ILLINOIS POLLUTION CONTROL BOARD
October 16, 2008

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

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

Today the Board partially grants and partially denies Hamman Farms' motion to strike or dismiss portions of United City of Yorkville's enforcement complaint. In addition, the Board finds that the complaint, as amended by this order, is neither duplicative nor frivolous and accepts the modified complaint for hearing. Hamman Farms has 60 days from its receipt of this order to file an answer.

On June 4, 2008, United City of Yorkville (Yorkville) filed a four-count, citizen's enforcement complaint against Hamman Farms (Hamman) concerning Hamman's application of landscape waste to Hamman's farmland in Kendall County. Yorkville alleges that Hamman has 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. Yorkville filed a response on July 22, 2008. On August 1, 2008, Hamman filed a motion for leave to file a reply, attaching the reply. Hamman's motion for leave to file, which Yorkville did not oppose, is granted.

The Board grants Hamman's motion to strike from Yorkville's complaint the allegation that the Illinois Environmental Protection Agency (Agency) has violated the Act. The Board also grants Hamman's motion to dismiss Yorkville's air pollution count as pled without sufficient factual allegations. Further, the Board grants Hamman's motion to strike as frivolous Yorkville's requests for attorney fees and costs. The Board otherwise denies Hamman's motion to strike or dismiss and accepts for hearing Yorkville's complaint, as modified by today's decision. The reasoning behind the Board's rulings is detailed below. Yorkville is not precluded from seeking leave to file an amended complaint to remedy the pleading deficiencies of its air pollution count.

In this opinion, the Board first sets forth a key provision of the Act before describing the pleadings. Next, the Board provides the applicable legal framework, including a discussion of citizen's enforcement actions and the standards that apply to motions to strike or dismiss pleadings. The Board then rules on Hamman's motion and determines whether Yorkville's complaint can be accepted for hearing.

SECTION 21(q) OF THE ACT

Because Section 21(q) of the Act (415 ILCS 5/21(q) (2006)) is central to this enforcement action, the Board sets forth the provision here in its entirety to enlighten the summary of pleadings that follow:

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:

(1) conducting a landscape waste composting operation for landscape wastes generated by such person's own activities which are stored, treated or disposed of within the site where such wastes are generated; or

(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, except that the Agency may allow a higher percentage 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;

(B) the property on which the composting facility is located, and any associated property on which the compost is used, is principally and diligently devoted to the production of agricultural crops and is not owned, leased or otherwise controlled by any waste hauler or generator of nonagricultural compost materials, and the operator of the composting facility is not an employee, partner, shareholder, or in any way connected with or controlled by any such waste hauler or generator;

(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 by the person operating the composting facility, and the finished compost is not stored at the composting site for a period longer than 18 months prior to its application as mulch, fertilizer, or soil conditioner;

> (D) the owner or operator, by January 1, 1990 (or the January 1 following commencement of operation, whichever is later) and 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. 415 ILCS 5/21(q) (2006).

The Act defines "landscape waste" as "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." 415 ILCS 5/3.270 (2006). "Compost" is defined as "the humus-like product of the process of composting waste, which may be used as a soil conditioner." 415 ILCS 5/3.150 (2006). "Composting" means "the biological treatment process by which microorganisms decompose the organic fraction of waste, producing compost." 415 ILCS 5/3.155 (2006). "Land application is not composting." 35 Ill. Adm. Code 830.102 (definition of "composting"). "Land application" is defined as "the spreading of waste, at an agronomic rate, as a soil amendment to improve soil structure and crop productivity." 35 Ill. Adm. Code 830.102.

PLEADINGS

Yorkville's Complaint

Yorkville makes a number of "general allegations" in its 17-page complaint (Comp.) before setting forth four counts of alleged violations. Comp. at 1-5.

Location

Yorkville is an Illinois municipal corporation located in Kendall County and, according to the complaint, Hamman is a farm located on approximately 2,200 acres of land in Kendall County, where Hamman grows crops of soybeans, wheat, and corn. Comp. at 1.

Registered Landscape Waste Composting Facility On a Farm

Yorkville claims that in approximately 1993, Hamman registered with the Agency as an "On-Site Compost Landscape Waste Compost Facility" under the Section 21(q)(3) exemption from permitting. Comp. at 1. The complaint asserts that Hamman, as part of its farming operations, receives landscape waste from off-site, grinds the landscape waste in a tub grinder, and then applies the material to its farm fields. *Id*. at 2. Yorkville alleges that since registering as an "On-Site Compost Landscape Waste Compost Facility," Hamman has filed with the Agency annual reports required of such on-farm facilities (citing 35 Ill. Adm. Code 830.106(b)(2)). *Id*. According to Yorkville, Hamman has certified that for the years 2002, 2003, 2004, 2005, and 2006, Hamman 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, respectively. *Id*.

Agronomic Rate of Applying Landscape Waste

The complaint alleges that in approximately 1992 or 1993, Hamman applied to the Agency for, but was denied, permission to apply landscape waste at "rates greater than the agronomic rate of twenty (20) tons per acre per year." Comp. at 2. Yorkville states that applying landscape waste to a field at agronomic rates results in "application measurements" of 3/4 of one inch in thickness. *Id*. Yorkville alleges that since Hamman registered as a compost facility, Hamman has applied landscape waste at rates resulting in application measurements greater than 3/4 of an inch, and Agency inspectors have on several occasions found litter mixed with the landscape waste in Hamman's fields. *Id*. Yorkville further alleges that since Hamman began applying landscape waste to its fields, the Agency has received complaints of "strong and offensive odors" around Hamman. *Id*.

Agency Inspection and Violation Notice

According to the complaint, Agency personnel inspected Hamman's farm on October 17, 2007. Comp. at 3. Yorkville claims that during the inspection, the Agency inspectors observed the following: (1) the landscape application rate was 2.5 inches to 3.0 inches thick; (2) numerous flies were present where landscape waste had been applied; and (3) "[g]eneral refuse" was in the landscape waste. *Id*. On November 15, 2007, Yorkville continues, the Agency issued a violation notice to Hamman, citing 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. *Id*. at 3-4.

The complaint alleges that the Agency's violation notice specified "'suggested resolutions,'" including:

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. Comp. at 4.

Yorkville asserts that following the violation notice, Donald J. Hamman admitted at a meeting with the Agency that Hamman was applying landscape waste at a rate greater than 20 tons per acre per year. Comp. at 4. On March 5, 2008, according to Yorkville, the Agency rejected Hamman's Compliance Commitment Agreement because Hamman "failed to agree to apply landscape waste at agronomic rates (twenty (20) tons per acre per year)" and failed to calculate the percentage of non-landscape waste on a daily basis. *Id*. at 4-5.

2008 Application to Apply Landscape Waste at Greater Than 20 Tons Per Acre Per Year

The complaint states that on April 10, 2008, Hamman submitted to the Agency a request for permission to apply landscape waste at rates greater than 20 tons per acre per year. Hamman submitted a supplemental application on April 16, 2008. On May 1, 2008, the Agency approved Hamman's request to "raise the agronomic rate." Comp. at 5.

Count I—Landscape Waste Mixed with Litter/General Refuse

In count I of the complaint, Yorkville alleges that Hamman has 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 regulations, and allowed its farm to become a waste disposal site. *Id*.

Count II—Landscape Waste Violations

Count II of the complaint alleges that Hamman has 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 states that "landscape waste" constitutes "waste" as defined in Section 3.535 of the Act (415 ILCS 5/3.535 (2006)). *Id*. at 12. Yorkville then 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 and regulations, 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*.

Yorkville also asserts that "the Agency's grant of permission allowing HAMMAN to apply landscape waste at rates up to eighty (80) tons per acre per [] year violates the Act and regulations." Comp. at 12.

Count III—Air Pollution

Yorkville alleges in count III of the complaint that Hamman has violated Section 9(a) of the Act (415 ILCS 5/9(a) (2006)) through its application of landscape waste. Specifically, Yorkville states that "HAMMAN's application of landscape waste is a contaminant." Comp. at 14. "In applying the landscape waste," Hamman has 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. *Id*.

Count IV—Water Pollution

Count IV of the complaint alleges that Hamman has violated Sections 12(a) and 12(d) of the Act (415 ILCS 5/12(a), (d) (2006)). Comp. at 16. Yorkville asserts that "the landscape waste that HAMMAN is applying is a contaminant" and that the landscape waste is "being discharged into ground water." *Id.* According to count IV, Hamman, "[i]n applying the landscape waste," is allowing both the discharge of a contaminant into the environment so as to cause or tend to cause water pollution, and the deposit of a contaminant so as to create a water pollution hazard. *Id.*

Relief Requested

For each of the four counts of the complaint, Yorkville asks the Board to order Hamman to cease and desist from further violations and to pay a civil penalty of $50,000 for each violation and an additional civil penalty of $10,000 for each day during which each such violation continued. Comp. at 9, 13, 15, 17. Yorkville also requests with each count that the Board award Yorkville "its costs and reasonable attorney's fees." *Id.*

Hamman's Motion to Strike or Dismiss

In its motion (Mot.), Hamman moves the Board to strike or dismiss counts II, III, and IV of Yorkville's complaint, as well as Yorkville's requests for attorney fees and costs. Mot. at 7.

Count II— Landscape Waste Violations

Hamman argues that Yorkville's complaint is "largely duplicative" of Yorkville's simultaneously filed petition for review in PCB 08-95, United City of Yorkville v. IEPA and Hamman Farms. Mot. at 2. There, Hamman continues, Yorkville alleges that the Agency "violated the law" when it allowed Hamman to apply landscape waste at the rate of up to 80 tons per acre per year. *Id.* Here, count II likewise alleges that:

> IEPA itself broke the law when it determined the appropriate agronomic rate at Hamman Farms, and that when Hamman Farms conducted its farming operations in accord with the Agency's express authorization, it, too, broke the law. *Id.*

Hamman incorporates by reference its motion to dismiss and supporting legal memorandum from PCB 08-95, maintaining that the Board lacks jurisdiction to reverse the Agency's technical findings as to the appropriate agronomic application of landscape waste. Mot. at 3. Similarly, according to Hamman, the Board lacks jurisdiction:

> to issue the finding requested in Count II: that the Agency broke the law when it calculated the agronomic rate for Hamman Farms, and that Hamman Farms' agronomic use of landscape waste, as expressly authorized by IEPA, was therefore a violation of the Act. *Id.*

Hamman concludes that because the Board "lacks jurisdictional authority to enter such a ruling, Count II should be stricken as frivolous, or in the alternative, dismissed." *Id.*

Count III—Air Pollution

Hamman characterizes count III as claiming that, "as a matter of law," applying landscape waste to farm fields causes the release of contaminants into the air, and therefore causes air pollution, "and thus the agronomic use of landscape waste in farming constitutes a violation of the Act." Mot. at 3. Hamman argues that under Yorkville's interpretation of the Act, it is apparent that "farming should be declared illegal" because "all fertilizers cause a release of odor (and therefore 'contaminants') into the air" and accordingly the use of any fertilizer would constitute air pollution in violation of the Act. *Id*., n.2.

Hamman points out that the Illinois legislature not only expressly authorized landscape waste application to farm fields, but it also enacted "special protections for Illinois farms to guard against those who would file nuisance suits based on the odors associated with farming." Mot. at 4, citing 740 ILCS 70/1 (2006) (Farm Nuisance Suit Act). According to Hamman, Yorkville's claims of unreasonable interference with its residents' use and enjoyment of life and property bear a "rather striking resemblance to a nuisance action" and are "nothing more than a nuisance action draped in statutory clothing." Mot. at 4-5. Hamman argues that count III should be dismissed as frivolous, maintaining that the Board lacks jurisdiction:

> to overrule the legislature's decision to allow farmers to use landscape waste as a soil conditioner and fertilizer, and it cannot, therefore, invalidate 415 ILCS 5/21(q) and declare that the conduct it authorizes is illegal. *** Because Count III asks the Board to find that the agronomic application of landscape waste to farm fields, which is authorized by 415 ILCS 5/21(q), is illegal, the Board lacks jurisdiction to grant the relief sought. *Id*. at 5.

Hamman alternatively asserts that count III should be dismissed because it fails to comply with the Board's procedural rules, which require the complaint to contain "[t]he dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations." Mot. at 4, citing 35 Ill. Adm. Code 103.204(c)(2). According to Hamman, Yorkville's allegations in count III are "nothing more than sweeping legal assertions, which lack the specificity demanded by the Rule." Mot. at 4.

Count IV—Water Pollution

Hamman asserts that count IV and count III are predicated on the same "theory." Mot. at 5. In count IV, Hamman explains, Yorkville alleges that the agronomic use of landscape waste in farming constitutes water pollution because landscape waste is a contaminant being discharged into groundwater and therefore, by applying landscape waste, Hamman is allowing the discharge of a contaminant into the environment so as to cause or tend to cause water pollution and so as to create a water pollution hazard. *Id*. at 5-6

Again, Hamman argues, count IV should be stricken as frivolous because the Board lacks jurisdiction to give Yorkville what it requests:

> a finding that the agronomic application of landscape waste, as authorized by the Illinois legislature at 415 ILCS 5/21(q), and as expressly authorized by the IEPA with respect to Hamman Farms, is illegal. Mot. at 6.

Further, as with count III, Hamman maintains alternatively that count IV should be dismissed because it lacks the specificity required by the Board's procedural rules. *Id*., citing 35 Ill. Adm. Code 103.204(c)(2).

Relief Requested

Hamman notes that in each of the four counts, Yorkville requests "an award of attorney's fees and costs of litigation." Mot. at 1. Because the Board lacks statutory authority to award these expenses in citizen enforcement actions, Hamman asserts that Yorkville's requests should be stricken as frivolous. *Id*. at 1-2.

Yorkville's Response

In Yorkville's response (Resp.), Yorkville opposes Hamman's motion to strike or dismiss counts II, III, and IV but does not specifically respond to Hamman's position that the requests for attorney fees and costs are frivolous.

Count II— Landscape Waste Violations

Yorkville first notes that the Board is specifically granted the authority to conduct proceedings upon complaints charging violations of the Act. Resp. at 1-2, citing 415 ILCS 5/5(d) (2006). Hamman, according to Yorkville, "attempts to hide its violations behind this pseudo-permit," referring to the Agency's May 1, 2008 determination allowing Hamman to apply landscape waste "at rates greater than the agronomic rate." Resp. at 2. Yorkville stresses that "the Act provides a permit is no defense to the charge of a violation of the Act." *Id*., citing 35 Ill. Adm. Code 201.121.[1] If a "full out" permit does not protect against violations, the Agency's "mere grant of permission" on May 1, 2008, does not protect Hamman. Resp. at 2.

Yorkville emphasizes that Hamman cannot use the Agency determination to protect itself from the alleged violations, "regardless of whether the Agency's May 1, 2008 decision was correct or not." Resp. at 2. Yorkville adds that while the Board is technically qualified to do so, the Board "likely does not need to review and/or evaluate the Agency's decision to determine that Hamman violated the Act under Count II." *Id*. at 3.

Yorkville distinguishes this enforcement action, where Yorkville seeks Board findings that Hamman has violated the Act, from the appeal where Yorkville seeks Board review of the Agency's decision granting Hamman permission to apply landscape waste at a greater rate. PCB 08-96 and PCB 08-95, Yorkville concludes, "are not duplicative because they are not identical or substantially similar." Resp. at 3-4.

---

[1] That provision reads: "The existence of a permit under this Part shall not constitute a defense to a violation of the Act or any rule or regulation of this Chapter, except for construction or operation without a permit." 35 Ill. Adm. Code 201.121.

Count III—Air Pollution

Yorkville argues that count III is sufficiently specific under the Board's procedural rules because the allegations "'advise [Hamman] of the extent and nature of the alleged violations to reasonably allow preparation of a defense.'" Resp. at 4, quoting 35 Ill. Adm. Code 103.204(c) (emphasis added by Yorkville). According to Yorkville, count III, "when taken together with the general allegations of Yorkville's Complaint, offers such description and specificity that Hamman is more than able to reasonably prepare a defense." Resp. at 4, citing, *e.g.*, Comp. at ¶¶4, 12 (described in Yorkville's response as "dates of when Hamman first applied landscape waste to its fields and when complaints of odor first began"). Yorkville further asserts that additional information can be obtained through discovery. Resp. at 4.

Yorkville maintains that Hamman "completely misses the mark" when it argues that count III is a "veiled nuisance complaint that somehow is prohibited by the Illinois legislature." Resp. at 4. However similar the count's language may be to language that would be used in a nuisance action, the "unreasonable interference" language of count III comes directly from the Act and "designates the standards that the Board must follow to determine . . . whether Hamman has committed air pollution." *Id*. at 5. Yorkville emphasizes that the Board has the authority to hear alleged violations of the Act, and "permits are no defense to violations." *Id*. at 5.

Yorkville argues that Hamman also "completely misrepresents the intention of the Legislature" because the Farm Nuisance Suit Act eliminated only nuisance suits that arise from "changed conditions" in the area surrounding a farm and "specifically cleared the way for nuisance suits that arise from negligent or improper operation of any farm." Resp. at 5, n.1, citing 740 ILCS 70/3 (2006).

Count IV—Water Pollution

As with its response to the motion to strike or dismiss count III, Yorkville maintains that count IV "offers such description that Hamman is more than able to reasonably prepare a defense." Resp. at 6, citing, *e.g.*, Comp. at ¶¶4, 67 (described in Yorkville's response as "dates of when Hamman first applied landscape waste to its fields and when contamination of groundwater began"). Yorkville likewise adds that more information can be obtained through the use of discovery procedures. Finally, Yorkville reiterates that the Board is authorized to conduct enforcement proceedings; Yorkville has charged Hamman with violations of the Act; and neither a permit nor the Agency's May 1, 2008 determination is a defense to alleged violations of the Act. Resp. at 6.

Hamman's Reply

Count II— Landscape Waste Violations

Hamman insists that Yorkville's claim here that the Agency's May 1, 2008 determination constitutes a violation of the Act is clearly identical to Yorkville's claim in PCB 08-95 that the same Agency determination is "illegal." Reply at 2. Further, according to Hamman, Yorkville "admits that Count II's violations against Hamman Farms are predicated on a finding that the Agency's May 1, 2008 [determination] violates the law." *Id*. Hamman argues that "any violation in Count II relies on a finding that the Agency's May 1, 2008 decision was illegal," and Yorkville lacks standing to challenge, and the Board lacks jurisdiction to review, that decision. *Id*. at 5.

Yorkville also "conveniently ignores the fact" that Section 21(q) of the Act (415 ILCS 5/21(q) (2006)) "provides that it is not 'a violation of the Act' for a farm to apply landscape waste to its fields at agronomic rates." Reply at 2-3. Hamman maintains that, "as a matter of law," the allegation that Hamman applied landscape waste at the agronomic rate determined by the Agency cannot state a violation of the Act or the regulations. *Id*. at 3.

Hamman counters Yorkville's claims of open dumping, unpermitted waste storage and disposal, and illegal operation of an unpermitted landscape waste compost facility, by asserting that Section 21(q)(2) of the Act "provides that '<u>no permit shall be required</u> for any person . . . applying landscape waste or composted landscape waste at agronomic rates . . .' 415 ILCS 5/21(q)(2)." Reply at 3 (emphasis added by Hamman).

Hamman emphasizes that Section 21(q) of the Act makes clear that the "agronomic rate" of application is "*either* the statutory default rate of 20 tons per acre per year, *or in the alternative*, the rate which the Agency determines is the appropriate agronomic rate in light of a farm's soil characteristics or crop needs." Reply at 4 (emphasis in original). The Agency calculated the agronomic rate for Hamman and stated that rate in the May 1, 2008 determination. *Id*.

Count III—Air Pollution

Hamman argues that Yorkville "blatantly misrepresents the Board's pleading requirements" under 35 Ill. Adm. Code 103.204(c). Reply at 5. Yorkville's claim that additional information can be obtained through discovery "ignores the <u>pleading</u> specificity required by the Rules." *Id*. (emphasis in original). According to Hamman:

> One cannot plead an air pollution violation without pleading the extent and strength of the alleged discharges or emissions, as required by the Rules; those Rules are not written in the disjunctive, and do not, therefore, require *either* the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences *or* allegations that allow preparation of a defense. Rather, the Rule requires <u>both</u>. Moreover, even if <u>both</u> were not required, stating that over the course of the last fifteen (15) years some complaints were made

> about Hamman Farms, hardly provides sufficient information to allow preparation of a defense. *Id*. at 6 (emphasis in original).

Hamman concludes that count III's "generic allegations fall woefully short" of the specificity required by the Board's procedural rules. *Id*. at 8.

In addition, Hamman argues that if Yorkville's air pollution claim is somehow adequate, then "every homeowner located near a farm could bring a viable action for air pollution violations against the nearby farm(s), since all working farms release 'odors.'" Reply at 6. Hamman then reiterates its arguments based on the Farm Nuisance Suit Act, adding that the General Assembly has clearly expressed its intent to protect Illinois farms "from claims such as those alleged in Count III, in which Yorkville alleges that residents near the farm are perturbed by the odors characteristic of farming." *Id*. at 6-7.

Hamman asserts that in the Act, the legislature stressed the importance of "'reducing the difficulty of disposal of wastes and encouraging and effecting the recycling and reuse of waste materials.'" Reply at 7, quoting 415 ILCS 5/20(b) (2006). Applying landscape waste to farm fields as a soil conditioner and fertilizer under Section 21(q), "rather than being dumped in landfill sites," furthers this legislative purpose.[2] Reply at 7. According to Hamman, Yorkville's attempted argument, that the application of landscape waste to farm fields is "a *per se* air pollution violation because it results in the release of odors into the atmosphere, stands in direct contravention to the clearly stated will of the General Assembly." *Id*. "[I]ronically," states Hamman, count III alleges "the very conduct which is expressly authorized at 415 ILCS 5/21(q) actually constitutes a violation of the Act." *Id*. Hamman concludes that because the Board "lacks jurisdiction to overrule the legislature's decision to allow farmers to use landscape waste as [a] soil conditioner and fertilizer," the Board can neither "invalidate" Section 21(q) nor "declare that the conduct which is expressly authorized by the Act constitutes a violation of the Act." *Id*. at 7-8.

Count IV—Water Pollution

Hamman argues that as with count III, count IV lacks adequate detail and alleges violations "predicated on Yorkville's theory than any agronomic use of landscape waste *per se* violates the Act." Reply at 8. Yorkville argues, according to Hamman, that it is enough to allege that "Hamman Farms has utilized landscape waste since 1993, and . . . any application of landscape waste to farm fields is a *per se* water pollution violation." *Id*. Hamman argues that the Board "lacks jurisdiction to give Yorkville what it demands":

> a finding that the agronomic use of landscape waste, which is expressly authorized by the Illinois legislature at 415 ILCS 5/21(q), somehow constitutes a

[2] Under the Act, owners and operators of sanitary landfills are prohibited from accepting landscape waste for final disposal. Landscape waste separated from other municipal waste may be accepted under specified circumstances, including that the landfill composts all landscape waste and uses the compost as a final vegetative cover for the landfill, or the landfill is permitted to use source separated and processed landscape waste as an alternative daily cover. 415 ILCS 5/22.2(c) (2006).

per se violation of the Act because when landscape waste is applied to fields it causes discharge of a contaminant into ground water. *Id*. at 9.

DISCUSSION

The Board first provides the legal framework for today's decision. In ruling on Hamman's motion to strike or dismiss and deciding whether to accept Yorkville's complaint for hearing, the Board discusses whether the complaint is duplicative or frivolous. Lastly, the Board gives Hamman 60 days to file an answer and directs the parties to hearing.

Legal Framework

Citizen's Enforcement Actions

Under Section 31(c) of the Act, the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. 415 ILCS 5/31(c) (2006); 35 Ill. Adm. Code 103.212(c). In addition, Section 31(d)(1) of the Act provides:

> Any person[3] may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder . . . . *** Unless the Board determines that such 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).

The latter type of enforcement action is referred to as a "citizen's enforcement proceeding," which the Board defines as "an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois." 35 Ill. Adm. Code 101.202. Yorkville's complaint against Hamman initiated a citizen's enforcement proceeding.

Section 31(c), referred to in the passage of Section 31(d)(1) quoted above, states that the complaint "shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation . . . ." 415 ILCS 5/31(c) (2006). Even though "[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law" (Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)), the Act and the Board's procedural rules "provide for specificity in pleadings" (Rocke v. PCB, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)) and "the charges must be sufficiently clear and specific to allow preparation of a defense" (Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354).

---

[3] The Act defines "person" as "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." 415 ILCS 5/3.315 (2006).

The Board's procedural rules codify the requirements for the contents of a complaint, including:

1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;

2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense.

3) A concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c).

Within 30 days after being served with a complaint, a respondent may file a motion to strike or dismiss a complaint, which may include a challenge that the complaint is "duplicative" or "frivolous." 35 Ill. Adm. Code 101.506, 103.212(b). 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. A complaint is "frivolous" if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

Motions to Strike or Dismiss

The Board has often looked to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. *See*, *e.g.*, People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *E.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* *In re* Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "To determine whether a cause of action has been stated, the entire pleading must be considered." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist 1993), citing A, C & S, 131 Ill. 2d at 438 ("'the whole complaint must be considered, rather than taking a myopic view of a disconnected part[,]'" A, C & S quoting People *ex rel*. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

"[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303; Chicago Flood, 176 Ill. 2d at 189, 680 N.E.2d at 270 ("[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party."); People v. Peabody Coal Co.,

PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001). The appellate court explained:

> It is impossible to formulate a simple methodology to make this determination, and therefore a flexible standard must be applied to the language of the pleadings with the aim of facilitating substantial justice between the parties. [Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Gonzalez v. Thorek Hospital & Medical Center, 143 Ill. 2d 28, 34, 570 N.E.2d 309 (1991)] The disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court. [Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Groenings v. City of St. Charles, 215 Ill. App. 3d 295, 299, 574 N.E.2d 1316 (2nd Dist. 1991)]

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Licoln health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); College Hills Corp., 91 Ill. 2d at 145, 435 N.E.2d at 466-67. In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4, citing Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303; *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; City of Wood River, PCB 98-43, slip op. at 2 (petitioner is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action"). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's failure to allege facts necessary to recover "may not be cured by liberal construction or argument." Condell Memorial Hospital, 119 Ill. 2d at 510, 520 N.E.2d at 43, quoting People *ex rel*. Kucharski v. Loop Mortgage Co., 43 Ill. 2d 150, 152 (1969). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467.

"Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties." Grist Mill Confections, PCB 97-174, slip op. at 4, citing Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E. 2d 1167 (1st Dist. 1994); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466 ("In determining whether the complaint is adequate, pleadings are liberally construed. The aim is to see substantial justice done between the parties."). Fact-pleading does not require a complainant to set out its evidence: "'To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People *ex rel*. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981), quoting Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970); City of Wood River, PCB 98-43, slip op. at 2. Moreover, "pleadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing College Hills, 91 Ill 2d at 145.

Hamman's Motion to Strike or Dismiss

Count II— Landscape Waste Violations

For the reasons given below, the Board grants in part and denies in part Hamman's motion to strike or dismiss count II. In paragraph 49 of count II, Yorkville alleges as follows:

> HAMMAN failed to establish that HAMMAN's soil characteristics or crop needs require a higher rate of landscape waste application in its request to the Agency. As a result, the Agency's grant of permission allowing HAMMAN to apply landscape waste at rates up to eighty (80) tons per acre per [] year violates the Act and regulations. Comp. at ¶49.

On the same date that it filed this citizen's enforcement complaint, Yorkville also filed a third-party appeal of the Section 21(q) determination issued by the Agency on May 1, 2008, to Hamman. The May 1 determination is the "Agency's grant of permission" to which Yorkville refers in paragraph 49 of the complaint.[4] On August 7, 2008, the Board granted the Agency's and Hamman's motions to dismiss Yorkville's third-party appeal. The Board determined that it lacked jurisdiction to hear Yorkville's petition for review of the Section 21(q) determination. United City of Yorkville v. IEPA and Hamman Farms, PCB 08-95, slip op. at 8 (Aug. 7, 2008).[5] The Board also stated that it "cannot hear Yorkville's petition as a complaint charging the Agency with violating the Act in approving Hamman's request." *Id*. at 7.

As it did in PCB 08-95, the Board again relies upon the Illinois Supreme Court's 1978 decision in Landfill, Inc. v. IPCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978). There the Court found that the Act did not allow third parties to prosecute the Agency's alleged permitting violations before the Board, but instead enabled citizens to bring complaints against permittees:

> The focus must be upon polluters who are in violation of the substantive provisions of the Act, since it would be unreasonable [for] the Agency to investigate its own compliance with permit-granting procedures.
> ***
> [A] citizen's statutory remedy is a new complaint against the polluter, not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit. Landfill, Inc., 74 Ill. 2d 541, 556, 560-61, 387 N.E.2d 258, 263, 265 (1978); *see also* Citizens Utilities Co. of Illinois v. PCB, 265 Ill. App. 3d 773, 781, 639 N.E.2d 1306, 1312 (3rd Dist 1994).

---

[4] The Board regulatory "standards for compost facilities" (35 Ill. Adm. Code 830) quote Section 21(q) of the Act for the definition of "agronomic rates." "'*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.)" 35 Ill. Adm. Code 830.102.

[5] The Board today issues an order in PCB 08-95 denying Hamman's request for attorney fees and costs and closing that docket.

The Board accordingly lacks jurisdiction to entertain Yorkville's allegation that the Agency's Section 21(q) determination violated the Act. Consistent with Landfill, Inc., the Board strikes with prejudice paragraph 49 from the complaint as frivolous and, to that extent, grants Hamman's motion. However, as explained below, the Board otherwise denies Hamman's motion to strike or dismiss count II.

In the balance of count II, Yorkville alleges that Hamman has violated Sections 21(a) 21(d)(1), 21(d)(2), 21(e), and 21(q) of the Act. Section 21(q) is set forth at pages 2 and 3 of this opinion. The other provisions of Section 21 allegedly violated by Hamman read in 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. 415 ILCS 5/21(a), (d)(1), (d)(2), (e) (2006).

Yorkville states that landscape waste constitutes "waste" under the Act. Comp. at ¶47. The Act defines "waste" in part as:

> 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 . . . . 415 ILCS 5/3.535 (2006).

Hamman registered with the Agency in about 1993 as an "On-Site Compost Landscape Waste Compost Facility" under Section 21(q)(3) of the Act, according to the complaint. Comp. at ¶4. Yorkville alleges that since then, Hamman has applied landscape waste at rates greater than the agronomic rate of 20 tons per acre per year. *Id*. at ¶48; *see also id*. at ¶10. Hamman, according to count II, has (1) allowed open dumping; (2) conducted waste-storage and waste-disposal operations without a permit and in violation of the Act and regulations; (3) become a waste disposal site, and one not permitted for the disposal of waste and not meeting the requirements of the Act or the regulations; and (4) not obtained a landscape waste composting operation permit or met the permit exemption of Section 21(q)(2) or (q)(3) of the Act. *Id*. at ¶¶50-53.

The Board disagrees with Hamman that "any violation in Count II relies on a finding that the Agency's May 1, 2008 decision was illegal." Reply at 5. The complaint was filed roughly one month after the Agency issued that determination. In the count II allegations enumerated above, Yorkville claims violations by Hamman dating back to around 1993. These include the allegation that Hamman has applied landscape waste at a rate greater than the agronomic rate of 20 tons per acre per year without obtaining a permit or qualifying for a Section 21(q) exemption from permitting. *See* College Hills, 91 Ill. 2d at 145 ("the whole complaint must be considered, rather than taking a myopic view of a disconnected part"); Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 ("the entire pleading must be considered").

Taking all well-pled allegations of the complaint as true and drawing all reasonable inferences from them in favor of Yorkville, the Board cannot conclude that there clearly is no set of facts that could be proven that would entitle Yorkville to prevail on count II. *See* Central Illinois Regional Airport, 207 Ill. 2d at 584-85, 802 N.E.2d at 254; Chicago Flood Litigation, 176 Ill. 2d at 184, 680 N.E.2d at 268; Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303. The Board denies Hamman's motion to strike or dismiss these allegations.[6]

Count III—Air Pollution

For the reasons discussed below, the Board denies Hamman's motion to strike count III as beyond the Board's jurisdiction, but grants Hamman's alternative motion to dismiss count III as insufficiently pled. Count III is dismissed, however, without prejudice.

In count III of the complaint, Yorkville alleges that Hamman has violated Section 9(a) of the Act. Comp. at 13-14. Section 9(a) provides:

> 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. 415 ILCS 5/9(a) (2006).

Yorkville alleges that Hamman's landscape waste application has allowed the "discharge of [a] contaminant into the environment so as to cause air pollution." Comp. at ¶60. The Act defines "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2006). Yorkville alleges that the contaminant at issue is odor, which is emitted from Hamman's application of landscape waste. Comp. at ¶58.

Initially, the Board must dispose of three arguments made by Hamman. First, Hamman's reliance on the Farm Nuisance Suit Act (FNSA) (740 ILCS 70 (2006)) is misplaced. As the Board held in another farm odor case, the FNSA does not provide a defense to a statutory cause of action alleging an air pollution violation:

---

[6] At page 26 of the opinion, the Board strikes with prejudice Yorkville's request for attorney fees and costs from this count's prayer for relief.

> Section 3 of the FNSA provides a farm with protection only from actions alleging that it has become a "private or public nuisance." Complainants here rely on the enforcement provisions of the Environmental Protection Act and allege air pollution, not on an action alleging nuisance. The FNSA was effective September 16, 1981, some 10 years after the passage of the Environmental Protection Act with its air pollution and enforcement provisions. Amendments to the FNSA as recent as January 1, 1996, make no reference to any enforcement action under the Environmental Protection Act for air pollution, instead referring only to a "nuisance action." (740 ILCS 70/4.5.) The Illinois Supreme Court has held that actions under [the] Environmental Protection Act alleging air pollution are distinct from common law nuisance claims. (See Incinerator, Inc. v. Pollution Control Board, 59 Ill. 2d 290, 299, 319 N.E.2d 794, 799 (1974) ("violations of the Act here in question are not defined in terms of nuisances."); City of Monmouth v. Illinois Pollution Control Board, 57 Ill. 2d 482, 485, 313 N.E.2d 161, 163 (1974) (same).) Accordingly, the Board finds that Section 3 of the FNSA does not bar complainants' claims. Gott v. M'Orr Pork, Inc., PCB 96-68, slip op. at 10-11 (Feb. 20, 1997); *see also* Fredrickson v. Grelyak, PCB 04-19, slip op. at 4 (May 5, 2005).

Second, contrary to Hamman's characterizations, the release of odor, without more, is not a "*per se* air pollution violation" under the Act. Reply at 7. The Act defines "air pollution" as:

> 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. 415 ILCS 5/3.115 (2006).

Yorkville alleges that the release of odor from Hamman's application of landscape waste "unreasonable interferes with Yorkville's residents' use and enjoyment of life and property." Comp. at ¶59.

As the Board has many times held, establishing this type of air pollution violation requires proof of interference with the enjoyment of life or property and proof that such interference was unreasonable. *E.g.*, M'Orr Pork, PCB 96-68, slip op. at 13-14. Whether an interference is unreasonable is determined by reference to the criteria set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (2006)). *Id*., citing Incinerator, Inc., 59 Ill. 2d at 296, 319 N.E.2d at 797; Wells Manufacturing Co. v. PCB, 73 Ill. 2d at 226, 233, 383 N.E.2d at 148, 151 (1978). The factors provided in Section 33(c) bear on the reasonableness of the emissions at issue, such as the character and degree of the resulting interference and the technical practicability and economic reasonableness of reducing or eliminating the emissions. 415 ILCS 5/33(c) (2006). Application of the Section 33(c) factors ensures that before the Board finds a violation, the complainant must prove a "substantial interference" with the enjoyment of life or property, excluding "trifling inconvenience, petty annoyance and minor discomfort." M'Orr Pork, PCB 96-68, slip op. at 13-14, quoting Processing and Books, Inc. v. PCB, 64 Ill. 2d 68, 77, 351 N.E.2d 865, 869 (1976) (in part quoting Incinerator, Inc., 59 Ill. 2d at 297, 319 N.E.2d at 797).

Third, Hamman asserts that the Board cannot find "the very conduct which is expressly authorized at 415 ILCS 5/21(q) actually constitutes a violation of the Act." Reply at 7. Hamman makes a similar argument concerning counts II and IV. As explained above, Hamman ignores the complaint's allegations that the agronomic rate of 20 tons per acre per year was exceeded for many years before the Agency issued its May 1, 2008 determination (Comp. at ¶¶4, 5, 9, 10). *See* Chicago Flood Litigation, 176 Ill. 2d at 184, 680 N.E.2d at 268 (must take all well-pled allegations as true and draw all reasonable inferences from them in favor of the non-movant); College Hills, 91 Ill. 2d at 145 ("the whole complaint must be considered, rather than taking a myopic view of a disconnected part"); Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 ("the entire pleading must be considered").

In addition, Section 21(q) of the Act prohibits the "[c]onduct of a landscape waste composting operation without an Agency permit, provided, however, that no permit shall be required for any person" who meets any one of three exemptions, including "applying landscape waste or composted landscape waste at agronomic rates." 415 ILCS 5/21(q) (2006). By holding a permit or complying with one of these three statutory exemptions from permitting (415 ILCS 5/21(q)(1)-(3) (2006)), a person is thereby not in violation of the requirement to have a permit; the person is not, however, insulated from liability if its activities otherwise violate the Act, such as by causing air pollution. This well-settled construction of the Act in no way "invalidates" Section 21(q). *See*, *e.g.*, People v. Peabody Coal Co., PCB 99-134, slip op. at 10-11 (June 5, 2003) (discharges in compliance with permit limits constitute a shield from effluent limit violations but not pollution violations); 35 Ill. Adm. Code 832.109 ("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."); RCRA Update, USEPA Regulations (7-1-87 Through 12-31-87), R87-39, slip op. at 6 (June 16, 1988) (permit protects only against enforcement for failure to have a permit).

As explained by the Illinois Supreme Court in Landfill, Inc.:

> The grant of a permit does not insulate violators of the Act or give them a license to pollute . . . . As the principal draftsman of the Act has noted, "One receiving a permit for an activity that allegedly violates the law can be charged with causing or *threatening to cause* such a violation in a citizen complaint under section 31(b) [now Section 31(d)], and the regulations expressly provide that the existence of a permit is no defense to such a complaint." Landfill, Inc., 74 Ill. 2d at 559-60, 387 N.E.2d at 265, quoting Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw. U.L. Rev. 389, 478 (1975) (emphasis added by Court).

Whether pollution in violation of the Act has occurred will depend upon the evidence and the Board's application of the law to the facts. Applying landscape waste at an agronomic rate is designed to provide crops with needed nutrition while minimizing the risk of pollution, but such application does not, as a matter of law, preclude the possibility of finding pollution. Likewise, applying landscape waste at an agronomic rate is obviously not *per se* a pollution violation. Hamman's argument to the contrary is based on its misinterpretation of what is required to prove air pollution under the Act. Moreover, evidence of compliance with a Section 21(q) exemption may be a relevant consideration in determining whether any interference was unreasonable, and

may be a mitigating factor in determining any penalty if there is a violation. 415 ILCS 5/33(c), 42(h) (2006).

In short, even if there is compliance with a Section 21(q) exemption from permitting, the Board does not lack jurisdiction to find an air pollution violation. *See, e.g.*, Landfill, Inc., 74 Ill. 2d at 559-60, 387 N.E.2d at 265. Yorkville's allegations of violation in count III are therefore not beyond the Board's authority to rule upon, and Hamman's motion to strike on that ground is accordingly denied.

Nevertheless, the Board does find merit in Hamman's argument that Yorkville's air pollution count is inadequately pled. Yorkville alleges that since approximately 1993, Hamman has applied landscape waste at rates greater than the agronomic rate and that at unspecified times over the ensuing 15-year period, the Agency has received an unspecified number of complaints about "strong and offensive odors around HAMMAN." Comp. at ¶¶4, 9, 10, 12. It is widely recognized that the mishandling of landscape waste can result in odor problems. *E.g.*, Regulation of Landscape Waste Compost Facilities 35 Ill. Adm. Code 830-832, R93-29, slip op. at 5, 11-14 (Nov. 3, 1994).[7] The Board finds, however, that Yorkville has not pled in its complaint sufficient facts concerning the alleged odor emissions or their consequences.

As discussed above, the elements of this air pollution violation include interference that is unreasonable. In considering Hamman's motion, the Board has taken all well-pled allegations in the complaint as true and drawn all reasonable inferences from them in favor of Yorkville. *See* Chicago Flood, 176 Ill. 2d at 184, 680 N.E.2d at 268; Beers, PCB 04-204, slip op. at 2. 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

[7] The Board takes notice (35 Ill. Adm. Code 101.630) of the Agency's May 1, 2008 determination, filed in PCB 08-95, which includes a condition stating that "Hamman Farms shall process, apply and incorporate the landscape waste in a manner that prevents the generation of nuisance conditions from flies or odors. Hamman Farms shall reduce or cease the application of landscape waste, as necessary, to prevent nuisance conditions." PCB 08-95, Yorkville Petition, Exhibit A at 2, filed June 4, 2008.

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.

The Illinois Supreme Court stated:

> It is fundamental that facts and not conclusions are to be pleaded. If, without considering the conclusions that are pleaded, there are not sufficient allegations of fact to state a cause of action, a motion to dismiss will properly be granted, no matter how many conclusions may have been stated and regardless of whether they inform the defendant in a general way of the nature of the claim against him. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 544 N.E.2d 733 (1989).

Moreover, the Board finds that when considering a motion to strike or dismiss, the availability of discovery does not dilute the pleading requirements, contrary to Yorkville's suggestion.

The Board grants Hamman's motion to dismiss count III because the count as pled does not satisfy the requirements of the Act (415 ILCS 5/31(c), (d)(1) (2006)) or the Board's procedural rules (35 Ill. Adm. Code 103.204(c)(2)) for the contents of a complaint. In granting the motion, however, the Board does so without prejudice, as the Board cannot conclude that there is clearly no set of facts that could be proven that would entitle Yorkville to prevail on the air pollution claim. *See* Central Illinois Regional Airport, 207 Ill. 2d at 585, 802 N.E.2d at 254 (plaintiff may seek leave to plead over where dismissal is based on matter that may be cured by filing amended complaint); *see also* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303.[8]

[8] At page 26 of the opinion, the Board strikes with prejudice Yorkville's request for attorney fees and costs from this count's prayer for relief.

Count IV—Water Pollution

For the reasons provided below, the Board finds unpersuasive Hamman's motion to strike or dismiss count IV. In count IV, Yorkville alleges that Hamman violated Sections 12(a) and 12(d) of the Act. Comp. at 15-16. Sections 12(a) and 12(d) provide:

> 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. 415 ILCS 5/12(a), (d) (2006).

The Act defines "waters" as "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." 415 ILCS 5/3.550 (2006).

Yorkville asserts that Hamman's landscape waste, a contaminant, has been discharged to groundwater and that Hamman's application of landscape waste has allowed the discharge of a contaminant into the environment so as to cause or tend to cause water pollution, and constitutes the deposit of a contaminant so as to create a water pollution hazard. Comp. at ¶¶66-69.

As with count III, Hamman makes the overbroad argument that if count IV is accepted, "any application of landscape waste to farm fields is a *per se* water pollution violation " because "when landscape waste is applied to fields it causes discharge of a contaminant into ground water." Reply at 8-9. According to Hamman, the Board lacks authority to find that the agronomic use of landscape waste, as authorized Section 21(q), "somehow constitutes a *per se* violation of the Act because when landscape waste is applied to fields it causes discharge of a contaminant into ground water." *Id*.

"Water pollution" under the Act, however, is not defined as a contaminant discharge to a water of the State. "Water pollution" is defined as:

> 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. 415 ILCS 5/3.545 (2006).

Further, as discussed above under the air pollution count, Hamman's argument fails to address Yorkville's allegations that Hamman exceeded the agronomic rate of 20 tons per acre per year for some 15 years before the Agency issued the May 1, 2008 determination (Comp. at ¶¶4,

5, 9, 10). *See* Chicago Flood Litigation, 176 Ill. 2d at 184, 680 N.E.2d at 268 (must take all well-pled allegations as true and draw all reasonable inferences from them in favor of the non-movant); College Hills, 91 Ill. 2d at 145 ("the whole complaint must be considered, rather than taking a myopic view of a disconnected part"); Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 ("the entire pleading must be considered"). Moreover, even if Hamman has complied with a Section 21(q) exemption from permitting, the Board has the authority to find a water pollution violation, as explained above. *See, e.g.*, Landfill, Inc., 74 Ill. 2d at 559-60, 387 N.E.2d at 265. The Board concludes that Yorkville's count IV is not beyond the Board's authority to rule upon, and Hamman's motion to strike on that ground is therefore denied.

As noted, Yorkville alleges that Hamman's application of landscape waste has allowed the discharge of a contaminant into the environment "so as to cause or tend to cause water pollution" in violation of Section 12(a) and "so as to create a water pollution hazard" in violation of Section 12(d). *Id*. at ¶¶68-69. It is long established that the Act not only prohibits one from causing water pollution but also from threatening to cause water pollution. *E.g.*, Allaert Rendering, Inc. v. PCB, 91 Ill. App. 3d 153, 156, 414 N.E.2d 492, 495 (3rd Dist. 1980) ("it is not necessary to show actual pollution in order to show a threat of pollution"); Wasteland, Inc. v. PCB, 118 Ill. App. 3d 1041, 1048-49, 456 N.E.2d 964, 971-72 (3rd Dist. 1983). Under Section 12(a), "a discharge is unlawful not only if it causes pollution but also if it 'tend[s]' to; and water pollution is shown by a discharge that 'is likely to' render the water harmful as well as by one that actually does." Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw. U.L. Rev. 389, 402 (1975). As the appellate court held concerning Sections 12(a) and 12(d):

> a "water pollution hazard" can be found although the actor does not yet threaten to cause pollution. * * * Section 12(a) of the Act enjoins, *inter alia*, "threaten * * * the discharge of any contaminant so as to cause or to tend to cause." If section 12(d) referring to water pollution hazard is not to be rendered superfluous, it must be construed to refer to conduct not yet amounting to a violation of section 12(a). Tri-County Landfill Co. v. PCB, 41 Ill. App. 3d 249, 258, 353 N.E.2d 316, 324 (2nd Dist. 1976); *see also* Jerry Russell Bliss, Inc. v. PCB, 138 Ill. App. 3d 699, 703-04, 485 N.E.2d 1154, 1157 (5th Dist. 1985); People v. John Prior d/b/a Prior Oil Co., PCB 02-177, slip op. at 23 (May 6, 2004).

Hamman does not dispute that the improper handling of landscape waste can lead to the pollution of groundwater. *E.g.*, Regulation of Landscape Waste Compost Facilities 35 Ill. Adm. Code 830-832, R93-29, slip op. at 15-16 (Nov. 3, 1994); 35 Ill. Adm. Code 830.202(l)(2) (closure must control, minimize or eliminate "the release of landscape waste, landscape waste constituents, landscape waste leachate, and composting constituents to the groundwater or surface waters or to the atmosphere to the extent necessary to prevent threats to human health or the environment.").[9] Taking all well-pled allegations of the complaint as true and drawing all

[9] For example, one definition of "agronomic rate" is a "rate of nutrient application onto a field so that the amount of nitrogen required by a crop to grow is available, *but the amount of nutrients that pass through the soil below where they are used by plants or into groundwater is minimized or non-existent*." Colorado State University Agriculture Dictionary, http://agnews.colostate.edu/index.asp?url=agdictionary_select_word (last modified on 7/7/2008) (emphasis added).

reasonable inferences from them in favor of Yorkville, the Board cannot conclude that there is clearly no set of facts that could be proven that would entitle Yorkville to prevail on count IV. *See* Central Illinois Regional Airport, 207 Ill. 2d at 584-85, 802 N.E.2d at 254; Chicago Flood Litigation, 176 Ill. 2d at 184, 680 N.E.2d at 268; Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303.

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).

The Board denies Hamman's motion to strike or dismiss count IV.[10]

Requested Attorney Fees and Costs

In each of the four counts of its complaint, Yorkville requests that the Board order Hamman to pay Yorkville's "costs and reasonable attorney's fees." Comp. at 9, 13, 15, 17. The Board, as an administrative agency, is a "creature of statute," and therefore has only the authority given to it by its enabling act. Granite City Div. of Nat. Steel Co. v. PCB, 155 Ill. 2d 149, 171, 613 N.E.2d 719, 729 (1993); *see also* Bevis v. PCB, 289 Ill. App. 3d 432, 437, 681 N.E.2d 1096, 1099 (5th Dist. 1997); McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 95, 506 N.E.2d 372, 376 (2nd Dist. 1987). The appellate court has held that absent explicit statutory authority to award "'attorney fees,'" the Board cannot do so. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 337-39, 676 N.E.2d 299, 307-09 (3rd Dist. 1997) (without a statute authorizing them, "attorney fees and other ordinary expenses of litigation may not be awarded."), *appeal denied*, 173 Ill. 2d 524, 684 N.E.2d 1335 (1997).

The Board may award costs and reasonable attorney's fees in enforcement actions only when the State's Attorney or the Attorney General is the complainant, and then only under the circumstances described in Section 42(f) of the Act (415 ILCS 5/42(f) (2006)). *E.g.*, Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc., PCB 98-81, slip op. at 2 (Jan. 22, 1998); Dayton Hudson Corp. v. Cardinal Industries, Inc., PCB 97-134, slip op. at 7-8 (Aug. 21, 1997). "The Board cannot award attorney fees and other ordinary expenses of litigation in citizen's enforcement suits." 2222 Elston LLC v. Purex Industries, Inc., PCB 03-55, slip op. at 12 (June 19, 2003). As discussed, Yorkville is a citizen complainant. Through its requests for attorney fees and costs, Yorkville seeks "relief that the Board does not have the

---

[10] At page 26 of the opinion, the Board strikes with prejudice Yorkville's request for attorney fees and costs from this count's prayer for relief.

authority to grant." 35 Ill. Adm. Code 101.202. The Board accordingly strikes with prejudice those portions of Yorkville's complaint as frivolous.

Duplicative or Frivolous

As stated above, "[u]nless 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. A complaint is "frivolous" if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Based on the information in this record and taking into account the Board's partial grant of Hamman's motion to strike or dismiss, the Board finds that Yorkville's complaint, so modified, is neither frivolous nor duplicative.[11]

Hearing and Answer

The Board accepts for hearing Yorkville's complaint as amended by this order. *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.212(a). 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. 35 Ill. Adm. Code 103.204(d). Hamman's filing of the motion to strike or dismiss stayed the 60-day period for filing an answer to the complaint, which stay ends today with the Board's ruling on the motion. *See* 35 Ill. Adm. Code 103.204(e). Hamman therefore has 60 days from receipt of this order to file an answer to Yorkville's complaint, as amended by today's rulings.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2006). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in

[11] The Board takes notice (35 Ill. Adm. Code 101.630) of Yorkville's statements, made in a response filed in PCB 08-95, that "IEPA had issued violation notices to Hamman and rejected Hamman's Compliance Commitment Agreement" and that "[o]n September 17, 2008, the Attorney General of the State of Illinois filed a complaint for injunctive relief and other civil penalties against Hamman for these violations." PCB 08-95, Yorkville Response to Motion for Attorney's Fees at 2, filed Sept. 19, 2008.

Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary of unreasonable financial hardship."

Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

CONCLUSION

The Board grants Hamman's motion to strike from Yorkville's complaint the allegation that the Agency violated the Act in issuing the May 1, 2008 determination concerning

Hamman's application of landscape waste. In addition, the Board grants Hamman's motion to dismiss Yorkville's air pollution count as insufficiently pled. The Board also grants Hamman's motion to strike as frivolous Yorkville's requests for attorney fees and costs. The Board otherwise denies Hamman's motion to strike or dismiss and accepts for hearing Yorkville's complaint, as amended by today's decision.

Any answer to the complaint, as amended, must be filed within 60 days after Hamman receives this order. Nothing in today's rulings precludes Yorkville from seeking leave to file an amended complaint that re-alleges air pollution and cures that count's factual pleading deficiencies. Any amended complaint must exclude the provisions of the original complaint stricken with prejudice by this order.

ORDER

1. The Board grants Hamman's motion to strike paragraph 49 from count II of Yorkville's complaint. Paragraph 49 is stricken with prejudice. The Board otherwise denies Hamman's motion to strike or dismiss count II, except as provided in paragraph 4 of this order.

2. The Board grants Hamman's motion to dismiss count III of Yorkville's complaint. Count III is dismissed without prejudice.

3. The Board denies Hamman's motion to strike or dismiss count IV of Yorkville's complaint, except as provided in paragraph 4 of this order.

4. The Board grants Hamman's motion to strike from the complaint Yorkville's requests for attorney fees and costs. The requests for attorney fees and costs are stricken with prejudice.

5. The Board accepts for hearing Yorkville's complaint as amended by this order.

6. Hamman has 60 days from receipt of this order to file an answer to Yorkville's complaint as amended by this order.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 16, 2008, by a vote of 4-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board