

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A)
MUNICIPAL CORPORATION,)
Complainant,)
v.)
HAMMAN FARMS,)
Respondent.)

PCB No. 08-96

Enforcement-Land, Air, Water

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 COMPLAINANT'S RESPONSE TO HAMMAN FARMS' MOTION FOR SUMMARY JUDGMENT, a copy of which is herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE,
Complainant,

By: Michelle M. LaGrotta
One of its Attorneys

Dated: January 19, 2012

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH WEISBERG & WRONA
53 W Jackson Blvd., Ste. 950
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Atty ID: 29637

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, Michelle M. LaGrotta, the undersigned certify that on January 19, 2012, I have served the attached **COMPLAINANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT**, 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
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ORIGINAL
RETURN TO CLERK'S OFFICE

Michelle M. LaGrotta

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE,)
A MUNICIPAL CORPORATION,)

Complainant,)

v.)

HAMMAN FARMS,)

Respondent.)

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

COMPLAINANT'S RESPONSE TO HAMMAN FARMS' MOTION FOR SUMMARY JUDGMENT

NOW COMES Complainant, UNITED CITY OF YORKVILLE, by and through its attorneys, Gardiner Koch Weisberg & Wrona, and for its RESPONSE TO HAMMAN FARMS' MOTION FOR SUMMARY JUDGMENT, it states as follows:

I. INTRODUCTION

On June 4, 2008, The United City of Yorkville ("Yorkville") filed a four-count complaint against Hamman Farms ("Hamman") alleging violations of the Environmental Protection Act ("Act"). On or about May 7, 2009, Yorkville filed its Amended Complaint. A copy of the Amended Complaint¹ is attached hereto as Exhibit 1. Similar to the original complaint, Yorkville's Amended Complaint contains four counts. These counts are as follows: 1) Open Dumping Violations; 2) Landscape Waste Violations; 3) Air Pollution Violations; and 4) Water Pollution Violations. Yorkville alleges that the violations span from 1993 to present. After the parties engaged in additional motion practice and written discovery, the parties engaged in settlement discussions. Hamman filed its Motion for Summary Judgment on or about December 6, 2011.

¹ Yorkville notes that Hamman may have inadvertently attached an incomplete copy of its Amended Complaint. Yorkville attaches a complete copy for the Board's review.

On or about September 17, 2008, the Illinois Attorney General on behalf of the People of the State of Illinois (“State”) filed a complaint again Hamman in the Circuit Court of the Sixteenth Judicial Circuit, Kendall County, Case No. 2008 CH 0811. On or about May 7, 2009, the State filed its First Amended Complaint For Injunctive Relief and Other Civil Penalties. A copy of which is attached hereto as Exhibit 2. The counts of the State’s First Amended Complaint are as follows: 1) Open Dumping; 2) Conducting a Waste Storage Operation Without a Development Permit; 3) Conducting a Waste Storage Operation Without an Operating Permit; and 4) Failure to Meet the Agronomic Rates Exemption. The State’s First Amended Complaint notably does not consist of any air or water pollution violations. The State’s allegations appear confined to 2007 to the date of the filing of the Amended Complaint. On or about March 10, 2011, Hamman and the State entered into a Consent Order resolving the dispute between them. A copy of the Consent Order is attached hereto as Exhibit 3.

After the State filed its Complaint in 2008, Hamman filed its Motion to Dismiss Counts I and II as Duplicative, which was filed on November 17, 2008. That motion requested the dismissal of Counts I and II on the basis that it was duplicative of the State’s action. That motion was fully briefed. On April 2, 2009, the Illinois Pollution Control Board (“Board”) issued its order and opinion denying Hamman’s motion. A copy of the Order is attached hereto as Exhibit 4.

II. ARGUMENT

A. Standard

Pursuant to 35 ILL. ADMIN. CODE § 101.516, “[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the

Board will enter summary judgment.” The purpose of summary judgment is to determine whether a genuine issue of material fact exists. Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004). In determining whether a genuine issue of material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. Id. While the use of summary judgment procedures is to be encouraged as an aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation. Duncan v. Peterson, 359 Ill. App.3d 1034, 1043, 835 N.E.2d 411, 419 (2d Dist. 2005). Therefore, it should be allowed only when the right of the moving party is clear and free from doubt. Id. This Board cannot grant summary judgment because genuine issues of material fact exist and Hamman is not entitled to judgment as a matter of law.

B. Hamman Fails To Establish Identity of Causes and Identity of Parties, And, Thus, Res Judicata Does Not Apply Here.

Because Hamman cannot establish two of the three requirements for the res judicata doctrine to apply, Hamman is not entitled to summary judgment. “A prior judgment may have preclusive effects in a subsequent action” under *res judicata*. Nowak v. St. Rita High Sch., 197 Ill. 2d 381, 389 (2001). The following three requirements must be satisfied for the doctrine to apply: “(1) there was final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies.” Id. at 390. Moreover, “[r]es judicata will not be applied where it would be fundamentally unfair to do so.” Id. Yorkville concedes that the Consent Order is a final judgment on the merits; however, genuine issues of material fact exist as to the remaining two counts. As a result, Hamman is not entitled to summary judgment.

1. Hamman fails to establish an identity of causes exists.

Although Yorkville's Amended Complaint and the State's Amended Complaint have similarities, their causes of actions do not consist of a single group of operative facts. To establish an identity of causes of action the party asserting *res judicata* must establish an "identity of causes of action" in the first and second lawsuit. Torcasso v. Standard Outdoor Sales, Inc., 157 Ill. 2d 484, 491 (1993). "The test generally employed to determine the identity of causes of action for purposes of *res judicata* is whether the evidence needed to sustain the second action would have sustained the first." Id. "If the same facts are essential to maintain both proceedings or the same evidence is necessary to sustain the two, there is identity between the causes of action asserted." Id. The invoking party must establish the identity of causes of action either within the existing record or by extrinsic evidence. Id. Here, Hamman fails to establish identity of causes of actions.

Hamman appears to rely on two bits of information from the State's Amended Complaint and Yorkville's Amended Complaint, namely, a reference to the year of 2007 and similar relief. However, the relief sought is not relevant to the issue of "whether the evidence needed to sustain the second cause of action would have sustained the first." The relief sought in the two complaints is just relief, not factual allegations that would sustain a cause of action and result in identity of causes of actions.

Moreover, Hamman's assertion that Yorkville and the State's cases concern the same timeframe is incorrect. While Yorkville does allege violations occurred in 2007, Yorkville also alleges violations that took place as far back as 1993. Ex. 1, ¶¶ 4, 10, 11, 12, 36, 48, 50-52, and 60-65. Thus, Yorkville's cause of action covers actions that took place during approximately fourteen years that the State does not even address. Hamman also mistakenly that Count III (air

pollution violations) and Count IV (water pollution violations) of Yorkville's Amended Complaint should be treated as an identity of causes. However, nowhere in the State's Amended Complaint does the State address odor allegations or water pollution allegations. None of the allegations in the State's Amended Complaint would sustain Yorkville's Count III and IV.

Here the Yorkville's complaint requires facts that are not found within the State's Complaint. Additionally, Yorkville's complaint addresses a different timeframe than that found within the State's allegations. As result, an identity of causes does not exist, and the Board must deny Hamman's motion for summary judgment.

2. A genuine issue of material fact exists as to whether Yorkville and the State are in privity.

Here, Hamman's motion for summary judgment fails because a genuine issue of material fact exists as to whether Yorkville and the State were in privity. The third element of *res judicata* is identity or privity between the parties. Atherton v. Conn.Gen. Life Ins. Co., 955 N.E.2d 656 (1st Dist. 2011). Because Yorkville was not a party to the State's litigation, Hamman must rely on privity between the parties. The issue of whether privity exists is generally a question of fact. Id. at 660. "With respect to the doctrine of *res judicata*, there is no generally prevailing definition of privity' which can automatically be applied to all cases; that determination requires a careful examination into the circumstances of each case." Id. (citing Purmal v. Robert N. Wadington & Assoc., 354 Ill. App. 3d 715, 722 (2004)).

The First District Appellate Court examined the issue of privity in State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co., 394 Ill. App. 3d 548, 559-60 (1st Dist. 2009). There it found the Restatement (Second) of Judgments to provide the most useful rationale for determining whether privity exists. Id. at 559. There are three general categories of relationships that may establish privity: 1) relationships that are "explicitly representative; 2) an array of

substantive legal relationships, in which one party to the relationship is treated as “having the capacity to bind the other to a judgment in an action to which the latter is not a party; and 3) successors in interest to property. Id. at 559-60. Here, none of those categories of privity describe the circumstances between Yorkville and the State, and Hamman does not assert that Yorkville has one of those described relationships with the State.

The first category deals with explicit representative relationships, such as trustees of an estate, an executor, guardian, or representative of a class. Id. at 559. Yorkville and the State did not engage in any type of explicit representative relationship when the State filed its Complaint. The second category also does not characterize the relationship between Yorkville and the State. Examples of the second category are: co-obligors, parties who are vicariously liable for each other, bailees and bailors, assignees and assignors. Id. at 560. Yorkville and the State did not have any such type of substantive legal relationship. Finally, Yorkville is not a successor in interest to property, and thus, these circumstances do not fit the third category.

Hamman asserts that the Yorkville and the State are in privity because “mutuality of interest.” Yet, Hamman fails to establish the basis for its assertion that the legal interests that Yorkville and the State are seeking to represent are “the public’s interest in maintaining environmental standards and seeing that the environmental laws are followed.” Hamman attaches no affidavit nor cites any case law, statutory authority, or other evidence that would purport to establish the State’s and Yorkville’s interests in the cases involving Hamman. While some overlap may exist between Yorkville’s and the State’s interests, their legal interests are not identical. Yorkville’s interest in this litigation concerns not only environmental protections but also the protection its citizens’ interests. As illustrated in the Purpose of the Illinois Environmental Protection Agency (“Agency”), the Agency’s interests do not include the

promotion of the interests of Yorkville's citizens. See Purpose of the Illinois EPA attached hereto as Exhibit 5. Hamman relies on People v. Progressive Land Developers, 151 Ill. 2d 285 (1992) to argue that the State may adequately represent a municipality's interests. Yet, the circumstances of Progressive Land Developers is distinguishable from the facts here. There the court looked at whether the private entity adequately represented the interests of the State, which were clearly delineated and identified as the same as the private entity's, to wit: arguing that certain assets of the defendant were held in constructive trust. Id. at 296. Here, the interests of the State and Yorkville are not so clearly identified and aligned, and thus, Progressive Land Developers does not apply.

Additionally, Hamman's reliance on documents from Yorkville's discovery response² is misplaced. Those documents are not representative of Yorkville's discovery response, which includes hundreds of other documents and sixteen compact discs of information. Although Yorkville and the Agency shared some information and had some meetings, Yorkville did not work in tandem with the Agency. Not all of the information that Yorkville relied upon in developing its Complaint was information exchanged between the Agency and Yorkville. Much of the information came from Yorkville's citizens, who were concerned about how Hamman had impacted their lives. As a result, these documents fail to establish privity between Yorkville and the State.

Here, Yorkville has established evidence demonstrating the State's interests and Yorkville's interests are not identical. Yorkville also asserts a lack of privity in the State's litigation. On the other hand, Hamman asserts that the State's and Yorkville's interests are

² While unclear, it appears that Hamman is attempting to assert the veracity of the information contained in these documents through Yorkville's Affidavit Pursuant to Rule 214, which Hamman attaches as Exhibit D to its Motion for Summary Judgment. However, it should be noted that the Affidavit only speaks to the completeness of Yorkville's production in response to Hamman's discovery requests. The Affidavit does not assert the correctness or veracity of the information contained in any of the documents responsive produced in response to those requests.

identical, and that they are in privity. Thus, a genuine issue of material fact exists as to whether Yorkville and the State are in privity, and the Board cannot grant summary judgment.

C. The Board Previously Ruled That Yorkville's Cause Of Action Is Not Duplicative Of The State's.

Hamman's second argument is identical to the argument that it made in its Motion to Dismiss Counts I and II as Duplicative, which was filed on or about November 17, 2008. As Yorkville maintained in its response, which was filed on or about December 1, 2008, these actions are not duplicative. The Board has ruled previously that the actions are not duplicative. Ex. 4, pp. 4-6. Hamman should be estopped from raising this issue again and attempting to relitigate a matter that the Board already has decided.

III. CONCLUSION

Because Hamman cannot establish identity of causes of actions and identity of parties, Hamman fails to meet its burden in establishing the requirements for *res judicata*. Moreover, a genuine issue of material fact exists as to whether the State and Yorkville are in privity. Therefore, the Board must deny Hamman's Motion for Summary Judgment.

Respectfully submitted,

UNITED CITY OF YORKVILLE

By: 
One of Its Attorneys

Dated: January 19, 2012

Thomas G. Gardiner
Michelle M. LaGrotta
Gardiner Koch Weisberg & Wrona
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(312) 362-0000
Law Firm ID: 29637

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAY 07 2009

STATE OF ILLINOIS
Pollution Control Board

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

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

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 AMENDED COMPLAINT,
copies of which are herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE,
Petitioner,

By: Michelle M. LaGrotta
One of its Attorneys

Dated: May 7, 2009

Thomas G. Gardiner
Michelle M. LaGrotta
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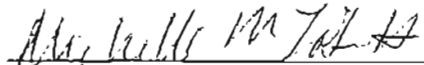
CERTIFICATE OF SERVICE

I, Michelle M. LaGrotta, the undersigned certify that on May 7, 2009, I have served the attached **AMENDED COMPLAINT**, upon:

Mr. John T. Theriault, 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
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Michelle M. LaGrotta

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAY 07 2009

UNITED CITY OF YORKVILLE, A)
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v.)

HAMMAN FARMS,)
Respondents.)

PCB No. 08-96

STATE OF ILLINOIS
Pollution Control Board

(Enforcement-Land, Air, Water)

AMENDED COMPLAINT

NOW COMES the Complainant, UNITED CITY OF YORKVILLE, by its attorneys, GARDINER KOCH & WEISBERG, pursuant to Section 31(d) of the Illinois Environmental Protection Act (415 ILCS 5/31(d)), and 35 Ill. Admin. Code § 103.200, and for its Amended Complaint against HAMMAN FARMS, states as follows:

GENERAL ALLEGATIONS

1. Complainant, UNITED CITY OF YORKVILLE, (hereinafter referred to as "Yorkville") is an Illinois municipal corporation in Kendall County, Illinois.
2. At all times relevant, HAMMAN FARMS (hereinafter referred to as "HAMMAN") is a farm, located on approximately twenty-two hundred acres of land in Kendall County.
3. On this land, HAMMAN grows crops of soybeans, wheat and corn.
4. Starting in or around 1993, HAMMAN registered with the Illinois Environmental Protection Agency ("Agency") as an On-Site Compost Landscape Waste Compost Facility (hereinafter referred to as "Compost Facility") pursuant to section 21(q)(3) of the Illinois Environmental Protection Act (hereinafter referred to as "Act").

5. As part of HAMMAN'S farming operations, HAMMAN receives landscape waste from offsite. HAMMAN grinds the landscape waste in a tub grinder. HAMMAN then applies the landscape waste to farm fields.

6. Sometime in or around 1992 to 1993, HAMMAN applied to the Agency for permission to apply landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year. The Agency denied Hamman's request.

7. Since registering with the Agency as a Compost Facility, HAMMAN has completed and filed annual reports as required under 35 Illinois Administrative Code §830.106(b)(2).

8. HAMMAN certified that it received landscape waste in the amounts of 157,391 cubic yards, 174,630 cubic yards, 266,441 cubic yards, 192,532 cubic yards, and 222,239 cubic yards for the years 2002, 2003, 2004, 2005, and 2006, respectively.

9. Application of landscape waste at agronomic rates results in application measurements of three quarter of an inch. Application measurements of greater than three quarters of an inch signify that landscape waste is being applied at rates greater than the agronomic rate.

10. Since registering as a Compost Facility, HAMMAN has applied landscape waste at rates resulting in application measurements greater than three quarters of one inch.

11. On several occasions since registering as a Compost Facility, Agency inspectors have found litter mixed with the landscape waste in HAMMAN's fields.

12. Since HAMMAN began the application of landscape waste to its fields, the Agency has received complaints of strong and offensive odors around HAMMAN.

13. On October 17, 2007, Agency inspectors, Gino Bruni and Mark Retzlaff, conducted an inspection of HAMMAN. During the inspection, the inspectors observed the following:

- a. The application rate was two and one half inches to three inches thick using a ruler;
- b. Numerous flies were at the field where landscape waste had been applied; and
- c. General refuse was in the landscape waste.

14. On November 15, 2007, the Agency issued HAMMAN a violation notice. The notice cited the following violations:

- a. Section 21(a) of the Act: HAMMAN openly dumped landscape waste and general refuse. HAMMAN did not apply landscape waste at agronomic rates.
- b. Section 21(d) of the Act: HAMMAN openly dumped landscape waste and general refuse. HAMMAN did not apply landscape waste at agronomic rates. HAMMAN conducted the aforementioned activities without a permit issued by the Agency.
- c. Section 21(p) of the Act: HAMMAN openly dumped litter, and litter was commingled with the landscape waste.
- d. 35 Ill. Admin. Code §807.201: HAMMAN openly dumped landscape waste and general refuse. HAMMAN did not apply landscape waste at agronomic rates. HAMMAN conducted the aforementioned activities without a developmental permit granted by the Agency.
- e. 35 Ill. Admin. Code §807.202: HAMMAN openly dumped landscape waste and general refuse. HAMMAN did not apply landscape waste at agronomic

rates. HAMMAN conducted the aforementioned activities without a developmental permit granted by the Agency.

15. The violation notice specified "suggested resolutions." These included the following:

- a. Immediately cease all open dumping;
- b. Immediately remove all litter/general refuse from incoming loads of landscape waste prior to placing into the tub grinder. A second screening of the landscape waste must be conducted prior to being applied to the farm fields. If necessary, a third screening must be conducted prior to the landscape waste being tilled into the field;
- c. Immediately apply landscape waste at agronomic rates (three quarters of one inch in thickness). Daily written agronomic rate calculations must be maintained for three years; and
- d. Immediately calculate, on a daily basis, the percentage of non-landscape waste. These calculations must be maintained for three years.

16. Following the violation notice, a violation notice meeting was held at the Agency's Des Plaines office. At the meeting, DONALD J. HAMMAN admitted that HAMMAN was applying landscape waste at a rate greater than twenty (20) tons per acre per year.

17. On March 5, 2008, the Agency rejected HAMMAN's Compliance Commitment Agreement on the following bases:

- a. HAMMAN failed to agree to apply landscape waste at agronomic rates (twenty (20) tons per acre per year); and

b. HAMMAN failed to calculate on a daily basis the percentage of non-landscape waste.

18. On April 10, 2008, HAMMAN filed a request for permission to apply landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year. HAMMAN included with its application the following documents: (1) Land Application Plan; (2) USDA Soil Conservation Service Soil Survey; (3) Chemical Analysis of Soil/Compost; (4) Calculations regarding Nitrogen Demand and Expected Nitrogen and Potassium Loading; and (5) Opinion of Dr. Razvi.

19. The Chemical Analysis of Soil/Compost included four (4) soil samples and one (1) sample of leaves with mixed forage. Midwest Laboratories, who performed the tests, received the four soil samples conducted the analyses on December 7, 2007. Midwest Laboratories' report did not identify the location from where the samples were taken. Midwest Laboratories, Inc. received the sample of leaves with mixed forage on December 5, 2007.

20. The Illinois Agronomy Handbook recommends using a sampling of one composite from each two and one half (2 ½) acre areas when conducting soil test analysis. Mr. Gary Cima, an expert in landscape waste application and former Agency investigator, recommends using a sampling of two tests from each one acre area.

21. On April 16, 2008, HAMMAN filed a supplemental application.

22. On May 1, 2008, the Agency approved HAMMAN's request to raise the agronomic rate.

COUNT I **OPEN DUMPING VIOLATIONS**

23. Section 21 of the Act, 415 ILCS 5/21(2008), provides in pertinent part as follows:

"No person shall:

(a) Cause or allow the open dumping of any waste...

(d) Conduct any waste-storage, waste treatment, or waste-disposal operation:

(1) without a permit granted by the Agency or in violation of any conditions imposed by such permit...

(2) in violation of any regulations or standards adopted by the Board under this Act;...

(e) Dispose, treat, store, or abandon any waste, or transport any waste to this State for disposal, treatment storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder....

(p) In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

(1) litter;..."

24. Section 3.185 of the Act, 415 ILCS 5/3.185 (2008), provides:

"‘Disposal’ means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."

25. Section 3.230 of the Act, 415 ILCS 5/3.230 (2008), provides in pertinent part:

"‘Household waste’ means any solid waste (including garbage, trash, and sanitary waste in septic tanks) derived from households..."

26. Section 3.270 of the Act, 415 ILCS 5/3.270 (2008), provides:

"‘Landscape waste’ means all accumulations of grass or shrubbery cuttings, leaves, tree limbs and other materials accumulated as the result of the care of lawns, shrubbery, vines and trees."

27. Section 3.305 of the Act, 415 ILCS 5/3.305 (2008), provides:

“‘Open dumping’ means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.”

28. Section 3.385 of the Act, 415 ILCS 5/3.385 (2008), provides:

“‘Refuse’ means waste.”

29. Section 3.445 of the Act, 415 ILCS 5/3.445 (2008), provides:

“‘Sanitary landfill’ means a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day’s operation, or by such other methods and intervals as the Board may provide by regulation.”

30. Section 3.470 of the Act, 415 ILCS 5/3.470 (2008), provides:

“‘Solid waste’ means waste.”

31. Section 3.480 of the Act, 415 ILCS 5/3.480 (2008), provides:

“‘Storage’ means the containment of waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal.”

32. Section 3.535 of the Act, 415 ILCS 5/3.535 (2008), provides in pertinent part:

“‘Waste’ means any garbage...or other discarded material, including solid, liquid, semi-solid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities...”

33. Section 3.540 of the Act, 415 ILCS 5/3.540 (2008), provides:

“‘Waste disposal site’ is a site on which solid waste is disposed.”

34. On October 23, 2007 the Agency inspected HAMMAN and found refuse mixed in with the landscape waste.

35. Garbage and refuse mixed with the landscape waste constitutes waste under section 3.535 of the Act. 415 ILCS 5/535.

36. On several occasions since HAMMAN began applying landscape waste, garbage has been mixed with the landscape waste on HAMMAN fields.

37. In allowing the garbage to be disposed of and remain on HAMMAN fields, HAMMAN allowed "open dumping" for purposes of 415 ILCS 5/21(a).

38. In allowing the garbage to be disposed of and remain on HAMMAN fields, HAMMAN conducted waste-storage and waste-disposal operations, for purposes of 415 ILCS 5/21(d)(1) and (2), without a permit and in violation of the Act and regulations.

39. In allowing the garbage to be disposed of and remain on HAMMAN fields, HAMMAN became a waste disposal site for purposes of 415 ILCS 5/21(e). At the time that HAMMAN allowed garbage to remain on HAMMAN fields, HAMMAN was not permitted for the disposal of waste, and thus does not meet the requirements of the Act or the regulations for purposes of 415 ILCS 5/21(e).

40. In allowing the garbage to be disposed of and remain on HAMMAN fields, HAMMAN allowed "open dumping" of litter for purposes of 415 ILCS 5/21(p)(1).

41. HAMMAN's failure to remove the waste is harmful to the environment and to the health and welfare of the people living and working near HAMMAN.

42. Because of the aforementioned reasons, HAMMAN has violated sections 21(a), 21(d)(1) and (2), 21(e), and 21(p)(1) of the Act.

PRAYER FOR RELIEF

WHEREFORE, Complainant, UNITED CITY OF YORKVILLE, respectfully requests that the Board enter an order against the Respondent:

- A. Authorizing a hearing in this matter at which time the Respondent will be required to answer the allegations herein;
- B. Finding that the Respondent has violated the Act and regulations as alleged herein;
- C. Ordering the Respondent to cease and desist from any further violations of the Act and associated regulations;
- D. Ordering the Respondent to pay a civil penalty of \$50,000 for each such violation, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a);
- E. Ordering the Respondent to pay an additional civil penalty of \$10,000 for each day during which each such violation continued, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a); and
- F. Granting such other relief as the Board may deem appropriate.

COUNT II
LANDSCAPE WASTE VIOLATIONS

43. Section 21 of the Act, 415 ILCS 5/21(2008), provides in pertinent part as follows:

“No person shall:...

(q) Conduct a landscape waste composting operation without an Agency permit, provided, however, that no permit shall be required for any person:...

(2) applying landscape waste or composted landscape waste at agronomic rates; or

(3) operating a landscape waste composting facility on a farm, if the facility meets all of the following criteria:

(A) the composting facility is operated by the farmer on property on which the

composting material is utilized, and the composting facility constitutes no more than 2% of the property's total acreage...

(C) all compost generated by the composting facility is applied at agronomic rates and used as mulch, fertilizer or soil conditioner on land actually farmed...

(D) the owner or operator, by...January 1 of each year thereafter, (i) registers the site with the Agency, (ii) reports to the Agency on the volume of composting material received and used at the site, (iii) certifies to the Agency that the site complies with the requirements set forth in subparagraphs (A), (B) and (C) of this paragraph (q)(3), and (iv) certifies to the Agency that all composting material was placed more than 200 feet from the nearest potable water supply well, was placed outside the boundary of the 10-year floodplain or on a part of the site that is floodproofed, was placed at least 1/4 mile from the nearest residence (other than a residence located on the same property as the facility) and there are not more than 10 occupied non-farm residences within 1/2 mile of the boundaries of the site on the date of application, and was placed more than 5 feet above the water table.

For the purposes of this subsection (q), 'agronomic rates' means the application of not more than 20 tons per acre per year, except that 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."

44. Section 3.270 of the Act, 415 ILCS 5/3.270 (2008), provides:

"'Landscape waste' means all accumulations of grass or shrubbery cuttings, leaves, tree limbs and other materials accumulated as the result of the care of lawns, shrubbery, vines and trees."

45. Section 830.102 of the Illinois Administrative Code Title 35, ILL. ADMIN. CODE

TIT. 35, §830.102, provides in pertinent part:

"Except as stated in this Section, the definition of each word or term used in this Part, 35 Ill. Adm. Code 831 and 35 Ill. Adm. Code 832 shall be the same as that applied to the same word or term in the Environmental Protection Act...

'Agronomic Rates' means the application of not more than 20 tons per acre per year, except that 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. (Section 21(q) of the Act.)...

'Compost' means the humus-like product of the process of composting waste, which may be used as a soil conditioner. (Section 3.70 of the Act.)

'Composting' means 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....

'Land application' means the spreading of waste, at an agronomic rate, as a soil amendment to improve soil structure and crop productivity....

'Landscape waste compost facility' means an entire landscape waste composting operation, with the exception of a garden compost operation....

'On-farm landscape waste compost facility' means a landscape compost facility which satisfies all of the criteria set forth in Section 830.106. "

46. Section 832.109 of the Illinois Administrative Code Title 35, ILL. ADMIN. CODE

TIT. 35, §832.109, provides:

"The issuance and possession of a permit shall not constitute a defense to a violation of the Act or any Board regulations, except for the development and operation of a facility without a permit."

47. Landscape waste constitutes waste under section 3.535 of the Act. 415 ILCS 5/535.

48. Since HAMMAN began applying landscape waste, HAMMAN has applied landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year.

49. In applying landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year, HAMMAN allowed "open dumping" for purposes of 415 ILCS 5/21(a).

50. In applying landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year, HAMMAN conducted waste-storage and waste-disposal operations, for purposes of 415 ILCS 5/21(d)(1) and (2), without a permit and in violation of the Act and regulations.

51. In applying landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year, HAMMAN became a waste disposal site for purposes of 415 ILCS 5/21(e). HAMMAN was not permitted for the disposal of waste, and thus does not meet the requirements of the Act or the regulations for purposes of 415 ILCS 5/21(e).

52. In applying landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year, HAMMAN does not meet the permit exemptions found in sections 21(q)(2) and (3) of the Act. In applying landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year, without a permit, HAMMAN violated section 21(q) of the act.

53. Because of the aforementioned reasons, HAMMAN has violated sections 21(a), 21(d)(1) and (2), 21(e), and 21(q).

PRAYER FOR RELIEF

WHEREFORE, Complainant, UNITED CITY OF YORKVILLE, respectfully requests that the Board enter an order against the Respondent,

- A. Authorizing a hearing in this matter at which time the Respondent will be required to answer the allegations herein;
- B. Finding that the Respondent has violated the Act and regulations as alleged herein;
- C. Ordering the Respondent to cease and desist from any further violations of the Act and associated regulations;
- D. Ordering the Respondent to pay a civil penalty of \$50,000 for each such violation, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a);
- E. Ordering the Respondent to pay an additional civil penalty of \$10,000 for each day during which each such violation continued, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a); and
- F. Granting such other relief as the Board may deem appropriate.

COUNT III
AIR POLLUTION VIOLATIONS

54. Section 9 of the Act, 415 ILCS 5/9 (2008) provides in pertinent part:

"No person shall:

(a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act..."

55. Section 3.115 of the Act, 415 ILCS 5/3.115 (2008), provides

“‘Air pollution’ is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.”

56. Section 3.165 of the Act, 415 ILCS 5/3.165 (2008), provides:

“‘Contaminant’ is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.”

57. Under Section 3.165 of the Act, the odor that is emitted from HAMMAN’s application of landscape waste is a contaminant.

58. Under Section 3.115 of the Act, the release of the odor, a contaminant, is air pollution that unreasonably interferes with the enjoyment of life or property. This odor unreasonably interferes with Yorkville’s residents’ use and enjoyment of life and property.

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 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.

60. Joann Gilbert, who resides at 8730 East Highpoint Road, Yorkville, Illinois, first noticed the odor caused by Hamman Farms during the summer of 1994. Ms. Gilbert found the

odor so offensive that she called emergency services because she thought the odor resulted from an accident. Although police officers came out to investigate the odor, Ms. Gilbert did not learn the source of the smell until several weeks later.

- a. From 1994 until 2006, Ms. Gilbert noticed the odor a several times per month from May until October.
- b. As a result of the odor, Ms. Gilbert began to use air conditioning instead of leaving the windows of her home open
- c. In May 2008, Ms. Gilbert noted the odor on at least three occasions. Ms. Gilbert noted the odor again on at least four occasions in June 2008 (on or about, June 18th, 19th, 20th, and 30th) and once in July 2008 (on or about, July 31st).
- d. On those occasions, Ms. Gilbert informed the Illinois Environmental Protection Agency.

61. Diane Pobol, a former Yorkville resident, resided on property surrounded by Hamman Farms from early 2006 until fall of 2008.

- a. Ms. Pobol noticed the odor for the first time in spring 2006. When Ms. Pobol first noticed the odor, she thought that there was a problem with the septic tank on her property. Ms. Pobol later learned that that the odor came from Hamman Farms.
- b. Ms. Pobol's home did not have air conditioning, and she was forced to leave windows open despite the smell. As a result of the odor, Ms. Pobol's eyes were often irritated and continually teared.

- c. Prior to moving into her home, Ms. Pobol had entered negotiations to rent one of the barns on the property. The rental money was intended to help subsidize the mortgage payments. Following the potential renters' visit to the property in May 2006, the potential renters refused to enter the lease due to the odor emanating from Hamman Farms. Ms. Pobol was never able to find a renter for the barn.
- d. Ms. Pobol tried to sell the property in 2006. The odor, along with the garbage and flies lying in and around the fields of Hamman Farms, drove away potential buyers. Ms. Pobol was unable to sell the home.

62. Todd Milliron, who has resided at 61 Cotswold Drive, Yorkville, Illinois since in or around September 1996, noticed the odor immediately upon moving into his home.

- a. Mr. Milliron noticed the odor on an ongoing basis from mid-May until early October of each year from 1996 until the fall of 2007. Although Mr. Milliron constantly noted the odor, the odor at times became especially intense when the wind blew in the direction of his home.
- b. Because of the ongoing odor, Mr. Milliron was forced to use air conditioning rather than leaving windows open. This caused Mr. Milliron to feel like a prisoner in his own home, unable to open the windows and get fresh air, or enjoy the exterior of his property.

63. Robert and Lynn Smith, who have resided at 9122 Lisbon Road, Yorkville, Illinois since in or around 1965, noticed the odor within the last ten years.

- a. The Smiths notice the odor on a daily basis from April to November; however, they note that the odor can be particularly bad when the wind directs the odor toward their home.
- b. The Smiths describe the odor as a sour smell that is worse than typical farm smells.
- c. The Smiths held family reunions on their property annually over the last three years. Each year, approximately two thirds of their guests left early due to the odor.
- d. The Smiths find that they are unable to enjoy outdoor activities on their property and are unable to leave their windows open when they otherwise would.

64. Larry Alex, who has resided at 2108 Bernadette Lane, Yorkville, Illinois for the last two years, has noticed the odor since moving into his home.

- a. Mr. Alex finds the intensity of the odor is dependent upon the wind direction.
- b. Mr. Alex finds the odor particularly strong about two to three times per month during the months of April through November.
- c. The odor has negatively affected Mr. Alex's outdoor activities.

65. William Fowler, who has resided at 8577 W Highpoint Road, Yorkville, Illinois since 1998, has noticed the odor every summer since moving into his home.

- a. Mr. Fowler finds the odor present from April to October or November.
- b. Mr. Fowler finds the odor to have a fowl, moldy grass smell that is not typical of farms.
- c. Mr. Fowler is unable to enjoy outdoor activities on his property.

- d. Mr. Fowler finds the odor embarrassing when he has guests at his home and is compelled to explain the odor.

66. In applying the landscape waste, HAMMAN is allowing the discharge of contaminant into the environment so as to cause air pollution under section 9(a) of the Act.

67. Because of the aforementioned reasons, HAMMAN has violated section 9(a) of the Act.

PRAYER FOR RELIEF

WHEREFORE, Complainant, UNITED CITY OF YORKVILLE, respectfully requests that the Board enter an order against the Respondent,

- A. Finding that the Respondent has violated the Act and regulations as alleged herein;
- B. Ordering the Respondent to cease and desist from any further violations of the Act and associated regulations;
- C. Ordering the Respondent to pay a civil penalty of \$50,000 for each such violation, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a);
- D. Ordering the Respondent to pay an additional civil penalty of \$10,000 for each day during which each such violation continued, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a); and
- E. Authorizing a hearing in this matter at which time the Respondent will be required to answer the allegations herein;
- F. Granting such other relief as the Board may deem appropriate.

COUNT IV
WATER POLLUTION VIOLATIONS

68. Section 12 of the Act, 415 ILCS 5/12 (2008), provides in pertinent part:

“No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act...

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.”

69. Section 3.165 of the Act, 415 ILCS 5/3.165 (2008), provides:

“‘Contaminant’ is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.”

70. Section 3.545 of the Act, 415 ILCS 5/3.545 (2008), provides:

“‘Water pollution’ is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.”

71. Section 3.550 of the Act, 415 ILCS 5/3.550 (2008), provides:

“‘Waters’ means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.”

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

73. 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.

74. 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.

75. 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.

76. Because of the aforementioned reasons, HAMMAN has violated sections 12(a) and 12(d) of the Act.

PRAYER FOR RELIEF

WHEREFORE, Complainant, UNITED CITY OF YORKVILLE, respectfully requests that the Board enter an order against the Respondent,

- A. Authorizing a hearing in this matter at which time the Respondent will be required to answer the allegations herein;
- B. Finding that the Respondent has violated the Act and regulations as alleged herein;
- C. Ordering the Respondent to cease and desist from any further violations of the Act and associated regulations;
- D. Ordering the Respondent to pay a civil penalty of \$50,000 for each such violation, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a);

- E. Ordering the Respondent to pay an additional civil penalty of \$10,000 for each day during which each such violation continued, pursuant to Section 42(a) of the Illinois Environmental Protection Act, 415 ILCS 5/42(a); and
- F. Granting such other relief as the Board may deem appropriate.

Respectfully submitted,

UNITED CITY OF YORKVILLE,
Complainant,

By: *Michelle M. LaGrotta*
One of its Attorneys

Dated: May 7, 2009

Thomas G. Gardiner
Kenneth M. Battle
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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
General of the State of Illinois,

Plaintiff,

vs.

DON HAMMAN FARMS LLC, an Illinois
limited liability company,

Defendant.

FILED

DEC 07 2011

DEBRA MORGAN, CLERK
KENDALL COUNTY, ILLINOIS

No. 2008-CH-0811

FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND OTHER CIVIL
PENALTIES

The PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney
General of the State of Illinois, on her own motion and at the request of the ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY, complains of the Defendant, DON HAMMAN
FARMS LLC, a limited liability company, as follows:

COUNT I

OPEN DUMPING

1. This Count I is brought on behalf of the People of the State of Illinois, *ex rel.* Lisa
Madigan, the Attorney General of the State of Illinois, on her own motion and at the request of
the Illinois Environmental Protection Agency, ("Illinois EPA"), pursuant to Sections 42(d) and
(e) of the Act, 415 ILCS 5/42(d) and (e) (2006), and is an action to restrain ongoing violations of
the Act and for civil penalties.



2. The Illinois EPA is an agency of the State of Illinois created by the Illinois General Assembly in Section 4 of the Act, 415 ILCS 5/4 (2006), and charged, *inter alia*, with the duty of enforcing the Act.

3. On information and belief, the Defendant, DON HAMMAN FARMS LLC ("Hamman Farms") at all times relevant to the complaint, was and is an Illinois limited liability company in good standing. The business address is 6110 State Route 71, Oswego, Kendall County, Illinois.

4. On information and belief, the Defendant, Hamman Farms, is an operator of a landscape waste land application facility located on 2300 acres of land at 6275 State Route 71, Oswego, Kendall County, Illinois ("Site"). The land is primarily used for agricultural purposes.

5. Since at least September 2007, or at a time better known to Defendant, and continuing to at least the filing of this complaint, Defendant has conducted an on-farm landscape waste application operation at the Site. Defendant receives monetary fees to accept landscape waste. The landscape waste is then land-applied to the Defendant's farm acreage.

6. Defendant, as owner and/or operator of the Site, is subject to the Act and the Rules and Regulations promulgated by the Illinois Pollution Control Board ("Board"). The Board's regulations for solid waste and special waste handling are found in Title 35, Subtitle G, Chapter 1, Subchapter 1, of the Illinois Administrative Code ("Board Regulations for Solid Waste Handling").

7. From at least September 21, 2007, or at a time better known to the Defendant, and continuing to at least the filing of this complaint, Defendant has caused or allowed thousands of pieces of plastic, metal, paper, and miscellaneous debris mixed with the landscape waste to be

deposited in and around the Site as well as on roads and ditches adjacent to the farm fields of the Site

8. Section 3.315 of the Act, 415 ILCS 5/3.315 (2006), provides the following definition:

"Person" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

9. Defendant Hamman Farms is a "person" as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315 (2006).

10. Sections 21(a) and 21(p)(1) of the Act, 415 ILCS 5/21(a), 21(p)(1)(2006), provide, in pertinent part, as follows:

Sec 21. Prohibited acts. No person shall:

(a) Cause or allow the open dumping of any waste.

* * *

(p) In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

(1) litter;

* * *

11. Section 3.535 of the Act, 415 ILCS 5/3.535(2006), provides the following definition:

"Waste" means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or

solid or dissolved materials in irrigation return flows, or coal combustion by-products as defined in Section 3.135, or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended, or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulation adopted by the State of Illinois pursuant thereto.

12. Section 3.445 of the Act, 415 ILCS 5/3.445(2006), provides the following

definition:

"Sanitary landfill" means a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the Board may provide by regulation.

13. Sections 3.185 and 3.305 of the Act, 415 ILCS 5/3.185, 5/3.305 (2006),

respectively, provide the following definitions:

"Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

"Open dumping" means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.

14. The thousands of pieces of plastic, metal, paper, and miscellaneous debris mixed with the landscape waste deposited in and around the Site as well as on roads and ditches surrounding the Site are "waste" as that term is defined in Section 3.535 of the Act, 415 ILCS 5/3.535 (2006).

15. The deposition of the landscape waste mixed with plastic, metal, paper, and miscellaneous debris on the Site constitutes "open dumping" as that term is defined in Section 3.305 of the Act, 415 ILCS 5/3.305(2006).

16. Defendant's Site is a "disposal" site as that term is defined in Section 3.185 of the Act, 415 ILCS 5/3.185 (2006) because of the landscape waste and plastic, metal, paper, and miscellaneous debris placed there.

17. Defendant's Site is not a "sanitary landfill" as that term is defined in Section 3.445 of the Act, 415 ILCS 5/3.445 (2006) and does not have a permit as one.

18. From on or about September 21, 2007, or at a time better known to the Defendant, and continuing at least until the filing of this complaint, Defendant has caused or allowed landscape waste, plastic, metal, paper, and miscellaneous debris to be openly dumped on their Site, without being a permitted landfill in violation of Section 21(a) of the Act, 415 ILCS 5/21(a)(2006).

19. From on or about September 21, 2007, or at a time better known to the Defendant, and continuing at least until the filing of this complaint, Defendant has caused or allowed landscape waste and debris to be openly dumped on their Site, mixed together in a manner creating litter in violation of Section 21(p)(1) of the Act, 415 ILCS 5/21(p)(1)(2006).

20. Plaintiff is without an adequate remedy at law. Plaintiff will be irreparably injured and violations of pertinent environmental statutes will continue unless this Court grants equitable relief in the form of permanent injunctive relief.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS respectfully requests that this Court enter a preliminary and, after a trial, permanent injunction and an Order in favor of Plaintiff and against the Defendant DON HAMMAN FARMS, LLC on this Court's:

1. Finding that the Defendant has violated Sections 21(a) and 21(p)(1) of the Act, 415 ILCS 21(a), 21(p)(1)(2006),
2. Enjoining the Defendant from any further violations of Sections 21(a) and 21(p)(1) of the Act, 415 ILCS 21(a), 21(p)(1)(2006);
3. Ordering Defendant to take the appropriate corrective actions that will result in the abatement of the violations alleged herein;
4. Assessing a civil penalty of \$50,000.00 against the Defendant for each and every violation of the Act and pertinent regulations and an additional \$10,000.00 for each day during which the violation continues;
5. Ordering that all costs of this action, including expert witness, consultant and attorney fees, be taxed against the Defendant; and
6. For such other relief as this Court may deem appropriate and just.

COUNT II

**CONDUCTING A WASTE STORAGE OPERATION WITHOUT A DEVELOPMENT
PERMIT**

1-16 Plaintiff realleges and incorporates by reference herein paragraphs 1 through 9 and 11 through 17 of Count I, as paragraphs 1 through 16 of this Count II

17 Sections 21(d) and 21(e) of the Act, 415 ILCS 5/21(d), 5/21(e)(2006), provide, in pertinent part, as follows:

No person shall:

- * * *
- d) Conduct any waste-storage, waste-treatment, or waste-disposal operation
 - (1) without a permit granted by the Agency.

- * * *
- (2) in violation of any regulations or standards adopted by the Board under this Act; ...
- * * *

- e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

18. Section 807.201 of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.201, states, in relevant part, as follows:

Development Permits

...no person shall cause or allow the development of any new solid waste management site or cause or allow the modification of an existing solid waste management site without a Development Permit issued by the Agency.

19. From some time before September 17, 2007, or at a time better known to Defendant, and continuing at least until the filing of this complaint, Defendant has conducted a waste-storage operation.

20. From some time before September 17, 2007, or at a time better known to Defendant, and continuing at least until the filing of this complaint, Defendant has caused or allowed the development of a solid waste disposal site, and/or modified its waste-storage operation without obtaining a Development Permit for said operation.

21. From some time before September 17, 2007, or at a time better known to Defendant, and continuing at least until the filing of this complaint, Defendant has disposed of waste at a site or facility which has not met the requirements of this Act or of the regulations and standards thereunder.

22. By failing to obtain a Development Permit for a waste storage operation, Defendant has violated Section 807.201 of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.201 and, therefore, violated Sections 21(d)(1), (d)(2), and 21(e) of the Act, 415 ILCS 5/21(d)(1), (d)(2), and (e)(2006).

23. Plaintiff is without an adequate remedy at law. Plaintiff will be irreparably injured and violations of pertinent environmental statutes will continue unless this Court grants equitable relief in the form of permanent injunctive relief.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court enter a preliminary and, after a trial, permanent injunction and an Order in favor of Plaintiff and against the Defendant, DON HAMMAN FARMS, LLC on this Count II:

1. Finding that the Defendant has violated 21(d)(1), (d)(2), and 21(e) of the Act, 415 ILCS 5/21(d)(1), (d)(2), and (e)(2006), and Section 807.201 of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.201;

2. Enjoining the Defendant from any further violations of 21(d)(1), (d)(2), and 21(e) of the Act, 415 ILCS 5/21(d)(1), (d)(2), and (e)(2006), and Section 807.201 of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.201, 807.202(b);

3. Ordering Defendant to take the appropriate corrective actions that will result in the abatement of the violations alleged herein,

4. Assessing a civil penalty of \$50,000.00 against the Defendant for each and every violation of the Act and pertinent regulations and an additional \$10,000.00 for each day during which the violation continues,

5. Ordering that all costs of this action, including expert witness, consultant and attorney fees, be taxed against the Defendant, and

6. For such other relief as this Court may deem appropriate and just.

COUNT III

CONDUCTING A WASTE STORAGE OPERATION WITHOUT AN OPERATING
PERMIT

1-18 Plaintiff realleges and incorporates by reference herein paragraphs 1 through 9 and 11 through 17 of Count I, and paragraphs 17 and 19 of Count II as paragraphs 1 through 18 of this Count III.

19. Section 807.202(b) of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.202(b) states, in relevant part, as follows:

Operating Permits

* * *

b) Existing Solid Waste Management Sites.

1) ...no person shall cause or allow the use or operation of any existing solid waste management site without an Operating Permit issued by the Agency not later than one year after the effective date of these Regulations.

20 From some time before September 17, 2007, or at a time better known to Defendant, and continuing at least until the filing of this complaint, Defendant has caused or allowed the use or operation of its waste-storage operation without obtaining an Operating Permit for said operation.

21 From some time before September 17, 2007, or at a time better known to Defendant, and continuing at least until the filing of this complaint, Defendant has stored waste at a site or facility which has not met the requirements of this Act or of the regulations and standards thereunder.

22. By failing to obtain an Operating Permit for a waste storage operation, Defendant has violated Sections 807.201 and 807.202(b) of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.201, 807.202(b), and, therefore, violated Sections 21(d)(1), (d)(2), and 21(e) of the Act, 415 ILCS 5/21(d)(1), (d)(2), and (e)(2006).

23. Plaintiff is without an adequate remedy at law. Plaintiff will be irreparably injured and violations of pertinent environmental statutes will continue unless this Court grants equitable relief in the form of permanent injunctive relief.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court enter a preliminary and, after a trial, permanent injunction and an Order in favor of Plaintiff and against the Defendant, DON HAMMAN FARMS, LLC on this Count II:

1. Finding that the Defendant has violated 21(d)(1), (d)(2), and 21(e) of the Act, 415 ILCS 5/21(d)(1), (d)(2), and (e)(2006), and Section 807.202(b) of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.202(b);

2. Enjoining the Defendant from any further violations of 21(d)(1), (d)(2), and 21(e) of the Act, 415 ILCS 5/21(d)(1), (d)(2), and (e)(2006), and Section 807.202(b) of the Board Solid Waste and Special Waste Hauling Regulations, 35 Ill. Adm. Code 807.201;

3. Ordering Defendant to take the appropriate corrective actions that will result in the abatement of the violations alleged herein;

4. Assessing a civil penalty of \$50,000.00 against the Defendant for each and every violation of the Act and pertinent regulations and an additional \$10,000.00 for each day during which the violation continues;

5. Ordering that all costs of this action, including expert witness, consultant and attorney fees, be taxed against the Defendant; and

6. For such other relief as this Court may deem appropriate and just.

COUNT IV

FAILURE TO MEET THE APPLICATION AT AGRONOMIC RATES
EXEMPTION

1. This count is brought on behalf of the PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, on her own motion, pursuant to Section 42(d) and (e) of the Environmental Protection Act, 415 ILCS 5/42(d) and (e) (2006) ("Act").

2. The Attorney General is the chief legal officer of the State of Illinois having the powers and duties prescribed by law. ILL. CONST. Article V, Section 15 (1970).

3-16. Plaintiff realleges and incorporates by reference herein paragraphs 2 through 9 and 11 through 17 of Count I, as paragraphs 3 through 16 of this Count IV.

17. Section 21(q)(2) of the Act, 415 ILCS 5/21(q)(2)(2006), provides, in relevant part, as follows:

Sec. 21 Prohibited acts. No person shall:

* * *

(q) Conduct a landscape waste composting operation without an Agency permit, provided, however, that no permit shall be required for any person

* * *

(2) applying landscape waste or composted landscape waste at agronomic rates; or

* * *

18. Section 830.102 of the Board Regulations for Solid Waste Handling, 35 of Ill Adm. Code 830.102, provides the following definition:

"Agronomic Rates" means the application of not more than 20 tons per acre per year, except that 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. (Section 21(q) of the Act)

19. Section 3.270 of the Act, 415 ILCS 5/3 270 (2006), provides the following definition:

"Landscape waste" means all accumulations of grass or shrubbery cuttings, leaves, tree limbs and other materials accumulated as the result of the care of lawns, shrubbery, vines and trees.

20. On September 21, 2007, inspectors from the Illinois EPA Bureau of Land observed landscape waste on the Site that had been applied at a rate of more than 20 tons per acre per year.

21. On October 17, 2007, inspectors from the Illinois EPA observed landscape waste on the Site that had been applied at a rate of more than 20 tons per acre per year.

22. On at least September 21, 2007, October 17, 2007, and at times better known to the Defendant, Defendant had not met the exemption from a permit requirement contained in Section 21(q)(2) of the Act, 415 ILCS 5/21(q)(2)(2006), and, thus, is required to have a permit for the operation of its landscaping waste application operation. Defendant did not have a permit or permission for said operation, and was not given permission by the Illinois EPA to apply a higher rate of landscape waste per acre per year until May 1, 2008.

23. By applying landscape waste at a rate of more than 20 tons of landscape waste per acre per year, without first obtaining a permit from the Illinois EPA, Defendant has violated Section 21(q)(2) of the Act, 415 ILCS 5/21(q)(2)(2006).

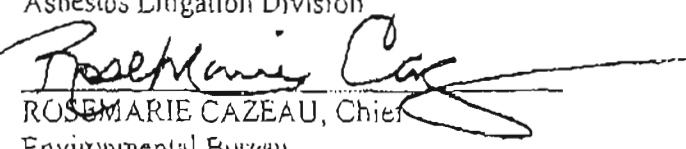
WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court enter Judgment in favor of Plaintiff and against the Defendant, DON HAMMAN FARMS, LLC, on this Count III:

1. Finding that the Defendant has violated Section 21(q)(2) of the Act, 415 ILCS 5/21(q)(2)(2006);
2. Enjoining the Defendant from any further violations of Section 21(q)(2) of the Act, 415 ILCS 5/21(q)(2)(2006);
3. Assessing a civil penalty of \$50,000.00 against the Defendant for each and every violation of the Act and an additional \$10,000.00 for each day during which the violation continues;
4. Ordering that all costs of this action, including expert witness, consultant and attorney fees, be taxed against the Defendant; and
5. For such other relief as this Court may deem appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

BY:


ROSEMARIE CAZEAU, Chief
Environmental Bureau
Assistant Attorney General

OF COUNSEL:

PAULA BECKER WHEELER
VANESSA CORDONNIER
Assistant Attorneys General
Environmental Bureau
69 W. Washington, Suite 1800
Chicago, IL 60602
(312) 814-1511

MAY 11 2009

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KENDALL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
<i>ex rel.</i> LISA MADIGAN, Attorney)	
General of the State of Illinois,)	
)	
)	
Plaintiff,)	
)	No 08-CH-0811
vs.)	
)	
DON HAMMAN FARMS, LLC, an Illinois)	
limited liability company,)	
)	
Defendant.)	

NOTICE OF FILING

TO: Charles Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389

George Mueller
George Mueller, P.C.
609 Etna Rd
Ottawa, IL 61350-1071

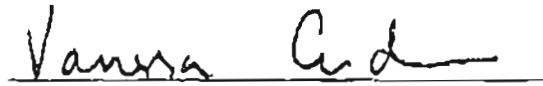
Please take notice that on May 5, 2009, I filed with the Clerk of the Circuit Court of Kendall County, Illinois, PLAINTIFF'S FIRST AMENDED COMPLAINT, a true and correct copy of which is hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS *ex*
rel. LISA MADIGAN, Attorney General of
State of Illinois,

By: Vanessa Cordonnier
VANESSA M. CORDONNIER
Assistant Attorney General
Environmental Bureau
69 W. Washington Street, 18th Floor
Chicago, Illinois 60602
(312) 814-0608

CERTIFICATE OF SERVICE

I, VANESSA M. CORDONNIER, an Assistant Attorney General, certify that I served the foregoing Notice of Filing, Plaintiff's First Amended Complaint, on the below listed individual(s), by posting same in a postage prepaid envelope by first class mail and depositing same with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois at or before the hour of 5:00 p.m. on May 5, 2009 and by sending the same via electronic mail.



SERVICE LIST

Charles Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389

George Mueller, P.C.
609 Elna Rd
Ottawa, IL 61350-1071

A. Parties

1. On May 5, 2009, a First Amended Complaint was filed on behalf of the People of the State of Illinois by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and upon the request of the Illinois EPA, pursuant to Section 42(d) and (e) of the Act, 415 ILCS 5/42(d) and (e) (2008), against the Defendant.

2. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2008).

3. At all times relevant to the Complaint, Defendant Don Hamman Farms, LLC ("Hamman Farms") was and is an Illinois limited liability company that is authorized to transact business in the State of Illinois and owned and operated an on-farm Landscape Waste application facility at 6275 State Route 71, Oswego, Kendall County, Illinois ("Facility" or "Site").

B. Allegations of Non-Compliance

Plaintiff contends that the Defendant has violated the following provisions of the Act:

Count I: OPEN DUMPING in violation of Sections 21(a) and 21(p)(1) of the Act, 415 ILCS 21(a) and 21(p)(1)(2008)

Count IV: FAILURE TO MEET THE APPLICATION AT AGRONOMIC RATES EXEMPTION in violation of Section 21(q)(2) of the Act, 415 ILCS 5/21(q)(2) (2008).

C. Non-Admission of Violations

The Defendant represents that it has entered into this Consent Order for the purpose of settling and compromising disputed claims without having to incur the expense of contested litigation. By entering into this Consent Order and complying with its terms, the Defendant does not affirmatively admit the allegations of violation within the Complaint and referenced above and this Consent Order shall not be interpreted as including such admission.

II. APPLICABILITY

This Consent Order shall apply to and be binding upon the Parties to the Consent Order. The Defendant waives as a defense to any enforcement action taken pursuant to this Consent Order the failure of any of its officers, directors, agents, employees or successors or assigns to take such action as shall be required to comply with the provisions of this Consent Order.

No change in ownership, corporate status or operator of the facility shall in any way alter the responsibilities of the Defendant under this Consent Order. In the event that the Defendant proposes to sell or transfer any real property or operations subject to this Consent Order the Defendant shall notify the Plaintiff thirty (30) calendar days prior to the conveyance of title, ownership or other interest, including a leasehold interest in the facility or a portion thereof. The Defendant shall make as a condition of any such sale or transfer, that the purchaser or successor provide to Defendant site access and all cooperation necessary for Defendant to perform to completion any compliance obligation(s) required by this Consent Order. The Defendant shall provide a copy of this Consent Order to any such successor in interest and the Defendant shall continue to be bound by and remain liable for performance of all obligations under this Consent Order. In appropriate circumstances, however, the Defendant and a proposed purchaser or

operator of the facility may jointly request, and the Plaintiff, in its discretion, may consider modification of this Consent Order to obligate the proposed purchaser or operator to carry out future requirements of this Consent Order in place of, or in addition to, the Defendant. This provision does not relieve the Defendant from compliance with any regulatory requirement regarding notice and transfer of applicable facility permits.

III. JUDGMENT ORDER

This Court has jurisdiction of the subject matter herein and of the Parties to the Consent Order and, having considered the stipulated facts and being advised in the premises, finds the following relief appropriate:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

A. Penalty

The Defendant shall pay a civil penalty of Seven Thousand Five Hundred Dollars (\$7,500.00). Payment shall be tendered at time of entry of the Consent Order.

B. Payment Procedures

All payments required by this Consent Order shall be made by certified check or money order payable to the Illinois EPA for deposit into the Environmental Protection Trust Fund ("EPTF"). Defendant's federal tax identification number shall appear on the face of the certified check or money order.

C. Future Compliance

1. The Defendant shall at all times in the future apply only "Landscape Waste," as defined by Section 3.270 of the Act, and biodegradable paper bags used to contain Landscape

Waste to fields at the Site. No non-landscape waste shall be applied to fields at the Site.

2. Immediately upon entry of this Consent Order, the Defendant shall replace its existing Landscape Waste acceptance protocol with a Landscape Waste intake system that includes the following requirements:

a. The acceptance of Landscape Waste for land application that contains only Landscape Waste material.

b. The establishment and operation of a load checking program designed to detect attempts by anyone to dispose of non-landscape waste at the Facility. At a minimum, the load checking program shall consist of the following components:

i. *Routine Inspections*

Defendant shall visually inspect every load of material before its acceptance at the Facility to determine the presence of non-landscape waste in the load. Defendant shall reject any and all load(s) containing non-landscape waste, or shall remove the non-landscape waste.

ii. *Random Inspections*

In addition to the inspections required under section III C.2.

Defendant shall, on a weekly basis, conduct a thorough visual inspection of at least one randomly selected load after it has been delivered and deposited at the Facility. Defendant shall reject any load containing non-landscape waste, or shall remove the non-landscape waste. The Defendant shall also ensure that any rejected

waste is removed from the Facility and properly disposed.

c. *Documentation of Inspection Results*

Defendant shall document the results of all inspections conducted pursuant to Sections III.C.2 b, above. The documentation for each inspection shall contain, at a minimum, the following:

- i. The date and time of the inspection, the name of the hauling firm, the vehicle identification number or license plate number, and the source of the Landscape Waste;
- ii. The results of the routine inspection required under section III.C.2.b.i, whether the load was accepted or rejected, and for rejected loads the reason for the rejection;
- iii. The results of any random inspection required under section III.C.2 b.ii, including, but not limited to, whether the load was accepted or rejected, and for rejected loads the reason for the rejection; and
- iv. The name of the individual who conducted the inspection activities.

d. *Rejection of Loads*

For all rejected loads the Defendant shall record, the date and time of the inspection, the name of the hauling firm, the vehicle identification number or license plate number, and the source of the non-landscape waste.

3. Effective immediately upon entry of this Consent Order, Defendant shall implement and begin utilization of the intake system as outlined in Section III.C.2 above for the acceptance of Landscape Waste at its Facility

4. At all times in the future, Defendant shall, prior to applying Landscape Waste to fields at the Site, clear all such fields of non-landscape waste and properly dispose of that waste. Additionally, Defendant shall, within twenty-four (24) hours after application of landscape waste to a field, clear that field of non-landscape waste present in the field and properly dispose of such waste.

5. Defendant shall at all times, upon discovery that material other than Landscape Waste has been improperly accepted or deposited at the Facility, within 24 hours remove and properly dispose of such waste material.

6. Effective immediately, the Defendant shall ensure that all appropriate Facility personnel are properly informed in the identification of material that is not Landscape Waste. Defendant shall maintain at its Facility, records of all training activities conducted pursuant to this section III.C.6 and make such records available to Illinois EPA upon its request.

7. Defendant shall keep at the Facility the documentation required under Section III C herein for a minimum of 3 years, and shall be made available to Illinois EPA upon its request for inspection and copying

8. At all times in the future, Defendant shall process, apply and incorporate the Landscape Waste the same day it is received on Site. If Defendant is unable to process, apply and incorporate the Landscape Waste on the date it is received, Defendant shall notify Illinois EPA by telephone by close of business that day, document the reason for the failure to process.

apply, and/or incorporate the Landscape Waste, document any steps taken by Defendant to remedy the failure, document the duration that Defendant expects to be unable to process, apply and/or incorporate Landscape Waste and submit that documentation to Plaintiff and Illinois EPA by close of business the next business day.

9. If Defendant is unable to process, apply and incorporate the Landscape Waste within five days after receipt, Defendant shall cease its receipt of Landscape Waste until such time as its capacity for same-day processing, application and incorporation is restored. This condition does not obviate the requirements of III.C.11, below.

10. At all times in the future, Defendant shall process, apply and incorporate the Landscape Waste in a manner that prevents the generation of nuisance conditions from flies or odors. Defendant shall reduce or cease the application of Landscape Waste, as necessary, to prevent nuisance conditions.

11. At all times in the future, Defendant shall minimize storm water runoff from fields where Landscape Waste has been applied. Defendant shall not apply Landscape Waste within 25 feet of drainage ways. Additionally, Defendant shall maintain buffer strips and field borders and place phosphorous containing material beneath the top two inches of the soil surface at the Site.

12. No later than September 30, 2011, Defendant shall sample and analyze soil on the fields at the Site where Landscape Waste is applied. Soil shall be analyzed for at a minimum the following parameters: pH, organic matter, phosphorous, potassium, magnesium, calcium and nitrate-nitrogen. Within 30 calendar days of receipt of the results of the soil sampling and

analysis required herein, Defendant shall submit these results to Plaintiff's representatives, listed in Section III.E, below.

13. No less than thirty (30) calendar days prior to the opening of the facility for receipt of Landscape Waste each calendar year commencing with calendar year 2011, Defendant shall provide written notice to all its Landscape Waste suppliers that only Landscape Waste will be accepted at the Facility. This written notification shall also be provided to all new suppliers of Landscape Waste within fourteen (14) calendar days prior to the first delivery.

14. The Illinois EPA, its employees and representatives, and the Attorney General, her employees and representatives, shall have the right of entry into and upon the Defendant's facility which is the subject of this Consent Order, at all reasonable times for the purposes of conducting inspections and evaluating compliance status. In conducting such inspections, the Illinois EPA, its employees and representatives, and the Attorney General, her employees and representatives, may take photographs, samples, and collect information, as they deem necessary.

15. This Consent Order in no way affects the responsibilities of the Defendant to comply with any other federal, state or local laws or regulations, including but not limited to the Act and the Board Regulations

16. The Defendant shall cease and desist from future violations of the Act and Board Regulations that were the subject matter of the Complaint

D. FORCE MAJEURE

1. *Force majeure* is an event arising solely beyond the control of the Defendant, which prevents the timely performance of any of the requirements of this Consent Order and shall include, but is not limited to, events such as floods, fires, tornadoes, other natural disasters.

and labor disputes beyond the reasonable control of the Defendant. An increase in costs associated with implementing any requirement of this Consent Order shall not, by itself, excuse the Defendant for a failure to comply with such a requirement.

2. When a *force majeure* event occurs which causes or may cause a delay in the performance of any of the requirements of this Consent Order, the Defendant shall orally notify the Illinois EPA (Bureau of Land, Field Operations Section, DesPlaines Office at (847) 294-4000) within forty eight (48) hours of the occurrence. Notwithstanding any oral notification given pursuant to the requirement above, written notice shall be given to the Plaintiff as soon as practicable, but no later than ten (10) calendar days after the claimed occurrence. This section shall be of no effect as to the particular event involved if the Defendant fails to comply with these notice requirements.

3. Within ten (10) calendar days of receipt of any written *force majeure* notice, the Plaintiff shall respond in writing regarding the Defendant's claim of a delay or impediment to performance. If the Plaintiff agrees that the delay or impediment to performance has been or will be caused by circumstances beyond the control of the Defendant and that the Defendant could not have prevented the delay by the exercise of due diligence, the parties shall stipulate to an extension of the required deadline(s) for all requirement(s) affected by the delay, by a period equivalent to the delay actually caused by such circumstances. Such stipulation may be filed as a modification to this Consent Order.

4. If the Plaintiff does not accept the Defendant's claim of a *force majeure* event, the Defendant must file a petition with the Court within twenty (20) calendar days of receipt of the Plaintiff's determination in order to contest the imposition of stipulated penalties. The Plaintiff

shall have twenty (20) calendar days to file its response to said petition. The burden of proof of establishing that a *force majeure* event prevented the timely performance shall be upon the Defendant. If this Court determines that the delay or impediment to performance has been or will be caused by circumstances solely beyond the control of the Defendant and that the Defendant could not have prevented the delay by the exercise of due diligence, the Defendant shall be excused as to that event (including any imposition of stipulated penalties), for all requirements affected by the delay, for a period of time equivalent to the delay or such other period as may be determined by this Court.

E. Enforcement and Modification of Consent Order

1. This Consent Order is a binding and enforceable order of this Court. This Court shall retain jurisdiction of this matter and shall consider any motion by any party for the purposes of interpreting and enforcing the terms and conditions of this Consent Order. The Defendant agrees that notice of any subsequent proceeding to enforce this Consent Order may be made by mail and waives any requirement of service of process.

2. The Parties to the Consent Order may, by mutual written consent, extend any compliance dates or modify the terms of this Consent Order without leave of this Court. A request for any modification shall be made in writing and submitted to the designated representatives. Any such request shall be made by separate document, and shall not be submitted within any other report or submittal required by this Consent Order. Any such agreed modification shall be in writing and signed by authorized representatives of each party, for filing and incorporation by reference into this Consent Order.

F. Notice and Submittals

Except for payments, the submittal of any notice, reports or other documents required under this Consent Order, shall be delivered to the following designated representatives:

As to the Plaintiff

Vanessa Horton
Assistant Attorney General
Office of the Illinois Attorney General
Environmental Bureau
69 W. Washington, 18th Floor
Chicago, Illinois 60602
FAX: (312) 814-2347

Peter Orinsky
Assistant Counsel
Illinois EPA
9511 W. Harrison
Des Plaines, IL 60016
FAX: (217) 294-4083

As to the Defendant

Don Hamman Farms LLC
Donald J. Hamman
6110 State Route 71
Oswego, IL 60543

George Mueller
609 Eina Road
Ottawa, IL 61350

G. Release from Liability

In consideration of the Defendant's payment of a \$7,500.00 penalty, its commitment to cease and desist as contained in Section III.C 16 above, and completion of all activities required hereunder, the Plaintiff releases, waives and discharges the Defendant from any further liability or penalties for the violations of the Act that were the subject matter of the Complaint herein.

The release set forth above does not extend to any matters other than those expressly specified in Plaintiff's First Amended Complaint filed on May 5, 2009. The Plaintiff reserves, and this Consent Order is without prejudice to, all rights of the State of Illinois against the Defendant with respect to all other matters, including but not limited to the following:

- a. criminal liability;
- b. liability for future violations;
- c. liability for natural resources damage arising out of the alleged violations; and
- d. the Defendant's failure to satisfy the requirements of this Consent Order.

Nothing in this Consent Order is intended as a waiver, discharge, release, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State of Illinois may have against any person, as defined by Section 3.315 of the Act, 415 ILCS 5/3.315 (2008), other than the Defendant.

H. Execution and Entry of Consent Order

This Order shall become effective only when executed by all Parties to the Consent Order and the Court. This Order may be executed by the parties in one or more counterparts, all of which taken together shall constitute one and the same instrument. The undersigned representatives for each party certify that they are fully authorized by the party whom they represent to enter into the terms and conditions of this Consent Order and to legally bind them to it.

WHEREFORE, the parties, by their representatives, enter into this Consent Order and submit it to this Court that it may be approved and entered.

AGREED.

FOR THE PLAINTIFF:

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

BY: _____
ROSEMARIE CAZEAU, Chief
Environmental Bureau

DATE: _____

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA BONNETT, Acting Director
Illinois Environmental Protection Agency

BY: _____
JOHN J. KIM
Chief Legal Counsel

DATE: _____

WHEREFORE, the parties, by their representatives, enter into this Consent Order and submit it to this Court that it may be approved and entered.

AGREED:

FOR THE PLAINTIFF:

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

LISA BONNETT, Acting Director
Illinois Environmental Protection Agency

BY: 

ROSEMARIE CAZEAU, Chief
Environmental Bureau

BY: 

JOHN J. KIM
Chief Legal Counsel

DATE: 3/8/11 *enc*

DATE: 3/4/11

Asbestos Litigation Division

BY: ROSEMARIE CAZEAU, Chief
Environmental Bureau

BY: JOHN J. KIM
Chief Legal Counsel

DATE: _____

DATE: _____

FOR THE DEFENDANT:

DON HAMMAN FARMS LLC

BY: Don Hamman

DATE: March 4, 2011

ENTERED:

FOR THE DEFENDANT:

DON HAMMAN FARMS LLC

BY: _____

DATE: _____

ENTERED:

Timothy J. McCann

JUDGE

DATE: 3/10/11

ILLINOIS POLLUTION CONTROL BOARD

April 2, 2009

UNITED CITY OF YORKVILLE, a municipal)	
corporation,)	
Complainant,)	
v.)	PCB 08-96
HAMMAN FARMS,)	(Citizen's Enforcement – Land, Water)
Respondent.)	

ORDER OF THE BOARD (by T.E. Johnson):

This citizen's enforcement action concerns the application of landscape waste to farmland in Kendall County. The case is before the Board today on three motions. First, Hamman Farms (Hamman) filed a motion to reconsider a portion of the Board's October 16, 2008 opinion and order. Second, Hamman filed a motion to dismiss as "duplicative" counts I and II of the complaint filed by United City of Yorkville (Yorkville). Third, Yorkville filed a motion for leave to file an amended complaint, attaching the amended complaint.

For the reasons below, the Board denies all three motions. The Board declines to reconsider its decision denying Hamman's motion for dismissal of count IV ("Water Pollution Violations") of Yorkville's complaint. The Board finds neither count I ("Open Dumping Violations") nor count II ("Landscape Waste Violations") duplicative of a pending circuit court action. Finally, the Board denies Yorkville's motion for leave to file an amended complaint setting forth a modified count III ("Air Pollution Violations"). Yorkville is granted leave, however, to file an amended complaint in accordance with this order by May 4, 2009. Hamman may file an answer by July 6, 2009.

Below, the Board will provide the procedural history of this case before ruling on the motions.

PROCEDURAL HISTORY

On June 4, 2008, Yorkville filed a four-count complaint against Hamman (Comp.). Yorkville alleged that Hamman violated provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2006)) prohibiting land, air, and water pollution and unpermitted waste handling activities. On July 8, 2008, Hamman filed a motion to strike or dismiss most of Yorkville's complaint. The Board ruled on that motion in an October 16, 2008 opinion and order. Among other things, the Board dismissed without prejudice count III ("Air Pollution Violations") of Yorkville's complaint as insufficiently pled, but denied Hamman's motion to dismiss count II ("Landscape Waste Violations") and count IV ("Water Pollution Violations"). In addition, the Board granted Hamman's motion to strike with prejudice both paragraph 49 of count II (alleging



violations by the Illinois Environmental Protection Agency) and Yorkville's requests for attorney fees and costs. The Board also accepted for hearing Yorkville's complaint as modified by the Board's order.

On November 14, 2008, Hamman filed a motion for reconsideration (Mot. Recon.) of the Board's October 16, 2008 decision denying Hamman's motion to dismiss count IV ("Water Pollution Violations"). Yorkville filed a response in opposition on December 1, 2008 (Resp. Recon.). On December 11, 2008, Hamman filed a motion for leave to file a reply, attaching the reply (Reply Recon.). Hamman's motion for leave to file, which Yorkville did not oppose, is granted.

On November 17, 2008, Hamman filed a motion to dismiss as duplicative count I ("Open Dumping Violations") and count II ("Landscape Waste Violations") of Yorkville's complaint (Mot. Dism.). Yorkville filed a response in opposition on December 1, 2008 (Resp. Dism.). On December 11, 2008, Hamman filed a motion for leave to file a reply, attaching the reply (Reply Dism.). Hamman's motion for leave to file, which Yorkville did not oppose, is granted.

On December 1, 2008, Yorkville filed a motion for leave to file an amended complaint to cure the deficiencies of dismissed count III ("Air Pollution Violations") (Mot. Am. Comp.), attaching the amended complaint (Am. Comp.). Hamman filed a response in opposition on December 10, 2008 (Resp. Am. Comp.). On December 24, 2008, Yorkville filed a motion for leave to file a reply, attaching the reply (Reply Am. Comp.). Yorkville's motion for leave to file, which Hamman did not oppose, is granted.

HAMMAN'S MOTION TO RECONSIDER

Count III of the complaint ("Air Pollution Violations") was dismissed on October 16, 2008. Yorkville alleged in count III that Hamman violated Section 9(a) of the Act (415 ILCS 5/9(a) (2006)) through its application of landscape waste. Yorkville asserted that in applying the landscape waste, Hamman allowed the discharge of a contaminant, odor, into the environment so as to cause air pollution by unreasonably interfering with Yorkville's residents' use and enjoyment of life and property. The Board granted Hamman's motion to dismiss count III because the count as pled did 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.

In its motion for reconsideration, Hamman argues that the reasons for the Board's October 16, 2008 dismissal of count III ("Air Pollution Violations") apply with equal force to Yorkville's count IV ("Water Pollution Violations"). Mot. Recon. at 4. According to Hamman, 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." *Id.* at 2-3, referring to 35 Ill. Adm. Code 103.204(c)(2). Hamman asserts that the Board should therefore reconsider its denial of Hamman's motion to dismiss count IV as insufficiently pled. Mot. Recon. at 5. Yorkville responds that the Board correctly applied the law to count IV, adding that Yorkville "does not need to make a showing of

'unreasonable interference' to establish a prima facie case of water pollution." Resp. Recon. at 2-4.

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluvan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. In addition, a motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

As the Board stated in its October 16, 2008 order:

The complaint is not required to set out all of Yorkville's evidence. *See Carriage Way West*, 88 Ill. 2d at 308, 430 N.E.2d at 1008-09; City of Wood River, PCB 98-43, slip op. at 2. Considering the entire complaint, the Board finds that Yorkville's allegations satisfy the pleading requirements, including the requirement to advise Hamman so as to reasonably allow Hamman to defend itself against the alleged violations of Sections 12(a) and 12(d). *See College Hills*, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354; *see also Village of Mettawa*, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 ("pleadings are not intended to create technical obstacles to reaching the merits of a case," but rather "a flexible standard must be applied to the language of the pleadings with the aim of facilitating substantial justice between the parties"); 415 ILCS 5/31(c), (d)(1) (2006); 35 Ill. Adm. Code 103.204(c)(2). United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 25 (Oct. 16, 2008)

The Board is not persuaded by Hamman's arguments for reconsideration. Hamman does not take into account the differences between the provisions of the Act allegedly violated or the differences in the groundwater pollution and air pollution counts as pled by Yorkville. Additionally, contrary to Hamman's assertions (Mot. Recon. at 3; Reply Recon. at 2), the Board's October 16, 2008 order did not state that Hamman's motion to dismiss was deficient for failing to "dispute the facts pled by Yorkville" (Mot. Recon. at 3). What is left out of Hamman's quotation of the Board's order (Mot. Recon. at 3) is the Board's citation to the specific paragraphs of Yorkville's complaint that Hamman's "argument fail[ed] to address" (Hamman Farms, PCB 08-96, slip op. at 23-24 (Oct. 16, 2008)). *See People ex rel. William J. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982) ("the whole complaint must be considered, rather than taking a myopic view of a disconnected part").

Applying the standards for reconsideration articulated above, the Board denies Hamman's motion to reconsider.

HAMMAN'S MOTION TO DISMISS COUNTS I AND II

Hamman moves to dismiss as “duplicative” counts I and II of Yorkville’s complaint. In count I (“Open Dumping Violations”), Yorkville alleges that Hamman violated Sections 21(a), 21(d)(1), 21(d)(2), 21(e), and 21(p)(1) of the Act (415 ILCS 5/21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1) (2006)) by applying landscape waste mixed with litter and general refuse to its farm fields and then allowing the litter and general refuse to remain. Comp. at 7-8. Yorkville maintains that Hamman has allowed open dumping, conducted waste-storage and waste-disposal operations without a permit and in violation of the Act, and allowed its farm to become a waste disposal site. *Id.* Count II (“Landscape Waste Violations”) alleges that Hamman violated Sections 21(a), 21(d)(1), 21(d)(2), 21(e), and 21(q) of the Act (415 ILCS 5/21(a), 21(d)(1), 21(d)(2), 21(e), 21(q) (2006)). Comp. at 12. Yorkville asserts that since Hamman began applying landscape waste to its farm fields, Hamman has applied landscape waste at rates greater than the agronomic rate of 20 tons per acre per year. According to count II, Hamman has allowed open dumping, conducted waste-storage and waste-disposal operations without a permit and in violation of the Act, allowed its farm to become a waste disposal site, and failed to obtain a landscape waste composting operation permit or qualify for an exemption from permitting under Section 21(q)(2) or (q)(3). *Id.*

In its pending motion to dismiss, Hamman argues that counts I and II of Yorkville’s complaint are duplicative of a complaint filed against Hamman by the Illinois Attorney General on behalf of the People of the State of Illinois in the Circuit Court of the Sixteenth Judicial Circuit, Kendall County, Case No. 2008 CH 0811. Mot. Dism. at 1-2. The People’s complaint, which was filed with the circuit court on September 17, 2008, became a part of the record before the Board for the first time as an attachment to Hamman’s instant motion for dismissal. According to Hamman, “[t]he same operative facts are pled and relied upon by Yorkville and by the Attorney General” and “the very same statutory provisions are alleged to have been violated in Yorkville’s Complaint and in the Attorney General’s Complaint.” *Id.* at 2. Hamman maintains that Yorkville’s citizen enforcement action should “yield to the action brought by the Attorney General concerning the same alleged violations.” *Id.* at 3.

Yorkville asserts that Hamman’s motion to dismiss is untimely under Section 101.506 of the Board’s procedural rules (35 Ill. Adm. Code 101.506), having been filed more than 30 days after Hamman was served with Yorkville’s complaint. Resp. Dism. at 2. Yorkville maintains that the Board must therefore strike or deny Hamman’s motion to dismiss because the motion was late. *Id.* at 3. As to the merits of Hamman’s motion, Yorkville concedes that “some of the factual allegations” of the two complaints “are similar,” but argues that Yorkville’s complaint is not duplicative of the People’s complaint:

Yorkville’s Complaint includes allegations that Hamman Farms violated the Illinois Environmental Protection Act since approximately 1993. On the other hand, the Attorney General’s Complaint contains allegations that Hamman Farms violated the Act only since September 21, 2007. With Yorkville covering almost fourteen additional years of alleged violations compared to the Attorney General’s one year, the two complaints can not be considered substantially similar. *Id.* at 4-5.

Hamman replies that Yorkville relies upon “impossibility” by asserting that Hamman should have argued about the People’s complaint “months before that complaint was even filed.” Reply Dism. at 4. Hamman filed its current motion to dismiss within roughly three weeks of receiving a copy of the Board’s October 16, 2008 decision ruling upon Hamman’s first motion to dismiss. *Id.* As for Yorkville’s argument about its complaint alleging violations over a longer period of time than does the People’s action, Hamman argues that the length of time during which violations allegedly occurred “would go only to the remedy.” *Id.* at 6. Further, according to Hamman, the “crucial inquiry” is whether the two complaints arise out of the same occurrence, not whether the legal theory, issues, burden of proof, or relief sought materially differ. *Id.*, citing Combined Ins. Co. of America v. Certain Underwriters at Lloyd’s London, 356 Ill. App. 3d 749, 753, 826 N.E.2d 1089, 1094 (1st Dist. 2005) (interpreting meaning of “same cause” within Section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3))).

The Board will not strike or deny Hamman’s motion to dismiss as untimely. Yorkville’s complaint was filed with the Board on June 4, 2008, while the People’s complaint was filed with the Kendall County Circuit Court approximately three and one-half months later, on September 17, 2008. Hamman correctly points out that the People’s complaint was filed *after* Hamman timely filed its first motion to dismiss portions of Yorkville’s complaint and *before* the Board ruled on that motion. Reply Dism. at 3. Under these circumstances, and to avoid any potential material prejudice, the Board will consider Hamman’s pending motion to dismiss counts I and II of Yorkville’s complaint based on the People’s circuit court complaint.

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004). “Unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1) (2006); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is “duplicative” if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202.

For the reasons below, the Board finds that counts I and II of Yorkville’s complaint before the Board are not duplicative of the People’s circuit court complaint. In deciding whether a citizen complaint is duplicative of a court action, the Board has looked to whether the parties before the Board are also before the court. *See Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises*, PCB 92-80, slip op. at 2 (July 30, 1992). For example, in Indian Creek Development v. Burlington Northern Santa Fe Railway Co., PCB 07-44 (Mar. 15, 2007), the Board found that a citizen complaint filed with Board against a railway company was not duplicative where, among other things, the citizen complainant was not a party to the circuit court action brought by the People against the same railway company. *See Indian Creek Development*, PCB 07-44, slip op. at 6. Here, the parties to the respective proceedings differ. Yorkville is not a party to the circuit court action.

The Board has also considered whether the two “complaints are based on different theories (*e.g.*, nuisance vs. violation of the Act).” Robert Smith v. Heritage Tool & Die Manufacturing, Inc., PCB 99-145, slip op. at 2 (June 3, 1999); *see also Ostro*, PCB 92-80, slip

op. at 2 (federal court action “based on statutes and legal theories other than the Act”). In the instant case, it is not disputed that alleged violations of the Act are at issue in both complaints or that the provisions of the Act ultimately alleged to have been violated are the same. However, Yorkville alleges that Hamman’s application of landscape waste at greater than 20 tons per acre per year violated not only Section 21(q) of the Act, as the People allege, but also Sections 21(a), (d)(1), (d)(2), (e), and (p)(1) of the Act. *See Indian Creek Development*, PCB 07-44, slip op. at 6 (fact that the citizen complaint before the Board alleged a violation of an additional provision of the Act militated toward finding the complaint not duplicative of circuit court action). Further, even where both complaints allege violations of Sections 21(d)(1) and (d)(2) for waste disposal without a permit, Yorkville alleges that Hamman also violated the provisions by conducting waste storage without a permit, which the People do not claim.

Additionally, when determining whether a citizen complaint is duplicative of a complaint filed in court, the Board has taken into account whether the two actions involved the “same time frame.” *Ostro*, PCB 92-80, slip op. at 2; *see also Dorothy L. Hoffman v. City of Columbia*, PCB 94-146, slip op. at 3 (June 2, 1994) (citizen complaint alleging noise pollution occurred in 1993 and 1994 is not duplicative of circuit court complaint alleging noise pollution occurred in 1991 and 1992). While there is some temporal overlap here, the dates and time periods of alleged violations are not the same under the respective complaints of Yorkville and the People. For example, regarding claimed violations resulting from Hamman allegedly applying landscape waste at greater than the statutorily-designated agronomic rate, Yorkville specifically pleads a longer period of violations, ranging back to 1993. The People’s allegations identify two dates of violation in the fall of 2007. With differing timeframes of alleged violations, the underlying facts at issue in the two actions would vary accordingly.

Finally, in deciding whether a citizen complaint is duplicative, the Board has looked to whether the relief requested in Board and court proceedings differed. *See Heritage Tool & Die*, PCB 99-145, slip op. at 2-3. Both Yorkville and the People seek the imposition of civil penalties under the Act. However, the additional violations alleged and the longer period of alleged violations affects the relief requested, as both the People and Yorkville seek civil penalties of \$50,000 for each violation and \$10,000 for each day of violation. *See* 415 ILCS 5/42(a) (2006). The total amount of civil penalties requested in the two proceedings therefore necessarily differs.

Considering all of the factors articulated above, the Board finds that Yorkville’s counts I and II are not identical or substantially similar to the complaint brought by the People in circuit court. The Board accordingly denies Hamman’s motion to dismiss counts I and II of Yorkville’s complaint as duplicative.

YORKVILLE’S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

As discussed above, the Board dismissed count III of the complaint (“Air Pollution Violations”) on October 16, 2008. In granting Hamman’s motion to dismiss count III, however, the Board did so without prejudice, as the Board could not conclude that there was clearly no set of facts that could be proven that would entitle Yorkville to prevail on the air pollution claim. With its pending motion for leave to file an amended complaint, Yorkville seeks to remedy the pleading deficiency of count III. Mot. Am. Comp. at 2.

The Board's October 16, 2008 opinion discussed count III's shortcomings:

The Board finds that 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).

A complainant alleging unreasonable interference is not required to plead facts on each of the Section 33(c) factors, nor set out all of its evidence. *See Kankakee Federation of Teachers*, 46 Ill. 2d at 446-47 (1970) ("only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts"); *Grist Mill Confections*, PCB 97-174, slip op. at 5 ("complainant is not required to present facts in the complaint concerning Section 33(c) of the Act in order to file a sufficient pleading but instead may present facts at hearing."). However, 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, including the requirement to advise Hamman so as to reasonably allow Hamman to prepare a defense. *See Lloyd A. Fry Roofing*, 20 Ill. App. 3d at 305, 314 N.E.2d at 354; *Grist Mill Confections*, PCB 97-174, slip op. at 4; 415 ILCS 5/31(c), (d)(1) (2006); 35 Ill. Adm. Code 103.204(c). Construing the complaint, however liberally, cannot generate those missing facts. *See Condell Memorial Hospital*, 119 Ill. 2d at 510, 520 N.E.2d at 43.

Yorkville's amended complaint would add the following paragraph of allegations, which Yorkville maintains "cures the defects in the Original Complaint by providing facts describing the effect of the odor on the residents of Yorkville" (Reply Am. Comp. at 1):

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 (Am. Comp. at 14, ¶59).

Hamman opposes Yorkville's motion for leave to file an amended complaint. Hamman argues that Yorkville's amended count III fails to address all of the deficiencies identified by the Board. Resp. Am. Comp. at 3-4. According to Hamman:

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. *Id.* at 4.

The Board finds that Yorkville's proposed amendment to the complaint pleads the nature of the alleged interferences with residents, correcting one of the deficiencies found by the Board on October 16, 2008. However, Yorkville still identifies neither the residents allegedly interfered with nor the locations at which the interferences allegedly took place. Accordingly, the Board finds that Yorkville has not pled the extent of the consequences of the alleged emissions so as to reasonably allow Hamman to prepare a defense. See 35 Ill. Adm. Code 103.204(c)(2). Likewise, Yorkville's amendatory language still includes no allegations on the dates or frequency and duration of the alleged disruptions over the 15-year span. *Id.* Absent this information, Yorkville's amendment would not cure all of the deficiencies identified in the Board's October 16, 2008 order. See 35 Ill. Adm. Code 103.206(e)(2). The Board therefore denies Yorkville's motion for leave to file the amended complaint. See Clemons v. Mechanical Devices Co., 202 Ill. 2d 344, 355-56, 781 N.E.2d 1072, 1080 (2002) (one factor to consider in deciding whether to grant leave to amend a pleading is whether the proposed amendment would cure a defect in the pleading).

The Board has already accepted for hearing Yorkville's original complaint, as modified by the Board's October 16, 2008 order. Hamman Farms, PCB 08-96, slip op. at 26 (Oct. 16, 2008). In the interest of moving this case forward expeditiously, the Board grants Yorkville leave to file an amended complaint to remedy, pursuant to today's order, the air pollution count. Any such amended complaint must be filed no later than May 4, 2009. If an amended complaint is timely filed, the Board will issue an order determining whether to also accept for hearing the modified air pollution count.

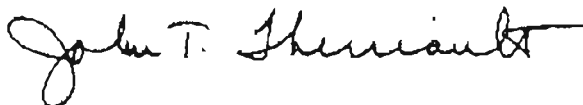
Under the Board's procedural rules, a respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. See 35 Ill. Adm. Code 103.204(d). Hamman's two motions to dismiss have stayed the 60-day periods for filing an answer. See 35 Ill. Adm. Code 103.204(e); Hamman Farms, PCB 08-96, slip op. at 28 (Oct. 16, 2008). For administrative economy, the Board now makes any answer from Hamman (whether to Yorkville's complaint as modified by the October 16, 2008 order, or to any amended complaint permitted by today's order) due by July 6, 2008.

CONCLUSION

The Board denies Hamman's motion to reconsider the Board's October 16, 2008 decision denying Hamman's motion to dismiss count IV ("Water Pollution Violations") of Yorkville's complaint. The Board also denies Hamman's motion to dismiss as "duplicative" count I ("Open Dumping Violations") and count II ("Landscape Waste violations") of Yorkville's complaint. Additionally, the Board denies Yorkville's motion for leave to file an amended complaint because Yorkville's modified pleading fails to remedy all of the deficiencies in dismissed count III ("Air Pollution Violations") of the original complaint. The Board grants Yorkville leave to file an amended complaint by May 4, 2009, that cures the air pollution count deficiencies identified in today's order. Any answer from Hamman is due by July 6, 2009.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 2, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board

www.epa.state.il.us

Pat Quinn, Governor

About the Illinois EPA

Purpose of the Illinois EPA

Mission Statement

The mission of the Illinois Environmental Protection Agency (IEPA) is to safeguard environmental quality, consistent with the social and economic needs of the State, so as to protect health, welfare, property and the quality of life. In support of this mission statement, the following program goals have been developed:

1. Provide leadership to chart a new course for clean air which is responsive to relevant needs in Illinois and complies with priority aspects of the Clean Air Act Amendments.
2. Address outstanding solid and hazardous waste management concerns and participate, as appropriate, in the national deliberations on reauthorization of the hazardous waste program.
3. Utilize creative means to address the priority needs for clean and safe water in Illinois and participate, as appropriate, in the national deliberations on reauthorization of the water programs.
4. Enhance capability to fund environmental cleanup, when necessary, and to provide better service for private party actions.
5. Promote pollution prevention and market-based approaches for continued environmental progress.
6. Develop an environmental planning capability which emphasizes risk-based analysis, good science and sound data, and open communication and informed participation.

Strategic Management Directions

1. Pursue the State's environmental interests in concert with applicable national environmental programs.
2. Produce sound environmental decisions that are conducive to environmental progress.
3. Strengthen the government framework for environmental protection in Illinois.
4. Foster innovation, systems improvement and human resource development.
5. Stress responsiveness to relevant publics.



