

(emphasis added). Thus, the facts pled in the Amended Complaint preclude, as a matter of law, a finding that Hamman Farms is engaged in a “composting operation.”

Count I – “Open Dumping”

2. The allegations in Count I do not state a cause of action for “Open Dumping.” First, Complainant concedes that the Illinois Environmental Protection Agency has 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). Despite this, Complainant alleges that Hamman Farms, in land-applying landscape waste to its farm fields as it is expressly authorized to do, has allowed bits of garbage, refuse or litter to become scattered in its fields. (*See generally*, Amended Complaint at Count I).

3. The allegation that Hamman Farms allowed bits of garbage, refuse or litter to become scattered in its fields does not, as a matter of law, state a cause of action for Open Dumping, which is defined in the statute as the consolidation of refuse at an unpermitted site. Because Count I fails to allege facts showing that refuse was consolidated at Hamman Farms, the Complaint fails to plead the facts necessary to state a cause of action for Open Dumping, and, accordingly, Count I should be dismissed.

4. Count I further includes allegations that Hamman Farms violated Sections 21(d)(1) and (2) and 21(e) of the Environmental Protection Act, which regulate the permitting of waste-storage, waste-treatment, and waste-disposal facilities. Hamman Farms’ use of landscape material in its farming operation is, however, 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 Count 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 be equated with the “storage,” “treatment,” or “disposal” of waste.

Count II– “Landscape Waste Violations”

5. Count II of the Amended Complaint, titled “Landscape Waste Violations,” re-alleges the “open dumping” and “permitting” violations contained in Count I. For the same reasons discussed above with respect to why those allegations must be dismissed in Count I, they should be dismissed in Count II.

6. Count II also alleges a violation of Section 21(q)(2), a legal impossibility. Section 21(q)(2) does not mandate or prohibit anything, but instead explains that the application of landscape waste material to fields at agronomic rates (or higher rates as determined by the Agency, as here) does not require a permit. The Amended Complaint 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). One cannot “violate” Section 21(q)(2), and the allegation that Hamman Farms did so must be dismissed as a matter of law.

Count III – “Air Pollution”

7. Complainant 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.

8. Complainant has failed to establish either a site-specific or causal nexus with respect to its air pollution allegations. The Amended Complaint does not allege that there is any consistency or even similarity among the "odors" it alleges neighboring landowners have noticed at various non-specific points over 15+ years. Nor does the Amended Complaint allege that the supposed consequences of these "odors" bear any causal nexus or relationship to any facility, material, or item on the Hamman Farms property.

9. 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.

10. In the alternative, should this Board deem the allegations of Count III sufficient, it must strike any and all allegations relating to alleged air pollution that occurred more than two years prior to the filing of the Amended Complaint. Illinois law provides for a two year statute of limitations on actions for damages for a statutory penalty. 735 ILCS 5/13-202. Complainant has alleged air pollution violations going back more than fifteen years, yet has failed to allege in any fashion that these violations are in any way a continuing violation, as required by Illinois law, and in fact cannot do so given the seasonal nature of the Hamman Farms operation.

11. For the reasons listed herein, and as further discussed in Hamman Farms' brief in support of this motion, filed concurrently herewith, Counts I-III of the Amended Complaint should be dismissed in their entirety.

WHEREFORE, Defendant, HAMMAN FARMS, prays that this Board dismiss Counts I-III of Complainant's Amended Complaint, and grant such other and further relief as the Board deems appropriate.

Dated: _____ HAMMAN FARMS

By: _____
One of Their Attorneys

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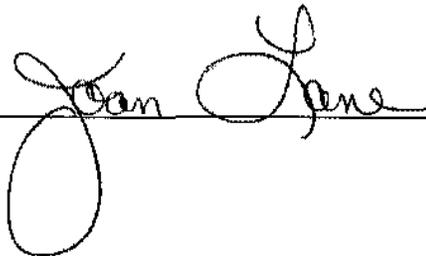
The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on June 30, 2009, she caused to be served a copy of the foregoing upon:

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(via electronic filing)

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

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