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 June 30, 2009, we electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent Hamman Farms' Brief in Support of Motion to Dismiss Counts I-III of Amended Complaint, a copy of which is attached hereto and hereby served upon you.

Dated: June 30, 2009

Respectfully submitted,

On behalf of HAMMAN FARMS

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RESPONDENT HAMMAN FARMS' BRIEF IN SUPPORT OF MOTION TO DISMISS COUNTS I-III OF AMENDED COMPLAINT

NOW COMES Respondent HAMMAN FARMS, by and through its attorneys HINSHAW & CULBERTSON LLP and MUELLER ANDERSON, P.C., and in support of its Motion to Dismiss Counts I-III of the Amended Complaint, pursuant to 35 Ill.Adm. Code § 101.500(a) and 735 ILCS 5/2-615, states as follows:

Background

The Amended Complaint, in similar fashion to the original Complaint, alleges various violations with respect to the farming operations of Hamman Farms LLC in Oswego, Kendall County, Illinois ("the Site"). The original Complaint alleged liability against Hamman Farms alone. The Amended Complaint now adds the Illinois Environmental Protection Agency ("Agency") as a Respondent, though the allegations in the Amended Complaint appear directed only at Hamman Farms ("Hamman"). On October 16, 2008, the Pollution Control Board ("Board") granted Hamman's motion to strike allegations from the original Complaint that the Agency had violated the Environmental Protection Act ("Act") by approving Hamman's application of landscape waste at greater than the default agronomic rate. In so doing, the Board concluded it did not have jurisdiction to entertain such an allegation. The Board simultaneously

dismissed a separate action (PCB No. 08-95) for the same reasons. Yet now, despite removing the stricken allegations from the Complaint, Complainant has inexplicably added the Agency as a Respondent in this action.

In addition to striking allegations over which it had no jurisdiction, the Board also granted Hamman's Motion to Dismiss Count III of the original Complaint on October 16, 2008, which alleged air pollution, as Complainant failed to plead sufficient factual allegations to support that count. The Board also struck as frivolous Complainant's request for attorneys' fees and costs in each of its prayers for relief. Finally, on April 2, 2009, the Board denied Hamman's Motion to Reconsider portions of its October 16, 2008 order, and also denied Hamman's Motion to Dismiss Counts I and II of the original Complaint as "duplicative" of an enforcement action initiated by the State of Illinois in Kendall County Circuit Court case number 08-CH-811.

Complainant has now filed its Amended Complaint, again containing four counts. Counts I and II, alleging "Open Dumping" and "Landscape Waste Violations," respectively, allege violations of the same sections of the Act with only one difference. Both counts must be dismissed as a matter of law for failure to state a cause of action, as outlined below. Count III again alleges air pollution, but is an insufficient attempt to cure the pleading failures of the original Complaint. Moreover, most of the allegations in Count III fall outside of the two year statute of limitations period, and are thus barred as a matter of law. Count III must again be dismissed in its entirety.

Hamman Farms Is Not a Landscape Waste Composting Operation

Complainant continues to allege that Hamman Farms is an "On-Site Compost Landscape Waste Compost Facility," pursuant to 415 ILCS 5/21(q)(3) (*see* ¶4 of Amended Complaint), despite the fact that the very allegations of the Amended Complaint squarely and directly negate

the applicability of this designation. The relevant regulations define a "composting operation" as "an enterprise engaged in the production and distribution of end-product compost." 35 Ill.Adm. Code 830.102 (emphasis added). End-product compost is defined to be "organic material that has been processed to maturity and classified as general use compost or designated use compost in accordance with [Part 830]." 35 Ill.Adm. Code 830.102 (emphasis added).

Here, the Amended Complaint pleads no facts that would suggest Hamman Farms is engaged in processing to maturity "end product compost." In fact, to the contrary, the Amended Complaint expressly acknowledges that the landscape waste received at Hamman Farms is simply ground and then directly land-applied to the farm's fields, not processed into a product. (*See* Amended Complaint, ¶5). Most importantly, the law expressly provides that "Land application is not composting." 35 Ill.Adm. Code 830.102 (emphasis added). Thus, the facts pled in the Amended Complaint preclude, as a matter of law, a finding that Hamman Farms is engaged in any type of "composting operation."

Complainant's allegation that Hamman receives and grinds landscape waste and then applies the landscape waste to farm fields flatly concedes that Hamman Farms is not engaged in the production of compost, and instead, directly land-applies landscape waste to its fields, an activity which is expressly excluded from the statutory definition of composting. *See* Amended Complaint, ¶5; *see also* 35 Ill.Adm. Code 830.102 (excluding land application from the definition of composting). Thus, any alleged violation conditioned upon Hamman Farms operating a landscape waste compost operation must be precluded given Complainant's admission that Hamman Farms meets the statutory exemption.

Standard of Review – 735 ILCS 5/2-615

Section 101.500 of Title 35 of the Illinois Administrative Code allows the Board to

entertain any motion the parties wish to file that is permissible under the Illinois Code of Civil Procedure. A motion under 735 ILCS 5/2-615, part of the Illinois Code of Civil Procedure, attacks the legal sufficiency of the Complaint. *Platson v. NSM America, Inc.*, 322 Ill.App.3d 138, 748 N.E.2d 1278 (2d Dist. 2001). The Complaint is viewed in a light most favorable to the non-moving party, however, conclusions of law or fact that are unsupported by specific factual allegations are not entitled to deference. *Id.*; *First Bank of Roscoe v. Rinaldi*, 262 Ill.App.3d 179, 634 N.E.2d 1204 (2d Dist. 1994). A defendant is entitled to dismissal where the complaint fails to sufficiently set forth every essential element of fact to be proved. *Id.*

Count I Fails to State a Claim for Open Dumping

Since July 1, 1990, the State of Illinois has prohibited the depositing of landscape waste in municipal solid waste landfill facilities. In addition to creating a system to establish and regulate commercial landscape waste disposal sites, the Legislature has also recognized that it is in the public interest to encourage recycling and reuse of materials that would otherwise end up in landfills and other commercial disposal sites. (*See* 415 ILCS 5/20(a),(c)).

The State facilitates the re-use of landscape waste material by, *inter alia*, encouraging farmers to apply such material to their fields as a soil conditioner and fertilizer. Contrary to Complainant's suggestion, no permit is required for Illinois farmers to make agronomic use of landscape waste by applying it to their fields to condition the soil and improve crop yields. *See* 415 ILCS 5/21(q); 35 Ill.Adm. Code 830.102. Hamman Farms is an Illinois farming operation that makes agronomic use of landscape waste by plowing such material directly into its fields to condition and fertilize the soil. *See* 35 Ill.Adm. Code 830.102 (noting the benefits of land application in agriculture).

The Environmental Protection Act defines the agronomic rate of application of landscape waste to be either the default rate, or the rate appropriate to a farm's crop needs or soil characteristics. 415 ILCS 5/21(q) (emphasis added). In May 2008, after reviewing the technical and scientific data concerning Hamman Farms' soil and crops, the Agency issued its formal determination of the appropriate annual agronomic rate of application for Hamman Farms. (*See* Amended Complaint at Count IV, ¶22). The Agency determined that the soil characteristics and/or crop needs at Hamman Farms justify application of landscape waste at a rate substantially higher than the default rate that appears at 415 ILCS 5/21(q). Complainant admits this.

Count I of the Amended Complaint alleges that, on October 23, 2007, the Agency inspected Hamman farms and "found refuse mixed in with landscape waste," and that, "On several occasions since Hamman began applying landscape waste, garbage has been mixed with the landscape waste on Hamman fields." (Amended Complaint, ¶¶ 34, 36). The gravamen of Count I's "Open Dumping" violation is a finding that miscellaneous garbage, refuse, and/or "litter" (see ¶40) became scattered on and around the Site after landscape waste was plowed into the farm's fields in or about October 2007.

The Act, however, specifically defines "Open Dumping" as a defendant's "consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305 (emphasis added); *see also* ¶ 27 of Amended Complaint. Although the Act does not define the term "consolidation," when a statutory term is left undefined, courts may turn to the dictionary for assistance. *Alvarez v. Pappas*, 229 Ill.2d 217, 225, 890 N.E.2d 434, 440, 321 Ill.Dec. 712, 718 (2008) (citing *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill.2d 1, 15, 165 Ill.Dec. 655, 585 N.E.2d 51 (1991)).

The Merriam Webster Dictionary (online edition) defines the term "consolidation" as

"the act or process of consolidating: the state of being consolidated," and defines "consolidating" as "(1) to join together into one whole; (2) to make firm or secure, strengthen; (3) to form into a compact mass." (http://www.merriam-webster.com/dictionary/consolidating, accessed on November 14, 2008). The statutory prohibition against consolidating refuse at an unpermitted site, which is defined as "Open Dumping," is clearly intended to prohibit the creation of piles of waste or refuse on sites that have not been properly permitted for waste disposal.

Count I, however, does not allege facts suggesting there was a consolidation of refuse at Hamman Farms. Rather, to the contrary, Count I alleges that in the course of plowing landscape waste into its fields, Hamman Farms allowed bits of garbage, refuse or litter to become scattered in its fields. (*See generally*, Amended Complaint at Count I). The allegation that Hamman Farms caused or allowed garbage, refuse or litter to be disposed of and remain on its fields does not show that Hamman Farms consolidated refuse on its property, and so does not allege the facts necessary to state an "Open Dumping" violation. Count I, therefore, alleging Open Dumping, should be dismissed for failure to plead the necessary facts to support the cause of action alleged.

It should be noted that the Amended Complaint appears to suggest that Hamman Farms also "openly dumped" landscape waste when it applied landscape waste to its fields. However, as Complainant acknowledges, 415 ILCS 5/21(q) expressly authorizes the land application of landscape material in an agricultural setting, and Complainant further admits, at paragraph 22 of the Amended Complaint, that the Illinois Environmental Protection Agency has expressly authorized Hamman Farms' land application of landscape material to its fields. Therefore, the allegation that Hamman Farms utilized landscape material as a fertilizer or soil enhancement

agent by plowing the material into its fields cannot state a cause of action for "Open Dumping."[1]

Because Count I fails to allege facts showing that Hamman Farms caused or allowed the consolidation of refuse at its farm, Count I fails to plead facts necessary to state a cause of action for Open Dumping. Count I should accordingly be dismissed as a matter of law.

Despite being labeled "Open Dumping Violations," Count I further alleges that Hamman conducted a waste-storage and waste-disposal operation, for purposes of 415 ILCS 5/21(d)(1) and (2) and 5/21(e), without a permit and in violation of the Act and regulations. (*See* Amended Complaint, ¶¶ 38-39). The Amended Complaint, both in Count I and Count II, cites Sections 21(d) and (e) of the Act for the proposition that no person shall conduct waste-storage, waste-treatment, or waste-disposal operations without a permit, and that no person shall "Dispose, treat, store or abandon any waste...except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder." (Amended Complaint, Count I, ¶23, Count II, ¶¶50-51). However, these provisions of the Environmental Protection Act and their associated regulations are inapplicable to Hamman Farms.

"Solid waste management" is defined in the regulations as "waste management." 35 Ill.Adm. Code 807.104. In turn, "waste management" is defined as "the process of storage, treatment or disposal of waste, not including hauling or transport." 35 Ill.Adm. Code 807.104.

The "disposal" of waste is defined in Part 807 of the regulations as:

> the discharge, deposit, injection, dumping, spilling, leaking or

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[1] Nor, by implication, can it state a cause of action for "open dumping" of "litter," in violation of 415 ILCS 5/21(p)(1), as also alleged in Count I. (*See* ¶40). In failing to state a cause of action for "open dumping" in the generic sense, Complainant has also failed to state a cause of action for "open dumping" of "litter" specifically, as one cannot openly dump litter specifically without openly dumping generally. For the same reasons outlined above, this allegation must also be dismissed.

> placing of any waste into or on any land or water or into any well so that such waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.

35 Ill.Adm. Code 807.104.

Although both Counts I and II of the Amended Complaint allege that Hamman Farms' use of landscape material to condition and fertilize its fields constitutes "conducting a waste storage operation," again, the Act expressly authorizes farms to use landscape waste for agronomic purposes to improve soil structure and crop productivity, through land application to fields. *See* 415 ILCS 5/21(q) and 35 Ill.Adm. Code 830.102. Hamman Farms' use of landscape material in its farming operation is, therefore, a statutorily-authorized use of landscape material to improve agricultural productivity, specifically exempted from the statutory and regulatory definitions relied upon by Complainant.

The statutorily-authorized use of landscape waste material in farming is entirely inconsistent with the conduct prohibited by the laws invoked by Complainant in Counts I and II, which were enacted to prevent unauthorized persons from developing and operating waste-storage, waste-treatment, or waste-disposal facilities. Plowing landscape material into farm fields to enhance crop yields and improve soil quality, all as specifically authorized by the Environmental Protection Act, cannot, as a matter of law, be equated with the "storage," "treatment," or "disposal" of waste. What Complainant is essentially asking this Board to do, under the guise of its misconstrued "open dumping" and "permitting" violations, is to second guess the Illinois legislature, which made a public policy decision that the application of landscape material to farm fields at either the default or site-specific agronomic rate (as here) is actually good for the environment, as has been born out at Hamman Farms.

Because such agricultural practices do not, as a matter of law, constitute the "storage," "treatment," or "disposal" of waste, the agricultural use of landscape material as a soil additive does not fall within the ambit of "waste management." As a result, the provisions of the Environmental Protection Act regulating waste management, and the accompanying solid waste management (Part 807) regulations do not, as a matter of law, apply to Hamman Farms. The allegations of permitting violations in Counts I and II, pursuant to Sections 21(d)(1) and (2) and 21(e) of the Act should, accordingly, be dismissed.

Count II Fails to State a Cause of Action for "Landscape Waste Violations"

Count II of the Amended Complaint alleges "Landscape Waste Violations," including the same "Open Dumping" violation (Section 21(a)), and the same permitting violations (Sections 21(d)(1) and (2) and 21(e)) as are contained in Count I, which should be dismissed for all of the same reasons outlined above with respect to Count I. The only real difference between Count I and Count II is the added "allegation" that Hamman has violated Section 21(q)(2), a legal impossibility.

In Count II of the Amended Complaint, Complainant alleges that "[i]n applying landscape waste at rates greater than the agronomic rate of twenty (20) tons per acre per year, Hamman does not meet the permit exemptions found in sections 21(q)(2) and (3) of the Act," and has thus "violated section 21(q) of the Act." (Amended Complaint, Count II, ¶¶52-53). As a threshold matter, 415 ILCS 5/21(q)(2) does not mandate or prohibit anything, but instead simply sets forth an exception to the permitting requirements that apply to landscape waste composting operations, which as discussed above Hamman Farms is not. Section 21(q)(2) explains that the application of landscape waste material to fields at agronomic rates does not require a permit. 415 ILCS 5/21(q)(2). Section 21(q)(2) does not, therefore, require a person to do, or to refrain

from doing, anything. Thus, one cannot "violate" Section 21(q)(2). Count II should accordingly be dismissed for failing to allege a "violation" which is actionable under Illinois law.

However, even if Count II did not fail for this reason, Complainant's theory that Hamman Farms "violated" Section 21(q)(2) is predicated on alleged observations at a visit to the farm in October 2007, during which inspectors allegedly observed that landscape material had been applied to the farm's fields at a rate greater than the default agronomic rate of 20 tons per acre. (Amended Complaint, General Allegations, ¶13) (providing no specific factual allegations to demonstrate that the default rate was exceeded). Moreover, and quite notably, the Amended Complaint also acknowledges that the Agency has determined that the appropriate, site-specific agronomic rate for Hamman Farms' use of such material is substantially higher than the default rate. (Amended Complaint, General Allegations, ¶ 22). The rate at which landscape material was applied to the fields at Hamman Farms in 2007 is, however, irrelevant to the theory that Hamman Farms allegedly violated the law by allegedly operating a landscape waste composting operation without a permit.

Assuming, *arguendo*, that Count II seeks a finding that Hamman Farms violated the law by operating a landscape waste composting operation without a permit (despite the fact that the Hamman Farms operation is not a landscape waste composting operation), the facts alleged in the Amended Complaint do not support a finding that Hamman Farms has operated or now operates a landscape waste composting operation, because there is no allegation that Hamman Farms processes landscape waste into end-product compost. (*See* discussion above at pp. 2-3).

Therefore, the alternative theory that Hamman Farms illegally operated a landscape waste composting operation without a permit also fails as a matter of law, since the Amended Complaint fails to plead the facts necessary to show that Hamman Farms was or is engaged in

the activities that constitute the operation of a "landscape waste composting operation" as defined by Illinois law. (*See* 35 Ill.Adm. Code 830.102).

Count III Fails to Plead Sufficient Facts to State a Cause of Action

Complainant still has not cured the defects which led the Board to dismiss Count III, alleging air pollution, on October 16, 2008. This Board's procedural rules require complaints to contain "[t]he dates, location, events, nature, extent, and strength of discharges of emissions and consequences alleged to constitute violations of the Act and regulations." 35 Ill.Adm. Code 103.204(c). Complainant has again only made sweeping legal assertions which lack the specificity demanded by the Rule.

Complainant has now included the names and addresses of persons who have allegedly noticed an unspecified and non-quantified "odor" at various and sundry scattered points between 1994 and 2008. *See* Amended Complaint, Count III, ¶¶ 60-65. The Amended Complaint does not even contain an allegation that these unspecified and non-quantified "odors" are similar, or that they have in any way been consistent at the various points alleged between 1994 and 2008. In fact, the allegations show the exact opposite to be true. For example, paragraph 60 simply suggests that Joann Gilbert has noticed an "offensive" odor at various points between 1994 and 2008, and makes no allegation as to the source of the odor. Paragraph 61 does not describe the odor that Diane Pobol allegedly noticed at various points sometime between 2006 and 2008. Paragraph 62 again only alleges "the odor," without further description, and alleges that Todd Milliron has noticed it at various points between 1996 and 2007. Paragraph 63 simply says that Robert and Lynn Smith have noticed "the odor" (described as "a sour smell that is worse than typical farm smells") "within the last ten years." Paragraph 64 alleges that Larry Alex has noticed "the odor" (no further description) for the last two years. And finally, paragraph 65

alleges that William Fowler has noticed "the odor" (described as "a fowl, moldy grass smell that is not typical of farms") since 1998.

Hamman cannot be expected to respond to such nebulous allegations. This Board's rules require specificity. There is nothing specific in these vague allegations of some undefined "odor" that is as internally inconsistent within the Amended Complaint as this. The dates alleged by Complainant are far too broad and wide-ranging for Hamman to fashion a plausible response. Moreover, Complainant has failed to sufficiently allege the location, events, and nature with respect to each of the alleged "odors," and has not included any allegation with respect to the extent and strength of the alleged "odors." Simply put, the Amended Complaint is not sufficiently specific under this Board's procedural rules to advise Hamman of the extent and nature of the alleged violations to reasonably allow preparation of a defense. As this Board stated in its October 16, 2008 Order, "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." 10/16/08 Order at 21. Complainant's vague and non-specific allegations do not meet this standard. As such, Count III must be dismissed.

In addition to lacking the required specificity, most of Complainant's air pollution allegations, stretching as far back as fifteen years, are barred by the Illinois statute of limitations, and must be stricken. Illinois law requires that actions for a statutory penalty, as here, be brought within two years after the cause of action accrued. *See* 735 ILCS 5/13-202. All allegations outside this two year period are thus barred as a matter of law. Moreover, Complainant cannot meet the "continuing violation" exception to the limitations period under Illinois law, inasmuch

as it has made no allegations in that regard in the Amended Complaint, and given the fact that the Hamman Farms operation is seasonal, shutting down between November and April every year. *See Carey v. Kerr-McGee Chemical Corporation*, 999 F.Supp. 1109, 1117 (N.D. Ill. 1996) (holding that under Illinois law, a continuing violation for which the statute of limitations governing property damage does not begin to run until the date of the last injury or when the tortious activity ceases, is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation). Because most of Complainant's air pollution allegations are time barred, they must be stricken.

CONCLUSION

WHEREFORE, Defendant, DON HAMMAN FARMS LLC, prays that this Court dismiss Counts I-III of the Amended Complaint, and grant such other and further relief as the Court deems appropriate.

Dated: June 30, 2009

HAMMAN FARMS

By: /s/_____
One of Their Attorneys

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on June 30, 2009, she caused to be served a copy of the foregoing upon:

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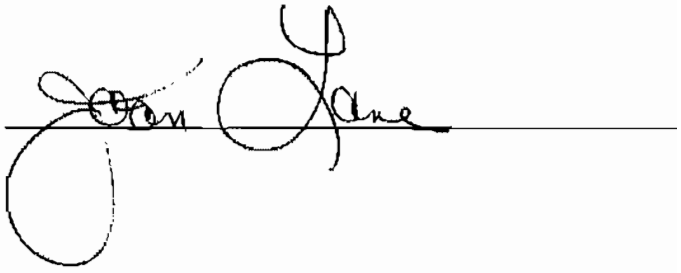

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