

BEFORE THE POLLUTION CONTROL BOARD

SUSAN M. BRUCE,)	
)	
Complainant,)	
)	
v.)	No. 2015-139
)	
HIGHLAND HILLS SANITARY DISTRICT,)	
)	
Respondent.)	

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STATE OF ILLINOIS
Pollution Control Board

 ORIGINAL

MOTION FOR EXTENSION OF TIME

Complainant, SUSAN M. BRUCE, by her attorneys, HUCK BOUMA PC, moves pursuant to 35 Ill. Adm. Code 101.500(d) for an extension of time from July 27, 2015 to August 10, 2015, to respond to the respondent's motions for reconsideration and to dismiss the complainant's pending and amended complaint. In support of her motion, complainant states as follows:

1. On July 8, 2015, the complainant filed an amended complaint as authorized by the order of the board dated June 4, 2015. A copy of that order is attached as exhibit A.
2. On July 12, 2015, the respondent served motions to dismiss the amended complaint and for reconsideration of the board's order of June 4, 2015. Copies of those motions are attached as exhibits B and C, respectively.
3. The following matters contributed to the delay by the claimant's counsel in responding to the motions within the time permitted:
 - a. The brief of the appellee in *Sonntag v. Stewart*, appeal number 2-14-0445, a complex appeal by the Attorney General of Illinois from two judgments of administrative review that is currently pending, for the second time, in the Appellate Court of Illinois for

the Second Judicial District. Claimant's counsel represents the appellee in that case and his brief was not completed until July 27, 2015, after numerous extensions of time, due to the complexity of the matter; and

b. A serious and chronic illness of the complainant's counsel's wife, which first arose about 2 years ago, requiring surgery and chemotherapy, and that recurred in May 2015, requiring the installation of a port and a new round of chemotherapy of six infusions over 18 weeks, related blood tests, regular doctor's visits, and the associated side-effects.

4. Complainant submits that the above and foregoing constitutes good and sufficient cause to permit the time to respond to those motions to be extended to August 10, 2015.

Respectfully submitted,

HUCK BOUMA PC

Lawrence A. Stein

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ILLINOIS POLLUTION CONTROL BOARD

June 4, 2015

SUSAN M. BRUCE,)	
)	
Complainant,)	
)	
v.)	PCB 15-139
)	(Citizens Enforcement – Water)
HIGHLAND HILLS SANITARY)	
DISTRICT,)	
)	
Respondent.)	

ORDER OF THE BOARD (by G.M. Keenan):

On January 16, 2015, Susan M. Bruce (complainant) filed a complaint against the Highland Hills Sanitary District (District) concerning the District's sanitary sewer system in DuPage County. The complaint alleges violations of the Board's water pollution regulations and a prior Board order that caused sewer backups into complainant's residence and flooding of her yard. The District moves to strike or dismiss the complaint as inadequately pled and in part as frivolous.

For the reasons set forth below, the Board grants the District's dismissal motion but allows complainant 30 days to file an amended complaint curing the deficiencies specified in this order. Below, the Board first provides the procedural history and addresses a procedural matter before summarizing the complaint and the filings regarding the District's motion to strike or dismiss. The Board then discusses and rules upon the pending motion.

PROCEDURAL MATTERS**Procedural History**

As noted above, complainant filed a citizen's complaint (Comp.) on January 16, 2015. On March 4, 2015, complainant filed a document styled as a proof of service stating that she served the complaint on the District on January 15, 2015. Attached to the filing was a certified mail receipt for mail addressed to the District and signed by Kirsten Schoenke on January 20, 2015.

On March 11, 2015, the District moved to dismiss the complaint for lack of personal jurisdiction. The motion asserted that the Board lacked personal jurisdiction over the District because the complaint was not properly served.

By order of March 17, 2015, the hearing officer memorialized an agreement between the parties regarding service of the complaint. Under the agreement, complainant was permitted to re-serve the complaint on the District, and the District had 30 days after the earlier of (1) proper

EXHIBIT A

service of the complaint or (2) the Board's ruling on the pending dismissal motion to file a motion challenging the sufficiency of the complaint. The agreement recited that the filing of such a motion would stay the 60-day period for the District to file an answer to the complaint.

On March 25, 2015, complainant filed an objection to the motion to dismiss for lack of personal jurisdiction. The objection asserted that the motion should be denied as moot because the District had been properly served in accordance with the March 17, 2015 hearing officer order. An amended proof of service stated that complainant's attorney had, on March 17, 2015, personally served a copy of the complaint on the District's president. The Board, taking account of these developments, rules upon the motion to dismiss for lack of personal jurisdiction in the immediately following subsection below.

On April 15, 2015, the District filed a motion to strike or dismiss the complaint as inadequately pled and in part as frivolous (Mot.). At the request of complainant's counsel, on May 6, 2015, the hearing officer extended to May 8, 2015, the deadline for complainant to respond to the District's second dismissal motion. On May 11, 2015, the Board received complainant's response in opposition to that motion (Resp.). The response was timely because it was postmarked May 8, 2015. *See* 35 Ill. Adm. Code 101.300(b)(2).

Motion to Dismiss for Lack of Personal Jurisdiction

The District's motion to dismiss the complaint for lack of personal jurisdiction asserts that under Section 2-211 of the Illinois Code of Civil Procedure (735 ILCS 5/2-211 (2014)), complainant was required but failed to serve the complaint on the District's president or clerk. Complainant's amended proof of service shows that complainant personally served a copy of the complaint on the District's president, and the District acknowledges that the complaint was so served. *See* Mot. at 1. Accordingly, the Board denies as moot the District's motion to dismiss for lack of personal jurisdiction.

SUMMARY OF COMPLAINT

The complaint consists of a completed complaint form, which the Board maintains on its website. The complaint alleges that on four specified days in April, July, and August, 2013, "twice in May 2013," and "three times in 2010," sewage from the District's sanitary sewer system "forcibly entered," in a "geyser like fashion," complainant's house through "every plumbing fixture with a drain. . . ." Comp. at 1-2. The complaint adds that sewage from the District's equipment also flooded complainant's backyard "above the ground level of the house." *Id.* at 2. According to the complaint, this pollution rendered the residence "unhealthy, unpleasant, uninhabitable," and "destroy[ed] complainant's property." *Id.* The complaint asserts that the District's alleged actions violate "Paragraph 601(a) and 602(b) of the Rules of the Board," as well as the Board's order in Traviseo v. Highland Hills Sanitary Dist., PCB 79-72 (Nov. 1, 1979).

Regarding relief, the Board's formal complaint form asks the complainant to describe the relief sought, and gives as examples an order that the respondent stop polluting, take pollution

abatement measures, reimburse cleanup costs, change its operation, or pay a civil penalty. *Id.* For this item, complainant wrote, “All.” *Id.*

SUMMARY OF MOTION TO STRIKE OR DISMISS

The motion to strike or dismiss argues, first, that the complaint fails to include allegations meeting the requirements of Section 103.204(c) of the Board’s procedural rules (35 Ill. Adm. Code 103.204(c)(2)). Mot. at 2-5. The District maintains that the complaint does not identify the address or location of the alleged sewer discharges, and should be dismissed on that ground. *Id.* at 2. In addition, the District argues that the complaint’s allegation that sewer backups occurred, among other occasions, “three times in 2010” and “twice in May 2013” should be stricken because they are insufficiently specific to enable the District to prepare a defense. *Id.* As another ground to dismiss the entire complaint, the District asserts that the complaint fails to specify the extent and nature of the alleged sewer backups other than the one that allegedly occurred on April 18, 2013, or to describe the duration of that or any other alleged backup. *Id.* at 3.

Further, the District asserts that the complaint is frivolous in that it seeks to enforce the Board’s final order in Travieso (Travieso order) or, alternatively, that it inadequately pleads a violation of that order. Mot. at 3-5. On the first ground, the District maintains that the Board lacks authority to enforce that order and that the claim for violation of that order fails to state a cause of action upon which the Board could grant relief. *Id.* at 4. In particular, the District continues, pursuant to Section 45(e) of the Environmental Protection Act (Act) and Section 103.600(b) of the Board’s procedural rules, a final Board order in a citizen’s enforcement case may be enforced in a “civil action” only by a person who was a party to the enforcement proceeding. *Id.*, citing 415 ILCS 5/45(e) (2014), 35 Ill. Adm. Code 103.600(b). Complainant, according to the District, was not a party to Travieso and, therefore, may not seek to enforce the Travieso order. *Id.* at 4-5. To the extent the complaint seeks to allege a violation of the Travieso order, the District contends it fails to do so, omitting necessary information including what relation, if any, the Travieso complainant bears to complainant, and what part of the Travieso order is claimed to have been violated. *Id.* at 5. Nor, according to the District, does the complaint “address whether there have been physical changes” to the District’s sewer system that render the Board’s cease and desist order in Travieso “no longer current and valid.” *Id.*

Finally, the District argues that the complaint’s claim that the District violated “Paragraph 601(a) of the Rules of the Board” is frivolous. Mot. at 5. According to the District, that provision, which has been renumbered as 35 Ill. Adm. Code 306.102(a), applies only to entities that “own or operate treatment works.” *Id.* at 6, citing Burns v. Village of Western Springs, PCB 80-31 (Apr. 16, 1981). The complaint, the District continues, does not allege that the District operates a treatment works. *Id.*

The District requests that the complaint be dismissed and the allegations “relating to enforcement” of the Travieso order be dismissed “with prejudice to leave to refile.” Mot. at 6.

SUMMARY OF RESPONSE IN OPPOSITION TO MOTION TO STRIKE OR DISMISS

In her response, complainant states that she “inadvertently omitted” her address when completing the formal complaint form. Resp. at 1. Complainant therefore “proposes to file” within a reasonable period allowed by the Board an amended complaint that includes her address. *Id.* With respect to the specific dates of the alleged sewer backups in 2010 and May 2013, complainant asserts that the existing allegations are sufficient to advise the District of “the extent of the alleged violations to reasonably allow preparation of a defense.” *Id.* at 1-2. Nonetheless, complainant adds, she is “prepared and proposes to file” an amended complaint “with more specificity” regarding the relevant dates in 2010 and May 2013, as well as any other discharges she can identify by specific date. *Id.* at 2.

Regarding the alleged backups other than that on April 18, 2013, complainant maintains that her allegations regarding the nature and duration of the violations is sufficient to reasonably allow the District to prepare a defense. Resp. at 2. Complainant, however, “can, and proposes to,” file an amended complaint “containing additional details on the nature and extent of the alleged discharges.” *Id.* And while the District does not argue that the allegations regarding the “strength” of the discharges are inadequate, complainant adds, in an amended complaint, she would endeavor to characterize the “strength” of the incidents as best she could, by, for example, “describing the height of the geyser-like formations” that allegedly entered her residence. *Id.* at 2-3.

Next, complainant explains that her residence was previously owned by the complainant in Travieso, but “concedes” that the Board “cannot enforce” the Travieso order at complainant’s request. Resp. at 3. Complainant, therefore, does not object to that part of the dismissal motion and, if granted leave to amend the complaint, would omit any request that the Board enforce the Travieso order. *Id.*

Finally, complainant states that in an amended complaint, she would include “appropriate allegations, based on a reasonable investigation,” concerning the District’s ownership or operation of a “treatment works.” Resp. at 3. Complainant concludes by requesting leave to file an amended complaint “addressing the deficiencies raised in” the motion to dismiss. *Id.* at 4.

DISCUSSION

The Board first provides the legal framework for today’s decision. The Board then analyzes and rules upon the District’s motion to strike or dismiss the complaint as inadequately pled and in part as frivolous.

Legal Framework

Under Section 31(c) of the Act, the Attorney General and the State’s Attorneys may bring actions before the Board to enforce Illinois’ environmental requirements on behalf of the People. 415 ILCS 5/31(c) (2014); 35 Ill. Adm. Code 103.212(c). In addition, Section 31(d)(1) of the Act provides:

Any person¹ may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder *** Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing 415 ILCS 5/31(d)(1) (2014); *see also* 35 Ill. Adm. Code 103.212(a).

The latter type of enforcement action is referred to as a “citizen’s enforcement proceeding,” which the Board defines as “an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois.” 35 Ill. Adm. Code 101.202. Complainant’s complaint against the District initiated a citizen’s enforcement proceeding.

Section 31(c), referred to in the passage of Section 31(d)(1) quoted above, states that the complaint “shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation” 415 ILCS 5/31(c) (2014). Even though “[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law” (Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)), the Act and the Board’s procedural rules “provide for specificity in pleadings” (Rocke v. PCB, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)) and “the charges must be sufficiently clear and specific to allow preparation of a defense” (Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354).

The Board’s procedural rules codify the requirements for the contents of a complaint, including:

- 1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;
- 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense.
- 3) A concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c).

Within 30 days after being served with a complaint, a respondent may file a motion to strike or dismiss a complaint, which may include a challenge that the complaint is “duplicative” or “frivolous.” 35 Ill. Adm. Code 101.506, 103.212(b). A complaint is “duplicative” if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill.

¹ The Act defines “person” as “any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.” 415 ILCS 5/3.315 (2014).

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.*

Ruling on the District’s Motion to Strike or Dismiss

The District argues that the complaint should be dismissed, first, because it fails to identify the location of the alleged sewer discharges. Mot. at 2. Complainant concedes this omission, and proposes to file an amended complaint specifying complainant’s home address as the location of the alleged overflows. Resp. at 1. The Board agrees that, as currently pled, the complaint does not adequately allege the “location” of the pollution, as required by Section 103.204(c) of the Board’s procedural rules (35 Ill. Adm. Code 103.204(c)). The Board, therefore, grants the motion to strike or dismiss the complaint as inadequately pled. The deficiency can be remedied, however, and the Board accordingly grants complainant’s request for leave to file an amended complaint within 30 days to cure the lack of specificity.

Although the failure to plead the location of the discharges is a sufficient ground to grant the dismissal motion, because the Board is allowing complainant to amend the complaint, the Board proceeds to address the remaining asserted grounds for striking or dismissing the complaint. In doing so, the Board turns first to the District’s arguments that certain allegations in the complaint are insufficiently pled, and then addresses the District’s contentions that particular claims are frivolous.

Arguments Regarding Insufficient Pleading

The District asserts that the complaint’s allegations that sewer backups occurred, among other occasions, “three times in 2010” and “twice in May 2013” do not meet the pleading standards of Section 103.204(c) of the Board’s procedural rules (35 Ill. Adm. Code 103.204(c)). Mot. at 2. Section 103.204(c) requires that a complaint include factual details such as the dates, locations, and nature and consequences of the alleged violations, as necessary to advise the respondent of the extent and nature of the alleged violations to “reasonably allow preparation of a defense.” 35 Ill. Adm. Code 103.204(c); *see also* Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354. The complaint here alleges that the sewer backups occurred on particular days in April, July, and August, 2013, as well as on unspecified days in May 2013 and 2010. The Board notes that the latter two allegations, while less specific than the other dates identified in the complaint —*e.g.*, April 18, 2013—are similar to allegations that the Board has previously found to meet the applicable pleading standards.

For example, Schilling v. Hill, PCB 10-100 involved allegations that improperly managed construction activities led to contamination of the citizen complainants’ pond and flooding of their property. Schilling, PCB 10-100, slip op. at 2-3. The complaint alleged that this pollution occurred “during or about 2006 and 2007,” and again “during the spring of 2010.” *Id.* at 10. The respondents moved to dismiss the complaint on the ground, among others, that it lacked specific dates on which the alleged pollution occurred. *Id.* However, the Board found that the complaint alleged “facts in sufficient detail,” emphasizing that “[i]n a citizen enforcement action, a complaint can adequately allege pollution without having to give exact

dates and times upon which the contaminants caused pollution, and the exact names of the contaminants.” *Id.* at 10-11, citing Finley v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 7 (Aug. 8, 2002). And in Finley, the Board held legally sufficient allegations that air pollution from the respondent’s facility began on January 1 and continued through the filing of the complaint on May 21, 2002, and “generally” occurred during the facility’s “work day operations.” *Id.* In both cases, the Board ruled that the respective complaints sufficiently advised the respondents of the nature and extent of the alleged violations to reasonably allow the respondents to prepare a defense. *Id.*; Schilling, PCB 10-100, slip op. at 10.

Similarly, here, the Board finds that the complaint is sufficiently specific regarding the dates on which the alleged pollution occurred. The complaint’s references to three unspecified dates in 2010 and two in May 2013 is sufficient to advise the District of dates of the alleged violations, and need not pinpoint the exact dates of the alleged violations. *See* 35 Ill. Adm. Code 103.204(c). While conceivably this level of specificity might not suffice for complainant to fully prevail on her claims, that is not the standard at this stage. Rather, the Board need only determine whether the complaint’s allegations are sufficiently specific. The Board finds that they are, and accordingly denies the motion to strike or dismiss them. In the amended complaint that the Board permits by this order, complainant may, but need not, furnish additional details about the dates at issue.

Nor is the Board persuaded that the complaint lacks necessary detail concerning the extent and nature of the alleged backups. The District focuses only on the allegations regarding the backups into complainant’s home and flooding of her backyard on April 18, 2013, without taking account of the complaint’s other allegations about the extent and nature of the pollution. These are the allegations that the pollution consisted of “[s]ewer back-ups from all plumbing fixtures with a drain . . . [and] [s]ewage eruption from respondent’s equipment or structure in the backyard, that floods the backyard and even infiltrates into the house.” Comp. at 2. The complaint also alleges that the sewer backups “deposit[ed] human waste in the yard and [h]ouse,” rendering “the home unhealthy, unpleasant, uninhabitable, and destroy[ing] complainant’s property.” *Id.* These allegations appear to generally describe the pollution and its consequences, regardless of the exact dates on which the alleged backups occurred. As for the duration of the alleged discharges, the Board deems it sufficient that the complaint describes their nature—“eruptions” through plumbing fixtures—and their enduring effects; the complaint need not spell out the precise duration of each alleged backup. Thus, the Board concludes that the complaint gives enough information about the nature and extent of the alleged backups and flooding to reasonably allow the District to prepare a defense. Of course, if complainant wishes, she may add further information on these subjects in an amended complaint.

Arguments That Particular Claims are Frivolous

The District contends that the complaint is frivolous to the extent it seeks to enforce the Travieso order. *See* Mot. at 3-5. Under Section 45(e) of the Act (415 ILCS 5/45(e) (2014), the District continues, that order is enforceable only in a civil action brought by a party to the Board proceeding in which it was issued. *See* Mot. at 4-5. To the extent the complaint seeks to enforce the Travieso order under Section 45(e)—*i.e.*, in a “civil action” for injunctive or other relief—the Board agrees that it is frivolous. Section 45(e) provides that a final order issued by the Board in

an enforcement action may be “enforced” in a *civil* action brought by a person who was a party to the prior proceeding. 415 ILCS 5/45(e) (2014). Complainant concedes she was not a party to Travieso, and Board proceedings are not “civil actions” (*i.e.*, a kind of judicial proceeding). *See People v. NL Indus.*, 152 Ill. 2d 82, 99-100, 604 N.E.2d 349, 356 (1992) (observing that while the Board “has no enforcement powers,” the Act provides for institution of a “*civil* action to obtain an injunction” enforcing final Board orders) (emphasis in original). Thus, the Board finds that the Travieso order may not be “enforced” in this proceeding.

The Board does have authority, however, to find that the District violated the Travieso order, upon a proper showing of such a violation. Under Section 31(d)(1) of the Act, “[a]ny person” may file a complaint “against any person allegedly violating . . . any Board order.” 415 ILCS 5/31(d)(1) (2014). Thus, complainant is entitled to assert a claim for violation of the Travieso order even though she was not a party to that proceeding. Nonetheless, the normal pleading standards apply to such a claim (*see id.*), and the complaint must, therefore, specify the “manner in and extent to which” the District is said to have violated the Travieso order (*see id.* at 5/31(c)). The District argues that the complaint does not meet this standard. The Board agrees that the complaint does not identify what part of the Travieso order the District is alleged to have violated, how the District did so, or what relationship, if any, there is between complainant and Mr. Travieso.² Thus, the Board rules that complainant’s claim for violation of the Travieso order is inadequately pled. In the amended complaint complainant is permitted to file, complainant may choose to abandon that claim, as her response proposes, *see* Resp. at 3, or re-plead it.

Finally, the District maintains that the complaint fails to state a cause of action for violation of Section 306.102(a) of the Board’s water pollution regulations (35 Ill. Adm. Code 306.102(a)). In relevant part, that provision states that all “treatment works and associated facilities shall be so constructed and operated as to minimize violations of applicable standards” during “contingencies” such as flooding or equipment failure. 35 Ill. Adm. Code 306.102(a). The District argues, and complainant concedes, that the complaint does not allege that the District owns or operates a “treatment works.” The Board agrees that this is an element of a violation of Section 306.102(a) that must be pled in a complaint. *See Burns v. Village of Western Springs*, PCB 80-31, slip op. at 2 (Apr. 16, 1981), *aff’d*, 107 Ill. App. 3d 864, 438 N.E.2d 458 (1982) (ruling that a violation of Rule 601(a) “cannot be found” because the respondent was not shown to “own or operate” a treatment works). Complainant may remedy this deficiency in an amended complaint, as she proposes.

The Board grants the District’s motion to strike or dismiss the complaint, but, as noted above, also grants complainant’s request for leave to file an amended complaint correcting the deficiencies described above. *See* 35 Ill. Adm. Code 101.302. In addition, the amended complaint should provide the current codifications of the regulations cited in the complaint as “Paragraph 601(a) and 602(b) of the Rules of the Board.” *See* 35 Ill. Adm. Code 306.Appendix

² In Travieso, the Board found that the District had violated “Rules 601(a) and 602(b) of the Water Pollution Rules” and Section 33(c) of the Act; issued a cease and desist order against “causing sewer backups at Complainant’s residence,” effective within 120 days after the date of the order; and required the District to submit to the Board and the Agency a “compliance program” to reduce “excess infiltration” into the District’s system. Travieso, PCB 79-72, slip op. at 2.

A (listing current codifications of "old Board rule numbers"). Any such amended complaint must be filed by July 6, 2015, which is the first business day immediately following the 30th day after the date of this order. Failure to file an amended complaint on or before that date will result in dismissal of this case. The amended complaint must comply with the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204. In addition, a copy of the amended complaint must be served upon the District, and proof of service upon the District must be filed with the Board. *See* 35 Ill. Adm. Code 101.304. The deadline for the District to file any motion attacking, or any answer to, the amended complaint will commence upon receipt of the amended complaint. *See* 35 Ill. Adm. Code 101.506, 103.212(b); *see also id.* at 103.204(e).

CONCLUSION

The Board grants the District's motion to strike or dismiss the complaint. The Board also grants complainant's request to file an amended complaint addressing the deficiencies described above, which complainant must file on or before July 6, 2015. Failure to timely file an amended complaint will result in the Board's dismissing this case and closing the docket.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 4, 2015, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE)	
)	
Complainant,)	PCB # 2015-139
v.)	(Citizens - Water Enforcement)
HIGHLAND HILLS SANITARY)	
DISTRICT,)	
)	
Respondent.)	

MOTION TO DISMISS AMENDED COMPLAINT

Respondent, HIGHLAND HILLS SANITARY DISTRICT ("District"), by and through its attorneys PODLEWSKI & HANSON P.C., respectfully requests, pursuant to 35 Ill. Adm. Code Section 101.506, that the Board dismiss the amended complaint.

In support of this motion, the District states as follows:

1. By its Order of June 4, 2015 the Board dismissed Complainant's original complaint, and granted her until July 6, 2015 to file an amended complaint. On July 6, 2015 Complainant filed her amended complaint which was received by Respondent on July 8, 2015.
2. In its June 4, 2015 Order the Board also addressed Respondent's arguments that the dates of three backups alleged to have occurred sometime in 2010 and two backups alleged to have occurred sometime in May of 2013 as well as descriptions of the nature, extent and duration of the alleged backups were insufficiently pled. The Board held that they had been sufficiently pled.
3. Simultaneously with the filing of this Motion to Dismiss the Amended Complaint, Respondent has filed Respondent's Motion for Reconsideration in Part of the Pollution Control Board's June 4, 2015 Order, distinguishing previous Board rulings and providing additional

evidence and arguments regarding the need for dates and information on the nature, extent and duration of the alleged backups.

4. Respondent incorporates by reference that motion into this Motion to Dismiss Amended Complaint.

5. As set forth in the motion for reconsideration, although she proposed to do so, in her amended complaint, Complainant did not provide additional specificity regarding the dates or the nature and extent of the alleged backups.

6. As set forth in the motion for reconsideration, the particular instances of failure to provide sufficient information to comply with Procedural Rule 103.204(c)(2) (35 Ill Adm. Code 103.204(c)(2)) that were the basis for Respondent's motion to dismiss the original complaint, have been repeated in the amended complaint, therefore the Respondent requests the Board to reconsider its ruling on the complaint and also to dismiss the amended complaint on those grounds.

7. In addition to the grounds and arguments given for reversal of the Board's opinion on the specificity of dates and the nature, extent and duration of the alleged sewer backups there is an additional ground for dismissal.

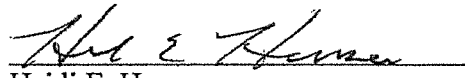
8. Complainant seeks to allege a violation of a 1979 Board order in Travieso v. Highland Hills Sanitary District., PCB 79-72 (Nov.1, 1979). Paragraph 7 of the Amended Complaint asserts that the order in Travieso, required respondent to "cease and desist from causing sewer backups at the complainant's location" and "complainant's property" (presumably referring to Mrs. Bruce as the complainant) whereas the Travieso, order provides that Respondent shall cease and desist from violations of specific rules "in causing sewer backups at Complainant's residence" (presumably referring to Mr. Travieso as the Complainant). As in the earlier

complaint, the amended complaint fails to "allege what relationship, if any, there is between complainant [Susan M. Bruce] and Mr. Travieso." June 4, 2015 PCB order, page 8.

9. The amended complaint has failed to comply with 35 Ill. Adm. Code 103.204(c)(2) in that it failed to provide the 2010 and May 2013 dates as well as the extent, nature and duration of the alleged violations so as to reasonably allow preparation of a defense. In addition, the amended complaint fails to explain the relationship, if any, between the Complainant in this matter and Mr. Travieso.

WHEREFORE, Respondent requests that the Board dismiss the amended complaint.

Respectfully submitted,


Heidi E. Hanson

Dated: July 12, 2015

Joseph R. Podlewski Jr.
Heidi E. Hanson
Podlewski & Hanson P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served the attached:

RESPONDENT'S MOTION FOR RECONSIDERATION IN PART OF THE POLLUTION
CONTROL BOARD'S JUNE 4, 2015 ORDER

and

MOTION TO DISMISS AMENDED COMPLAINT

By depositing same in the U. S. Mail at Western Springs, Illinois before 4:30 this day, July 12,
2015 postage prepaid, upon the following persons:

Original and 3 copies to

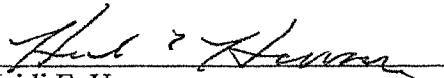
Attn: Clerk
Illinois Pollution Control Board
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

One copy to:

Hearing Officer Bradley Halloran
Illinois Pollution Control Board
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Dated: July 12, 2015


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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE)	
)	
Complainant,)	PCB # 2015-139
v.)	(Citizens - Water Enforcement)
HIGHLAND HILLS SANITARY)	
DISTRICT,)	
)	
Respondent.)	

**RESPONDENT'S MOTION FOR RECONSIDERATION IN PART OF THE
POLLUTION CONTROL BOARD'S JUNE 4, 2015 ORDER**

Respondent, HIGHLAND HILLS SANITARY DISTRICT ("District"), by and through its attorneys PODLEWSKI & HANSON P.C., respectfully requests, pursuant to 35 Ill. Adm. Code Section 101.520, that the Board reconsider, in part, its order of June 4, 2015.

In support of this motion, the District states as follows:

1. On April 15, 2015 Respondent filed a motion to dismiss the complaint for, among other things, inadequate specificity in pleading and failure to comply with the Board's procedural rules.
2. The Board issued an order dated June 4, 2015, which was received by Respondent on June 8, 2015. In it, the Board dismissed the Complaint and granted Complainant leave to file an amended complaint. The Board also addressed Respondent's arguments that the Complaint failed to comply with Procedural Rule 103.204(c)(2) (35 Ill Adm. Code 103.204(c)(2)) in that it had failed to specify dates in 2010 and in May of 2013 on which sewer backups were alleged to have occurred and that it had failed to provide adequate information on the nature, extent, and duration of all of the discharges and on the nature and extent of all but one of the discharges; thereby impairing the District's ability to prepare a defense.

3. Procedural Rule 103.204(c)(2) (35 Ill. Adm. Code 103.204(c)(2)) provides that a complaint “must contain”:

The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense;

4. In her Objection to the Motion to Dismiss, paragraphs 3 and 4, Complainant proposed to provide additional specificity on the missing dates and additional details on the nature and extent and strength of the discharges.

5. In its June 4, 2015 order, pages 6 and 7, Board found that the Complainant’s allegation that backups occurred “twice in May 2013” and “three times in 2010” was sufficient to meet the Section 103.204(c)(2) requirement of “dates”, that the description provided in paragraphs 6, 7, and 8 of the Complaint was sufficient to meet the nature, extent, and duration requirements of Section 103.204(c)(2) and that Complainant therefore had met her obligation to “advise respondents of the extent and nature of the alleged violations to reasonably prepare for a defense.” *Id* at 7.

6. On July 6, 2015 Complainant filed the Amended Complaint, but did not provide any additional specificity on the dates and did not provide further details on the nature, extent and duration of the alleged discharges. The allegations of paragraphs 3, 6, 7, and 9 of the Amended Complaint merely repeat the allegations in paragraphs 6, 7, and 8 of the original Complaint. Despite indicating that she could provide further dates and details, she has not done so.

7. Consequently, the District respectfully moves that the Board reconsider its June 4, 2015 order with regard to the sufficiency of information needed for compliance with 35 IAC 103.204(c)(2) in this case. The District will also be moving to dismiss the Amended Complaint.

Allegations of 2010 and 2013 Sewer Backup Dates

8. Without knowing the dates on which the sewer backups are alleged to have occurred it is impossible to determine:

a. whether (and how much) rain occurred in the area on that date and therefore whether an excessive rainfall or “Act of God” defense could be asserted;

b. whether construction was occurring on the sewers in the area on that date and therefore whether an act of the Respondent, a contractor, or that of another third party might have been responsible;

c. whether the alleged backups took place before, after, or during specific sewer cleaning, repairs, or inflow and infiltration investigations and thus whether they were caused by, cured by, or unrelated to those events;

d. whether events upstream or downstream of the District’s sewers might have contributed to, or caused, the alleged backups (including, but not limited to, conditions at the wastewater treatment plant that receives the District’s sanitary sewer flow); and

e. whether the allegations of violation arising from the backups alleged to have occurred in 2010 would be subject to a statute of limitations affirmative defense. Union Oil Co. of California d/b/a Unocal v. Barge-Way Oil Co., Inc., PCB 98-169, slip op. at 5, n.1 (Jan. 7, 1999). See also. Zohfeld v. Drake, et al., PCB 05-193, slip op. at 1 (April 6, 2006), and 735 ILCS 5/13-205.

9. In reaching its conclusion that the May 2013 and 2010 allegations were sufficiently pled the Board cited to two previous decisions, Finley, et al. v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 12 (Aug. 8, 2002) and Schilling et al. v. Hill et al., PCB 10-100, slip op. at 2-3

(November 4, 2010). The District respectfully argues that those decisions are distinguishable from the present case in several material respects.

10. In Schilling, the complainants alleged that material which was being disturbed and eroded as a result of respondent's construction activities was contaminating a pond owned by complainants and that the construction activities occurred "during or about" 2006 and 2007 and in the spring of 2010. The pollution alleged in Schilling, was apparently due to a gradual accumulation of material and continued over a period of months.

11. The Board found the allegations in Schilling, were sufficient to comply with the 35 Ill. Adm. Code 103.204(c) requirement that the "dates" of the allegation be stated in the complaint. The Board noted that "complainants would be hard pressed here to provide exact dates when pollution occurred to their pond, where the construction activities commenced and the time the contaminants entered complainants' property are likely to differ." Schilling, slip op. at 10.

12. In Finley, the complaint alleged that air pollution "(1) began on January 1, 2000, and was continuing when the complaint was filed on May 21, 2002; and (2) occurs 'generally daily during the plant work day operations'" PCB June 4, 2015 order page 7. The Board found the pleading of "dates" to be adequate in Finley, also. Even though the dates in that case were not listed specifically, the reference to "plant work day operations" would have been sufficient to enable the respondent in that case to determine the dates of alleged violations by referencing its own operating schedule.

13. Schilling, and Findley, are distinguishable from the present case in that the respondents in both of those cases would have been in a position to independently determine the dates of the alleged pollution because the allegations were based on specific and known actions of those respondents. That is not the case with the allegations made by Mrs. Bruce. A residential sewer

backup can occur without the District's having undertaken any specific activity. It can occur without the District's knowledge. It can occur as a result of an Act of God or the act of a third party tributary to the sewer. It can also occur as a result of the complainant's own plumbing problems, as was recognized by the Board in Konkel v. City of Crest Hill, PCB 92-145 (May 20, 1993).

14. Also unlike the situations in Schilling, and Findley, the residential sewer backups alleged here are not continuous or "every work day" occurrences. They are apparently isolated, discrete events. Two of the alleged dates are separated by over a year. The events may well have had different causes. Furthermore, the knowing dates of the alleged backups may help the District to identify the causes of the backups, particularly if they are related to rainfall or construction.

15. Because of the nature of the alleged violations, if Complainant continues to withhold the dates on which it claimed the events occurred, the District will be unable to investigate the possible causes of the events and therefore will be prejudiced in its ability to prepare a defense.

Allegations Regarding Nature, Extent and Duration of the Alleged Discharges

16. Paragraph 7 of the Formal Complaint states as follows:

April 18, 2013: Sewage forcibly entered the house through every drain in a geyser like fashion, and also through the respondent's equipment in the complainant's backyard, flooding the backyard above the ground level of the house. Additional backups twice in May 2013, July 24, 2013, August 3 and 6, 2013, and three times in 2010.

17. Paragraph 7 is vague and open to interpretation. The Board, in its discussion, June 4, 2015 Order page 7, and in its summary of the Complaint, page 2, quoted below, reads the description following "April 18, 2013" and the colon, as though it describes all of the other backups:

The complaint alleges that on four specified days in April, July, and August, 2013, “twice in May 2013,” and “three times in 2010,” sewage from the District’s sanitary sewer system “forcibly entered,” in a “geyser like fashion,” complainant’s house through “every plumbing fixture with a drain. . . .” Comp. at 1-2. The complaint adds that sewage from the District’s equipment also flooded complainant’s backyard “above the ground level of the house.” *Id.* at 2.

18. Based on its reading that the description applied to each sewer backup, the Board found that the description was sufficient. However, it is not clear whether the description of the pollution was intended to apply to each of the dates separately or whether it is solely a description of the April 18, 2013 alleged sewer backup.

19. The language of paragraph 7 of the Complaint has been repeated in paragraph 7 of the Amended Complaint, but the colon has been changed to a comma and the list of additional backups has been moved to another subparagraph which would further indicate that the “sewage forcibly entering the house...” clause was never intended to apply to dates other than April 18, 2013. Thus discharges of significantly differing “nature, extent, duration and strength” may have occurred on those other dates. Paragraph 6 of the Complaint (repeated as Paragraph 6 of the Amended Complaint) describes a “type of pollution” but also does not indicate on which date(s) it occurred.

20. With regard to duration, the Board’s June 4, 2015 Order, page 7 states that “the Board deems it sufficient that the complaint describes their nature—“eruptions” through plumbing fixtures—and their enduring effects:..” However, the District is tasked with identifying the causative agent of each alleged backup so that it can prepare its answer and defense and it will require significantly more information to do so (as further described in paragraph 8 of this Motion).

21. Given the multiple possible causes for sewer backups, information on the nature, extent and duration of discharge is especially important. A sewer backup can occur without the Respondent sanitary district's knowledge because it can occur entirely on private property, to which the District is not permitted access. It can also occur entirely within a structure.

22. Here, unlike Schilling, and Findley, the District may not have had the opportunity to observe the events complained of. Thus the description required to be included in the complaint is particularly necessary for the District to be able to determine the cause of each of the alleged backups and to accurately answer the complaint, prepare its defense, and assert any applicable affirmative defenses.

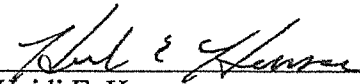
23. Withholding basic information on the dates, nature, extent and duration of the alleged violations leaves Respondent without the ability to investigate or refute the allegations, and without the ability to prepare its answer and affirmative defenses. The dates on which the sewer backups occurred and the nature, extent, and duration of the discharges are solely within Complainant's knowledge. Respondent, Highland Hills Sanitary District should not be forced to "guess" when the backups occurred or their nature, extent and duration.

24. Although the Complaint was dismissed on other grounds, it also failed to comply with 35 Ill. Adm. Code 103.204(c)(2) in that it failed to provide the 2010 and May 2013 dates as well as the extent, nature and duration of the alleged violations so as to reasonably allow preparation of a defense. These problems were not cured by the Amended Complaint.

25. The District respectfully requests that the Board reconsider its findings that the dates, nature, extent and duration of each sewer backup event have been described sufficiently to comply with 35 IAC 103.204(c)(2) and to allow the District to prepare a defense.

WHEREFORE, for the reasons stated above, Respondent prays that the Board reconsider its June 4, 2015 order and also grant the Motion to Dismiss the Amended Complaint filed this day.

Respectfully submitted,


Heidi E. Hanson

Dated: July 12, 2015

Joseph R. Podlewski Jr.
Heidi E. Hanson
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CERTIFICATE OF MAILING

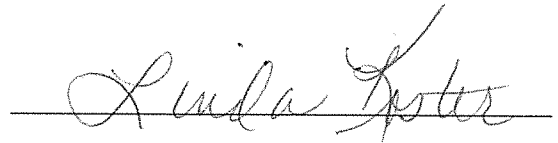
I, Linda Koster, state as follows under penalty of perjury this fourth day of August 2015:

1. I filed this *Motion for Extension of Time* by placing it in an envelope with proper postage prepaid and plainly addressed to State of Illinois, Clerk of the Pollution Control Board, James R. Thompson Center, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601.

2. I served this *Motion for Extension of Time* by placing accurate copies of it in an envelope with proper postage prepaid and by certified mail, return receipt requested, and plainly addressed to Joseph R. Podlewski, Jr., Esq., Heidi E. Hanson, Esq., Podlewski & Hanson P.C., 4721 Franklin Avenue, Suite 1500, Western Springs, Illinois 60558.

3. I deposited the envelopes in the United States mail at Wheaton, Illinois on August 4, 2015, before 4:30 p.m.

4. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he/she verily believes the same to be true.

A handwritten signature in cursive script, reading "Linda Koster", is written over a horizontal line.