ILLINOIS POLLUTION CONTROL BOARD
June 18, 2009

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

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

Today the Board finds that United City of Yorkville's amended complaint is neither duplicative nor frivolous and accepts the amended complaint for hearing. In this order, the Board first provides the procedural history of the case. The Board then addresses the amended complaint, after which the Board discusses hearing and gives Hamman Farms until July 9, 2009, to file an answer to the amended complaint.

PROCEDURAL HISTORY

On June 4, 2008, United City of Yorkville (Yorkville) filed a four-count citizen's enforcement complaint against Hamman Farms (Hamman) concerning Hamman's application of landscape waste to Hamman's farmland in Kendall County. 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 October 16, 2008, the Board ruled on Hamman's July 8, 2008 motion to strike or dismiss most of Yorkville's complaint. Specifically, the Board dismissed without prejudice count III ("Air Pollution Violations") of Yorkville's complaint as insufficiently pled, but denied Hamman's motion to dismiss counts II ("Landscape Waste Violations") and 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 April 2, 2009, the Board denied Hamman's November 14, 2008 motion to reconsider the Board's October 16, 2008 decision denying Hamman's motion for dismissal of count IV of Yorkville's complaint. The Board also denied Hamman's November 12, 2008 motion to dismiss counts I ("Open Dumping Violations") and II as duplicative. In addition, the Board denied Yorkville's December 1, 2008 motion for leave to file an amended complaint setting forth a modified count III, finding that Yorkville's proposed amendment would not cure all of the deficiencies identified in the Board's October 16, 2008 order. However, the Board granted Yorkville leave to file an amended complaint by May 4, 2009, to remedy count III in accordance

with the Board's order. On May 7, 2009, Yorkville filed an amended complaint. Although Yorkville's amended complaint was filed three days late and not accompanied by a motion for leave to file *instanter*, the Board accepts the filing in the interest of administrative economy and as no material prejudice to Hamman will result.

AMENDED COMPLAINT

Yorkville's four-count amended complaint alleges that Hamman violated Sections 9(a), 12(a), 12(d), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), and 21(q) of the Act (415 ILCS 5/9(a), 12(a), 12(d), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(q) (2006)). Yorkville further alleges that Hamman violated these provisions by (1) applying landscape waste mixed with litter and general refuse to Hamman's farm fields and then allowing the litter and general refuse to remain; (2) allowing open dumping, conducting waste-storage and waste-disposal operations without a permit, allowing Hamman's farm to become a waste disposal site without a permit, and failing to obtain a landscape waste composting operation permit or qualify for an exemption from permitting; (3) allowing the discharge of odor into the environment so as to cause air pollution by unreasonably interfering with Yorkville residents' use and enjoyment of life and property; and (4) allowing the discharge of a contaminant into the environment so as to cause or tend to cause water pollution, and the deposit of a contaminant so as to create a water pollution hazard. For each of the four counts of the complaint, Yorkville asks the Board to order Hamman to cease and desist from further violations and to pay a civil penalty of $50,000 for each violation and an additional civil penalty of $10,000 for each day during which the violation continued.

Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2006)) allows any person to file a complaint with the Board. Section 31(d)(1) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; *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. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Hamman has filed no motion responsive to the amended complaint. No evidence before the Board indicates that Yorkville's amended complaint is duplicative or frivolous.

HEARING AND ANSWER

The Board accepts the amended complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.212(a). The Board's April 2, 2009 order made any answer from Hamman to any amended complaint due by July 6, 2009. Because the amended complaint was filed three days late, the Board now makes any answer to the amended complaint due by July 9, 2009. A respondent's failure to timely file an answer to a complaint may have severe consequences. Generally, if Hamman fails to timely file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the amended complaint, the Board will consider Hamman to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2006). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary of unreasonable financial hardship."

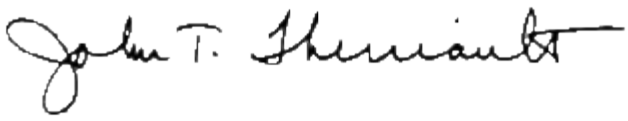
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider:

(1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 18, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board