

3. On March 10, 2011, the State and Hamman Farms entered into a Consent Order in the Kendall County case, approved by the court, which states, "It is the intent of the parties to this Consent Order that it be a final judgment on the merits of this matter." (See Exhibit C attached to Memorandum). (Emphasis added).

4. Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies. *People v. Progressive Land Developers, Inc.*, 151 Ill.2d 285, 294, 602 N.E.2d 820 (Ill. S.Ct. 1992). That judgment is an absolute bar to subsequent actions involving the same claims or demands by the same parties or their privies. *Id.*

5. Three elements must be satisfied when arguing res judicata: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there is identity of causes of action; and (3) there is identity of parties or their privies. *Citizens Opposing Pollution v. Exxon Mobil Coal U.S.A.*, 404 Ill.App.3d 543, 555, 936 N.E.2d 181 (5th Dist. 2010).

6. As to a final judgment being rendered on the merits by a court of competent jurisdiction, the Consent Order itself (see Exhibit C to Memorandum), signed by the judge in the Kendall County case, establishes that the Order is, and was intended to be, a final judgment on the merits of the matter.

7. The second element, identity of causes of action, is defined by the facts which give the plaintiff a right to relief. *Progressive Land Developers*, 151 Ill.2d at 295. "If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and res judicata bars the latter action." *Id.* The question to be answered is whether there is a single group of operative facts common to both cases. *Id.*

8. Here, a single group of operative facts is common to both cases. The allegations in the State's First Amended Complaint that supported the open dumping and landscape waste violations in the Kendall County case are, again, virtually identical in every way to the City's allegations of the same violations in its Amended Complaint in the PCB matter. (Compare Exhibits A and B, attached to the Memorandum).

9. In addition, if the first suit involved the same cause of action, the judgment in the former suit is conclusive not only as to all questions actually decided but as to all questions which might properly have been litigated and determined in that action. *People v. Progressive Land Developers, Inc.*, 151 Ill.2d at 294.

10. Counts III (Air Pollution Violations) and IV (Water Pollution Violations) are premised upon the allegations of open dumping and landscape waste violations.

11. Specifically, the City alleges in Count III that an odor emanated from Hamman Farms as a result of the application of landscape waste, thereby causing air pollution. Such allegation is directly related to the allegations that Hamman Farms allowed garbage to be disposed of and remain on its fields (Count I, ¶¶ 34-41) and that Hamman Farms applied landscape waste at rates greater than the agronomic rate (Count II, ¶¶ 48-52).

12. Similarly, the City's allegation that Hamman Farms' application of landscape waste constituted water pollution (Count IV) is premised upon the allegations of open dumping and landscape waste violations.

13. Moreover, the Consent Order entered into between the State and Hamman Farms specifically encompasses potential odors and water pollution arising from the application of landscape waste. (See Exhibit C attached to the Memorandum).

14. Counts III and IV “would have been properly litigated and determined” in the Kendall County case had they been raised, and in fact were encompassed within the Consent Order entered into between the State and Hamman Farms; thus, res judicata applies equally to Counts III and IV as it does to Counts I and II.

15. Finally, the State and the City of Yorkville are in privity.

16. Privity is said to exist between parties who adequately represent the same legal interests. *Atherton v. Connecticut General Life Insurance Company*, 2011 WL 3715003 (1st Dist., August 22, 2011); *Progressive Land Developers*, 151 Ill.2d at 296. It is the identity of interest that controls in determining privity, not the nominal identity of the parties. *Id.*

17. The Illinois Attorney General adequately represented the same legal interests that the City of Yorkville is seeking to represent – namely the public’s interest in maintaining environmental standards and seeing that the environmental laws are followed. In fact, the State and the City of Yorkville worked in tandem in bringing their respective enforcement actions.

18. All three elements of the doctrine of res judicata are squarely met; thus, the City of Yorkville is precluded from obtaining judgment on its claims.

II. FURTHER ACTION WITH RESPECT TO THE CITY’S ALLEGATIONS WOULD BE CONTRARY TO THE LEGISLATIVE INTENT OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT.

19. Further, suit by the City would only be appropriate had the State failed to take any action. As set forth herein, however, the State of Illinois and Hamman Farms entered into a Consent Order in the Kendall County case, which Order was approved by the court. Pursuant to this Consent Order, settlement was reached concerning all alleged violations and requirements regarding future compliance.

20. Permitting suit by the City under such circumstances is contrary to the intent of the Illinois Environmental Protection Act's two-tiered enforcement structure, as it is duplicative of the First Amended Complaint filed by the State of Illinois, which has since been resolved by the parties.

WHEREFORE, the Respondent, HAMMAN FARMS LLC, respectfully requests that the Pollution Control Board enter an Order granting summary judgment in its favor, and for such further relief as the Board deems necessary and proper.

Dated: December 6, 2011

Respectfully submitted,

On behalf of HAMMAN FARMS LLC

/s/ Charles F. Helsten

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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 6, 2011, she caused to be served a copy of *Respondent Hamman Farms' Motion for Summary Judgment* upon the following:

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