BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A MUNICIPAL CORPORATION, Petitioner,	)	
v.	)	**PCB No. 08-95** **Appeal of Agency Decision**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and HAMMAN FARMS, Respondents.	)	

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 MOTION FOR ATTORNEY'S FEES,** copies of which are herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE,
Petitioner,

By:_____
One of its Attorneys

Dated: September 19, 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

CERTIFICATE OF SERVICE

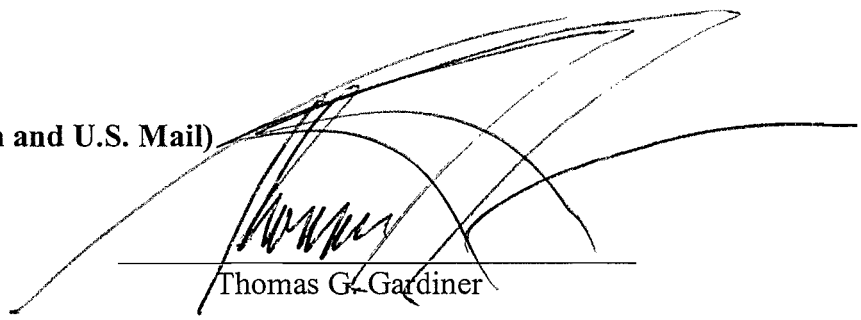
I, Thomas G. Gardiner, the undersigned certify that on September 19, 2008, I have served the attached **PETITIONER'S RESPONSE TO MOTION FOR ATTORNEY'S FEES**, upon:

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 email to: Michelle.Ryan@illinois.gov and 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)



Thomas G. Gardiner

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A municipal corporation,	)	
Petitioner,	)	PCB NO. 08-95
v.	)	Permit Appeal
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and HAMMAN FARMS,	)	
Respondents.	)	

PETITIONER'S RESPONSE TO MOTION FOR ATTORNEY'S FEES

NOW COMES, Petitioner, United City of Yorkville, by and through its attorneys, Gardiner Koch & Weisberg, and in response to Hamman Farms' Motion for Attorneys' Fees, states as follows:

I. HAMMAN FARM'S CLAIM FOR ATTORNEY'S FEES IS UNWARRANTED

This case stems from an administrative action by the Illinois Environmental Protection Agency (hereinafter "IEPA"). In the history of Illinois, only two "permits" have been granted by the IEPA to spread landscape waste on property at a level greater than 20 tons per acre.[1] The grant of permission to apply landscape waste at Hamman Farms (hereinafter "Hamman") is the second instance.

The actions of Hamman relating to environmental concerns and its application for landfill permitting are the biggest issues in Yorkville in the past 20 years. Hamman has been the subject of numerous public meetings and was the primary issue in the last city election and change in administration.

[1] On information and belief, the first to receive permission was Joyce Farms. After initially applying at a rate of 80 tons, Joyce Farms ultimately applied at the agronomic rate of 20 tons per acre like the rest of Illinois farms applying landscape waste.

The permission granted in this case to Hamman allowing it to apply 80 tons per acre of landscape waste was remarkable given the history of Hamman and the alacrity with which permission was granted. On April 10, 2008, Hamman applied for permission to apply landscape waste at the rate of 80 tons per acre. At the time Hamman submitted its application, the IEPA had issued violation notices to Hamman and rejected Hamman's Compliance Commitment Agreement because Hamman refused to comply with the IEPA's request for daily calculations of non-landscape waste and the agronomic rate of application. In fact, during the course of the proceedings in this case, the IEPA Manager for Field Operations, Paul Purseglove, admitted, during a joint public meeting of the Kendall County Board and the Yorkville City Council relating only to noncompliance and environmental problems, that Hamman was in violation at the time of its application. On September 17, 2008, the Attorney General of the State of Illinois filed a complaint for injunctive relief and other civil penalties against Hamman for these violations.

At the public meeting, the large crowd of citizens questioned how a permit for applying landscape at a level of 80 tons per acre, more than four times the agronomic rate, could be granted to a farm that was documented to be in violation of the rules. Residents presented pictures and slide shows regarding violations. Residents testified that the odor from Hamman was discernable miles away. The IEPA administrator claimed that the law required that the application be evaluated in a vacuum. The citizens and Yorkville officials were dumbfounded by this claim. They thought that this could not be the law or that the current law must be extended or modified such that this instance could not happen again.

The process by which the application was granted was also alarming. From application on April 10, 2008 to approval on May 1, 2008 was 21 days. The approval of the only application

in Illinois to apply landscape waste at a rate of 80 tons per acre was granted in less time than is allotted to answer a general Complaint in our circuit courts.

Like the statement of the IEPA administrator that Hamman's application must be considered in a vacuum without the benefit of current information, Hamman now wants the entire process to suffer no scrutiny. According to Hamman, the IEPA administrators can make decisions without reviewing current violations of Hamman, evidence from citizens, or third party expert input and, then, after the administrative decision is made, citizens and their municipalities must sit on their hands. In short, Hamman claims that problems caused by a property owner who is partially within the United City of Yorkville and who adjoins the United City of Yorkville will not provide Yorkville with the ability to appeal an erroneous decision. Yorkville must sit on its hands because the welfare of its citizens is within the province of unelected, unaffected employees of the IEPA, not elected officials. Hamman now wants to punish Yorkville by forcing it to pay attorneys' fees for having the nerve to file an appeal.

II. ILLINOIS SUPREME COURT RULE 137 DOES NOT APPLY TO PROCEEDINGS BEFORE THE ILLINOIS POLLUTION CONTROL BOARD.

Illinois Supreme Court Rule 137 does not apply to proceedings before the Illinois Pollution Control Board. Hamman cites the Illinois Administrative Code § 101.100(b) to support its contention that this Rule applies to these proceedings. However, this section of the code, when read in entirety provides: "The provisions of the Code of Civil Procedure [735 ILCS 5] and *the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board.* However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." 35 Ill. Admin. Code § 101.100(b) (emphasis added). The Board's regulations clearly provide that the Illinois Supreme Court rules do not provide to these proceedings. Moreover, the Board's procedural rules are not

even silent on the issue of sanctions as the Board's rules include an entire section on sanctions in §101.800. Had the Board sought to adopt a provision similar to Rule 137, it would have included such a provision in §101.800, a SubPart entitled "Sanctions." Notably, the Board omitted from its list of sanctions attorney's fees in §101.800. As a result, Hamman's Motion for Attorney's Fees is improper and must be denied.

III. THE MOTION FOR ATTORNEY'S FEES MUST BE DENIED BECAUSE YORKVILLE ACTED GOOD FAITH AND WITHOUT AN IMPROPER PURPOSE

Even assuming *arguendo* that the Board finds Illinois Supreme Court Rule 137 applies to its proceedings, Hamman's Motion must be denied because Yorkville acted in good faith. Rule 137 provides that a court may impose appropriate sanctions if a pleading is not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

In the Motion for Attorney's Fees, Hamman cites one case for its claim that longstanding law prevented Yorkville from filing a petition for review. Hamman does not cite the Landfill, Inc. v. PCB case directly, but instead uses the "See" citation form. The " See" citation form means: "used instead of 'no signal' when the proposition is not directly stated by the cited authority but obviously follows from it; there is an inferential step between the authority cited and the proposition it supports." The Bluebook, p.46; Eighteenth Edition. By this citation form, Hamman admits that the appeal is not in direct contravention of existing law. Hamman offers no citation of any other case for its claim that Yorkville acted in bad faith.

Even the Landfill, Inc. case allows for an extension of the law. In Landfill, the Illinois Supreme Court ruled that the Illinois Pollution Control Board could not issue rules that grant third-party appeal rights of decisions to grant sanitary landfill permits in light of the third party's

ability to intervene during the permit-issuance process. 74 Ill. 2d 541, 552-60 (1978). In that case, the IEPA held public hearings at which third parties could object to the permit. Id. Here, third parties have no such ability to object during the permit-issuance process. Neither Yorkville, nor any citizen, had the opportunity to provide input or offer objections prior to the IEPA's decision to allow Hamman to increase the rate of landscape application. Had Yorkville or other citizens had that opportunity, they could have presented evidence of Hamman's violations and pointed out the inadequacy of Hamman's submissions, including their lack of soil analysis tests.

The differences between the cases support the appeal in this case. The importance of the empirical information validates the necessity to allow an appeal in this type of case. Under Hamman's construction of Rule 137, the submittal of the original Brandeis brief in an appeal before the United States Supreme Court should have been sanctionable. Instead, the introduction of such empirical evidence was held to be a logical extension of existing law such that the Supreme Court could consider such evidence.

The closed process advocated by Hamman is bad public policy and the appeals must be allowed. This is the second case of allowing the application of landscape waste at 80 tons per acre is an appropriate juncture to allow such an appeal.

Rule 137 is intended to prevent the filing of frivolous or false lawsuits, "the rule is not intended to penalize litigants and their attorneys merely because they were zealous, yet unsuccessful." Peterson v. Randhava, 313 Ill. App.3d 1, 7 (1st Dist. 2000). The rule's penal character requires the Court "to strictly construe the rule against the movant." Gershak, 317 Ill. App. 3d at 22. Additionally, the movant bears the burden of establishing a violation of the rule. Id. Here, Hamman did not produce any evidence that Yorkville violated Rule 137.

Even when plaintiffs have brought invalid and unsuccessful claims, the Courts do not impose sanctions where plaintiffs make a good faith argument for the extension, modification, or reversal of existing law. For example, in Chabraja v. Avis Rent A Car System, Inc., the Court found that the plaintiffs had no basis to bring a suit under the Illinois Uniform Deceptive Trade Practices Act and no claim under the Illinois Consumer Fraud and Deceptive Business Practices Act. 192 Ill. App. 3d 1074, 1078-79 (1st Dist. 1989). Yet, when defendants sought sanctions, the Appellate Court upheld the trial court's decision to not impose sanctions because the plaintiffs made a good-faith argument for extension, modification or reversal of existing law. Id. at 1080-81. Likewise, in In re Marriage of Ahmad, the husband sought attorney fees after the wife's attorney sought fees for paralegal services, even though Illinois does not recognize recovery for paralegal fees. 198 Ill. App. 3d 15, 22 (2d Dist. 1990). There the Appellate Court upheld the trial court's denial of the husband's motion because the wife's attorney made a good faith argument for reversing existing law. Id.

Similarly, Yorkville's Petition for Review, though ultimately unsuccessful, was made in good-faith. Section 5 of the Illinois Environmental Protection Act provides that 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). Yorkville based its standing arguments on the interpretation of this provision. In addition, Yorkville argued in its Response to the Motions to Dismiss filed in this matter that public policy required the existing law to be modified to grant third parties right to appeal decisions by the Illinois Environmental Protection Agency to grant permits. While these arguments ultimately proved unsuccessful, like those parties in Chabraja and Ahmad discussed above, Yorkville's arguments for an additional interpretation and

modification of existing law were made in good faith. Thus, Yorkville did not violate Supreme Court Rule 137.

Hamman tries to make the argument that Yorkville's continued pursuit of the claim after Hamman filed its motion to dismiss[2] demonstrates Yorkville's intent to harass or annoy Hamman. Yet, this argument holds no water because Yorkville was not required to voluntarily dismiss its petition when it had a good-faith basis to believe that it had standing and a basis to argue for modification of the existing law. Moreover, Yorkville merely proceeded as necessitated by the statutory deadline of October 16, 2008 and hearing dates of August 14 and 15, 2008. Additionally, it was Hamman, not Yorkville, that requested the expedited discovery schedule while motions to dismiss were still pending in this matter. Here, Hamman filed its Motion to Dismiss on July 7, 2008, requested an expedited discovery schedule on July 9, 2008, and issued its discovery requests on July 16, 2008. Yorkville did not even issue discovery until July 23, 2008. Still, because the hearing was set for August 14 and 15, 2008 due to the statutory deadline of October 16, 2008, it was necessary to proceed to discovery so that both parties would be prepared for the hearing should the Board decide not to dismiss the case. Consequently, Hamman's argument that because Yorkville issued discovery while the motions were still pending, it somehow demonstrates Yorkville's intent to harass Hamman misrepresents the facts. The statutory deadline, which Hamman controlled and could have waived so as to have the hearing set more than a week after the Board's ruling, controlled the timeline and the movement of litigation, not Yorkville. Therefore, Yorkville's actions in issuing discovery could not possibly provide any evidence of an improper purpose.

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[2] In paragraph 6 of Hamman's motion, Hamman claims that it "brought it to Yorkville's attention that there was absolutely no jurisdiction for the Board to hear the petition." Yorkville can only assume that Hamman is claiming that by filing its Motion to Dismiss that it brought this to Yorkville's attention. Yorkville received no other communication from Hamman regarding jurisdiction despite what this statement might otherwise imply.

In addition, Hamman's motion fails to cite any provision of Yorkville's pleading that is false or provide any basis upon which the Illinois Pollution Control Board could find that Yorkville's intent is improper, as is Hamman's burden as the movant. Again, Hamman's conclusory statements that Yorkville filed merely to harass or annoy Hamman are meritless and fall far short of meeting Hamman's burden. While the Illinois Pollution Control Board ultimately ruled that Yorkville lacked standing, Yorkville's pleadings were filed in good faith, and they incorporated a good-faith argument for the modification, extension and reversal of existing law. As a result, sanctions are unwarranted, and the Board must deny the Motion for Attorney's Fees.

IV. HAMMAN FARM'S MOTION FOR ATTORNEY FEES MUST BE DENIED BECAUSE IT LACKS THE REQUISITE SPECIFICITY

Hamman's Motion for Attorney's Fees lacks the requisite specificity, and thus, it must be denied. A motion for sanctions must "specifically allege which statements were false and what fees were incurred as a result of those false statements." Diamond Mortgage Corp. of Ill. v. Armstrong, 176 Ill. App. 3d 64, 71 (1st Dist. 1988). The specificity requirements are necessary to ensure that the responding party has the opportunity to challenge and defend against the allegations made. Id. See also, Gershak v. Feign et al., 317 Ill. App. 3d 14, 23 (1st Dist. 2000). In Diamond Mortgage, the Court held that the movant's petition for attorney fees lacked the requisite specificity because the petition made general statements that the pleadings contained false statements but did not specify which allegations were untrue nor identified which pleadings contained the false allegations. 176 Ill. App. 3d at 71. In this case, nowhere in Hamman's Motion does it specifically cite those pleadings which contain false allegations nor those sections of those pleadings which are false or otherwise untrue. Furthermore, Hamman's blanket statements that Yorkville filed this action solely to harass and annoy Hamman's lack factual

foundation and fail to meet the specificity standards required in a motion for sanctions.[3] Consequently, Hamman's Motion must be denied.

V. CONCLUSION

Hamman Farms' Motion for Attorney Fees fails because Rule 137 does not apply to proceedings before the Board. Moreover, even assuming *arguendo* that the Board finds Rule 137 to apply to these proceedings, Hamman's Motion lacks merit and specificity and must be denied. First, Hamman fails to cite with specificity any of Yorkville's pleadings that are false or otherwise untrue. Second, regardless of claimant's success, Illinois Supreme Court Rule 137 does not impose attorney fees or other sanctions when the pleading is grounded in a good-faith argument for modification, reversal or extension of existing. Here, Yorkville's action was filed in good-faith and made such an argument.

WHEREFORE, for all the above-mentioned reasons, the United City of Yorkville respectfully requests this Court deny Hamman Farms' Motion for Attorney's Fees.

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

[3]While this Court need never reach the question of the appropriateness of the fees, we note that the fees requested are utterly unreasonable. Hamman requests $20,590.81 for attorney fees and related costs. Hamman attorneys claim to have spent more than 85 hours to produce a two-and-one-half page motion to dismiss, 17 interrogatories, 11 requests to produce, a two-and-one-half page memorandum regarding discovery, a six page supplemental memorandum, and a seven page reply memorandum. Such legal fees are excessive and disproportionate to the amount of work that Hamman completed in this matter.