proof is on the petitioner. *ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d 325 (3rd Dist. 1997).

The record must contain evidence to support the issuance of the permit and the conditions attached to that permit. The Board is obligated to review the entirety of the record to determine (1) if the record supports the IEPA's decision, and (2) that the procedures used by the Illinois EPA are consistent with the Act and Board regulations. The Board will not affirm the Illinois EPA's decision on the permit unless the record supports the decision. The Illinois EPA's decision is not awarded any special deference by the Board. See *IEPA v. PCB* (1986), 115 Ill. 2d 65, 70.

Thus, the request for judgment on the pleadings 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 Board's review of permit challenges in particular. If the Board follows the Petitioner's logic in its arguments objecting to reconsideration, then (according to the arguments against reconsideration) the end justifies the means. The City's abandonment of what it now calls the Sole Disputed Fact suggests that no matter what factual contentions it may have pleaded in requesting summary judgment (and that the affidavit refuted), the end result (according to the City) must stand. It must stand (according to the City) even though the Board misapplied existing law by considering the affidavit to be improper and by ignoring the verified statements within such affidavit (and the City's failure to submit a counter-affidavit) refuting the City's factual contentions regarding the allegedly arbitrary or capricious vacillation of the permitting agency. It must stand even though the City thereby misrepresented the "fact" of the purported agreement in an effort to convince the Board that the Illinois EPA erred in the sensitive area designation. It must stand (according to the City) even though the City's reply (in light of the affidavit) invited the Board to consider the City's factual misrepresentation to be immaterial

and further invited the Board to misapply existing law and adopt the City's argument regarding waiver. It must still stand even though the United States Environmental Protection Agency has reviewed the Board's March 4, 2010 Order and the Illinois EPA's underlying permit decision regarding application of the federal CSO Policy, and provided the April 14, 2010 letter from EPA's Region 5 Water Division Director in support of the Illinois EPA's interpretation of the CSO Policy. Apparently, the result must stand no matter what.

The Board's finding of the invalidity of the Illinois EPA's "current practice" must apparently stand. The City 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. The City invited the Board to speculate regarding the alleged existence of a "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.

The EPA letter is 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. The City objects because the April 14, 2010 letter is not part of the administrative record, it is untimely submitted, and it is not authenticated. 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.

In closing, the request for reconsideration is made in good faith and this reply addresses the Petitioner's several objections to such reconsideration.

WHEREFORE, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests that the April 14, 2010 EPA letter be duly considered and 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
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