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STATE OF ILLINOIS
Pollution Control Board

Respondents.

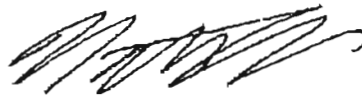
NOTICE OF FILING

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PLEASE TAKE NOTICE that on May 14, 2010, I have filed with the office of the Clerk of the Illinois Pollution Control Board, 100 West Randolph, Suite 11-500, Chicago, IL 60601 an

original and nine copies of the Petitioner's Consolidated Response to the Motions to Dismiss
Filed by IEPA and Grand Prairie, a copy of which is herewith served upon you.

Dated: May 14, 2010



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Case No. 10-74
(Permit Appeal)

I. Introduction

Lost in the Motions to Dismiss filed by Grand Prairie and the IEPA (the “Motions”) is the fact that the IEPA issued valid permits to Mill Creek to provide water and sewer services to the Settlements of LaFox **before** it issued permits to Grand Prairie. No objection to these permits was made by Grand Prairie and the permits were sought and obtained at the request of the owners/developers of the Settlements of LaFox. Mill Creek relied on these permits in making its long term plans and constructing infrastructure improvements.

Unlike Grand Prairie's silence during the issuance of the Mill Creek Permits, Mill Creek raised numerous objections to the issuance of the Grand Prairie Permits. As outlined in the Petition, objections were raised before CMAP and the IEPA. Mill Creek was prevented from raising an objection before the Kane County Board because Grand Prairie and the IEPA violated Illinois law by failing to obtain approval from the County and hold a public meeting for such purpose. Not only did the owners/developers of the Settlements of LaFox shop around for a

better deal after they had committed to Mill Creek, but they did so in a manner that did not allow Mill Creek to be involved in the process.

In the Motions, Respondents raise two broad arguments: (1) Mill Creek lacks standing to bring its Petition; and (2) the issuance of the permits to Grand Prairie comports with federal and Illinois law. Respondents' Motions should be denied.

Mill Creek has standing to bring its Petition and the IPCB has jurisdiction. Illinois Administrative Code authorizes Mill Creek to bring its Petition because the IEPA's decision to approve the Grand Prairie Permit Application was also directed to Mill Creek. Further, the IPCB has jurisdiction to hear appeals related to the local siting approval of a county board.

Separate from the jurisdictional question, the violations of the Federal Clean Water Act and Illinois Environmental Protection Act are clear. Section 1288(d) of the Clean Water Act prohibits the issuance of permits for construction of sewage works to any entity other than Mill Creek. Furthermore, Grand Prairie's failure to obtain approval from Kane County (and the IEPA's failure to require proof of such approval) makes the issuance of the Grand Prairie Permits a violation of Illinois law. Finally, Mill Creek's objection to Grand Prairie's permit application makes the issuance of the Grand Prairie Permits improper under IEPA Rules.

On a more fundamental basis, however, the issuance of permits to Mill Creek and then subsequently to Grand Prairie to provide sewage and water services to the same development leads to chaos in the management and strategic planning of the Mill Creek FPA. If the Grand Prairie Permits are allowed to stand, both Mill Creek and Grand Prairie would have a right under Illinois law to provide service to the development. How are those competing rights to be adjudicated? Who makes the decision as to which permittee provides services to the residents of

the development? The existence of a second set of competing permits creates a cloud of uncertainty that the federal law, state law and IEPA rules were designed to prevent.

For the reasons outlined below, the Motions to Dismiss filed by Grand Prairie and the IEPA should be denied.

II. Argument

A. Mill Creek has Standing to Bring the Petition and the IPCB has Jurisdiction to Hear It.

Mill Creek has standing to bring the Petition and the IPCB has jurisdiction to hear it. Respondents rely solely on 415 ILCS 5/40 for the suggestion that the IPCB lacks jurisdiction to hear Mill Creek's Petition. Respondents, however, ignore regulations that are "authorized by Sections 26 and 27 of the Environmental Protection Act (Act) [415 ILCS 5/26 and 27] and implement[] Sections 5, 39, 39.5, 40, 40.1 and 57 of the Act [415 ILCS 5/5, 39, 40, 40.1, 40.2, 57]." (Emphasis added). ILL. ADMIN. CODE tit. 35 § Subt. A., Chapt. I(1), Pt. 105 "Authority"; 415 ILCS 5/26 ("The Board may adopt such procedural rules as may be necessary to accomplish the purposes of this Act."). "Administrative regulations have the force and effect of law, are presumed valid, and will be construed under the same standards that apply in construing statutes. Regulations adopted by an agency pursuant to its statutory authority will not be set aside unless they are arbitrary and capricious." *City of Chicago v. Illinois Labor Relations Bd. Local Panel*, 396 Ill. App. 3d 61, 73 (1st Dist. 2009).

In this case, the regulations state, "[i]f the Agency's final decision is to deny or to conditionally grant or approve, the person who applied for or otherwise requested the Agency decision, **or the person to whom the Agency directs its final decision**, may petition the Board for review of the Agency's final decision." (Emphasis added) ILL. ADMIN. CODE tit. 35 § 105.204(f).

On February 19, 2010, in addition to sending notice to Grand Prairie of the IEPA's decision to conditionally grant the permits, the IEPA also directed its decision to Mill Creek by sending a notice letter to Mill Creek. (*See* Ex. 1, Feb. 19, 2010 Ltr. from A. Keller to J. Sheaffer re: Grand Prairie Sanitary District Construction Application Log No. 2825-2009). In that letter, the IEPA acknowledged Mill Creek's objection to the issuance of the Grand Prairie Permits and provided notice of the IEPA's intent to conditionally grant the Grand Prairie Permits. Since the decision of the IEPA was directed to Mill Creek, it has standing to contest the issuance of the Grand Prairie Permits and the rules promulgated by the IPCB recognize that it has jurisdiction to hear the dispute.

Furthermore, as alleged in the Petition, no public hearing was held by the County of Kane concerning the siting of Grand Prairie's proposed pollution control facility. (Petition ¶ 23). The IPCB has jurisdiction to hear a third-party petition contesting the approval of the local siting authority. 415 ILCS 5/40.1(b). Although approval has not been provided by the County of Kane, the IPCB has implicit jurisdiction to review the permits issued to Grand Prairie given the purported approval obtained by the local siting authority. Put another way, it would be nonsensical to allow a third-party to appeal an actual approval of a local siting authority but not a circumstance where the law and approval process is flatly ignored.

For these two independent reasons, Mill Creek has standing to bring its Petition and the IPCB has jurisdiction to hear this dispute.

B. The IEPA's Issuance of Permits to Grand Prairie Violated Federal and State Law as well as IEPA Rules.

Both the IEPA and Grand Prairie address the merits of the Petition in the Motions to Dismiss. Many of the arguments raised by the Respondents, however, refer to or incorporate

facts that are contained in the IEPA record¹ or facts that are outside the Petition. Given the factual nature of the arguments raised, disposition of Mill Creek's Petition on a motion to dismiss is inappropriate. As an initial step, the IEPA record should be produced. Fact discovery is then necessary to investigate the factual assertions raised by the Respondents. Mill Creek disagrees with many of these factual assertions and resulting legal conclusions. While Mill Creek does not believe it has a sufficient information to argue the merits at this point, this section will illustrate the factual nature of the Respondents' arguments and address the legal contentions raised.

1. The IEPA Violated the Clean Water Act When it Issued the Grand Prairie Permits

The IEPA violated 33 U.S.C. § 1288(d) of the Clean Water Act when it issued permits to Grand Prairie after it had designated Mill Creek as the DMA for the Mill Creek FPA and previously issued permits for the same development to Mill Creek. (Petition ¶¶ 18, 19).

In pertinent part the statute states:

After a waste treatment management agency having the authority required by subsection (c) of this section has been designated under such subsection for an area and a plan for such area has been approved under subsection (b) of this section, the Administrator shall not make any grant for construction of a publicly owned treatment works under section 1281(g)(1) of this title within such area except to such designated agency and for works in conformity with such plan.

Thus, once Mill Creek was designated as the authority over the development (as the DMA) and the IEPA issued permits to Mill Creek for the development to construct a facility, the issuance of a second set of permits to Grand Prairie was in violation of Federal law.

Citing *Northern Moraine Wastewater Reclamation District v. Illinois Commerce Commission*, 392 Ill. App. 3d 542 (2nd Dist. 2009), Respondents argue that status as a DMA

¹ The IEPA record has not yet been produced in this case.

does not provide a DMA with a right to serve the property in a FPA. (IEPA Motion at p. 6, Grand Prairie Motion at p. 9). *Northern Moraine* is inapposite to the case at bar on multiple grounds. First, Section 1288(d) of the Clean Water Act was not addressed by the court in *Northern Moraine*. Instead, the court cited Section 1288(c) concerning the requirements for becoming a DMA under the Act. Section 1288(d) pertains to the construction of a new facility within a FPA and states, “the Administrator **shall not make any grant for construction of a publicly owned treatment works . . . within such area except to such designated agency. . . .**” (Emphasis added). This Section expressly prohibits the IEPA from issuing permits for the construction of a new pollution control facility to any entity other than Mill Creek. Unlike the case at bar, the permit in question in *Northern Moraine* concerned the continuation of service provided by a permittee rather than the construction of a new facility. Finally, unlike the complainant in *Northern Moraine* which was solely the DMA, Mill Creek is both the DMA and in possession of prior issued permits to provide service to the Settlements of LaFox. The possession of valid permits distinguishes this case from any holding in *Northern Moraine*.

2. The IEPA Violated Illinois Law When it Issued the Grand Prairie Permits

The IEPA violated 415 ILCS 5/39(c) when it issued permits to Grand Prairie without obtaining proof that the location of the new pollution control facility had been approved by the County of Kane. (Petition ¶¶ 20-23). It is of note that Grand Prairie and the IEPA do not deny that there was a failure to obtain a local siting approval from Kane County and Respondents provide no evidence that the required public hearing was held. Instead, Respondents argue that local siting review was unnecessary because the facility proposed by Grand Prairie for which the permits were issued is not a pollution control facility but rather a “sewage works.” (IEPA Motion at pp. 7-8, Grand Prairie Motion at pp. 10-11).

The Grand Prairie Permits are clear however that they concern the construction of a new pollution control facility. The Grand Prairie Permits state, “Permit is hereby granted to the above designated permittee(s) to construct and or operate water **pollution control facilities** described as follows: . . .” (Emphasis added) (Ex. I to Petition at p. 1, Ex. J. to Petition at p. 1). Thus, according to the Permits, the facilities to be constructed are pollution control facilities. This evidence precludes dismissal of the Petition.

Respondents also argue that the IEPA is the appropriate body to determine which projects constitute a pollution control facility and require siting approval under the Act. (IEPA Motion at p. 7, Grand Prairie Motion at p. 11). As illustrated above, the permits issued by the IEPA identify the facilities to be constructed as “pollution control facilities.” Notwithstanding this fact, to the extent the IEPA made any formal decision that siting approval was not necessary, that fact would be located in the IEPA record which has not been provided or produced. There remains a clear question of fact as to whether and on what basis the IEPA made this determination (or if such a determination was even made). Simply put, dismissal on this ground is inappropriate.

3. The IEPA Violated IEPA Rules When it Issued the Grand Prairie Permits

The IEPA violated its own rules by issuing permits to Grand Prairie. As raised in the Petition, 35 Ill. Admin. Code § 351.502 sets forth various requirements for conflict resolution in revising Water Quality Management (“WQM”) Plans. Respondents argue that this section is inapplicable because the “[p]ermits only authorize facilities located entirely within the FPA, which does not necessitate the IEPA to recognize an exception to the boundaries of a FPA.” (IEPA Motion at p. 9, Grand Prairie Motion at p. 12).

The issuance of the Grand Prairie permits, however, inherently changes the internal boundaries of the Mill Creek FPA by authorizing a second entity to construct water and sewer

facilities to provide services to the Settlements of LaFox. The WQM Plan was, therefore, changed without the authorization of Mill Creek as the DMA of the Mill Creek FPA.

Furthermore, how and in what way the WQM Plan was changed remains a question of fact that cannot be adjudicated at this time. Mill Creek has properly alleged a violation of IEPA Rules that should not be dismissed without discovery and a subsequent hearing.

4. Mill Creek was Issued Current and Valid Permits to Provide Sewage and Water Services to the Settlements of LaFox

Contrary to Grand Prairie's argument, Mill Creek's permits remain valid and current. Grand Prairie states that "MCWRD's Permit No. 2003-GO-5061-5 for certain water pollution control facilities expired on October 31, 2008." (Grand Prairie Motion at p. 6). Grand Prairie apparently ignores the second permit attached to the Petition as Exhibit B. Permit No. 2008-GO-1239 expressly provides, "[t]his Permit renews and replaces Permit Number 2003-GO-5061 which was previously issued for the herein permitted facilities." (Exhibit B to Petition at p. 1). Permit No. 2008-GO-1239 expressly states that it expires on August 31, 2013. Thus, the permits issued to Mill Creek to provide water and sewage service to the Settlements of LaFox remains current and valid.

Grand Prairie also argues that Mill Creek permits are subject to a condition that brings the permits' validity into question. Grand Prairie states, "[t]he IEPA expressly provided that the MCWRD Permits were subject to the condition that any wastewater facilities constructed or operated under the Permits were to serve 'the annexed Settlements of LaFox development.'" (Grand Prairie Motion at p. 7). An examination of the Mill Creek Permits reveal that the reference to "the annexed Settlements of LaFox development" was not a condition to the issuance of any permit but rather a description of the boundaries for which water and sewer services were to be provided. The only non-standard condition to either permit outlined by the

IEPA was that the permit expires on August 31, 2013 and is subject to renewal at that time.

(Exhibit B to Petition at p. 1).

Finally, Grand Prairie argues that “[b]ecause the [Settlements of LaFox] is located within the corporate limits of [Grand Prairie], . . . [Grand Prairie] alone has jurisdiction to decide whether and how the sanitary sewerage service is to be provided to the [Settlements of LaFox].” (Grand Prairie Motion at p. 5). Essentially, Grand Prairie is attempting to make a long-since-expired attack of the IEPA’s issuance of permits to Mill Creek. The IEPA issued permits to Mill Creek in 2007 and Grand Prairie, despite being in existence since 2002, failed to raise any objection to the issuance of the permits. In fact, as alleged in the Petition, the owners/developers of the Settlements of LaFox specifically requested that Mill Creek seek such permits from the IEPA to provide services to the property. (Petition ¶¶ 4-6). Grand Prairie should not be given a second bite of the apple. Moreover, development of the relevant facts will demonstrate the precise role of the owners/developers in the issuance of the Mill Creek Permits and their last-second resurrection of the previously dormant Grand Prairie Sanitary District in an attempt to circumvent the Mill Creek Permits.

Quoting *People ex rel. Greening v. Bartholf*, 388 Ill. 445 (1944), Grand Prairie suggests that Illinois law precludes the issuance of permits to Mill Creek because “two governmental units ‘cannot have jurisdiction and control, at one time, of the same territory for the same purpose.’” (Grand Prairie Motion at p. 5). *Bartholf*, however, did not involve the allocation of jurisdiction or control of competing sanitary districts. In fact, the court in that case recognized “the organization of [a] sanitary district, which included parts of other municipalities, was constitutional even though the different municipal authorities exercised, in parts of the same

territory, the power and authority to build and control public improvements for the sewage disposal in such territory." *Barthlof*, 388 Ill. at 466.

Grand Prairie's reliance on the *Village of Frankfort v. Illinois Environmental Protection Agency*, 366 Ill. App. 3d 649 (1st Dist. 2006) is also misplaced. The court in *Village of Frankfort* interpreted the Metropolitan Water Reclamation Act; a statutory scheme distinctly different from the Sanitary District Act of 1936 that is applicable to Grand Prairie. The Metropolitan Water Reclamation Act applies to and created the Metropolitan Water Reclamation District of Greater Chicago. *See* 70 ILCS 2605/1 *et. seq.*

In sum, the arguments raised by Grand Prairie regarding the validity of the Mill Creek Permits provide no basis for the IPCB to grant Grand Prairie's Motion to Dismiss.

III. Conclusion

For the above stated reasons, Petitioner Mill Creek Water Reclamation District respectfully requests that the Illinois Pollution Control Board deny Grand Prairie Sanitary District's and the Illinois Environmental Protection Agency's Motions to Dismiss.

DATE: May 14, 2010

Respectfully Submitted,

MILL CREEK WATER RECLAMATION
DISTRICT

By 

One of its Attorneys

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CERTIFICATE OF SERVICE

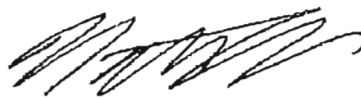
I, Nathan W. Lamb, an attorney, certify that May 14, 2010, I filed the above Petitioner's Consolidated Response to the Motions to Dismiss filed by IEPA and Grand Prairie. An original and nine copies were filed on recycled paper with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601. Copies were served via U.S. Mail to the following:

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PAT QUINN, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

217/782-0610

February 19, 2010

Mr. John R. Sheaffer, II
President
Sheaffer & Roland, Inc.
611 Stevens Street
Geneva, Illinois 60134

Re: Grand Prairie Sanitary District
Construction Permit Application Log No. 2825-2009

Dear Mr. Sheaffer:

We have received your comment letters dated October 13, 2009 and November 12, 2009 regarding the subject construction permit application.

The Grand Prairie Sanitary District project ultimate service area will be approximately 1,252 acres with a proposed design average flow of 0.6 MGD (6,000 P.E.). The treatment plant will be phased into two phases and phase one will be sized for a design average flow of 0.3 MGD (3,000 P.E.). The treatment plant consists of an influent pump station, screening facilities, activated sludge with membrane biological reactor (MBR), disinfection, effluent pumps, sludge handling facilities, and a spray irrigation system. The spray irrigation system also includes an effluent storage lagoon for storage of effluent when irrigation is not possible. The facility will not have a surface discharge.

Section 208 of the Clean Water Act, 33 U.S.C. §1288 ("Section 208 of the CWA") is entitled Areawide Waste Treatment Management. The purpose of Section 208 of the CWA was to identify problem areas and develop plans for the appropriate treatment of waste and establish a continuing planning process. Under Section 208(b) of the CWA, the designated states were to identify the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs over a twenty-year period, establish construction schedules and identify those agencies necessary to construct, operate, and maintain all facilities required by the plan or needed to carry out the plan.

Section 208(c) of the CWA states that you can designate one or more agencies to carry out the plan in an area. Section 208(e) of the CWA, prohibits the Agency from issuing an NPDES permit, which is in conflict with the plan approved under Section 208(a).

A review of the Agency's Water Quality Management Plan ("WQMP") shows that it envisions amendments of the WQMP to establish new point source discharges and sets forth a mechanism for coordinating the issuance of NPDES permits pursuant to the WQMP. Section 208(e) of the CWA provides that the Agency may not issue an NPDES permit if it is in conflict with the plan. However, the WQMP provides a mechanism for consistency review to determine whether the new point source permit is in conflict with its provisions.

EXHIBIT 1

Rockford • 4102 N. Main St., Rockford, IL 61103 • (815) 987-7760

Elgin • 595 S. State, Elgin, IL 60123 • (847) 608-1111

Bureau of Land - Peoria • 7620 N. University St., Peoria, IL 61614 • (309) 693-5462

Collinsville • 2009 Mall Street, Collinsville, IL 62234 • (618) 346-5120

Des Plaines • 9511 W. Harrison St., Des Plaines, IL 60016 • (847) 294-4000

Peoria • 5415 N. University St., Peoria, IL 61614 • (309) 693-5463

Champaign • 2125 S. First St., Champaign, IL 61820 • (217) 278-5800

Marion • 2309 W. Main St., Suite 116, Marion, IL 62959 • (618) 993-7200

Since this facility will not have a surface discharge neither Section 208 of the CWA nor the Water Quality Management Plan are at issue in the permitting process. When the Agency after its review determines that the proposed facility if constructed and operated as proposed will not cause or contribute to a violation of the Act, the CWA and its regulations, it must issue the permit. 415 ILCS 5/39.

The submitted construction permit application complies with the Illinois Recommended Standards for Sewage Works, Subtitle C, Chapter I, and the Illinois Environmental Protection Act. Therefore, the permit has been issued to the Grand Prairie Sanitary District. A copy of the permit is attached.

Should you have questions or comments regarding the above, please contact Amy Dragovich, Permits at 217/782-0610 or Connie Tonsor, Division of Legal Counsel at 217/782-5544.

Sincerely,



Alan Keller, P.E.
Manager, Permit Section
Division of Water Pollution Control

SAK:ALD:j:\docs\misc\dragovich\grandprairie

Attachment: Construction Permit

cc: Mill Creek Water Reclamation District
Grand Prairie Sanitary District
Locke Lord Bissell & Liddell LLP
Des Plaines Region
Records Unit