

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A)
MUNICIPAL CORPORATION,)
Petitioner,)
v.)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY, and)
HAMMAN FARMS,)
Respondents:)

PCB No. 08-95
Appeal of Agency Decision

RECEIVED
CLERK'S OFFICE
JUL 21 2008
STATE OF ILLINOIS
Pollution Control Board

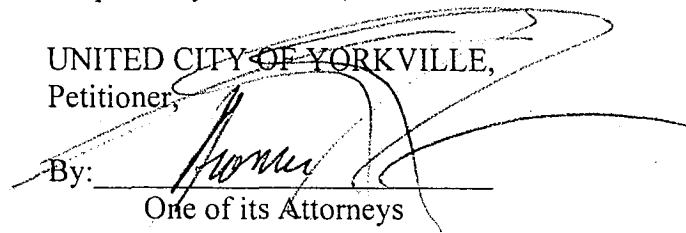
NOTICE OF FILING

TO: SEE PERSONS ON ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of Clerk of the Illinois
Pollution Control Board, an original and nine copies each of PETITIONER'S RESPONSE TO
HAMMAN'S MOTION TO DISMISS, copies of which are herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE,
Petitioner,

By: 
One of its Attorneys

Dated: July 21, 2008

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH & WEISBERG
53 W Jackson Blvd., Ste. 950
Chicago, IL 60604
(312) 362-0000
Atty ID: 29637

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE


I, Michelle M. LaGrotta, the undersigned certify that on July 21, 2008, I have served the attached PETITIONER'S RESPONSE TO HAMMAN'S MOTION TO DISMISS, 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. 22-500
100 W Randolph Street
Chicago, IL 60601
(via hand delivery)

Michelle M. Ryan
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(via U.S. Mail)

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 U.S. Mail)


Michelle M. LaGrotta

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE,)
A municipal corporation,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY, and)
HAMMAN FARMS,)
)
Respondents.)

PCB NO. 08-95

Permit Appeal

RECEIVED
CLERK'S OFFICE
JUL 21 2008
STATE OF ILLINOIS
Pollution Control Board

PETITIONER'S RESPONSE TO HAMMAN'S MOTION TO DISMISS

NOW COMES, Petitioner, United City of Yorkville, by and through its attorneys, Gardiner Koch & Weisberg, and in response to Hamman Farm's Motion to Dismiss, states as follows:

I. HAMMAN'S MOTION MUST BE DENIED BECAUSE THE BOARD HAS AUTHORITY OVER LANDSCAPE WASTE

Hamman Farms' argument that the Illinois Environmental Protection Agency's ("Agency") decision of May 1, 2008 does not involve a subject that the Illinois Pollution Control Board ("Board") is authorized to regulate is wrong. While Hamman Farms ("Hamman") is correct that the Board's jurisdictional authority is limited to that granted by its enabling statute, the enabling statute gives the Board authority over Agency decisions involving the application of landscape waste. As Hamman described in its motion, the Board has the authority to conduct proceedings "upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate." 415 ILCS 5/5(d). The Agency's decision of May 1, 2008 granting Hamman permission to apply landscape waste at a rate greater than the agronomic rate is such a final determination that the

Board has the authority to review. Section 21(q) of the Environmental Protection Act (“Act”) states the Agency “may allow a higher rate for individual sites where the owner or operator has demonstrated to the Agency that the site’s soil characteristics or crop needs require a higher rate.” 415 ILCS 5/21(q). Because the Act grants the Agency the authority to allow higher rates, the May 1, 2008 decision is a “final determination made pursuant to this Act” for purposes of Section 5(d) of the Act.

Additionally, the subject area of landscape waste is one which the Board has the authority to review. Under section 22.33(b) of the Act, the Board has the authority to adopt rules and regulations governing landscape waste compost facilities. 415 ILCS 5/22.33(b). This leads to the conclusion that if the Board has the authority to adopt rules and regulations governing landscape waste compost facilities, the Board must have jurisdictional authority to regulate the subject area of landscape waste compost facilities, and likewise, the authority to review the subject area of landscape waste. Because the Agency’s May 1, 2008 decision is a final determination involving a subject area over which the Board has authority, the Agency’s argument fail and its motion to dismiss must be denied.

II. THE BOARD HAS THE TECHNICAL EXPERTISE TO REVIEW AGENCY DECISIONS

Similarly, Hamman’s argument that the Board cannot review the Agency decision because it involves technical analysis holds no water. First, reviewing the Agency’s decision does not require the Board to make technical findings. Rather, the Board is required merely to review the Agency decision to ensure that the Agency complied with statutory procedures and standards. Here, the appropriate standard is “that the site’s soil characteristics or crop needs require a higher rate.” 415 ILCS 5/21(q) The Board does not need to perform any investigation to review the Agency record and determine whether the Agency had sufficient information to

meet that standard. Indeed, the Act intended for the Agency and Board to have distinct functions. The Agency's functions include determining policy, administering the permit program, and enforcing provisions of the Act while the Board's functions include, *inter alia*, review of Agency decisions. Jurcak v. Environmental Protection Agency, 161 Ill. App. 3d 48, 51 (1st Dist. 1987). Reviewing the Agency's decision in this case does not require the Board to make technical decisions as Hamman suggests, it merely requires the Board to review the Agency investigation and ensure that the Agency complied with the statutory standard.

Moreover, even if the review requires some technical decisions, the Appellate Court found that review of a permit is within the province of the Board, which is "composed of seven technically qualified Board members with the expertise to make the necessary inquiries and evaluation." Jurcak, 161 Ill. App. 3d at 53. The Court reasoned that because such a review "requires evaluation and judgment based on scientific data, knowledge of waste water treatment technologies and engineering methodology and the application of technical standards," it was a decision best left to the Board. Id. See also, Dean Foods Co. v. Ill. Pollution Control Board, 143 Ill. App. 3d 322, 337 (2d Dist. 1986) (Court finding that the Board should have had the opportunity to inquire whether the petitioner provided the best degree of treatment; that such a factual determination "involves evaluations and judgments about scientific data, waste water treatment technologies and engineering methodology, as well as application of highly technical standards;" and that the Board "has the expertise to make such evaluations and applications.") Consequently, Hamman's argument must fail.

III. EVEN ASSUMING *ARGUENDO* THAT THE ACT DOES NOT GRANT THE BOARD THE AUTHORITY TO REVIEW THIS AGENCY DECISION, SOUND PUBLIC POLICY DEMANDS REVIEW OF AGENCY DECISIONS

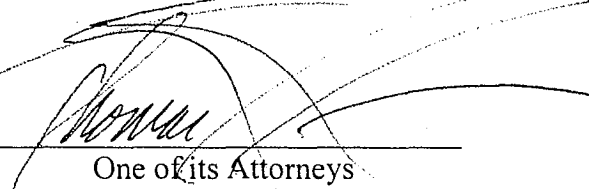
Granting the Agency unappealable authority to make decisions, such as the one at issue in this matter, is bad public policy and gives rise to the potential for abuse. Without oversight, the Agency possesses the power to grant permits and other types of authorization for activities that contribute to pollution and misuse of land within the State of Illinois. Agency decisions must be subject to review to ensure that the Agency follows the provisions of the Act and performs the necessary investigation prior to granting permits.

Should the Board find that it does not have authority to review the Agency's decision allowing Hamman to apply to landscape waste at rates of up to 80 tons per acre per year, the decision will stand despite the Agency's inadequate investigation and failure to follow the Act's standards. Section 21(q) of the Act requires that such an allowance be based on a showing that "the site's soil characteristics or crop needs require a higher rate." Yet, the Agency granted Hamman permission to apply at a higher rate based on only four soil samples when the Illinois Agronomy Handbook calls for at least 880 soil samples. With only four soil samples, the Agency could not have possibly determined that site's soil characteristics or crop needs require a higher rate. Still, if the Board decides it cannot review this matter, the Agency's decision will allow Hamman to pollute and misuse land within the State of Illinois in contravention to the Act's purposes. Thus sound public policy requires the Board to have reviewing authority over Agency decisions to prevent abuses of power such as the one at issue in this case.

WHEREFORE, for the abovementioned reasons, the United City of Yorkville respectfully requests the Illinois Pollution Control Board deny Hamman Farm's Motion to Dismiss.

Respectfully submitted,

UNITED CITY OF YORKVILLE



One of its Attorneys

Thomas G. Gardiner
Michelle M. LaGrotta
Gardiner Koch & Weisberg
53 W Jackson Blvd., Ste. 950
Chicago, IL 606104
(312) 362-0000
Law Firm ID: 29637

