

ILLINOIS POLLUTION CONTROL BOARD  
October 18, 2012

LARRY D. WELCH, )  
)  
Complainant, )  
)  
v. ) PCB 12-131  
) (Citizen's Enforcement - Water)  
DEKALB SANITARY DISTRICT, )  
)  
Respondent. )

ORDER OF THE BOARD (by T.A. Holbrook):

This citizen's enforcement action was initiated with the filing of a *pro se* complaint (Comp.) by Mr. Larry D. Welch on June 5, 2012, against the DeKalb Sanitary District (District). Mr. Welch's complaint concerns sewage backup in his residential basement due to alleged violations by the District at its Meadow Trail lift station, which is located at 457 Red Wing Drive in DeKalb, DeKalb County.

Today, the Board denies the District's motion to dismiss (Mot.), which was filed on July 3, 2012. However, the Board, on its own motion, dismisses the complaint as frivolous. Accordingly, the Board declines to accept Mr. Welch's complaint for hearing and closes the docket. Below, the Board summarizes the complaint and the motion, after which the Board discusses the reasons for its rulings.

**SUMMARY OF FILINGS**

**Mr. Welch's Complaint**

Mr. Welch alleges that the District's Meadow Trail lift station "failed" between midnight on June 15, 2011, and 10:00 a.m. on June 16, 2011. Comp. at ¶¶6, 7; Comp. Att. at 7. The complaint further alleges that the "required alarm system failed to activate." Comp. at ¶7; *see also* Comp. Att. at 8. According to the complaint, the lift station failure resulted in sewage backup in Mr. Welch's home at 3336 Meadow Trail E. in DeKalb, causing "substantial damage" to his "finished basement." Comp. at ¶¶6-8; *see also* Comp. Att. at 20-22.

Mr. Welch's complaint alleges that the District violated the "Illinois Recommended Standards for Sewage Works" of the Illinois Environmental Protection Agency (Agency) at Sections 370.440 ("Alarm Systems") and 370.450 ("Emergency Operations") (35 Ill. Adm. Code 370.440, 370.450). Comp. at ¶5. The complaint also alleges that the District violated the "Schedule F Application for Lift Station Construction/Operation." *Id.*; *see also* Comp. Att. at 5-6 ("Instructions for Application for Construction/Operation Permit for Sewer System Lift Station/Force Main, Schedule F"). Mr. Welch requests that the Board issue "[a]n order to bring the sewage lift station within compliance immediately (Alarm functionality, Storage Capacity &

Fencing)” and impose “[a] Fine for clear violations that caused damage to personal property.” Comp. at ¶9.

### **District’s Motion to Dismiss**

The District’s motion for dismissal of Mr. Welch’s complaint alleges a number of facts, supported by the affidavit of Mr. Mark Eddington, P.E., District Manager of the DeKalb Sanitary District. The District’s legal arguments are summarized following a summary of the affidavit.

#### **Affidavit of District Manager**

During the morning of June 15, 2011, the District inspected the Meadow Trail lift station and found no malfunction. Mot. at ¶2. At 8:30 a.m. on June 16, 2011, the District inspected the lift station and “discovered that both pump motor capacitors had failed and a relay in the lift station’s high water alarm had failed.” *Id.* at ¶3. District staff immediately went to the wastewater treatment plant for an emergency pump and “then returned to the lift station; bypassed the malfunctioning pumps, and sent the emergency pump down the wet well.” *Id.* at ¶5. District staff determined that the high water alarm did not function because “the intrinsically safe relay had malfunction[ed].” *Id.* at ¶8.

After this incident, Mr. Welch reported that a backup had occurred in his basement and sought “damages for the repair costs.” Mot. at ¶9. On October 19, 2011, Mr. Welch filed a civil lawsuit against the District in the Circuit Court of Sixteenth Judicial Circuit, DeKalb County, No. 11-SC-1343. *Id.* at ¶10. In Mr. Welch’s “Small Claim Complaint” (Mot. Exh. A), Mr. Welch alleged that the District was “indebted” to him “in the sum of \$8,621.37, for damages incurred due to raw sewage backing up into the basement of [his] home on June 16, 2011.” Mot. Exh. A. On March 30, 2012, “the civil lawsuit was dismissed with prejudice upon the parties reaching a settlement.” Mot. at ¶12. The settlement contained a “Release for Property Damage Only” (Mot. Exh. B), stating, among other things, that in consideration of \$7,733.87, Mr. Welch “releases and discharges [the District] from any and all claims, demands, and causes of action that [Mr. Welch] ever had, has or will have for property damage, known or unknown, arising from the above described accident.” Mot. Exh. B.

#### **Legal Arguments**

The District argues that Mr. Welch’s complaint is both “frivolous” and “duplicative.” Mot. at ¶13, 21. First, the District asserts that the complaint is frivolous because the allegations in the complaint are “void of facts which reasonably inform the District of the manner and extent to which the Environmental Protection Act and/or regulations are being violated.” *Id.* at ¶14.

The District argues that the complaint is also frivolous because Mr. Welch fails to state a cause of action for any of the three alleged violations. Mot. at ¶15. The District asserts that there was no violation of 35 Ill. Adm. Code 370.440 because the District has “the required alarm systems in place.” *Id.* at ¶¶16, 17. Next, according to the District, there was no violation of 35 Ill. Adm. Code 370.450 because the District has “the required emergency operations in place.” *Id.* at ¶18. As for the alleged violation concerning Schedule F, the District argues that it “has

met the requirements for said permit,” claiming that the lift station is locked and secure. *Id.* at ¶19.

Lastly, the District asserts that Mr. Welch’s complaint here is “duplicative” of his small claims lawsuit filed in DeKalb County Circuit Court because the latter made “allegations identical or substantially similar to those in the Complaint” before the Board. Mot. at ¶20.

### **DISCUSSION**

The District moves to dismiss Mr. Welch’s complaint as duplicative and frivolous. As Mr. Welch did not file a response to the District’s motion, he is “deemed to have waived any objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d).

Section 31(d)(1) of the Environmental Protection Act (Act) (415 ILCS 5/31(d)(1) (2010)) provides that “[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1) (2010); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is “duplicative” if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. A complaint is “frivolous” if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.*

The Board declines to dismiss Mr. Welch’s complaint on the grounds articulated in the District’s motion to dismiss. The Board accordingly denies the motion. However, the Board finds that, on other grounds, each of the three violations alleged is frivolous. The Board therefore, on its own motion, dismisses the complaint as frivolous. Nothing in this order precludes Mr. Welch from filing a new complaint seeking to correct the deficiencies identified by the Board.

### **Duplicative**

The District argues that the complaint is duplicative of the “Small Claim Complaint” filed by Mr. Welch in DeKalb County Circuit Court. In deciding whether a citizen complaint before the Board is duplicative of a court action, the Board has looked to a number of factors, including whether the two “complaints are based on different theories (*e.g.*, nuisance vs. violation of the Act)” and whether the relief requested differs. Smith v. Heritage Tool & Die Manuf., Inc., PCB 99-145, slip op. at 2-3 (June 3, 1999).

In this case, Mr. Welch alleges that the District violated rules and permit instructions. No such allegations were made in the circuit court action, where Mr. Welch alleged that the District caused property damage. Additionally, before the Board, Mr. Welch seeks an order requiring the Meadow Trails lift station to be brought into compliance and imposing a civil penalty upon the District. In the small claims complaint, Mr. Welch sought money damages. Based upon the different legal theories on which the actions were brought and the contrasting remedies sought, the Board finds that the complaint here is not identical or substantially similar to Mr. Welch’s

small claims complaint filed in circuit court. The Board therefore denies the District's motion to dismiss the complaint before the Board as duplicative.

### **Frivolous**

Mr. Welch's complaint alleges that the District committed three violations: two of the Part 370 rules (35 Ill. Adm. Code 370); and one of the instructions for Schedule F to a permit application. According to the complaint, the District violated provisions of Section 370.440 ("The alarm shall be activated in cases of power failure, pump failure, unauthorized entry, or any cause of pump station malfunction.") and Section 370.450(d)(2)(C) ("Where part or all of the engine-driven pumping equipment is portable, sufficient storage capacity shall be provided to allow time for detection of pump station failure and transportation and hookup of the portable equipment."). 35 Ill. Adm. Code 370.440, 370.450(d)(2)(C). Schedule F is the "Lift Station/Force Main" portion of a permit application, and Mr. Welch's complaint alleges that the District violated part of the instructions to Schedule F ("All pumping stations and related equipment shall be protected against vandalism (by fencing or other suitable provisions)").

By their own terms, however, the Part 370 rules "establish criteria for the *design and preparation of plans and specifications* for wastewater collection and treatment systems." 35 Ill. Adm. Code 370.100 (emphasis added). Part 370 provides criteria for use in applying with the Agency for a permit. *See* 35 Ill. Adm. Code 370.110; *see also* 35 Ill. Adm. Code 309.241(b) (standards for permit issuance). The provisions of Sections 370.440 and 370.450(d)(2)(C) at issue here are therefore not themselves requirements that can be violated through the *operation* of a lift station.<sup>1</sup> Similarly, while the Board has the authority to hear a complaint alleging the violation of a "permit or term or condition thereof" (415 ILCS 5/31(c)(1) (2010)), the *instructions to a permit application*, like the Schedule F instructions, cannot be violated for purposes of enforcement under the Act. *See* 415 ILCS 5/31 (2010). Under these circumstances, the Board finds that Mr. Welch's complaint fails to state a cause of action upon which the Board can grant relief. Accordingly, the Board, on its own motion, dismisses the complaint as frivolous.

The District's motion to dismiss contends that the complaint is frivolous on different grounds: insufficiently pled facts; and the District's compliance with the Part 370 rules and its permit. The Board's ruling above renders these questions moot and the Board therefore denies the District's motion to dismiss the complaint as frivolous.

### **CONCLUSION**

The District's motion for dismissal of Mr. Welch's complaint is denied. However, on its own motion, the Board dismisses the complaint because the alleged violations of Part 370 and a permit application instruction are frivolous. The Board closes the docket.

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<sup>1</sup> Mr. Welch does not allege any violation by the Agency in issuing any permit, nor could the Board entertain any such allegation. *See Landfill, Inc. v. PCB*, 74 Ill. 2d 541, 556, 559-60 (1978).

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) (2010); *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 order on October 18, 2012, by a vote of 4-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board