BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A MUNICIPAL CORPORATION, Petitioner,	)	
v.	)	PCB No. 08-96 Enforcement-Land, Air, Water
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and HAMMAN FARMS, Respondents.	)	

NOTICE OF FILING

TO: SEE PERSONS ON ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of Clerk of the Illinois Pollution Control Board, an original and nine copies each of **PETITIONER'S RESPONSE TO HAMMAN'S MOTION TO STRIKE AND/OR DISMISS**, copies of which are herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE,
Petitioner,

By: _____
One of its Attorneys

Dated: July 22, 2008

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CERTIFICATE OF SERVICE

I, Michelle M. LaGrotta, the undersigned certify that on July 22, 2008, I have served the attached **PETITIONER'S RESPONSE TO HAMMAN'S MOTION TO DISMISS**, upon:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILL, A MUNICIPAL CORPORATION, Complainant,	)	
v.	)	PCB No. 08-96 (Enforcement-Land, Air, Water)
HAMMAN FARMS, Respondent.	)	

YORKVILLE'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE AND/OR DISMISS

NOW COMES, the Complainant, United City of Yorkville, by and through its attorneys, Gardiner Koch & Weisberg, and for its response to Respondent's Motion to Strike and/or Dismiss, it states as follows:

I. COUNT II MUST STAND BECAUSE IT IS NEITHER FRIVOLOUS NOR DUPLICATIVE

A. The Board Has The Authority to Grant the Relief Requested in Count II, And As Such, Count II is Not Frivolous

The Illinois Pollution Control Board ("Board") possesses the authority not only to make findings that Hamman Farms ("Hamman") violated the Illinois Environmental Protection Act ("Act") but also to grant the relief requested in Count II of the United City of Yorkville's complaint. Thus, Hamman's claim that Count II is frivolous is erroneous. Hamman argues that the Board lacks the authority to make specific findings that Hamman is violating the Act. Yet, the entire basis for having enforcement proceedings is for the Board to determine whether a particular person or entity is violating or threatening to violate the Act. In fact, section 5(d) of the Act provides, "[t]he Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or condition of a permit, or any Board order." 415 ILCS 5/5(d). There can be no doubt that the

Board has the authority to make determinations that a person or entity is violating the Act.

Despite the Act's explicit language, Hamman still attempts to put a cloud on the Board's authority by claiming that the Board cannot make a factual determination regarding whether the Illinois Environmental Protection Agency's ("Agency") decision of May 1, 2008 violates the Act such that it causes pollution. This decision allows Hamman to apply landscape waste at rates greater than the agronomic rate. As discussed above, the Board is specifically granted the authority to conduct proceedings upon complaints charging violations of the Act. Although Hamman attempts to hide its violations behind this pseudo-permit, the Act provides a permit is no defense to the charge of a violation of the Act. ILL. ADMIN. CODE TIT. 35 § 201.121. If a full out permit does not provide an entity protection from violations, the Agency's mere grant of permission in the May 1, 2008 decision will not provide Hamman protection. Therefore, regardless of whether the Agency's May 1, 2008 decision was correct or not, Hamman still cannot use that decision to protect itself from the violations that Yorkville claims.

Moreover, the Illinois Appellate Court has noted in White Fence Farm, Inc. v. Land and Lakes Co. et al that the plaintiff should have filed enforcement proceedings when seeking review of a permit that the plaintiff claimed violated the Act. 99 Ill. App. 3d 234, 238 & 244 (4th Dist. 1981). The Court stated, "Even though [the defendant] has a sanitary landfill permit, it does not, by virtue of that permit, have a license to pollute the environment. [Plaintiff] can pursue a section 31(b) action before the Board, alleging that [the defendant] is threatening pollution, and the permit will be no defense to that action." Id. at 244. Similarly, Yorkville is charging that Hamman is polluting and violating the Act by applying landscape waste at rates greater than the agronomic rate. The Board has the authority to make these findings. Consequently, Count II of

Yorkville's complaint is not frivolous, and Hamman's motion to strike and/or dismiss Count II must be denied.

B. The Board Has The Expertise And Authority To Make Decisions Regarding The Agency's May 1, 2008 Decision

Hamman further tries to confuse the issues by declaring that the Board has no authority to evaluate and/or reverse the Agency's technical findings by incorporating its Motion to Dismiss filed in PCB Case No. 08-95. While the Board likely does not need to review and/or evaluate the Agency's decision to determine that Hamman violated the Act under Count II, the Board is more than able to provide such review. First, the Act requires the Board to be "composed of seven technically qualified Board members with the expertise to make the necessary inquiries and evaluation." Jurcak v. Environmental Protection Agency, 161 Ill. App. 3d 48, 53 (1st Dist. 1987). Additionally, the Appellate Court further determined that reviews of a permit are best left to the Board because such a decision "requires evaluation and judgment based on scientific data, knowledge of waste water treatment technologies and engineering methodology and the application of technical standards." Id. Thus if the Board were required to review the Agency decision, those technical determinations are well within the Board's expertise. As a result, Count II is not frivolous, and it should not be dismissed.

C. This Matter Is Distinguishable From That In PCB Case No. 08-95 So It Cannot Be Stricken Or Dismissed On The Basis Of Duplicity

This matter is not duplicative of the matter seeking review the Agency decision (PCB No 08-95). The other matter is an appeal of the Agency decision granting Hamman authority to apply landscape waste at rates of up to 80 tons per acre per year. On the other hand, these proceedings are enforcement proceedings, which seek findings by the Board that Hamman has violated the Act and caused land, air and water pollution. Additionally, Count II charges that

Hamman violated the Act by operating a landscape waste compost facility without a permit. Thus, these proceedings are not duplicative because they are not identical or substantially similar, and Count II should not be stricken or dismissed.

II. DESPITE HAMMAN'S ATTEMPTS TO CONFUSE THE BOARD, COUNT III MUST STAND

A. Count III Reasonably Allows Preparation Of A Defense, And Thus, It Should Not Be Dismissed

Count III satisfies the requirements of Section 103.204(c) of Title 35 of the Illinois Administrative Code. That section states as follows: "The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense." (emphasis added) ILL. ADMIN. CODE TIT. 35 § 103.204(c). The specificity of the complaint must be such as to "reasonably allow preparation of a defense." Here, Count III, when taken together with the general allegations of Yorkville's Complaint, offers such description and specificity that Hamman is more than able to reasonably prepare a defense. For example, Yorkville includes dates of when Hamman first applied landscape waste to its fields and when complaints of odor first began. See Yorkville Complaint, pg. 1 ¶ 4 & pg. 2 ¶ 12. Additional information can be obtained through the use of discovery procedures, such as interrogatories and depositions. Because Yorkville's Complaint reasonably allows Hamman to prepare its defense, it satisfies the requirements of Section 103.204(c). Therefore, Hamman's motion must be denied.

B. Hamman's Claim That Count III Is "Nothing More Than A Nuisance Action" Completely Ignores The Act's Statutory Language And Definition Of Air Pollution

Hamman, in its motion to strike Count III, completely misses the mark with its argument that Count III is a veiled nuisance complaint that somehow is prohibited by the Illinois legislature. Hamman claims that because Yorkville's Count III used the following language that the odor "unreasonably interferes with Yorkville's residents' use and enjoyment of life and

property," it is somehow a nuisance complaint. However, Yorkville's language in Count III comes directly from language in Act. Specifically, that language is taken from Section 3.115, which provides:

> "'Air pollution' is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." (emphasis added) 415 ILCS 5/3.115.

Moreover, the Act defines a contaminant as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." (emphasis added). Regardless of whether this language is similar to any language that would be used in a nuisance action, it is the Act's language and it designates the standards that the Board must follow to determine whether there are violations of the Act, specifically whether Hamman has committed air pollution. See 415 ILCS 5/9(a), 415 ILCS 5/3.115, 415 ILCS 3.165. Furthermore, because the Board is charged with the authority to conduct enforcement proceedings based on violations of the Act, Count III cannot be frivolous and should not be stricken and/or dismissed.[1]

As discussed above in Section I (A), the Illinois Administrative Code clearly provides that permits are no defense to violations of the Act. ILL. ADMIN. CODE TIT. 35 § 201.121. Thus, Hamman's argument that the Agency's May 1, 2008 decision somehow protects it from liability is wrong. The Board has the authority to grant relief under Count III of Yorkville's Complaint, and it must deny Hamman's motion to strike/dismiss Count III.

[1] Hamman also completely misrepresents the intention of the Legislature by arguing that the Legislature intended to protect farms from suits like this one. The Farm Nuisance Suit Act, of which Hamman quotes the policy in page 4 of its motion, provides: "No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation, provided, that the provisions of this Section shall not apply whenever a nuisance results from the negligent or improper operation of any farm or its appurtenances." (emphasis added) 740 ILCS 70/3. Clearly the Legislature did not intend to do away with all nuisance suits arising from farming operations, but rather only those arising from changed conditions. Moreover, the Legislature specifically cleared the way for nuisance suits that arise from negligent or improper operation of any farm.

III. COUNT IV MUST ALSO STAND BECAUSE IT IS NOT FRIVOLOUS AND PROVIDES ENOUGH DETAIL FOR HAMMAN TO REASONABLY PREPARE A DEFENSE

As stated above, a complaint must only include such detail as "to reasonably allow preparation of a defense." (emphasis added) ILL. ADMIN. CODE TIT. 35 § 103.204(c). Here, Count IV, when taken together with the general allegations of Yorkville's Complaint, offers such description that Hamman is more than able to reasonably prepare a defense. For example, Yorkville includes dates of when Hamman first applied landscape waste to its fields and when contamination of groundwater began. See Yorkville Complaint, pg. 1 ¶ 4 & pg. 16 ¶ 67. Additional information can be obtained through the use of discovery procedures, such as interrogatories and depositions. Because Yorkville's Complaint reasonably allows Hamman to prepare its defense, it satisfies the requirements of Section 103.204(c). Therefore, Hamman's motion must be denied.

Finally, for the same reasons discussed above in Section I(A) and Section II(B), the Board has the authority, pursuant to Section 5(d) of the Act, to conduct enforcement proceedings upon charges of violations of the Act. 415 ILCS 5/5(d). In Count IV, Yorkville has charged that Hamman violated several provisions of the Act. A permit is no defense to violations of the Act, and so, the Agency's May 1, 2008 decision provides Hamman no defense to these allegations. ILL. ADMIN. CODE TIT. 35 § 201.121. The Board has the authority to determine whether Hamman violated the Act as charged in Count IV. Therefore, Hamman's motion fails, and it must be denied.

WHEREFORE, the United City of Yorkville, respectfully requests that the Illinois Pollution Control Board deny Hamman Farms' Motion to Strike and/or Dismiss, and grant such other relief as it deems just and equitable.

Respectfully submitted,

UNITED CITY OF YORKVILLE

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