

# GRAND PRAIRIE SANITARY DISTRICT

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August 12, 2009

Wastewater Committee  
Chicago Metropolitan Agency for Planning  
233 S. Wacker Drive, Suite 800  
Chicago, IL 60606

Re: Grand Prairie Sanitary District Water Quality Review # 09-WQ-005

Dear Wastewater Committee,

We are in receipt of the CMAP Staff Report dated August 12, 2009 (the "*Staff Report*") regarding Grand Prairie Sanitary District's Water Quality Application 09-WQ-005 (the "*Application*"). In response to the Staff Report, the Grand Prairie Sanitary District (the "*District*") finds it necessary to 1) address the procedural and substantive anomalies surrounding the Application, 2) clarify the role and purpose of a Facilities Planning Area ("*FPA*") and a Designated Management Agency ("*DMA*"), 3) explain the well-established law in Illinois regarding jurisdiction, and 4) remind the Wastewater Committee of the underlying statutory framework surrounding the provision of sanitary sewer service through sanitary districts. Ultimately the District will demonstrate that the Staff Report's recommendation of "Non-Support" was made in error.

## **1. Anomalies in the Application Process**

### **A. Procedural Roadblocks**

As a preliminary matter, the District would like to make part of the public record a number of the procedural anomalies that it has experienced surrounding the processing of this Application. Whether these abnormalities resulted from an overburdened staff, mere oversights, or some other reason, the District would simply like to note some of the roadblocks incurred in this otherwise normal application.

The District has previously been advised that, when an applicant is submitting its materials prior to a hearing before the Wastewater Committee, it is required to submit such materials to CMAP Staff on Tuesday of the week prior to the meeting. For its application, the District was notified on July 29, 2009 that all of its materials in support of its Application would need to be submitted on July 31, 2009, four days earlier than the established standard, despite the fact that the Associate Planner charged with facilitating the application would not be in the office on that day. Because the District wished to provide a comprehensive explanation and support of its Application, it worked to submit all requested materials by the accelerated deadline. It should also be noted that a letter submitted as recently as August 10, 2009 by an objecting developer has been accepted as part of the public record regarding the Application and posted on CMAP's Facilities Planning Area (FPA) and Water Quality Management — Minutes & Agendas web page,

while the District's submission in support of its Application is still absent from the web site due to an apparent scanning error.

While the District understands that it presented a voluminous submission in support of its application, the Staff was unable to provide its written comments on the standard timeline, despite the earlier submission of the District's materials. Generally, Staff will present its findings on the Thursday of the week prior to the meeting of the Wastewater Committee, presumably to give the applicant an opportunity to tailor its presentation to be responsive to Staff analysis and comments. The District did not learn of the Staff finding of "Non-Support" until August 10, 2009, and even at that time, Staff sent another copy of the preliminary staff report issued in April of 2009, rather than the most recent Staff Report that is responsive to the District's recently submitted materials. While this delay may seem insignificant, it has imposed a practical difficulty upon the District to respond meaningfully to the Staff Report so as to be appreciative of the time of the members Wastewater Committee.

While each of these individual inconveniences may be due to very legitimate purposes or honest mistakes on the part of the Staff, when viewed collectively, these procedural anomalies certainly demonstrate that the District has been disadvantaged prior to any evaluation or analysis of its Application.

#### **B. Substantive Oversight**

Along with the seemingly uphill battle the District faced in having its Application received and reviewed, the District has found that in preparing the Staff Report the CMAP Staff has either grossly misunderstood, misread, or misrepresented the analytical bases for the recommendation of "Non-Support".

CMAP evaluates all applications on nine established criteria (the "*Criteria*"), but the Staff Report includes evaluation of matters outside of the Criteria and misrepresents other Criteria. The Staff found the Application to be "Consistent" with Prong One of the Criteria, which states "The proposed facility amendment must be designed to meet the State of Illinois water quality standards for the receiving waters and the appropriate discharge standards or must receive a variation from the Illinois Pollution Control Board." While the analysis of this prong of the Criteria should be straightforward and technical, the staff uses this space to address various unresponsive issues including the objections and asserted costs incurred by Mill Creek Water Reclamation District ("*MCWRD*") in attempting to provide service to an area outside of its jurisdiction, the purpose of FPAs and DMAs, and regionalization issues generally.

In its lengthy analysis of Prong One, the Staff Report has demonstrated a basic misunderstanding of regionalization policy. Certainly the Staff is aware that the District is implementing a land application system, so it is perplexing that the Staff Report evaluates the Application based upon a regionalization policy associated with point source discharge systems. The Staff Report even states, "The promotion of

regionalization has been established and outlined in the *Water Quality Management Plan Amendment Process and Procedures* manual, Appendix V, which provides procedures for determining compliance with point source management policies. . . This approach discourages small conventional treatment plant discharges which often experience failure.” (Emphasis added.) While this analysis may be appropriate for a point source discharge facility, it clearly has no relevance to the District’s Application. The CMAP’s own Wastewater Planning Strategy Report clearly indicates that “regionalization may be a very effective technique to reduce point source impacts.”<sup>1</sup> It is wholly inappropriate for the Staff Report to analyze the District’s application based upon standards for a point source discharge system.

For many of the Criteria that the Staff did address directly, the factual basis underlying the Staff’s analysis is deeply flawed. For instance, in the cost effectiveness prong of the Criteria, the origin of specific data relied upon in the Staff Report is unclear, some of the included data is irrelevant, and some of the Staff’s assertions are inaccurate. On page 9 of the Staff Report, the staff includes amounts purportedly spent by MCWRD allegedly to provide service to territory within the District’s boundaries. Although the Staff Report cites to the MCWRD letter dated March 30, 2009 as its source, such letter does not contain any of these figures. It is unclear how Staff determined these amounts. Furthermore, Staff included in its analysis of the District’s application to establish a land application sanitary sewer system, costs MCWRD claims to have incurred for construction of water supply facilities. This data, even if accurate, clearly has no place in the evaluation of the District’s Application. Finally, on the chart comparing service from the District and service from MCWRD on page 8 of the Staff Report, the staff indicates that Inspection/Construction Project Management and Project Management/Design costs are not provided by the District. This is false. On page 11 of the materials submitted by the District, the District clearly states that these costs are “included as part of the cost of the WWTP.” Although the Staff Report’s analysis is fundamentally flawed, there was no indication of whether the Application is “Consistent” or “Inconsistent” with the cost effectiveness prong of the Criteria. Accounting for the flaws in the Staff report, there is no question that the District’s proposal is the more cost-effective means of serving the District’s territory.

The Staff’s analysis regarding affected units of local government is also misguided. While Illinois law is clear that a sanitary district has the sole authority to provide service within its boundaries, the Staff uses its analysis of this prong of the Criteria to gloss over the fact that the District, which was in existence at the time of the Mill Creek FPA expansion in 2006 was not established as a DMA or even notified of the hearing. The Staff Report states, “If the issue of corporate limits is applicable or decisive in this instance, Staff questions why the issue was not raised when MCWRD’s request was considered by NIPC and the Illinois EPA.” This is a valid question that Staff should be called upon to answer. Are CMAP Staff suggesting that they and their predecessors have or had no knowledge of the existence of sanitary districts created by referendum and

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<sup>1</sup> Found at <http://www.goto2040.org/ideazone/forum.aspx?id=776>.

court order within CMAP's sphere of influence? Why did NIPC Staff not notify the District of the FPA expansion request involving District territory in 2006? The District was validly established in 2002 and its existence has been on record with the Illinois Secretary of State since April 20, 2004. By failing to notify the District in connection with #06-WQ-168, the validity of the 2006 FPA expansion must be called into question. The Staff Report has touched on a valid issue that Staff should be required to address.

## **2. Misunderstanding of the Role and Purpose of a FPA and DMA**

Furthermore, the Staff has demonstrated a fundamental misunderstanding of the basic role and purpose of a Facilities Planning Area and Designated Management Agency. Throughout the Staff Report, Staff has misidentified the Mill Creek FPA, erroneously characterized a FPA as a unit of local government, misstated the role of FPAs and DMAs generally, and ignored the law in Illinois regarding a FPA's and a DMA's authority.

Throughout the Staff Report, Mill Creek FPA is referred to "Mill Creek Water Reclamation District FPA" and "MCWRD FPA." While this may seem like a ministerial error, it indicates that Staff has a fundamental understanding of MCWRD's relationship with Mill Creek FPA. While MCWRD is a DMA within Mill Creek FPA, the expansion of the Mill Creek FPA did not somehow expand the boundaries of MCWRD as well. Conversely, the expansion of the Mill Creek FPA to include the District's territory did not remove any of that territory from the District. The District is a separate unit of local government within the Mill Creek FPA that should also have been identified as a DMA.

The Staff does not seem to make a distinction between units of local government and an FPA. Staff seems to misconstrue the nature of an FPA as a unit of local government in its analysis of prong seven of the analysis regarding the affects on units of local government. MCWRD and the District are both units of local government under Illinois law. An FPA is nothing more than a planning tool. To the extent that Staff is construing an FPA as a unit of local government, it is flatly contrary to the law in Illinois.

Along with the misunderstanding of the nature of an FPA, the Staff Report also completely misconstrues the role of FPAs and DMAs. On page 10, the Staff Report states, "Once approved by the IEPA, an FPA is an area in which a DMA has the right to plan, design, construct, own, and operate sewer facilities (wastewater treatment plants, interceptors, collection systems, etc.) and to apply for federal and/or state funds and permits associated with the construction of these wastewater facilities." The Staff Report cites to the Final FPA Program Evaluation prepared in 2003 by a consultant for the Illinois Environmental Protection Agency.<sup>2</sup> In the same paragraph cited by Staff, the Final FPA Program Evaluation clarifies the role of FPAs and DMAs. It states, "FPAs are defined as the area considered for possible wastewater treatment service (the "service envelope") within a twenty year planning period as specified in 40 CFR 35.2030(b)(3). Exceptions are those areas where the designated management agencies (DMAs) have

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<sup>2</sup> Found at <http://www.epa.state.il.us/water/watershed/facility-planning/facility-planning.pdf>.

defined an area to be serviced by on-site treatment over the next twenty years. A DMA is a public, quasi-public, or private enterprise designated for and engaging in planning, collection, transport, treatment, or sludge disposal of sewage." This definition makes clear that the District should be identified as a separate DMA within the Mill Creek FPA. The same Final FPA Program Evaluation also highlights the outdated nature of FPAs generally since the FPA process was created largely to satisfy the requirements of the federal Construction Grants Program Under Title II of the Clean Water Act, which has since been discontinued.

The law regarding DMAs and FPAs in Illinois has become clarified recently by the Illinois Appellate Court for the Second District (in which Kane County is located) in the case of *Northern Moraine Wastewater Reclamation Dist. v. Illinois Commerce Comm'n*, 2009 WL 1698515 (Ill. App. 2d Dist. 6/12/2009). In that case, the Court expressly rejected an argument by a DMA that it had a right to serve a property in a FPA by virtue of its DMA status. Specifically, the Court ruled: "Nothing in the ... regulation grants a DMA a federal monopoly in providing services." *Id.* at 12.

The Court in *Northern Moraine* also noted that the evidence indicated that "the 'decided advantages' of a spray irrigation system were that there would be 'no requirement to amend that applicable Area-wide Water Quality Management (208) Plan' and '[n]o requirement for a national pollution discharge elimination system permit.'" *Id.* at 7. Further, with respect to DMA status, the Court ruled that, because spray irrigation systems are not point source systems, the Clean Water Act regulations do "not require [the spray irrigation system operator] to become a DMA for the FPA" in order to be authorized to provide sanitary sewerage service within that FPA. *Id.* at 17. Finally, the Court also indicated and that an entity like the District is entitled to be approved as a DMA "unless [it] lacks the legal, financial and managerial authority required under Section 208(c)(2)" of the Clean Water Act. *See Id.* at 12.

Despite the clarity provided by the Court in *Northern Moraine* and the Final FPA Program Evaluation, to which the Staff Report cites, the Staff Report still fundamentally misconstrues the nature, role, and legal status of FPAs and DMAs. As a result, the "Inconsistent" conclusion regarding prongs six and seven of the Criteria are themselves inconsistent with Illinois law.

### **3. Demonstrated Confusion Regarding the Established Law of Jurisdiction**

Most importantly, the Staff has failed to recognize the well-established law in Illinois regarding jurisdiction over the provision of sanitary sewer service. Regardless of any of the above analysis, it remains indisputable that the District is the *only* governmental entity that has the authority to provide service within its boundaries. Yet, the Staff Report continues to insist that the jurisdiction issue is a "legal issue and the current process is not the venue to determine such legal matters." This statement makes little sense as the entire Staff Report is purported applying the standards established by state

and federal law in evaluating the Application. Why applying the established law regarding jurisdiction is any different is a mystery.

Illinois courts have ruled specifically that decisions over the provision of sewerage services are determined by governmental boundaries. In *Village of Frankfort v. Illinois Environmental Protection Agency*, 366 Ill. App. 3d 649 (1<sup>st</sup> Dist. 2006), the court rejected the Village of Frankfort's effort to provide sewerage services to territory located within the corporate limits of the Metropolitan Water Reclamation District ("**MWRD**"). According to the Appellate Court, "[o]nce the subject area was added to MWRD's corporate boundaries ... MWRD had and continues to have exclusive jurisdiction and authority to decide who provides sewer service within that area." *Id.* at 654 (emphasis added).

To the extent that the Staff had any remaining questions, the memorandum from the Kane County State's Attorney dated July 15, 2009 and the letter from Kane County Special Assistant State's Attorney dated July 29, 2009 should have provided ample clarification with regard to the legal status of the District to provide service within its boundaries.

Finally, even if the District were not in existence, MCWRD still could not serve the property in question since MCWRD has failed to annex the property. There is no circumstance under which MCWRD could currently and lawfully serve the property, so it is surprising that the Staff Report does not give this issue the credence it deserves.

#### **4. Governance by the People**

Although often lost in this bureaucratic process, the Committee members must keep in mind the residents within the District who will be affected by the Wastewater Committee's decision. The Illinois General Assembly has established procedures allowing the people to create local sanitary districts for the provision of wastewater disposal. This authority is properly and squarely in the hands of the voters. The residents of the District who voted to create the District in 2002, some of whom currently serve on the District's Board of Trustees, created the District pursuant to law for the purpose of providing sanitary sewer service to the area within the District. Any administrative decision that attempts to undermine that process would certainly be unlawful.

Ultimately, this Application presents a technically sound project, proposed by the only unit of local government established to provide sanitary sewer service to the residents of the District territory. To disregard the will of the people would not only be contrary to Illinois law, but also a step in the wrong direction as Illinois moves toward more open and transparent governance.

CMAP Wastewater Committee

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The District respectfully requests the Committee to disregard the recommendation of the Staff Report and to issue a finding of "support" for the District's application.

Sincerely,

A handwritten signature in black ink, appearing to read "Marlo M. Del Percio". The signature is stylized and cursive, with a large, sweeping flourish at the end.

Marlo M. Del Percio  
Assistant Clerk

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