

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.

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NOV 17 2006

STATE OF ILLINOIS  
Pollution Control Board

PCB No. 2006-141

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on November 17, 2006, we filed the attached **Answer and Affirmative Defenses to Complainant'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:

Frederick M. Feldman  
Frederick M. Feldman, Its Attorney

Frederick M. Feldman/Alan J. Cook/Lisa Luhrs Draper  
Metropolitan Water Reclamation District of Greater Chicago  
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STATE OF ILLINOIS       )  
                                      ) S.S.  
COUNTY OF COOK        )

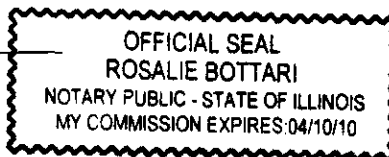
**CERTIFICATE OF SERVICE**

I, Cheryl Bourgeois being duly sworn on oath, certify that I caused a copy of the attached Respondent **Answer and Affirmative Defenses to Complainant'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 17<sup>th</sup> day of November, 2006.

Cheryl Bourgeois

SUBSCRIBED and SWORN to before  
me this 17<sup>th</sup> day of November, 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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PCB No. 2006-148 STATE OF ILLINOIS  
Pollution Control Board

RESPONDENT METROPOLITAN WATER RECLAMATION DISTRICT OF  
GREATER CHICAGO'S ANSWER AND AFFIRMATIVE DEFENSES TO  
COMPLAINANT'S AMENDED COMPLAINT

Now comes Respondent, the METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO (hereinafter "MWRDGC"), by its attorney, Frederick M. Feldman, and for its Answer and Affirmative Defenses to Complainant Flagg Creek Water Reclamation District's ("FCWRD") Amended Complaint states as follows:

**Jurisdiction**

1. Respondent MWRDGC admits that FCWRD has filed this action. The remainder of the allegations contained in paragraph 1 are conclusions of law to which no answer is required.

**The Parties**

2. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 2, and therefore denies same.

3. The MWRDGC admits that Hinsdale conveys wastewater to MWRDGC. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the remaining allegations contained in paragraph 3, and therefore denies same.

4. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 4, and therefore denies same.

5. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 5, and therefore denies same.

6. The MWRDGC denies that it has a combined overflow equivalent of 0.5-million people, and further denies that it serves an area of 872 square miles which includes 124 suburban communities. The MWRDGC admits the remaining allegations contained in paragraph 6.

7. The MWRDGC denies that the way it implements its statutory duties contributes excess flow to FCWRD at any time. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the remaining allegations contained in paragraph 7 and therefore denies same.

8. The MWRDGC denies the allegations contained in paragraph 8.

#### **The Flagg Creek Water Reclamation District System**

9. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 9, and therefore denies same.

10. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 10, and therefore denies same.

11. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 11, and therefore denies same.

12. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 12, and therefore denies same.

13. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 13, and therefore denies same.

14. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 14, and therefore denies same.

15. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 15, and therefore denies same.

16. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 16, and therefore denies same.

17. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 17, and therefore denies same.

18. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 18, and therefore denies same.

19. The MWRDGC denies that its actions cause or contribute to unauthorized CSO events in FCWRD's system. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the remaining allegations contained in paragraph 19 regarding the actions of other respondents, and therefore denies same.

20. The MWRDGC denies that any corrective action by MWRDGC is required. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the remaining allegations contained in paragraph 20 regarding the actions of other respondents, and therefore denies same.

**Count I: The Village of Hinsdale**

21-48. The MWRDGC makes no answer to the allegations contained in Count I because the averments contained therein are not directed towards MWRDGC.

**Count II: Metropolitan Water Reclamation District**

49. The MWRDGC denies that the area in Cook County served by FCWRD was placed under the jurisdiction of the MWRDGC in the 1970s. The MWRDGC admits the remaining allegations contained in paragraph 49. The MWRDGC affirmatively states that MWRDGC treats flows from DuPage County equivalent to, or greater than, the flows generated in the Cook County portion of the Village of Hinsdale.

50. The MWRDGC admits the allegations contained in paragraph 50. The MWRDGC affirmatively states that portions of the Cook County area of the Village of Hinsdale are served by the MWRDCG.

51. The MWRDGC admits the allegations contained in paragraph 51.

52. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 52, and therefore denies same.

53. The MWRDGC admits the allegations contained in paragraph 53.

54. The MWRDGC admits the allegations contained in paragraph 54. The MWRDGC affirmatively states that the Village of Hinsdale and FCWRD sewers on which MWRDGC diversion structures are located handle flows from large areas outside of Cook County, and not within the territorial boundaries of the MWRD.

55. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 55, and therefore denies same.

56. The MWRDGC admits the allegations contained in paragraph 56. The MWRDGC affirmatively states that its intercepting sewer system downstream from the MWRD-served area does not have capacity to accept additional flows.

57. The allegations contained in paragraph 57 are conclusions of law to which no answer is required. To the extent any statement of fact is alleged, the MWRDGC denies same.

58. The allegations contained in paragraph 58 are conclusions of law to which no answer is required. To the extent any statement of fact is alleged, the MWRDGC denies same.

59. The allegations contained in paragraph 59 are conclusions of law to which no answer is required. To the extent any statement of fact is alleged, the MWRDGC denies same.

60. The allegations contained in paragraph 60 are conclusions of law to which no answer is required. To the extent any statement of fact is alleged, the MWRDGC denies same.

61. The MWRDGC admits the allegations contained in paragraph 61.

62. The MWRDGC denies that it levies taxes on residents within Cook County. The MWRDGC admits that it levies taxes on real estate within its corporate boundary for stormwater management. The remainder of the allegations contained in paragraph 62 are conclusions of law to which no answer is required. MWRDGC submits that the Stormwater Management Act (70 ILCS 2605/7h) speaks for itself.

63. The MWRDGC denies the allegations contained in paragraph 63.

64. The MWRDGC lacks sufficient knowledge upon which to form an opinion as to the truth or falsity of the allegations contained in paragraph 64, and therefore denies same.

65. The allegations contained in paragraph 65 are conclusions of law to which no answer is required. To the extent any statement of fact is alleged, the MWRDGC denies same.

66. The MWRDGC denies the allegations contained in paragraph 66.



**Count III: Illinois Department of Transportation**

67-76. The MWRDGC makes no answer to the allegations contained in Count III because the averments contained therein are not directed towards MWRDGC.

**Count IV: DuPage Department of Transportation**

77-87. The MWRDGC makes no answer to the allegations contained in Count IV because the averments contained therein are not directed towards MWRDGC.

WHEREFORE, Respondent, Metropolitan Water Reclamation District of Greater Chicago, prays for a finding in its favor and against the Complainant, Flagg Creek Water Reclamation District, and requests any and all such other relief that this Board deems fair and just.

**AFFIRMATIVE DEFENSES**

**First Affirmative Defense**

**(Lack of Authority by Board to Determine Contract Rights)**

1. FCWRD alleges that FCWRD has a draft agreement with MWRD that has not been executed.
2. The purported agreement requires MWRD to divert flow from the FCWRD and Village of Hinsdale sewer systems (DuPage County) equivalent to the flow generated in the MWRDGC areas of Hinsdale that are connected to FCWRD and Village of Hinsdale sewer systems.
3. FCWRD further alleges that MWRD does not treat a substantial amount of flow coming from the DuPage County area, though MWRD is required to treat it under the parties' draft agreement.
4. The parties' draft agreement sets forth the amount of DuPage County flow to be diverted for treatment by MWRDGC.

5. The Illinois Pollution Control Board ("Board") does not have authority to determine private contract rights. The Board's authority under the Act does not extend to adjudication of the rights and liabilities of FCWRD and MWRDGC pursuant to their draft agreement. In order for the Board to find the MWRDGC violated Section 12 (a) of the Environmental Protection Act, based upon its alleged failure to abide by the draft agreement, the Board would have to interpret the parties' rights and obligations under the draft agreement, which it is not statutorily authorized to do.

**Second Affirmative Defense**

**(Lack of Authority by Board Over Violations of MWRD Act )**

1. The Board lacks authority to adjudicate FCWRD's claim asserting that MWRDGC is in violation of its obligations under the recently enacted Stormwater Management Act (2605 ILCS/ 7h).

2. FCWRD alleges that MWRD is authorized by statute to regulate stormwater within Cook County.

3. FCWRD further alleges that stormwater that flows into Flagg Creek is obstructed by dead trees and other detritus and does not properly flow downstream.

4. FCWRD further alleges that MWRD is required to remove these obstructions from Flagg Creek.

5. FCWRD further alleges that MWRD has failed to remove these obstructions from Flagg Creek.

6. The Board's authority does not extend to adjudication of this alleged violation by MWRD of its statutory authority under the Stormwater Management Act to maintain Flagg Creek. In order for the Board to find that MWRDGC violated Section 12(a) of the Act based

upon its alleged failure to remove obstructions from Flagg Creek, the Board would have to interpret MWRDGC's obligations under the MWRD Act.

### **Third Affirmative Defense**

#### **(Failure to Mitigate and/or Comply with Environmental Protection Act)**

1. FCWRD alleges that stormwater obstructed in Flagg Creek backs up into FCWRD's polishing ponds, thereby interfering with FCWRD's operations.
2. FCWRD has failed to take the necessary corrective action to remove dead trees and other detritus from Flagg Creek in the vicinity of its facilities to prevent stormwater from backing up into its polishing ponds.
3. FCWRD has failed to make necessary design and construction improvements, and to adequately maintain its facilities to ensure its polishing pond operations function properly.
4. Any failure by FCWRD to fulfill its statutory obligations under the Illinois Environmental Protection Act would have been eliminated and/or lessened had FCWRD performed required maintenance of Flagg Creek, and adequately designed, constructed and maintained its polishing ponds to ensure proper operation of its facilities.
5. FCWRD had a duty to mitigate its claims.
6. FCWRD breached its duty to mitigate.
7. To the extent the MWRDGC is found liable with respect to the claims asserted by FCWRD, MWRDGC's liability is reduced in proportion to FCWRD's failure to mitigate its claims and/or comply with the pertinent provisions of the Environmental Protection Act.

#### **Fourth Affirmative Defense**

##### **(Equitable Estoppel)**

1. FCWRD alleges that MWRD installed flow restrictors in its sewers, which block a substantial amount of flow originating in DuPage County from entering the MWRD system.
2. The amount of DuPage County flow accepted by MWRDGC was determined by FCWRD's predecessor in interest, the Hinsdale Sanitary District. A house and head count was conducted jointly between Hinsdale Sanitary District and Metropolitan Sanitary District (n/k/a MWRDGC) to estimate the dry weather flow generated in the Cook County areas connected to the Hinsdale Sanitary District.
3. MWRDGC adjusted the flow restricting devices installed in the sewers in compliance with the recommendations of the Hinsdale Sanitary District.
4. The input and requirements imposed by the Hinsdale Sanitary District were complied with in good faith by MWRDGC in adjusting the flow restrictors to accept the agreed upon amount of flow from Hinsdale Sanitary District sewers. The MWRDGC's actions were in full cooperation with, and accepted by, the Hinsdale Sanitary District.
5. The MWRDGC detrimentally relied upon the representations of Hinsdale Sanitary District regarding the acceptable amount of flow.
6. FCWRD is now equitably estopped from claiming that the acceptable flow amounts asserted by its predecessor in interest are inadequate.

#### **Fifth Affirmative Defense**

##### **(Laches)**

1. Complainant's amended complaint does not identify a single calendar date, year, or decade of occurrence of the alleged acts or omissions of the MWRDGC.

2. Upon information and belief, FCWRD knew or should have known of the alleged acts or omissions of the MWRDGC many years prior to bringing this action.

3. To the extent FCWRD is asserting claims against MWRDGC based upon MWRDGC's decades-old historical practice of accepting the same or similar amounts of flow from DuPage County, the claims are barred by the doctrine of laches.

4. Complainant's failure to timely assert its claims has substantially prejudiced MWRDGC's ability to defend itself and has caused MWRDGC to incur increased costs.

WHEREFORE, Respondent, the Metropolitan Water Reclamation District of Greater Chicago, respectfully requests that the Illinois Pollution Control Board find in its favor and against Complainant on the aforestated Affirmative Defenses, and requests any and all such other relief that this Board deems fair and just.

Respectfully submitted,

Metropolitan Water Reclamation District  
of Greater Chicago

By Frederick M. Feldman  
Frederick M. Feldman, Attorney 

Dated: November 17, 2006

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