

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A
MUNICIPAL CORPORATION,

Complainant,

v.

HAMMAN FARMS,,

Respondents.

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

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on December 10, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent's Reply in Support of its Motion for Reconsideration, a copy of which is attached hereto and hereby served upon you.

Dated: December 10, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/Charles F. Helsten

Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Nicola Nelson
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

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)

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

NOW COMES the Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, and for its Reply in Support of its Motion for Reconsideration, states as follows:

The Underlying Pleading: Hamman Farms' Motion to Strike and Dismiss

On July 8, 2008, Hamman Farms filed a Motion to Strike and Dismiss in the instant case, in which it sought, *inter alia*, dismissal of Counts III and IV for lack of specificity. The Motion argued that that both Count III and Count IV "fail[] to list '[t]he dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations.' See 35 Ill.Adm.Code 103.204(c)(2)." (Hamman Farms' Motion to Strike and Dismiss at ¶21). The motion argued that in addition to supplying sufficient information to allow a Respondent to mount a defense, a complaint must also plead the information listed in Section 103.204(c).

The Board's October 16, 2008 Order

On October 16, 2008, the Board granted in part and denied in part Hamman Farms' Motion to Strike and Dismiss. The Board dismissed Count III (Air Pollution) for lack of specificity, but declined to dismiss Count IV (Water Pollution) for lack of specificity. In

declining to dismiss Count IV, the Board opined that “the Act not only prohibits one from causing water pollution but also from threatening to cause water pollution.” (Board’s Order at 24).

Although it would have been improper for Hamman Farms to dispute factual allegations on a motion to dismiss, the Board opined that Hamman Farms’ motion to dismiss had not challenged Yorkville’s factual allegation that Hamman Farms began to apply landscape waste to its fields in an amount exceeding the statutory default rate before IEPA concluded that it was appropriate for Hamman Farms to apply the material at the higher rate. (Board’s Order at 23-24).¹ Noting the alleged application of material at a rate above the default rate, the Board stated that “Hamman does not dispute that the improper handling of landscape waste can lead to the pollution of groundwater.” (Board’s Order at 24)(emphasis added).

The Board then concluded that because the Complaint alleges that Hamman Farms improperly applied landscape waste to its fields, thereby discharging a “contaminant” into the environment, it would be inappropriate to dismiss Count IV because the Board couldn’t conclude that there was no set of facts that would entitle Yorkville to prevail on its water pollution allegations. (See Board’s Order at 25). However, the Board’s Order did not address the specificity requirements of 35 Ill.Adm.Code 103.204(c) with respect to Count IV.

Hamman Farms’ Motion for Reconsideration

In its Motion for Reconsideration, Hamman Farms urged the Board to reconsider its application of the law with respect to the pleading requirements of 35 Ill.Adm.Code 103.204(c)(2) as to Count IV. Hamman Farms argued that the same failure to plead “[t]he dates,

¹ Hamman Farms has not admitted, and does not admit, Yorkville’s allegation that material was applied to Hamman Farms’ fields at an improper rate.

location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations” (again, as required by 35 Ill.Adm.Code 103.204(c)) which the Board found to be fatal to Count III, was also fatal to Count IV.

Because Count IV alleges Water Pollution violations of Section 12(a) and 12(d) without pleading the dates, location, extent, duration, and strength of discharges or emissions, as required by the Act and the Rules, Hamman Farms urged the Board to reconsider its application of the law.

Yorkville’s Response to the Motion for Reconsideration

Yorkville erroneously claims that in its Order, the Board found that Count IV of Yorkville’s Complaint “included the requisite dates, locations, extent, duration, etc.” (Yorkville’s Response at 2-3). In fact, the Board made no such finding. Rather, the Board held that “improper handling of landscape waste can lead to the pollution of groundwater.” (Board’s Order at 24)(emphasis added). Then, without ever addressing the absence of any “dates, locations, extent, duration, etc.” (which the Board found to be fatal to Count III), and without ever discussing or applying 35 Ill.Adm.Code 103.204(c), the Board announced that “[c]onsidering 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 Section 12(a) and 12(d).” (Board’s Order at 25). Thus, Yorkville’s allegation that the Board held Yorkville had adequately pled the requisite “dates, locations, extent, duration, etc.” misrepresents the Board’s findings as to Count IV.

Yorkville also erroneously alleges that Hamman Farms’ “only attempt at explanation” for

why the Board should reconsider its ruling on Count IV was Hamman Farms' conclusion that it would have decided the issue of pleading specificity differently. (Yorkville's Response at 3). Yorkville thereby misrepresents the thrust of the arguments in Hamman Farms' Motion for Reconsideration. In its motion, Hamman Farms pointed to and quoted the detailed pleading requirements of 35 Ill.Adm.Code 103.204, which expressly require that all complaints, not just air pollution complaints, include the "dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations." (Yorkville's Motion at ¶¶ 5, 8, 11, 12, quoting 35 Ill.Adm.Code 103.204(c)). Therefore, the Board's finding that the Complaint failed to plead the mandatory information and so failed to state an air pollution violation (Count III), should also have resulted in a finding that the Complaint failed to state a water pollution violation (Count IV).

Yorkville also erroneously asserts in its Response that the Board's decision to dismiss Count III was not based on the absence of dates, location, nature, extent, and strength of discharges or emissions, but was instead simply based solely on Yorkville's failure to adequately plead allegations demonstrating "unreasonable interference." (Yorkville's Response at 3). Contrary to the representations in Yorkville's brief, the Board expressly held that it was dismissing Count III as insufficiently pled (Board's Order at 18), and in explaining the failure of Count III to satisfy the pleading requirements, stated that:

absent the ultimate facts on the dates or frequency and duration of the alleged odor emissions and the nature and extent of the allegedly resulting interference, Yorkville's complaint does not meet the pleading requirements...

(Board's Order at 21)(emphasis added).

Thus, Yorkville's Response not only misstates Hamman Farms' arguments, it also

misrepresents the Board's holding in the case.

The Board Did Not Apply 35 Ill. Adm. Code 103.204(c) to Count IV

As set forth in Hamman Farms' Motion for Reconsideration, the pleading requirements of 35 Ill. Adm. Code 103.204(c) apply to all complaints alleging violations of the Act, including those alleging water pollution violations. As there are no special pleading rules for water pollution violations, on motions to dismiss, this Board applies the specificity requirements of 35 Ill. Adm. Code 103.204(c) in assessing alleged violations of Section 12 of the Act. *See, e.g., George R. Strunk v. Williamson Energy LLC (Pond Creek Mine #1)*, PCB 07-135 at *9 (Dec. 20, 2007) (citing 35 Ill. Adm. Code 103.204(c)(2)) (finding that complaint's failure to plead "[t]he dates, location, events, nature, extent, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations" mandated dismissal of claims purporting to state violations of Section 12(a), (b), and (d)).

The fact that the Act prevents discharges that cause water pollution (Section 12(a)), as well as those that tend to cause water pollution (Section 12(d)), does not negate the pleading requirements of Section 103.204(c). Moreover, contrary to the Board's apparent assumption in its Order, "[t]he mere presence of a potential source of water pollutants on the land does not necessarily constitute a water pollution hazard," and therefore a discharge of "contaminant" onto the ground does not create the threat of pollution. *See Bliss v. IEPA*, 138 Ill. App. 3d 699, 704, 485 N.E.2d 1154 (5th Dist. 1985) (holding that evidence showing TCE-contaminated oil had been deposited "in a quantity sufficient to puddle on the surface of the ground" near the Mississippi River, in an area prone to leaky artesian conditions, was not sufficient to demonstrate the presence of a water pollution hazard). Thus, it is not sufficient for Yorkville to state a water pollution violation by simply alleging that the Respondent plowed landscape waste material into

the ground, and in so doing discharged a contaminant into the environment, thereby creating a threat of water pollution because doing so has the potential to lead to water pollution. *See id.* Setting the bar for pleading so low would have serious public policy implications, making it possible for a citizen to state water pollution claims against any farmer who applies natural or chemical fertilizers, pesticides, or other products designed to enhance yields, to his or her fields.

There is a sound policy reason for the specificity requirements in pleading environmental violations, as confirmed by this Board in *Strunk*, and the Board is accordingly obliged to apply those requirements to all complaints, including the Complaint filed by Yorkville.

Conclusion

The Board's Order of October 16, 2008 declined to apply the pleading requirements of 35 Ill.Adm.Code 103.204(c) to Count IV. Accordingly, Hamman Farms requests that the Board reconsider its ruling concerning Count IV, apply the specificity requirements to Count IV, and dismiss Count IV for failing to meet the pleading requirements of the Act and the Rules.

WHEREFORE: Respondent, Hamman Farms, respectfully requests that the Board reconsider its October 16, 2008 Order, and to dismiss Count IV for failure to comply with the specificity requirements of the Act and the Rules.

Dated: December 10, 2008

Respectfully submitted,

Charles F. Helsten
Nicola Nelson
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

On behalf of HAMMAN FARMS

/s/Charles F. Helsten
Charles F. Helsten
One of Its Attorneys

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on December 10, 2008, she caused to be served a copy of the foregoing upon:

Mr. John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
100 W. Randolph, Suite 11-500
Chicago, IL 60601
(via electronic filing)

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH & WEISBERG
53 W. Jackson Blvd., Ste. 950
Chicago, IL 60604
tgardiner@gkw-law.com
mlagrotta@gkw-law.com

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 w. Randolph Street
Chicago, IL 60601
(via email: hallorab@ipcb.state.il.us)

Via electronic filing and/or e-mail delivery.

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

PCB No. 08-96
Charles F. Helsten
Nicola A. Nelson
HINSHAW & CULBERTSON
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900