

ILLINOIS POLLUTION CONTROL BOARD

June 1, 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 March 3, 2006, Flagg Creek Water Reclamation District (FCWRD) filed a four-count citizen's water pollution complaint (Comp.). FCWRD named as respondents the Village of Hinsdale (Hinsdale), the Metropolitan Water Reclamation District of Greater Chicago (MWRDGC), the Illinois Department of Transportation (IDOT), and DuPage County (DuPage) (collectively, respondents). *See* 415 ILCS 5/31(d) (2004); 35 Ill. Adm. Code 103.204. FCWRD operates a wastewater treatment plant. FCWRD alleges that the respondents execute their statutory duties in a manner that contributes excess flow to FCWRD during times of rainfall. FCWRD further alleges that these overflows prevent it from complying with various terms and conditions to which it is subject.

The Board has not previously determined whether the complaint can proceed to hearing in whole or in part as to any or all claims and respondents. The Board, under section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (2004)), finds that the complaint is not duplicative but is in part frivolous, as described below. The Board today grants a motion of MWRDGC to strike and dismiss paragraphs 61 through 70 of count II of FCWRD's complaint as frivolous.

The Board on its own motion also strikes as frivolous the portions of complaint alleging violations of any legal authority other than the Act and the Board's regulations. These authorities include the Combined Sewer Overflow Control Policy issued by the United States Environmental Protection Agency (USEPA) and FCWRD's ordinance.

The Board accepts the balance of the complaint for hearing as to all four respondents. In doing so, the Board finds the balance of the complaint neither duplicative nor frivolous within the meaning of section 31(d) of the Act. *See* 415 ILCS 5/31(d) (2004).

To enable the parties and the Board to proceed expeditiously by using a single complaint document, the Board directs FCWRD to file an amended complaint consistent with the terms of this order on or before July 6, 2006, 35 days from the date of this order. MWRDGC has 60 days from the filing of an amended complaint to file its answer. The other respondents are given leave to file amended answers within the same 60-day period, if they choose to do so.

Below, the Board first briefly describes the procedures through which the Board determines whether a citizen's complaint is frivolous or duplicative. The Board next summarizes the allegations in FCWRD's complaint and its requested relief before turning to the arguments in MWRDGC's motion to strike and dismiss and in FCWRD's response (Resp.). Finally, the Board analyzes those arguments before determining whether any of the allegations in the complaint are frivolous or duplicative.

DUPLICATIVE/FRIVOLOUS DETERMINATION PROCEDURES

Section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (2004)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2004); 35 Ill. Adm. Code 103.212(a).

A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Filing such a motion stays the 60-day period for filing an answer to the complaint. *Id.* "The stay will begin when the motion is filed and end when the Board disposes of the motion." 35 Ill. Adm. Code 103.204(e).

PROCEDURAL HISTORY

On March 3, 2006, FCWRD filed its complaint. 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, motion 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.

FCWRD'S 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. 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. 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. Comp. at 3. FCWRD alleges that these CSO events do not comply with federal CSO policy or state regulations. *Id.*, citing 59 Fed.Reg. 18688, 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 or with federal CSO policy. Comp. at 3, citing 59 F.R. 18688. Below, the Board separately summarizes the allegations made by FCWRD against each of the four respondents.

Hinsdale

FCWRD alleges that Hinsdale violated sections 12(a) and 12(b) of the Act (415 ILCS 5/12(a) and 12(b) (2004)). FCWRD further alleges that Hinsdale violated 35 Ill. Adm. Code 306, Subpart C and 35 Ill. Adm. Code 307.1101. FCWRD further alleges that Hinsdale has violated the Combined Sewer Overflow Control Policy issued by the USEPA, the direction of the Sanitary Water Board¹ in 1968 to separate Hinsdale's sewers, and FCWRD's ordinance and statutory duty. Pet. at 5-6.

FCWRD further alleges that Hinsdale violated these provisions by failing to separate its sewers, allowing substantial wet weather flows to enter FCWRD's combined sewer system and travel to and inundate the FCWRD system; and by failing to operate its leaf collection program to prevent leaves and stormwater from entering the FCWRD system.

MWRDGC

FCWRD alleges that MWRDGC violated section 12(a) of the Act (415 ILCS 5/12(a) (2004)). Pet. at 7. FCWRD further alleges that MWRDGC violated 35 Ill. Adm. Code 306, Subpart C and 35 Ill. Adm. Code 307.1101. Pet. at 6-7. FCWRD further alleges that MWRDGC has violated MWRDGC's National Pollutant Discharge Elimination System (NPDES) permit, the Combined Sewer Overflow Control Policy issued by USEPA, and FCWRD's ordinance prohibiting wet weather flows, hindering FCWRD's fulfillment of its statutory duty. *Id.*

¹ The Sanitary Water Board was a predecessor agency to the Board and was abolished with the enactment of the Act.

FCWRD further alleges that MWRDGC violated the Act and Board rules by diverting flows from the area served by MWRDGC to FCWRD. FCWRD alleges that these diverted flows, combined with wet weather flows from that area served by FCWRD, cause or contribute to unauthorized combined sewer overflows within FCWRD's system. FCWRD further alleges that MWRDGC has violated its statutory duty to regulate stormwater and to maintain Flagg Creek so that stormwater is not obstructed in it. Pet. at 6-7.

IDOT

FCWRD alleges that IDOT violated section 12(a) of the Act (415 ILCS 5/12(a) (2004)). Pet. at 8. FCWRD further alleges that IDOT violated 35 Ill. Adm. Code Part 306, Subpart C and 35 Ill. Adm. Code 307.1101. *Id.* FCWRD further alleges that IDOT has violated FCWRD's ordinance prohibiting wet weather flows and has interfered with FCWRD's statutory duty to provide capacity for sanitary flows from residents in its service area. *Id.*

FCWRD further alleges that IDOT violated these provisions by failing to provide for wet weather flows from 55th Street, which cause or contribute to unauthorized combined sewer overflows within FCWRD's system. Pet. at 8.

DuPage

FCWRD alleges that DuPage violated section 12(a) of the Act (415 ILCS 5/12(a) (2004)). Pet. at 9. FCWRD further alleges that DuPage violated 35 Ill. Adm. Code Part 306, Subpart C and 35 Ill. Adm. Code 307.1101. *Id.* FCWRD further alleges that DuPage violated FCWRD's ordinance prohibiting wet weather flows and has interfered with FCWRD's statutory duty to provide capacity for sanitary flows from residents in its service area. *Id.*

FCWRD further alleges that DuPage violated these provisions by failing to provide for wet weather flows from 55th Street, which cause or contribute to unauthorized combined sewer overflows within FCWRD's system. Pet. at 9.

Relief Requested

In its request for relief, FCWRD seeks "an order directing Hinsdale to comply with the direction of the Sanitary Water Board requiring Hinsdale to separate its combined sewer." Pet. at 9. FCWRD also seeks a Board order "directing Hinsdale to comply with FCWRD's ordinance prohibiting combined sewers." *Id.* In addition, FCWRD seeks an order directing Hinsdale to comply with the Act, Board regulations, and combined sewer overflow policy by stopping stormwater flows and large leaf loads from entering FCWRD's sewers. *Id.* Finally, FCWRD asks that the Board issue an order that all four respondents address their respective wet weather flows and stop stormwater flows from entering FCWRD's sewers. *Id.*

MWRDGC MOTION TO STRIKE AND DISMISS

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, motion for leave to serve a bill of

particulars² (MWRDGC Mot.). MWRDGC moves that those paragraphs be dismissed as frivolous because the Board lacks the authority to decide whether MWRDGC has committed the violations alleged in them. MWRDGC Mot. at 5. None of the other three respondents filed a motion under section 103.212(b). However, respondents' answers contained affirmative defenses raising jurisdictional issues. *See* IDOT Ans. at 2, Hinsdale Ans. at 11, DuPage Ans. at 3.

MWRDGC claims that FCWRD's complaint alleges that MWRDGC has violated its statutory duty to regulate stormwater in Cook County. MWRDGC Mot. at 2, citing Comp. at 7 (¶¶ 61-70). MWRDGC further claims that FCWRD has pled that this alleged failure to regulate stormwater has interfered with FCWRD's duty to provide capacity for sanitary flows. MWRDGC Mot. at 2, citing Comp. at 7 (¶ 70). MWRDGC argues that FCWRD has pled that this alleged violation of MWRDGC's statutory duty violates the Act's prohibition on causing or contributing to water pollution (415 ILCS 5/12(a) (2004)) and also violates the Board's regulation prohibiting any person from introducing pollutants that interfere with operation of a sewage treatment plant (35 Ill. Adm. Code 307.1101). MWRDGC Mot. at 2, citing Comp. at 7 (¶¶ 68-69).

MWRDGC argues that FCWRD has not identified "the specific Illinois statutory provision regarding stormwater regulation that it claims was breached by the MWRD." MWRDGC Mot. at 2. MWRDGC notes that its statutory duties arise from its enabling statute. *Id.*, citing 70 ILCS 2605/1 *et seq.* (2004) (Metropolitan Water Reclamation District Act). MWRDGC further notes that the General Assembly recently amended the Metropolitan Water Reclamation District Act by giving MWRDGC the additional duty of managing stormwater. MWRDGC Mot. at 2-3, citing 70 ILCS 2605/7h (2004) (Public Act 93-1049, eff. Nov. 19, 2004).

MWRDGC acknowledges that the Act gives the Board authority to adjudicate complaints that allege violations either of the Act or Board regulations. MWRDGC Mot. at 3, citing 415 ILCS 5/5(d) and 5/30-33 (2004). MWRDGC argues, however, that "the Board's authority is limited to the terms of its enabling statute." MWRDGC Mot. at 3, citing Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565 (5th Dist. 1997). In the Concerned Adjoining Owners case, MWRDGC states that organizations of citizens claimed that the City of Salem did not comply with the Illinois Municipal Code in annexing property for a landfill. MWRDGC Mot. at 3, citing Those Opposed to Area Landfills (T.O.T.A.L.) v. City of Salem, Concerned Adjoining Owners v. City of Salem, PCB 96-79, 96-82 (consolidated) (Mar. 7, 1996). The Board stated it "does not have the authority to decide whether the annexation and purchase of the property by the City was conducted according to the applicable statutes in the Illinois Municipal Code, as the Board's authority is limited to those matters arising under the Act." MWRDGC Mot. at 3, citing Those Opposed to Area Landfills (T.O.T.A.L.) v. City of Salem, Concerned Adjoining Owners v. City of Salem, PCB 96-79, 96-82 (consolidated), slip op. at 5 (Mar. 7, 1996). MWRDGC further notes that the appellate court affirmed the Board's decision, stating that "[t]he Board's authority

² A bill of particulars is a "[f]orm or means of discovery in which the prosecution sets forth the time, place, manner, and means of the commission of the crime as alleged in the complaint or indictment." BLACK'S LAW DICTIONARY 165 (6th ed. 1990)

is limited to the terms of its enabling statute, which does not extend to matters arising under the Municipal Code.” MWRDGC Mot. at 3, citing Concerned Adjoining Owners and Those Opposed to Area Landfills (T.O.T.A.L.) v. PCB, et al., 680 N.E.2d 810, 819 (5th Dist. 1997). Extending this analysis to the case at hand, MWRDGC argues “it follows that the Board’s authority does not extend to the matters arising under the MWRD’s enabling statute, assuming that this is the basis of the ‘statutory duty’ alleged by Complainant.” MWRDGC Mot. at 3.

MWRDGC also emphasizes the case of Material Service Corp., in which the Board dismissed a complaint as frivolous. Material Service Corp. v. J.W. Peters & Sons, Inc., PCB 98-97, slip op. at 2 (Apr. 2, 1998). MWRDGC argues that the Board in that case “held that it did not have jurisdiction to determine whether the respondent was in violation of the Act, when, in order to do so, it first had to find violations of the Gasoline Storage Act and regulations promulgated thereunder.” MWRDGC Mot. at 4. MWRDGC further argues that, because it did not have jurisdiction to adjudicate violations of the Gasoline Storage Act, the Board dismissed the complaint. *Id.* Applying the Board’s reasoning in Material Service Corp. to this case, MWRDGC stresses that the Board also lacks “jurisdiction to determine whether MWRDGC is in violation of the recently-enacted Stormwater Management Act.” *Id.* (referring to 70 ILCS 2605/7h (2004)). MWRDGC concludes by stating that, because paragraphs 61-70 of the complaint appear to allege violations of the Stormwater Management Act, they should be struck for lack of jurisdiction. *Id.*

FCWRD RESPONSE

FCWRD argues that neither the Act nor the caselaw support MWRDGC’s claim that “the Board loses authority over matters arising under the Act in any circumstances where an alleged violation of the Act also involves an alleged violation of another statute.” Resp. at 2. FCWRD argues that the Act does not limit the Board’s authority by explicitly divesting it of authority “in any case in which construing another statute is necessary to enforce the Act.” *Id.* Had the General Assembly wished to limit the Board’s authority in that fashion, FCWRD argues that it could have drafted the Act to read that “[t]he Board shall have authority to conduct proceedings upon complaints charging violations of the Act, any rule or regulation adopted under the Act, *[provided however in no event may the Board construe another statute or regulation in connection with its deliberations regarding violations of the Act]*.” Resp. at 3 (emphasis in original). FCWRD suggests that the Board should not construe its grant of authority to contain a limit that the General Assembly did not specifically include in the Act. *See id.*

In support of its argument, FCWRD cites to A.E. Staley Manuf. Co. v. IEPA, 290 N.E.2d 890 (4th Dist. 1972), in which the petitioner argued that the Act limited the Board’s authority to discharges into the waters of the state and that the Board did not have authority to control discharges into sanitary sewers which are tributary to a sanitary treatment plant. Resp. at 3, citing Staley, 290 N.E.2d at 893. Noting that the appellate court characterized the petitioner’s position as “unduly restrictive,” FCWRD emphasizes that the court found a “realistic and practical nexus” between Staley’s discharge and the waters of the state that was sufficient to give the Board authority over Staley’s sewer. Resp. at 3, citing Staley, 290 N.E.2d at 894-95. In this matter, FCWRD finds a nexus between MWRDGC’s alleged failure to properly manage stormwater and the violations of the Act and Board regulations alleged in the complaint. While

acknowledging that the MWRDGC is delegated its authority by a separate act, FCWRD argues that the Board's authority to hear complaints alleging violations of the Act includes the power to supervise MWRDGC "only to the extent reasonably required to effectuate the purposes of the Act." Resp. at 4.

FCWRD discounts MWRDGC's emphasis on the Concerned Adjoining Landowners case. FCWRD argues that the appellate court did not limit the Board's authority to act on complaints alleging a violation of the Act. Resp. at 4. Instead, argues FCWRD, the court merely upheld the Board's determination that annexation is not addressed in the Act and does not involve causing or threatening pollution. Resp. at 4-5. In comparison, claims FCWRD, the breach of MWRDGC's statutory duty has allegedly caused a violation of the Act and the Board's regulations. Resp. at 5; *see* Comp. at 7.

FCWRD also seeks to distinguish the Materials Service Corp. case relied upon by MWRDGC. In the complaint in that case, argues FCWRD, "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." Resp. at 5. In this case, however, FCWRD argues that it has alleged that MWRDGC violated the Act and Board regulations. *Id.*

Generally, FCWRD claims that the Board "is the proper venue" to hear the evidence and issue an order addressing the violations of the Act and the Board regulations alleged in the complaint. Resp. at 1. FCWRD states that, in order for the Board to fulfill its duties, it "must consider and evaluate the statutory responsibility and authority of MWRDGC" to determine whether the Act has been violated and to craft a remedy in the event that a violation is found. *Id.*

BOARD ANALYSIS AND FINDINGS

Complaint Not Duplicative

The Board has not identified any other cases either substantially similar or identical to this matter pending in other forums. Additionally, MWRDGC's motion to strike does not allege that any potentially duplicative matters are now pending. Based on the record now before the Board, none of the allegations in the complaint are duplicative as to any respondent.

Complaint Frivolous in Part

FCWRD has alleged that MWRDGC has breached its statutory duty to maintain Flagg Creek so that stormwater is not obstructed. Comp. at 7 (¶¶ 66-67). FCWRD has further alleged that this breach is itself a violation of the Act and the Board's regulations (Comp. at 7 (¶¶ 68-69)) and an interference with FCWRD's own statutory duties (Comp. at 7 (¶ 70)). While FCWRD has not specifically cited the source of MWRDGC's statutory duty (*see* Comp. at 7 (¶¶ 61-70)), FCWRD clearly refers to section 7h of the Metropolitan Water Reclamation District Act. 70 ILCS 2605/7h (2004) (Stormwater management). As pled, the complaint requires the Board to determine whether MWRDGC has violated its enabling statute in order to determine whether MWRDGC has violated the Act and Board regulations.

The Board notes that its 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). The Board's role is analogous to a court of limited jurisdiction. The Board can act only pursuant to the authority conferred on it by statute. *Pickering v. Illinois Human Rights Comm'n.*, 246 Ill. App. 3d 340, 352 (2nd Dist. 1986), citing *City of Chicago v. Fair Employment Practices Com.*, 65 Ill. 2d 108, 112-13 (1976). 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).

This limited authority is reflected in the caselaw. In *Material Service Corp. v. J.W. Peters & Sons, Inc.*, PCB 98-97 (Apr. 2, 1998), the Board dismissed as frivolous a complaint alleging a violation of regulations adopted under the Gasoline Storage Act (GSA). "The Board does not have the jurisdiction to determine" violations of regulations adopted under the GSA. *Material Service Corp. v. J.W. Peters & Sons, Inc.*, PCB 98-97, slip op. at 2 (Apr. 2, 1998), citing 430 ILCS 15/2 (1996), 41 Ill. Adm. Code 170.670. In *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), the court affirmed the Board's conclusion that it did not have authority to determine compliance with the Municipal Code: "[t]he Board's authority is limited to the terms of its enabling statute." *Id.* at 819, citing 415 ILCS 5/5 (1992). FCWRD has not persuasively distinguished its complaint from these precedents.

FCWRD suggests that, in the absence of language explicitly forbidding the Board from interpreting any other statute, the Act is elastic enough to allow the Board to determine whether other statutes and regulations have been violated in connection with alleged violations of the Act. Taken to its logical conclusion, this argument would impermissibly extend the principle of pendent jurisdiction and all but convert the Board into a court of general jurisdiction. Consequently, the Board finds that paragraphs 61-70 of the complaint are frivolous because they assert claims over which the Board lacks jurisdiction and thus request relief that the Board lacks authority to grant. The Board grants MWRDGC's motion to strike and dismiss paragraphs 61 through 70 of FCWRD's complaint as frivolous. Having granted that motion, the Board denies the alternative motion for leave to serve a bill of particulars as moot.

The Board further notes that FCWRD has alleged violations of FCWRD's ordinance against all four respondents. The analysis and conclusion above with regard to the Board's authority to adjudicate violations of the Metropolitan Water Reclamation District Act apply with equal force to the Board's authority to adjudicate violations of the FCWRD ordinance. To the extent that it alleges a violation of that ordinance, the Board lacks jurisdiction over it. While the Board notes that respondents have raised this issue of the Board's jurisdiction in their answers (*see* IDOT Ans. at 2, Hinsdale Ans. at 11, DuPage Ans. at 3), the Board on its own motion finds that the alleged violations of FCWRD's ordinance are frivolous because they assert claims over which the Board lacks jurisdiction and thus request relief that the Board lacks authority to grant.

Similarly, the Board cannot directly enforce the USEPA's combined sewer overflow policy. To the extent that it alleges a violation of that policy, the Board lacks jurisdiction over it. The Board on its own motion finds that the alleged violations of USEPA's policy are frivolous because they assert claims over which the Board lacks jurisdiction and thus request relief that the

Board lacks authority to grant. The Board notes, however, that it has incorporated elements of the policy into its regulations. *See, e.g.*, 35 Ill. Adm. Code 306 Subpart C (Combined Sewers and Treatment Plant Bypasses).

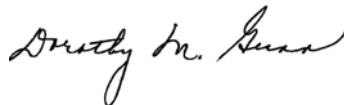
The Board accepts the balance of the complaint for hearing as to all four respondents. In doing so, the Board finds the balance of the complaint neither duplicative nor frivolous within the meaning of section 31(d) of the Act. *See* 415 ILCS 5/31(d) (2004).

To enable the parties and the Board to proceed expeditiously by using a single complaint document, the Board directs FCWRD to file an amended complaint consistent with the terms of this order on or before July 6, 2006, 35 days from the date of this order. MWRDGC has 60 days from the filing of an amended complaint to file its answer. The other respondents are given leave to file amended answers within the same 60-day period, if they choose to do so.

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 June 1, 2006, by a vote of 3-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board