BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on August 1, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent's Reply in Support of its Motion to Strike and/or Dismiss and Supplement to the Motion to Strike or Dismiss and its proposed Brief attached thereto, a copy of which is attached hereto and hereby served upon you.

Dated: August 1, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/
Charles F. Helsten
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT HAMMAN FARMS' MOTION FOR LEAVE TO FILE A REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE AND/OR DISMISS

NOW COMES Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, pursuant to 35 Ill.Adm.Code 101.500(e), requesting leave to file a Reply brief in support of its Motion to Strike and/or Dismiss, stating as follows:

1. On July 8, 2008, Respondent Hamman Farms filed a Motion to Strike and/or Dismiss, requesting that the Board strike and/or dismiss the request for attorney's fees and costs, and Counts II, III and IV of the Complaint filed by the United City of Yorkville.

2. On July 22, 2008, Yorkville filed a Response brief opposing Hamman Farms' Motion.

3. The Petitioner's Response brief misrepresents the law, as well as Hamman Farms' arguments, and such misrepresentations have the potential to mislead the Board.

4. Because the pending motion is dispositive as to the majority of the allegations of Yorkville's Complaint, the outcome of the motion has enormous significance and Hamman Farms is at risk to suffer material prejudice if it is not permitted to file a Reply brief addressing the mischaracterizations in Yorkville's brief.

5. Respondent Hamman Farms accordingly requests permission to file its Reply

brief with the Board, a copy of which is attached hereto.

WHEREFORE, Respondent HAMMAN FARMS respectfully requests leave, pursuant to 35 Ill.Adm.Code 101.500(e), to file the attached Reply brief, and such other and further relief as the Board deems appropriate and just.

Dated: August 1, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/

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One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A MUNICIPAL CORPORATION,	)	
Complainant,	)	
v.	)	PCB No. 08-96 (Enforcement-Land, Air, Water)
HAMMAN FARMS,	)	
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RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE AND/OR DISMISS

NOW COMES the Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, and in support of its Motion to Strike or Dismiss, states as follows:

BACKGROUND

On June 4, 2008, the City of Yorkville ("Yorkville") initiated this four-count citizen's enforcement action against Respondent, Hamman Farms. As discussed in Hamman Farms' initial brief in support of the Motion to Strike and/or Dismiss, Yorkville's request for attorneys fees and costs cannot be granted, therefore the request is frivolous and should be stricken. *See Zohfeld v. Drake et al.*, PCB 05-193 (July 7, 2005) (citing *ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d 325, 337-39, 676 N.E.2d 299 (3rd Dist. 1997); *People v. State Oil Co.*, PCB 97-103 (Aug. 19, 1999)). Notably, Yorkville tacitly admits its request for attorney's fees and costs was improper by entirely omitting any discussion of the issue in its Response brief. Yorkville's frivolous request for attorney's fees and costs should accordingly be stricken.

Count II

The portion of Yorkville's Response brief that addresses Count II misrepresents the law, Hamman Farms' arguments, and, arguably, even the allegations of Yorkville's own complaint.

First, Yorkville asserts that Hamman Farms:

> 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.

(Yorkville's brief at 2; *see also* Yorkville's Complaint at Count II, paragraph 49).

Yorkville therefore apparently argues that the Board has jurisdiction to declare that the Agency's May 1, 2008 decision "violates the Act such that it causes pollution." In other words, Yorkville here seeks Board review of the May 1, 2008 decision, which according to Yorkville, constitutes a violation of the Act. Clearly, this argument is identical to that asserted in Yorkville's simultaneously filed action in PCB 08-095, which challenges the Agency's May 1, 2008 decision. (*See generally*, Yorkville's Petition in PCB 08-095).

Yorkville goes on to allege that Hamman Farms is "hiding behind" the May 1, 2008 "pseudo-permit" and that Hamman Farms' *compliance* with the Agency's May 1, 2008 determination of the appropriate agronomic rate is a violation of the law because the Agency's determination itself violates the law. (Yorkville's brief at 2). In other words, Yorkville admits that Count II's violations against Hamman Farms are predicated on a finding that the Agency's May 1, 2008 violates the law. Clearly, Count II's alleged "violations" are entirely duplicative of those alleged in PCB 08-095, which is likewise based on the assertion that the Agency's May 1, 2008 decision is "illegal."

Based again on the premise that the Agency's May 1, 2008 decision was illegal, Yorkville goes on to argue that Hamman Farms cannot defeat the violations alleged in Count II because under 35 Ill.Adm.Code 201.121, "a permit is no defense to the charge of a violation of the Act." (Yorkville's brief at 2)(emphasis added). However, Yorkville conveniently ignores the

fact that 415 ILCS 5/21(q) provides that it is not "a violation of the Act" for a farm to apply landscape waste to its fields at agronomic rates. The allegation that Hamman Farms applied landscape waste at the agronomic rate determined by the Agency does not (and can not, as a matter of law) state a "violation" of the Act or the regulations, therefore the claim that the Agency's May 1, 2008 "permit" is not a defense to "violations of the Act" misses the mark. In summary, and for the reasons noted above, Count II fails to state any violations of the Act by Hamman Farms.

The allegation, at paragraph 49 in Count II of the Complaint, that the Agency's May 1, 2008 decision allowing Hamman Farms to apply landscape waste at rates up to eighty (80) tons per acre per year "violates the Act and regulations" alleges a violation by the Agency, not by Hamman Farms. The Agency is not a party to this action, and this so-called violation is not even alleged to have been committed by Hamman Farms.

Count II further alleges that by applying landscape waste at the agronomic rate set by the Agency pursuant to Section 5/21(q), Hamman Farms committed open dumping, and conducted waste-storage and waste-disposal operations without a permit, (Complaint at 50-52), and operated "a landscape waste compost facility without a permit." (Yorkville's brief at 4).[1] These allegations ignore the fact that the Act provides that "no permit shall be required for any person...applying landscape waste or composted landscape waste at agronomic rates..." 415 ILCS 5/21(q)(2) (emphasis added).

The Environmental Protection Act defines the term "*agronomic rate*" as:

> the application of not more than 20 tons per acre per year, except

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[1] Although the Complaint does not directly allege that Hamman Farms operated a landscape composting operation without a permit, Hamman Farms surmises that this is what Yorkville intends to allege in paragraph 53.

> that the Agency may allow a higher rate for individual sites where the owner or operator has demonstrated to the Agency that the site's soil characteristics or crop needs require a higher rate.

415 ILCS 5/21(q)(emphasis added).

Thus, the Act makes clear that the "agronomic rate" of application is *either* the statutory default rate of 20 tons per acre per year, *or in the alternative*, the rate which the Agency determines is the appropriate agronomic rate in light of a farm's soil characteristics or crop needs. Here, the Agency calculated the agronomic rate based on soil characteristics and crop needs, and declared that agronomic rate on May 1, 2008. Because the Act provides that no permit is required to apply landscape waste to farm fields at agronomic rates, Yorkville fails to state violations by Hamman Farms in Count II, and Count II should accordingly be stricken or dismissed. Moreover, Count II's allegations are duplicative of those in PCB 08-095, and accordingly, Count II should be stricken or dismissed on this basis as well.

It should be noted that on page 3 of its brief, Yorkville proffers the same Appellate Court case and the same misinterpretation of that case that it proffered in its response to the Motion to Dismiss filed in PCB 08-095. Here, once more, Yorkville erroneously alleges that *Jurcak v. Environmental Protection Agency*, 161 Ill.App.3d 48 (1st Dist. 1987) supports its position, urging that *Jurcak* provides authorization for the Board to review and reverse the Agency's May 1, 2008 decision. As noted in Hamman Farms' brief in PCB 08-095, *Jurcak* involved an appeal by an applicant whose permit application was granted subject to conditions; the appeal in that case challenged the conditions imposed by the Agency. *Id.* That is not the case here, where Yorkville is a third-party, not an applicant. Thus, as previously discussed, Yorkville has no standing to challenge the Agency's May 1, 2008 calculation of the appropriate agronomic rate, and the Board lacks jurisdiction to review the decision. (*See generally*, Hamman Farms' Motion to

Dismiss and briefs in support, filed in PCB 08-095).

Because Count II fails to state violations by Hamman Farms, which simply applied landscape waste to its fields at agronomic rates, as authorized by 415 ILCS 5/21(q), and because any violation in Count II relies on a finding that the Agency's May 1, 2008 decision was illegal, Count II should be dismissed for failing, as a matter of law, to state violations by Hamman Farms, or in the alternative, Count II should be dismissed or stricken because it is duplicative of PCB 08-095 and/or because Yorkville lacks standing to challenge the Agency's May 1, 2008 decision and the Board lacks jurisdiction to review the Agency's decision.

Count III

In response to Hamman Farms' argument concerning Count III, which alleges "air pollution," but fails to provide "[t]he dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations," as required by 35 Ill.Adm.Code 103.204(c), Yorkville responds that it has provided enough specificity to "reasonably allow preparation of a defense" and that this is all the Rules require. (Yorkville's brief at 4). This, however, blatantly misrepresents the Board's pleading requirements under the Rules. *See* 35 Ill.Adm.Code 103.204(c). Yorkville's claim that "[a]dditional information can be obtained through the use of discovery procedures" ignores the pleading specificity required by the Rules. Yorkville's claim, at page 4 of its brief, that it is sufficient to state an air pollution claim to simply plead that "[s]ince HAMMAN began the application of landscape waste to its fields, the Agency has received complaints of strong and offensive odors around HAMMAN," perfectly illustrates the grossly insufficient pleading that characterizes Yorkville's Complaint. One cannot plead an air pollution violation without pleading the extent and strength of the alleged discharges or omissions, as required by the Rules;

those Rules are not written in the disjunctive, and do not, therefore, require *either* the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences *or* allegations that allow preparation of a defense. Rather, the Rule requires both. Moreover, even if both were not required, stating that over the course of the last fifteen (15) years some complaints were made about Hamman Farms, hardly provides sufficient information to allow preparation of a defense.

Yorkville's brief asserts that Respondent's farm has cause an "odor," and that this farming odor "unreasonably interferes with the enjoyment of life or property"; such vague allegations fail to state violations of Illinois air pollution laws. (*See* Yorkville's brief at 5). If Yorkville was correct, every homeowner located near a farm could bring a viable action for air pollution violations against the nearby farm(s), since all working farms release "odors" (which Yorkville refers to as the "release of contaminants" into the atmosphere).

With respect to references to the Farm Nuisance Act, in which the legislature declared its intent to protect farms from nuisance suits based on the odors of farming, Yorkville claims (arguing by footnote) that the legislature only intended to control nuisance suits against farms where they arise from "changed conditions." (Yorkville's brief at 5, fn 1).

The General Assembly, however, declared in Section 1 of the Farm Nuisance Act, that, "It is the declared policy of the state to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products" and that "when nonagricultural land uses extend into agricultural areas, farms often become the subject of nuisance suits. As a result, farms are sometimes forced to cease operations." 740 ILCS 70/1. Because the legislature was concerned that residents moving into agricultural areas were filing suits against farms based on the inevitable "odors" of farming, it passed the Farm

Nuisance Act declaring that:

> It is the purpose of this Act to reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed to be a nuisance.

740 ILCS 70/1.

Clearly, then, the legislature has expressed its intent to protect the state's agricultural resources, i.e. farms, from claims such as those alleged in Count III, in which Yorkville alleges that residents near the farm are perturbed by the odors characteristic of farming.

Similarly, the legislature has memorialized, in the Environmental Protection Act, the importance of recycling, reuse and conservation of natural resources and solid waste, and of "reducing the difficulty of disposal of wastes and encouraging and effecting the recycling and reuse of waste materials." (415 ILCS 5/20(b)). In furtherance of that purpose, the Act allows landscape waste material to be reused and recycled by being applied to farm fields as soil conditioner and fertilizer, rather than being dumped in landfill sites where the material benefits no one. *See* 415 ILCS 5/21(q). Yorkville's attempt to argue that the application of landscape waste to farm fields is a *per se* air pollution violation because it results in the release of odors into the atmosphere, stands in direct contravention to the clearly stated will of the General Assembly. Count III thereby attacks the legislature's authorization of the agronomic use of landscape waste in farm fields as fertilizer and soil conditioner, and, ironically enough, asserts that the very conduct which is expressly authorized at 415 ILCS 5/21(q) actually constitutes a violation of the Act.

As discussed in Hamman Farms' Motion to Dismiss and brief in support thereof, because the Board lacks jurisdiction to overrule the legislature's decision to allow farmers to use landscape waste as soil conditioner and fertilizer, it cannot, therefore, invalidate 415 ILCS

5/21(q) and cannot declare that the conduct which is expressly authorized by the Act constitutes a violation of the Act. As a result, the request that it do so is frivolous. Finally, as noted above, Count III's generic allegations fall woefully short of the specificity required by the Board's Rules on pleading. Count III should, accordingly, be stricken and/or dismissed.

Count IV

The portion of Yorkville's Response brief that addresses Count IV parallels the section addressing Count III. As with Count III, Count IV alleges violations predicated on Yorkville's theory than any agronomic use of landscape waste *per se* violates the Act. In Count IV, Yorkville alleges that the agronomic use of landscape waste "is water pollution in that the landscape waste is a contaminant which is being discharged into ground water" and that therefore, by applying landscape waste to farm fields, Hamman Farms "is allowing the discharge of contaminant into the environment so as to cause or tend to cause water pollution…[and] so as to create a water pollution hazard under section 12(d) of the Act." (Complaint, Count IV at ¶¶ 66-69).

With respect to its failure to comply with 35 Ill.Adm.Code 103.204(c), which requires that the Complaint set forth "[t]he dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations," Yorkville counters that Count IV should be allowed to stand because the Complaint states that Hamman Farms has utilized landscape waste since 1993, and because any application of landscape waste to farm fields is a *per se* water pollution violation. (Yorkville's brief at 6, citing ¶4 and ¶69 of its Complaint as providing sufficient detail to meet the requirements of 35 Ill.Adm.Code 103.204).

For the same reasons set forth above with respect to the alleged Air Pollution violations,

the Board lacks jurisdiction to give Yorkville what it demands: a finding that the agronomic use of landscape waste, which is expressly authorized by the Illinois legislature at 415 ILCS 5/21(q), somehow constitutes a *per se* violation of the Act because when landscape waste is applied to fields it causes discharge of a contaminant into ground water. It is important to note that Count IV alleges no special conduct by Hamman Farms, other than its application of landscape waste to farm fields. The Board lacks jurisdiction to declare that 415 ILCS 5/21(q), which authorizes agronomic application of landscape waste, violates the Act, therefore Count IV of Yorkville's complaint is frivolous, and/or fails to state a violation by Hamman Farms. In addition, as with Count III, it fails to plead allegations with the specificity required by the Rules and the Board is also justified in striking or dismissing Count IV on that basis.

WHEREFORE, for the foregoing reasons, Respondent, Hamman Farms, respectfully requests that the Board strike Yorkville's request for attorney's fee and costs, and strike or dismiss Counts II, III and IV of Yorkville's Complaint.

Dated: August 1, 2008

Respectfully submitted,

On behalf of Hamman Farms

/s/

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on August 1, 2008, she caused to be served a copy of the foregoing upon:

Mr. John T. Therriault, Assistant Clerk
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A copy of the same was enclosed in an envelope in the United States mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.

Susan Burton

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