

ILLINOIS POLLUTION CONTROL BOARD
April 2, 2009

UNITED CITY OF YORKVILLE, a municipal)
corporation,)
)
Complainant,)
)
v.) PCB 08-96
) (Citizen's Enforcement – Land, Water)
HAMMAN FARMS,)
)
Respondent.)

ORDER OF THE BOARD (by T.E. Johnson):

This citizen's enforcement action concerns the application of landscape waste to farmland in Kendall County. The case is before the Board today on three motions. First, Hamman Farms (Hamman) filed a motion to reconsider a portion of the Board's October 16, 2008 opinion and order. Second, Hamman filed a motion to dismiss as "duplicative" counts I and II of the complaint filed by United City of Yorkville (Yorkville). Third, Yorkville filed a motion for leave to file an amended complaint, attaching the amended complaint.

For the reasons below, the Board denies all three motions. The Board declines to reconsider its decision denying Hamman's motion for dismissal of count IV ("Water Pollution Violations") of Yorkville's complaint. The Board finds neither count I ("Open Dumping Violations") nor count II ("Landscape Waste Violations") duplicative of a pending circuit court action. Finally, the Board denies Yorkville's motion for leave to file an amended complaint setting forth a modified count III ("Air Pollution Violations"). Yorkville is granted leave, however, to file an amended complaint in accordance with this order by May 4, 2009. Hamman may file an answer by July 6, 2009.

Below, the Board will provide the procedural history of this case before ruling on the motions.

PROCEDURAL HISTORY

On June 4, 2008, Yorkville filed a four-count complaint against Hamman (Comp.). Yorkville alleged that Hamman violated provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2006)) prohibiting land, air, and water pollution and unpermitted waste handling activities. On July 8, 2008, Hamman filed a motion to strike or dismiss most of Yorkville's complaint. The Board ruled on that motion in an October 16, 2008 opinion and order. Among other things, the Board dismissed without prejudice count III ("Air Pollution Violations") of Yorkville's complaint as insufficiently pled, but denied Hamman's motion to dismiss count II ("Landscape Waste Violations") and count IV ("Water Pollution Violations"). In addition, the Board granted Hamman's motion to strike with prejudice both paragraph 49 of count II (alleging

violations by the Illinois Environmental Protection Agency) and Yorkville's requests for attorney fees and costs. The Board also accepted for hearing Yorkville's complaint as modified by the Board's order.

On November 14, 2008, Hamman filed a motion for reconsideration (Mot. Recon.) of the Board's October 16, 2008 decision denying Hamman's motion to dismiss count IV ("Water Pollution Violations"). Yorkville filed a response in opposition on December 1, 2008 (Resp. Recon.). On December 11, 2008, Hamman filed a motion for leave to file a reply, attaching the reply (Reply Recon.). Hamman's motion for leave to file, which Yorkville did not oppose, is granted.

On November 17, 2008, Hamman filed a motion to dismiss as duplicative count I ("Open Dumping Violations") and count II ("Landscape Waste Violations") of Yorkville's complaint (Mot. Dism.). Yorkville filed a response in opposition on December 1, 2008 (Resp. Dism.). On December 11, 2008, Hamman filed a motion for leave to file a reply, attaching the reply (Reply Dism.). Hamman's motion for leave to file, which Yorkville did not oppose, is granted.

On December 1, 2008, Yorkville filed a motion for leave to file an amended complaint to cure the deficiencies of dismissed count III ("Air Pollution Violations") (Mot. Am. Comp.), attaching the amended complaint (Am. Comp.). Hamman filed a response in opposition on December 10, 2008 (Resp. Am. Comp.). On December 24, 2008, Yorkville filed a motion for leave to file a reply, attaching the reply (Reply Am. Comp.). Yorkville's motion for leave to file, which Hamman did not oppose, is granted.

HAMMAN'S MOTION TO RECONSIDER

Count III of the complaint ("Air Pollution Violations") was dismissed on October 16, 2008. Yorkville alleged in count III that Hamman violated Section 9(a) of the Act (415 ILCS 5/9(a) (2006)) through its application of landscape waste. Yorkville asserted that in applying the landscape waste, Hamman allowed the discharge of a contaminant, odor, into the environment so as to cause air pollution by unreasonably interfering with Yorkville's residents' use and enjoyment of life and property. The Board granted Hamman's motion to dismiss count III because the count as pled did not satisfy the requirements of the Act (415 ILCS 5/31(c), (d)(1) (2006)) or the Board's procedural rules (35 Ill. Adm. Code 103.204(c)(2)) for the contents of a complaint.

In its motion for reconsideration, Hamman argues that the reasons for the Board's October 16, 2008 dismissal of count III ("Air Pollution Violations") apply with equal force to Yorkville's count IV ("Water Pollution Violations"). Mot. Recon. at 4. According to Hamman, count IV, like count III, "proffers only legal conclusions which are unsupported by allegations of specific facts, and should have, like Count III, been dismissed for failure to meet the Board's pleading requirements." *Id.* at 2-3, referring to 35 Ill. Adm. Code 103.204(c)(2). Hamman asserts that the Board should therefore reconsider its denial of Hamman's motion to dismiss count IV as insufficiently pled. Mot. Recon. at 5. Yorkville responds that the Board correctly applied the law to count IV, adding that Yorkville "does not need to make a showing of

‘unreasonable interference’ to establish a prima facie case of water pollution.” Resp. Recon. at 2-4.

A motion to reconsider may be brought “to bring to the [Board’s] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board’s] previous application of existing law.” Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. In addition, a motion to reconsider may specify “facts in the record which were overlooked.” Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

As the Board stated in its October 16, 2008 order:

The complaint is not required to set out all of Yorkville’s evidence. *See Carriage Way West*, 88 Ill. 2d at 308, 430 N.E.2d at 1008-09; City of Wood River, PCB 98-43, slip op. at 2. Considering the entire complaint, the Board finds that Yorkville’s allegations satisfy the pleading requirements, including the requirement to advise Hamman so as to reasonably allow Hamman to defend itself against the alleged violations of Sections 12(a) and 12(d). *See College Hills*, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354; *see also Village of Mettawa*, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (“pleadings are not intended to create technical obstacles to reaching the merits of a case,” but rather “a flexible standard must be applied to the language of the pleadings with the aim of facilitating substantial justice between the parties”); 415 ILCS 5/31(c), (d)(1) (2006); 35 Ill. Adm. Code 103.204(c)(2). United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 25 (Oct. 16, 2008)

The Board is not persuaded by Hamman’s arguments for reconsideration. Hamman does not take into account the differences between the provisions of the Act allegedly violated or the differences in the groundwater pollution and air pollution counts as pled by Yorkville. Additionally, contrary to Hamman’s assertions (Mot. Recon. at 3; Reply Recon. at 2), the Board’s October 16, 2008 order did not state that Hamman’s motion to dismiss was deficient for failing to “dispute the facts pled by Yorkville” (Mot. Recon. at 3). What is left out of Hamman’s quotation of the Board’s order (Mot. Recon. at 3) is the Board’s citation to the specific paragraphs of Yorkville’s complaint that Hamman’s “argument fail[ed] to address” (Hamman Farms, PCB 08-96, slip op. at 23-24 (Oct. 16, 2008)). *See People ex rel. William J. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982) (“the whole complaint must be considered, rather than taking a myopic view of a disconnected part”).

Applying the standards for reconsideration articulated above, the Board denies Hamman’s motion to reconsider.

HAMMAN'S MOTION TO DISMISS COUNTS I AND II

Hamman moves to dismiss as “duplicative” counts I and II of Yorkville’s complaint. In count I (“Open Dumping Violations”), Yorkville alleges that Hamman violated Sections 21(a), 21(d)(1), 21(d)(2), 21(e), and 21(p)(1) of the Act (415 ILCS 5/21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1) (2006)) by applying landscape waste mixed with litter and general refuse to its farm fields and then allowing the litter and general refuse to remain. Comp. at 7-8. Yorkville maintains that Hamman has allowed open dumping, conducted waste-storage and waste-disposal operations without a permit and in violation of the Act, and allowed its farm to become a waste disposal site. *Id.* Count II (“Landscape Waste Violations”) alleges that Hamman violated Sections 21(a), 21(d)(1), 21(d)(2), 21(e), and 21(q) of the Act (415 ILCS 5/21(a), 21(d)(1), 21(d)(2), 21(e), 21(q) (2006)). Comp. at 12. Yorkville asserts that since Hamman began applying landscape waste to its farm fields, Hamman has applied landscape waste at rates greater than the agronomic rate of 20 tons per acre per year. According to count II, Hamman has allowed open dumping, conducted waste-storage and waste-disposal operations without a permit and in violation of the Act, allowed its farm to become a waste disposal site, and failed to obtain a landscape waste composting operation permit or qualify for an exemption from permitting under Section 21(q)(2) or (q)(3). *Id.*

In its pending motion to dismiss, Hamman argues that counts I and II of Yorkville’s complaint are duplicative of a complaint filed against Hamman by the Illinois Attorney General on behalf of the People of the State of Illinois in the Circuit Court of the Sixteenth Judicial Circuit, Kendall County, Case No. 2008 CH 0811. Mot. Dism. at 1-2. The People’s complaint, which was filed with the circuit court on September 17, 2008, became a part of the record before the Board for the first time as an attachment to Hamman’s instant motion for dismissal. According to Hamman, “[t]he same operative facts are pled and relied upon by Yorkville and by the Attorney General” and “the very same statutory provisions are alleged to have been violated in Yorkville’s Complaint and in the Attorney General’s Complaint.” *Id.* at 2. Hamman maintains that Yorkville’s citizen enforcement action should “yield to the action brought by the Attorney General concerning the same alleged violations.” *Id.* at 3.

Yorkville asserts that Hamman’s motion to dismiss is untimely under Section 101.506 of the Board’s procedural rules (35 Ill. Adm. Code 101.506), having been filed more than 30 days after Hamman was served with Yorkville’s complaint. Resp. Dism. at 2. Yorkville maintains that the Board must therefore strike or deny Hamman’s motion to dismiss because the motion was late. *Id.* at 3. As to the merits of Hamman’s motion, Yorkville concedes that “some of the factual allegations” of the two complaints “are similar,” but argues that Yorkville’s complaint is not duplicative of the People’s complaint:

Yorkville’s Complaint includes allegations that Hamman Farms violated the Illinois Environmental Protection Act since approximately 1993. On the other hand, the Attorney General’s Complaint contains allegations that Hamman Farms violated the Act only since September 21, 2007. With Yorkville covering almost fourteen additional years of alleged violations compared to the Attorney General’s one year, the two complaints can not be considered substantially similar. *Id.* at 4-5.

Hamman replies that Yorkville relies upon “impossibility” by asserting that Hamman should have argued about the People’s complaint “months before that complaint was even filed.” Reply Dism. at 4. Hamman filed its current motion to dismiss within roughly three weeks of receiving a copy of the Board’s October 16, 2008 decision ruling upon Hamman’s first motion to dismiss. *Id.* As for Yorkville’s argument about its complaint alleging violations over a longer period of time than does the People’s action, Hamman argues that the length of time during which violations allegedly occurred “would go only to the remedy.” *Id.* at 6. Further, according to Hamman, the “crucial inquiry” is whether the two complaints arise out of the same occurrence, not whether the legal theory, issues, burden of proof, or relief sought materially differ. *Id.*, citing Combined Ins. Co. of America v. Certain Underwriters at Lloyd’s London, 356 Ill. App. 3d 749, 753, 826 N.E.2d 1089, 1094 (1st Dist. 2005) (interpreting meaning of “same cause” within Section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3))).

The Board will not strike or deny Hamman’s motion to dismiss as untimely. Yorkville’s complaint was filed with the Board on June 4, 2008, while the People’s complaint was filed with the Kendall County Circuit Court approximately three and one-half months later, on September 17, 2008. Hamman correctly points out that the People’s complaint was filed *after* Hamman timely filed its first motion to dismiss portions of Yorkville’s complaint and *before* the Board ruled on that motion. Reply Dism. at 3. Under these circumstances, and to avoid any potential material prejudice, the Board will consider Hamman’s pending motion to dismiss counts I and II of Yorkville’s complaint based on the People’s circuit court complaint.

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004). “Unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1) (2006); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is “duplicative” if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202.

For the reasons below, the Board finds that counts I and II of Yorkville’s complaint before the Board are not duplicative of the People’s circuit court complaint. In deciding whether a citizen complaint is duplicative of a court action, the Board has looked to whether the parties before the Board are also before the court. *See Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises*, PCB 92-80, slip op. at 2 (July 30, 1992). For example, in Indian Creek Development v. Burlington Northern Santa Fe Railway Co., PCB 07-44 (Mar. 15, 2007), the Board found that a citizen complaint filed with Board against a railway company was not duplicative where, among other things, the citizen complainant was not a party to the circuit court action brought by the People against the same railway company. *See Indian Creek Development*, PCB 07-44, slip op. at 6. Here, the parties to the respective proceedings differ. Yorkville is not a party to the circuit court action.

The Board has also considered whether the two “complaints are based on different theories (*e.g.*, nuisance vs. violation of the Act).” Robert Smith v. Heritage Tool & Die Manufacturing, Inc., PCB 99-145, slip op. at 2 (June 3, 1999); *see also Ostro*, PCB 92-80, slip

op. at 2 (federal court action “based on statutes and legal theories other than the Act”). In the instant case, it is not disputed that alleged violations of the Act are at issue in both complaints or that the provisions of the Act ultimately alleged to have been violated are the same. However, Yorkville alleges that Hamman’s application of landscape waste at greater than 20 tons per acre per year violated not only Section 21(q) of the Act, as the People allege, but also Sections 21(a), (d)(1), (d)(2), (e), and (p)(1) of the Act. *See Indian Creek Development*, PCB 07-44, slip op. at 6 (fact that the citizen complaint before the Board alleged a violation of an additional provision of the Act militated toward finding the complaint not duplicative of circuit court action). Further, even where both complaints allege violations of Sections 21(d)(1) and (d)(2) for waste disposal without a permit, Yorkville alleges that Hamman also violated the provisions by conducting waste storage without a permit, which the People do not claim.

Additionally, when determining whether a citizen complaint is duplicative of a complaint filed in court, the Board has taken into account whether the two actions involved the “same time frame.” *Ostro*, PCB 92-80, slip op. at 2; *see also Dorothy L. Hoffman v. City of Columbia*, PCB 94-146, slip op. at 3 (June 2, 1994) (citizen complaint alleging noise pollution occurred in 1993 and 1994 is not duplicative of circuit court complaint alleging noise pollution occurred in 1991 and 1992). While there is some temporal overlap here, the dates and time periods of alleged violations are not the same under the respective complaints of Yorkville and the People. For example, regarding claimed violations resulting from Hamman allegedly applying landscape waste at greater than the statutorily-designated agronomic rate, Yorkville specifically pleads a longer period of violations, ranging back to 1993. The People’s allegations identify two dates of violation in the fall of 2007. With differing timeframes of alleged violations, the underlying facts at issue in the two actions would vary accordingly.

Finally, in deciding whether a citizen complaint is duplicative, the Board has looked to whether the relief requested in Board and court proceedings differed. *See Heritage Tool & Die*, PCB 99-145, slip op. at 2-3. Both Yorkville and the People seek the imposition of civil penalties under the Act. However, the additional violations alleged and the longer period of alleged violations affects the relief requested, as both the People and Yorkville seek civil penalties of \$50,000 for each violation and \$10,000 for each day of violation. *See* 415 ILCS 5/42(a) (2006). The total amount of civil penalties requested in the two proceedings therefore necessarily differs.

Considering all of the factors articulated above, the Board finds that Yorkville’s counts I and II are not identical or substantially similar to the complaint brought by the People in circuit court. The Board accordingly denies Hamman’s motion to dismiss counts I and II of Yorkville’s complaint as duplicative.

YORKVILLE’S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

As discussed above, the Board dismissed count III of the complaint (“Air Pollution Violations”) on October 16, 2008. In granting Hamman’s motion to dismiss count III, however, the Board did so without prejudice, as the Board could not conclude that there was clearly no set of facts that could be proven that would entitle Yorkville to prevail on the air pollution claim. With its pending motion for leave to file an amended complaint, Yorkville seeks to remedy the pleading deficiency of count III. Mot. Am. Comp. at 2.

The Board's October 16, 2008 opinion discussed count III's shortcomings:

The Board finds that Yorkville has stated little more than the legal conclusion that the odor has resulted in unreasonable interference with the enjoyment of life and property. *See Village of Mettawa*, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (“legal conclusions unsupported by allegations of specific facts are insufficient”). “[P]ure conclusions [], even in administrative proceedings, are insufficient.” *City of Des Plaines v. PCB*, 60 Ill. App. 3d 995, 1000, 377 N.E.2d 114, 119 (1st Dist. 1978).

A complainant alleging unreasonable interference is not required to plead facts on each of the Section 33(c) factors, nor set out all of its evidence. *See Kankakee Federation of Teachers*, 46 Ill. 2d at 446-47 (1970) (“only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts”); *Grist Mill Confections*, PCB 97-174, slip op. at 5 (“complainant is not required to present facts in the complaint concerning Section 33(c) of the Act in order to file a sufficient pleading but instead may present facts at hearing.”). However, absent the ultimate facts on the dates or frequency and duration of the alleged odor emissions and the nature and extent of the allegedly resulting interference, Yorkville's complaint does not meet the pleading requirements, including the requirement to advise Hamman so as to reasonably allow Hamman to prepare a defense. *See Lloyd A. Fry Roofing*, 20 Ill. App. 3d at 305, 314 N.E.2d at 354; *Grist Mill Confections*, PCB 97-174, slip op. at 4; 415 ILCS 5/31(c), (d)(1) (2006); 35 Ill. Adm. Code 103.204(c). Construing the complaint, however liberally, cannot generate those missing facts. *See Condell Memorial Hospital*, 119 Ill. 2d at 510, 520 N.E.2d at 43.

Yorkville's amended complaint would add the following paragraph of allegations, which Yorkville maintains “cures the defects in the Original Complaint by providing facts describing the effect of the odor on the residents of Yorkville” (Reply Am. Comp. at 1):

Specifically, the odor caused by Hamman Farms has substantially interfered with the Yorkville residents' rights to public health and comfort and to the quiet use and enjoyment of their land, in some of the following ways:

- a. It forces Yorkville residents to remain indoors;
- b. It prevents Yorkville residents from opening windows to cool their homes and causes them to use air conditioning instead;
- c. It precludes Yorkville residents from entertaining guests outdoors;
- d. It precludes Yorkville residents from using the outdoor portions of their property, including decks attached to their homes;
- e. It prevents Yorkville children from playing outdoors; and
- f. It occasionally causes nausea in the people who smell the odor (Am. Comp. at 14, ¶59).

Hamman opposes Yorkville's motion for leave to file an amended complaint. Hamman argues that Yorkville's amended count III fails to address all of the deficiencies identified by the Board. Resp. Am. Comp. at 3-4. According to Hamman:

Yorkville simply alleges that unidentified people, on unspecified dates over a fifteen year time span, on an unspecified number of occasions, for an unspecified length of time, chose to alter their behavior due to the alleged odor of yard waste in the area. *Id.* at 4.

The Board finds that Yorkville's proposed amendment to the complaint pleads the nature of the alleged interferences with residents, correcting one of the deficiencies found by the Board on October 16, 2008. However, Yorkville still identifies neither the residents allegedly interfered with nor the locations at which the interferences allegedly took place. Accordingly, the Board finds that Yorkville has not pled the extent of the consequences of the alleged emissions so as to reasonably allow Hamman to prepare a defense. *See* 35 Ill. Adm. Code 103.204(c)(2). Likewise, Yorkville's amendatory language still includes no allegations on the dates or frequency and duration of the alleged disruptions over the 15-year span. *Id.* Absent this information, Yorkville's amendment would not cure all of the deficiencies identified in the Board's October 16, 2008 order. *See* 35 Ill. Adm. Code 103.206(e)(2). The Board therefore denies Yorkville's motion for leave to file the amended complaint. *See Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 355-56, 781 N.E.2d 1072, 1080 (2002) (one factor to consider in deciding whether to grant leave to amend a pleading is whether the proposed amendment would cure a defect in the pleading).

The Board has already accepted for hearing Yorkville's original complaint, as modified by the Board's October 16, 2008 order. Hamman Farms, PCB 08-96, slip op. at 26 (Oct. 16, 2008). In the interest of moving this case forward expeditiously, the Board grants Yorkville leave to file an amended complaint to remedy, pursuant to today's order, the air pollution count. Any such amended complaint must be filed no later than May 4, 2009. If an amended complaint is timely filed, the Board will issue an order determining whether to also accept for hearing the modified air pollution count.

Under the Board's procedural rules, a respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). Hamman's two motions to dismiss have stayed the 60-day periods for filing an answer. *See* 35 Ill. Adm. Code 103.204(e); Hamman Farms, PCB 08-96, slip op. at 28 (Oct. 16, 2008). For administrative economy, the Board now makes any answer from Hamman (whether to Yorkville's complaint as modified by the October 16, 2008 order, or to any amended complaint permitted by today's order) due by July 6, 2008.

CONCLUSION

The Board denies Hamman's motion to reconsider the Board's October 16, 2008 decision denying Hamman's motion to dismiss count IV ("Water Pollution Violations") of Yorkville's complaint. The Board also denies Hamman's motion to dismiss as "duplicative" count I ("Open Dumping Violations") and count II ("Landscape Waste violations") of Yorkville's complaint. Additionally, the Board denies Yorkville's motion for leave to file an amended complaint because Yorkville's modified pleading fails to remedy all of the deficiencies in dismissed count III ("Air Pollution Violations") of the original complaint. The Board grants Yorkville leave to file an amended complaint by May 4, 2009, that cures the air pollution count deficiencies identified in today's order. Any answer from Hamman is due by July 6, 2009.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 2, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board