

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 December 10, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent's Response in Opposition to Yorkville's Motion for Leave to File Amended Complaint, a copy of which is attached hereto and hereby served upon you.

Dated: December 10, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/Charles F. Helsten

## Charles F. Helsten

## One of Its Attorneys

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**RESPONDENT'S RESPONSE IN OPPOSITION TO YORKVILLE'S MOTION FOR  
LEAVE TO FILE AMENDED COMPLAINT**

NOW COMES the Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, and for its Response in Opposition to Yorkville's Motion for Leave to File its Amended Complaint, states as follows:

### **Hamman Farms' Motion to Dismiss Count III (Air Pollution)**

Hamman Farms filed a Motion to Strike and/or Dismiss on July 8, 2008, seeking to strike certain portions of Yorkville's Complaint, and seeking dismissal of Counts II, III, and IV of Yorkville's Complaint.

With respect to Count III, Hamman Farms argued, *inter alia*, that:

Count III fails to comply with the Board's procedural rules, which require that the complaint contain "[t]he dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations." 35 Ill. Adm. Code 103.204(c). Yorkville's allegations in Count III are nothing more than sweeping legal assertions, which lack the specificity demanded by the Rule. Count III should therefore be dismissed for a failure to comply with the Board's Rules.

(Hamman Farms' Motion to Strike and/or Dismiss, at p. 4).

### The Board's Order Dismissing Count III

On October 16, 2008, the Board issued its ruling on Hamman Farms' motion, granting in

part and denying in part the requests to strike and/or dismiss Yorkville's Complaint. The Board granted the motion to dismiss Count III based on a lack of specificity. (Board's Order at 18, granting "Hamman's alternative motion to dismiss count III as insufficiently pled"). In doing so, the Board explained that:

the count as pled does not satisfy the requirements of the Act (415 ILCS 5/31(c), (d)(1) (2006)) or the Board's procedural rules (35 Ill. Adm. Code 103.204(c)(2)) for the contents of a complaint.

(Board's Order at 21).

The Board further opined that with respect to the lack of specificity:

Yorkville has stated little more than the legal conclusion that the odor has resulted in unreasonable interference with the enjoyment of life and property. *See Village of Mettawa*, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 ("legal conclusions unsupported by allegations of specific facts are insufficient"). "[P]ure conclusions [], even in administrative proceedings, are insufficient." *City of Des Plaines v. PCB*, 60 Ill. App. 3d 995, 1000, 377 N.E.2d 114, 119 (1st Dist. 1978).

(Board's Order at 21).

The Board criticized the complaint's vague allegations, noting that Yorkville had merely pled that "at unspecified times over the ensuing 15-year period, the Agency has received an unspecified number of complaints," thereby failing to provide sufficient detail to allow Hamman Farms to prepare a defense, and also failing to comport with the pleading requirements established by the Act and the Rules. (Board's Order at 21-22)(emphasis added).

The Board warned that "absent the ultimate facts on the dates or frequency and duration of the alleged odor emissions and the nature and extent of the allegedly resulting interference, Yorkville's complaint does not meet the pleading requirements." (Board's Order at 21).

#### **Yorkville's Motion for Leave to File an Amended Complaint**

On December 1, 2008, Yorkville filed Motion for Leave to File Amended Complaint, in

which it requested leave to file a proposed Amended Complaint, a copy of which was attached to its motion, in order “to sufficiently plead its position on Count III of the Original Complaint and to satisfy 415 ILCS 5/31(c) and (d)(2) and 35 Ill.Adm.Code 103.204(c)(2).” (Yorkville’s Motion for Leave, at ¶4).

The proposed Amended Complaint, however, is as defective as the original complaint, and fails to provide the specific facts required by the Rules, including “[t]he 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).

Moreover, the proposed Amended Complaint fails to provide the missing information that the Board expressly spelled out, in detail, in its Order, to wit: “the dates or frequency and duration of the alleged odor emissions and the nature and extent of the allegedly resulting interference.” (Board’s Order at 21). The Complaint also fails to clarify the “unspecified number of complaints” purportedly made “at unspecified times over the ensuing 15-year period.” (Board’s Order at 21).

Instead of providing the information delineated in the Board’s Order, Yorkville seeks leave to file a Complaint that is identical to its original defective complaint, but for the following one paragraph of additional text:

59. Specifically, the odor caused by Hamman Farms has substantially interfered with the Yorkville residents’ rights to public health and comfort and to the quiet use and enjoyment of their land, in some of the following ways:

- a. It forces Yorkville residents to remain indoors;
- b. It prevents Yorkville residents from opening windows to cool their homes and causes them to use air conditioning instead;

- c. It precludes Yorkville residents from entertaining guests outdoors;
- d. It precludes Yorkville residents from using the outdoor portions of their property, including decks attached to their homes;
- e. It prevents Yorkville children from playing outdoors; and
- f. It occasionally causes nausea in the people who smell the odor.

The Rules and cases are clear: the minimal pleading requirements for an air pollution violation require that a complaint allege “[t]he dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations.” *George R. Strunk v. Williamson Energy LLC (Pond Creek Mine #1)*, PCB 07-135 at \*8 (Dec. 20, 2007) (citing 35 Ill. Adm. Code 103.204(c)(2)). Here, however, Yorkville simply alleges that unidentified people, on unspecified dates over a fifteen year time span, on an unspecified number of occasions, for an unspecified length of time, chose to alter their behavior due to the alleged odor of yard waste in the area. Moreover, although the standard for air pollution requires that there be “unreasonable” interference, Yorkville instead pleads the odor caused “substantial” interference with residents’ use and enjoyment of their land. The proposed Amended Complaint, therefore, utterly and completely fails to cure the defects previously identified by the Board.

### **Conclusion**

Here, Yorkville requests leave to file a complaint that is just as defective as its initial complaint. The proposed Amended Complaint fails to provide the information specifically spelled out in the Board’s Order dismissing Count III, and fails to meet the pleading

requirements of the Act and the Rules.

Because the "Amended Complaint" attached to Yorkville's Motion for Leave to File Amended Complaint fails to cure the fatal defects of Count III which were identified in the Board's Order of October 16, 2008, the Board should deny Yorkville's motion. *See Bd. of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill.2d 419, 432, 712 N.E.2d 330, 337, 238 Ill.Dec. 608, 615 (1999) (setting forth the four factors to be weighed in determining whether to allow an amended complaint: "(1) whether the proposed amendment will cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely filed; and (4) whether the moving party had previous opportunities to amend") (emphasis added).

WHEREFORE: Respondent, Hamman Farms, respectfully requests that the Board deny Yorkville's Motion for Leave to File Amended Complaint, and grant such other and further relief as it deems appropriate.

Dated: December 10, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/Charles F. Helsten

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One of Its Attorneys

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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 December 10, 2008, she caused to be served a copy of the foregoing upon:

Mr. John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board  
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**(via electronic filing)**

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A handwritten signature in black ink, appearing to read "Jean Kane", is written over a horizontal line.

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