

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A
MUNICIPAL CORPORATION.

Complainant,

v.

HAMMAN FARMS.,

Respondents.

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

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on November 14, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent's Motion for Reconsideration, a copy of which is attached hereto and hereby served upon you.

Dated: November 14, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/Nicola Nelson

Nicola Nelson

One of Its Attorneys

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RESPONDENT'S MOTION FOR RECONSIDERATION

NOW COMES the Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP pursuant to 35 Ill.Adv.Code 101.518, and moving for reconsideration of the Board's October 16, 2008 Order, as to Count IV of Yorkville's Complaint, states as follows:

1. On June 4, 2008, the City of Yorkville ("Yorkville") filed its four-count citizen's enforcement action against Respondent, Hamman Farms, thereby initiating this action.
2. On July 8, 2008, Hamman Farms filed a Motion to Strike or Dismiss portions of Yorkville's Complaint.
3. On October 16, 2008, the Board granted Hamman Farms' motion in part, granting Hamman Farms' request to strike Yorkville's request for attorney's fees and costs; granting Hamman Farms' request to strike allegations that the IEPA violated the law when it determined the appropriate agronomic rate for Hamman Farms' application of landscape waste to its fields; and granting Hamman Farms' request for dismissal of Count III for failure to meet the pleading specificity requirements of 35 Ill. Adm. Code 103.204. The Board declined to dismiss Count IV.
4. Counts III and IV of Plaintiff's Complaint both assert that the application of landscape waste to fields for use as a soil conditioner and fertilizer, which is a practice

authorized by the legislature in the Environmental Protection Act at 415 ILCS 5/21(q), releases contaminants into the environment and therefore causes pollution in violation of the Act. Count III asserts that the application of landscape waste to farm fields causes pollution because contaminants are thereby released into the air; Count IV asserts that the application of landscape waste to farm fields causes pollution because contaminants are thereby released into ground water. The Board dismissed Count III for failure to meet the pleading requirements of the Rules, but failed to dismiss Count IV.

5. Hamman Farms' Motion to Strike or Dismiss and briefs in support argued that although Count III alleges the application of landscape waste to farm fields causes "air pollution," it fails to provide any "dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations," as required by 35 Ill.Adm.Code 103.204(c). Yorkville responded that it had provided enough specificity to "reasonably allow preparation of a defense" and that this is all the Rules require. In granting the Motion to Dismiss Count III, the Board explained that Yorkville's complaint stated "little more than the legal conclusion" that Hamman Farms' application of landscape waste caused air pollution because it unreasonably interfered with residents' enjoyment of life or property. (Board's order at 21). The Board supported its analysis by citing *LaSalle Nat'l Trust v. Village of Mettawa*, 249 Ill.App.3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993), for the proposition that "legal conclusions unsupported by allegations of specific facts are insufficient." (Board's Order at 21). The Board further cited *City of Des Plaines v. PCB*, 60 Ill.App.3d 995, 1000, 337 N.E.2d 114, 119 (1st Dist. 1978) which explains that "pure conclusions [], even in administrative proceedings, are insufficient." (Board's Order at 21).

6. Count IV, like Count III, proffers only legal conclusions which are unsupported

by allegations of specific facts, and should have, like Count III, been dismissed for failure to meet the Board's pleading requirements.

7. As a threshold matter, in declining to dismiss Count IV, the Board states that "Hamman's argument fails to address Yorkville's allegations that Hamman exceeded the agronomic rate of 20 tons per acre per year for some 15 years before the Agency issued the May 1, 2008 determination." (Board's Order at 23). However, on a Motion to Dismiss it would have been impermissible for Hamman Farms to dispute the facts pled by Yorkville, since a Motion to Dismiss admits all well pleaded facts. Thus, Hamman Farms hereby makes clear that its silence regarding that factual allegation is due solely to the procedural posture of the case at this juncture.

8. More importantly, Count IV, like Count III, fails to allege specific facts to support that Hamman Farms violated the Act, inasmuch as Count IV's "factual" allegations are limited to the following:

66. Under Section 3.165 of the Act, the landscape waste that HAMMAN is applying is a contaminant.

67. Under Section 3.545 of the Act, HAMMAN's application of landscape waste is water pollution in that the landscape waste is a contaminant which is being discharged into ground water.

68. In applying the landscape waste, HAMMAN is allowing the discharge of contaminant into the environment so as to cause or tend to cause water pollution under section 12(a) of the Act.

69. In applying the landscape waste, HAMMAN is allowing the deposit of contaminants so as to create a water pollution hazard under section 12(d) of the Act.

9. The pleading deficiency of Count IV is the same as the pleading deficiency of Count III, inasmuch as Count III's "factual" allegations, which appear at paragraphs 58, 59, 60

and 61, are virtually identical to Count IV's "factual" allegations at paragraphs 66, 67, 68 and 69, but for the substitution of the assertion that the application of landscape waste caused water pollution in Count IV, in place of Count III's assertion that applying landscape waste causes air pollution.

10. Rather than providing the requisite facts, Count IV and Count III both allege the same conclusory syllogism:

- i. Landscape waste is a contaminant/releases a contaminant (Count IV paragraph 66; Count III paragraph 58);
- ii. The application of landscape waste to farm fields is pollution because it leads to the discharge of a contaminant into ground water (Count IV paragraphs 67-68) / into the environment (Count III paragraph 60);
- iii. Because Hamman Farms applies landscape waste to its fields, it is therefore discharging contaminants into the environment (Count IV paragraph 68-69; Count III paragraph 60).
- iv. Hamman Farms therefore violated the Act by causing water pollution or a water pollution hazard (Count IV paragraphs 69, 70) / by causing air pollution (Count III paragraph 61).

11. As the Board observes in its opinion, these "factual" allegations in Count III fail to meet the specificity requirements of Section 103.204(c). However, just as these "factual" allegations fail to meet the Rules' specificity requirements when pled as Count III, the same "factual" allegations fail to meet the Rules' specificity requirements when pled as Count IV. Count IV, like Count III, pleads only legal conclusions. Thus, Count IV fails to meet the pleading requirements under the Rules and it should, like Count III, have been dismissed for failure to plead with requisite specificity.

12. The Board's Order suggests that it distinguishes between Counts III and IV on the basis that the Act prohibits conduct that poses "a threat" to water pollution. (Board's Order at p.

24). However, the fact that the Act prohibits the “threat” of water pollution does not negate the pleading requirements of 35 Ill.Adm.Code 103.204, which do not provide an exemption from the specificity requirements for complaints alleging “threatened” pollution. Rather, Section 103.204 declares in unequivocal terms that an enforcement complaint must contain:

The dates, location, events, nature, extent, duration and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations.

35 Ill.Adm.Code 103.204(c)(2).

13. Because Count IV of Yorkville’s Complaint fails to meet the specificity requirements of Section 103.204(c)(2), the Board’s finding that Count IV provided sufficient specificity to survive a motion to dismiss for failure to comply with 35 Ill.Adm.Code 103.204(c)(2) reflects a misapplication of the relevant law. The Board is accordingly urged to reconsider the application of 35 Ill.Adm.Code 103.204(c)(2) to Count IV of Yorkville’s Complaint, and to reconsider its denial of Hamman Farms’ request for dismissal of Count IV.

Dated: November 14, 2008

Respectfully submitted,

On behalf of Hamman Farms

/s/

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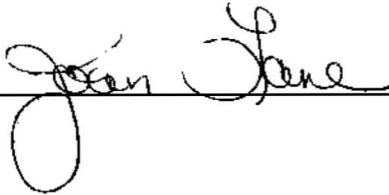
The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on November 14, 2008, she caused to be served a copy of the foregoing upon:

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