

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE,)	
Complainant,)	PCB # 2015-139
v.)	(Citizens - Water Enforcement)
HIGHLAND HILLS SANITARY)	
DISTRICT,)	
Respondent.)	

NOTICE OF FILING


To: Lawrence A. Stein
Aronberg Goldgehn Davis & Garmisa
330 N. Wabash Avenue
Suite 1700
Chicago, Illinois 60611

PLEASE TAKE NOTICE that I have today filed with the Pollution Control Board the following documents:

HIGHLAND HILLS SANITARY DISTRICT'S REPLY TO OBJECTION TO
MOTION FOR PARTIAL SUMMARY JUDGMENT

a copy of which is hereby served upon you.

Respectfully submitted,


Heidi E. Hanson

Dated: May 19, 2016

Joseph R. Podlewski Jr.
Heidi E. Hanson
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**HIGHLAND HILLS SANITARY DISTRICT’S REPLY TO OBJECTION
TO MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respondent, HIGHLAND HILLS SANITARY DISTRICT (“District”), by and through its attorneys PODLEWSKI & HANSON P.C., hereby responds to Complainant, Susan M. Bruce’s (“Bruce”) OBJECTION TO MOTION FOR PARTIAL SUMMARY JUDGMENT (“Objection”).

For its Response, the District states as follows:

1. The District was given leave, by the Hearing Officer’s May 4, 2016 order, to file a reply to the Complainant’s Objection to its Motion for Partial Summary Judgment on or before May 26, 2016.

Highland Hills Sanitary District Does Not Own or Operate a Treatment Works.

2. In her Objection, Complainant objects to the Motion for Partial Summary Judgment (“Motion”) as it regards the applicability of Section 306.102(a) of the Board’s water pollution control regulations (35 Ill. Adm. Code 306.102(a)) and Chapter 3, Rule 601(a). The Board has twice ruled that a complainant must show that a respondent owned or operated a treatment works as an essential element of a claim of violation of those rules. (See Respondent’s Memorandum in Support of its Motion for Partial Summary Judgment, Page 3).

3. In support of its Motion, the District provided the affidavit of Alphonse Sarno, past president and current member of its board, swearing on oath the District did not own or operate a treatment works. In its memorandum of law, the District addressed Complainant's citation to a definition of "treatment works" that was not applicable to the Board's rules on water pollution control, and the District also provided the correct and applicable definition of "treatment works" which clearly exempted sewers from the definition.

4. In her Objection, Complainant argues that she has not had the opportunity to ascertain the truth of the allegation that the District does not own or operate a treatment works, and therefore it would be premature for the Board to render summary judgment.

5. Put differently, 18 months after her initial complaint the Complainant asserts that she is still unsure as to whether the District owns or operates a treatment works, a fact that the Board has found is an essential element of her cause of action.

6. The Complainant has the burden of proof here and, by her Objection, she has admitted that she is unprepared, and unable, to meet it.

7. She has not provided a contravening affidavit or any legal argument at all. She has not given the Board any substantive reason to deny the Motion for Partial Summary Judgment. Her only argument is that she has not "had the opportunity to ascertain the truth of the allegations." Yet, rather than request more time and provide a reason for the further delay, she asks that the Board rule on the merits of the Motion – and deny it (Objection page 2), citing as her only argument that she is unprepared to address the Motion.

8. This is a simple matter. A treatment works is a physical structure. It either exists or it does not. The past president and current board member of the District has sworn that the District does not have a treatment works. He is in a position to know. Section 306.102(a) and

Chapter 3, Rule 601(a) are simply not applicable to the District and no evidence to the contrary was offered by Bruce.

9. Providing the Complainant with additional time will not change that fact that the District does not own or operate a treatment works. The Board should not countenance Bruce's transparent attempt to create further delay through her attempt to avoid addressing a simple factual matter. There is no genuine issue of material fact here. The District is entitled to summary judgment as a matter of law on the alleged violation of Section 306.102(a) and Rule 601.

The 2003 Amendment to Section 31(d)(1) of the Act Cannot be Applied Retroactively so as to Provide Bruce with Standing to Allege a Violation of the 1979 Travieso Order.

10. The District moved for partial summary judgment on the Complainant's allegations relating to *Travieso v. Highland Hills Sanitary Dist.*, PCB 79-72 (Nov. 1, 1979) ("*Travieso*") arguing that a 2003 amendment to the Illinois Environmental Protection Act which permitted a nonparty to pursue a violation of "any Board order" postdated the *Travieso* case and could not be applied retroactively.

11. Bruce's Objection (paragraph 4) confusingly characterizes this as "grounds that the *Travieso* order does not apply or cannot be enforced" and argues that the Board has already ruled on that contention.

12. As an initial matter, the Board did indeed rule that the *Travieso* order cannot be enforced. The District argued that in a citizen's civil matter Mrs. Bruce, as a nonparty to the *Travieso* case, was unable to enforce the *Travieso* cease and desist order pursuant to 415 ILCS 5/45(e). (See Respondent's Motion to Dismiss Complaint for Failure to Comply with Board Rules and to Dismiss in Part for Being Frivolous, pages 3-5). The Board agreed that Mrs. Bruce

could not enforce the *Travieso* order. (June 4, 2015 Board Order, pages 7-8 and September 3, 2015 Order, page 3).

13. In its June 4, 2015 order, the Board granted the District's motion to strike or dismiss the initial complaint (page 6) and gave Complainant guidance should it choose to replead.

Although the failure to plead the location of the discharges is a sufficient ground to grant the dismissal motion, because the Board is allowing complainant to amend the complaint, the Board proceeds to address the remaining asserted grounds for striking or dismissing the complaint.

14. The Board went on to suggest, on page 8, that if Bruce amended her complaint she could pursue another avenue. Distinguishing between enforcing the *Travieso* order, pursuant to 415 ILCS 5/45(e) and pleading a violation of a Board order pursuant to 415 ILCS 5/31(d)(1) the Board stated:

The Board does have authority, however, to find that the District violated the *Travieso* order, upon a proper showing of such a violation. Under Section 31(d)(1) of the Act, "[a]ny person" may file a complaint "against any person allegedly violating . . . any Board order." 415 ILCS 5/31(d)(1) (2014). Thus, complainant is entitled to assert a claim for violation of the *Travieso* order even though she was not a party to that proceeding. Nonetheless, the normal pleading standards apply to such a claim (*see id.*), and the complaint must, therefore, specify the "manner in and extent to which" the District is said to have violated the *Travieso* order (*see id.* at 5/31(c)). The District argues that the complaint does not meet this standard. The Board agrees that the complaint does not identify what part of the *Travieso* order the District is alleged to have violated, how the District did so, or what relationship, if any, there is between complainant and Mr. *Travieso*. Thus, the Board rules that complainant's claim for violation of the *Travieso* order is inadequately pled. In the amended complaint complainant is permitted to file, complainant may choose to abandon that claim, as her response proposes, *see* Resp. at 3, or re-plead it.

15. The Board's suggestion of an alternative pleading option encounters an obstacle in the unusual circumstance where, as here, the order claimed to have been violated predates the 2003 grant of authority for a nonparty to pursue a violation of a Board order and thus the 2003

amendments would have to be applied retroactively in order for the Complainant to invoke subject matter jurisdiction.

16. The Board has never before had the issue of the retroactive application of Section 31(d)(1) squarely before it. It has not had the benefit of argument or briefing on that issue until now. It has never ruled on the issue of retroactivity of the 2003 amendment to section 3(d)(1). The District has now raised the issue; Complainant has had an opportunity to respond; and now the District asks the Board to make a ruling on this issue.

17. Although it is by no means clear, Complainant in her Objection appears to be arguing that the Board's suggestion was in fact a ruling with precedential and preclusionary effect and thus seeks to prevent the Board from fully considering the retroactivity issue.

18. The Board's statement that it had authority to find the District violated the *Travieso* order was merely an observation, possibly dicta, but certainly not a ruling. The Board never had the issue of retroactive application before it and so could not have ruled on it. Furthermore, the Board stated that its June 4, 2015 ruling was based on pleading deficiencies. The Board struck the complaint and its suggestion on repleading was not necessary for its decision.

19. The issue of retroactivity is a threshold question. If the 2003 amendment to Section 31(d)(1) cannot be retroactively applied, then Bruce cannot invoke subject matter jurisdiction before the Board over her claim that the District has violated the *Travieso* order.

20. Subject matter jurisdiction is such an important element of a matter that it can be raised at any point in a case including upon appeal, and it cannot be waived by any action of the parties or created by any action of a court (or Board). “[S]ubject matter jurisdiction cannot be conferred by waiver, stipulation, consent or estoppel. *Jones v. Industrial Comm'n*, 335 Ill.App.3d

340, 343 (2002). Subject matter jurisdiction can be raised at any time and may even be raised sua sponte by a reviewing court. Jones, 335 Ill.App.3d 343". *Ruff v. Splice, Inc.* 398 Ill App3d 431, 923 NE2d 1250, 338 Ill Dec 101 (1st Dist 2010).

21. In summary, the Board ruled on the issue of whether the *Travieso* order could be enforced. (It cannot be.) The Board offered a suggestion that Bruce could try to plead a violation of the *Travieso* order pursuant to 415 ILCS 5/31(d)(1), but it did not rule on that matter. The Board's own pleading suggestion does not preclude it from deciding the retroactivity issue. The Board's pleading suggestion cannot in any way confer or create jurisdiction for it to hear alleged violations of the *Travieso* case by Bruce. Because the argument that the *Travieso* case predates the provision allowing a nonparty to file a complaint based on "any Board order" is one of subject matter jurisdiction, it can be raised at any time.

The *Travieso* Order Does Not Apply to the Bruce Residence.

22. Complainant did not object to the District's argument that the 1979 Illinois Pollution Control Board could not have intended for the *Travieso* cease and desist order to apply to the Bruce residence.

The Cease and Desist Order in *Travieso* Should No Longer be Given Effect.

23. The District also moved for partial summary judgment on the *Travieso* allegations, arguing that the *Travieso* cease and desist order was old, stale, remote and based on sewer backups due to an unrelated cause.

24. Bruce's objection to the motion states that "Complainant's argument regarding the passage of time raises an issue of fact..." Complainant, however, has made no discernible argument regarding the passage of time.

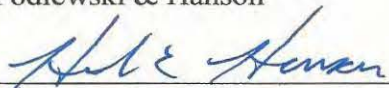
25. If we assume that Bruce intended to say “Respondent’s argument raises an issue of fact” her own argument does not markedly improve. She does not explain what issue of fact she refers to. There do not appear to be any facts with which she could take issue, because all the facts referenced in that section of the Motion were drawn either from the Board’s *Travieso* order or from her own Amended Complaint.

26. There are, and can be, no contested facts on this subject because they are all taken from a prior Board decision or her own pleadings, therefore, her vague allegation of an undefined “issue of fact” is not a valid objection and the Motion for Partial Summary Judgment should be granted.

WHEREFORE Respondent respectfully requests that its Motion for Partial Summary Judgment be granted.

Respectfully submitted,

Highland Hills Sanitary District
by its attorneys,
Podlewski & Hanson



Heidi E. Hanson

Dated: May 19, 2016

Joseph R. Podlewski Jr.
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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served on this date the attached:

HIGHLAND HILLS SANITARY DISTRICT'S REPLY TO OBJECTION TO
MOTION FOR PARTIAL SUMMARY JUDGMENT

upon the Clerk's Office On-Line, Illinois Pollution Control Board by electronic filing before
4:30, and

upon the following, by email transmission before 4:30:

Bradley Halloran, Hearing Officer at the email address of Brad.Halloran@illinois.gov.
(pursuant to 35 Ill Adm. Code 101.1060(d)),

Lawrence A. Stein at the email address of lstein@agdglaw.com
(pursuant to April 5, 2016 consent).

The number of pages in the email nine (9) pages (including this Certificate).

My email address is heh70@hotmail.com.


Heidi E. Hanson

Dated: May 19, 2016

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