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 December 11, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent's Reply in Support of its Motion to Dismiss Counts I and II as Duplicative, a copy of which is attached hereto and hereby served upon you.

Dated: December 11, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/Charles F. Helsten
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS COUNTS I AND II AS DUPLICATIVE

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

Procedural History

On July 8, 2008, Hamman Farms filed a Motion to Strike and Dismiss in the instant case. The motion was fully briefed by the parties, with Hamman Farms filing a Reply on August 1, 2008. In its motion, Hamman Farms argued that Counts I and II of the complaint in this action were duplicative of the complaint simultaneously filed by Yorkville in PCB 08-095. On August 8, 2008, the Board dismissed Yorkville's other complaint (in PCB 08-095).

On September 17, 2008, after the motion to dismiss in this action (PCB 08-096) had been fully briefed, and while the parties were awaiting a ruling from the Board, the Attorney General filed an enforcement action against Hamman Farms in Kendall County Circuit Court which is entirely duplicative of this action. On October 16, 2008, the Board issued its ruling on the motion to dismiss in this action, granting in part and denying in part Hamman Farms' motion. Hamman Farms received a copy of the Board's Order on October 23, 2008. The Board's Order denied the request for dismissal of Counts I and II as duplicative of PCB 08-095, as that action had been

dismissed by that time.

Thereafter, on November 17, 2008, Respondent Hamman Farms filed a Motion to Dismiss Counts I and II of Yorkville's Complaint as duplicative of the Attorney General's action in Kendall County Circuit Court (which was filed on September 17, 2008) and alleges the same causes of action as those alleged in Counts I and II of this action. Hamman Farms attached a copy of the Attorney General's Complaint, docketed as 2008-CH-0811, to its November 17, 2008 Motion to Dismiss. On information and belief, the Board had not reviewed the Attorney General's complaint in case number 2008-CH-0811 (16th Judicial Circuit), prior to November 17, 2008.

Yorkville's Allegation that the Board has Already Found Counts I and II are Not Duplicative of the Attorney General's September 17, 2008 Complaint is Patently False

Yorkville's response to the pending Motion to Dismiss erroneously alleges that the Board held, in its October 16, 2008 Order, that Counts I and II were not duplicative of the Attorney General's Complaint in 2008-CH-0811. (Yorkville's Response at pp. 1-2). Inasmuch as the Board did not receive a copy of the Attorney General's Complaint until November 17, 2008, Yorkville misstates the facts. To support its assertion that the Board ruled on this question in its October 16, 2008 Order, Yorkville points to a footnote in the October 16, 2008 Order in which the Board took note that it had learned, from a pleading filed in PCB 08-095, that "a complaint" had been filed against Hamman Farms by the Attorney General. However, the fact that the Board noted "a complaint" had been filed by the Attorney General hardly equates with a finding by the Board that Counts I and II in this action are not duplicative of the Attorney General's action.

Yorkville appears to be unaware of the fact that in every case filed with the Board, before accepting a case and setting it for hearing, the Board must make a threshold determination as to

whether a complaint is duplicative or frivolous. *See* 35 Ill.Adm.Code 101.202. Here, in response to the July 8, 2008 motion, which was fully briefed before the Attorney General's complaint was ever filed, the Board found that as modified, the complaint was neither frivolous nor duplicative, based on matters in the record at that time, and was therefore suitable for hearing.

It is worth remembering, at this juncture, that in its July 8 2008 motion, Hamman Farms had urged that portions of Yorkville's Complaint were duplicative of the action Yorkville simultaneously filed in PCB 08-095. Obviously, Hamman Farms could not argue the duplicativeness of the Attorney General's complaint in July, inasmuch as the Attorney General's complaint was not filed until well after the July motion had been fully briefed and the parties were awaiting an order.[1] The Board ultimately held that the complaint in PCB 08-096 was not duplicative of PCB 08-095, and issued the necessary declaration that the Complaint, as modified, was neither duplicative nor frivolous. (Order at p. 26).

Yorkville's entire argument that the Board has already held that the complaint is not duplicative of the Attorney General's action therefore hinges on a footnote, in which the Board explained that it took notice, from a pleading filed in PCB 08-095, that "a complaint" had been filed by the Attorney General on September 17, 2008, and was currently pending. (Order at FN 11). The Board did not address the contents of the Attorney General's Complaint, and indeed there is no reason to believe that the Board had ever seen a copy of the Attorney General's complaint prior to November 17, 2008. Thus, it is entirely unremarkable that the Board did not address the question of whether this action is duplicative of the Attorney General's pending action. Instead, the Board simply held that based on the information present in the record at that

[1] The Board's October 16, 2008 Order memorializes Hamman Farms' argument regarding the duplicativeness of PCB 08-095 and PCB 08-096, as well as Yorkville's rejoinders. (See Order at pp. 7, 9, 11, 16).

time, it was accepting the case for hearing. (October 16, 2008 Order at p. 26) (emphasis added).

Yorkville decries the fact that Hamman Farms did not file an additional motion to dismiss, raising the Attorney General's September 17, 2008 complaint, while the parties were awaiting a ruling from the Board on the July 8, 2008 motion to strike and dismiss.(Yorkville's Response at FN 1). However, it was perfectly reasonable for Hamman Farms to await a ruling on the pending motion before bringing new and additional matters to the attention of the Board prior to its ruling. Had the Board found in Hamman Farms' favor on the July 8, 2008 motion, there would have been no reason for Hamman Farms to file a motion raising the matter of the Attorney General's action.

Yorkville's Argument that Hamman Farms' Motion is Untimely Relies Upon Impossibility

According to Yorkville, this motion is untimely because Hamman Farms was required to challenge Counts I and II as duplicative of the Attorney General's September 17, 2008 complaint months before that complaint was even filed. (Yorkville's Response at p. 2). Yorkville asserts that Hamman Farms would suffer no material prejudice by being required to file such a motion by July 18, 2008, nothwithstanding the fact that Hamman Farms did not know of the Attorney General's complaint until it was filed in September. This argument, which requires a party to perform an impossibility, is illogical at best.

Upon receiving a copy of the Board's ruling on the July motion, Hamman Farms acted promptly, filing the pending motion and attaching a copy of the Attorney General's complaint within approximately three weeks. It would have been a waste of attorney and Board resources for Hamman Farms to have filed an additional motion, initiating an additional round of briefing, while the Board was considering but had not yet ruled on the prior motion. Accordingly, Yorkville's argument that the Board must strike or deny Hamman Farms' motion based on the

Attorney General's September 17, 2008 complaint, because the motion was not filed by July 18, 2008 is baseless.

Citizen Suits Must Yield to Actions by the Attorney General

Yorkville seeks to dissect and distinguish *Village of DePue*, purporting thereby to avoid the underlying principle articulated by the Seventh Circuit Court of Appeals in that case, to wit, once the State has become involved in prosecuting an environmental action, local interests must yield because an allegedly polluted site is not solely a matter of local concern. *Village of DePue, Ill. v. Exxon Mobil Corp.*, 537 F.3d 775, 789 (7th Cir. 2008). Indeed, as Yorkville points out, the Act provides for citizen enforcement actions, but it also provides that the Board cannot hear actions that are duplicative of another pending action. 35 Ill.Adm.Code 101.202 (emphasis added).

The rule against hearing duplicative actions has a parallel in civil litigation in the courts. As the Illinois Supreme Court has explained, "[i]t is entirely clear that the pendency before different judges of separate suits involving identical parties and issues is incompatible with the orderly and efficient administration of justice." *People ex rel. Phillips Petroleum Co. v. Gitchoff*, 65 Ill.2d 249, 257, 357 N.E.2d 534, 538 (1976). The parties need not be strictly identical for suits to be duplicative, because an Attorney General action filed in the name of the People of the State of Illinois is brought on behalf of all of the people in the state, including those adversely affected by the defendant's alleged violations. *Bonovich v. Convenient Food Mart, Inc.*, 18 Ill.App.3d 884, 886, 310 N.E.2d 710, 711 (Ill.App.Ct. 1974); *see also Jackson v. Callan Pub., Inc.*, 356 Ill.App.3d 326, 338, 826 N.E.2d 413, 426 (Ill.App.Ct. 2005). Indeed, as long as the litigants' interests are the same or very similar, strict identity is not required. *Hapag-Lloyd (America), Inc. v. Home Insurance Co.*, 312 Ill.App.3d 1087, 1092, 729 N.E.2d 36, 40 (2000);

Kapoor v. Fujisawa Pharmaceutical Co., Ltd., 298 Ill.App.3d 780, 786, 699 N.E.2d 1095 (1998); *Doutt v. Ford Motor Co.*, 276 Ill.App.3d 785, 788, 659 N.E.2d 89, 92 (1995); *Schnitzer v. O'Connor*, 274 Ill.App.3d 314, 319, 653 N.E.2d 825, 828 (1995); *Katherine M. v. Ryder*, 254 Ill.App.3d 479, 487, 627 N.E.2d 42, 48 (1993); *Skipper Marine Electronics, Inc. v. Cybernet Marine Products*, 200 Ill.App.3d 692, 695-96, 558 N.E.2d 324, 326 (1990).

Yorkville appears unwilling to accept that only one of the two cases can go forward at a time. However, where the Attorney General has made the decision to bring to bear the full resources of the State in prosecuting the same cause(s) of action against Hamman Farms, it is the State whose case should proceed. *See Jackson v. Callan Pub., Inc.*, 356 Ill.App.3d 326, 339, 826 N.E.2d 413, 427 (Ill.App.Ct. 2005) (holding that where private plaintiffs' and the Attorney General's interests are aligned, plaintiffs' right to maintain an action is subordinate to that of the Attorney General).

Counts I and II are Duplicative of the Attorney General's Action

Yorkville argues that the cases are not identical because the Attorney General's action alleges violations occurring over a shorter period of time than does Yorkville's action. However, the length of time during which violations allegedly occurred would go only to the remedy, not the question of whether Hamman Farms violated the environmental laws cited by both the Attorney General and Yorkville. When determining whether two pending actions are duplicative of one another, the crucial inquiry is " 'whether the two actions arise out of the same transaction or occurrence [citation], not whether the legal theory, issues, burden of proof or relief sought materially differ between the two actions.' " *Combined Ins. Co. of America v. Certain Underwriters at Lloyd's London*. 356 Ill.App.3d 749, 753, 826 N.E.2d 1089, 1094 (Ill.App.Ct. 2005)(emphasis added) (quoting *Kapoor v. Fujisawa Pharmaceutical Co., Ltd.*, 298 Ill.App.3d

780, 786, 699 N.E.2d 1095 (Ill.App.Ct. 1998) and *Terracom Development Group, Inc. v. Village of Westhaven*, 209 Ill.App.3d 758, 762, 568 N.E.2d 376 (Ill.App.Ct. 1991)). Therefore, Yorkville's argument that its action is distinguishable because the alleged violations went on for a longer period of time is of no moment.

WHEREFORE: Respondent, Hamman Farms, respectfully requests that the Board grant its Motion to Dismiss Counts I and II as duplicative.

Dated: December 11, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

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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 December 11, 2008, she caused to be served a copy of the foregoing upon:

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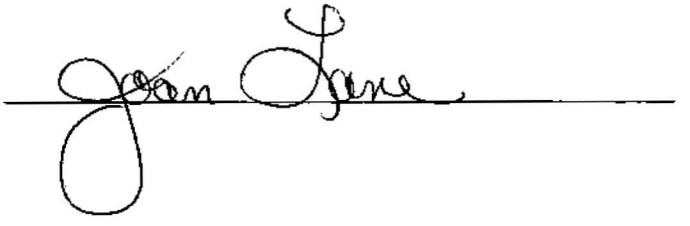

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