

ILLINOIS POLLUTION CONTROL BOARD
September 21 2006

FLAGG CREEK WATER RECLAMATION)	
DISTRICT,)	
)	
Complainant,)	
)	
v.)	PCB 06-141
)	(Citizens Enforcement - Water)
VILLAGE OF HINSDALE,)	
METROPOLITAN WATER)	
RECLAMATION DISTRICT OF GREATER)	
CHICAGO, ILLINOIS DEPARTMENT OF)	
TRANSPORTATION, and DUPAGE)	
COUNTY,)	
)	
Respondents.)	

ORDER OF THE BOARD (by A.S. Moore):

On July 28, 2006, the Metropolitan Water Reclamation District of Greater Chicago (MWRDGC) filed a motion to strike and dismiss count II of an amended complaint filed June 29, 2006, by Flagg Creek Water Reclamation District (FCWRD). For the reasons discussed below, the Board today denies that motion. The Board finds that the amended complaint is consistent with the Board’s order dated June 1, 2006.

In addition, the Board notes that, in filing its answer and affirmative defenses to the amended complaint, the Village of Hinsdale has requested that the Board “issue an order dismissing FCWRD’s complaint against Hinsdale with prejudice.” The Board today reserves ruling on that issue and directs the hearing officer to adopt a schedule for responding to the request for dismissal.

Below, the Board first provides the procedural history of this matter. The Board next summarizes the allegations in count II of FCWRD’s amended complaint and its requested relief. The Board then summarizes the arguments made in MWRDGC’s motion to strike and dismiss and in FCWRD’s response. Finally, the Board analyzes those arguments before reaching its conclusion on the motion and issuing its order.

PROCEDURAL HISTORY

On March 3, 2006, FCWRD filed its complaint (Comp.). On April 5, 2006, MWRDGC filed a motion to strike and dismiss paragraphs 61 through 70 of count II of FCWRD’s complaint or, in the alternative, for leave to serve a bill of particulars (MWRDGC Mot.). On April 19, 2006, FCWRD filed its response in opposition to MWRDGC’s motion to dismiss paragraphs 61-70 (Resp.). The Board received answers from IDOT on April 25, 2006 (IDOT Ans.), from

Hinsdale on May 5, 2006 (Hinsdale Ans.), and from DuPage on May 9, 2006 (DuPage Ans.). Respondents' answers contained affirmative defenses raising jurisdictional issues. *See* IDOT Ans. at 2, Hinsdale Ans. at 11, DuPage Ans. at 3.

In an order dated June 1, 2006, the Board found that FCWRD's complaint is not duplicative but is in part frivolous and granted MWRDGC's motion to strike and dismiss paragraphs 61 through 70 of the complaint as frivolous. In the same order, the Board directed FCWRD to file an amended complaint consistent with the terms of the order on or before July 6, 2006. The Board also allowed respondents 60 days from the filing of an amended complaint to file an answer.

On June 29, 2006, FCWRD filed its Amended Complaint (Am. Comp.). On July 28, 2006, MWRDGC filed a motion to strike and dismiss count II of FCWRD's amended complaint (MWRDGC Mot. 2). On August 10, 2006, the hearing officer granted an agreed motion to extend the deadline to respond to MWRDGC's motion to strike to August 18, 2006. On August 18, 2006, FCWRD filed its response in opposition to MWRDGC's motion to strike and dismiss count II of FCWRD's amended complaint (Resp. 2).

The Board received answers to the amended complaint from Hinsdale (Hinsdale Ans. 2) on August 28, 2006 and from DuPage (DuPage Ans. 2) on August 15, 2006. Those answers contained affirmative defenses (Hinsdale Ans. 2 at 10-13; DuPage Ans. 2 at 3-4), and Hinsdale seeks a Board order dismissing the amended complaint against it with prejudice (Hinsdale Ans. 2 at 13).

FCWRD'S AMENDED COMPLAINT

FCWRD System

"FCWRD, formerly known as the Hinsdale Sanitary District, is a municipal government agency organized in 1926 under the Sanitary District Act of 1917." Am. Comp. at 1, citing 70 ILCS 2405/0.1 *et seq.* (2004). "FCWRD is responsible for wastewater treatment within a designated service area of approximately 24 square miles," including all or part of the municipalities of Hinsdale, Clarendon Hills, Oak Brook, Oak Brook Terrace, Burr Ridge, Westmont, Villa Park, Lombard, Darien, and Willowbrook. Am. Comp. at 1.

Generally, FCWRD argues that the four respondents' actions cause stormwater to enter the FCWRD system, causing or contributing to unauthorized combined sewer overflow (CSO) events. Am. Comp. at 3. FCWRD alleges that these CSO events do not comply with state regulations governing CSOs. *Id.*, 35 Ill. Adm. Code Part 306, Subpart C. FCWRD further alleges that, without cooperation from and corrective action by the four respondents, FCWRD cannot comply with the terms and conditions of its National Pollutant Discharge Elimination System (NPDES) permit. Am. Comp. at 3.

Allegations Against MWRGDC

FCWRD alleges that MWRDGC violated section 12(a) of the Act (415 ILCS 5/12(a) (2004)). Am. Comp. at 6 (¶¶ 58, 65). FCWRD further alleges that MWRDGC violated 35 Ill. Adm. Code 306, Subpart C and 35 Ill. Adm. Code 307.1101. Am. Comp. at 6-7 (¶¶ 57, 59, 65). FCWRD also alleges that MWRDGC has violated MWRDGC's National Pollutant Discharge Elimination System (NPDES) permit. Am. Comp. at 6 (¶ 57). FCWRD further alleges that MWRDGC has "interfere[d] with FCWRD's fulfillment of its statutory duty." Am. Comp. at 7 (¶¶ 60, 66).

Specifically, FCWRD alleges that MWRDGC violated the Environmental Protection Act (Act) and Board regulations by diverting flows from the area served by MWRDGC, which, in combination with wet weather flows from FCWRD's service area, cause or contribute to unauthorized CSOs in FCWRD's system. Am. Comp. at 6 (¶¶ 57-58). FCWRD further alleges that MWRDGC violated the Act and Board regulations by failing to remove dead trees and other debris from Flagg Creek so that stormwater is not obstructed there. Am. Comp. at 7 (¶ 65). FCWRD further alleges that flow diversions violate MWRDGC's NPDES permit. Am. Comp. at 6 (¶ 57). FCWRD further alleges that MWRDGC's flow diversion violates Board regulations by "introducing pollutants that interfere with the operation and performance of FCWRD." Am. Comp. at 6 (¶ 59). FCWRD further alleges that MWRDGC "interferes with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area." Am. Comp. at 7 (¶¶ 60, 66).

Relief Requested

In its request for relief, FCWRD requests that the Board issue an order directing MWRDGC and each of the other three respondents "to address . . . wet weather flows, and stop the storm water flows from entering FCWRD's sewers." Am. Comp. at 9

MWRDGC MOTION TO STRIKE AND DISMISS COUNT II

Paragraphs 49-60

MWRDGC argues that paragraphs 49-60 of FCWRD's amended complaint are based upon an alleged breach of an agreement between MWRDGC and FCWRD. MWRDGC Mot. 2 at 6. Specifically, FCWRD alleges that it has historically served and continues to serve an area within Cook County that was placed under the jurisdiction of the MWRDGC in the 1970s. Am. Comp. at 6 (¶¶ 49-50). FCWRD further alleges that it "has a draft agreement with MWRD[GC] that has not been executed, which requires MWRD[GC] to provide service to a roughly-equivalent area in DuPage County that is within the FCWRD's statutory authority." Am. Comp. at 6 (¶ 51).

MWRDGC notes that the complaint alleges that MWRDGC has installed diversion structures that block flows from DuPage County territory that MWRDGC is obligated to serve under the terms of the parties' unexecuted draft agreement. MWRDGC Mot. 2 at 7, citing Am. Comp. at 6 (¶¶ 53-54). MWRDGC argues that the amended complaint alleges that MWRDGC "has intentionally placed structures in its sewers that circumvent MWRD[GC]'s obligations under the agreement." MWRDGC Mot. 2 at 9. MWRDGC then claims that "FCWRD surmises

that the blocked flows make their way into the FCWRD system instead.” MWRDGC Mot. 2 at 7, citing Am. Comp. at 6 (¶ 55).

MWRDGC argues that FCWRD has claimed that the flows blocked by MWRDGC, when combined with wet weather flows from FCWRD, cause or contribute to violations of the Act or Board regulations. MWRDGC Mot. 2 at 7, citing Am. Comp. at -7 (¶¶ 57-60). In other words, “MWRDGC’s alleged breach of an agreement with FCWRD to accept flow from DuPage County (Hinsdale) is the basis for FCWRD’s conclusion that MWRDGC is in violation of the Act and Board regulations.” MWRDGC Mot. 2 at 8, citing Am. Comp. at 6-7 (¶¶ 57-60). MWRDGC claims that, “[i]n order to find that the MWRDGC violated Section 5/12(a) of the Act of the Board’s regulations, the Board must first determine the rights and liabilities of the parties under their agreement.” MWRDGC Mot. 2. at 6. Specifically

the Board must first determine that the MWRDGC, an agency that primarily serves Cook County, owed some type of contractual duty to FCWRD to provide service to an area in DuPage County. The Board must further find that the MWRDGC was in breach of that duty by not accepting sufficient DuPage County flow. MWRDGC Mot. 2 at 2.

Without doing so, argues MWRDGC, “the Board simply could not find from the pleaded facts that MWRDGC had any obligation to process flow from DuPage County, or that its alleged failure to accept sufficient flow resulted in MWRDGC violation of Section 12(a) of the Act or of the Board’s regulations.” MWRDGC Mot. 2 at 9.

MWRDGC first responds that accepting flow from DuPage County is not its “status quo.” MWRDGC Mot. 2 at 7. MWRDGC notes that its “enabling statute indicates that the intended jurisdiction of the MWRDGC is Cook County, with a few exceptions not applicable here.” *Id.*, citing 70 ILCS 2605/1 *et seq.* (2004). MWRDGC suggests that the purported agreement with FCWRD to accept DuPage County flow would conflict with its limited statutory authority, although MWRDGC acknowledges that units of local government may generally enter into intergovernmental agreements. MWRDGC Mot. 2 at 7, citing Ill. Const. 1970, art. VII, § 10, 5 ILCS 220/1 *et seq.* (2004) (Intergovernmental Cooperation Act).

MWRDGC further argues that “[t]he Board has long held that it does not have jurisdiction over disputes based on contractual agreements.” MWRDGC Mot. 2 at 7, citing IEPA v. Will County Landfill, Inc., PCB 72-13, slip op. at 2 (Dec. 12, 1972). MWRDGC notes that, in the Will County Landfill case, the Board dismissed third-party complaints for indemnity or breach of contract, stating “[w]e do not determine the rights of the parties for indemnity under the lease or for breach of contract. For a determination of these issues the parties must resort to a court of law.” MWRDGC Mot. 2 at 8, citing IEPA v. Will County Landfill, Inc., PCB 72-13, slip op. at 2 (Dec. 12, 1972). MWRDGC further notes that the Board more recently cited the Will County Landfill case for the proposition that “its authority under the Act does not extend to adjudication of these contractual matters.” MWRDGC Mot. 2 at 8, citing Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Assoc., Inc., PCB 05-29, slip op. at 11 (July 21, 2005).

Finally, MWRDGC argues that its motion to dismiss paragraphs 49-60 of FCWRD's amended complaint "is consistent with the Board's June 1, 2006 order." MWRDGC Mot. 2 at 9. Specifically, MWRDGC emphasizes that the Board's statement that it would not accept for hearing "portions of [the] complaint alleging violations of any legal authority other than the Act and the Board's regulations." MWRDGC Mot. 2 at 9. MWRDGC claims that the amended complaint fails to conform to the Board's order because it still requires the Board to adjudicate authority other than the Act and Board regulations. MWRDGC Mot. 2 at 2. "In effect," argues MWRDGC, "paragraphs 49-60 were dismissed on the Board's own motion as stated in its June 1 order." *Id.*

Paragraphs 61-66

MWRDGC argues that paragraphs 61 through 66 of FCWRD's amended complaint "allege generally that MWRD[GC] has a statutory duty to remove obstructions from Flagg Creek, and that its failure to do so has caused stormwater to back up into FCWRD's polishing ponds in violation of the Act and regulations adopted by the Board under the Act." MWRDGC Mot. 2 at 5, citing Am. Comp. at 7 (¶¶ 61-66).

MWRDGC notes that the amended complaint alleges that "MWRD[GC] is authorized by statute to regulate stormwater within Cook County." MWRDGC Mot. 2 at 5, citing Am. Comp. at 7 (¶ 61). MWRDGC argues that this allegation is identical to the corresponding allegation in the original complaint. MWRDGC Mot. 2 at 5, citing Comp. at 7 (¶ 62). MWRDGC also notes that the amended complaint alleges that stormwater does not flow properly into Flagg Creek because it is obstructed by dead trees and other debris. MWRDGC Mot. 2 at 5, citing Am. Comp. at 7 (¶ 63). MWRDGC further argues that this allegation is nearly identical to the corresponding allegation in the original complaint. MWRDGC Mot. 2 at 5, citing Comp. at 7 (¶64). MWRDGC claims that the amended complaint alleges that MWRDGC's failure to remove dead trees and other debris from Flagg Creek causes stormwater to back up into FCWRD's polishing pond during high flow events. MWRDGC Mot. 2 at 6. This back-up, alleges FCWRD, interferes with the pond's ability to polish FCWRD effluent and acts as a pollutant in it. *Id.*, citing Am. Comp. at 7 (¶ 64). MWRDGC concludes by arguing that FCWRD has alleged that MWRDGC's failure to remove debris from Flagg Creek so that the flow of stormwater is not obstructed is itself a violation of the Act and Board regulations. MWRDGC Mot. 2 at 6, citing Am. Comp. at 6 7 (¶¶ 65-66); *see* 415 ILCS 5/12(a) (2004), 35 Ill. Adm. Code 307.1101.

MWRDGC argues that FCWRD's amended complaint has only struck from the original complaint "the most direct references to a statutory duty and the breach thereof." MWRDGC Mot. 2 at 10, citing Comp. at 7 (¶¶66-70). MWRDGC further argues that "[t]hese deletions do not change the basic premise of amended paragraphs 61-69, that is, that the MWRDGC has a duty by Illinois statute to clear obstructions from Flagg Creek and that its failure to do so has resulted in violations of the Act and Board regulations." MWRDGC Mot. 2 at 11.

MWRDGC further notes that FCWRD in its amended complaint fails to identify any specific statutory authority through which MWRDGC regulates stormwater in Cook County. MWRDGC Mot. 2 at 10. In a previous order, notes MWRDGC, the Board stated that FCWRD

“clearly refers to section 7h of the MWRD Act.” *Id.*, citing Flagg Creek Water Reclamation District v. Village of Hinsdale, et al., PCB 06-141, slip op. at 7 (June 1, 2006); *see* 70 ILCS 2605/7h (2004) (Stormwater management). MWRDGC notes that FCWRD has not alleged that MWRDGC caused or created the obstruction of Flagg Creek with dead trees and other debris. MWRDGC Mot. 2 at 11; *see* Am. Comp. at 7 (¶¶ 63-65). Nonetheless, argues MWRDGC, FCWRD has claimed that MWRDGC “has an absolute to duty to remedy” that obstruction. MWRDGC Mot. 2 at 11. Unless FCWRD relies upon section 7h of the MWRD Act, claims MWRDGC, then MWRDGC has no greater duty than any other entity along Flagg Creek not to interfere with the operation of the FCWRD. *Id.*

MWRDGC argues that “[t]he Board ruled with respect to the original complaint that it did not have authority to adjudicate violations of the MWRD[GC] Stormwater Management Act as the basis for establishing violations of the Act or Board regulations.” MWRDGC Mot. 2 at 9. MWRDGC claims that FCWRD has merely “eliminated the buzzwords ‘breach of statutory duty’” from its amended complaint and still seeks to have the Board determine whether MWRDGC has breached its stormwater management statute. MWRDGC Mot. 2. at 12. Consequently, MWRDGC argues that “paragraphs 61 through 66 of the amended Count II should also be dismissed.” MWRDGC Mot. 2 at 13.

FCWRD RESPONSE

Paragraphs 49-60

FCWRD acknowledges that the claim against MWRDGC alleged in paragraphs 49-60 of the amended complaint “was plead almost verbatim in the original complaint.” Resp. 2 at 4; *see* Am. Comp. at 6-7 (¶¶ 49-66), Comp. at 6-7 (¶¶ 50-71). FCWRD stresses, however, that MWRDGC’s motion to strike paragraphs 61-70 of the original complaint raised no issue with regard to the Board’s jurisdiction over the claims now alleged in paragraphs 49-60 of the amended complaint. Resp. 2 at 4; *see* MWRDGC Mot. at 3-4. FCWRD argues that the Board has already determined that these paragraphs are not frivolous and accepted them for hearing. Resp. 2 at 4.

FCWRD claims that “the amended complaint does not allege a claim for breach of contract.” Resp. 2 at 4-5. FCWRD further claims that “[c]ount II does not seek to have this Board enforce a contract or award damages for breach of a contract.” Resp. 2 at 1. Noting that it has only alleged the existence of a draft contract that has not been executed, FCWRD argues that “the amended complaint does not even allege the existence of a contract.” Resp. 2 at 1-2; *see* Am Comp. at 6 (¶ 61). FCWRD further argues that paragraphs 49-60 of the amended complaint allege only violations of the Act, Board regulations, and permits issued pursuant to the Act. Resp. 2 at 2, 5. Noting that MWRDGC serves an area in DuPage County roughly equivalent to the Cook County area served by FCWRD, FCWRD suggests that the un-executed draft agreement between the two districts “is relevant factual background information for this Board to consider when adjudicating MWRDGC’s control over causing or allowing pollution.” Resp. 2 at 2.

FCWRD argues that MWRDGC “misunderstands this Board’s prior rulings upon which it relies in support of its motion.” Resp. 2 at 5. FCWRD notes that, in IEPA v. Will County Landfill, Inc., “the Board asserted jurisdiction and accepted the case for hearing, notwithstanding the existence of the contracts alleged.” Resp. 2 at 5, citing IEPA v. Will County Landfill, Inc., PCB 72-13, slip op. at 2 (Dec. 12, 1972). FCWRD argues that, although the Board asserted jurisdiction only to resolve environmental issues, the existence of a lease agreement and the potential right of possession of a site formed the Board’s basis for accepting jurisdiction over a third-party respondent. Resp. 2 at 5, citing IEPA v. Will County Landfill, Inc., PCB 72-13. “Properly understood,” argues FCWRD, “IEPA v. Will County Landfill actually supports the Board’s acceptance of jurisdiction of Count II, rather than MWRDGC’s motion. Resp. 2 at 5.

FCWRD also relies upon the Mather case, in which it claims the Board distinguished a parallel circuit court case alleging a breach of contract and seeking damages for the breach. Resp. 2 at 5, citing Mather Investment Properties, L.L.C. v. Illinois State Trapshooters Ass’n., Inc., PCB 05-29, slip op. at 3-5, 11-12 (July 21, 2005). FCWRD emphasizes that although Mather’s complaint pled the existence of a contract to purchase real estate (Mather, PCB 05-29, slip op. at 1-2 (¶¶ 4-6) (Aug. 17, 2004)), and although the Board acknowledged that the facts and parties of the two claims overlapped, the Board found that “the case before it was not duplicative or frivolous.” Resp. at 2, citing Mather, PCB 05-29, slip op. at 3-5 (July 21, 2005). In Mather, argues FCWRD, the Board states “the complaint in this matter alleges only that Trapshooters Association violated Section 21(e) of the Act . . . adjudication of which falls within the Board’s statutory authority.” Resp. 2 at 6, citing Mather, PCB 05-29, slip op. at 11 (July 21, 2005). FCWRD argues that, because it has only alleged that MWRDGC has violated the Act, Board regulations, and conditions of MWRDGC’s NPDES permit, its amended complaint contains only allegations within the Board’s statutory authority. Resp. 2 at 6, citing 415 ILCS 5/5(d) (2004).

FCWRD also cites IEPA v. Village of Millstadt, PCB 78-132. In that case, respondent Testing, Analysis, and Control, Inc. (TAC) moved to dismiss the complaint against it on the grounds that accepting jurisdiction would require the Board to determine parties’ rights under a contract by which TAC operated and maintained a wastewater treatment facility for the village. Resp. 2 at 6, citing IEPA v. Village of Millstadt, PCB 78-132, slip op. at 1 (Sept. 7, 1978). TAC argued and the Board agreed “that determination of third party contract rights is the function of a court and not this Board.” Village of Millstadt, PCB 78-132, slip op. at 1-2 (Sept. 7, 1978). The Board stressed, however, that “[t]he Act prohibits any person . . . from causing or allowing a violation of the regulations, regardless of whether such violation was caused or allowed as a result of a contractual arrangement.” Village of Millstadt, PCB 78-132, slip op. at 1 (Sept. 7, 1978). FCWRD stresses the Board’s statement in that order that “[t]he only question before the Board is whether respondents did in fact cause or allow pollution, and that question must be developed in the record.” Village of Millstadt, PCB 78-132, slip op. at 2 (Sept. 7, 1978).

Paragraphs 61-66

FCWRD argues that its amended complaint does not allege that MWRDGC has violated its enabling statute or seek to have the Board adjudicate violations of that statute. Resp. 2 at 6, citing 70 ILCS 2605/7h (2004). Stating that it is unquestioned that MWRDGC is authorized to manage stormwater in Cook County, FCWRD claims that “reference to MWRDGC’s undisputed

authority to manage stormwater in Cook County is not an allegation that MWRDGC is violating the MWRDGC Act.” Resp. 2 at 7.

FCWRD argues that MWRDGC has misinterpreted the Board’s June 1, 2006 order granting MWRDGC’s motion to strike specified paragraphs of the original complaint. Resp. 2 at 7. Citing that order, FCWRD argues that the Board has authority to hear complaints alleging violations of the Act and Board regulations but lacks authority to with regard to violations of other statutes or regulations. *Id.*; see Flagg Creek Water Reclamation District v. Village of Hinsdale, et al., PCB 06-141, slip op. at 7-8 (June 1, 2006).

FCWRD argues that its amended complaint is consistent with the Board’s June 1, 2006 order. “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, Board regulations and conditions of various permits issued pursuant to the Act and Board regulations.” Resp. 2 at 2. FWRD disputes MWRDGC’s contention “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.” Resp. 2 at 7. FCWRD claims that MWRDGC is mistaken in arguing that the Board cannot consider the MWRDGC Act in “assessing MWRDGC’s undisputed control over stormwater management in Cook County.” *Id.*

FCWRD argues that, if the Board accepted MWRDGC’s position regarding consideration of other statutes, then the Board would limit its authority to conduct proceedings and make it more difficult for the Board to fashion remedies and resolve issues such as control and authority. Resp. 2 at 8-9. Generally, argues FCWRD, “[c]ontrol 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.” Resp. 2 at 9. In this case, FCWRD claims that the Board may consider the MWRDGC Act on the issues of authority and control over stormwater management “without in any manner determining whether MWRDGC has complied with the MWRDGC Act.” *Id.*

BOARD ANALYSIS AND FINDINGS

As noted in its June 1, 2006 order, the Board’s powers are limited to those vested in it by the Environmental Protection Act. See Chemetco, Inc. v. PCB, 140 Ill. App. 3d 283, 286 (5th Dist. 1986); 415 ILCS 5/5 (2004). Specifically, the Act provides that “[t]he Board shall have authority to conduct proceedings upon complaints charging violations *of this Act*, [and] any rule or regulation adopted under this Act.” 415 ILCS 5/5(d) (2004) (emphasis added). The Board also noted that its caselaw reflects this limited authority. See, e.g., Concerned Adjoining Owners and Those Opposed to Area Landfills (T.O.T.A.L.) v. PCB, et al., 680 N.E.2d 810 (5th Dist. 1997), Material Service Corp. v. J.W. Peters & Sons, Inc., PCB 98-97 (Apr. 2, 1998). Consequently, the Board struck as frivolous “the portions of the [original] complaint alleging violations of any legal authority other than the Act and the Board’s regulations.” Flagg Creek Water Reclamation District v. Village of Hinsdale, et al., PCB 06-141, slip op. at 8-9 (June 1,

2006). The Board also directed FCWRD to file an amended complaint consistent with the terms of its order. *Id.* at 9.

In response to that direction, FCWRD on June 29, 2006 timely filed its amended complaint. In count II of the amended complaint, FCWRD alleges that MWRDGC has caused or contributed to water pollution in violation of section 12(a) of the Act. Am. Comp. at 6-7 (¶¶ 58, 65), citing 415 ILCS 5/12(a) (2004)) FCWRD further alleges that MWRDGC has caused or contributed to unauthorized CSOs and has introduced pollutants that interfere with FCWRD's operation and performance in violation of Board regulations. Am. Comp. at 6-7 (¶¶ 57, 59, 65), citing 35 Ill. Adm. Code 306, Subpart C; 35 Ill. Adm. Code 307.1101. FCWRD further alleges that MWRDGC has caused or contributed to unauthorized CSOs in violation of MWRDGC's NPDES permit. Am. Comp. at 6 (¶ 57). FCWRD no longer pleads that MWRDGC has breached its statutory duty under its enabling act. *Compare* Am. Comp. at 6-7 *with* Comp. at 7 (¶ 67) ("MWRD[GC] has breached its statutory duty.").

The Board finds that the allegations pled by FCWRD in the amended complaint fall within its statutory authority "to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, [and] any permit or term or condition of a permit." 415 ILCS 5/5(d) (2004). Consequently, the Board denies MWRDGC's motion to strike and dismiss count II of FCWRD's amended complaint.

The Board does not accept MWRDGC's argument that, "in order to find that the MWRDGC violated Section 5/12(a) of the Act or the Board's regulations, the Board must first determine the rights and liabilities of the parties under their agreement." Mot. 2 at 6. As pled in the amended complaint, the Board must determine whether MWRDGC caused or contributed to water pollution in violation of the Act, Board regulations, and an NPDES permit. These provisions prohibit a person from committing those violations, "regardless of whether such violation was caused or allowed as a result of a contractual arrangement." IEPA v. Village of Millstadt, PCB 78-132, slip op. at 1 (Sept. 7, 1978), citing IEPA v. James McHugh Construction Co., et al., PCB 71-291. Likewise, the amended complaint does not require the Board to determine whether MWRDGC violated the terms of its enabling statute in order to determine whether MWRDGC has caused or contributed to water pollution in violation of the Act and Board regulations. Am. Comp at 7 (¶¶ 61-66).

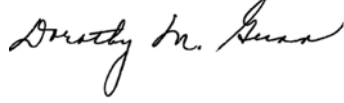
CONCLUSION

The Board denies MWRDGC's motion to strike and dismiss count II of FCWRD's amended complaint and directs the hearing officer to proceed expeditiously to hearing. Although the Board today reserved ruling on Hinsdale's request that the Board issue an order dismissing FCWRD's complaint against it, the Board directs the hearing officer to adopt a schedule for responding to the request for dismissal.

IT IS SO ORDERED.

Board Member N.J. Melas abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 21, 2006, by a vote of 3-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board