

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
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 document:

ANSWER TO AMENDED FORMAL COMPLAINT AND AFFIRMATIVE DEFENSES

a copy of which is hereby served upon you.

Respectfully submitted,



Heidi E. Hanson

Dated: November 3, 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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**ANSWER TO AMENDED FORMAL COMPLAINT
AND AFFIRMATIVE DEFENSES**

Respondent, Highland Hills Sanitary District, by its attorneys PODLEWSKI & HANSON P. C. (the "District" or "HHSD") states in answer and defense to the Amended Formal Complaint as follows:

1. Complainant, SUSAN M. BRUCE, is an individual who owns the real property commonly known as 115 East 14th Place, in Lombard, Illinois 60148, which is a parcel of land improved with a single family residence within the borders of the respondent.

ANSWER 1: Respondent lacks sufficient knowledge to form a belief as to who owns the real property described in paragraph 1 of the Amended Formal Complaint. Respondent admits all other allegations of paragraph 1.

2. Respondent, HIGHLAND HILLS SANITARY DISTRICT, [is] a municipal corporation, with offices located at 566 East 13th Place, Lombard, Illinois 60148.

ANSWER 2: Admitted.

3. The activity of the respondent that is allowing the pollution complained of is allowing, permitting, or omitting to take the necessary and lawfully required actions

to prevent, the discharge of untreated effluent or sewage from the respondent's facilities onto the complainant's land, and into the single family residence erected on her land, coming in both by gushing through the plumbing fixtures in her house and seeping into her house after flooding her backyard up against the house.

ANSWER 3: Respondent admits that there is a single family residence on Mrs. Bruce's land. With regard to allegations regarding "allowing, permitting, or omitting to take the necessary and lawfully required actions..." Respondent states that these are legal conclusions to which no answer is required. Respondent admits that the backyard of Complainant's residence was flooded on at least two occasions during heavy rainstorms. To the extent the remaining allegations of this paragraph allege facts, Respondent lacks sufficient knowledge to form a belief as the truth or accuracy of all remaining allegations.

4. The location of the discharge of effluent or sewage into complainant's house is inside her house at 115 East 14th Place, in Lombard, Illinois 60148 and in her backyard at the same address.

ANSWER 4: Respondent admits that the Complainant resides at 115 East 14th Place in Lombard, Illinois 60148. Respondent lacks sufficient knowledge to form a belief as the truth or accuracy of all remaining allegations.

5. The respondent violated the rules of the board codified at 35 Ill. Adm. Code 306.102 either by malfunction or spillage in that there is backup from respondent's sanitary system depositing effluent or sewage containing human waste onto the complainant's backyard and in her house. The respondent is also violating the portions of the judgment of the board in *Traviseo [sic] v. Highland Hills Sanitary District*, PCB 79-72, that required the respondent to cease and desist from causing sewer backups at the complainant's location, by failing, and continuing to fail, to cease and desist from causing sewer backups at the complainant's property, as ordered by the board.

ANSWER 5: Respondent denies that 35 Ill Adm. Code 306.102(a) applies to Respondent and therefore denies violating it. With regard to Section 306.102(b) Respondent

admits that it has reported sewer backups at 115 East 14th Place, Lombard. Respondent lacks sufficient knowledge to form a belief as the truth or accuracy of the remaining allegations in the first sentence of paragraph 5 of the Amended Formal Complaint.

With respect to the allegations in the second sentence of paragraph 5, the Board's order in Travieso v. Highland Hills Sanitary District, PCB 79-72 speaks for itself. However, Respondent notes that Complainant has improperly described the cease and desist order in that matter. Respondent admits that it has reported sewer backups at 115 East 14th Place Lombard on two of the dates alleged in paragraph 7 of the Amended Formal Complaint but Respondent lacks sufficient knowledge to form a belief as to the remaining allegations in the second sentence of paragraph 5 of the Amended Formal Complaint.

6. The type of pollution respondent allowed, permitted, or caused is sewer backups through all the plumbing fixtures in the house with a drain, including floor drains, toilets, bathtubs, showers, and even elevated sinks. Sewage eruptions from respondent's equipment or structure in the backyard that floods the backyard and even infiltrates from the backyard into the house.

ANSWER 6: This paragraph is a legal conclusion to which no answer is required. However, to the extent to which the first sentence of this paragraph alleges facts Respondent admits that it reported sewer backups and on one occasion sewage was discharged from a private cleanout pipe attached to the private sewer line and located on the patio of Complainant's residence. Respondent lacks sufficient knowledge to form a belief as the truth or accuracy of the other allegations in the first sentence of paragraph 6 of the Amended Formal Complaint. Respondent denies the remaining allegations in Paragraph 6 of the Amended Formal Complaint.

7. The duration and frequency of the alleged pollution is as follows:

a. On 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 with sewage above the ground level of the house.

ANSWER 7a: Respondent admits that on April 18, 2013 115 East 14th Place, Lombard experienced backyard flooding and Respondent reported a sewer backup. Respondent denies that it has any equipment in Complainant's backyard. Respondent lacks sufficient knowledge to form a belief as the truth or accuracy of the remaining allegations in paragraph 7a of the Amended Formal Complaint.

b. Additional backups occurred twice in May 2013, July 24, 2013, on August 3 and 6, 2013, and three times in 2010.

ANSWER 7b: With regard to backups which allegedly occurred twice in May 2013, on July 24, 2013, and on August 3 and 6, 2013, Respondent lacks information sufficient to form a belief as the truth or accuracy of this statement. With regard to backups which allegedly occurred three times in 2010, Respondent admits that it reported two sewer backups at 115 East 14th Place, Lombard during 2010. With regard to the allegation of a third backup in 2010, Respondent lacks information sufficient to form a belief as the truth or accuracy of this statement. Respondent denies that it has any equipment in Complainant's backyard. Respondent lacks sufficient knowledge to form a belief as the truth or accuracy of the remaining allegations in paragraph 7b of the Amended Formal Complaint.

8. Respondent owns or operates a treatment works, as it provides sanitary sewer service to the area under its jurisdiction, which area includes complainant's property, sanitary sewer service it provides through the use of:

devices and systems owned by a local government unit and used in the storage, treatment, recycling, and reclamation of sewerage or industrial wastes of a liquid nature, including intercepting sewers, outfall sewers, sewage collection systems, pumping power and other equipment, and appurtenances

(415 ILCS 5/19.1(f).)

ANSWER 8: Respondent denies that it owns or operates a treatment works.

Respondent admits that it provides sanitary sewer "service" to the area under its jurisdiction, to the extent it provides for collection and conveyance of sanitary sewage, but Respondent denies that it provides "service" to the extent "service" could be interpreted as providing sewage treatment.

Respondent admits that the area under its jurisdiction includes 115 East 14th Place, in Lombard, Illinois and admits that Susan Bruce resides there but Respondent lacks sufficient knowledge to form a belief as to whether she owns the real property at that address.

Respondent admits that sanitary sewer service is provided through devices and systems owned by a local government unit but denies that the storage, treatment, recycling and reclamation of sewerage or industrial wastes of a liquid nature is provided by

Respondent, except to the extent that such sanitary sewage can be considered to be stored in the HHSD sewer pipes prior to being its being transported out of Respondent's jurisdiction and on to the Flagg Creek Water Reclamation District treatment works.

Respondent denies that it provides sanitary sewer service through outfall sewers or pumping power.

The Illinois Environmental Protection Act speaks for itself but Respondent denies that 415 ILCS 5/19.1(f) is quoted correctly above.

9. The ill effects that the respondent's pollution has had on human health, on the environment, on the enjoyment of life or property and on any lawful business or activity is that the respondents discharge of effluent or sewage renders the complainant's home unhealthy, unpleasant, uninhabitable, and destroys complainant's property.

ANSWER 9: Respondent lacks information sufficient to form a belief as to the truth or accuracy of these allegations.

10. Complainant seeks the board to order the respondent to take all necessary measures to stop the discharge of effluent or sewage onto complainants land or into her house on that land, including without limitation:

- a. taking all necessary pollution abatement measures to stop that discharge;
- b. performing an appropriate cleanup;
- c. reimbursing complainant's cleanup costs;
- d. changing its operations to cease and desist from the discharge;
- e. paying a civil penalty in an amount deemed appropriate by the board;
- f. finding that the respondent violated the board's judgment in *Traviseo v. Highland Hills Sanitary District*, case number PCB 79-72, by previously failing to, and continuing to fail to, cease and desist from causing sewer backups at the complainant's property, as ordered by the board in that

proceeding.

ANSWER 10: The allegations of subparagraphs 10(a) through (e) merely state what Complainant is seeking as relief and do not require an answer. To the extent that subparagraph 10(f) is a restatement of Complainant's previous allegations it is denied. With regard to all subparagraphs, Respondent states that Complainant is not entitled to the relief requested.

WHEREFORE, Respondent requests that the Amended Formal Complaint be dismissed.

AFFIRMATIVE DEFENSES

Respondent Highland Hills Sanitary District, ("HHSD") asserts the following affirmative defenses without waiving Complainant's obligation to meet her burden of proof. One or more of these affirmative defenses may be applicable to a given allegation of violation and the defenses may be asserted alternatively. By asserting these defenses Respondent does not assume any burden of proof not otherwise imposed by law.

Affirmative Defense #1 – Act of God

1. The lot with street address 115 East 14th Place, Lombard, IL ("Bruce lot") is located within the HHSD service area in an unincorporated area in DuPage County, Illinois.
2. HHSD provides drinking water and sewage conveyance services to the approximately 400 residences and a few commercial customers within its boundaries. It owns and maintains approximately 26,000 feet of sanitary sewer.
3. The Illinois Pollution Control Board in 35 Ill Adm. Code 301.375 defines a sanitary sewer as "a sewer that carries wastewater together with incidental land runoff." HHSD's sewers were designed, and are operated, as sanitary sewers.
4. The Illinois Pollution Control Board in 35 Ill Adm. Code 301.255 defines a combined sewer as "a sewer designed and constructed to receive both wastewater and land runoff." HHSD's sewers are not combined sewers.
5. HHSD does not provide stormwater management services. HHSD does not and has not at any time relevant to the Amended Formal Complaint, maintained storm sewers or combined sewers.
6. The Illinois Pollution Control Board ("Board") in its August 29, 1974 order in the regulatory proceeding captioned In the Matter of DuPage County Wastewater Regionalization, R70-17 ordered that sewage treatment in DuPage County be regionalized. At that time the Highland Hills Sanitary District operated a sewage treatment plant. Order at pages 6-7.

7. The Board's August 29, 1974 order required that many small package sewage treatment plants, including HHSD's plant, be closed and their sewage be diverted to larger facilities. In HHSD's case the order specified that their sewage was to be sent to a wastewater treatment plant operated by the Hinsdale Sanitary District and that the Hinsdale Sanitary District plant "shall be expanded to meet the needs of the region." Order at page 7.

8. HHSD complied with the Board's order. On or about September of 1977 HHSD completed its connection to the Hinsdale Sanitary District and abandoned its treatment plant.

9. The Illinois Supreme Court invalidated the Board's regionalization program in Village of Lombard v. PCB, 66 Ill.2d 503, 363 N.E.2d 814 (1977). On September 7, 1978 the Board repealed its order of August 29, 1974.

10. Since abandoning its treatment plant HHSD's sewer service has consisted only of sanitary sewers which operate by gravity.

11. On or about July of 2005 the Hinsdale Sanitary District changed its name to the Flagg Creek Water Reclamation District ("FCWRD"). FCWRD accepts, and treats, sewage from HHSD and from Clarendon Hills, Oakbrook Terrace, and portions of Burr Ridge, Hinsdale, Darien, Willowbrook, Elmhurst, Westmont, Oak Brook, Villa Park and Lombard. Some of the areas that are tributary to the FCWRD treatment plant are on combined sewers and contribute stormwater as well as sanitary sewage.

12. At all times relevant to the Amended Formal Complaint, HHSD's sewage has been directed from private sewer service lines to HHSD-owned 8 inch sewers and from there to a 15 inch interceptor sewer which begins less than 300 feet from the boundary of the HHSD service area. From there the sewage is directed to a lift station owned by FCWRD and located at North Chase Avenue at the east end of 13st Street in Lombard. HHSD is located at the western boundary of the FCWRD treatment area.

13. HHSD has no physical control over its sewage once it leaves the HHSD-owned sewers and it has no control over sewage generated outside HHSD boundaries.

14. Surcharging, or overwhelming, of sewers during rainfall events can occur from outside HHSD's boundaries due to reverse flow in the HHSD sewers coming from outside the HHSD boundaries or from an inability of FCWRD's plant or interceptor sewer to accept any further flow from HHSD's sewers.

15. HHSD's sanitary sewers have sufficient capacity to handle sewage from within HHSD's boundaries. They have not been placed on restricted status or critical review by the Illinois Environmental Protection Agency.

16. HHSD routinely cleans and inspects its sewers and in late 2010 it pursued a program to require homeowners to remove illegal downspout connections tributary to the public sewer.

17. Complainant alleges flooding occurred in her house and yard on April 18, 2013, and on three dates in 2010.

18. A Sewer System Overflow report filed for April 18, 2013 with the Illinois EPA by HHSD noted 5-6 inches of rain in a 22 hour period and stated that "the receiving treatment facility filled and didn't allow any more water." At O' Hare airport, approximately 9 miles away from HHSD, on April 17 and 18, 2013, according to the Weather Underground using the O'Hare Field Gauge, 5.53 inches of rain fell in 25 hours which was a "25 year storm" at that location. On April 18, 2013 a state of emergency was declared by Governor Quinn for dangerous flooding due to heavy rainfall throughout the northern half of Illinois, which includes the HHSD service area.

19. On or about July 24, 2010 a Sewer System Overflow report filed with the Illinois EPA by HHSD noted 7 ½ inches of rainfall in a 24 hour period and stated that "the treatment center could not handle the volume of water." At O' Hare airport, according to the Weather Underground using the O'Hare Field Gauge, 5.81 inches of rain fell in 9 hours which was a "75 year storm." In a July 26, 2010 letter to the Illinois EPA, FCWRD reported the conditions for its area as follows:

...a severe rain event understood to qualify as a return period of greater than 100 years...Approximately 7 inches of heavy rain fell in 8 hrs from 9 pm on July 23 to 5 am on July 24...

20. On August 3, 2010 according to a Sewer System Overflow report filed with the Illinois EPA by HHSD, 3 inches of rainfall fell in one hour. In an August 5, 2010 letter to the Illinois EPA, FCWRD reported the conditions as follows:

...a severe rain that commenced late in the evening on August 2nd and continued through the day on August 3rd 2010 that followed a previous event on July 24th understood to qualify as a return period of greater than 100years. [sic] the 24 hour recorded rain by the USGS in Oakbrook at 22nd was 2.53 inches. The 24 hr recorded rain at the District Main Plant was 2.5 inches for August 2nd, the August 3rd rains 24 hr rains were 0.71 inches at Oakbrook and 2.43 inches at the main Plant.

21. When excessive rainfall causes a sanitary sewer overflow it is an affirmative defense to an alleged violation of the Board's rules if that excessive rainfall is found to be an Act of God.

22. The Board has recognized an Act of God as an affirmative defense to an alleged violation of its rules. People v. William Charles Real Estate Investment, PCB 10-108 (March 17, 2011 pages 8-12). People v. Town of Cortland, PCB 11-67 (November 13, 2011 p.6).

23. The extraordinary rainfall events described above were Acts of God beyond the reasonable control of the Respondent.

24. The extraordinary rainfall events described above were in whole or in part the cause of the sewer backups Complainant allegedly experienced on April 18, 2013, and at two times in 2010.

25. Respondent reserves the right to assert an Act of God defense when the unknown dates of two alleged backups in May of 2013 and the single unknown date of the alleged backup in 2010 are determined through discovery.

**Affirmative Defense #2 - Act of Third Party - Flagg Creek Water Reclamation
District and Tributary Sources**

1. - 20. Respondent hereby incorporates paragraphs 1 through 20 of Affirmative Defense #1 as paragraphs 1 through 20 of Affirmative Defense #2.

21. The Board has recognized an act of a third party as an affirmative defense to an alleged violation of its rules. People v. Town of Cortland, PCB 11-67 (November 13, 2011 p.6).

22. At all times relevant to the Amended Formal Complaint HHSD has not provided sewage treatment services. Said services are provided for the sewage generated within the HHSD boundaries by the FCWRD.

23. Sewage from other areas and municipalities, as listed in paragraph 11 to this affirmative defense, is also transported to FCWRD facilities, which include sewers, lift stations and the sewage treatment plant. Some of the sewage from those tributary sources is mixed with stormwater flow and conveyed through combined sewers.

24. HHSD has no control over the amount of sewage or stormwater directed to the FCWRD facilities by other parties.

25. Stormwater coming from combined sewers and from infiltration interferes with FCWRD's ability to allow capacity for other municipalities and sanitary districts, including HHSD, that have separate sewers.

26. During wet weather events the FCWRD wastewater treatment plant, the FCWRD interceptor sewers and FCWRD lift stations can become overwhelmed with stormwater and sewage. This can result either in sewage being forced back through the tributary lines (including HHSD's) or the inability of the FCWRD facilities to accept sewage flow coming from HHSD.

27. The alleged backups experienced by Complainant and described in paragraphs 18 through 20 of this affirmative defense are due in whole or in part to third parties, including FCWRD and other entities contributing sewage and stormwater flow to FCWRD facilities, and thus the backups are outside HHSD's control.

28. Respondent reserves the right to assert an Act of Third Party defense for other alleged dates of violations when the circumstances of those violations are determined through discovery.

Affirmative Defense #3 – Complainant and Mr. Bruce’s Failure to Maintain the Private Sewer Line and Storm Sewer

1. – 21. Respondent hereby incorporates paragraphs 1 through 20 of Affirmative Defense #1 and paragraph 21 Affirmative Defense #2 as paragraphs 1 through 21 of Affirmative Defense #3.

22. Highland Hills Sanitary District does not own, operate or control any storm sewers or manholes on the Bruce lot.

23. The Bruce lot is sloped, with the back yard which is located south of the house, having a higher elevation than the front yard which is located north of the house.

24. On information and belief there is a stormsewer manhole or overflow located in the back yard of the Bruce lot which has overflowed during significant rainfall events causing, along with rainfall, overland flow in the direction of the house, and resulting in the flooding of the yard and house.

25. The Bruce lot has a private sanitary sewer service line from the house to the 8 inch HHSD main sanitary sewer. The Bruce lot is at a lower elevation than much of the HHSD service area and therefore on information and belief their private sanitary sewer service line has a less pronounced slope than many of the homes connected to the public sewer line which results in the Bruce home being among the first to experience problems in the event of sewer surcharging or backup on the public sanitary sewer line.

26. Highland Hills Sanitary District Sewer Ordinance 2012-04 Section 2 E states as follows:

...The owner of any premises in the District served by a connection with the district sewer system shall install, maintain, repair and when necessary replace the private sewer service line from the connection at the public sewer to the building it serves, at the Owner’s expense.

27. After the dates of the violations alleged in Ramon Travieso v Highland Hills Sanitary District, PCB 79-72, a “check valve” also described as a “backflow prevention valve” was installed on the private sanitary sewer service line at 115 East 14th Place, Lombard. The purpose of the check valve was to prevent backflow along the private sanitary sewer service line if the public sewer became surcharged, or overwhelmed.

28. The owner and residents of the Bruce lot did not properly maintain the check valve and on or about July 24, 2010 during a severe rainstorm the valve failed. On information and belief the valve has not yet been replaced or repaired.

29. There is a privately owned "cleanout" pipe on the patio of the house on the Bruce lot, which pipe is located about 2 feet from the house and was designed to allow for rodding out of the private sanitary sewer service line.

30. On information and belief, since the check valve failed, Complainant and her husband have been using the cleanout pipe to divert sewage, which would have been blocked by the check valve, from entering the house. The cleanout pipe was not intended for that purpose and using it to relieve sewage pressure on her private line results in sewage being discharged from the cleanout pipe onto the patio of the house.

31. The alleged backups experienced by Complainant are due in whole or in part to Complainant and her husband's action or lack of action.

32. Complainant has, in violation of the HHSD ordinance, if she is the owner of the premises, failed to maintain her own sewer line including the check valve. Alternatively, if Complainant is not the owner of the premises then an unknown third party owner is responsible for failure to maintain the private sewer line. As a result of the failure to maintain the private sanitary sewer and check valve, Complainant has experienced sewer backups and discharge from the cleanout pipe.

Affirmative Defense #4 – Travieso Residence

1. The November 1, 1979 Board order in Ramon Travieso v Highland Hills Sanitary District, PCB 79-72 ("Travieso Case") states: "Respondent shall cease and desist from any further violations of Rules 601(a) and 602(b) in causing sewer backups at Complainant's residence within 120 days of the date of this order". (emphasis added) Order page 4.

2. Complainant alleges that Respondent has violated the Board's cease and desist order in the Travieso Case.

3. Ramon Travieso, the complainant in the Travieso Case resided at 115 East 14th Place, Lombard, IL during the sewer backups alleged in 1979 in the Travieso Case.

4. Ramon Travieso has not resided at 115 East 14th Place, Lombard since approximately 1988. Therefore, any sewer backups which may have occurred at that address in 2010 or 2013 have not occurred at Ramon Travieso's residence and therefore cannot form a basis for Susan Bruce's complaint that the cease and desist order has been violated.

5. Therefore, the Board should not entertain Susan Bruce's Complaint to the extent that the complaint seeks to pursue a violation of the 1979 cease and desist order because the order, by its own terms, was no longer applicable after Mr. Travieso left the property.

Affirmative Defense #5 – General Equity

1. The allegations in Ramon Travieso v Highland Hills Sanitary District, PCB 79-72 ("Travieso Case") involved 10 sewer backups, during both wet and dry weather, occurring over a period of 72 days. The backups ended on May 14, 1979 after a specific area of the main sewer was cleaned. Travieso, November 1, 1979 order page 1.

2. The Board ordered HHSD to cease and desist from causing additional sewer backups at Mr. Travieso's residence and retained jurisdiction in that matter until April 16, 1981.

3. On information and belief Mr. Travieso sold the house in 1988 and never enforced the cease and desist order.

4. On information and belief, Complainant has lived in the house since 1988. She has not alleged any sewer backups prior to 2010.

5. Thirty and one half years have passed between the last sewer backup alleged by Travieso, shortly before May 14, 1979, and the first backup alleged by Susan Bruce, sometime in 2010.

6. In the Amended Formal Complaint Susan Bruce has alleged nine sewer backups over a period of 4 years, commencing on an unspecified date in 2010. In the middle two years, 2011 and 2012, she alleged no backups at all. This pattern is so unlike the approximately-once-per-week backup pattern, alleged in the Travieso Case that it appears impossible for the backups to have been caused by a main sewer blockage as they were in the Travieso Case.

7. Three of the backups occurred during extreme rainfall events. The cause of other alleged backups is not known and will need to be determined through discovery. However, the alleged violations are so far removed in time, cause, and type from the violations the Board found in the Travieso Case that the Board should not consider the 2010 and 2013 alleged violations as a failure to comply with the Travieso order.

8. Because over thirty years have passed with no allegation of noncompliance, as a matter of general equity and reasonableness, the Board should either hold that the cease and desist order has been complied with and is no longer in effect, or vacate that order, and allow Susan Bruce to make her case on the basis of currently effective rules and regulations.

Affirmative Defense #6 – The 2003 Amendment to Section 31(d)(1) of the Illinois Environmental Protection Act is Not Retroactive

1. The Illinois Code of Civil Procedure, section 2-613(d), (735 ILCS 5/2-613(d)) provides as follows:

d) The facts constituting any affirmative defense, ... and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, ... in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

2. The Pollution Control Board ordered HHSD to “cease and desist from any further violations of Rules 601(a) and 602(b) in causing sewer backups at Complainant’s residence within 120 days of the date of this order.” Ramon Travieso v Highland Hills Sanitary District, PCB 79-72 (Travieso Case), November 1, 1979 (Order page 4).

3. The Board found in its June 4, 2015 order in this matter, that the Complainant in this case, Susan Bruce, cannot enforce the Board’s cease and desist order in the Travieso Case. In the same order the Board also found that pursuant to 415 ILCS 5/31(d)(1) the “Board does have authority, however, to find that the District violated the Travieso order upon a proper showing of such violation.” (Order, page 8)

4. At the time that the Travieso Case concluded with the Board’s last order of April 16, 1981 there was no third party right to pursue a violation of a Board order.

5. At the time of the Travieso Case and until 2003, Section 31(d)(1) read as follows:

Any person may file with the Board a complaint...against any person allegedly violating this Act, any rule or regulation thereunder or any permit or term or condition thereof.

6. The Illinois Environmental Protection Act Section 31(d)(1) (415 ILCS 5/31(d)(1)) now states as follows:

Any person may file with the Board a complaint...against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.

7. The phrase “or any Board order” was added by Public Act 93-152 effective July 10, 2003 and thus the statutory authority of a nonparty to bring a case for violation of a Board order between two other parties did not exist until that date, long after the cease and desist order had been entered, and complied with, in the Travieso Case.

8. The Illinois Supreme Court has held that if retroactive application of an amendment would increase a party's liability for past actions, or result in inequitable consequences, the court must presume that the legislature did not intend that it be so applied, absent a clear expression of legislative intent that it be applied retroactively. People v. J.T. Einoder, 2015 IL 117193, (March 19, 2015) (para 30).

9. Illinois Environmental Protection Act Section 31(d)(1) does not state that it should be applied retroactively and should not be interpreted so as to give it retroactive application. To give it retroactive application would result in inequitable consequences and would increase HHSD's liability for its 1979 conduct in that it would allow nonparties to sue for violation of the 1979 cease and desist order against HHSD which they would not have been permitted to do at the time the order in the Travieso Case was entered.

10. Therefore, the Board should not entertain Susan Bruce's complaint to the extent that it seeks to pursue violations of the 1979 cease and desist order in the Travieso Case.

Affirmative Defense #7 – Impossibility

1. - 20. Respondent hereby incorporates paragraphs 1 through 20 of Affirmative Defense #1 as paragraphs 1 through 20 of Affirmative Defense #7.

21. Board rule 35 Ill Adm. Code Section 306.304 states that: "Overflows from sanitary sewers are expressly prohibited."

22. Overflows from combined sewers are regulated by 35 Ill Adm. Code 306.305, but they are not prohibited.

23. The Board's rules do not make a specific exception from Section 306.304 for a sewer system such as HHSD's which was originally designed as a sanitary sewer system leading to a dedicated treatment plant, but which is now required to send its waste to facilities which accept both sanitary sewage and stormwater.

24. The Highland Hills Sanitary District was placed in an untenable position when it was forced to give up its treatment works and depend on an outside entity, the FCWRD, to accept its sewage.

25. On several occasions during the relevant time period, the FCWRD which accepts both stormwater and sewage, has been unable to accept the HHSD's sewage because the FCWRD has been overwhelmed by stormwater, but HHSD is prohibited by Section 306.304 from relieving its sewers by use of an overflow because the HHSD sewers are sanitary sewers.

26. When the FCWRD is overwhelmed and cannot accept HHSD's sewage, the sewage has nowhere to go and will be forced back into the HHSD sewers and private sewer pipes. It will seek its own overflow points and HHSD has no legal opportunity to relieve the pressure.


27. From time to time the ability of its sewage to move downstream is controlled by rainfall and FCWRD, and is not under HHSD's control. HHSD is prohibited by law from using a combined sewer overflow, thus creating a situation where it is impossible to achieve compliance with the Board rules.

Affirmative Defense #8 – Statute of Limitations

1. The Amended Formal Complaint alleges three sewer backup violations in 2010.
2. Respondent is aware of two sewer backups in 2010 but cannot determine the date of the alleged third 2010 backup, and Complainant has not yet provided it.
3. Because the date is unknown, the third 2010 backup may be outside the five year statute of limitations period set forth in 735 ILCS 5/13-205 which provides that "actions not otherwise provided for shall be commenced within 5 years next after the cause of action accrued."
4. The Respondent reserves the right to assert the affirmative defense of statute of limitations if an allegation of a violation would be barred by that statute.

WHEREFORE, for the reasons given in the above affirmative defenses Respondent requests that the Amended Formal Complaint be dismissed.

Respectfully submitted,
Highland Hills Sanitary District
by its attorneys,
Podlewski & Hanson


Heidi E. Hanson

Dated: November 3, 2015

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Heidi E. Hanson
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HIGHLAND HILLS SANITARY)	
DISTRICT,)	
)	
Respondent.)	

AFFIDAVIT OF ALPHONSE SARNO JR.

ALPHONSE SARNO JR. subscribes and states as follows:

- 1) That he is the past president of the Highland Hills Sanitary District and that he has served in that capacity or in the capacity of Highland Hills Sanitary District board member since 2010.
- 2) That he has read the attached ANSWER TO AMENDED FORMAL COMPLAINT AND AFFIRMATIVE DEFENSES.
- 3) That he has made reasonable inquiry of his staff and the other Highland Hills Sanitary District board members and that where indicated in the attached ANSWER TO AMENDED FORMAL COMPLAINT AND AFFIRMATIVE DEFENSES, the Highland Hills Sanitary District does not possess sufficient knowledge to form a belief as to the truth of the allegations.

Further Affiant Sayeth Not.

Dated: 11/3/15

Alphonse Sarno Jr
Alphonse Sarno Jr.

Subscribed and sworn to before me this 3 day of November 2015

Nadia M. Hajduk
Notary Public



CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served on the date of November 3, 2015 the attached:

ANSWER TO AMENDED FORMAL COMPLAINT AND AFFIRMATIVE DEFENSES

Upon the following persons, by electronic filing before 4:30 this day:

Clerk's Office On-Line
Illinois Pollution Control Board
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

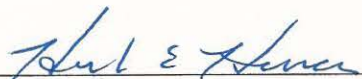
And by depositing same in the U. S. Postal Service mailbox at Western Springs, Illinois before 4:30 this day, November 3, 2015 with proper postage prepaid, upon the following persons:

One copy to:

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

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

Dated: November 3, 2015



Heidi E. Hanson

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