BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MILL CREEK WATER RECLAMATION DISTRICT,	)	
Petitioner,	)	
v.	)	PCB 10-74
	)	(Third-Party Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and GRAND PRAIRIE SANITARY DISTRICT,	)	
Respondents.	)	

APPEARANCE

The undersigned hereby enters the Appearance of the Grand Prairie Sanitary District as Respondent and Holland & Knight LLP as their attorneys herein.

GRAND PRAIRIE SANITARY DISTRICT

By _____
One of Its Attorneys

April 27, 2010

Victor P. Filippini, Jr.
Marlo M. Del Percio
Holland & Knight LLP
131 South Dearborn Street
30th Floor
Chicago, Illinois 60603
(312) 263-3600

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MILL CREEK WATER RECLAMATION DISTRICT, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and GRAND PRAIRIE SANITARY DISTRICT, Respondents.	)	PCB 10-74 (Third-Party Permit Appeal)

NOTICE OF FILING

TO: SEE ATTACHED CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on April 27, 2010, I have filed with the office of the Clerk of the Illinois Pollution Control Board, 100 West Randolph, Suite 11-500, Chicago, IL 60601 an original and nine copies of: 1) the Appearance of the Grand Prairie Sanitary District as Respondent and Holland & Knight LLP as its attorneys; and 2) a Motion To Dismiss Petition For Review of IEPA Permit Decision, copies of which are herewith served upon you.

GRAND PRAIRIE SANITARY DISTRICT

By _____
One of Its Attorneys

April 27, 2010

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30th Floor
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(312) 263-3600

CERTIFICATE OF SERVICE

I, Marlo M. Del Percio, an attorney, certify that I caused to be served the foregoing **Notice of Filing** and **Appearance** of the Grand Prairie Sanitary District as Respondent and Holland & Knight LLP as its attorneys and **Motion To Dismiss Petition For Review of IEPA Permit Decision** upon:

Bradley P. Halloran
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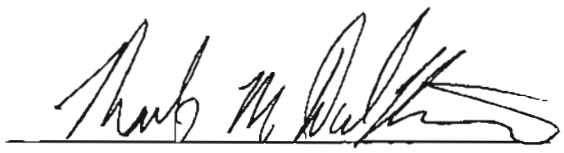
by having the same deposited in U.S. mail postage prepaid at 131 S. Dearborn Street, Chicago, Illinois before 5:00 p.m. on April 27, 2010



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MILL CREEK WATER RECLAMATION DISTRICT,	)	
Petitioner,	)	
v.	)	PCB 10-74
	)	(Third-Party Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY; and GRAND PRAIRIE SANITARY DISTRICT,	)	
Respondents.	)	

MOTION TO DISMISS PETITION FOR REVIEW OF IEPA PERMIT DECISION

NOW COMES Respondent Grand Prairie Sanitary District, pursuant to the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* and 35 Ill. Admin. Code 101.506, and hereby moves to dismiss Petitioner's Petition for Review of IEPA Permit Decision.

In support of this Motion, Respondent states as follows:

I. Background

In January 2009, Grand Prairie Sanitary District (the "***District***") submitted an application to the Chicago Metropolitan Agency for Planning ("***CMAP***") in Support of CMAP Water Quality Review #09-WQ-005 (the "***Application***") to establish a 100% land application or "spray irrigation" wastewater system (the "***Sewerage System***") to provide sanitary sewerage service within its corporate boundaries (the "***Subject Property***"). The Subject Property effectively coincides with a mixed-use planned unit development of approximately 1,280 unincorporated acres known as the "Settlements of LaFox" that has been preliminarily approved and zoned by Kane County (the "***Development***"). Petition, ¶¶ 2, 8.

While the District's territory is all located within the Mill Creek Facilities Planning Area (the "***Mill Creek FPA***") pursuant to NIPC Water Quality Review #06-WQ-168, under applicable law, the District is the only governmental body with legal authority to provide sanitary sewerage service within the Subject Property.

CMAP staff evaluated the application under "Criteria for Facility Amendments to the Areawide Water Quality Management Plan for Northeastern Illinois" (the "***Criteria***"), and reported that the Application was consistent with water quality and engineering Criteria, but erroneously found that the Application was inconsistent with the criteria regarding the designated management agency ("***DMA***") and adjoining units of local government. *See* Petition, Ex. E. Ultimately, the CMAP Wastewater Committee declined to follow the Staff's recommendation of nonsupport and forwarded the application to the Illinois Environmental Protection Agency (the "***IEPA***") with no recommendation. Petition, ¶10.

On February 19, 2010, the IEPA issued permits authorizing the District to develop the Sewerage System (the "***Permits***"). Specifically, the permits allow the District to construct, own, and operate a wastewater treatment facility, spray irrigation system, and a lift station to serve the Subject Property. Petition, ¶16.

Petitioner Mill Creek Water Reclamation District ("***MCWRD***") is a neighboring unit of local government and is also located within the Mill Creek FPA. MCWRD had considered, but declined, to annex the Development after it was unable to reach an agreement with the landowners within the Development (the "***Landowners***"). Petition, Ex. G at 2. Nevertheless, MCWRD has now filed a petition to appeal the issuance of the Permits (the "***Petition***") seemingly as a negotiation tactic to encourage the Landowners to disconnect from the District and annex to MCWRD. *See* Petition, ¶ 7. Despite its efforts to thwart the governmental purpose

of the District, MCWRD has no legal authority either to challenge the IEPA's issuance of the Permits or to serve the Development or the Subject Property. Furthermore, the IEPA's issuance of the Permits to the District comports with both Federal and State law.

II. MCWRD Does Not Have Standing To Appeal The IEPA's Issuance Of Permits To The District.

The law in Illinois does not authorize MCWRD to appeal the issuance of the Permits. The General Assembly has explicitly established the entities that are authorized to appeal the issuance of permits by the IEPA. The Illinois Environmental Protection Act (the "***Act***") provides, "If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the *applicant* may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a)(1) (emphasis added). Limiting such appeals to an applicant (which MCWRD is not) is not inadvertent. As proof, the language in Section 40(a)(1) should be contrasted with Section 40(b): "if the Agency grants a RCRA permit for a hazardous waste disposal site, *a third party, other than the permit applicant or Agency*, may within 35 days after the date on which the Agency issued its decision, petition the Board for a hearing to contest the issuance of the permit." 415 ILCS 5/40(b) (emphasis added). Only the applicant can appeal the issuance of a general permit issued with conditions under Section 39. The Permits issued to the District do not fall within any of the categories in which the Act authorizes a third-party appeal.

The distinctions in the language regarding appeals may not be overlooked since in Illinois, "Statutes should be construed, if possible, so that no portion is rendered superfluous or meaningless." *Illinois Department of Revenue v. Illinois Civil Service Commission*, 357 Ill.App.3d 352, 366 (1st Dist. 2005). Moreover, Illinois courts strictly construe statutes with regard to parties that may appeal permit decisions to the Illinois Pollution Control Board (the

"***IPCB***"). See *McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency*, 154 Ill.App.3d 89, 94-95 (2nd Dist. 1987), *appeal denied McHenry County Landfill, Inc. v. Illinois Pollution Control Bd.*, 115 Ill.2d 543 (1987)(contrasting language in the Act that provides for third party right to appeal as opposed to applicant's right to appeal, and finding that the IPCB improperly permitted objectors to become parties to the proceeding before it).

Given the clear statutory language governing appeals before the IPCB, MCWRD's appeal may not be heard. "An administrative agency possesses no inherent or common law powers, and any authority that the agency claims must find its source within the provisions of the statute by which the agency was created." *Illinois Department of Revenue v. Illinois Civil Service Commission*, 357 Ill.App.3d at 363. "To give validity to its findings and orders, an administrative agency must comply with the procedures and rules promulgated by the legislature." *Ragano v. Civil Service Commission*, 80 Ill.App.3d 523, 527 (1st Dist. 1980). "Any action outside the authority granted by its enabling statute is void." *Pickering v. Illinois Human Rights Commission*, 146 Ill.App.3d 340, 352 (2nd Dist. 1986), *see also Homefinders, Inc. V. City of Evanston*, 65 Ill.2d 115, 129 (1976). MCWRD's appeal is outside the scope of appeals authorized under the Act, and case law in Illinois confirms that such an appeal may not be heard.

The IPCB should dismiss MCWRD's unlawful appeal. Under Illinois law, "When one improperly seeks to initiate an action before an administrative board, such as by requesting review of a decision which the board has no authority to review, the board at least has jurisdiction to enter a final order dismissing the action." *Citizens Against the Randolph Landfill, (CARL) v. Pollution Control Bd.*, 178 Ill.App.3d 686, 692-3 (4th Dist. 1988). Furthermore, courts have found that "[d]ue process does not prohibit the exclusion of third parties from the pollution control permit application procedure." *Id.* at 693; *see also E & E Hauling, Inc. v. Pollution*

Control Board, 107 Ill.2d 33 (1985). As a result, MCWRD's Petition for appeal should be dismissed for lack of standing.

III. The IEPA's Issuance Of Permits To The District Comports With Federal And State Law.

Not only does MCWRD lack standing to appeal the issuance of the Permits to the District, but MCWRD's appeal is in any event meritless. The District is the only unit of local government that may legally provide sanitary sewer service to the Subject Property, and the IEPA's issuance of the Permits to the District meets all Federal and State requirements.

A. The District Is the Only Entity With Legal Authority To Provide Service To The Subject Property.

Because the Subject Property is located within the corporate limits of the District, the District and the District alone has jurisdiction to decide whether and how sanitary sewerage service is provided to the Subject Property.

Under Illinois law, it is axiomatic that two governmental units "cannot have jurisdiction and control, at one time, of the same territory for the same purpose." *People ex rel. Greening v. Bartholf*, 388 Ill. 445, 463 (1944). Where sanitary districts are concerned, the General Assembly has made clear under the Sanitary District Act of 1936, 70 ILCS 2805/1 *et seq.* (the "***Sanitary District Act***") that:

> The board of trustees [of a sanitary district] has full power to pass all necessary ordinances, rules and regulations for the proper management and conduct of the business of the board and the sanitary district, *and for carrying into effect the collection and disposal of sewage and the purposes for which the sanitary district was formed.*

70 ILCS 2805/4 (emphasis added).

In 2002, the District was established in accordance with Sanitary District Act. Petition, ¶2. Since that time, the District has been the only validly existing sanitary district with

jurisdiction over the Subject Property. Moreover, under Illinois law, a sanitary district cannot be dissolved except in the manner provided by statute. *See Cleary v. Hoobler,* 207 Ill. 97, 102-03 (1904). With respect to the District, such dissolution could only occur by referendum of the voters of the District. 70 ILCS 2805/33; *see People ex rel. McCarthy v. Firek,* 5 Ill. 2d 317, 326 (1955). No such dissolution referendum has been alleged or has occurred.

Furthermore, Illinois courts have ruled specifically that decisions over the provision of sewerage services are determined by governmental boundaries. In *Village of Frankfort v. Illinois Environmental Protection Agency,* 366 Ill. App. 3d 649 (1st Dist. 2006), the court rejected the Village of Frankfort's effort to provide sewerage services to territory located within the corporate limits of the Metropolitan Water Reclamation District. Thus, not only was it lawful for the IEPA to issue the Permits to the District, but the District is the only unit of local government that may lawfully provide sanitary sewer service to the Subject Property.

1. MCWRD's Permits Do Not Authorize MCWRD To Serve Territory Within The District.

MCWRD asserts in the Petition that MCWRD "has already been issued permits to expand its facilities to serve the [Subject Property] . . . Under these circumstances Federal Law prohibits the subsequent issuance of permits to [the District]." Petition, ¶ 19. A review of the permits issued to Mill Creek (the "***MCWRD Permits***") reveals the gross misrepresentations in MCWRD's argument.

First, MCWRD's Permit No. 2003-GO-5061-5 for certain water pollution control facilities expired on October 31, 2008. *See* Petition, Ex. A. As a result any purported authority to serve the Development or the Subject Property associated with such permit has lapsed as well.

Moreover, the MCWRD Permits were issued in 2007 and 2008—well after the establishment of the District. As such, the IEPA expressly provided that the MCWRD Permits

were subject to the condition that any wastewater facilities constructed or operated under the Permits were to serve "the annexed Settlements of LaFox development." *See* Petition, Exhibits A and B. No such annexation has occurred.

Furthermore, the MCWRD Permits contain the condition that the issuance of the Permits "does not release the permitee from compliance with other applicable statutes and regulations of the United States, of the State of Illinois, or with applicable local laws, ordinances and regulations." *Id.* The MCWRD Permits recognize that MCWRD only has the authority to serve the Subject Property if such Subject Property is disconnected from the District and annexed to MCWRD. As discussed more fully above, Illinois law is clear that the District is the only governmental unit that may lawfully provide service to the Subject Property. As a result, the MCWRD Permits are facially ineffective because express conditions thereof remain unsatisfied. As such, the MCWRD Permits have no bearing in the determination of whether the District's Permits were lawfully issued.

As a result, while the MCWRD might claim that it had planned for the Subject Property to be served by its facilities, at no time was the Subject Property in the MCWRD's corporate boundaries, and therefore at no time did MCWRD have permits to serve the Subject Property. Although MCWRD obviously knew that these permit conditions were not satisfied, it tried to pull the wool over the IPCB's eyes with its disingenuous argument that the MCWRD Permits were meaningful. In fact, not only is any assertion that the Subject Property should be served by MCWRD wishful thinking, it is legally wrong.

2. MCWRD's Status As A DMA Within The Mill Creek FPA Does Not Give MCWRD Authority To Serve Territory Outside Its Jurisdictional Boundaries.

Although MCWRD has suggested that the 2006 expansion of the Mill Creek FPA gives MCWRD some special right to serve the Subject Property, this is based on fundamental misunderstandings of the facilities planning process under the Clean Water Act (the "***CWA***"). *See* Petition, ¶¶ 18-19. The fact that the Subject Property is located within the Mill Creek FPA does not relate to the issue of authority to provide sanitary sewerage service to the Subject Property.

First, a FPA is not a device for apportioning responsibility for providing sanitary sewerage services. Rather, it is a planning tool:

> Facilities planning should focus upon the geographic area to be served by the waste treatment system(s) of which the proposed treatment works will be an integral part. The facilities plan should include the area necessary to prepare an environmental assessment and to assure that the most cost-effective means of achieving the established water quality goals can be implemented.

40 CFR 35.917-2(a).

As a planning tool, the creation or amendment of a FPA does not give any specific authority to serve the area. In fact, the selection of DMAs in a FPA is not determined by the FPA *per se,* but by whether "a public or private entity ... has the responsibility of planning, treating, or transporting wastewater and its residual solids." 35 Ill. Admin. Code 399.20. That responsibility is determined not by the CWA, but by State law: "While the federal clean water program provides for the use of various state and local governments in pursuing environmental goals, it does not constitute a grant of substantive powers to political subdivisions of another sovereign. ... *The Clean Water Act does not authorize petitioners to do what they cannot do under state law." Northern Colorado Water Conserv. Dist. v. Board of County Comm'rs of Grand County,* 482 F. Supp. at 1118 (D. Colo. 1980)(emphasis added).[1]

[1] Furthermore, the IEPA has acknowledged that FPAs were created "largely to satisfy the requirements of the federal Construction Grants Program under Title II of the CWA.... Neither the federal program nor any similar state

In its Petition, MCWRD creatively tries to muddle the distinction between the "Mill Creek Facilities Planning Area," which was established per federal law as a planning tool and the "Mill Creek Water Reclamation District," which, like Grand Prairie Sanitary District, is a unit of local government within the Mill Creek FPA and is charged with providing sanitary sewer service only within its jurisdictional boundaries, not to the entire FPA.

Furthermore, the Illinois Appellate Court for the Second District (in which Kane County is located) has recently reached the same conclusion regarding a DMA's role in an FPA in the case of *Northern Moraine Wastewater Reclamation Dist. v. Illinois Commerce Comm'n*, 392 Ill. App. 3d 542 (2d Dist. 2009). In that case, the Court expressly rejected an argument by a DMA that it had a right to serve a property in a FPA by virtue of its DMA status. Specifically, the Court ruled: "Nothing in the ... regulation grants a DMA a federal monopoly in providing services." *Id.* at 559.

The Court in *Northern Moraine* also noted that the evidence indicated that "the 'decided advantages' of a spray irrigation system were that there would be 'no requirement to amend that applicable Area-wide Water Quality Management (208) Plan' and '[n]o requirement for a national pollution discharge elimination system permit.'" *Id.* at 552. Further, with respect to DMA status, the Court ruled that, because spray irrigation systems are not point source systems, the CWA regulations do "not require [the spray irrigation system operator] to become a DMA for the FPA" in order to be authorized to provide sanitary sewerage service within that FPA. *Id.* at 565.

In sum, (i) the District meets all the qualifications to become a DMA in the Mill Creek FPA, (ii) the District can operate the Sewerage System for the Subject Property within the Mill

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program exists today....The need for FPAs and the FPA process has been questioned for nearly 10 years." *See* IEPA website [http://www.epa.state.il.us/water/watershed/facility-planning/index.html].

Creek FPA without becoming a DMA, and (iii) MCWRD's status as a DMA within the Mill Creek FPA does not give it any special authority to serve the Subject Property.[2]

B. The Process Through Which The Permits Were Issued To The District Comports With State Law.

Although MCWRD did not undergo a siting process pursuant to 415 ILCS 5/39(c) when it obtained the MCWRD Permits in its attempt to serve the Subject Property, MCWRD now asserts, albeit incorrectly, that the District is required to undergo such a process. *See* Petition, ¶¶ 20-23. In its Petition, MCWRD mischaracterizes the District's establishment of "sewage works" as a "pollution control facility," and as a result attempts to apply inapplicable law regarding siting to the District's permitting process.

The Illinois Environmental Protection Act defines "sewage works" as "individually or collectively those constructions or devices used for collecting, pumping, treating, and disposing of sewage, industrial waste or other wastes or for the recovery of by-products from such wastes. 415 ILCS 5/3.455. A "pollution control facility" is defined as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator. This includes sewers, sewage treatment plants, and any other facilities owned or operated by sanitary districts organized under the Metropolitan Water Reclamation District Act." 415 ILCS 5/3.330.[3] Furthermore, the General Assembly expressly excludes "Solid or dissolved material in domestic sewage" from the definition of "waste." 415 ILCS 5/3.53. Thus, by definition, the District was establishing sewage works rather than a pollution control facility.

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[2] The District is aware that CMAP and the IEPA have occasionally established "sub-FPAs" in order to distinguish service areas of different DMAs within a FPA. Although neither the CWA, the Federal CWA regulations, nor the laws and regulations in Illinois countenance "sub-FPAs," the District has no objection if the Subject Property designated as a sub-FPA with the District as the DMA for such "sub-FPA." Of course, this designation is not necessary, but it may be convenient.

[3] The District is not organized under the Metropolitan Water Reclamation District ("***MWRD***") Act. Moreover, even the MWRD's sewage facilities are expressly exempt from local siting approvals under 415 ILCS 5/39(c).

Further, Illinois courts have established that the IEPA is the appropriate body to determine which projects constitute a "pollution control facility" and require siting approval under the Act. In *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Il.App.3d 963 (2nd Dist 2003), the City of Waukegan challenged the IEPA's decision to allow a sanitary district to construct a Biosolids Reuse Project without requiring the sanitary district to go through the siting procedures outlined in Section 39(c) of the Act. The court found that "it is clear that the [IEPA] acted within its jurisdiction when determining that local siting approval was not required in order for the District to obtain its necessary permits." *Id.* at 975. The court continued, "We believe the Agency's expertise is a necessary part of determining whether a facility constitutes a 'new pollution control facility.' There is no allegation in this case that the [IEPA] failed to make the necessary determinations under section 39(c). Rather, the City simply disagrees with the [IEPA]'s decision that local siting approval is not required." *Id.* at 976. Although the *City of Waukegan* case involved biosolids (which arguable fall within the definition of "waste" and therefore could be a "new pollution control facility"), the Court found that the IEPA acted properly by *not* requiring compliance with the local siting approval process. Thus, in this case where only sewage works are involved, the IEPA certainly was not only the appropriate body to determine whether the District was required to go through the local siting approval process prior to the issuance of its Permits, but the IEPA correctly determined that no such local siting approval process was necessary or proper under the Illinois Environmental Protection Act.

C. The IEPA's Rules Do Not Prohibit The Issuance Of Permits To The District.

Finally, MCWRD argues that the issuance of the Permits to the District violates IEPA rules that identify when the IEPA may recognize exceptions to the boundaries of a FPA. *See* Petition, ¶ 24-25. MCWRD cites to IEPA regulations, which provide, "For purposes of issuing

permits, other than NPDES permits, the Agency may recognize exceptions to the boundaries of facility planning areas without revising the approved WQM Plan in the following circumstances . . ." 35 Ill. Admin. Code 351.502. It is unclear why MCWRD is applying these criteria to the present circumstances. The District's Permits only authorize facilities located entirely within the FPA, which does not necessitate the IEPA to recognize an exception to the boundaries of a FPA. Further, any WQM Plan issues have been addressed through the permitting process. Thus, MCWRD's attempts to apply the Section 351.502 criteria are inexplicable under the circumstances and should be disregarded.

IV. Conclusion

MCWRD's efforts to appeal the issuance of the Permits to the District, despite its lack of standing or any legal basis to do so, appears to be nothing more than an attempt to delay the District from proceeding with its proper statutory activities and to coerce the developers of the Settlements of LaFox development to disconnect from the District and annex to MCWRD. The IPCB is not an appropriate forum for such negotiation tactics, and MCWRD's Petition is a waste of the limited administrative resources of the District, the IPCB, and the MCWRD itself. Certainly MCWRD can find better ways to use its funds collected through its constituents' sewer user fees than filing frivolous petitions before the IPCB.

MCWRD's Petition for appeal should be dismissed with prejudice.

Respectfully submitted,

GRAND PRAIRIE SANITARY DISTRICT

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