

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 Action)

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on July 30, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent Hamman Farms' Motion for Leave to File a Reply Brief in Support of its Motion to Dismiss and attached proposed Hamman Farms' Reply Brief in Support of its Motion to Dismiss, copies of which are attached hereto and hereby served upon you.

Dated: July 30, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/

Charles F. Helsten
One of Its Attorneys

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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 Action)

**RESPONDENT HAMMAN FARMS' MOTION FOR LEAVE TO FILE A REPLY BRIEF
IN SUPPORT OF ITS MOTION TO DISMISS**

NOW COMES Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, pursuant to 35 Ill.Adm.Code 101.500(e), requesting leave to file a Reply brief in support of its Motion to Dismiss, stating as follows:

1. On July 7, 2008, Respondent Hamman Farms filed a Motion to Dismiss seeking dismissal of this action based on the Board's lack of jurisdiction and the Petitioner's lack of standing.
2. On July 15, 2008, Petitioner filed a Response brief opposing Hamman Farms' Motion to Dismiss.
3. Because the pending motion to dismiss is entirely dispositive of this action, the outcome of the motion has enormous significance.
4. The Petitioner's Response brief is predicated on spurious, fallacious reasoning, and contains misrepresentations which have the potential to mislead the Board.
5. Hamman Farms is at risk to suffer material prejudice if it is not permitted to file a Reply brief countering the fallacious reasoning and misrepresentations that pervade Petitioner's brief.

6. Respondent Hamman Farms accordingly requests permission to file its Reply brief with the Board, a copy of which is attached hereto.

WHEREFORE, Respondent HAMMAN FARMS respectfully requests leave, pursuant to 35 Ill. Adm. Code 101.500(e), to file the attached Reply brief, and such other and further relief as the Board deems appropriate and just.

Dated: July 29, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A
MUNICIPAL CORPORATION,

Complainant,

v.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY and HAMMAN
FARMS,

Respondents.

PCB No. 08-95
(Appeal of Agency Action)

**HAMMAN FARMS' REPLY BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS**

NOW COMES Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, and for its Reply Brief in Support of its Motion to Dismiss, states as follows:

I. Petitioner's Response Brief is Predicated on Flawed Logic and a Misrepresentation of the Law

Petitioner hypothesizes that because the Board has authority to review final determinations by the Agency, it therefore has authority to review every final determination by the Agency. This unfounded theory completely disregards the well-recognized statutory limitations to Board review of Agency decisions, which have been repeatedly memorialized in the decisions of Illinois courts.

Petitioner seemingly believes that the Illinois Appellate Court and Supreme Court are either mistaken about the specifically defined and limited breadth of the Board's jurisdiction, or in the alternative, that they really did not mean it when they declared, *e.g.*, that, "[i]f the Board were to become involved as the overseer of the Agency's decision-making process through evaluation of challenges to permits, it would become the permit-granting authority, a function not delegated to the Board by the Act." *Citizens Utilities Co. of Illinois v. PCB*, 265 Ill.App.3d

773, 780, 639 N.E.2d 1306, 203 Ill.Dec. 487 (3rd Dist. 1994) (emphasis added), citing *Landfill, Inc. v. Pollution Control Bd.*, 74 Ill.2d 541, 557, 387 N.E.2d 258, 262-263, 25 Ill.Dec. 602, 606-607 (Ill. 1978). Clearly, Petitioner's theory that all final Agency determinations are reviewable by the Board is false, and there is no jurisdictional basis for Petitioner's action.

Most significantly, although a permit applicant whose application has been denied can appeal to the Board, "[t]here are no comparable statutory provisions for Board review on either substantive or technical grounds of the Agency's grant of a permit, thus indicating a legislative intent not to provide for such a proceeding." *Citizens Utilities*, 265 Ill.App.3d at 780, citing *Landfill*, 74 Ill.2d at 557 (emphasis added).¹ Even as recently as July 10, 2008, this Board reiterated that there are "no third-party rights to appeal [a] non-hazardous waste permit under Section 40 of the Act; Section 40(a)(1) grants appeal rights solely to the permit applicant. 415 ILCS 5/40(a)(1)(2006). Third-party appeal rights for hazardous waste permits are granted only for RCRA permits, and permits granted by the Agency under Section 39.3 of the Act for hazardous waste sites. 415 ILCS 5/40(b), (c), and (e) 2006." *People of Williamson Co. v. Kibler Development Corp.*, PCB 08-093 at 11 (July 10, 2008).

Petitioner flagrantly disregards and/or ignores the above-referenced precedent, and continues to argue that the Board has jurisdiction to review every final decision by the Agency, and indeed must do so, lest the Agency 'abuse' its power and "contribute to pollution and misuse of land." (Petitioner's brief at 4). It has accordingly become clear that Petitioner is not dissuaded by the fact that there is no statutory or other good faith basis for standing or jurisdiction in this

¹ Notably, although no permit is at issue here, Petitioner repeatedly characterizes this action as the Agency's improper granting of a permit. (See, e.g., "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.") (Petitioner's brief at p. 4).

action, and instead, Petitioner continues to pursue its frivolous action, going so far as to serve discovery on Hamman Farms that clearly illustrates bad faith with respect to this litigation.²

In addition to disregarding its lack of standing and the absence of subject matter jurisdiction, Petitioner nevertheless argues that because the Board “has the authority to adopt rules and regulations governing landscape waste compost facilities...[t]his leads to the conclusion that...the Board must have jurisdictional authority...to adopt rules and regulations governing landscape waste compost facilities, and [therefore] the authority to review the subject area of landscape waste.” (Petitioner’s brief at 2). Petitioner’s simplistic, hopscotch-style logic is amusing, but of course it suffers from a fatal flaw: this case does not involve the composting of landscape waste.

First and foremost, Hamman Farms is not a composting operation. A composting operation is defined by the regulations as “an enterprise engaged in the production and distribution of end-product compost.” *See* 35 Ill.Adm.Code 830.102. Moreover, composting is defined by the regulations as:

the biological treatment process by which microorganisms decompose the organic fraction of the waste, producing compost.
(Section 3.70 of the Act.) Land application is not composting.

35 Ill.Adm.Code 830.102 (emphasis added).

Hamman Farms is not a composting operation, and it does not produce compost. Rather, Hamman Farms utilizes the land application of landscape waste on its farm as soil conditioner and fertilizer, and in that regard it sought a determination from the Agency of the appropriate agronomic rate at which to apply the material, in light of the farm’s soil characteristics and crop

² *See* Hamman Farms’ Supplement to its Motion for Hearing Officer’s Order on Discovery and attachments thereto.

needs.³ Land application of landscape waste is, by definition, “not composting.” *Id.* Therefore, Petitioner’s claim that the Board’s jurisdictional authority to review this case derives from its authority to regulate composting operations is, at best, misguided. Had Petitioner bothered to take a look at the relevant regulations, it would realize there is simply no legal basis for its argument. As noted above, Petitioner has either failed to investigate the basic law governing its action, or in the alternative, it has decided to misrepresent the law in an attempt to keep its ill-conceived litigation alive.

Petitioner has continuously ignored the fact that Hamman Farms is not a defined composting facility, which may explain why Petitioner continuously misinterprets the Agency’s action at issue here as the granting of a permit. A correct and honest statement of the facts ought to be at the heart of any valid legal argument.

II. Petitioner’s Brief Misrepresents Hamman Farm’s Argument

In addition to twisting the law, Petitioner also twists Hamman Farms’ argument, alleging that Hamman Farms is asserting that the Board cannot review the Agency’s determination of the appropriate agronomic rate “because it involves technical analysis.” (Petitioner’s brief at 2). Hamman Farms has not previously – and does not now - argue that the Board lacks the expertise to make technical determinations. Rather, Hamman Farms’ brief in support of its Motion to Dismiss points out that “the Supreme Court has observed that the legislature delegated to IEPA the authority to perform ‘technical, licensing, and enforcement functions.’” (Hamman Farms’ brief at p. 5, quoting *Landfill, Inc. v. Pollution Control Bd.*, 74 Ill.2d 541, 554, 387 N.E.2d 258, 262-263, 25 Ill.Dec. 602, 606-607 (Ill. 1978)). Hamman Farms’ brief further points out that the Illinois Supreme Court has declared that the legislature vested the Agency – not the Board – with

³ Pursuant to 415 ILCS 5/21(q).

“the duty to collect and disseminate information, acquire technical data, and conduct experiments to carry out the purposes of the Act...[and to] conduct surveillance and inspection of actual or potential pollution sources.” *Id.*

It is, therefore, the Board’s lack of jurisdiction, not the extent of its technical expertise, that forms the core of Hamman Farms’ Motion to Dismiss this action:

Because this technical analysis [of the data concerning the farm’s soil characteristics and crop needs] is a matter left exclusively to the jurisdiction of the Agency, there is no jurisdictional authority for the Board to hear and decide Yorkville’s Petition, and the Board similarly lacks authority to grant the relief sought: reversal of the IEPA’s technical findings.

(Hamman Farms’ brief at 7).

The cases cited in Petitioner’s Response brief are similarly inapposite and misrepresented. For example, Petitioner cites *Jurcak v. Environmental Protection Agency*, suggesting that *Jurcak* supports its position and holds that the Board is authorized to review the Agency’s decision in this case because permit review is “a decision best left to the Board.” (Petitioner’s brief at p. 3, characterizing the holding of *Jurcak*). *Jurcak*, however, involved an appeal by an applicant who was unhappy with a condition that had been imposed by the Agency in issuing his permit; *Jurcak* therefore appealed to the Board in the hope that he could get the Board to remove the Agency-imposed condition. *Id.* An appeal by an applicant who has been issued a permit with conditions is, of course, one of the types of appeals expressly provided for under the regulations:

a) The Board is authorized to hear the following types of adjudicatory cases:

2) Permit Appeal. Any person who, pursuant to Section 39 of the Act (415 ILCS 5/39), has been denied a permit by the Agency, or issued a permit by the Agency with one or more conditions to

which that person objects, may file a petition with the Board for review of the Agency's action. If the Agency grants a RCRA permit for a hazardous waste disposal site or grants or denies a National Pollutant Discharge Elimination System (NPDES) permit, certain third parties may petition the Board for a hearing to contest the decision of the Agency (415 ILCS 5/40(b), (e)(1)). (See 35 Ill. Adm. Code 105.)

2 Ill. Adm. Code 2175.600(a) (emphasis added).

The second case cited by Petitioner, *Dean Foods Co. v. Pollution Control Bd.*, 143 Ill. App. 3d 322, 492 N.E.2d 1344 (2nd Dist. 1986), presents the identical situation, *i.e.*, an appeal by a permit applicant who was unhappy about a condition imposed by the Agency. Thus, neither case cited by Petitioner in any way stands in support of Petitioner's theory that the Board has jurisdiction in this matter.

III. Petitioner Improperly Urges the Board to Ignore its Statutory Limitations and Exercise Jurisdiction Not Authorized by the Act

The *coup de grace* of Petitioner's brief is its argument that even if the Board lacks authority to do so, it should, nonetheless, still review the Agency's determination of the agronomic rate for Hamman Farms' land in order to prevent "abuses of power such as the one at issue in this case." (Petitioner's brief at p. 4). In a sweeping repudiation of the Supreme Court, the Appellate Court, and the Illinois General Assembly, all of whom have concluded that the Board is not authorized to review the granting of a permit by the Agency except under expressly prescribed circumstances, the Petitioner announces that:

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.

(Petitioner's brief at p. 4).

Petitioner's argument, which lobbies for a *de facto* change to Illinois law, should be directed to the legislature, not to this Board, and the relief sought – that the Board review a matter it is not authorized to review, and reverse an Agency decision it has no authority to reverse – falls squarely within the definition of frivolous. *See* 35 Ill. Adm. Code 101.202, defining 'frivolous' to mean "a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief."

IV. Conclusion

Petitioner filed this action without the requisite (much less any) investigation of the relevant law, or, in the alternative, filed it in contumacious disregard thereof. Petitioner's assertion that "sound public policy requires the Board to have reviewing authority" over the Agency's granting of permits, and over this matter in particular, asks the Board to engage in an extra-legal exercise of jurisdiction in derogation of clear precedent forbidding it, ostensibly to prevent the Illinois Environmental Protection Agency from running amok and polluting the State.

Petitioner's real motive, to harass Hamman Farms, is clearly what drives this action, and its misuse of the administrative process is deplorable. The Board should accordingly repudiate Petitioner's abusive efforts in the strongest terms, and summarily dismiss this action for want of standing and/or jurisdiction, before the charade of discovery and a hearing inflict further injury on Respondent Hamman Farms, and before the taxpayers of Illinois are forced to expend more State resources defending against what is clearly an unjustified, unauthorized Petition.

WHEREFORE, HAMMAN FARMS respectfully requests that the Board dismiss this action and grant such other and further relief as it deems appropriate and just.

Dated: _____

Respectfully submitted,

On behalf of Hamman Farms

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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 July 30, 2008, she caused to be served a copy of the foregoing upon:

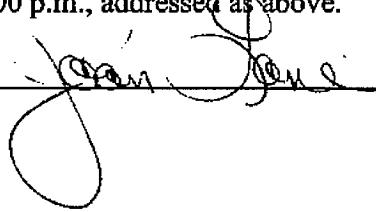
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A copy of the same was enclosed in an envelope in the United States mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.



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