

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE,

Complainant,

v.

HIGHLAND HILLS SANITARY
DISTRICT,

Respondent.

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)
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)
)
)

PCB # 2015-139
(Citizens - Water Enforcement)

RECEIVED
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JUL 15 2015

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To:

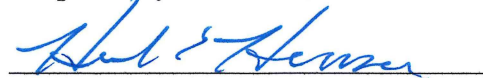
Lawrence A. Stein
Huck Bouma PC
1755 South Naperville Road
Wheaton, IL 60189

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

RESPONDENT'S MOTION FOR RECONSIDERATION IN PART OF THE POLLUTION
CONTROL BOARD'S JUNE 4, 2015 ORDER
and
MOTION TO DISMISS AMENDED COMPLAINT

a copy of which is hereby served upon you.

Respectfully submitted,



Heidi E. Hanson

Dated: July 12, 2015

Joseph R. Podlewski Jr.
Heidi E. Hanson
Podlewski & Hanson P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served the attached:

RESPONDENT'S MOTION FOR RECONSIDERATION IN PART OF THE POLLUTION
CONTROL BOARD'S JUNE 4, 2015 ORDER

and

MOTION TO DISMISS AMENDED COMPLAINT

By depositing same in the U. S. Mail at Western Springs, Illinois before 4:30 this day, July 12,
2015 postage prepaid, upon the following persons:

Original and 3 copies to


Attn: Clerk
Illinois Pollution Control Board
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

One copy to:

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

Lawrence A. Stein
Huck Bouma PC
1755 South Naperville Road
Wheaton, IL 60189

Dated: July 12, 2015


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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE)
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 Complainant,)
 v.)
 HIGHLAND HILLS SANITARY)
 DISTRICT,)
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MOTION TO DISMISS AMENDED COMPLAINT

Respondent, HIGHLAND HILLS SANITARY DISTRICT (“District”), by and through its attorneys PODLEWSKI & HANSON P.C., respectfully requests, pursuant to 35 Ill. Adm. Code Section 101.506, that the Board dismiss the amended complaint.

In support of this motion, the District states as follows:

1. By its Order of June 4, 2015 the Board dismissed Complainant’s original complaint, and granted her until July 6, 2015 to file an amended complaint. On July 6, 2015 Complainant filed her amended complaint which was received by Respondent on July 8, 2015.
2. In its June 4, 2015 Order the Board also addressed Respondent’s arguments that the dates of three backups alleged to have occurred sometime in 2010 and two backups alleged to have occurred sometime in May of 2013 as well as descriptions of the nature, extent and duration of the alleged backups were insufficiently pled. The Board held that they had been sufficiently pled.
3. Simultaneously with the filing of this Motion to Dismiss the Amended Complaint, Respondent has filed Respondent’s Motion for Reconsideration in Part of the Pollution Control Board’s June 4, 2015 Order, distinguishing previous Board rulings and providing additional

evidence and arguments regarding the need for dates and information on the nature, extent and duration of the alleged backups.

4. Respondent incorporates by reference that motion into this Motion to Dismiss Amended Complaint.

5. As set forth in the motion for reconsideration, although she proposed to do so, in her amended complaint, Complainant did not provide additional specificity regarding the dates or the nature and extent of the alleged backups.

6. As set forth in the motion for reconsideration, the particular instances of failure to provide sufficient information to comply with Procedural Rule 103.204(c)(2) (35 Ill Adm. Code 103.204(c)(2)) that were the basis for Respondent's motion to dismiss the original complaint, have been repeated in the amended complaint, therefore the Respondent requests the Board to reconsider its ruling on the complaint and also to dismiss the amended complaint on those grounds.

7. In addition to the grounds and arguments given for reversal of the Board's opinion on the specificity of dates and the nature, extent and duration of the alleged sewer backups there is an additional ground for dismissal.


8. Complainant seeks to allege a violation of a 1979 Board order in Travieso v. Highland Hills Sanitary District., PCB 79-72 (Nov.1, 1979). Paragraph 7 of the Amended Complaint asserts that the order in Travieso, required respondent to "cease and desist from causing sewer backups at the complainant's location" and "complainant's property" (presumably referring to Mrs. Bruce as the complainant) whereas the Travieso, order provides that Respondent shall cease and desist from violations of specific rules "in causing sewer backups at Complainant's residence" (presumably referring to Mr. Travieso as the Complainant). As in the earlier

complaint, the amended complaint fails to “allege what relationship, if any, there is between complainant [Susan M. Bruce] and Mr. Travieso.” June 4, 2015 PCB order, page 8.

9. The amended complaint has failed to comply with 35 Ill. Adm. Code 103.204(c)(2) in that it failed to provide the 2010 and May 2013 dates as well as the extent, nature and duration of the alleged violations so as to reasonably allow preparation of a defense. In addition, the amended complaint fails to explain the relationship, if any, between the Complainant in this matter and Mr. Travieso.

WHEREFORE, Respondent requests that the Board dismiss the amended complaint.

Respectfully submitted,


Heidi E. Hanson

Dated: July 12, 2015

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Podlewski & Hanson P.C.
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Complainant,)	PCB # 2015-139
v.)	(Citizens - Water Enforcement)
HIGHLAND HILLS SANITARY)	
DISTRICT,)	
)	
Respondent.)	

**RESPONDENT'S MOTION FOR RECONSIDERATION IN PART OF THE
POLLUTION CONTROL BOARD'S JUNE 4, 2015 ORDER**

Respondent, HIGHLAND HILLS SANITARY DISTRICT ("District"), by and through its attorneys PODLEWSKI & HANSON P.C., respectfully requests, pursuant to 35 Ill. Adm. Code Section 101.520, that the Board reconsider, in part, its order of June 4, 2015.

In support of this motion, the District states as follows:

1. On April 15, 2015 Respondent filed a motion to dismiss the complaint for, among other things, inadequate specificity in pleading and failure to comply with the Board's procedural rules.
2. The Board issued an order dated June 4, 2015, which was received by Respondent on June 8, 2015. In it, the Board dismissed the Complaint and granted Complainant leave to file an amended complaint. The Board also addressed Respondent's arguments that the Complaint failed to comply with Procedural Rule 103.204(c)(2) (35 Ill Adm. Code 103.204(c)(2)) in that it had failed to specify dates in 2010 and in May of 2013 on which sewer backups were alleged to have occurred and that it had failed to provide adequate information on the nature, extent, and duration of all of the discharges and on the nature and extent of all but one of the discharges; thereby impairing the District's ability to prepare a defense.

3. Procedural Rule 103.204(c)(2) (35 Ill Adm. Code 103.204(c)(2)) provides that a complaint “must contain”:

The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense;

4. In her Objection to the Motion to Dismiss, paragraphs 3 and 4, Complainant proposed to provide additional specificity on the missing dates and additional details on the nature and extent and strength of the discharges.

5. In its June 4, 2015 order, pages 6 and 7, Board found that the Complainant’s allegation that backups occurred “twice in May 2013” and “three times in 2010” was sufficient to meet the Section 103.204(c)(2) requirement of “dates”, that the description provided in paragraphs 6, 7, and 8 of the Complaint was sufficient to meet the nature, extent, and duration requirements of Section 103.204(c)(2) and that Complainant therefore had met her obligation to “advise respondents of the extent and nature of the alleged violations to reasonably prepare for a defense.” *Id* at 7.

6. On July 6, 2015 Complainant filed the Amended Complaint, but did not provide any additional specificity on the dates and did not provide further details on the nature, extent and duration of the alleged discharges. The allegations of paragraphs 3, 6, 7, and 9 of the Amended Complaint merely repeat the allegations in paragraphs 6, 7, and 8 of the original Complaint. Despite indicating that she could provide further dates and details, she has not done so.

7. Consequently, the District respectfully moves that the Board reconsider its June 4, 2015 order with regard to the sufficiency of information needed for compliance with 35 IAC 103.204(c)(2) in this case. The District will also be moving to dismiss the Amended Complaint.

Allegations of 2010 and 2013 Sewer Backup Dates

8. Without knowing the dates on which the sewer backups are alleged to have occurred it is impossible to determine:

a. whether (and how much) rain occurred in the area on that date and therefore whether an excessive rainfall or “Act of God” defense could be asserted;

b. whether construction was occurring on the sewers in the area on that date and therefore whether an act of the Respondent, a contractor, or that of another third party might have been responsible;

c. whether the alleged backups took place before, after, or during specific sewer cleaning, repairs, or inflow and infiltration investigations and thus whether they were caused by, cured by, or unrelated to those events;

d. whether events upstream or downstream of the District’s sewers might have contributed to, or caused, the alleged backups (including, but not limited to, conditions at the wastewater treatment plant that receives the District’s sanitary sewer flow); and

e. whether the allegations of violation arising from the backups alleged to have occurred in 2010 would be subject to a statute of limitations affirmative defense. Union Oil Co. of California d/b/a/ Unocal v. Barge-Way Oil Co., Inc., PCB 98-169, slip op. at 5, n.1 (Jan. 7, 1999). See also. Zohfeld v. Drake, et al., PCB 05-193, slip op. at 1 (April 6, 2006), and 735 ILCS 5/13-205.

9. In reaching its conclusion that the May 2013 and 2010 allegations were sufficiently pled the Board cited to two previous decisions, Finley, et al. v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 12 (Aug. 8, 2002) and Schilling et al. v. Hill et al., PCB 10-100, slip op. at 2-3

(November 4, 2010). The District respectfully argues that those decisions are distinguishable from the present case in several material respects.

10. In Schilling, the complainants alleged that material which was being disturbed and eroded as a result of respondent's construction activities was contaminating a pond owned by complainants and that the construction activities occurred "during or about" 2006 and 2007 and in the spring of 2010. The pollution alleged in Schilling, was apparently due to a gradual accumulation of material and continued over a period of months.

11. The Board found the allegations in Schilling, were sufficient to comply with the 35 Ill. Adm. Code 103.204(c) requirement that the "dates" of the allegation be stated in the complaint. The Board noted that "complainants would be hard pressed here to provide exact dates when pollution occurred to their pond, where the construction activities commenced and the time the contaminants entered complainants' property are likely to differ." Schilling, slip op. at 10.

12. In Finley, the complaint alleged that air pollution "(1) began on January 1, 2000, and was continuing when the complaint was filed on May 21, 2002; and (2) occurs 'generally daily during the plant work day operations'" PCB June 4, 2015 order page 7. The Board found the pleading of "dates" to be adequate in Finley, also. Even though the dates in that case were not listed specifically, the reference to "plant work day operations" would have been sufficient to enable the respondent in that case to determine the dates of alleged violations by referencing its own operating schedule.

13. Schilling, and Findley, are distinguishable from the present case in that the respondents in both of those cases would have been in a position to independently determine the dates of the alleged pollution because the allegations were based on specific and known actions of those respondents. That is not the case with the allegations made by Mrs. Bruce. A residential sewer

backup can occur without the District's having undertaken any specific activity. It can occur without the District's knowledge. It can occur as a result of an Act of God or the act of a third party tributary to the sewer. It can also occur as a result of the complainant's own plumbing problems, as was recognized by the Board in Konkel v. City of Crest Hill, PCB 92-145 (May 20, 1993).

14. Also unlike the situations in Schilling, and Findley, the residential sewer backups alleged here are not continuous or "every work day" occurrences. They are apparently isolated, discrete events. Two of the alleged dates are separated by over a year. The events may well have had different causes. Furthermore, the knowing dates of the alleged backups may help the District to identify the causes of the backups, particularly if they are related to rainfall or construction.

15. Because of the nature of the alleged violations, if Complainant continues to withhold the dates on which it claimed the events occurred, the District will be unable to investigate the possible causes of the events and therefore will be prejudiced in its ability to prepare a defense.

Allegations Regarding Nature, Extent and Duration of the Alleged Discharges

16. Paragraph 7 of the Formal Complaint states as follows:

April 18, 2013: Sewage forcibly entered the house through every drain in a geyser like fashion, and also through the respondent's equipment in the complainant's backyard, flooding the backyard above the ground level of the house. Additional backups twice in May 2013, July 24, 2013, August 3 and 6, 2013, and three times in 2010.

17. Paragraph 7 is vague and open to interpretation. The Board, in its discussion, June 4, 2015 Order page 7, and in its summary of the Complaint, page 2, quoted below, reads the description following "April 18, 2013" and the colon, as though it describes all of the other backups:

The complaint alleges that on four specified days in April, July, and August, 2013, “twice in May 2013,” and “three times in 2010,” sewage from the District’s sanitary sewer system “forcibly entered,” in a “geyser like fashion,” complainant’s house through “every plumbing fixture with a drain. . . .” Comp. at 1-2. The complaint adds that sewage from the District’s equipment also flooded complainant’s backyard “above the ground level of the house.” *Id.* at 2.

18. Based on its reading that the description applied to each sewer backup, the Board found that the description was sufficient. However, it is not clear whether the description of the pollution was intended to apply to each of the dates separately or whether it is solely a description of the April 18, 2013 alleged sewer backup.

19. The language of paragraph 7 of the Complaint has been repeated in paragraph 7 of the Amended Complaint, but the colon has been changed to a comma and the list of additional backups has been moved to another subparagraph which would further indicate that the “sewage forcibly entering the house...” clause was never intended to apply to dates other than April 18, 2013. Thus discharges of significantly differing “nature, extent, duration and strength” may have occurred on those other dates. Paragraph 6 of the Complaint (repeated as Paragraph 6 of the Amended Complaint) describes a “type of pollution” but also does not indicate on which date(s) it occurred.

20. With regard to duration, the Board’s June 4, 2015 Order, page 7 states that “the Board deems it sufficient that the complaint describes their nature—“eruptions” through plumbing fixtures—and their enduring effects:..” However, the District is tasked with identifying the causative agent of each alleged backup so that it can prepare its answer and defense and it will require significantly more information to do so (as further described in paragraph 8 of this Motion).

21. Given the multiple possible causes for sewer backups, information on the nature, extent and duration of discharge is especially important. A sewer backup can occur without the Respondent sanitary district's knowledge because it can occur entirely on private property, to which the District is not permitted access. It can also occur entirely within a structure.

22. Here, unlike Schilling, and Findley, the District may not have had the opportunity to observe the events complained of. Thus the description required to be included in the complaint is particularly necessary for the District to be able to determine the cause of each of the alleged backups and to accurately answer the complaint, prepare its defense, and assert any applicable affirmative defenses.

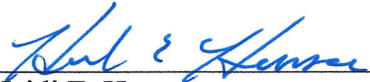
23. Withholding basic information on the dates, nature, extent and duration of the alleged violations leaves Respondent without the ability to investigate or refute the allegations, and without the ability to prepare its answer and affirmative defenses. The dates on which the sewer backups occurred and the nature, extent, and duration of the discharges are solely within Complainant's knowledge. Respondent, Highland Hills Sanitary District should not be forced to "guess" when the backups occurred or their nature, extent and duration.

24. Although the Complaint was dismissed on other grounds, it also failed to comply with 35 Ill. Adm. Code 103.204(c)(2) in that it failed to provide the 2010 and May 2013 dates as well as the extent, nature and duration of the alleged violations so as to reasonably allow preparation of a defense. These problems were not cured by the Amended Complaint.

25. The District respectfully requests that the Board reconsider its findings that the dates, nature, extent and duration of each sewer backup event have been described sufficiently to comply with 35 IAC 103.204(c)(2) and to allow the District to prepare a defense.

WHEREFORE, for the reasons stated above, Respondent prays that the Board reconsider its June 4, 2015 order and also grant the Motion to Dismiss the Amended Complaint filed this day.

Respectfully submitted,



Heidi E. Hanson

Dated: July 12, 2015

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