

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

FLAGG CREEK WATER RECLAMATION )  
DISTRICT )  
) )  
Complainant )  
) )  
v. )  
) )  
VILLAGE OF HINSDALE, METROPOLITAN )  
WATER RECLAMATION DISTRICT OF )  
GREATER CHICAGO, ILLINOIS )  
DEPARTMENT OF TRANSPORTATION, )  
DUPAGE COUNTY )  
Respondents. )

**PCB 06-141**

**NOTICE OF FILING**

To: PERSONS ON ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have filed today with the Office of the Clerk of the Illinois Pollution Control Board, 100 West Randolph Street, Suite 11-500, Chicago, Illinois, copies of which are herewith served upon you, of the FCWRD's Response in Opposition to MWRDGC's Motion to Strike and Dismiss Count II of FCWRD's Amended Complaint and Notice of Filing.

Respectfully submitted,




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Dated: August 18 2006

THIS FILING IS SUBMITTED ON RECYCLED PAPER

**SERVICE LIST**

***Flagg Creek Water Reclamation District v. Village of Hinsdale, et al.***

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*For the Village of Hinsdale*

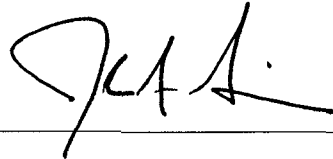
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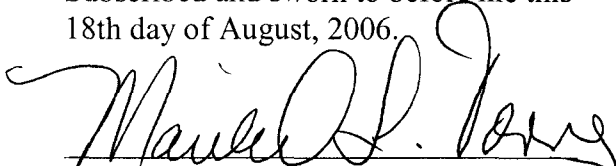
**CERTIFICATE OF SERVICE**

The undersigned being first duly sworn upon oath states that I served FCWRD's Response in Opposition to MWRDGC's Motion to Strike and Dismiss Count II of FCWRD's Amended Complaint, on the 18th day of August 2006, via electronic mail transmission to each person to whom it is directed.

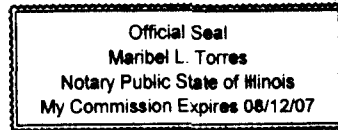



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Subscribed and sworn to before me this 18th day of August, 2006.



Notary Public



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PCB 06-141  
 Bradley P. Halloran  
 Hearing Officer

FCWRD'S RESPONSE IN OPPOSITION TO MWRDGC'S MOTION  
 TO STRIKE AND DISMISS COUNT II OF FCWRD'S AMENDED COMPLAINT

Complainant, Flagg Creek Water Reclamation District ("FCWRD") through its attorneys,  
 Gardner Carton & Douglas LLP, pursuant to 35 Ill. Adm. Code 101.500(d), responds in  
 opposition to the July 28, 2006 Motion to Strike and Dismiss Count II of FCWRD's Amended  
 Complaint brought by Respondent Metropolitan Water Reclamation District of Greater Chicago  
 ("MWRDGC's Motion") as follows:

I. INTRODUCTION

MWRDGC's Motion challenges this Board's jurisdiction to hear both claims against it  
 alleged in Count II of the Amended Complaint. The Board has already accepted for hearing  
 FCWRD's first claim against MWRDGC, regarding MWRDGC's diversion of wet weather flow  
 from the MWRDGC-served area in DuPage County into FCWRD's sewer system. In any event,  
 MWRDGC's challenge to the Board's jurisdiction to proceed with this claim in Count II is  
 misguided. Count II does not seek to have this Board enforce a contract or award damages for  
 breach of a contract. Indeed, the Amended Complaint does not even allege the existence of a

contract<sup>1</sup>. Nevertheless the historical context pursuant to which the current situation in which MWRDGC serves an area of DuPage County roughly equivalent to the area in Cook County served by FCWRD, is relevant factual background information for this Board to consider when adjudicating MWRDGC's control over causing or allowing pollution, alleged in the Amended Complaint.

MWRDGC also challenges the Board's jurisdiction to proceed with the second claim against it in Count II, regarding the manner in which MWRDGC exercises its undisputed authority to manage stormwater in Cook County so as to impair the operation and performance of FCWRD. This challenge is based upon a misreading of the Amended Complaint, or a misreading of the June 1, 2006 Order of this Board, or both.

In its June 1, 2006 Order, this Board found: "As pled, the complaint requires the Board to determine whether MWRDGC has violated its enabling statute in order to determine whether MWRDGC has violated the Act and Board regulations." Order, p. 7. Because the Board concluded that it lacked jurisdiction to adjudicate alleged violations of other statutes and regulations, the Board concluded that the complaint as pled requested relief that the Board did not have authority to grant. *Id.* pp. 8-9. The Board directed FCWRD to file an amended complaint consistent with the terms of its Order, on or before July 6, 2006.

On June 29, 2006, FCWRD filed its Amended Complaint. The Amended Complaint does not allege violations of the MWRDGC Act, notwithstanding MWRDGC's assertions to the contrary. The Amended Complaint pleads only violations of the Environmental Protection Act (the "Act"), Board regulations and conditions of various permits issued pursuant to the Act and Board regulations.

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<sup>1</sup> Paragraph 51 of the Amended Complaint actually alleges the absence of a current contract: "FCWRD has a draft agreement with MWRD that has not been executed."

## II. COUNT II OF AMENDED COMPLAINT

Count II of the Amended Complaint sets forth two claims against MWRDGC.

Paragraphs 49-60 allege that MWRDGC's diversion of wet weather flows from an area in DuPage County which MWRDGC serves, combined with wet weather flows FCWRD receives, causes or contributes to unauthorized CSO's within FCWRD's system in violation of MWRDGC's NPDES permit, and in violation of Board regulations found at 35 Il. Adm. Code Part 306, Subpart C, Amend. Complt., ¶57. This same MWRDGC's wet weather diversion also causes or contributes to water pollution in violation of regulations and standards adopted by the Board under the Act, Amend. Complt. ¶58. Finally, this MWRDGC's wet weather diversion also introduces pollutants that interfere with the operation and performance of FCWRD in violation of Board rule 35 Il. Adm. Code 307.1101, Amend. Complt. ¶59.

The second claim against MWRDGC is contained in paragraphs 61-66 of Count II which allege that MWRDGC, as the designated stormwater management agency for Cook County, has carried out its stormwater management activities in such a way as to allow dead trees and other detritus to obstruct stormwater that flows into Flagg Creek from properly flowing downstream, and thereby causing and contributing to water pollution in violation of the Board regulations and the Act and introducing pollutants that interfere with the operation and performance of FCWRD, in violation of Board rule at 35 Il. Adm. Code 307.1101. Amended Complaint, ¶¶65-66.

## III. THE BOARD'S JURISDICTION

The Pollution Control Board, established pursuant to Section 5 of the Illinois Environmental Protection Act, 415 ILCS 5/5, is vested with “. . . authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit . . . [.]” 415 ILCS 5/5(d). Section 31(d) of the Act provides that: “Any person may file with the Board a complaint, meeting the

requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, as any Board order . . . Unless the Board determines that such Complaint is duplicative or frivolous, it shall schedule a hearing . . .” 415 ILCS 5/31(d). “‘Frivolous’ means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief.” 35 Ill. Adm. Code 101.202.

#### IV. ARGUMENT

##### A. The Board has Jurisdiction to Adjudicate the Alleged Violations of the Act and Board Regulations, Without Regard to Whether or Not a Contract Exists.

Although the claim against MWRDGC set forth in paragraphs 49-60 of the Amended Complaint was plead almost verbatim in the original complaint, MWRDGC raised no issue about the Board’s jurisdiction to accept that claim for hearing, when it filed its motion to strike paragraphs 61-70 of the original complaint. Indeed, after making its own independent assessment as to whether this claim was duplicative or frivolous, this Board determined that it was not frivolous and accepted the claim for hearing. June 1, 2006 Order, p. 9. Nevertheless, MWRDGC now contends that this Board lacks jurisdiction to proceed with this claim alleging violations of the Act, Board regulations and Board issued permits because the Amended Complaint purportedly alleges the existence of a contract between FCWRD and MWRDGC. MWRDGC Motion, p. 2.

As noted above, the Amended Complaint does not actually allege the existence of a contract between MWRDGC and FCWRD. The Amended Complaint alleges that historically FCWRD has served an area in Cook County that was placed under the jurisdiction of MWRDGC in the 1970’s. Amended Complaint, ¶ 49. Further, the Amended Complaint alleges that a draft agreement with MWRDGC has not been executed. Amended Complaint, ¶ 51. In any event, the

Amended Complaint does not allege a claim for breach of contract. Rather, the Amended Complaint alleges violations of the Act, Board regulations and permits as well as the underlying facts which show MWRDGC's control over causing or allowing pollution.

Moreover, MWRDGC misunderstands this Board's prior rulings upon which it relies in support of its Motion. In both *IEPA v. Will County Landfill*, PCB 72-13 (December 12, 1972) and *Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Assoc., Inc.*, PCB 05-29 (July 29, 2005), the Board asserted jurisdiction and accepted the case for hearing, notwithstanding the existence of the contracts alleged. Indeed, in *IEPA v. Will County Landfill*, the existence of the lease agreements was the basis upon which the Board accepted jurisdiction over the Fahey Estate. "We assert jurisdiction only to determine those issues relating to the quality of our environment." *Id.* The Board declined to determine the rights of the parties for indemnity under the lease or for breach of contract. The Amended Complaint in this case does not seek indemnity under a contract or allege breach of contract. Properly understood, *IEPA v. Will County Landfill* actually supports the Board's acceptance of jurisdiction of Count II, rather than MWRDGC's Motion.

In *Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Association, Inc.*, PCB 05-29 (July 21, 2005), the Board distinguished the parallel case pending in the Circuit Court of Sangamon County. The Sangamon County Circuit Court case alleged breach of contract and sought contract damages. The case before the Board involved two of the same parties and arose out of the same circumstances, but alleged only violations of the Act. The Board explained that notwithstanding the overlapping factual basis for the claims, including the existence of the various contracts, which were pled in the IPCB complaint, as well as the overlapping parties, the case before it was not duplicative or frivolous. The Board in *Mather*



held: “On the other hand, the complaint in this matter alleges only that Trapshooters Association has violated Section 21(e) of the Act (415 ILCS 5/21(e) (2004), adjudication of which falls within the Board’s statutory authority. *See* 415 ILCS 5/5(d) (2004).” *Mather*, p. 11. Likewise in this case, FCWRD alleges only that MWRDGC has violated the Section 12(a) of the Act, Board regulations at 35 Il. Adm. Code 306 Part C, 307. 1101 and conditions of MWRDGC’s NPDES permit. Adjudication of these alleged violations falls within the Board’s statutory authority. *See* 415 ILCS 5/5(d). Thus, *Mather*, like *Will County Landfall*, supports this Board’s assertion of jurisdiction over Count II of the Amended Complaint.

FCWRD draws the Board’s attention to *IEPA v. Village of Millstadt, et al.*, PCB 78-132 (Sept. 7, 1978), where the Board rejected the very argument advanced by MWRDGC in this case. In *Millstadt*, respondent TAC moved to dismiss arguing that accepting jurisdiction would require the Board to determine third party contract rights. The Board explained:

The only question before the Board is whether respondents did in fact cause or allow pollution, and that question must be resolved based upon the evidence developed in the record. The Complaint before us alleges a cause of action against TAC over which we have jurisdiction under the Act. Whether indeed TAC did exercise such control as to cause or allow pollution must be resolved based on the record.

*Id.* Similarly in this case, the Amended Complaint alleges a cause of action against MWRDGC over which the Board has jurisdiction. Whether indeed MWRDGC did exercise such control as to cause or allow pollution must be resolved based on the evidence developed in the record.

B. Count II Alleges Violations of the Act and Board Regulations, And Does Not Allege Violations of the MWRDGC Act.

The Amended Complaint does not allege that MWRDGC has violated MWRDGC’s enabling statute, 70 ILCS 2605/7h (the “MWRDGC Act”), or otherwise seek to have the Board adjudicate violations of the MWRDGC’s Act. Although at various points in MWRDGC’s Motion, Respondent does contend that the Amended Complaint contains such an allegation,

MWRDGC's Motion conspicuously fails to cite any such allegation in the Amended Complaint. Rather, MWRDGC cites to the paragraph in the Amended Complaint which alleges that MWRDGC is authorized by statute to manage stormwater in Cook County. MWRDGC's Motion, pp. 10-11. There is no question that MWRDGC is authorized by statute to manage stormwater in Cook County. Indeed, MWRDGC quotes language of its enabling MWRDGC Act to confirm this undisputed fact. MWRDGC's Motion, p.10, n. 3. The Amended Complaint's reference to MWRDGC's undisputed authority to manage stormwater in Cook County is not an allegation that MWRDGC is violating the MWRDGC Act.

MWRDGC's Motion misinterprets this Board's June 1, 2006 Order in this regard, as well as the statutory and precedential basis for the Order. In this Board's June 1, 2006 Order, it determined that its authority: "to conduct proceeding upon complaints charging *violations* of this Act, any rule or regulation adopted under this Act," did not confer upon it authority to determine *violations* of other statutes or regulations. June 1, 2006 Order, p. 8. (emphasis supplied).

Thus, this Board concluded: "As pled, the complaint requires the Board to determine whether MWRDGC has *violated* its enabling statute in order to determine whether MWRDGC has violated the Act and Board regulations." *Id.* (emphasis supplied). The statutory language conferring jurisdiction on the Board over: "complaints charging *violations* of this Act" was not broad enough to include complaints charging *violations* of other acts in conjunction with violations of this Act, the Board concluded.

MWRDGC contends that the mere reference in the Amended Complaint to MWRDGC's statutory duty relative to stormwater management under its enabling MWRDGC Act somehow divests the Board of jurisdiction to consider the alleged violations of the Act and Board regulations. MWRDGC essentially argues that all references to statutory authority other than the

Environmental Protection Act must be ignored by this Board. Thus, MWRDGC posits:

“Without reliance on the Stormwater Management Act, MWRDGC has no greater duty . . .”

MWRDGC’s Motion, p. 11. This suggestion that consideration of the MWRDGC’s Act is off-limits to this Board for the purpose of assessing MWRDGC’s undisputed control over stormwater management in Cook County is mistaken.

MWRDGC’s reliance upon *Concerned Adjoining Owners and Those Opposed to Area Landfills (T.O.T.A.L.) v. PCB*, 288 Ill. App. 3d 565 (5<sup>th</sup> Dist. 1997) and *Material Service Corp. v. J.W. Peters & Sons, Inc.*, PCB 98-97 (April 2, 1998) in support of this argument is misplaced. The court in *T.O.T.A.L.* did not rule that the Board lacks jurisdiction to rely upon or consider the authority and responsibility of the City of Salem under the Municipal Code in connection with an alleged violation of Act. Rather, *T.O.T.A.L.* held only that the Board was not authorized to determine whether the Salem City Council violated the Illinois Municipal Code when purchasing and annexing the property for the proposed landfills. *Id.* at 576. Likewise, in *Material Service Corp.*, the Board did not hold that it lacked authority to consider the Gasoline Storage Act, or the authority that act conferred upon the Office of the State Fire Marshall. Rather, the Board ruled that it lacked: “jurisdiction to determine whether Peters is in *violation* of 41 Ill. Adm. Code 170, 670; this determination must be made by the OSFM.” *Material Service Corporation* at p. 3, (emphasis supplied). MWRDGC has cited no authority which supports its contention that the Board is prohibited from relying upon its enabling statute, the MWRDGC Act, for the purpose of confirming the undisputed fact that MWRDGC has authority over stormwater management in Cook County.

Indeed, such a restriction upon the Board’s authority would significantly impair the Board’s ability to effectively conduct proceedings upon complaints charging violations of the

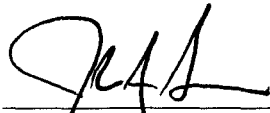
Act or Board regulations. Acceptance of MWRDGC's contention that the Board may not consider or rely upon statutes or regulations other than the Act and Board regulations, would sharply curtail the Board's jurisdiction over municipalities, sanitary districts or other political subdivisions, as they are all creatures of statute from which they derive their authority and responsibility. If the enabling act of any municipality, sanction sanitary district or other political subdivision could not be considered by the Board, the Board would be powerless to determine necessary issues of authority and control, fashion remedies, and otherwise adjudicate alleged violations of the Act committed by these entities. In the case *A.E. Staley Manufacturing Company v. Environmental Protection Agency*, 8 Ill. App. 3d 1018 (4<sup>th</sup> Dist. 1972), the court reaffirmed the principle of administrative law that: "...where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred." *Id.* at 1023. Control over causing or allowing pollution is a relevant consideration this Board may consider when making a determination whether allegations of violations of the Act or Board regulations are established. Thus, without in any manner determining whether MWRDGC has complied with the MWRDGC Act, the Board may properly consider the MWRDGC Act as reasonably necessary for purposes of its undisputed authority and control over stormwater management in Cook County in connection with the alleged violations of the Act, Board regulations, and conditions of permits issued pursuant to the Act, alleged in the Amended Complaint.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Complainant Flagg Creek Water Reclamation District respectfully requests that the Board deny MWRDGC's Motion to Strike and Dismiss Count II of FCWRD's Amended Complaint in its entirety, and accept the Amended Complaint

as plead for hearing on the alleged violations of the Act, Board regulations and conditions of permits issued pursuant to the Act.

Respectfully Submitted,  
Flagg Creek Water  
Reclamation District

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