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May 5, 2010

David M. Kent
Director of Utilities
City of Quincy
730 Main Street
Quincy, Il 62301

RECEIVED
CLERK'S OFFICE

MAY 07 2010

STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

Re: City of Quincy v. IEPA, PCB No. 08-86 (NPDES Permit Appeal)

Dear Mr. Kent:

Enclosed is the Petitioner's Response to the Respondent's Motion for Leave to Reply mailed today to the Illinois Pollution Control Board for filing.

Very truly yours,

MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY:

Joel A. Benoit

WRITER'S EMAIL: benoit@mohanlaw.com

JAB:trg
Enclosure

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAY 07 2010

STATE OF ILLINOIS
Pollution Control Board

CITY OF QUINCY, an Illinois municipal corporation,
Petitioner,
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PCB No. 08-86
(NPDES Permit Appeal)

ORIGINAL

NOTICE OF FILING

To: Thomas Davis
Division of Legal Counsel
Illinois Attorney General's Office
500 South Second Street
Springfield, IL 62706

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that on the 5th day of May, 2010, I mailed the following document for filing with the Clerk of the Pollution Control Board of the State of Illinois:

**PETITIONER'S RESPONSE TO THE
RESPONDENT'S MOTION FOR LEAVE TO REPLY**

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

CITY OF QUINCY, an Illinois municipal corporation, Petitioner

By: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
its attorneys

By Joel A. Benoit
Joel A. Benoit

MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Ste. 325
Springfield, IL 62701
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THIS FILING IS SUBMITTED ON RECYCLED PAPER
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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CLERK'S OFFICE

MAY 07 2010

STATE OF ILLINOIS
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CITY OF QUINCY, an Illinois municipal corporation,
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ORIGINAL

**PETITIONER'S RESPONSE TO THE
RESPONDENT'S MOTION FOR LEAVE TO REPLY**

NOW COMES Petitioner City of Quincy, by and through its attorneys, Mohan, Alewelt, Prillaman & Adami, and for its Response to the Respondent's Motion for Leave to Reply, states as follows:

I. Because the IEPA has not contended that it will suffer material prejudice if the filing of the Reply is not allowed, there is no basis for the Board to grant the IEPA's Motion for Leave to Reply.

The 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*." 35 Ill. Adm. Code 101.500(e)(emphasis added). The IEPA has not contended that it will suffer material prejudice if the filing of its reply is not allowed.

The 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. Id. The IEPA's desires and speculations are insufficient to support a finding that allowing a reply will prevent material prejudice. Accordingly, the Motion for Leave to Reply should be denied, and the Reply attached thereto should be stricken.

II. The proposed Reply offers no valid arguments supporting reconsideration of the Board's March 4, 2010, Order.

If the Board allows the Reply, the Board should recognize that the Reply is, for the most part, simply a restatement of the IEPA's earlier arguments. In response, the City of Quincy adopts its earlier arguments and offers the following, additional responses:

A. The City of Quincy filed a motion for summary judgment, not a motion for judgment on the pleadings.

A motion for judgment on the pleadings, 735 ILCS 5/2-615(d) and a motion for summary judgment, 735 ILCS 5/2-1005, are distinct types of motions. The Board's procedural rules allow for the filing of motions for summary judgment. 35 Ill. Admin. Code 101.516. The City of Quincy filed a motion for summary judgment. The Board should ignore the IEPA's repeated references to motions for judgment on the pleadings.

B. The City of Quincy did not raise a "new issue" in its December, 2008, Reply.

The IEPA's contention that the City of Quincy raised a "new issue" in its December, 2008, Reply by demonstrating the immateriality of the Sole Disputed Fact is baseless. The IEPA states that in its Response to the motion for summary judgment, it was challenging the veracity of the City of Quincy's factual contention concerning the Sole Disputed Fact, not the materiality of the disputed fact. (Proposed Reply, pp. 2 & 8).

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.

C. The IEPA failed to show that there was a genuine issue of material fact preventing the entry of summary judgment in the City of Quincy’s favor.

Once the City of Quincy presented facts and law showing that it was entitled to summary judgment, the IEPA had the burden of production to show that the City of Quincy was not entitled to summary judgment. Environmental Site Developers, Inc. v. White & Brewer Trucking, Inc., 1997 Ill. ENV LEXIS 649 at *3-6 (PCB No. 96-180)(Nov. 20, 1997) (Enforcement-Water-Citizens); Motion for Summary Judgment, p. 2. The IEPA needed to clearly identify disputed issues of material fact from the record. Sexton Environmental Systems, Inc. v. IEPA, 1991 Ill. ENV LEXIS 162 at *2 (PCB No. 91-4)(Permit Appeal).

The only fact challenged by the IEPA was the Sole Disputed Fact. (Proposed Reply, p. 1). As this is an immaterial factual dispute, the IEPA failed to meet its burden of production, and summary judgment was properly entered in favor of the City of Quincy.

D. The IEPA has misstated the record.

The Motion for Leave to Reply misstates the record, as follows: “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).” (Proposed Reply, p. 6). No previous permit issued to the City of Quincy identified sensitive areas; the draft permit mailed to the City of Quincy on April 10, 2007, did not identify sensitive areas. (Motion for Summary Judgment, p. 7).

E. The Board regularly denies motions for reconsideration when the movant fails to identify facts purportedly overlooked.

Contrary to the IEPA's statement, (Proposed Reply, p. 5), the Board opinions cited by the City of Quincy do show that the Board regularly denies motions for reconsideration when the movant fails to specify the facts the Board purportedly overlooked.

F. Every fact set forth in a motion for summary is not necessarily a material fact, and disputes concerning immaterial facts are no bar to the entry of summary judgment.

The IEPA states that because the City of Quincy "pleaded *as a material fact* the Illinois EPA's alleged concurrence during the meeting—the Attorney General ... requested and filed the [Hahn] affidavit to rebut the factual contentions *in the City's pleadings*." (Motion for Leave, p. 6). The IEPA does not identify the pleading it is referring to; the IEPA assumes the IEPA is referring to the motion for summary judgment, which is not a pleading. 735 ILCS 5/2-601-5/2-613 (Pleadings are complaints, answers, affirmative defenses, replies to affirmative defenses, and counterclaims.).

Even if a motion were a pleading, every fact alleged in a pleading is not necessarily a material fact. 735 ILCS 5/2-615(a)(Motions to dismiss may request that immaterial matter in the complaint be stricken out.). Similarly, as with the Sole Disputed Fact, not every fact set forth in the City of Quincy's motion for summary judgment is a material fact, e.g., that the system serves 49,250 people is not material to the issues presented. (Motion for Summary Judgment, p. 3).

The IEPA does not reveal how it determined that the Sole Disputed Fact was "pled" as a material fact. 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)). Even if the City of Quincy's intent had been to plead the Sole Disputed Fact as a material fact and rely upon it extensively in its arguments, though, the City of Quincy's intent cannot make an immaterial fact material or a material fact immaterial. Whether a fact is material is dependent upon the issue(s) presented, e.g., in the present case, whether the Sole Disputed Fact is true or false is irrelevant to the issue of whether Outfall 002 discharges into a sensitive area.

Even the IEPA admits that the Hahn Affidavit "...does not relate to the technical or legal grounds in justification of the permitting decision." (Proposed Reply, p. 6). Thus, as the City of Quincy has argued and the Board has found, the Hahn Affidavit, even if it were part of the record, does not create a material issue of disputed fact.

Accordingly, the existence of the Sole Disputed Fact in the motion for summary judgment is not a ground for reconsidering the Board's order.

G. Summary judgment motions may be granted in NPDES permit appeals, and the IEPA had an opportunity to set forth facts in the record supporting its permit decision.

The IEPA has clarified that its position is not that summary judgment may not be entered in an NPDES permit appeal; the IEPA's position is that the incorrect process was used in these proceedings. (Motion for Leave, p. 1; Proposed Reply, p.. 7). Nothing 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. The correct process was employed.

CERTIFICATE OF SERVICE

I hereby certify that I did on the 5th day of May, 2010, send by First Class Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instrument entitled **PETITIONER'S RESPONSE TO THE RESPONDENT'S MOTION FOR LEAVE TO REPLY**

To: Thomas Davis
Division of Legal Counsel
Illinois Attorney General's Office
500 South Second Street
Springfield, IL 62706

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

RECEIVED
CLERK'S OFFICE
MAY 07 2010
STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

and the original and nine copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

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



Joel A. Benoit

MOHAN, ALEWELT, PRILLAMAN & ADAMI
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