ILLINOIS POLLUTION CONTROL BOARD
March 4, 2010

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

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

The City of Quincy (Quincy) appeals 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 on March 27, 2008, 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 (CSS). Quincy has moved for summary judgment, disputing IEPA's sensitive area designations.

Generally, a CSS carries storm water, domestic sewage, and commercial and industrial wastewater in a single pipe to a publicly owned treatment works (POTW). A CSO is potentially untreated effluent discharged directly to a surface water from a CSS (prior to reaching the POTW), which typically occurs when there is considerable rainfall or snowmelt causing the flow volume to exceed CSS or POTW capacity.

For the reasons below, the Board finds that there are no genuine issues of material fact and that Quincy is entitled to judgment as a matter of law. The Board therefore grants Quincy's motion for summary judgment and strikes the sensitive area designations and associated requirements from Special Condition 14(7) of the NPDES permit. The Board remands the matter to IEPA to issue a revised NPDES permit in accordance with today's opinion.

In this opinion, the Board first provides a summary of its decision and an overview of the legal framework for this appeal, which includes both NPDES permitting and the 1994 Federal CSO Control Policy (59 Fed. Reg. 18688-98 (Apr. 19, 1994)). The Board then sets forth the procedural history of the case, followed by the Board's findings of fact. Next, the Board summarizes the parties' arguments, after which the Board discusses its analysis and rules on Quincy's motion for summary judgment. The opinion is followed by the Board's order.

SUMMARY OF 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.

The Board finds that there are no genuine issues of material fact and that Quincy is entitled to judgment as a matter of law. The Board therefore grants Quincy's motion for summary judgment. The provisions of Special Condition 14(7) at issue are stricken and the NPDES permit is remanded to IEPA with instructions.

LEGAL FRAMEWORK

NPDES Permits and Permit Appeals

The Act prohibits any contaminant discharge to surface waters in Illinois without an NPDES permit or in violation of the terms and conditions of such permit. 415 ILCS 5/12(f) (2008). Section 402 of the Federal Water Pollution Control Act (33 U.S.C. §1342) established the NPDES, the national framework for permitting wastewater discharges. With its 1977 amendments, the Federal Water Pollution Control Act became commonly known as the "Clean Water Act" (CWA).[1] Under the NPDES, a facility that discharges from a point source directly to surface waters is required to obtain a permit.[2] Generally, in the NPDES permit, levels of control are imposed on the effluent, including both technology-based and water quality-based requirements. CSOs are point sources subject to NPDES permitting. 59 Fed. Reg. at 18689.

In Illinois, IEPA is the permitting authority, responsible for administering regulatory programs to protect the environment, including the NPDES. If IEPA denies a permit or grants one with conditions, the permit applicant may appeal IEPA's determination to the Board. 415 ILCS 5/4, 5, 39, 40(a)(1) (2008); 35 Ill. Adm. Code 105, 301, 304, 309. The petitioner has the burden of proof on appeal. 415 ILCS 5/40(a)(1) (2008); 35 Ill. Adm. Code 105.112(a). Board hearings are based exclusively on the record before IEPA at the time IEPA issued its permit

[1] "CWA" means the Federal Water Pollution Control Act, as amended by the "Clean Water Act." 35 Ill. Adm. Code 301.240.

[2] "Point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. ***" 40 C.F.R. §122.2.

determination. 35 Ill. Adm. Code 105.214(a). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge IEPA's reasons for denying or conditionally granting the permit, information developed after IEPA's determination typically is not admitted at hearing or considered by the Board. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *afff'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).

The Act states that:

> All NPDES permits shall contain those terms and conditions, including but not limited to schedules of compliance, which may be required to accomplish the purposes and provisions of this Act. 415 ILCS 5/39(b) (2008).

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).

Standards for Considering Motions for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). When determining whether a genuine issue of material fact exists, the record "must be construed strictly against the movant and liberally in favor of the opponent." Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

A genuine issue of material fact precluding summary judgment exists when "the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004). Summary judgment "is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt." Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871.

1994 Federal CSO Control Policy

The Act calls for discharges of contaminants to surface waters to comport with the CWA, including NPDES permitting. 415 ILCS 5/11(a), 39(b) (2008). With the Wet Weather Water Quality Act of 2000, the CWA was amended to require that all NPDES permits for municipal CSOs comply with the 1994 CSO Control Policy (59 Fed. Reg. 18688-98 (Apr. 19, 1994)) of the United States Environmental Protection Agency (USEPA). 33 U.S.C. §1342(q)(1). The 1994 CSO Control Policy establishes a comprehensive national strategy for controlling CSO discharges through NPDES permitting. 59 Fed. Reg. at 18689.[3]

The goal of the Policy is to "achieve cost-effective CSO controls that ultimately meet appropriate health and environmental objectives and requirements." 59 Fed. Reg. at 18689. The Policy allows "a phased approach to implementation of CSO controls considering a community's financial capability." *Id*. The permitting provisions of the Policy apply to all CSOs resulting from storm water flow, including snow melt runoff. *Id*. at 18689. "Dry weather" CSO discharges (*i.e.*, "non-precipitation related flows") are prohibited. *Id*.

The Policy imposes two main obligations on permittees: implementing the "nine minimum controls"; and developing, submitting, and implementing a "long-term CSO control plan." 59 Fed. Reg. at 18690. The nine minimum controls are: (1) proper operation and regular maintenance programs for the sewer system and CSOs; (2) maximum use of the collection system for storage; (3) review and modification of pretreatment requirements to assure CSO impacts are minimized; (4) maximization of flow to the POTW for treatment; (5) prohibition of CSOs during dry weather; (6) control of solid and floatable materials in CSOs; (7) pollution prevention; (8) public notification to ensure that the public receives adequate notification of CSO occurrences and CSO impacts; and (9) monitoring to effectively characterize CSO impacts and the efficacy of CSO controls. *Id*. at 18691.

The long-term CSO control plan (LTCP) must:

> ultimately result in compliance with the requirements of the CWA. The long term plans should consider the site specific nature of CSOs and evaluate the cost effectiveness of a range of control options/strategies. 59 Fed. Reg. at 18691.

The LTCP is to include "both fixed-date project implementation schedules (which may be phased) and a financing plan to design and construct the project as soon as practicable." *Id*. The minimum elements of the long term CSO control plan are: (1) characterization, monitoring, and modeling of the CSS; (2) public participation; (3) consideration of sensitive areas; (4) evaluation of alternatives; (5) cost/performance considerations; (6) operational plan; (7) maximizing treatment at the existing POTW treatment plant; (8) implementation schedule; and (9) post-construction compliance monitoring program. *Id*. at 18691-94. The final LTCP is generally to be incorporated into the POTW's next NPDES permit for implementation. *Id*. at 18696.

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[3] Board regulations address NPDES permits (Part 309), effluent limits (Part 304), water quality standards (Part 302), water use designations and site-specific water quality standards (Part 303), and CSOs (Part 306, last amended in 1990). 35 Ill. Adm. Code 302, 303, 304, 309.

Regarding the consideration of "sensitive areas," and critical to this appeal, USEPA states in the Policy:

> [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 Policy calls for LTCPs to be developed and submitted "as soon as practicable, but generally within two years after the effective date of the permit issuance/modification." 59 Fed. Reg. at 18696. The Policy recognizes, however, that "a longer timetable for completion" may be needed "on a case-by-case basis to account for site-specific factors that may influence the complexity of the planning process." *Id*.

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 (Pet.) 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.). By hearing officer order of December 1, 2008, IEPA's response to the motion was due by December 15, 2008, and Quincy's reply was due by December 29, 2008. The Board received IEPA's response on December 22, 2008, along with a motion for leave to file the response *instanter*. Quincy has not opposed the motion for leave, which is granted, and the Board accordingly accepts IEPA's response (Resp.). The Board received Quincy's reply (Reply) on December, 31, 2008. The reply was timely filed because it was postmarked on the filing deadline of December 29, 2008. The present statutory deadline for the Board to decide this case is June 3, 2010.

FACTS

Quincy's CSOs

Quincy's wastewater treatment facility is located at 700 West Lock & Dam Road in Quincy, Adams County. AR at 38. Quincy's combined sewer system[4] and wastewater treatment facility serve 49,250 people. AR at 38. The combined sewer system (CSS) includes six

[4] "Combined Sewer" means "a sewer designed and constructed to receive both wastewater and land runoff." 35 Ill. Adm. Code 301.255.

combined sewer overflows (CSOs). AR at 136-47. The CSOs are identified as follows in "reissued" NPDES permit No. IL0030503:

Discharge Number	Location	Receiving Water
002	South Side CSO	Curtis Creek
003	Jefferson Street CSO	Mississippi River
004	Dicks-Payton CSO	Mississippi River
005	Broadway Street CSO	Mississippi River
006	Cedar Street CSO	Quincy Bay
007	Whipple Creek CSO	Whipple Creek

AR at 379; *see also* AR at 247.

Only CSOs 002, 006, and 007 are at issue in this appeal.

Outfall 002 - South Side CSO

Outfall 002, the South Side CSO, discharges to Curtis Creek, which generally runs east-west. AR at 136-37, 203, 306. On March 28, 2007, IEPA photographed the CSO discharge structure for outfall 002 and on October 9, 2007, IEPA photographed a nearby parking area and hiking trail. AR at 201-03. IEPA also provided an aerial photograph of the outfall and surrounding area. AR at 203.

The CSO discharge structure for outfall 002 is located in the southwest part of the City, on the north bank of Curtis Creek, southeast of Indian Mounds Park, and west of Eighth Street. AR at 148, 201, 203, 283. To the north of the CSO discharge structure is a small parking area. Running northeast from the parking area (*i.e.*, away from the CSO structure and Curtis Creek), there is a hiking trail that leads through a heavily wooded area to Eighth Street. AR at 201-03. To the north of the parking area is an east-west road, northwest of which is Indian Mounds Park. AR at 203.

Quincy's consultant, Camp Dresser & McKee (CDM), surveyed Curtis Creek on foot on August 20 and 28, 2007. AR at 304, 305, 316. The emphasis of CDM's survey was on whether there were any "'waters with primary contact recreation.'" AR at 310.[5] The survey divided Curtis Creek into sampling locations spaced approximately 300 feet apart, starting just upstream

[5] To develop a study approach for identifying recreational uses of the CSO receiving waters, representatives of CDM and Klingner & Associates, P.C. (Klingner) conducted a preliminary tour of CSO outfalls 002, 006, and 007 on August 20, 2007. AR at 305. Under CDM's direction, Klingner conducted a more detailed stream assessment on August 23, 2007 (Whipple Creek for outfall 007) and August 28, 2007 (Curtis Creek for outfall 002). *Id.* The August survey is documented in CDM's memorandum report entitled "*Primary Recreation Contact Survey for Curtis Creek and Whipple Creek, City of Quincy, Illinois*," dated September 11, 2007. AR 304-31. Klingner also assisted CDM in conducting a more detailed assessment of the receiving water for outfall 006 on September 18, 2007. AR at 338. The September survey is documented in CDM's memorandum report entitled "*Recreational Use Survey of Quincy Bay, City of Quincy, Illinois*," dated September 21, 2007. AR at 338-57.

of the CSO discharge structure. AR at 305, 306. A transect was placed across the stream at each sampling location, where, among other things, depth measurements were taken at three equally distributed spots along the transect. AR at 306, 316. CDM observed stream bank slope and vegetation and looked for beaches, public access points, swimming, boating, and fishing, as well as evidence of past recreational activity by searching for "rope swings over the water, paths or trails to the creek or the presence of bait containers and 'Y' sticks used for fishing." AR at 305, 310. The CDM memorandum report of the survey includes a map of the transect locations (AR at 306), an aerial photograph (AR at 313), and photographs of Curtis Creek (AR at 323-31).

Roughly 6,000 feet west of CSO outfall 002 is Curtis Creek's confluence with the Mississippi River. AR at 306, 308, 313, 323-24. Curtis Creek's wetted stream width ranged from 7 to 60 feet, averaging 31.5 feet. AR at 308-09. The depths of the creek ranged from 1.2 to 49.2 inches where depth could be measured. AR at 306, 309, 310, 323-31. The stream banks of the upper reaches are densely populated with trees and shrubs. AR at 306, 310, 313, 323-28. The under story is composed of herbaceous vegetation dominated by poison ivy. AR at 310. Over 98% of the stream bank in the upper reaches was rated "difficult" for accessing the creek, and "moderate to steep" for bank slope. AR at 310, 311. According to CDM, the upper half of Curtis Creek is not deep enough to support recreational watercraft (*e.g.*, canoes, kayaks, or powerboats) or "swimming or any other water activity that would result in full body immersion." AR at 309, 310, 311.

Backflow from the Mississippi River made it unsafe for CDM to measure water depth in the lower portions of Curtis Creek. AR at 309-10. These lower portions, which flow through an industrial area with concrete bank walls, are channelized until the confluence with the Mississippi River. AR at 306, 310-311, 314, 329-331. Before the confluence, the lower reach of Curtis Creek has steep banks that are densely vegetated with trees and shrubs, restricting access. AR at 311. The under story is composed of herbaceous vegetation dominated by poison ivy. AR at 310.

CDM reported that primary contact recreation was not observed in Curtis Creek during the survey. AR at 311. CDM explained that no established beaches or public access points to the creek were present and that no visual evidence of "recreation activity (swimming, wading, etc) past or present" was observed in Curtis Creek during the survey. AR at 310. "Residential areas" along Curtis Creek are "limited to a few homes located about several hundred feet from the CSO outfall." AR at 311. According to CDM, "[b]ased upon the physical and hydrologic configuration of the stream channel to support primary contact recreation, the probability that the stream is accessed by the public on a routine basis is low." AR at 311. CDM concluded that based on the survey and the "physical obstacles that prevent access" to Curtis Creek, primary contact recreation is not a current use of the water body. *Id.*

Outfall 006 - Cedar Street CSO

The CSO discharge structure for outfall 006, the Cedar Street CSO, discharges to a concrete channel. AR at 204. IEPA photographed the CSO discharge structure on March 23, 2007. AR at 204. IEPA also provided an aerial photograph of the structure and surrounding area. AR at 205. The CSO discharge structure is located in the northwest part of the City and,

more specifically, in Riverview Park, south of Locust Street and east of North Bottom Road. The concrete channel leads westerly into the park toward the receiving water body. AR at 148, 204-05, 283. CSO 006 ultimately discharges to the receiving water at the east bank of the water body. The CSO receiving water lies between Quinsippi Island and the Illinois mainland. AR at 204-05, 342-43.

This receiving water is listed in the NPDES permit application form and the NPDES permit as "Quincy Bay." AR at 144-45, 379. However, Quincy maintained in other record documentation that the receiving water is actually a "Mississippi River channel" and not Quincy Bay. AR at 338-39. The CSO 006 discharge enters the receiving water well south of the Cedar Creek confluence and just south of the Quinsippi Island Bridge. AR at 339, 343.

The CDM memorandum report documenting the August 2007 survey noted that primary contact recreation has not been observed in the CSO 006 receiving water. AR at 311. On September 18, 2007, CDM conducted a survey by boat, beginning immediately north of the Cedar Creek confluence and extending 1.25 miles south to the southern end of Quinsippi Island. AR at 338-39, 343. The boat survey included an assessment of Art Keller Marina, which is located on the west side of the CSO 006 receiving water. AR at 338-40, 343. On the same date, CDM also surveyed the east bank (Illinois mainland) and west bank (east side of Quinsippi Island) on foot. AR at 338, 343. CDM looked for swimming, water skiing, wading, beaches, rope swings, docks, boats, jet skis, fishing, ladders into the water from piers and docks, and trails to the water. CDM also observed water depth and clarity, bank slope and vegetation, and "proximity of residential and park areas." AR at 338-40.

Water clarity was murky, with visibility less than 1 foot. AR at 339. Because of shallow water depths along the east bank, most of the boating was in the western and middle portions of the water body. AR at 339, 344. The east bank has parks, piers, and boat launching and docking facilities. Persons were observed fishing from boats and from piers and using boat ramps. AR at 339, 346-48, 351-54. Along the east bank, there is a small playground with a fence separating it from a steep slope to the water. AR at 339. The east bank is heavily vegetated except for park areas. The east bank has a steep to moderately steep slope, but within Kesler Park, there are areas of easy access to the water. *Id*.

The west bank is heavily vegetated. AR at 339, 355, 357. The only road from the Illinois mainland to Quinsippi Island is the Quinsippi Island Bridge, and roads from the bridge permit automobile access only to Art Keller Marina. AR at 339, 342-43. Banks leading to the marina had a very high slope, limiting bank access mainly to the stairs leading to the docks. *Id*. Except for stairs leading to the marina, there were no visible paths to the water on the west bank. *Id*. Art Keller Marina consists of boat docks, a fueling station, and piers. AR at 340, 349-51. At the time of the survey, the marina held approximately 150 boats. AR at 340. Persons fished from a pier. Many docks and piers had picnic areas. *Id*. No sandbars or beaches were seen in the marina. Access to the banks within the marina is difficult because of steep slopes and dense vegetation. *Id*.

The receiving water body is a "no wake" zone, not permitting water skiing. AR at 340, 356. A "no wake" sign further warns: "Beware of strong current during high water." AR at

356. CDM observed no canoeing or kayaking, nor any jet skis or ladders into the water. AR at 339-40. The City maintains parks on the east bank, but CDM reported that "physical features (i.e. soft sediments, steep drop-offs, concrete banks, limited visibility) most likely make the channel an unsuitable place for swimming." AR at 340. CDM added that the Quincy Park District does not identify any of the parks along the water body as suitable for swimming. *Id*.

CDM concluded that current uses of the CSO 006 receiving water are primarily recreational navigation and fishing. AR at 340. CDM further concluded that that there were no established beaches or indications of primary contact along either bank and that during the boat survey, there were no visible signs of "past or present primary body contact recreation (swimming, water skiing, wading, etc.)." AR at 339-40.

Outfall 007 - Whipple Creek CSO

Outfall 007, the Whipple Creek CSO, discharges to Whipple Creek, which generally runs east-west. AR at 146-47, 206, 209, 307. On March 28, 2007, IEPA photographed the CSO discharge structure for outfall 007 and on October 9, 2007, IEPA photographed a residential property located downstream of outfall 007. AR at 206-08. IEPA also provided an aerial photograph of the outfall and surrounding area. AR at 209.

The CSO discharge structure is located in the northwest part of the City and, more specifically, on the south bank of Whipple Creek, east of Sixth Street and north of Locust Street. AR 148, 206, 209. The referenced downstream residential property is located on the north side of Whipple Creek, north of Locust Street and west of Fifth Street; Fifth Street is west of Sixth Street. AR at 148, 207-09. IEPA stated that the residence and its "[s]ide yard play area" are "bordering" Whipple Creek; that the side yard play area has "no barrier or fencing" between it and Whipple Creek; and that Whipple Creek is 30 to 50 feet behind the side yard's trampoline. AR 207-08. Between the residential property and Whipple Creek is a heavily wooded area. AR at 207-09. IEPA's photographs of the residential property were taken from the road in front of the property. AR at 207-08.

On August 20 and 28, 2007, CDM surveyed Whipple Creek with the same emphasis and methodology described above for Curtis Creek.[6] AR at 305, 307-08. The CDM memorandum report of the survey includes a map of the transect locations (AR at 307), an aerial photograph (AR at 314), and photographs of Whipple Creek (AR at 318-22). Approximately 3,330 feet west of outfall 007 is Whipple Creek's confluence with Cedar Creek. AR at 305, 307. Whipple Creek's wetted steam width ranged from 1 to 18 feet, averaging 8.8 feet. AR at 305, 308. Whipple Creek's depth ranged from 0 to 4.8 inches, averaging 1.5 inches. AR at 305, 308, 318-22. Whipple Creek's banks are densely populated with trees and shrubs. AR at 305, 307, 311, 318-22. The understory is composed of herbaceous vegetation dominated by poison ivy. AR at 305, 311. Over 95% of the stream bank was rated "difficult" for accessing the creek, and "moderate to steep" for bank slope. AR at 305, 311. According to CDM, Whipple Creek is not deep enough to support recreational watercraft (*e.g.*, canoes, kayaks, or powerboats) or

[6] *See* footnote 5.

"swimming or any other water activity that would result in full body immersion." AR at 308, 311.

CDM reported that primary contact recreation was not observed in Whipple Creek during the survey. AR at 311. CDM explained that no established beaches or public access points to the creek were present and that no visual evidence of "recreation activity (swimming, wading, etc) past or present" was observed in Whipple Creek during the survey. AR at 308. Whipple Creek "flows by several residential areas in its upper reaches," but access to the creek is "very difficult," as stream banks are "steep and densely covered with vegetation, and at most sites the under story is dominated by poison ivy." AR at 311. According to CDM, "[t]here is low probability that individuals from the residential areas are visiting or recreating in the creek on a routine basis." *Id*. CDM concluded that based on the survey and the "physical obstacles that prevent access" to Whipple Creek, primary contact recreation is not a current use of the water body. *Id*.

NPDES Permitting

Seeking reissuance of its NPDES permit No. IL0030503, the City submitted an NPDES permit renewal application to IEPA on July 17, 2006. AR at 21-148. Quincy's application states that in the previous year: CSO outfall 002 had approximately 12 CSO events, the average duration of each was about 1.6 hours, and the minimum rainfall that caused a CSO event was 0.28 inches; CSO outfall 006 had approximately 10 CSO events, the average duration of each was about 0.8 hours, and the minimum rainfall that caused a CSO event was 0.71 inches; and CSO outfall 007 had approximately 12 CSO events, the average duration of each was about 1.9 hours, and the minimum rainfall that caused a CSO event was 0.28 inches. AR at 136-37, 144-47.

On April 10, 2007, IEPA issued a draft NPDES permit and "Public Notice/Fact Sheet." AR at 219-20. Special Condition 14 of the draft permit authorized CSO discharges from outfalls 002, 006, and 007, among others listed. AR at 233. Special Condition 14(7) of the draft permit was entitled "Sensitive Area Considerations." AR at 234. Special Condition 14(7) included the following statements:

> Pursuant to Section II.C.3 of the federal CSO Control Policy of 1994, sensitive areas are any water likely to be impacted by a CSO discharge which meet one or more of the following criteria: (1) designated as an Outstanding National Resource Water; (2) found to contain shellfish beds; (3) found to contain threatened or endangered aquatic species or their habitat; (4) used for primary contact recreation; or, (5) within the protection area for a drinking water intake structure.
>
> The IEPA has tentatively determined that none of the outfalls listed in this Special Condition [including outfalls 002, 006, and 007] discharge to sensitive areas. *Id*.

Special Condition 14(10) of the April 10, 2007 draft permit was entitled "Long-Term Control Planning and Compliance with Water Quality Standards." AR at 236. Special

Condition 14(a) provided that "discharges from the CSOs . . . shall not cause or contribute to violations of applicable water quality standards or cause use impairment in the receiving waters." *Id*. Special Condition 14(10)(b) required Quincy to "develop a Long-Term CSO Control Plan (LTCP) for assuring that the discharges from the CSOs (treated or untreated) authorized in this Permit comply with Paragraph 10.a above and all applicable standards, including water quality standards." *Id*. The draft permit required Quincy to submit the LTCP to IEPA "within twenty-four (24) months of the effective date of this Permit." *Id*. Special Condition 14(10)(c) stated that "[p]ursuant to the Policy, the required components of the LTCP" include the following:

> 1. Characterization, monitoring, and modeling of the Combined Sewer System (CSS);
> 2. Consideration of Sensitive Areas;
> 3. Evaluation of alternatives;
> 4. Cost/performance considerations;
> 5. Revised CSO Operational Plan;
> 6. Maximizing treatment at the treatment plant;
> 7. Implementation schedule;
> 8. Post-Construction compliance monitoring program; and
> 9. Public participation. *Id*.

On June 7, 2007, the IEPA Field Operations Section sent a letter to CDM offering comments "for the City's consideration during the development of their CSO long-term control plan (LTCP)." AR at 241. The IEPA letter includes the following statements:

> The receiving streams for all six CSO discharges should be characterized at a minimum as having "primary contact" and "aquatic life" designated uses.
>
> Whipple Creek, Cedar Street and South Side CSOs discharge either into or upstream from parks or public use areas. The City should consider relocating or eliminating these discharge locations. *Id*.

The IEPA letter also provided that "[i]n the City's development of their LTCP," the nine LTCP elements from the 1994 Policy "should be included." AR at 242.

On July 31, 2007, IEPA issued a revised draft NPDES permit and public notice/fact sheet. AR at 245-67. The public notice/fact sheet describes the "Stream Classification" as "General Use" for each of the receiving waters of CSO outfalls 002, 006, and 007. AR at 247. The public notice/fact sheet further provides that the stream segments receiving the discharges from outfalls 002, 006, and 007 are not on the CWA Section 303(d) list of "impaired waters."[7] *Id*. Special Condition 14(7) of the July 31, 2007 draft permit was revised from the April 10, 2007 draft permit to state that CSO outfalls 002, 006, and 007 discharge to sensitive areas. AR at 245. Special Condition 14(7) now read in pertinent part:

[7] Section 303(d) of the CWA (33 U.S.C. § 1313(d)).

> Pursuant to Section II.C.3 of the federal CSO Control Policy of 1994, sensitive areas are any water likely to be impacted by a CSO discharge which meet one or more of the following criteria: (1) designated as an Outstanding National Resource Water; (2) found to contain shellfish beds; (3) found to contain threatened or endangered aquatic species or their habitat; (4) used for primary contact recreation; or, (5) within the protection area for a drinking water intake structure.
>
> *The IEPA has determined that outfall(s) 002, 006 and 007 discharge to sensitive area(s).* Within three (3) months of the effective date of this Permit, the Permittee shall submit two (2) copies of either a schedule to relocate, control, or treat discharges from these outfalls. If none of these options are possible, the Permittee shall submit adequate justification as to why these options are not possible. Such justification shall be in accordance with Section II.C.3 of the National CSO Control Policy. The IEPA has determined that none of the other outfalls[8] listed in this Special Condition discharge to sensitive areas. AR at 261 (emphasis added).

Special Condition 14(10) of the revised draft permit continued to address the LTCP, but now required Quincy to submit the LTCP by a date certain, August 1, 2009. AR at 263.

On August 8, 2007, Quincy sent a letter to IEPA objecting to the sensitive area designations in the revised draft permit. AR at 268-69. Among other things, 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 responded to the City of Quincy's objection on August 28, 2007, stating in relevant part:

> 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

[8] The receiving water for CSO outfalls 003, 004, and 005 is listed in the draft permit and final permit as the Mississippi River. AR at 260, 379.

> indicate that outfalls 002, 006 and 007 discharge to sensitive areas because of the above stated reasons. AR at 278.

On September 13, 2007, the City of Quincy mailed a letter to IEPA in which Quincy repeated its objection to IEPA's sensitive area determinations:

> Based upon the Agency's prior position on this matter namely, that none of these Outfalls discharge to sensitive areas, and based upon the CDM Study[9] which confirms the Agency's prior position, and based further upon the potentially disastrous financial consequences to the City of Quincy if Item 7 of Special Condition 14 is not changed back to reflect the Agency's prior position on this matter ("that none of the Outfalls listed in this Special Condition discharge to sensitive areas"), the City of Quincy respectfully requests that Item 7 of Special Condition 14 be amended to specifically state "that none of the Outfalls listed in this Special Condition discharge to sensitive areas." AR at 301.

Attached to Quincy's September 13, 2007 letter was CDM's memorandum report entitled "*Primary Recreation Contact Survey for Curtis Creek and Whipple Creek, City of Quincy, Illinois,*" dated September 11, 2007, which documents the August 2007 survey described above. AR 304-31.

On September 26, 2007, Quincy submitted another letter, again asking that IEPA amend Special Condition 14(7), and arguing:

> No new factual basis was cited by the Agency for reversing its position on this matter, or for treating Quincy differently than other similarly-situated municipalities. Nor have we found any prior reference to or application of the Agency's new rule, or policy, that automatically labels every receiving water a "sensitive area" if it winds through a residential or recreational area. At the very least we would have expected that there would have been formal rulemaking, with an opportunity to comment, before being subjected to this new rule. AR 335-36.

Attached to Quincy's September 26, 2007 letter was CDM's memorandum report entitled "*Recreational Use Survey of Quincy Bay, City of Quincy, Illinois,*" dated September 21, 2007, which documents the September 2007 survey described above. AR at 338-57.

Also attached to Quincy's September 26, 2007 letter were "planning level" cost estimates from CDM for addressing the three CSOs. AR at 357-59. In arriving at the cost estimates, CDM calculated CSO flows, volumes, and frequencies "using a typical CSO year analysis involving long-term simulations using a simplified version of the Quincy combined sewer system model (CSS) and fifty years of rainfall data." AR at 357. CDM estimated costs under what it described as a scenario that included the sensitive area designations and under what it described as a scenario with no sensitive area designations. AR at 357-59.

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[9] This refers to the August 2007 CDM survey described above.

For CSO controls with the sensitive area designations, CDM considered three options: (1) relocating the three CSO outfalls to the Mississippi River by pipeline; (2) eliminating the three CSOs by separating the combined sewers (*i.e.*, storm flow would discharge to a new storm sewer system; sanitary flow would discharge to the existing combined sewer system); and (3) storing the three CSOs in steel underground tanks during wet weather events for eventual treatment when conveyance and treatment capacity become available. AR at 358.

Estimated Costs of CSO Controls with Sensitive Area Designations						
CSO	**Drainage Area (acres)**	**Redirect to Mississippi River***	**Sewer Separation** ($25,000/acre)**	**Sewer Separation** ($60,000/acre)**	**Store/Treat 1-year Storm Event*****	**Store/Treat 10-year Storm Event*****
South Side 002	819	$3,500,000	$20,500,000	$49,000,000	$29,000,000	$49,500,000
Cedar Street 006	329	$3,000,000	$8,500,000	$20,000,000	$25,500,000	$47,000,000
Whipple Creek 007	1,167	$19,500,000	$29,000,000	$70,000,000	$32,000,000	$61,000,000
Totals****	2,316	$26,000,000	$58,000,000	$139,000,000	$86,500,000	$157,500,000

AR at 359.

*CDM opined that relocation of the outfall "only delays the ultimate resolution" and "would not improve the overall water quality and would not be a likely recommendation if there was no sensitive area designation." AR at 358.
**CDM opined that sewer separation costs can range from $5,000 to $100,000 per acre and "depend upon condition of local sewer laterals, sewer system complexity, subsurface conditions (i.e. the presence of bedrock), and groundwater elevation," but "a more reasonable range for the City of Quincy may be $25,000 to $60,000 per acre." AR at 358.
***Do not include costs of pumping CSOs from the tank back into the system.
****CDM stated that its planning level cost estimates could vary by approximately 30%. AR at 359. CDM considered control costs only for CSOs 002, 006, and 007, *i.e.*, not for CSOs 003, 004, and 005, though CDM stated that "the level of control at one CSO may be influenced by CSO controls at other locations." AR at 357.

Because CDM believed that sewer separation and storage/treatment were "the only realistic alternatives to consider in this comparison," it concluded that with the sensitive area designations, a "reasonable range of planning level costs for CSO controls could be approximately $60 million to $160 million." AR at 359.

For CSO controls with no sensitive area designations, CDM considered two options: (1) constructing relief trunk sewers and an interceptor parallel to existing facilities to convey a portion of the flows from the CSOs to the POTW, which in turn would require additional wet-weather treatment capacity; and (2) storing the three CSOs in steel underground tanks during wet weather events for later treatment when conveyance and treatment capacity become available. AR at 358-59.

Estimated Costs of CSO Controls with No Sensitive Area Designations			
CSO	**Drainage Area (acres)**	**Parallel Relief Trunk Sewers***	**Store/Treat 3-month Storm Event****
South Side 002	819	$1,500,000	$17,000,000
Cedar Street 006	329	$250,000	$16,000,000
Whipple Creek 007	1,167	$1,500,000	$16,000,000
Interceptor	n/a	$10,000,000	n/a
POTW Upgrades	n/a	$18,000,000	n/a
Totals***	2,316	$31,250,000	$49,000,000

AR at 359.

*Based on an approximate alignment along existing sewers/interceptors. AR at 358.
** Do not include costs of pumping CSOs from the tank back into the system. AR at 359.
*** CDM stated that its planning level cost estimates could vary by approximately 30%. AR at 359. CDM considered control costs only for CSOs 002, 006, and 007, *i.e.*, not for CSOs 003, 004, and 005, though CDM stated that "the level of control at one CSO may be influenced by CSO controls at other locations." AR at 357.

CDM concluded that if the there were no sensitive area designations, planning level costs for CSO controls "could likely range from about $30 million to $50 million." AR at 359.

On March 27, 2008, IEPA issued the final NPDES permit, No. IL0030503, to Quincy. AR at 369-86. The final permit, with an effective date of April 1, 2008, and an expiration date of March 31, 2013, contained Special Conditions 14(7) and 14(10) unchanged from the July 31, 2007 draft permit. The condition being appealed here, Special Condition 14(7), appeared in its entirety in the final permit as follows:

> Sensitive Area Considerations
>
> 7. Pursuant to Section II.C.3 of the federal CSO Control Policy of 1994, sensitive areas are any water likely to be impacted by a CSO discharge which meet one or more of the following criteria: (1) designated as an Outstanding National Resource Water; (2) found to contain shellfish beds; (3) found to contain threatened or endangered aquatic species or their habitat; (4) used for primary contact recreation; or, (5) within the protection area for a drinking water intake structure.
>
> The IEPA has determined that outfall(s) 002, 006 and 007 discharge to sensitive area(s). Within three (3) months of the effective date of this Permit, the Permittee shall submit two (2) copies of either a schedule to relocate, control, or treat discharges from these outfalls. If none of these options are possible, the Permittee shall submit adequate justification as to why these options are not possible. Such justification shall be in accordance with Section II.C.3 of the National CSO

> Control Policy. The IEPA has determined that none of the other outfalls listed in this Special Condition discharge to sensitive areas. However, if information becomes available that causes the IEPA to reverse this determination, the IEPA will notify the Permittee in writing. Within three (3) months of the date of notification or other date contained in the notification letter, the Permittee shall submit two (2) copies of either a schedule to relocate, control, or treat discharges from these outfalls. If none of these options are possible, the Permittee shall submit adequate justification at that time as to why these options are not possible. Such justification shall be in accordance with Section II.C.3 of the National CSO Control Policy. AR at 380.

On the issuance date of the final "reissued" NPDES permit, March 27, 2008, IEPA also sent a letter to Quincy Mayor John Spring in response to the Mayor's October 2007 inquiry (AR at 360) into the then draft permit's sensitive area designations:

> 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.

PARTIES' ARGUMENTS

Quincy's Motion for Summary Judgment

Quincy argues that IEPA's sensitive area determinations in the NPDES permit were based on an invalid and therefore unenforceable rule (Mot. at 13-14); a misinterpretation of the 1994 CSO Control Policy's phrase "sensitive area" (*id*. at 14-20); and an improper departure from IEPA's previous interpretation of the Policy as applied to Quincy, because there have been no changes in the underlying streams' uses (*id*. at 20-23).

Quincy maintains therefore that IEPA's designations of the three receiving waters as sensitive areas in Special Condition 14(7) of the NPDES permit are not necessary to accomplish the purposes of the Act. Mot. at 28. Further, according to Quincy, IEPA's "erroneous determinations will result in misdirecting limited funds which are needed to comply with the goals of the 1994 Policy." *Id*.

Quincy asserts that it is entitled to summary judgment as a matter of law because the undisputed facts demonstrate that "none of these receiving waters are waters with primary contact recreation, and, thus, none of these receiving waters are sensitive areas." Mot. at 28. Quincy seeks removal of those portions of Special Condition 14(7) setting forth IEPA's "erroneous determinations that Outfalls 002, 006, and 007 discharge into 1994 sensitive areas and imposing obligations upon the City of Quincy based upon those determinations" and a finding that IEPA's "'current practice,'" announced in its August 28, 2007 letter to Quincy, is an "invalid rule." *Id*. Quincy also asks that it be allowed to identify and address any sensitive areas as part of its LTCP. *Id*. at 26-27.

IEPA's Response

IEPA opposes Quincy's motion for summary judgment by quoting two passages authored by Quincy, one from the motion and one from the administrative record. Both quotes relate to a July 12, 2007 meeting that IEPA had with Quincy and the City's consultants. Resp. at 2. In the first passage, Quincy states that at the meeting, "it was agreed that none of the City of Quincy's CSOs discharged to sensitive areas." *Id*., quoting Mot. at 8. In the second passage, Quincy refers to an August 8, 2007 letter from the City stating that 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." *Id*., quoting AR at 268.

IEPA argues that "[n]either factual statement is accurate" and attaches the affidavit of Ralph Hahn, an IEPA employee in the Permit Section of the Bureau of Water. Resp. at 2; Affid. at 1. Describing the affidavit, IEPA explains that Mr. Hahn "states with direct and personal knowledge that the Illinois EPA did not agree at the meeting with the City and its consultants on July 12, 2007, that none of the City of Quincy's CSOs discharged to sensitive areas." Resp. at 2. Mr. Hahn's affidavit provides: "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." Affid. at 2.

IEPA concludes its argument as follows:

> The Motion for Summary Judgment is premised upon the allegation that the Illinois EPA had agreed, prior to the issuance of the NPDES permit, that none of the City of Quincy's CSOs discharged to sensitive areas. No affidavit supports this factual allegation by the City. The Illinois EPA's counter-affidavit specifically denies this allegation. Therefore, there exists a genuine issue of material fact precluding the Board from granting judgment on the pleadings. Resp. at 2.

Quincy's Reply

Quincy asserts that "[e]xcept for one fact," IEPA's response "does not contest the facts, law, and arguments" set forth in Quincy's motion for summary judgment. Reply at 2. According to Quincy, "assuming *arguendo*" that the fact identified by IEPA is disputed, this alone does not prevent the Board from granting Quincy's motion for summary judgment. *Id*. at 3. Quincy argues that (1) Mr. Hahn's post-determination affidavit is not part of the record and is therefore inadmissible (*id*.); (2) Quincy is not required to provide an affidavit because the fact cited in its motion is part of the record (*id*. at 4); (3) Mr. Hahn's affidavit is ambiguous and does not necessarily create a disputed fact, as his silence might be deemed agreement (*id*. at 4-5); and (4) the purportedly disputed fact is not material to the issues raised in this permit appeal (*id*. at 6-9) ("Indeed, the issues presented in this permit appeal would not be affected had no meeting been held on July 12, 2007.").

DISCUSSION

In this part of the opinion, the Board begins by explaining why there are no genuine issues of material fact in this case. Next, the Board discusses why Quincy is entitled to judgment as a matter of law, a discussion which addresses why IEPA's "current practice" of designating "sensitive areas" is an unpromulgated "rule" in violation of the Administrative Procedure Act (APA) (5 ILCS 100 (2008)) and why that current practice misinterprets the 1994 Federal CSO Control Policy. The Board then rules on Quincy's motion, granting summary judgment in favor of Quincy and remanding the matter to IEPA to reissue the NPDES permit in accordance with this opinion.

There Are No Genuine Issues of Material Fact in This Case

Quincy operates a CSS and POTW. The CSS has six CSOs, three of which are the subject of this appeal. CSO outfall 002 discharges to Curtis Creek; CSO outfall 006 discharges to a concrete channel and ultimately into a water body that lies between Quinsippi Island and the Illinois mainland; and CSO outfall 007 discharges to Whipple Creek. The NPDES permit at issue lists these "receiving waters" as follows: Curtis Creek for outfall 002; Quincy Bay for outfall 006; and Whipple Creek for outfall 007.

In July 2006, Quincy applied for reissuance of its NPDES permit with IEPA. In March 2007, IEPA photographed the CSO 002 discharge structure (located on the north bank of Curtis Creek) and in October 2007, IEPA photographed a nearby parking area and hiking trail. North of the CSO 002 discharge structure is the small parking area, from which there is a hiking trail leading away from the structure and Curtis Creek. In March 2007, IEPA photographed the CSO 006 discharge structure and associated concrete channel, located in a park.

In March 2007, IEPA photographed the CSO 007 discharge structure (located on the south bank of Whipple Creek) and in October 2007, IEPA photographed a residential property located downstream of the 007 discharge structure and north of Whipple Creek. IEPA took the photographs of the residential property from the road in front of the residence. The residence has a side yard with a trampoline. IEPA stated that the trampoline is situated some 30 to 50 feet away from Whipple Creek. The area behind the residential property (*i.e.*, between the property and Whipple Creek) is heavily wooded and, according to IEPA, lacks any fence.

IEPA issued a draft permit in April 2007 stating that IEPA had tentatively determined that none of Quincy's CSOs discharge to "sensitive areas." In July 2007, however, IEPA issued a second draft permit, this time stating that three of Quincy's six CSOs (002, 006, and 007) discharge to sensitive areas. In response to Quincy's objection about the designation of these receiving waters as sensitive areas, IEPA explained in an August 2007 letter that "[c]urrent Agency practice is to designate streams through residential areas or public use areas as having a high probability for primary contact activity," adding that "the 1994 CSO Control Policy lists recreational activities as primary contact in its definition of a sensitive area." AR at 278.

Quincy then had its consultant, CDM, survey the receiving waters for CSOs 002, 006, and 007. The surveys were conducted in August and September 2007. CDM surveyed all three

water bodies on foot. CDM also surveyed the CSO 006 receiving water by boat. The reports documenting the surveys were submitted to IEPA in September 2007: the August 2007 survey on September 13, 2007, and the September 2007 survey on September 26, 2007.

CDM surveyed each of the receiving waters for evidence of current and past recreational use. For example, with respect to the receiving waters for CSO outfalls 002 and 007, CDM looked for beaches, public access points, swimming, wading, rope swings over the water, trails to the water, boating, fishing, and bait containers. CDM also took measurements of stream depth and width and assessed bank slope and vegetation. CDM surveyed an approximately 6,000-foot stretch of Curtis Creek (CSO 002) and an approximately 3,330-foot stretch of Whipple Creek (CSO 007).

Access to Curtis Creek and Whipple Creek is difficult due primarily to steep banks and heavy vegetation. Curtis Creek ranged from 1.2 to 49.2 inches deep where its depth could be measured. Backflow from the Mississippi River made it unsafe to measure water depth in the lower portions of Curtis Creek, which are channelized and flow through an industrial area. Whipple Creek ranged from 0 to 4.8 inches deep. For Curtis Creek and Whipple Creek, CDM stated that "water depth is not deep enough (excluding the lower reaches of Curtis Creek) to support swimming or any other water activity that would result in full body immersion." AR at 311. For both Curtis Creek and Whipple Creek, CDM observed no evidence of any past or present recreational use of any kind.

CDM's September 13, 2007 submittal to IEPA stated that primary contact recreation has not been observed in the receiving water for CSO outfall 006. AR at 311. As documented in CDM's September 26, 2007 submittal, CDM surveyed an approximately 1.25-mile stretch of the CSO 006 receiving water for similar indications of current and past recreational use. Because this water body is plainly used for recreational navigation and fishing and has boat launches, piers, docks, a marina, and bordering parks, CDM also assessed water clarity and looked for water skiing, jet skis, and ladders into the water. Based on the survey, CDM observed no jet skis or any ladders into the water body, which is a "no wake" zone and may have a strong current during high water. There were no established beaches on either bank and the Quincy Park District does not identify any of the parks along the water body as suitable for swimming. Further, CDM found that physical features (soft sediments, steep drop-offs, concrete banks, and limited visibility) most likely make the water body unsuitable for swimming. CDM observed no evidence of past or present primary contact recreation on this receiving water.

Attached to Quincy's September 26, 2007 submittal to IEPA were CDM's planning level cost estimates for addressing CSOs 002, 006, and 007: one set of estimates assumed the sensitive area designations in the second draft permit applied and the other assumed there were no sensitive area designations. Based on the CSO controls considered and recommended by CDM under the two scenarios, planning level cost estimates assuming the sensitive area designations were roughly from $10 million to $130 million more expensive than under the assumption of no sensitive areas.

No subsequent documentation from IEPA mentioned CDM's recreational use surveys of the three CSO receiving waters or CDM's CSO control cost estimates. On the date of final

permit issuance, March 27, 2008, IEPA stated in a letter to Quincy Mayor John Spring that IEPA "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.

On March 27, 2008, IEPA issued to Quincy the final "reissued" NPDES permit, No. IL0030503, effective April 1, 2008. As stated in Special Condition 14(7) of the final permit, IEPA determined that CSO outfalls 002, 006, and 007 discharge to sensitive areas. Special Condition 14(7) requires that Quincy, within three months of the permit's effective date, provide IEPA with "a schedule to relocate, control, or treat discharges from these outfalls." AR at 380. Special Condition 14(7) continues that "[i]f none of these options are possible, the Permittee shall submit adequate justification as to why these options are not possible" and "[s]uch justification shall be in accordance with Section II.C.3 of the National CSO Control Policy. " *Id*. Special Condition 14(10) of the final NPDES permit requires Quincy to "develop a Long-Term CSO Control Plan (LTCP)" and submit it to IEPA by August 1, 2009. AR at 382. Special Condition 14(10) further provides that required components of the LTCP include "[c]haracterization, monitoring, and modeling of the Combined Sewer System (CSS)" and "[c]onsideration of Sensitive Areas." *Id*.

On appeal before the Board, Quincy asks that the Board "remove those portions of Special Condition 14(7) of the NPDES permit setting forth the Agency's erroneous determinations that Outfalls 002, 006, and 007 discharge into 'sensitive areas' and imposing obligations upon the Petitioner based upon those determinations." Pet. at 5. Quincy also requests that the Board "allow the Petitioner to identify and address any 'sensitive areas' as part of its long-term control plan and in a manner consistent with the federal CSO Control Policy of 1994." *Id*.

In this appeal, IEPA has taken no issue with CDM's surveys of the CSO receiving waters or CDM's cost estimates for CSO controls. 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. Resp. at 2 ("Illinois EPA did not agree at the meeting"); Affid. at 2 ("I did not agree at the meeting").

Initially, the Board finds that because Quincy's motion (Mot. at 8) cites to the administrative record for the factual assertion about a consensus having been reached (AR at 268), the assertion need not be supported by affidavit, contrary to IEPA's argument (Resp. at 2). 35 Ill. Adm. Code 101.504. More importantly, however, whether any such consensus was reached is immaterial to the issues on appeal.

"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." Connor v. Merrill Lynch Realty, Inc., 220 Ill. App. 3d 522, 528, 581 N.E.2d 196, 200 (1st Dist. 1991). 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.

The Board finds that even if the fact that IEPA has seized upon is disputed, it is not a *material* fact precluding summary judgment. Moreover, as Quincy asserts, the IEPA representative's assertion of fact, that he did not agree at the meeting, comes in a December 2008 affidavit, which is outside of the IEPA administrative record and therefore not a proper consideration for the Board on review.[10] Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280.

The 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. The Board finds that there are no genuine issues of material fact here. The Board therefore turns to whether Quincy is entitled to judgment as a matter of law

Quincy Is Entitled to Judgment as a Matter of Law

As indicated, IEPA has provided the Board with no arguments concerning whether Quincy is entitled to judgment as a matter of law. For the reasons below, the Board finds that Quincy is so entitled.

IEPA's "Current Practice" is an Invalid "Rule"

Two letters from IEPA reveal its reasoning for designating the CSO 002, 006, and 007 receiving waters as sensitive areas. Quincy submitted a comment on the second draft NPDES permit, objecting solely to IEPA's designation of sensitive areas in Special Condition 14(7). AR at 268-69. In response, IEPA stated the following in an August 2007 letter to Quincy:

> The Agency received your comments on the revised draft Permit on August 9, 2007. 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.

Later, on the date of permit issuance and in response to the concerns of Quincy Mayor John Spring over the sensitive area designations, IEPA explained in a letter to Mayor Spring: "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 APA defines a "rule" as follows:

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[10] Quincy argues that Mr. Hahn's silence might be deemed agreement. Reply 4-5. In light of the Board's rulings, the Board need not reach this issue.

> 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. 5 ILCS 100/1-70 (2008).

IEPA designated the receiving waters for CSO outfalls 002, 006, and 007 as sensitive areas based on the current IEPA "practice" of designating streams "through residential or public use areas" as having a "high probability" for primary contact recreation. IEPA later noted that this change in designation for Quincy was premised on "potential human contact" due to the presence of "residential and public use areas downstream" of the CSO discharges.

This practice is not a statement concerning only internal agency management, nor does it otherwise qualify for an exemption from the APA definition of "rule." On its face, this "[c]urrent Agency practice" is not restricted in its applicability to a specific entity. Under the terms of the practice as articulated by IEPA, the sensitive area designation would apply whenever a stream receiving a CSO discharge runs through "residential or public use areas." IEPA was not merely interpreting the 1994 CSO Control Policy and applying it to this particular set of facts. Sparks & Wiewel Construction Co. v. Martin, 250 Ill. App. 3d 955, 968, 620 N.E.2d 533, 542-43 (4th Dist. 1993).

The Board finds that this IEPA practice of designating sensitive areas is a statement of general applicability that implements policy affecting the rights of persons or entities outside the agency and therefore is a "rule" under the APA (5 ILCS 100/1-70 (2008)). It is undisputed that the IEPA practice was never subjected to the APA's rulemaking requirements of public notices, opportunity for public comment, and filing with the Secretary of State. 5 ILCS 100/5-35, 5-40, 5-65 (2008). The Board finds that as applied by IEPA here, the practice is an unpromulgated rule. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 15-16 (Apr. 1, 2004). Unless a rule is promulgated in conformity with the APA, "it is not valid or effective against any person or party and may not be invoked by an administrative agency for any purpose." Sparks, 250 Ill. App. 3d at 967, 620 N.E.2d at 542; 5 ILCS 100/5-10(c) (2008). Accordingly, IEPA's practice is invalid and cannot be invoked to impose the sensitive area designations in Special Condition 14(7) of Quincy's NPDES permit.

IEPA's "Current Practice" Also Misinterprets the 1994 Federal CSO Control Policy

Even if IEPA's current practice were not considered an unenforceable "rule," the practice incorrectly construes the term "sensitive area" as used in USEPA's 1994 CSO Control Policy. The rules governing the interpretation of regulatory language are the same as those applied in the construction of statutes. Granite City Div. of Nat'l Steel Co. v. PCB, 155 Ill. 2d 149, 162, 613 N.E.2d 719, 724 (1993); Diakonian Society v. City of Chicago Zoning Board of Appeals, 63 Ill. App. 3d 823, 826, 380 N.E.2d 843, 845-46 (1st Dist. 1978). The primary task in construing the

provision is to ascertain and give effect to the intent of its drafter. Vicencio v. Lincoln-Way Builders, Inc., 204 Ill. 2d 295, 301, 789 N.E.2d 290, 294 (2003). The best indication of the drafter's intent is the language itself, given its plain and ordinary meaning. Krohe v. City of Bloomington, 204 Ill. 2d 392, 395, 789 N.E.2d 1211, 1212 (2003). If the language is clear and unambiguous, then it must be applied without resort to further aids of construction. *Id*. If, however, the language is ambiguous, other sources may be reviewed to ascertain the drafter's intent. *Id*.

A term is considered ambiguous if more than one interpretation of it is reasonable. People v. Holloway, 177 Ill. 2d 1, 8, 682 N.E.2d 59, 63 (1997). If so, the ambiguous term must be given a construction that is reasonable and that will avoid absurd, unjust, or unreasonable results, which the drafter could not have intended. County Collector of DuPage County v. ATI Carriage House, Inc., 187 Ill. 2d 326, 332, 718 N.E.2d 164, 168 (1999). In doing so, the purpose of the provision being interpreted may be considered. Williams v. Staples, 208 Ill. 2d 480, 487, 804 N.E.2d 489, 493 (2004).

"Waters With Primary Contact Recreation". The 1994 CSO Control Policy 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 (emphasis added).

For primary contact recreation then, USEPA's definition of sensitive area refers only to "waters with primary contact recreation." In defining sensitive areas, the 1994 Policy does not mention "residential or public use areas." IEPA's August 2007 letter makes clear that IEPA's current practice is premised upon the "waters with primary contact recreation" language of the definition.

It is true that USEPA's "sensitive area" definition provides a *non-exhaustive* list of examples, having been prefaced by the word "include." People v. Perry, 224 Ill. 2d 312, 330-31, 864 N.E.2d 196, 208-09 (2007) (given its plain and ordinary meaning, "includes" introduces an illustrative list, not an exhaustive one). Even so, under the *ejusdem generis* doctrine of construction, the examples in a definition do limit the class of unstated items covered by the definition to others of a like kind. Therefore, unstated items that are not similar to the stated items do not come within the definition. City of East St. Louis v. East St. Louis Financial Advisory Authority, 188 Ill. 2d 474, 484-85, 722 N.E.2d 1129, 1134 (1999) ("The doctrine of *ejusdem generis* provides that when a statute lists several classes of persons or things but provides that the list is not exhaustive, the class of unarticulated persons or things will be interpreted as those 'others such like' the named persons or things.").

None of the "sensitive area" examples in the USEPA definition constitutes the mere possibility of that matter occurring. The NPDES permit issued by IEPA recognizes as much:

> Pursuant to Section II.C.3 of the federal CSO Control Policy of 1994, sensitive areas are any water likely to be impacted by a CSO discharge which meet one or more of the following criteria: (1) designated as an Outstanding National Resource Water; (2) found to contain shellfish beds; (3) found to contain threatened or endangered aquatic species or their habitat; (4) *used for* primary contact recreation; or, (5) within the protection area for a drinking water intake structure. AR at 380 (emphasis added to IEPA's paraphrasing of the item at issue in this appeal).

As Quincy observes, for example, "[t]he 1994 Policy states that sensitive areas are waters with threatened or endangered species and their habitat; it does not state that every water that could in the future become the home to threatened or endangered species is currently a sensitive area." Mot. at 16-17. Likewise, the definition in the 1994 Policy refers to waters "with" primary contact recreation, not waters "with *the potential for*" or "with *a high probability of*" such recreation.

The Board's regulations define "primary contact" as follows:

> any recreational or other water use in which there is prolonged and intimate contact with the water involving considerable risk of ingesting water in quantities sufficient to pose a significant health hazard, such as swimming and water skiing. 35 Ill. Adm. Code 301.355.

Primary contact recreation accordingly entails recreational use through which there is prolonged and intimate contact with the water, resulting in considerable risk of ingesting enough water to pose a significant health hazard. The Board finds 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.

IEPA misinterpreted the 1994 CSO Control Policy when IEPA stated that the Policy "lists recreational activities as primary contact in its definition of a sensitive area." AR at 278. USEPA does not simply list "recreational activities" as "primary contact." The Policy's definition of sensitive area refers to "waters with primary contact recreation." The Policy later gives swimming as an example of primary contact recreation. 59 Fed. Reg. at 18695. Not all forms of recreation, however, are primary contact. The Board's regulations define "secondary contact" as follows:

> any recreational or other water use in which contact with the water is either incidental or accidental and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, commercial and recreational boating and any limited contact incident to shoreline activity. 35 Ill. Adm. Code 301.380.

Under the Policy's definition, whether a CSO receiving water used for "recreational activities" is a sensitive area for that reason depends on the type of recreational activities. For example, though swimming is a form of primary contact recreation, fishing is considered a secondary contact form of recreation.

IEPA Has Misapplied Board Regulations and USEPA Guidance. Included in the record of this appeal (AR 1-4) are excerpts from a Board rulemaking decision, Amendments to Subtitle C: Water Pollution. Fecal Coliform and Seasonal Disinfection, R85-29 (June 30, 1988). Also included in the record (AR at 20) is a quotation from USEPA guidance on how use designations of waters may be established based on site-specific factors presented by CSOs, *Coordinating CSO Long-Term Planning with Water Quality Standards Reviews*, USEPA, EPA-833-R-01-002 at 16-17 (July 31, 2001). The inclusion of these documents indicates IEPA's reliance upon them in arriving at its current practice of designating sensitive areas. As explained below, that reliance is misplaced.

Section 302.209, the subject of the Board's R85-29 rulemaking, sets forth the "general use" water quality standard for fecal coliform. General use water quality standards must be met in waters of the State for which there is no specific use designation; all waters of the State are designated as general use waters unless otherwise specifically provided.[11] 35 Ill. Adm. Code 302.101(b), 302.201, 303.201. IEPA identified the receiving waters for CSO outfalls 002, 006, and 007 as general use waters. AR at 247. Whether the Section 302.209 fecal coliform standard or any other water quality standard applies to these receiving waters is not the issue before the Board today.

Section 302.209(a) reads as follows:

> a) During the months May through October, based on a minimum of five samples taken over not more than a 30 day period, fecal coliform (STORET number 31616) shall not exceed a geometric mean of 200 per 100 ml, nor shall more than 10% of the samples during any 30 day period exceed 400 per 100 ml in protected waters. Protected waters are defined as waters which, due to natural characteristics, aesthetic value or environmental significance are deserving of protection from pathogenic organisms. *Protected waters* will meet one or both of the following conditions:
>
> 1) presently support or have the physical characteristics to support primary contact;
>
> 2[)] *flow through or adjacent to parks or residential areas*. 35 Ill. Adm. Code 302.209(a) (emphasis added).

[11] The vast majority of Illinois streams are designated "general use" waters. Another use designation is "secondary contact and indigenous aquatic life waters." 35 Ill. Adm. Code 303.441.

The language of Section 302.209(a)(2) is similar to the language of IEPA's current practice for designating sensitive areas. However, as the Board explained in R85-29:

> Protected waters are not only those which "presently support or have the physical characteristics to support primary contact recreation" . . . , but also those which otherwise "flow through or adjacent to parks or residential areas" . . . . A protected water is thus more encompassing than the primary contact waters.
>
> The rationale for extending the protection afforded by a fecal coliform standard to streams which flow through or adjacent to parks or residential areas is succinctly expressed by the Agency:
>
> > Year-round relief [from disinfection] would not be allowed in streams that flow through residential neighborhoods and certain recreational areas. These streams may often invite public contact simply due to their accessible locations without regard to their suitability for primary contact recreation. Streams in such locations would be treated as if primary contact were *possible*. Fecal Coliform and Seasonal Disinfection, R85-29, slip op. at 16-17 (emphasis added); *see also* 35 Ill. Adm. Code 302.209(b) (exemption).

"Protected waters" under Section 302.209 may include waters with the *potential* for primary contact recreation. In defining the term "protected waters" some six years before USEPA issued the 1994 CSO Control Policy, the Board was setting a water quality standard to apply in waters designated for general use. "Designated uses" are uses specified for each water body or segment "whether or not they are being attained." 40 C.F.R. §131.3. In Illinois, water quality standards for the designated use of "general use":

> will protect the State's water for aquatic life (except as provided in Section 302.213), wildlife, agricultural use, secondary contact use and most industrial uses and ensure the aesthetic quality of the State's aquatic environment. Primary contact uses are protected for all General Use waters whose physical configuration permits such use. 35 Ill. Adm. Code 302.202.

The CSO Control Policy, in contrast, refers to "waters *with* primary contact recreation" (*i.e.*, where primary contact recreation is an actual use). The Policy does not define sensitive areas as "waters *designated for* primary contact recreation," though USEPA clearly could have used the word "designated" in defining sensitive areas (and did so twice, once for "designated Outstanding National Resource Waters" and again for "designated protection areas" of public drinking water intakes). A water body adjacent to a residential area, for example, may be both designated for general use and "protected" under Section 302.209, but still have no primary contact recreation.

The record also includes a passage from USEPA guidance, highlighted for emphasis. To provide context, the Board sets forth the entire paragraph containing the emphasized language:

> D. How do states protect recreational uses, particularly in urban areas?
>
> States generally try to protect and maintain the recreational uses of their waters wherever possible, consistent with the "swimmable" goal of the CWA. Some states adopt primary contact recreation uses (e.g., swimming and some types of boating, such as kayaking) for all state waters. Others evaluate site-specific factors such as actual use, existing water quality, potential for water quality improvement, access, recreational facilities, location, safety considerations, and physical attributes of the water body (depth, width, substrate, safety, etc.). Physical attributes of the water body may be considered, but no single physical factor can be the only basis for deciding that primary contact recreation is not appropriate. Swimming may occur unless access is precluded, for example by fences or locked gates, particularly in areas where children may not have other swimming opportunities. In addition, children will splash and swim in shallow waters that may otherwise be considered too shallow for full body immersion by adults. AR at 20 (emphasis not in original USEPA guidance document, entitled "*Coordinating CSO Long-Term Planning with Water Quality Standards Reviews*").

The Board does not question that states may take these approaches when designating the uses of waters to protect recreational uses. Further, the Board acknowledges that a primary objective of the LTCP is to attain designated uses and that designated uses may be revised to account for CSO impacts. 59 Fed. Reg. at 18694-95. Here, however, IEPA was determining whether the CSO receiving waters should be considered sensitive areas, not proposing to establish or amend their designated uses.[12] Further, just because a water's use designation includes primary contact recreation does not mean that the water is in fact used for primary contact recreation.

Board Ruling on IEPA's Interpretation of "Sensitive Areas"

The Board finds no ambiguity in the phrase "waters with primary contact recreation" as used in the 1994 Policy's definition of "sensitive areas." Such waters are used for primary contact recreation. By automatically designating any CSO receiving water as a sensitive area because there is a "residential or public use area downstream" of the CSO discharge, IEPA expands the federal definition of sensitive areas beyond what its plain language can bear. With the considerable extra expenses that a CSO discharger may face due to a sensitive area designation, USEPA undoubtedly chose its definitional words carefully.

[12] *Cf.* Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304, R08-9 (pending IEPA rulemaking proposal to amend certain designated uses based on use attainability).

Even if there were any ambiguity in the language, IEPA's construction of "waters with primary contact recreation" is inconsistent with the purpose of designating receiving waters as sensitive areas. The Policy calls for "a permittee's long-term CSO control plan to give the highest priority to controlling overflows to sensitive areas." 59 Fed. Reg. at 18692. Though all CSO dischargers are subject to compliance with water quality standards, the sensitive area designation under the Policy imposes additional obligations on the permit holder. When a receiving water is designated a sensitive area, new or significantly increased overflows to the area are prohibited. *Id*. Further, existing overflows to a sensitive area must be relocated, eliminated, or treated. Wherever "physically possible and economically achievable," CSOs to sensitive areas are to be *eliminated or relocated*, except where either would "provide less environmental protection than additional treatment." *Id*. Where elimination or relocation is not physically possible and economically achievable, or would provide less protection than additional treatment, treatment is to be provided as needed to meet water quality standards "for full protection of existing and designated uses." *Id*. Where elimination or relocation is proven not to be physically possible or economically achievable at the time, permittees are to conduct in each subsequent permit term a "reassessment based on new or improved techniques to eliminate or relocate, or on changed circumstances that influence economic achievability." *Id*. Additionally, for implementing CSO controls, construction phasing is to consider "[*e*]*liminating* overflows that discharge to sensitive areas as the *highest priority*." *Id*. at 18694 (emphasis added).

Absent the sensitive area designations, however, the permittee may be able to look simply at system-wide objectives in arriving at CSO controls. 59 Fed. Reg. at 18692-93. For example, under the "presumption approach," an LTCP is generally presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA if (1) the CSS has no more than an average of four (and up to an additional two) untreated overflow events per year or (2) the program eliminates or captures for treatment no less than 85% by volume of the combined sewage collected in the CSS during precipitation events on a system-wide annual average basis. *Id*. at 18692.

IEPA has not disputed CDM's markedly different cost estimates for addressing the CSOs depending upon whether or not the three outfalls at issue are deemed to discharge to sensitive areas. In the Policy, USEPA repeatedly acknowledged the limited resources of municipalities and intended that those resources be allocated logically to the areas prioritized as being the most in need. 59 Fed. Reg. at 18688, 18690, 18694. Quincy convincingly argues that IEPA's overbroad interpretation, if allowed, might render almost every CSO receiving water a sensitive area, which would "eviscerate[] the 1994 Policy's directive to give priority to protecting truly sensitive areas," particularly in light of USEPA's recognition that "municipalities have limited funds to address CSO issues." Mot. at 21. The Board finds that this would be an unjust and unreasonable result, which USEPA could not have intended.

Board Ruling on Motion for Summary Judgment

Quincy's surveys of the receiving waters for CSOs 002, 006, and 007, conducted in August and September 2007, revealed no evidence of past or present primary contact recreation (*e.g.*, swimming, bathing beaches, water skiing). Further, physical obstacles (*e.g.*, steep banks,

dense vegetation) prevent or discourage accessing the CSO 002 and 007 receiving waters, while physical features (*e.g.*, soft sediments, concrete banks, limited visibility) and the risk of a strong current appear to make the CSO 006 receiving water unattractive and potentially hazardous for swimmers. IEPA's photographs do not contradict this evidence. CDM did observe fishing and motor boating in the CSO 006 receiving water, but these are forms of secondary not primary contact recreation. CDM's survey results are consistent with its initial report that no primary contact recreation has been observed in this water body. The Quincy Park District does not identify any of the parks along the CSO 006 receiving water as suitable for swimming, and the water body is a "no wake" zone, which should preclude water skiing. Nowhere in the record is there evidence that any of the three receiving waters is used for primary contact recreation.

Construing the record strictly against Quincy as the movant and liberally in favor of IEPA as the opponent of the motion, the Board finds that there are no genuine issues of material fact. IEPA makes a single argument against summary judgment, claiming an immaterial fact as a disputed issue of material fact. The evidence in the record before IEPA at the time of NPDES permit issuance established that the receiving waters for CSOs 002, 006, and 007 are not used for primary contact recreation.

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.

As there is no genuine issue of material fact and Quincy is entitled to judgment as a matter of law, the Board grants Quincy's motion for summary judgment. Consistent with Quincy's request, the Board strikes the sensitive area designations for the receiving waters of CSO outfalls 002, 006, and 007 from Special Condition 14(7) of the permit, along with the attendant obligations specified there. On remand, IEPA must amend the special condition to provide that none of these outfalls discharge to sensitive areas.[13]

[13] 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.

Quincy further asks that it be allowed to identify and address any sensitive areas as part of its LTCP in accordance with the 1994 CSO Control Policy. Pet. at 5; Mot. at 26-27. Special Condition 14(10)(b) required the submittal of Quincy's LTCP by August 1, 2009, *i.e.*, 16 months from the IEPA-specified April 1, 2008 effective date of the permit. In the permit to be reissued on remand, Special Condition 14(10)(b) must be amended to give Quincy 16 months to submit the LTCP.

CONCLUSION

The Board's ruling today is narrow. For example, the Board is not finding that the receiving waters for CSOs 002, 006, and 007 should not be designated as "general use" waters or otherwise making any determination on use attainability. The Board articulates no "formula" for surveying CSO receiving waters. Nor is the Board finding that the receiving waters for CSOs 002, 006, and 007 cannot ultimately be, based on the final LTCP, designated as "sensitive areas" for having "primary contact recreation" or for other reasons consistent with USEPA's 1994 CSO Control Policy. 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."

There are no genuine issues of material fact and Quincy is entitled to judgment as a matter of law. The Board therefore grants Quincy's motion for summary judgment. 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, are not required to further the purposes of the Act and are accordingly stricken. The Board remands the matter to IEPA with instructions.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants Quincy's motion for summary judgment.

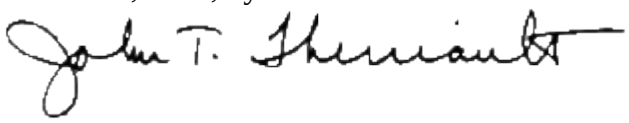
2. The Board strikes the following from Special Condition 14(7) of NPDES permit No. IL0030503: "The IEPA has determined that outfall(s) 002, 006 and 007 discharge to sensitive area(s). Within three (3) months of the effective date of this Permit, the Permittee shall submit two (2) copies of either a schedule to relocate, control, or treat discharges from these outfalls. If none of these options are possible, the Permittee shall submit adequate justification as to why these options are not possible. Such justification shall be in accordance with Section II.C.3 of the National CSO Control Policy."

3. The Board remands this matter to IEPA to reissue the NPDES permit to Quincy in accordance with this opinion.

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 opinion and order on March 4, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board