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 RESPONDENT'S MOTION FOR RECONSIDERATION**, copies of which are herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE,
Petitioner,

By: _____
One of its Attorneys

Dated: December 1, 2008

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH & WEISBERG
53 W Jackson Blvd., Ste. 950
Chicago, IL 60604
(312) 362-0000
Atty ID: 29637

CERTIFICATE OF SERVICE

I, Michelle M. LaGrotta, the undersigned certify that on December 1, 2008, I have served the attached **PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION**, upon:

Mr. John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
(via hand delivery)

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Ste. 22-500
100 W Randolph Street
Chicago, IL 60601
(via hand delivery)

Charles F. Helsten
Nicola A. Nelson
Hinshaw & Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(via email to: NNelson@hinshawlaw.com and CHelsten@hinshawlaw.com, and U.S. Mail)

Michelle M. LaGrotta

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, Respondent.	)	

YORKVILLE'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION

NOW COMES, the Complainant, United City of Yorkville, by and through its attorneys, Gardiner Koch Weisberg & Wrona, and hereby responds to Respondent's Motion for Reconsideration. In response to the Respondent's Motion for Reconsideration, it states as follows:

I. STANDARD OF REVIEW

In ruling upon a motion for reconsideration, the Illinois Pollution Control Board (hereinafter referred to as "Board") will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. 34 Ill. Admin. Code § 101.902. The Board also has noted that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of the existing law." Citizens Against Regional Landfill v. county board of Whiteside, PCB 93-156 (March 11, 1993, citing Korogluyen v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

To prevail on its motion for reconsideration, Respondent Hamman Farms must establish one of the following to justify reconsideration of the Board's October 16, 2008 order: (1) newly

discovered evidence; (2) changes in the law; or (3) error in the court's previous application of the existing law. Here, Hamman Farms does not raise any argument as to newly discovered evidence or changes in the law. Because Hamman Farms' argument that the Board misapplied the law is groundless, Hamman Farms' Motion for Reconsideration must be denied.

II. THE BOARD CORRECTLY APPLIED THE LAW TO COUNT IV

Hamman Farm's Motion fails to identify in what way the Board misapplied the law or misinterpreted the law or otherwise applied the wrong standard. Instead, Hamman Farms mischaracterizes the basis of the Board's decision to dismiss Count III of the United City of Yorkville's Complaint in its attempt to argue that Count IV should also be dismissed. Ultimately, review of the October 16, 2008 order demonstrates that not only did the Board use the correct standard in evaluating Hamman Farm's Motion to Strike and/or Dismiss, the Board also correctly applied that standard.

Most importantly, the Board correctly describes and applies the standard for evaluating whether a Complaint's factual allegations are sufficient to withstand a Motion to Strike and/or Dismiss. On pages 14-15 of the Board's Opinion and Order of October 16, 2008, the Board outlines the law governing motions to strike or dismiss pleadings, giving particular emphasis to the law governing fact-pleading. Particularly, the Board considered the Complaint as a whole and took all well-pled allegations of the complaint as true and drew all reasonable inferences from them to determine that there were sufficient allegations to satisfy the pleadings requirements. The Board noted that Yorkville made allegations that Hamman Farms exceeded the agronomic rate of 20 tons per acre per year from approximately fifteen years before the Agency issued the May 1, 2008 determination. Additionally, in applying the law to the factual allegations, the Board correctly determined that these allegations were adequate for Count IV to

survive a motion to dismiss because they included the requisite dates, locations, extent, duration etc.

Hamman Farms' only attempt at explanation of its misapplication argument is that because Hamman Farms concluded that Count IV failed to meet specificity requirements, then the Board's finding that Count IV was sufficient must somehow reflect a misapplication of the relevant law. See page 5 ¶ 13 of the Respondent's Motion for Reconsideration. In other words, Hamman Farms bases its argument on the fact that Hamman Farms would have decided differently. However, as is well known in the appellate world, even though one would have decided differently, that does not result in the conclusion that the law was misapplied or the decision was erroneous. Abrahamson v. Illinois Dep't of Professional Regulation, 153 Ill. 2d 76, 88 (1992). Thus, Hamman Farms' argument is insufficient to warrant reconsideration of the Board's order because there is no misapplication of the law.

Finally, Hamman Farms' additional argument for reconsideration is fallacious. This argument can be summarized as the following: because Count III was dismissed and Count IV was presented in a similar manner to Count III, Count IV likewise must be deficient and also dismissed. Unfortunately, Hamman Farms incorrectly describes the basis for which Count III was dismissed. In contrast to Hamman Farms' assertion that Count III was dismissed for lack of specificity, the Board's decision focused on Yorkville's failure to allege facts demonstrating that "the odor resulted in unreasonable interference with the enjoyment of life and property." See page 21 of the October 16, 2008 Board Order, attached hereto as Exhibit A. The Board specifically found that Yorkville's statement was "little more than the legal conclusion." Id. Because Yorkville failed to include factual allegations that demonstrated "unreasonable interference," a necessary element to the air pollution claim, the Board held that "no set of facts

could be proven that would entitle Yorkville to prevail on the air pollution claim." See page 22 of the Board's Order. Unlike Count III, Count IV, which asserts a water pollution claim, does not include any similar legal conclusions. Moreover, Yorkville does not need to make a showing of "unreasonable interference" to establish a prima facie case of water pollution.[1] As a result, Hamman Farms' argument is erroneous, and the Motion for Reconsideration must be denied.

WHEREFORE, the United City of Yorkville respectfully requests the Board deny Respondent's Motion for Reconsideration and grant such other relief as the Board deems just and equitable.

Respectfully submitted,
UNITED CITY OF YORKVILLE

By: _____
One of Its Attorneys

Dated: December 1, 2008

Thomas G. Gardiner
Michelle M. LaGrotta
Gardiner Koch Weisberg & Wrona
53 W Jackson Blvd., Ste. 950
Chicago, IL 60604
(312) 362-0000
Law Firm ID: 29637

[1] In its Formal Complaint, Yorkville asserts violations of sections 12(a) and 12(d) of the Environmental Protection Act. To establish a violation of section 12(a), one must demonstrate that the polluter "cause[d] or threaten[ed] or allow[ed] the discharge of any contaminant into the environment in any State so as to cause or tend to cause water pollution in Illinois..." 415 ILCS 5/12(a). To establish a violation of 12(d), one must demonstrate that the polluter "deposit[ed] any contaminants upon the land in such place and manner as to create a water pollution hazard." 415 ILCS 5/12(d). Notably missing from the elements of a water pollution claim is any allegation of "unreasonable interference."