

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAR 27 2012

STATE OF ILLINOIS
Pollution Control Board

UNITED CITY OF YORKVILLE,)
A MUNICIPAL CORPORATION,)
)
Complainant,)
)
v.)
)
HAMMAN FARMS,)
)
Respondents.)

PCB No. 08-96
(Enforcement- Land, Air, Water)

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NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on March 27, 2012, we caused to be filed with the Clerk of the Illinois Pollution Control Board, **Complainant's Motion for Leave to File Sur-Reply in Opposition to Hamman Farms' Motion for Summary Judgment**, a copy of which is attached hereto and hereby served upon you.

Dated: March 27, 2012

Respectfully submitted,

UNITED CITY OF YORKVILLE



One of Its Attorneys

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH WESIBERG & WRONA
53 W. Jackson Blvd., Suite 950
Chicago, IL 60604
312-362-0000
Atty ID: 29637

THIS FILING IS SUBMITTED ON RECYCLED PAPER

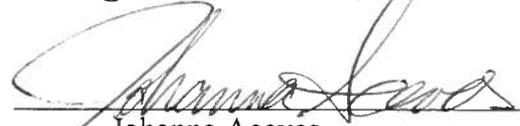
CERTIFICATE OF SERVICE

I, Johanna Aceves, the undersigned, certify that on March 27, 2012, I have served the attached **Motion for Leave to File Sur Reply in Opposition to Hamman Farms' Motion for Summary Judgment**, 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. 11-500
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)


Johanna Aceves

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COMPLAINANT'S MOTION FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO HAMMAN FARMS' MOTION FOR SUMMARY JUDGMENT

NOW COMES the Complainant, UNITED CITY OF YORKVILLE, by and through its attorneys, GARDINER KOCH WEISBERG & WRONA, pursuant to 35 Ill. Adm. Code 101.500(e), and hereby requests leave to file Sur-Reply in Opposition to Hamman Farms' Motion for Summary Judgment, and in support thereof, states as follows:

1. On December 6, 2011, Respondent HAMMAN FARMS filed its Motion for Summary Judgment and Memorandum in Support of Its Motion for Summary Judgment.
2. On January 19, 2012, Complainant, UNITED CITY OF YORKVILLE filed its Response to Hamman Farms' Motion for Summary Judgment.
3. On March 12, 2012, Respondent HAMMAN FARMS filed its Reply In Support of Motion for Summary Judgment, which misrepresents *inter alia* law regarding the State's interest, public policy, and case law.
4. In the absence of an opportunity to file a Sur-Reply to Hamman's Reply In Support of Hamman Farms' Motion for Summary Judgment, United City of Yorkville will be materially prejudiced.

5. On March 13, 2012, Respondent HAMMAN FARMS served its Reply on Complainant. A copy of the email providing service is attached hereto as Exhibit A.
6. Yorkville has prepared a Sur-Reply, which addresses the misrepresentations of Hamman Farms' Reply, and by this Motion seeks leave to file its Sur-Reply with the Board to avoid material prejudice. A copy of the proposed Sur-Reply is attached hereto as Exhibit B.

WHEREFORE, Complainant United City of Yorkville respectfully requests that the Board grant leave to file its Sur-Reply in Objection to Hamman Farms' Motion for Summary Judgment, a copy of which is attached hereto.

Dated: March 27, 2012

Respectfully submitted,

UNITED CITY OF YORKVILLE



One of Its Attorneys

Thomas G. Gardiner
Michelle M. LaGrotta
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312-362-0000
Atty ID: 29637

Michelle Lagrotta

From: jlane@hinshawlaw.com
Sent: Tuesday, March 13, 2012 9:11 AM
To: Thomas Gardiner; Michelle Lagrotta
Subject: Hamman Farms PCB 08-96
Attachments: Document.pdf

Please see attached hereto Respondent Hamman Farms' Reply in Support of Motion for Summary Judgment which was uploaded to the PCB site yesterday afternoon.

Joan Lane
Legal Assistant to Charles Helsten,
Sherry Harlan and Yashekia Simpkins
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Hinshaw & Culbertson LLP is an Illinois registered limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).

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Complainant,)	
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v.)	PCB No. 08-96
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COMPLAINANT’S SUR-REPLY IN OPPOSITION TO HAMMAN FARMS’ MOTION FOR SUMMARY JUDGMENT

NOW COMES, the Complainant, UNITED CITY OF YORKVILLE, by and through its attorneys, Gardiner Koch Weisberg & Wrona, and for its Sur-Reply in Opposition to the Motion for Summary Judgment, it states as follows:

I. HAMMAN FARMS’ PRIVACY ARGUMENT IS MISLEADING.

Respondent Hamman Farms incorrectly argues that “allowing municipalities and/or agencies individually to enforce the Environmental Act before the Board –as Yorkville seeks to do in this case—would violate both the case law and the public policy of the State of Illinois.” Hamman Farms Reply in Support of Motion for Summary Judgment, page 7 ¶ 11. This argument fails to note that the Environmental Protection Act allows for the filing of enforcement actions by citizens, which includes municipalities. See 415 ILCS 5/31(d) and 415 ILCS 5/3.315. Thus, the pursuit of this action by Yorkville is in conformity with the law and public policy, which specifically authorizes the filing of enforcement actions by persons, other than the Illinois Attorney General. 415 ILCS 5/31(d). Notably, Hamman Farms also fails to cite the entirety of Article XI of the Illinois State Constitution, which provides:



“SECTION 1. PUBLIC POLICY - LEGISLATIVE RESPONSIBILITY

The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.

SECTION 2. RIGHTS OF INDIVIDUALS

Each person has the right to a healthful environment. **Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”** Ill. Const. art. XI, §§ 1-2 (emphasis added).

The Constitution of the State of Illinois even recognizes the rights of individuals to enforce their right to a healthful environment.

Furthermore, Hamman Farms’ argument that the Illinois Attorney General is the only officer entitled to represent the state’s interests in litigation before the Pollution Control Board is misleading. Hamman Farms attempts to argue that only the Illinois Attorney General can bring this action on the ostensible basis that the state is the real party in interest. See Hamman Farms Reply, page 7 ¶10. However, the cases, on which Hamman Farms relies, are distinguishable. First, County of Cook ex rel. Rifkin v. Bear Stearns & Co., Inc., citing Fuchs v. Bidwill, 65 Ill. 2d 503 (1976) involves the evaluation of the plaintiffs’ standing as taxpayers. 215 Ill. 2d 466 (2005). Both Rifkin and Fuchs analyzed the taxpayers’ standing in seeking the recovery of allegedly misappropriated or wrongfully retained public funds and/or property. Rifkin additionally analyzed Lyons v. Ryans, 201 Ill. 2d 529 (2002), which likewise involved a taxpayer derivative action. Rifkin, 215 Ill. 2d 466. Lyons determined that because only the state would be entitled to the benefits of a successful action, which was the return of misappropriated public funds, the state was the real party in interest. 201 Ill. 2d at 532 & 535. These cases

determined that the state was the real party in interest because only the state would be entitled to the benefits of a successful lawsuit, namely, the recovery of public funds and/or property. Here, the state is not the only party that would be entitled to the benefits of a successful action; rather, the citizens of Yorkville would receive the benefits from successful resolution of this action. Specifically, they would be able to enjoy their property without interference resulting from Hamman Farms' operation (e.g. odor and litter). Thus, Hamman Farms' reliance on the above-referenced cases is misplaced.

Finally, as stated in its Response to the Motion for Summary Judgment, the State and Yorkville do not have identical interests, and thus, they are not in privity. Therefore, the Board must deny the Motion for Summary Judgment.

II. THE CONSENT ORDER ADDS NO NEW FACTUAL ALLEGATIONS FOR THE EVALUATION OF DUPLICITY.

Hamman Farms' argues that the Consent Order somehow now shows that the action by the State of Illinois and this pending action are duplicative. Yet, the Consent Order adds no new factual allegations to make the determination of duplicity. See Ex. 3 of Yorkville's Response to Motion for Summary Judgment, pp. 1-2. Furthermore, the Board in its Order of April 2, 2009 evaluated whether the relief requested was identical and determined that the relief was not duplicative. See Ex. 4 of Yorkville's Response to Motion for Summary Judgment, p. 6. Thus, the Consent Order adds no new allegations, and Yorkville maintains that Hamman Farms should be estopped from raising this argument again. In the alternative, Yorkville adopts and incorporates its argument from its Response to the Motion to Dismiss Counts I and II as Duplicative, which was filed on or about December 1, 2008. These actions are not duplicative, and the Board must deny Hamman Farms' Motion for Summary Judgment.

WHEREFORE, the United City of Yorkville respectfully requests the Board deny Hamman Farms' Motion for Summary Judgment, and grant such other relief as the Board deems just and equitable.

Dated: March 27, 2012

Respectfully submitted,

On behalf of UNITED CITY OF YORKVILLE


One of Its Attorneys

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