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.	)	

NOTICE OF FILING

TO: SEE ATTACHED CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on June 3, 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 the Motion for Leave to File a Reply and the Reply of the Grand Prairie Sanitary District in Support of its Motion to Dismiss Petition for Review of IEPA Permit Decision, attached thereto, copies of which are herewith served upon you.

GRAND PRAIRIE SANITARY DISTRICT

By _____
One of Its Attorneys

June 3, 2010

Victor P. Filippini, Jr.
Marlo M. Del Percio
Holland & Knight LLP
131 South Dearborn Street
30th Floor
Chicago, Illinois 60603
(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,** along with the **Motion for Leave to File a Reply** and the **Reply of the Grand Prairie Sanitary District in Support of its Motion to Dismiss Petition for Review of IEPA Permit Decision**, attached thereto, upon:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street,
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

John T. Therriault
Illinois Pollution Control Board
100 W. Randolph Street,
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

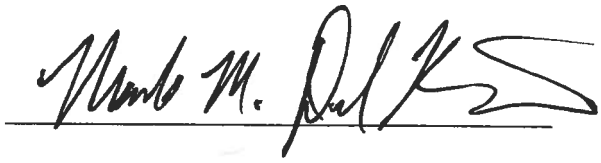
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Gerald T. Karr
Senior Assistant Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602

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

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

by having the same deposited in U.S. mail postage prepaid at 131 S. Dearborn Street, Chicago, Illinois before 5:00 p.m. on June 3, 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 FOR LEAVE TO FILE A REPLY

NOW COMES the respondent, Grand Prairie Sanitary District (the "***District***"), by its attorneys, Holland & Knight LLP, and respectfully requests the Illinois Pollution Control Board (the "***Board***") to grant the District leave to file its brief in reply in support of its Motion to Dismiss the Petition for Review of IEPA Permit Decision, pursuant to 35 Ill. Admin. Code 101.500. In support of this motion, the District states as follows:

1. Mill Creek Water Reclamation District ("***MCWRD***") filed a response to the District's Motion to Dismiss the Petition for Review of IEPA Permit Decision (the "***Response***") on May 14, 2010.

2. During the telephonic hearing of this matter on May 20, 2010, the District advised the hearing Officer that no response had been received from MCWRD. Later that day, MCWRD did serve the Response on the District via e-mail.

3. The Illinois Administrative Code provides that a reply brief may be filed upon motion presented to the Board within 14 days after service. 35 Ill. Admin. Code 101.500(e).

4. Because MCWRD raised issues in its Response regarding standing to appeal, siting requirements, and permitting that do not accurately reflect the law or the facts at issue, a reply from the District is warranted.

5. Because of the impact that the Opinion will have on the District, the precedent it may set regarding standing before the Board, and the effect that it will have on the IEPA's permit granting authority, the District requests this Board to grant the District leave to file its reply brief in this action *instanter*, a copy of which is attached hereto as Exhibit 1.

6. The District's proposed reply brief is being served and filed concurrently with this Motion in anticipation of this Court's favorable consideration.

NOW, THEREFORE, for the foregoing reasons, the District respectfully requests this Board to grant its motion for leave to file the attached "Reply of the Grand Prairie Sanitary District In Support of Its Motion To Dismiss Petition for Review of IEPA Permit Decision."

Respectfully submitted,

GRAND PRAIRIE SANITARY DISTRICT

By: _____
One of Its Attorneys

Victor P. Filippini, Jr. (ARDC #6185490)
Marlo M. Del Percio (ARDC #6296200)
Holland & Knight LLP
131 South Dearborn
30th Floor
Chicago, Illinois 60603
(312) 263-3600

EXHIBIT 1

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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)

REPLY OF THE GRAND PRAIRIE SANITARY DISTRICT IN SUPPORT OF ITS MOTION TO DISMISS PETITION FOR REVIEW OF IEPA PERMIT DECISION

Grand Prairie Sanitary District (the "***District***") files this reply ("***Reply***") to petitioner Mill Creek Water Reclamation District's ("***MCWRD***") "Consolidated Response to the Motions to Dismiss Filed By IEPA and Grand Prairie" (the "***Response***"). As the Response is rife with misstatements of law and fact, this Reply is required.

I. MCWRD Lacks Standing to Appeal the IEPA's Issuance of the District's Permits.

Despite the statutory authorization allowing only the applicant to appeal general permits issued under Section 39 of the Illinois Environmental Protection Act (the "***Act***"), *see* 415 ILCS 5.40(a)(1), MCWRD claims that it has standing because the IEPA's decision to issue the District's Permits was also "directed to" MCWRD (Resp. pp. 2, 4) in the form of a courtesy letter notifying MCWRD's engineer (the "***Courtesy Letter***") that the IEPA issued the District's Permits. (Resp. p. 3, Ex. 1.) This assertion of standing fails on multiple levels.

To support its claim of standing, MCWRD cites Ill. Admin. Code Tit. 35 § 105.204(f), which states in part: "the person to whom the Agency directs its final decision, may petition the Board for review of the Agency's final decision." But Subsection (f) only applies to "Other Agency Final Decisions." The District's Permits were not granted under Subsection (f) but rather

Subsection (a), which applies to permits granted under Section 39 of the Act. Under Subsection (a) and the statutory grant of authority in 415 ILCS 5.40(a)(1), only "the applicant may . . . petition for a hearing before the Board to contest the decision of the Agency." MCWRD was not the applicant and therefore does not have standing.

Even if Subsection (f) were relevant, MCWRD would still not have standing since the decision was not directed to MCWRD. The Courtesy Letter was not itself the final decision of the IEPA, but simply notice to MCWRD of a final decision. The District's Permits were the final decision of the IEPA, and those were directed only to the District. Not only does MCWRD's argument fail as a matter of law, it also fails as a matter of public policy. To give credence to MCWRD's argument would allow any curiosity seeker to secure standing merely by commenting on a matter before the IEPA and receiving any acknowledgement in response. This is silly.

MCWRD's further "authority" for its standing is a string cite to statutory provisions that purportedly give the Illinois Pollution Control Board ("***IPCB***") jurisdiction to hear MCWRD's appeal even though MCWRD lacks standing. Upon close review, however, the only statutory hook MCWRD could specifically provide to establish its standing is "The [IPCB] may adopt such procedural rules as may be necessary to accomplish the purpose of this act." While this is certainly true, under Illinois law, "Standing is not a procedural technicality, but rather is an aspect or component of justiciability." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill.2d 141, 147 (1997). Furthermore, Illinois courts have firmly established, "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). Certainly an administrative rule authorizing the IEPA to

make all necessary procedural rules would not trump the clear statutory regime that only authorizes the applicant to appeal decisions under 415 ILCS 5.40(a)(1).

MCWRD also argues that the IPBC has jurisdiction to hear a third-party petition contesting the approval of local siting authority under 415 ILCS 5.40.1(b). As the District explained in its Motion to Dismiss, and further elaborates in Section III of this Reply, local siting is not needed for this type of facility.

In short, MCWRD has no standing.

II. MCWRD Misinterprets Federal and State Law Regarding Sanitary Districts.

Despite MCWRD's claims to the contrary, the IEPA's issuance of the District's Permits comports with all federal and State laws.

A. The Issuance of the District's Permits Comports with Federal Law.

The issuance of the District's Permits did not violate the Clean Water Act. MCWRD argues that "Section 1288(d) of the Clean Water Act prohibits the issuance of permits for construction of sewage works to any entity other than Mill Creek." Resp. at 2. But Section 1288(d) of the Clean Water Act only applies to the issuance of funding through grants, 33 U.S.C. § 1288(d); it has nothing to do with the actual issuance of permits to construct and operate sewage works. MCWRD attempts to enlarge its house of cards by distinguishing *Northern Moraine Wastewater Reclamation Dist. v. Illinois Commerce Comm'n,* 392 Ill. App. 3d 542 (2d Dist. 2009) (rejecting an argument by a DMA that it had a right to serve a property in a FPA by virtue of its DMA status) on the grounds that its was not decided under 33 U.S.C. § 1288(d). But neither the permits in *Northern Moraine* nor the District Permits have anything to do with grants under 33 U.S.C. § 1288(d), so MCWRD's house-of-cards argument must tumble and fail.

B. The Issuance of the District's Permits Comports with Illinois Law.

MCWRD asserts that the IEPA violated state law by issuing the District's Permits without obtaining proof that the location of the Sewer System had been approved by Kane County. Resp. at 6. This argument, while factually false,[1] is also irrelevant.

Rather than point to any specific statutory provision requiring siting for the Sewer System, MCWRD latches onto the words "***water*** pollution control facilities" in the District's Permits, and thereby argues that pollution control facilities require siting under the Act. While MCWRD provides no further analysis, the District fully explained that the Sewer System would be classified as sewage works under the Act. *See* Motion to Dismiss at 10-11. The statutory classifications in the Act plainly trump the identification of a facility on a permit form. Furthermore, in *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Il.App.3d 963 (2nd Dist 2003), the court found in connection with a sewage works facility 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, "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. This case is no different. MCWRD does not allege in its Petition that the IEPA did not make a determination on whether siting was required, nor could it because the Courtesy Letter identified why the IEPA did not require siting.[2]

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[1] MCWRD's argument is outside of the pleading, but, in fact, Kane County did hold public hearings in connection with the Settlements of LaFox planned unit development zoning, during which the location of the District's Sewer System was approved by the County.

[2] The Courtesy Letter clearly states that the District's permit application "complies with the Illinois Recommended Standards for Sewage Works, Subtitle C., Chapter I, and the Illinois Environmental Protection Act." Resp. Ex. 1.

C. The Issuance of the District's Permits Comports with the IEPA's Rules.

MCWRD continues to assert that the IEPA must go through the process of recognizing an exception to an FPA boundary, under 35 Ill. Admin. Code 351.502, despite the fact that the District's Permits only authorize facilities entirely within the boundaries of the FPA. MCWRD argues that the issuance of the District's Permits changes the "internal boundaries" of the FPA. Resp. at 7. While referencing these purported "internal boundaries" of the Mill Creek FPA, MCWRD fails to identify (i) the location of such "internal boundaries," (ii) the process by which the "internal boundaries" were established, or (iii) any reference at all to the recognition of such "internal boundaries" in federal law or Illinois statutes, cases, or codes. As such, it would be appropriate to assume that when Illinois Administrative Code discusses the "boundaries" of FPAs, it is likely using the term "boundaries" as it is used in ordinary English language to mean the external border of the FPA rather than some amorphous and imaginary "internal boundaries." Since the issuance of the District's Permits did not require a change in the FPA's *actual* boundaries, the IEPA's issuance of the District's Permits was not in violation of its internal rules.

Finally, MCWRD argues that the Motion to Dismiss is inappropriate because there are still outstanding questions of fact that need to be determined. "Many of the arguments raised by the Respondents, however, refer to or incorporate facts that are contained in the IEPA record or facts that are outside the Petition." Resp. at 4-5. While MCWRD notes that it "disagrees with many of these factual assertions and resulting legal conclusion," it fails to identify any such assertions or conclusions specifically. Resp. at 5. As such, the District cannot respond to such phantom arguments.[3]

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[3] Ironically, despite its unsubstantiated objection to the District's alleged factual assertions outside of the petition, MCWRD attached an exhibit not included in the Petition to the Response. Resp. at 4.

III. MCWRD Does Not Have the Authority to Serve the Subject Property.

Throughout its response, MCWRD continuously references its "valid permits" which authorize it to provide service to the Settlements of LaFox. Resp. at 1, 2, 6. Such permits, however, authorize MCWRD to serve the "annexed Settlements of LaFox" (the "***MCWRD Permits***") Petition. Ex. A, B. The Settlement of LaFox were never annexed to MCWRD (*see* Petition, Ex. G, p. 2), and Illinois law is clear that the provision of sewerage services are determined by governmental boundaries. *See Village of Frankfort v. Illinois Environmental Protection Agency,* 366 Ill. App. 3d 649 (1st Dist. 2006); *see also People ex rel. Greening v. Bartholf,* 388 Ill. 445, 463 (1944). MCWRD further argues that the language in the MCWRD Permits, which authorize MCWRD to serve the "annexed Settlements of LaFox development" was merely "a description of the boundaries for which water and sewer services were to be provided." Resp. at 8. This defies logic. Without an actual annexation, how could one identify the "annexed Settlement of LaFox development"? More fundamentally, had the Settlements of LaFox development been annexed to MCWRD, the Settlements of LaFox would have been within the jurisdictional boundaries of MCWRD and eligible for service. But the Settlements of LaFox development was not annexed by MCWRD, so MCWRD's permits did not on their face and could not under law authorize MCWRD to serve the Settlements of LaFox or any other area within the jurisdictional boundaries of the District.

In none of its filings has MCWRD provided any legal basis for how it can serve property within the jurisdictional boundaries of another sanitary district. MCWRD merely attempts to distinguish to the controlling *Village of Frankfort* and *Bartholf* cases from the case at hand, but MCWRD's arguments make distinctions without any substantive difference. While the Metropolitan Water Reclamation Act (rather than the Sanitary District Act of 1936) is at issue in

Village of Frankfort, the premise still stands that decisions over the provision of sewerage services are determined by governmental boundaries. MCWRD's interpretation of *Bartholf* also misses the mark because a municipality and sanitary district may have overlapping jurisdictions in Illinois law because they are not organized for the same purpose; two sanitary districts may not.

IV. MCWRD's Petition For Appeal Should Be Dismissed With Prejudice.

Threshing through the abundance of chaff in MCWRD's Response, one finds that the germ of this Petition is that MCWRD is disappointed at having errantly "relied on [MCWRD Permits] in making its long term plans and constructing infrastructure improvements" prior to annexing the Settlements of LaFox. Resp. at 1, 2. MCWRD is now using the IPCB in an attempt to frustrate the development of the Settlements of LaFox by objecting to the District's Permits which were lawfully issued. This misplaced vendetta is now sapping the resources of not only MCWRD and the District, but also the IEPA and IPCB. As a result, MCWRD's Petition for appeal should be dismissed with prejudice.

Respectfully submitted,

GRAND PRAIRIE SANITARY DISTRICT

By: _____
One of Its Attorneys

Victor P. Filippini, Jr. (ARDC #6185490)
Marlo M. Del Percio (ARDC #6296200)
Holland & Knight LLP
131 South Dearborn
30th Floor
Chicago, Illinois 60603
(312) 263-3600

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