

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUL 28 2006

STATE OF 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 No. 2006-141

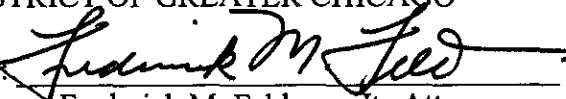
NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on July, 28, 2006, we filed the attached Respondent Metropolitan Water Reclamation District of Greater Chicago's Motion to Strike and Dismiss Count II of FCWRD's Amended Complaint with the office of the Clerk of the Illinois Pollution Control Board, 100 West Randolph Street, Suite 11-500, Chicago, Illinois, a copy of which is herewith served upon you.

METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO

BY:


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STATE OF ILLINOIS)
) S.S.
COUNTY OF COOK)

CERTIFICATE OF SERVICE

I, Cheeryl Bourgeois, being duly sworn on oath, certify that I caused a copy of the attached Respondent **Metropolitan Water Reclamation District of Greater Chicago's Motion to Strike and Dismiss Count II of FCWRD's Amended Complaint**, to be sent via first class U.S. Mail to the attached named individuals at their addresses as shown, with proper postage prepaid, from 100 E. Erie Street, Chicago, Illinois, at or near the hour of 4:00 p.m., this 28 day of July, 2006.

Cheeryl R. Bourgeois

SUBSCRIBED and SWORN to before
me this 28th day of July, 2006.

Rosalie Bottari
Notary Public



THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

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

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FLAGG CREEK WATER RECLAMATION)
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DEPARTMENT OF TRANSPORTATION,)
DUPAGE COUNTY.)

Respondents.)
)

PCB No. 2006-141

**RESPONDENT METROPOLITAN WATER RECLAMATION DISTRICT
OF GREATER CHICAGO'S MOTION TO STRIKE AND DISMISS COUNT II
OF FCWRD'S AMENDED COMPLAINT**

Now comes the Respondent, Metropolitan Water Reclamation District of Greater Chicago (hereinafter "MWRDGC"), through its Attorney, Frederick M. Feldman, and pursuant to 35 Ill. Adm. Code 101.506 hereby submits its Motion to Strike and Dismiss Count II of the Amended Complaint of Flagg Creek Water Reclamation District (hereinafter "FCWRD"). In support of its motion, the MWRDGC states as follows:

I. INTRODUCTION

In response to the MWRDGC's motion to strike and dismiss paragraphs 61 through 70 of the original complaint, the Illinois Pollution Control Board ("Board") struck those allegations as frivolous in a Board Order dated June 1, 2006. The Board on its own motion also dismissed as frivolous those portions of the complaint alleging violations of any legal authority other than the Illinois Environmental Protection Act (the "Act") and the Board's regulations.

Pursuant to the Board's Order, FCWRD amended its complaint. The amended count against the MWRDGC, however, does not cure the fatal deficiency confirmed by the Board in its Order: the amended allegations still require the Board to adjudicate legal authority other than the Act and the Board's regulations.

Indeed, in light of the decision rendered by the Board, it is now apparent that the allegations against the MWRDGC in total require the Board to make determinations that exceed its authority under the Act. Consequently, consistent with the Board's Order, the MWRDGC now moves for dismissal of the amended count II in its entirety as frivolous.

Paragraphs 49-60 of the amended complaint should be dismissed as frivolous because the Board does not have jurisdiction to determine contractual matters between the parties. FCWRD has alleged the existence of an agreement between the parties. The Board is called upon to determine the rights and liabilities of the parties pursuant to the agreement, which is a practice that the Board has long held exceeds its authority. In order to establish that the MWRDGC violated the Act or Board regulations with respect to the allegations stated in paragraphs 49-60, the Board must first determine that the MWRDGC, an agency that primarily serves Cook County, owed some type of contractual duty to FCWRD to provide service to an area in DuPage County. The Board must further find that the MWRDGC was in breach of that duty by not accepting sufficient DuPage County flow. Making these determinations would violate the Board's own direction that it will not consider portions of the complaint in this proceeding that allege violations of any legal authority other than that granted to the Board under its enabling statute. In effect, paragraphs 49-60 were dismissed on the Board's own motion as stated in its June 1 Order.

The balance of the amended complaint against MWRDGC (paragraphs 61-66) should also be dismissed as frivolous. FCWRD has not amended the allegations to establish jurisdiction in the Board. Certain paragraphs of the original complaint were specifically dismissed by the Board because the allegations were grounded on establishing violations by the MWRDGC of its own Stormwater Management Act. The equivalent paragraphs in the amended complaint (paragraphs 61-66) are still grounded on establishing violations of the Stormwater Management Act. FCWRD responded to the Board's decision by eliminating the obvious red flag conclusory allegations regarding MWRDGC's breach of its statutory duty under the Stormwater Management Act, but the central underpinnings of the allegations remain the same. The Board must first determine whether MWRDGC has violated its Stormwater Management Act in order to determine whether MWRDGC has violated the Act and Board regulations.

II. STATEMENT OF FACTS

A. Background of the Proceedings

On March 3, 2006, FCWRD filed a multi-count complaint against various governmental entities, including MWRDGC (Complaint ("Compl.") attached as Ex. "A"). The MWRDGC moved to dismiss paragraphs 61-70 on the basis that the Board did not have jurisdiction to adjudicate an alleged breach of the MWRDGC's statutory duty under the Stormwater Management Act (70 ILCS 2605/7h). (See MWRDGC's Motion to Strike and Dismiss Paragraphs 61-70 of Count II of FCWRD's Complaint, filed April 5, 2006). On June 1, 2006, the Board unanimously adopted an Order dismissing paragraphs 61-70 of count II of FCWRD's complaint as frivolous (Order of the Board (by A.S. Moore) adopted June 1, 2006 ("Order") attached as Ex. "B"). The Board on its own

motion also struck as frivolous “the portions of the complaint alleging violations of any legal authority other than the Act and the Board’s regulations” (Order, Ex. B at 1). The Board directed FCWRD to file an amended complaint consistent with the terms of the Order (Order, Ex. B at 9). The amended complaint was filed on June 29, 2006 (Amended Complaint (“Am. Compl.”) attached as Ex. “C”). Count II of the amended complaint is directed against the Metropolitan Water Reclamation District (Am. Compl., Ex. C at 6-7).

B. The Allegations Regarding MWRDGC’s Breach of Agreement to Accept DuPage County Flows

Allegations 49 through 60 allege generally that the MWRD is required to accept flows coming from an area in DuPage County pursuant to an agreement between the parties, and that instead, MWRD is diverting those flows into the FCWRD system causing FCWRD to violate the Act and Board regulations (Am. Compl., Ex. C at 6-7).

To support this claim, FCWRD pleads that FCWRD provides service to an area in Cook County that is located in the MWRD’s jurisdiction (Am. Compl., ¶ ¶ 49-50). FCWRD further pleads that “FCWRD has a draft agreement with MWRD that has not been executed, which requires MWRD to provide service to a roughly equivalent area in DuPage County that is within the FCWRD’s statutory authority....” (Am. Compl., ¶ 51). FCWRD alleges that the MWRD sewer system has diversion structures that cause a “substantial” amount of flow from the DuPage County area to be blocked from entering the MWRD’s sewer system (Am. Compl., ¶ ¶ 53-54). FCWRD then pleads upon information and belief that the blocked flows “make their way to the FCWRD sewer system” (Am. Compl., ¶ 55). FCWRD alleges that MWRD’s diversion of flows from the DuPage County area, combined with wet weather flow from FCWRD, causes or contributes to unauthorized CSOs in FCWRD’s system, in violation of MWRD’s NPDES

permit (unspecified), and Illinois regulations (Am. Compl., ¶ 57); that by diverting the DuPage County flow, MWRD is violation of Section 5/12 (a) of the Act (Am. Compl., ¶ 58); and of Board rule prohibiting the introduction of pollutants that interfere with FCWRD's operations (Am. Compl., ¶ 59). The allegations stated in paragraphs 49-60 in the amended complaint are substantially similar as those stated in the original complaint, though not identical (See Am. Compl., Ex. C at 6-7; Compl., Ex. A at 6-7).

C. The Allegations Regarding MWRDGC's Breach of Its Statutory Duty to Maintain Flagg Creek

Paragraphs 61 through 66 of the amended count II allege generally that MWRD has a statutory duty to remove obstructions from Flagg Creek, and that its failure to do so has caused stormwater to backup into FCWRD's polishing ponds in violation of the Act and regulations adopted by the Board under the Act (See Am. Compl., Ex. C at 6).

Specifically, FCWRD pleads in the amended complaint that the "MWRD is authorized by statute to regulate stormwater within Cook County" (Am. Compl., ¶ 61). This allegation is identical to the equivalent paragraph in the original complaint (Compl., Ex. A at ¶ 62). FCWRD also pleads in the amended count that "MWRD levies taxes on residents within Cook County, including residents within FCWRD, to ensure stormwater is appropriately managed and does not obstruct sewers and streams" (Am. Compl., ¶ 62). This paragraph also reiterates the allegation stated in the original complaint, with the exception that FCWRD dropped the phrase from the beginning of the sentence "[p]ursuant to that authority" (See Compl., Ex. A at ¶ 63). The amended complaint further states that "[s]tormwater that flows into Flagg Creek is obstructed by dead trees and other detritus and does not properly flow downstream" (Am. Compl., ¶ 63). This allegation is also verbatim from the original complaint, with the exception of the addition

of the word “properly” in the amended pleading (See Compl., Ex. A at ¶ 63). FCWRD alleges that “[d]uring high flow events, the stormwater backs up into FCWRD’s polishing pond, interfering with the pond’s ability to polish the effluent from FCWRD and acting as a pollutant to FCWRD’s pond” (Am. Compl., ¶ 64). This allegation is identical to that stated in the original complaint (See Compl., Ex. A at ¶ 65). FCWRD then alleges that MWRD’s failure to remove the dead trees and other detritus from Flagg Creek so that stormwater is not obstructed is a violation of the Act’s prohibition on causing or contributing to water pollution, a violation of Board regulations and standards under 5/12(a), as well as a violation of 35 Ill. Adm. Code 307.1101 prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD (Am. Compl., ¶ 65). FCWRD omitted allegations previously pled in the original complaint stating that “MWRD has a duty by statute and its collection of taxes within FCWRD service area to maintain Flagg Creek...,” and that, “MWRD has breached its statutory duty” (Compl., Ex. A at ¶ ¶ 66, 67).

II. ARGUMENT

A. The Board Lacks Jurisdiction to Adjudicate An Alleged Breach of Agreement by MWRDGC

Paragraphs 49 through 60 of the amended count against MWRDGC are premised on the alleged breach of agreements oral or written between MWRDGC and FCWRD. In order to find that the MWRDGC violated Section 5/12(a) of the Act or the Board’s regulations, the Board must first determine the rights and liabilities of the parties under their agreement.

The existence of the agreement is alleged in paragraph 51 of the Amended Complaint as follows: “FCWRD has a draft agreement with MWRD that has not been

executed, which requires MWRD to provide service to a roughly equivalent area in DuPage County that is within the FCWRD's statutory authority (MWRD-served area)." (Am. Compl., ¶ 51). The complaint alleges that MWRD is not complying with the agreement. FCWRD complains that MWRD has installed "diversion structures" in its sewer system. The structures block "a substantial amount of flow" from the DuPage County area, which MWRD is required to accept under the agreement. FCWRD surmises that the blocked flows make their way into the FCWRD system instead. (Am. Compl., ¶¶ 53-54). FCWRD claims that the flows blocked by MWRD, in combination with FCWRD wet weather flows, cause or contribute to violations of the Act or Board regulations. (Am. Compl., ¶¶ 57-59).

The scenario that FCWRD pleads, that MWRD is accepting some DuPage County flow, is not status quo for MWRDGC. The MWRDGC's enabling statute indicates that the intended jurisdiction of the MWRDGC is Cook County, with a few exceptions not applicable here. (70 ILCS 2605/1 *et seq.*).¹ The arrangement to accept DuPage County flows, FCWRD pleads, is pursuant to an agreement that "...requires the MWRD to provide service to a[n]... area in DuPage County." (Am. Compl., ¶ 51).²

The Board has long held that it does not have jurisdiction over disputes based on contractual agreements. *Environmental Protection Agency v. Will County Landfill, Inc.*, PCB 72-13 (Dec. 12, 1972). In that matter, the IEPA charged that the respondents, the

¹ Section 2605/1 of the MWRD Act states in part, "[t]he corporate limits of the Sanitary District of Chicago,...within the territorial limits of Cook County, may be extended in such a manner as may be provided by law to include any area of contiguous territory *within the limits of said Cook County*..." (70 ILCS 2605/1) (emphasis added).

² Pursuant to Article VII, Section 10 of the Illinois Constitution, "units of local government", have authority to enter into agreements to: "...contract or otherwise associate among themselves...to obtain or share services and to exercise, combine, or transfer any power or function...." See also, Intergovernmental Cooperation Act, 5 ILCS 220/1 *et seq.*

current operators and owners of a landfill, had been guilty of dumping garbage and refuse. *Will County Landfill* at 2. All respondents filed Third-Party Complaints against the estate of the original lessee requesting indemnity under the terms of the lease, or alleging that the original lessee had breached the terms of the lease. *Id.* The original lessee's estate moved to dismiss the Third-Party Complaints on jurisdictional grounds and for a number of reasons that would involve consideration of the terms of the lease. The Board dismissed without prejudice the Third-Party Complaints for indemnity or breach of contract. *Id.* at 3. The Board stated, "[w]e do not determine the rights of the parties for indemnity under the lease or for a breach of contract. For a determination of these issues the parties must resort to a court of law." *Will County Landfill*, at 2.

In a more recent discussion by the Board, the Board quoted *Will County Landfill* with approval on the issue of lack of Board authority over contractual disputes. *Mather Investment Properties, L.L.C., v. Illinois State Trapshooters Assoc., Inc.*, PCB 05-29, (July 21, 2005). The Board in *Mather* decided a motion to stay by the respondent. In its discussion regarding comity, the Board noted that "its authority under the Act does not extend to adjudication of these contractual matters," *Mather*, at 11, citing 415 ILCS 5/5(d) (2004) and *IEPA v. Will County Landfill, Inc.*, PCB 72-13, slip op. at 2.

The MWRDGC's alleged breach of an agreement with FCWRD to accept flow from DuPage County (Hinsdale) is the basis for FCWRD's conclusion that MWRDGC is in violation of the Act and Board regulations. (Am. Compl., ¶¶ 57- 60). Without resort to interpretation of the contractual obligations incurred under that agreement, the Board simply could not find from the pleaded facts that MWRDGC had any obligation to process flow from DuPage County, or that its alleged failure to accept sufficient flow

resulted in MWRDGC violations of Section 12(a) of the Act or of the Board's regulations. FCWRD pleads that some type of contractual obligation exists between MWRDGC and FCWRD. According to FCWRD, the agreement requires MWRD to do certain things, and MWRD has intentionally placed structures in its sewers that circumvent MWRD's obligations under the agreement. In long-standing precedent, the Board has established that determining contractual rights is not within the Board's jurisdiction. *Environmental Protection Agency v. Will County Landfill, Inc.*, PCB 72-13 (Dec. 12, 1972), slip op. at 2.

The MWRDGC's moving to dismiss amended paragraphs 49 through 60 at this time is consistent with the Board's June 1, 2006 Order. The Board made it clear that it would not consider "portions of [the] complaint alleging violations of any legal authority other than the Act and the Board's regulations." (Order, at 1). While the Board did accept the "balance of the complaint for hearing" (*Id.*), it would be inconsistent with the Board's order if the "balance of the complaint" included portions of the complaint over which the Board had no legal authority. It is a fundamental principle of law that a court may raise the lack of subject matter jurisdiction at any time in the proceedings, even on appeal. *Keller v. Walker*, 319 Ill. App. 3d 67, 69 (3rd Dist. 2001).

B. The Board Lacks Authority to Determine an Alleged Violation of the Stormwater Management Act by MWRDGC

The Board ruled with respect to the original complaint that it did not have authority to adjudicate alleged violations of the MWRD Stormwater Management Act as the basis for establishing violations of the Act or Board regulations. FCWRD's amendments to the pertinent allegations do nothing to correct this fundamental deficiency so as to now bestow jurisdiction on the Board.

The core allegations remain the same in amended count II as those stated in the original complaint. (See Am. Compl., Ex. C at 6-7; Compl., Ex. A at 7). FCWRD has only deleted some of the more obvious references to the breach of the MWRDGC's statutory duty. The key factual allegations in the amended complaint that premise the allegations on the Stormwater Management Act are identical to those pleaded in the original complaint. They state:

[t]he MWRD is authorized by statute to regulate stormwater within Cook County (Am. Compl., ¶ 61); and,

MWRD levies taxes on residents within Cook County, including residents within FCWRD, to ensure that stormwater is appropriately managed and does not obstruct sewers and streams.

(Am. Compl., ¶ 62).

While FCWRD once again neglects to identify the specific statutory authority by which the MWRD acts to regulate stormwater in Cook County, the Board has previously ruled in response to the identical allegation that the FCWRD “clearly refers to section 7h of the MWRD Act,” citing 70 ILCS 2605/7h (2004) (Stormwater management) (Order at 7). Moreover, FCWRD admits that MWRDGC levies taxes for stormwater management purposes.³ It is axiomatic that an entity may not levy taxes without having the statutory authority duty to do so. See *People ex rel. Schlaeger*, 396 Ill. 85, 88 (1947).

FCWRD has omitted the most direct references to a statutory duty and the breach thereof. FCWRD no longer specifically pleads that “MWRD has a duty by statute and its collection of taxes within FCWRD service area to maintain Flagg Creek so that stormwater is not obstructed in the [Flagg] Creek” (Compl., ¶ 66); or that “MWRD has

³ Section 12 of the MWRD's enabling act was amended in 2004 to state, “in addition, for *stormwater management purposes*...the board of commissioners may levy taxes for the year 2005 and each year thereafter...” 70 ILCS 2605/12 (emphasis added).

breached its statutory duty” (Compl., ¶ 67) (See also Compl. ¶¶ 68, 69, 70) (deletion of the phrase “MWRD’s breach of its statutory duty”).

These deletions do not change the basic premise of amended paragraphs 61-69, that is, that the MWRDGC has a duty by Illinois statute to clear obstructions from Flagg Creek and that its failure to do so has resulted in violations of the Act and Board regulations. FCWRD may have attempted through these omissions to further obscure the statutory source of the MWRDGC’s alleged duty to clear Flagg Creek of obstructions. But from what other source does the MWRDGC’s obligation to maintain Flagg Creek arise if not from the Stormwater Management Act? FCWRD does not allege that MWRDGC created the condition, i.e. the debris and detritus in the creek, yet FCWRD nonetheless argues that MWRDGC has an absolute duty to remedy it. Without reliance on the Stormwater Mangement Act, then MWRDGC has no greater duty than the county, the local municipality under the Illinois Municipal Code, the pertinent drainage district under the Illinois Drainage Code or the private landowner through whose property Flagg Creek traverses not to interfere with FCWRD operations.

In the earlier proceedings directed toward the allegations stated in the original complaint, FCWRD responded that the Board could perform limited interpretation of statutes other than its own enabling act, if that is what is required to determine a violation of the Act. (FCWRD Response to MWRDGC’s Motion to Dismiss, at 4). Relying upon the authority cited by the MWRDGC and reasserted by MWRDGC herein, (see *Material Service Corp. v. J.W. Peters & Sons, Inc.*, PCB 98-97 (Apr. 2, 1998) and *Concerned Adjoining Owners and Those Opposed to Area Landfills (T.O.T.A.L.) v. PCB*, 288 Ill. App. 3d 565 (5th Dist 1997)), the Board rejected FCWRD’s argument. The Board held

that “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” (Order, at 8). Nothing really has changed since the original effort. Though FCWRD has eliminated the buzzwords “breach of statutory duty”, it still is asking the Board vis-a-vis the amended allegations to determine a breach by MWRDGC of its Stormwater Management Act. The Board has definitively declined to do so.

III. CONCLUSION

Count II of FCWRD’s Amended Complaint in its entirety requires this Board to consider legal authority over which its authority does not extend.

Paragraphs 49 through 60 allege that FCWRD and MWRD have an agreement to process flows that would not be typically be within either entity’s jurisdiction. The terms of the agreement and MWRDGC’s breach thereof, bear direct relation to MWRDGC’s alleged violations of the Act and Board regulations. However, the Board has consistently maintained that its authority under the Act does not extend to adjudication of such contractual matters.

Similarly, paragraphs 61 through 66 suffer from the same fatal flaw. In its June 1 Order dismissing portions of the original complaint as frivolous, the Board held that “[a]s 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.” (Order, at 7). The amended allegations in paragraphs 61-66 still require the Board to determine whether MWRDGC has violated the Stormwater Management Act in order to determine whether MWRDGC has violated the Act and Board regulations.

Consistent with Board precedent and its June 1, 2006 Order, paragraphs 61 through 66 of the amended count II should also be dismissed as frivolous.

WHEREFORE, Respondent, **Metropolitan Water Reclamation District of Greater Chicago**, prays that its Motion to Strike and Dismiss Count II of the Amended Complaint of Flagg Creek Water Reclamation District be granted and the Amended Complaint be dismissed with prejudice pursuant to 35 Ill. Adm. Code 102.202.

Respectfully submitted,

Metropolitan Water Reclamation District
of Greater Chicago

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WATER RECLAMATION DISTRICT OF
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DEPARTMENT OF TRANSPORTATION,
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PCB 06-

Complaint

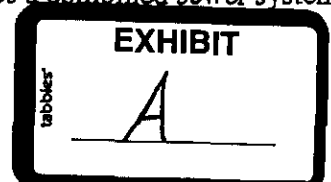
Jurisdiction

1. Complainant Flagg Creek Water Reclamation District (FCWRD), by and through its counsel Gardner Carton & Douglas LLP, brings this complaint before the Illinois Pollution Control Board ("Board") pursuant to Section 31(d)(1) of the Illinois Environmental Protection Act ("Act"), 415 ILCD 5/31(d), which allows enforcement proceedings to be initiated against any person allegedly violating the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order.

The Parties

2. FCWRD, formerly known as the Hinsdale Sanitary District, is a municipal government agency organized in 1926 under the Sanitary District Act of 1917, 70 ILCS 2405, et seq. FCWRD is responsible for wastewater treatment within a designated service area of approximately 24 square miles, which includes the Village of Hinsdale, the Village of Clarendon Hills, and the Village of Oak Brook, as well as portions of Burr Ridge, Oak Brook Terrace, Westmont, Villa Park, Lombard, Darien and Willowbrook.

3. The Village of Hinsdale (Hinsdale) is a municipality governed by the Illinois Municipal Code, 65 ILCS 5/1-1-1, et seq. Hinsdale owns and operates a combined sewer system



that conveys wastewater to both the Metropolitan Water Reclamation District of Greater Chicago (MWRD) and the FCWRD.

4. The Illinois Department of Transportation (IDOT) is a state agency created by the Department of Transportation Law, 20 ILCS 2705/2705-1 *et seq.* IDOT has responsibility for planning, construction and maintenance of Illinois' extensive transportation network, which encompasses, highways and bridges, airports, public transit, rail freight and rail passenger systems, and includes roadways within the boundaries of FCWRD's service area.

5. DuPage County is a body corporate and politic established by the Illinois Counties Code. The DuPage County Division of Transportation (DDOT) is an agency of DuPage County, and is responsible for the construction and maintenance of the County Highway system which serves the over 900,000 residents of DuPage County. DDOT maintains approximately 220 miles of arterial highway and 50 miles of recreational trails in DuPage County.

6. MWRD is a municipal government agency created by the Illinois Legislature in 1889. MWRD has a combined sewer overflow equivalent of 0.5-million people. The District serves an area of 872 square miles which includes the City of Chicago and 124 suburban communities. MWRD is also the designated stormwater management agency for Cook County.

7. The way in which Hinsdale, IDOT, DDOT, and MWRD, implement their statutory duties contributes excess flow during rainfall events to FCWRD, which has a disproportionate effect on FCWRD's system.

8. As a result of these excess flows, within FCWRD's sewer system, Sanitary Sewer Overflows ("SSO") and Combined Sewer Overflows ("CSO") events occur during both wet weather and dry weather.

The Flagg Creek Water Reclamation District System

9. The FCWRD wastewater treatment plant (WWTP) is located at 6975 Commonwealth Avenue in the Village of Burr Ridge, Illinois. It is designed to take dry weather flow and limited wet weather flow. See Figure 1.

10. The FCWRD has an interceptor system that serves the Village of Clarendon Hills, the Village of Hinsdale, and portions of the Village of Westmont, traveling east along the BNSF railroad from Illinois Route 83 to County Line Road, and then south toward Interstate 294 (I-294), to the FCWRD WWTP. This interceptor is known as the "Mainline Interceptor." See Figure 1.

11. FCWRD also has a 60-inch interceptor ("West 60-Inch Interceptor") that runs south along I-294 and collects flows from three other interceptors: the 55th Street Interceptor, running west along 55th Street; the 59th Street Interceptor, running south along 59th Street; and the 63rd Street Interceptor, running south along 63rd Street. See Figure 1.

12. FCWRD's other main interceptor is the Storm Water Pollution Control ("SWPC") Interceptor which runs from its Spinning Wheel Pumping station south along I-294.

13. Historically, bypasses from the FCWRD sewer system as well as the Hinsdale sewer system overflowed to Flagg Creek. On information and belief, in the 1970s, FCWRD was directed by the Sanitary Water Board to close its CSOs and accept Hinsdale's CSOs until Hinsdale separated its sewers, which Hinsdale was also ordered by the Sanitary Water Board in 1968 to separate by 1978.

14. To comply with the order directed to it, FCWRD constructed the Spinning Wheel Pumping Station and installed a new sixty inch interceptor, the Storm Water Pollution Control Interceptor, along Interstate 294 (SWPC Interceptor). See Figure 1.

15. The Spinning Wheel Pumping Station and SWPC Interceptor were generally intended to serve three purposes: to serve a new northern service area, to catch overflows from the FCWRD's existing forty two inch interceptor, and to temporarily provide relief to Hinsdale's CSOs until Hinsdale could separate its sewers in accordance with the Sanitary Water Board's order.

16. The pumping capacity of the Spinning Wheel Pumping Station is greater than the capacity of the SWPC Interceptor so long as that interceptor receives wastewater from Hinsdale's combined sewer system, so that during rain events, surcharges and overflows occur in the SWPC Interceptor and create hydraulic obstructions and overflows in other interceptors.

17. FCWRD has an NPDES Permit, No. IL0022586, which allows one CSO discharge point for excess flows from its WWTP. Standard Condition Number 26 of the District's NPDES permit prohibits CSOs at any other points.

18. FCWRD's Ordinance, which has been in place since 1931, revised in 1961 and 1980, prohibits combined sewer systems within its service area.

19. The unpermitted CSO events that occur in the FCWRD system do not comply with the CSO Control Policy, issued by the United States Environmental Protection Agency on April 19, 1994 (59 FR 18688), or state regulations governing CSOs found at 35 Il. Adm. Code Part 306, Subpart C.

20. The actions by Hinsdale, MWRD, IDOT and DDOT that cause stormwater to enter the FCWRD sewer system cause or contribute to the unauthorized CSO events.

21. FCWRD cannot comply with the terms and conditions of its NPDES permit and the CSO policy without the cooperation and corrective actions of Hinsdale, MWRD, IDOT and DDOT in eliminating wet weather flows from the FCWRD system.

Count I: The Village of Hinsdale

22. Hinsdale owns and operates a combined sewer system, and collects fees from certain residents for its ownership and operation of the combined sewer system.

23. Hinsdale's combined sewer system allows stormwater drainage from streets and public and private property during storm events to combine directly with sanitary waste flows.

24. The combined sewer system serving Hinsdale was constructed prior to 1900, and is constructed primarily of brick and clay tile piping. On information and belief, it is in poor repair.
25. The primary flows from Hinsdale to the FCWRD system occur through the Mainline Interceptor at two main locations: County Line Road and Highland Avenue, and Third Avenue and Princeton Road.
26. On information and belief, there is at least one additional unknown sewer connection along FCWRD's Mainline Interceptor from Hinsdale.
27. Hinsdale holds an NPDES permit, No. IL0066818, granted by the Illinois Environmental Protection Agency (Illinois EPA), which authorizes discharges to Flagg Creek from four Combined Sewer Overflow (CSO) points. On September 6, 2005, Illinois EPA issued a public notice proposing to renew that permit.
28. Consistent with the Illinois Pollution Control Board (Board) regulations, Hinsdale's NPDES permit requires first flush and ten times average dry weather flows to be treated before Hinsdale discharges from any of its permitted CSOs.
29. On information and belief, Hinsdale does not utilize its authorized CSO points frequently because of these restrictions, instead diverting a large volume of wet weather flows far in excess of ten times the average dry weather flow to FCWRD.
30. Because the MWRD sewer system has flow restrictors in its junction chambers where flows from Hinsdale are directed to the MWRD's sewer system, FCWRD receives all of the wet weather flows from Hinsdale.
31. The large volume of wet weather flows from Hinsdale, combined with the short travel time, surcharges FCWRD interceptors. The Mainline Interceptor and its SWPC Interceptor are most affected, which in turn results in overflows upstream and downstream of where Hinsdale sewers discharge to the FCWRD's interceptor.
32. The large volume of wet weather flows from Hinsdale cause both Hinsdale and the FCWRD to experience unauthorized CSOs within their respective systems.
33. The large volume of wet weather flows from Hinsdale disrupts the flow to the FCWRD's wastewater treatment facility and interferes with its effective operation.
34. The large volume of wet weather flows from Hinsdale interferes with FCWRD's ability to allow capacity for other municipalities that have separate sewers.
35. On information and belief, Hinsdale has never fully complied with the direction of the Illinois Sanitary Water Board issued in 1968 directing Hinsdale to separate its sewers.
36. Hinsdale is in violation of FCWRD's ordinance prohibiting combined sewers to discharge to the FCWRD sewer system

37. Hinsdale also directs a leaf collection program. On information and belief, the program operates by directing Hinsdale residents to place leaves in the parkway on the day of leaf collection, but Hinsdale does not address those leaves that are not properly placed in the parkway or that are placed in the street and allowed to wash into the street drains.

38. During the times in which the leaf collection program is active, a significant residual leaf load from Hinsdale's leaf collection program enters street drains and is conveyed to FCWRD along with stormwater, plugging its influent screening equipment and compromising the wastewater treatment system.

39. The leaf load is conveyed to FCWRD as a result of leaves and yard waste from Hinsdale's roadways washing into the combined sewer system.

40. By failing to separate its sewers and allowing substantial wet weather flows to enter its combined sewer system and travel to and inundate the FCWRD system, Hinsdale is in violation of the Sanitary Water Board's direction to Hinsdale to separate its sewers, FCWRD's ordinance prohibiting wet weather flows, the Combined Sewer Overflow Control Policy issued by U.S. EPA, and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

41. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is violating the Act's prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a).

42. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is in violation of the conditions of its NPDES Permit from Illinois EPA, and in violation of Act, 415 ILCS 5/12(b).

43. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

44. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is interfering with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

45. By failing to operate its leaf collection program to prevent leaves and stormwater from entering the FCWRD system, Hinsdale is in violation of the nine minimum controls required by the U.S. EPA's Combined Sewer Overflow Policy, and the FCWRD's ordinance.

46. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, Hinsdale is in violation of the Act's prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a).

47. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, the Combined Sewer Overflow Control Policy issued by U.S. EPA, and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

48. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, Hinsdale is in violation of the conditions of its NPDES Permit from Illinois EPA, and in violation of the Act, 415 ILCS 5/12(b).

49. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, Hinsdale is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

Count II: Metropolitan Water Reclamation District

50. FCWRD has historically served an area in Cook County that was placed under the jurisdiction of the MWRD in the 1970s.

51. Service to these areas in Cook County continues to be provided by FCWRD ("FCWRD-served area").

52. FCWRD has a draft agreement with MWRD that has not been executed, which requires MWRD to provide service to a roughly equivalent area in DuPage County that is within the FCWRD's statutory authority ("MWRD-served area").

53. FCWRD's sewer system accepts the dry weather and wet weather flows from the FCWRD-served area.

54. The MWRD sewer system has flow restrictors in its junction chambers where flows from Hinsdale are directed to the MWRD's sewer system.

55. On information and belief, the diversion structures cause a substantial amount of flow from the MWRD-served area to be blocked from entering the MWRD's sewer system.

56. On information and belief, those flows then make their way to the FCWRD sewer system.

57. On information and belief, the MWRD interceptor that receives the flows from the MWRD-served area has capacity that is not being used.

58. MWRD's diversion of flows from the MWRD-served area, combined with wet weather flows from the FCWRD-served area, cause or contribute to unauthorized CSOs within FCWRD's system, in violation of MWRD's NPDES permit, FCWRD's ordinance prohibiting wet weather flows, the Combined Sewer Overflow Control Policy issued by U.S. EPA, and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

59. By diverting flows from the MWRD-served area to FCWRD, MWRD is in violation of the Act's prohibition on causing or contributing to water pollution, and violating regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a).

60. By diverting flows from the MWRD-served area to FCWRD, MWRD is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

61. MWRD's diversion of flows from the MWRD-served area, combined with wet weather flows from the FCWRD-served area, interfere with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

62. MWRD is also authorized by statute to regulate stormwater within Cook County.

63. Pursuant to that authority, MWRD levies taxes on residents within Cook County, including residents within FCWRD, to ensure stormwater is appropriately managed and does not obstruct sewers and streams.

64. Stormwater that flows into Flagg Creek is obstructed by dead trees and other detritus and does not flow downstream.

65. During high flow events, the stormwater backs up into FCWRD's polishing pond, interfering with the pond's ability to polish the effluent from FCWRD and acting as a pollutant to FCWRD's pond.

66. MWRD has a duty by statute and its collection of taxes within the FCWRD service area to maintain Flagg Creek so that stormwater is not obstructed in the Creek.

67. MWRD has breached its statutory duty.

68. MWRD's breach of its statutory duty is a violation of the Act's prohibition on causing or contributing to water pollution, and violating regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a).

69. MWRD's breach of its statutory duty is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

70. MWRD's breach of its statutory duty interferes with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

Count III: Illinois Department of Transportation

71. The Illinois Department of Transportation (IDOT) has jurisdiction over a part of 55th Street east of County Line Road, and is responsible for its operation, repair and maintenance.

72. 55th Street was originally constructed as a two-lane roadway, but IDOT expanded 55th Street east of County Line Road to a four-lane roadway and added curbs.

73. By expanding 55th Street and adding curbs, IDOT has substantially increased the amount of stormwater that is conveyed to the FCWRD.

74. The wet weather flows from 55th Street contribute to the unauthorized CSOs within FCWRD's system.

75. The wet weather flows from 55th Street interfere with the effective operation of FCWRD's wastewater treatment facility.

76. The wet weather flows from 55th Street interfere with FCWRD's ability to allow capacity for wastewater from existing and new residents within its service area.

77. By failing to provide for wet weather flows from 55th Street, IDOT is causing or contributing to unauthorized CSOs within FCWRD's system, in violation of FCWRD's ordinance prohibiting wet weather flows and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

78. By failing to provide for wet weather flows from 55th Street, IDOT is in violation of the Act's prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act 415 ILCS 5/12(a).

79. By failing to provide for wet weather flows from 55th Street, IDOT is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

80. IDOT's wet weather flows from 55th Street interfere with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

Count IV: DuPage Department of Transportation

81. DDOT has jurisdiction over part of 55th Street west of County Line Road, and is responsible for its operation, repair and maintenance.

82. 55th Street was originally constructed as a two-lane roadway, but DDOT expanded 55th Street west of County Line Road to a four-lane roadway and added curbs.

83. DDOT has installed storm sewers on certain segments of 55th Street, but has not installed storm sewers to accept the runoff from all of 55th Street

84. In segments of 55th Street where no storm sewers are present, stormwater runoff enters the FCWRD's system through the 55th Street Interceptor.

85. The wet weather flows from 55th Street contribute to the unauthorized CSOs within FCWRD's system.

86. The wet weather flows from 55th Street interfere with the effective operation of FCWRD's wastewater treatment facility.

87. The wet weather flows from 55th Street interfere with FCWRD's ability to allow capacity for wastewater from existing and new residents within its service area.

88. By failing to provide for wet weather flows from 55th Street, DDOT is causing or contributing to unauthorized CSOs within FCWRD's system, in violation of FCWRD's ordinance prohibiting wet weather flows and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

89. By failing to provide for wet weather flows from 55th Street, DDOT is causing or contributing to unauthorized CSOs within FCWRD's system, in violation of the Act's prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act 415 ILCS 5/12(a).

90. By failing to provide for wet weather flows from 55th Street, DDOT is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

91. DDOT's wet weather flows from 55th Street interfere with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.


Relief Requested

WHEREFORE, for all of the foregoing reasons, FCWRD requests that the Illinois Pollution Control Board:

- A. Issue an order directing Hinsdale to comply with the direction of the Sanitary Water Board requiring Hinsdale to separate its combined sewer;
- B. Issue an order directing Hinsdale to comply with the FCWRD's ordinance prohibiting combined sewers;
- C. Issue an order directing Hinsdale to comply with the Act, Board regulations and the CSO Control Policy, and stop the storm water flows and large leaf load from entering FCWRD's sewers;
- D. Issue an order directing Hinsdale, MWRD, IDOT and DDOT to address their wet weather flows, and stop the storm water flows from entering FCWRD's sewers; and
- E. Grant any other additional relief which fully and completely rectifies the violations complained of herein.

FLAGG CREEK WATER
RECLAMATION DISTRICT

By: _____



One of Its Attorneys

Dated: March 3, 2006

GARDNER CARTON & DOUGLAS LLP

Richard J. Kissel

Roy M. Harsch

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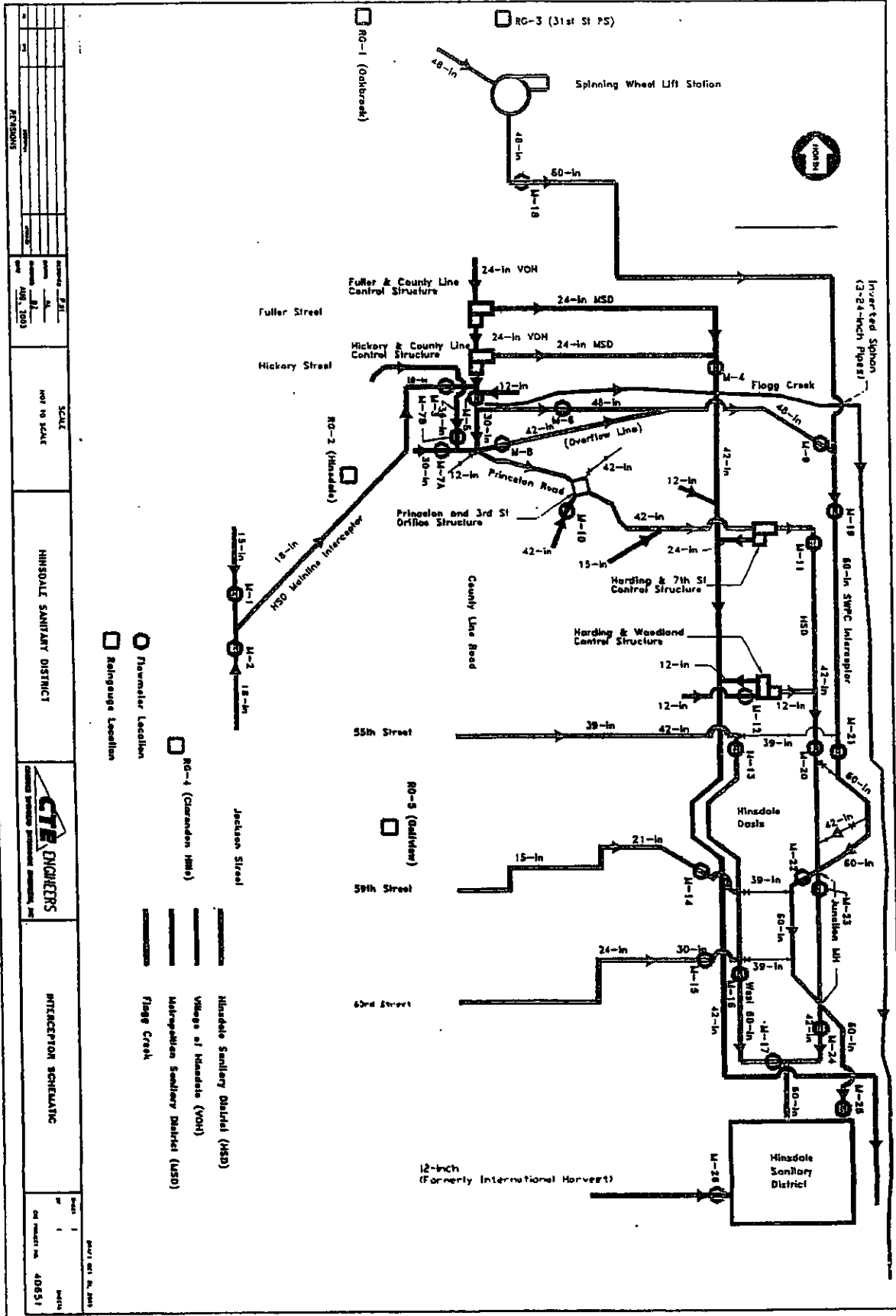
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Chicago, Illinois 60606

CH02/ 22408025.1



DATE	DESIGNED BY	SCALE	HINSDALE SANITARY DISTRICT	 <small>COMMERCIAL ENGINEERING, INC.</small>	INTERCEPTION SCHEMATIC	DATE	PROJECT NO.
10/1/00	10/1/00	NOT TO SCALE				10/1/00	40851

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).

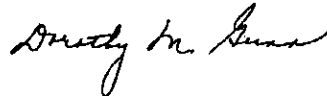
The Board accepts the balance of the complaint for hearing as to all four respondents. In doing so, the Board finds the balance of the complaint neither duplicative nor frivolous within the meaning of section 31(d) of the Act. *See* 415 ILCS 5/31(d) (2004).

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

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

Amended Complaint

Jurisdiction

1. Complainant Flagg Creek Water Reclamation District (FCWRD), by and through its counsel Gardner Carton & Douglas LLP, brings this Amended Complaint before the Illinois Pollution Control Board ("Board") pursuant to Section 31(d)(1) of the Illinois Environmental Protection Act ("Act"), 415 ILCD 5/31(d), which allows enforcement proceedings to be initiated against any person allegedly violating the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order.

The Parties

2. FCWRD, formerly known as the Hinsdale Sanitary District, is a municipal government agency organized in 1926 under the Sanitary District Act of 1917, 70 ILCS 2405, et seq. FCWRD is responsible for wastewater treatment within a designated service area of approximately 24 square miles, which includes the Village of Hinsdale, the Village of Clarendon Hills, and the Village of Oak Brook, as well as portions of Burr Ridge, Oak Brook Terrace, Westmont, Villa Park, Lombard, Darien and Willowbrook.

3. The Village of Hinsdale (Hinsdale) is a municipality governed by the Illinois Municipal Code, 65 ILCS 5/1-1-1, et seq. Hinsdale owns and operates a combined sewer system



that conveys wastewater to both the Metropolitan Water Reclamation District of Greater Chicago (MWRD) and the FCWRD.

4. The Illinois Department of Transportation (IDOT) is a state agency created by the Department of Transportation Law, 20 ILCS 2705/2705-1 *et seq.* IDOT has responsibility for planning, construction and maintenance of Illinois' extensive transportation network, which encompasses, highways and bridges, airports, public transit, rail freight and rail passenger systems, and includes roadways within the boundaries of FCWRD's service area.

5. DuPage County is a body corporate and politic established by the Illinois Counties Code. The DuPage County Division of Transportation (DDOT) is an agency of DuPage County, and is responsible for the construction and maintenance of the County Highway system which serves the over 900,000 residents of DuPage County. DDOT maintains approximately 220 miles of arterial highway and 50 miles of recreational trails in DuPage County.

6. MWRD is a municipal government agency created by the Illinois Legislature in 1889. MWRD has a combined sewer overflow equivalent of 0.5-million people. The District serves an area of 872 square miles which includes the City of Chicago and 124 suburban communities. MWRD is also the designated stormwater management agency for Cook County.

7. The way in which Hinsdale, IDOT, DDOT, and MWRD, implement their statutory duties contributes excess flow during rainfall events to FCWRD, which has a disproportionate effect on FCWRD's system.

8. As a result of these excess flows, within FCWRD's sewer system, Sanitary Sewer Overflows ("SSO") and Combined Sewer Overflows ("CSO") events occur during wet weather.

The Flagg Creek Water Reclamation District System

9. The FCWRD wastewater treatment plant (WWTP) is located at 6975 Commonwealth Avenue in the Village of Burr Ridge, Illinois. It is designed to take dry weather flow and limited wet weather flow. See Figure 1.

10. The FCWRD has an interceptor system that serves the Village of Clarendon Hills, the Village of Hinsdale, and portions of the Village of Westmont, traveling east along the BNSF railroad from Illinois Route 83 to County Line Road, and then south toward Interstate 294 (I-294), to the FCWRD WWTP. This interceptor is known as the "Mainline Interceptor." See Figure 1.

11. FCWRD also has a 60-inch interceptor ("West 60-Inch Interceptor") that runs south along I-294 and collects flows from three other interceptors: the 55th Street Interceptor, running west along 55th Street; the 59th Street Interceptor, running south along 59th Street; and the 63rd Street Interceptor, running south along 63rd Street. See Figure 1.

12. FCWRD's other main interceptor is the Spinning Wheel Interceptor formerly known as the Storm Water Pollution Control Interceptor which runs from its Spinning Wheel Pumping station south along I-294.

13. Historically, bypasses from the FCWRD sewer system as well as the Hinsdale sewer system overflowed to Flagg Creek. On information and belief, in the 1970s, FCWRD was directed by the Sanitary Water Board to close its CSOs and accept Hinsdale's CSOs until Hinsdale separated its sewers, which Hinsdale was also ordered by the Sanitary Water Board in 1968 to separate by 1978.

14. To comply with the order directed to it, FCWRD constructed the Spinning Wheel Pumping Station and installed a new sixty inch interceptor, the Spinning Wheel Interceptor, along Interstate 294. See Figure 1.

15. The Spinning Wheel Pumping Station and Spinning Wheel Interceptor were generally intended to serve two purposes: to serve a new northern service area and to catch overflows from the FCWRD's existing forty two inch interceptor. It has also temporarily provided relief to Hinsdale's CSOs until Hinsdale could separate its sewers in accordance with the Sanitary Water Board's order.

16. The pumping capacity of the Spinning Wheel Pumping Station is greater than the capacity of the Spinning Wheel Interceptor so long as that interceptor receives wastewater from Hinsdale's combined sewer system, so that during rain events, surcharges and overflows occur in the Spinning Wheel Interceptor and create hydraulic obstructions and overflows in other interceptors.

17. FCWRD has an NPDES Permit, No. IL0022586, which allows one discharge point for excess wet weather flows from its WWTP. Standard Condition Number 26 of the District's NPDES permit prohibits CSOs at any other points.

18. The unpermitted CSO events that occur in the FCWRD system do not comply with state regulations governing CSOs found at 35 Il. Adm. Code Part 306, Subpart C.

19. The actions by Hinsdale, MWRD, IDOT and DDOT that cause stormwater to enter the FCWRD sewer system cause or contribute to the unauthorized CSO events.

20. FCWRD cannot comply with the terms and conditions of its NPDES permit without the cooperation and corrective actions of Hinsdale, MWRD, IDOT and DDOT in eliminating wet weather flows from the FCWRD system.

Count I: The Village of Hinsdale

21. Hinsdale owns and operates a combined sewer system, and collects fees from certain residents for its ownership and operation of the combined sewer system.

22. Hinsdale's combined sewer system allows stormwater drainage from streets and public and private property during storm events to combine directly with sanitary waste flows.

23. The combined sewer system serving Hinsdale was constructed prior to 1900, and is constructed primarily of brick and clay tile piping. On information and belief, it is in poor repair.

24. The primary flows from Hinsdale to the FCWRD system occur through the Mainline Interceptor at two main locations: County Line Road and Highland Avenue, and Third Avenue and Princeton Road.

25. On information and belief, there is at least one additional unknown sewer connection along FCWRD's Mainline Interceptor from Hinsdale.

26. Hinsdale holds an NPDES permit, No. IL0066818, granted by the Illinois Environmental Protection Agency (Illinois EPA), which authorizes discharges to Flagg Creek from four Combined Sewer Overflow (CSO) points. On September 6, 2005, Illinois EPA issued a public notice proposing to renew that permit.

27. Special Condition No. 6 of Hinsdale's NPDES Permit expressly requires that: "Permitter shall comply with the nine minimum controls contained in the National CSO Control Policy published in the Federal Register on April 19, 1994."

28. Consistent with the Illinois Pollution Control Board (Board) regulations, Hinsdale's NPDES permit requires first flush and ten times average dry weather flows to be treated before Hinsdale discharges from any of its permitted CSOs.

29. On information and belief, Hinsdale does not utilize its authorized CSO points frequently because of these restrictions, instead diverting a large volume of wet weather flows far in excess of ten times the average dry weather flow to FCWRD.

30. Because the MWRD sewer system has flow restrictors in its junction chambers where flows from Hinsdale are directed to the MWRD's sewer system, FCWRD receives all of the wet weather flows from Hinsdale.

31. The large volume of wet weather flows from Hinsdale, combined with the short travel time, surcharges FCWRD interceptors. The Mainline Interceptor and its Spinning Wheel Interceptor are most affected, which in turn results in overflows upstream and downstream of where Hinsdale sewers discharge to the FCWRD's interceptor.

32. The large volume of wet weather flows from Hinsdale cause both Hinsdale and the FCWRD to experience unauthorized CSOs within their respective systems.

33. The large volume of wet weather flows from Hinsdale disrupts the flow to the FCWRD's wastewater treatment facility and interferes with its effective operation.

34. The large volume of wet weather flows from Hinsdale interferes with FCWRD's ability to allow capacity for other municipalities that have separate sewers.

35. On information and belief, Hinsdale has never fully complied with the direction of the Illinois Sanitary Water Board issued in 1968 directing Hinsdale to separate its sewers.

36. Hinsdale also directs a leaf collection program. On information and belief, the program operates by directing Hinsdale residents to place leaves in the parkway on the day of

leaf collection, but Hinsdale does not address those leaves that are not properly placed in the parkway or that are placed in the street and allowed to wash into the street drains.

37. During the times in which the leaf collection program is active, a significant residual leaf load from Hinsdale's leaf collection program enters street drains and is conveyed to FCWRD along with stormwater, plugging its influent screening equipment and compromising the wastewater treatment system.

38. The leaf load is conveyed to FCWRD as a result of leaves and yard waste from Hinsdale's roadways washing into the combined sewer system.

39. By failing to separate its sewers and allowing substantial wet weather flows to enter its combined sewer system and travel to and inundate the FCWRD system, Hinsdale is in violation of the Sanitary Water Board's direction to Hinsdale to separate its sewers, Hinsdale's NPDES Permit, and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

40. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is violating the Act's prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a).

41. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is in violation of the conditions of its NPDES Permit from Illinois EPA, and in violation of Act, 415 ILCS 5/12(b).

42. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

43. By failing to separate its sewers and sending substantial wet weather flows to the FCWRD system, Hinsdale is interfering with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

44. By failing to operate its leaf collection program to prevent leaves and stormwater from entering the FCWRD system, Hinsdale is in violation of Hinsdale's NPDES Permit.

45. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, Hinsdale is in violation of the Act's prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a).

46. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, Hinsdale is in violation of Hinsdale's NPDES Permit and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

47. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, Hinsdale is in violation of the conditions of its NPDES Permit from Illinois EPA, and in violation of the Act, 415 ILCS 5/12(b).

48. By failing to operate its leaf collection program to prevent leaves from entering the FCWRD system, Hinsdale is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

Count II: Metropolitan Water Reclamation District

49. FCWRD has historically served an area in Cook County that was placed under the jurisdiction of the MWRD in the 1970s.

50. Service to these areas in Cook County continues to be provided by FCWRD ("FCWRD-served area").

51. FCWRD has a draft agreement with MWRD that has not been executed, which requires MWRD to provide service to a roughly equivalent area in DuPage County that is within the FCWRD's statutory authority ("MWRD-served area").

52. FCWRD's sewer system accepts the dry weather and wet weather flows from the FCWRD-served area.

53. The MWRD sewer system has flow restrictors in its junction chambers where flows from Hinsdale are directed to the MWRD's sewer system.

54. On information and belief, the diversion structures cause a substantial amount of flow from the MWRD-served area to be blocked from entering the MWRD's sewer system.

55. On information and belief, those flows then make their way to the FCWRD sewer system.

56. On information and belief, the MWRD interceptor that receives the flows from the MWRD-served area has capacity that is not being used.

57. MWRD's diversion of flows from the MWRD-served area, combined with wet weather flows from the FCWRD-served area, cause or contribute to unauthorized CSOs within FCWRD's system, in violation of MWRD's NPDES permit, and Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

58. By diverting flows from the MWRD-served area to FCWRD, MWRD is in violation of the Act's prohibition on causing or contributing to water pollution, and violating regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a).

59. By diverting flows from the MWRD-served area to FCWRD, MWRD is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

60. MWRD's diversion of flows from the MWRD-served area, combined with wet weather flows from the FCWRD-served area, interfere with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

61. MWRD is authorized by statute to regulate stormwater within Cook County.

62. MWRD levies taxes on residents within Cook County, including residents within FCWRD, to ensure stormwater is appropriately managed and does not obstruct sewers and streams.

63. Stormwater that flows into Flagg Creek is obstructed by dead trees and other detritus and does not properly flow downstream.

64. During high flow events, the stormwater backs up into FCWRD's polishing pond, interfering with the pond's ability to polish the effluent from FCWRD and acting as a pollutant to FCWRD's pond.

65. MWRD's failure to remove the dead trees and other detritus from Flagg Creek so that stormwater is not obstructed in the Creek, is a violation of the Act's prohibition on causing or contributing to water pollution, and a violation of regulations and standards adopted by the Board under the Act, 415 ILCS 5/12(a) as well as a violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

66. MWRD interferes with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area by MWRD's failure to remove detritus from Flagg Creek downstream from FCWRD's WWIP.

Count III: Illinois Department of Transportation

67. The Illinois Department of Transportation (IDOT) has jurisdiction over a part of 55th Street east of County Line Road, and is responsible for its operation, repair and maintenance.

68. 55th Street was originally constructed as a two-lane roadway, but IDOT expanded 55th Street east of County Line Road to a four-lane roadway and added curbs.

69. By expanding 55th Street and adding curbs, IDOT has substantially increased the amount of stormwater that is conveyed to the FCWRD.

70. The wet weather flows from 55th Street contribute to the unauthorized CSOs within FCWRD's system.

71. The wet weather flows from 55th Street interfere with the effective operation of FCWRD's wastewater treatment facility.

72. The wet weather flows from 55th Street interfere with FCWRD's ability to allow capacity for wastewater from existing and new residents within its service area.

73. By failing to provide for wet weather flows from 55th Street, IDOT is causing or contributing to unauthorized CSOs within FCWRD's system, in violation of Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

74. By failing to provide for wet weather flows from 55th Street, IDOT is in violation of the Act's prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act 415 ILCS 5/12(a).

75. By failing to provide for wet weather flows from 55th Street, IDOT is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

76. IDOT's wet weather flows from 55th Street interfere with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

Count IV: DuPage Department of Transportation

77. DDOT has jurisdiction over part of 55th Street west of County Line Road, and is responsible for its operation, repair and maintenance.

78. 55th Street was originally constructed as a two-lane roadway, but DDOT expanded 55th Street west of County Line Road to a four-lane roadway and added curbs.

79. DDOT has installed storm sewers on certain segments of 55th Street, but has not installed storm sewers to accept the runoff from all of 55th Street

80. In segments of 55th Street where no storm sewers are present, stormwater runoff enters the FCWRD's system through the 55th Street Interceptor.

81. The wet weather flows from 55th Street contribute to the unauthorized CSOs within FCWRD's system.

82. The wet weather flows from 55th Street interfere with the effective operation of FCWRD's wastewater treatment facility.

83. The wet weather flows from 55th Street interfere with FCWRD's ability to allow capacity for wastewater from existing and new residents within its service area.

84. By failing to provide for wet weather flows from 55th Street, DDOT is causing or contributing to unauthorized CSOs within FCWRD's system, in violation of Illinois regulations governing CSOs, found at 35 Il. Adm. Code Part 306, Subpart C.

85. By failing to provide for wet weather flows from 55th Street, DDOT is causing or contributing to unauthorized CSOs within FCWRD's system, in violation of the Act's

prohibition on causing or contributing to water pollution and violating regulations and standards adopted by the Board under the Act 415 ILCS 5/12(a).

86. By failing to provide for wet weather flows from 55th Street, DDOT is in violation of the Board rule at 35 Il. Adm. Code 307.1101, prohibiting any person from introducing pollutants that interfere with the operation and performance of FCWRD.

87. DDOT's wet weather flows from 55th Street interfere with FCWRD's fulfillment of its statutory duty to provide capacity for sanitary flows from existing and new residents within its service area.

Relief Requested

WHEREFORE, for all of the foregoing reasons, FRCWRD requests that the Illinois Pollution Control Board:

- A. Issue an order directing Hinsdale to comply with the direction of the Sanitary Water Board requiring Hinsdale to separate its combined sewer;
- B. Issue an order directing Hinsdale to comply with the Act, Board regulations, and stop the storm water flows and large leaf load from entering FCWRD's sewers;
- C. Issue an order directing Hinsdale, MWRD, IDOT and DDOT to address their wet weather flows, and stop the storm water flows from entering FCWRD's sewers; and
- D. Grant any other additional relief which fully and completely rectifies the violations complained of herein.

FLAGG CREEK WATER
RECLAMATION DISTRICT

By: 

One of Its Attorneys

Dated: March 3, 2006

GARDNER CARTON & DOUGLAS LLP

Richard J. Kissel

Roy M. Harsch

John A. Simon

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JUL 28 2006

STATE OF ILLINOIS
Pollution Control Board

PCB No. 2006-141

Respondents.

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on 28th, July, 2006, we filed the attached **Designation of Lead Attorneys** with the office of the Clerk of the Illinois Pollution Control Board, 100 West Randolph Street, Suite 11-500, Chicago, Illinois, a copy of which is herewith served upon you.

METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO

BY:

Frederick M. Feldman, Its Attorney

Frederick M. Feldman/Alan J. Cook/Lisa Luhrs Draper
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

FLAGG CREEK WATER RECLAMATION
DISTRICT,

Petitioner,

v.

VILLAGE OF HINSDALE, METROPOLITAN
WATER RECLAMATION DISTRICT, ILLINOIS
DEPARTMENT OF TRANSPORTATION,
DUPAGE COUNTY,

Respondent.

PCB No. 06-141

DESIGNATION OF LEAD ATTORNEYS

Pursuant to Section 101.400(4) of the Illinois Pollution Control Board's Procedural Rules, 35 Ill. Adm. Code 101.400(a), the Metropolitan Water Reclamation District of Greater Chicago, by its Attorney, Frederick M. Feldman, hereby designates Alan J. Cook, Head Assistant Attorney, (312) 751-6588, and Lisa Luhrs Draper, Principal Assistant Attorney, (312) 751-6576 at 100 East Erie, Chicago, Illinois 60611, as the lead attorneys for purposes of telephone and mail contact pertaining to the proceeding.

Metropolitan Water Reclamation District
of Greater Chicago

By 
Frederick M. Feldman, Attorney

DATED: July 27, 2006

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

STATE OF ILLINOIS)
) S.S.
COUNTY OF COOK)

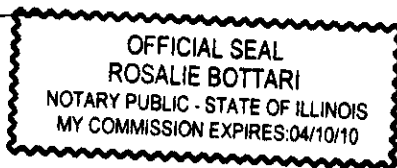
CERTIFICATE OF SERVICE

I, Cheryl Burgess, being duly sworn on oath, certify that I caused a copy of the attached Respondent **Designation of Lead Attorneys**, to be sent via first class U.S. Mail to the attached named individuals at their addresses as shown, with proper postage prepaid, from 100 E. Erie Street, Chicago, Illinois, at or near the hour of 4:00 p.m., this 28th day of July, 2006.

Cheryl Burgess

SUBSCRIBED and SWORN to before
me this 28th day of July, 2006.

Rosalie Bottari
Notary Public



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SERVICE LIST

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

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