BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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| MILL CREEK WATER RECLAMATION DISTRICT | ) | |
| Petitioner, | ) | |
| v. | ) | PCB No. 10-74 (Third-Party Permit Appeal) |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and GRAND PRAIRIE SANITARY DISTRICT, | ) | |
| Respondents. | ) | |

**NOTICE OF FILING**

TO: Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

Victor P. Filippini, Jr.
Holland & Knight LLC
131 South Dearborn Street30th Floor
Chicago, Illinois 60603

Nathan W. Lamb
Locke Lord Bissell & Liddell
111 South Wacker Drive
Chicago, Illinois 60606

Donald J. Manikas
Walker Wilcox Matousek, LLP
225 W. Washington St, Suite 2400
Chicago, Illinois 60606

PLEASE TAKE NOTICE that on April 27, 2010, I filed with the Clerk of the Illinois Pollution Control Board, Respondent's, Illinois Environmental Protection Agency, Motion to Dismiss Petition for Review, a copy of which is attached and served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Gerald Karr

Gerald T. Karr
Senior Assistant Attorney General
Environmental Bureau
69 West Washington Street
Suite 1800
Chicago, Illinois 60602
(312) 814-3369

DATED: April 27, 2010

**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

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**ILLINOIS ENVIRONMENTAL PROTETION AGENCY'S MOTION TO DISMISS PETITION FOR REVIEW**

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Illinois Pollution Control Board ("Board") Procedural Rule 101.506, 35 Ill. Adm. Code 101.506, and hereby moves the Board to dismiss Petitioner's, MILL CREEK WATER RECLAMATION DISTRICT ("MCWRD"), Petition for Review. In support of its Motion to Dismiss, Illinois EPA states as follows:

## I

## INTRODUCTION

On February 19, 2010, the Illinois EPA issued two permits authorizing the Grand Prairie Sanitary District (the "District") to construct, own, and operate a wastewater treatment facility, spray irrigation system, and a lift station to provide sanitary sewerage service within its corporate boundaries.

On or about March 25, 2010, MCWRD filed a Petition for Review ("Petition")

seeking review of the decision by Illinois EPA to issue the two construction permits to the District. This Petition was received by Illinois EPA on or about March 29, 2010.

MCWRD's Petition raises three grounds for the relief it seeks. First, MCWRD requests that the permits be set aside on the grounds that issuance violates the Clean Water Act's prohibition against multiple treatment permits within the same FPA. The second ground for MCWRD's appeal is its allegation that the Illinois EPA violated the Illinois Environmental Protection Act ("Act") by failing to hold a public hearing before granting the permit. Finally, MCWRD has alleged that issuing the permit violated Illinois EPA guidelines setting forth requirements for conflict resolution in revising water quality management plans.

MCWRD has requested that the permits issued to the District be set aside and that any application for permits to the District should be denied on the basis that issuance is contrary to State and Federal law. Illinois EPA respectfully requests that the Board enter an order denying MCWRD's Petition.

## II

## ARGUMENT

### A. THE BOARD LACKS JURISDICTION TO HEAR THE APPEAL

The Board lacks jurisdiction to reverse the issuance of a permit by the Illinois EPA to the District. Where the tribunal has no jurisdiction an appeal can confer no jurisdiction on the reviewing court. Citizens Utilities Co. of Illinois v. Illinois Pollution Control Board, 265 Ill.App.3d 773, 777, 639 N.E.2d 1306 (3rd Dist. 1994). The Board's principal function is to adopt regulations defining the requirements of the permit system. Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978).

The Illinois EPA's role is to determine whether specific applicants are entitled to permits. Id. If the Board were to become the overseer of the Illinois EPA's decision making process through the evaluation of challenges to permits, it would become the permit granting authority, a function not delegated to the Board by the Act. Id. To confer jurisdiction on the Board in this instance would improperly usurp a power from the Illinois EPA in a manner that is contrary to the Act.

The one exception is when a permit has been denied. Id. Specific procedural requisites are established for Board review of a permit denial. Citizens Utilities Co. of Illinois, 265 Ill.App.3d at 780. There are no comparable statutory provisions for Board review on either substantive or technical grounds of the Agency's grant of a permit, thus indicating a legislative intent not to provide for such a proceeding. Id.

The relief requested by MCWRD from the Board is exactly the type of relief the Board is without power to give. Further, the scenario in this case does not fall within the single exception that grants the Board review of an Illinois EPA permit decision because there was no denial of a permit. Since this case involves the grant of a permit by the Illinois EPA, the Board is without power to reverse the Illinois EPA's decision to grant the permit.

## B. MCWRD IS WITHOUT STANDING TO CHALLENGE THE ISSUANCE OF THE COMPLAINT

MCWRD, as a third-party appellant, is without standing to challenge the permit issued to the District. Generally, third party standing to attack issued permits and permit conditions is well settled: Third party challenges to permits are not allowed. Koers v. Illinois EPA, PCB 88-163 (October 20, 1988)(citing Landfill, Inc. v. Pollution Control Bd., 74 Ill.2d 541, 557, 387 N.E.2d 258 (Ill. 1978)). Some exceptions have been made

by the legislature, but the Board does not have general authority to allow third party challenges without explicit statutory authority. Riverdale Recycling, Inc. v. Illinois Environmental Protection Agency, PCB 00-228 (August 10, 2000)(citing Citizens Utilities Co. of Illinois, 265 Ill.App.3d 773, 775, 639 N.E.2d 1306 (3rd Dist. 1994). There is no explicit statutory authority granting a third party to attack a permit granting the right to construct and operate Wastewater Treatment Facilities. Since there is no affirmative grant, the Board is without authority to allow the challenge.

In further support of the case law cited above, the General Assembly has provided which entities are authorized to appeal the issuance of permits by the Illinois EPA. 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) (2008). 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.

Given the clear statutory language governing appeals before the Board, 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 Board should deny MCWRD's Petition for Review.

## C. ILLINOIS EPA'S PERMITS COMPLY WITH ALL RELEVANT LAWS

In the event the Board finds that the MCWRD has standing to pursue this Petition, the Illinois EPA asserts that its permits were properly issued and comply with all appropriate laws and MCWRD's Petition should be denied.

### 1. Illinois EPA's Permits Did Not Violate the Clean Water Act

MCWRD asserts in the Petition that MCWRD has the permits to serve the property located within the District's corporate boundaries and Federal Law prohibits the subsequent issuance of permits to the District to construct the treatment facilities that are the subject of the Illinois EPA permits. (See Petitioner's Petition, para. 19).

First, a Facility Planning Area ("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 Designated Management

Agent ("DMA") 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. Adm. 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). The permits issued by the Illinois EPA were issued pursuant to the Act, not the CWA. As such, it is the Act which governs construction, not the CWA.

In its Petition, MCWRD attempts to argue that the fact that it is in the "Mill Creek Facilities Planning Area," which was established per federal law as a planning tool gives it authority over the District and federal laws controls construction of treatment facilities. However both the MCWRD and the District are units of local government within the Mill Creek FPA and both are 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 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 Illinois EPA issued the permits pursuant to its authority contained in the Act, and the Federal CWA is not relevant. The Board should deny the Petition.

**2. The Illinois EPA Permits Were Issued in Compliance With Section 39 of the Act**

MCWRD next argues that the permits issued by the Illinois EPA to the District are invalid because the District failed to go through "local siting" pursuant to Section 39.2 of the Act, 415 ILCS 5/39.2 (2008) and failed to submit evidence of such pursuant to Section 39© of the Act, 415 ILCS 5/39(c)(2008).

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. The District is not organized under the Metropolitan Water Reclamation District Act. Furthermore, the General Assembly expressly excludes "Solid or dissolved material in domestic sewage" from the definition of "waste." 415 ILCS 5/3.535. Thus, by definition, the District was establishing sewage works rather than a pollution control facility.

Further, Illinois courts have established that the Illinois EPA 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 Illinois EPA'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 Illinois EPA failed to make the necessary determinations under section 39(c). Rather, the City simply disagrees with the Illinois EPA's decision that local siting approval is not required." *Id.* at 976. The Court found that the Illinois EPA acted properly by *not* requiring compliance with the local siting approval process. Similarly, in this case where only sewage works are being considered and not a biosolids reuse project, the Illinois EPA 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 Illinois EPA correctly determined that no such local siting approval process was necessary or proper under the Act. Therefore, the Board should deny the MCWRD's Petition.

### 3. The Illinois EPA Rules Do Not Apply in This Instance

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 Petitioners Petition, paras. 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. Adm. Code 351.502. It is unclear why MCWRD is applying these criteria to the present circumstances. The District is located entirely within the FPA, does not necessitate the Illinois EPA to recognize an exception to the boundaries of a FPA, and the WQM Plan has been revised through the permitting process. MCWRD's attempts to apply these criteria are not relevant to these proceedings and should not be considered. The Board should deny the MCWRD's Petition.

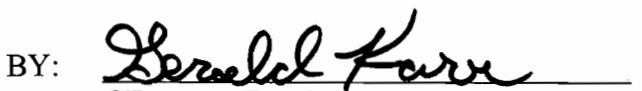
## III

## CONCLUSION

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board deny Petitioner's, MILL CREEK WATER RECLAMATION DISTRICT, Petition for Review of Illinois EPA's Permit Decision with prejudice, and for such other relief as the Board deems appropriate.

Respectfully submitted,

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

BY: 

GERALD T. KARR
Senior Assistant Attorney General
Environmental Bureau

69 W. Washington St.
Chicago, Illinois 60602
(312) 814-3369

**CERTIFICATE OF SERVICE**

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 27th day of April, 2010, I caused to be served by First Class Mail the foregoing Notice of Filing and Respondent's Motion to Dismiss upon the individuals listed on the attached service list, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.

Gerald Karr

GERALD T. KARR