BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: PERSONS ON ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have filed electronically today with the Office of the Clerk of the Illinois Pollution Control Board, 100 West Randolph Street, Suite 11-500, Chicago, Illinois, Flagg Creek's Response In Opposition to MWRD's Motion to Dismiss Paragraphs 61 – 70, Or Alternatively for Leave to Serve A Bill of Particulars, a copy of which is herewith served upon you.

Respectfully submitted,

/s/ John A. Simon

CERTIFICATE OF SERVICE

I, John A. Simon, an attorney, certify that I sent a copy of the foregoing Flagg Creek's Response In Opposition to MWRD's Motion to Dismiss Paragraphs 61 – 70, Or Alternatively for Leave to Serve A Bill of Particulars by U.S. Mail and/or E-mail to the parties on the attached Service List on this 19th of April, 2006.

/s/ John A. Simon

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Dated: April 19, 2006

SERVICE LIST

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

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

FLAGG CREEK'S RESPONSE IN OPPOSITION
TO MWRD'S MOTION TO DISMISS PARAGRAPHS 61-70
OR ALTERNATIVELY, FOR LEAVE TO SERVE A BILL OF PARTICULARS

Complainant, Flagg Creek Water Reclamation District ("FCWRD") through its attorneys, Gardner, Carton & Douglas LLP, pursuant to 35 Ill. Adm. Code 101.500(d), responds in opposition to the April 5, 2006 Motion to Strike and Dismiss Paragraphs 61 through 70 of Count II, or in the Alternative, for Leave to Serve a Bill of Particulars, filed by the Metropolitan Water Reclamation District of Greater Chicago ("MWRD") as follows:

INTRODUCTION

The Board is the proper venue to hear the evidence and craft an order comprehensively addressing the violations of the Illinois Environmental Protection Act ("Act") and Board regulations alleged in the Complaint. Indeed, in order to fulfill its mandate under the Act, the Board must consider and evaluate the statutory responsibility and authority of MWRD, and for that matter each Party to this action, both in terms of ascertaining whether any violation of the Act has been demonstrated and, also for purposes of crafting an appropriate order and remedy in the event it does find such a violation. The Complaint, including specifically Paragraphs 61-70,

are factually sufficient under the Board pleading rules. A Bill of Particulars is unnecessary in view of the broad discovery provided by the Board procedural rules which are better suited for developing the evidence in this proceeding.

ARGUMENT

A. The Board Has Authority To Determine If MWRD Is In Violation of the Illinois Environmental Protection Act and Board Regulations.

MWRD concedes that: "[t]he Act confers upon the Board the power to adjudicate complaints that allege violations of the Act or Board regulations. 415 ILCS 5/5(d) and 5/30 – 5/33." MWRD Motion ¶6. MWRD further concedes that Paragraphs 68 and 69 of the Complaint allege MWRD's violation of 415 ILCS 5/12(a) and 35 Ill. Adm. 307.1101. MWRD Motion ¶3. These concessions taken together with the factual allegations of the Complaint are sufficient to establish the Board's jurisdiction over Paragraph 61 – 70 of the Complaint. 415 ILCS 5/5(d).

The proposition advanced by MWRD, that the Board loses its authority over matters arising under the Act in any circumstance where an alleged violation of the Act also involves an alleged violation of another statute, is not supported by the language of the Act or case law. Section 5(d) of the Act which confers authority upon the Board: "to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, ..." does not contain language limiting this grant of authority to divest the Board of authority in any case in which construing another statute is necessary to enforce the Act, as urged by MWRD. Had the General Assembly intended to limit the Board's authority in such a manner as advocated by MWRD, the Legislature would have included such limiting language in the Act. For example, the Legislature could have written Section 5(d) to read:

> The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any role or regulation

> adopted under this Act, [*provided however in no event may the Board construe another statute or regulation in connection with its deliberations regarding violations of this Act*] . . . .

Of course, the Legislature did not include any such limiting proviso in Section 5(d) and neither should this Board. Indeed, such a limitation would impede the Board from effectively accomplishing its mandate and from achieving the purposes of the Act.

In *A.E. Staley Manufacturing Company v. Environmental Protection Agency*, 8 Ill. App. 3d 1018, 290 N.E. 2d 892 (4th Dist. 1972), the court rejected as "unduly restrictive" plaintiffs attempt to limit the Board's authority over any aspect of its sewer which authority was expressly delegated to the City of Decatur under the Municipal Code. *Id.* at 1021. While acknowledging that administrative agencies are limited to the powers vested in them by statute, the *A.E. Staley* court noted: "A corollary of this proposition also is that where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred." *Id.* at 1023. In *A.E. Staley*, the court recognized that petitioner's sewer discharged into the Decatur Sanitary District operated under authority delegated by the Municipal Code. Nevertheless, the "realistic and practical nexus" between petitioner's discharge into the Decatur sanitary sewers and the discharge from the Decatur Sanitary District into the waters of the State, was sufficient to give the Board authority to exercise some supervision over petitioner's sewer. "Thus the control of the Pollution Control Board over petitioner's sewer is only to the extent reasonably required to effectuate the purposes of the Act." *Id.* at 1021.

In this case, "the realistic and practical nexus" between MWRD's failure to properly manage stormwater in Flagg Creek downstream from FCWRD's polishing pond, and the violations of the Act and Board regulations alleged in the Complaint, is sufficient to give the Board authority to exercise some supervision over MWRD's management of stormwater

downstream from FCWRD. Drawing upon the corollary to an express grant of authority noted in *A.E. Staley*, it is apparent that the express grant of authority to the Board to conduct proceedings upon complaints charging violations of the Act, grants to the Board the power to exercise supervision over the MWRD "only to the extent reasonably required to effectuate the purposes of the Act" notwithstanding the separate delegation to MWRD over stormwater management in Cook County in the MWRD Act.

A.E. Staley presented the issue this way:

> It is, of course, obvious that the Act is designed to control pollution irrespective of its source. The issue here then is whether or not it is reasonably required that the Pollution Control Board exercise some supervision over the sewers of the plaintiff in order to perform the duties imposed upon it by the legislature in the Environmental Control Act. If the petitioner is adequately removing the contaminants released through its sewers so that it is adequately treated and no pollution gets into waters of the state, petitioner has no problem. We cannot assume that it will be unreasonably or arbitrarily treated by the Board.

A.E. Staley, 8 Ill.App. 3d at 1023. Likewise in this case, the issue here is whether or not it is reasonably required that the Board exercise some supervision over MWRD stormwater management of Flagg Creek downstream from FCWRD's treatment works, in order to perform the duties imposed upon it by the legislature in the Environmental Control Act. If MWRD can demonstrate that it is adequately removing dead trees and other detritus from Flagg Creek so that it does not back up into FCWRD's polishing pond in high flow events, MWRD has no problem. Nor should MWRD assume that it will be unreasonably or arbitrarily treated by the Board.

The case cited by MWRD, *Concerned Adjoining Owners v. Pollution Control Board*, 288 Ill.App. 3d 565 (5th Dist. 1997), does not stand for a limitation on the Board's authority to conduct proceedings upon complaints, such as FCWRD's, charging violations of the Act. The *Concerned Adjoining Owners* court merely concurred with the Board's determination that

whether the City of Salem followed the statutory requirements of the Illinois Municipal Code when purchasing and annexing property, was not a matter arising under the [Illinois Environmental Protection] Act. *Id.* at 577. In other words, compliance or noncompliance with statutory requirements for purchasing and annexing property did not threaten or cause pollution. In contrast, FCWRD's claim against MWRD in Paragraphs 61-70 of the Complaint arises under the Act as MWRD's failure to properly manage stormwater in Flagg Creek has caused water pollution in violation of Section 12(a) of the Act, and has interfered with the operation of Flagg Creek's polishing pond in violation of Board Rule at 35 Ill. Adm. Code 307.1101.

In *Material Service Corporation v. J.W. Peters & Sons, Inc.*, PCB No. 98-92, 1998 WL 166017 (Ill. Pol. Control Bd.), also cited by MWRD, the matters alleged in the complaint did not arise under the Act. While the complaint in *Material Service Corporation* did cite Section 57.1(a) of the Act, the Board noted that: "Section 57.1(a) does not require Peters to remove the tanks. It requires only that if the USTs are to be removed, they be removed in accordance of the LUST program." *Id.* at *2. Thus, the cited section of the Act had no application to the facts alleged in the complaint and the matter did not arise under the Act. Unlike the circumstance in *Material Service Corporation*, threatening or creating water pollution as alleged by FCWRD, is a violation of the Act, and acts and omissions interfering with the operation of FCWRD's treatment works is a violation of Boards regulations.

B. The Allegations of the Complaint Are Factually Sufficient

The Complaint, including Paragraphs 61-70, is not factually deficient and complies with the pleading requirements of Board Rule 103.204(c). The Complaint: 1) references the provision of the Act (12(a)) and regulations (307.1101) that MWRD is alleged to be violating; 2) contains the dates (high flow events), location (Flagg Creek downstream from FCWRD's

polishing pond), events (obstruction of stormwater flow downstream) and consequences alleged to constitute violations of the Act and regulations (causing or contributing to water pollution and introducing pollutants that interfere with the operation and performance of FCWRD; and 3) contains a concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204.

In *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 308, 430 N.E.2d 1005 (1981), the Illinois Supreme Court explained the difference between pleading "ultimate facts" required by Illinois' Code of Civil Procedure, and "evidentiary facts" not required to be pled in a Complaint but which are developed in discovery and at trial. "But it is a rule of pleading long established, that a pleader is not required to set out his evidence. To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *Id.* quoting *Board of Education v. Kankakee Federation of Teachers Local No. 886* (1970), 46 Ill.2d 439, 446-47, N.E.2d 18.[1] Paragraphs 61-70 plead the ultimate facts which, if proved, establish violations of the Act and Board Rule. Paragraphs 62 and 63 allege MWRD's authority and responsibility to regulate and manage stormwater in Cook County to ensure that it does not obstruct sewers and streams as well as the fact that MWRD has levied taxes under this authority for this purpose, including upon residents within FCWRD. Paragraph 64 alleges that stormwater that flows into Flagg Creek is obstructed by dead trees and other detritus and does not flow downstream. Paragraph 65 specifically alleges that during high flow events, the stormwater backs up into FCWRD's polishing pond, interfering with the pond's ability to polish the effluvent from FCWRD and acting as a pollutant to FCWRD's pond.

[1] FCWRD notes that a pleading which comports with the Illinois Code of Civil Procedure *a fortiori* satisfies the more relaxed standard for pleadings in an administrative proceeding. "It is correct that pleadings or charges in an administrative proceeding need not be drawn to comply with the same technical requirements as imposed in court actions." *Winnetkans Interested in Protecting the Environment (WIPE). Illinois Pollution Control Board,* 55 Ill.App.3d 475, 482, 370 N.E.2d 1176 (1st Dist. 1977).

Paragraph 68 alleges that this breach of MWRD's statutory duty causes or contributes to water pollution in violation of Section 12(a) of the Act. Paragraph 69 alleges that this breach of MWRD's statutory duty is a violation of Board rule 307.1101 prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

After outlining the "ultimate facts" alleged in the Complaint in *Carriage Way West*, the Illinois Supreme Court observed: "That will start the suit by putting the defendants on notice of the plaintiff's legal theory and underlying facts. Further facts can be developed in discovery and at trial." 88 Ill.2d at 310. Likewise, in this case, the Complaint, including specifically Paragraphs 61-70, has advised MWRD of FCWRD's legal theory and underlying facts. Further facts can be developed in discovery and at trial.

C. A Bill of Particulars Is Unnecessary

MWRD's alternative request for a Bill of Particulars is the wrong vehicle to go about developing the evidentiary facts in this administrative proceeding. As noted by MWRD, the Board's procedural rules do not contain a provision for a Bill of Particulars; a pleading devise seldom used in civil cases. "A bill of particulars is a pleading requested, for the most part, in criminal cases. Its purpose is to supplement in detail an already sufficient charge to enable a defendant or respondent to better prepare a defense." *Madonia v. Houston*, 125 Ill. App. 3d 713, 718-19, 466 N.E. 2d 648 (4th Dist. 1984).

A better vehicle for obtaining and developing the detail supplementing FCWRD's already sufficient Complaint, is the broad discovery provided for in the Board procedural rules subpart F: Hearings, Evidence and Discovery, Section 101.600 through 101.632, including specifically Interrogatories, Section 101.620; Production of Information, Section 101.614; and Subpoenas and Depositions, Section 101.622.

CONCLUSION

WHEREFORE, for the foregoing reasons, Complainant Flagg Creek Water Reclamation District respectfully requests that: 1) the Board deny MWRD's Motion to Strike and Dismiss Paragraphs 61 through 70 of Count II; 2) deny MWRD's alternative Motion for Leave to Serve a Bill of Particulars, and; 3) accept the case for hearing.

Respectfully submitted,

FLAGG CREEK WATER
RECLAMATION DISTRICT

By: /s/ John A. Simon
One of Its Attorneys

Dated: April 19, 2006

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