

RECEIVED
CLERK'S OFFICE

AUG 11 2009

STATE OF ILLINOIS
Pollution Control Board

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 August 11, 2009, we electronically filed with the Clerk of the Illinois Pollution Control Board, **Complainant's Motion for Leave to File Reply in Support of its Motion to Strike and Complainant's Reply in Support of its Motion to Strike**, copies of which are attached hereto and hereby served upon you.

Dated: August 11, 2009

Respectfully submitted,

UNITED CITY OF YORKVILLE



One of Its Attorneys

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH WESIBERG & WRONA
53 W. Jackson Blvd., Suite 950
Chicago, IL 60604
312-362-0000
Atty ID: 29637

RECEIVED
CLERK'S OFFICE
JUL 14 2009
STATE OF ILLINOIS
Pollution Control Board

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 August 11, 2009, 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 hand delivery)

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph St.
Chicago, IL 60601
(via hand delivery)

Charles F. Helston
Nicole A. Nelson
Hinshaw & Culbertson
100 Park Avenue
PO Box 1389
Rockford, IL 61105-1389
(via email to: NNelson@hinshawlaw.com and CHelsten@hinshawlaw.com, and U.S. Mail)



Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH WEISBERG & WRONA
53 W. Jackson Blvd., Suite 950
Chicago, IL 60604
312-362-0000
Atty ID: 29637

RECEIVED
CLERK'S OFFICE
AUG 11 2009
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|---------------------------|---|---------------------------------|
| UNITED CITY OF YORKVILLE, |) | |
| A MUNICIPAL CORPORATION, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB No. 08-96 |
| |) | (Enforcement- Land, Air, Water) |
| |) | |
| HAMMAN FARMS, |) | |
| |) | |
| Respondents. |) | |

**COMPLAINANT'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS
MOTION TO STRIKE**

NOW COMES the Complainant, UNITED CITY OF YORKVILLE, by and through its attorneys, GARDINER KOCH WEISBERG & WRONA, pursuant to 35 Ill. Adm. Code 101.500(e), and hereby requests leave to file Reply in Support of its Motion to Strike in order to respond to Respondent's Response in Opposition, stating as follows:

1. On June 30, 2009, Respondent HAMMAN FARMS filed its Motion to Dismiss Counts I-III of Amended Complaint.
2. On July 14, 2009, Complainant, UNITED CITY OF YORKVILLE filed its Motion to Strike
3. On July 28, 2009, Respondent HAMMAN FARMS filed its Response to Yorkville's Motion to Strike Respondent's Motion to Dismiss, which misrepresents law concerning amended complaints, the Board's rules governing time for filing motions to dismiss, and the Board's rulings in its April 30, 2009 Opinion and Order.
4. In the absence of an opportunity to file a Reply in support of its Motion Strike, United City of Yorkville will be materially prejudiced.

RECEIVED
CLERK'S OFFICE
AUG 11 2009
STATE OF ILLINOIS
Judicial Control Board


5. Yorkville has prepared a Reply, which addresses the misrepresentations of Hamman Farms' Response, and by this Motion seeks leave to file its Reply with the Board to avoid material prejudice. A copy of the proposed Reply is attached hereto.

WHEREFORE, Complainant United City of Yorkville respectfully requests that the Board grant leave to file its Reply in Support of its Motion to Strike, a copy of which is attached hereto.

Dated: August 11, 2009

Respectfully submitted,

UNITED CITY OF YORKVILLE


One of Its Attorneys

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH WEISBERG & WRONA
53 W. Jackson Blvd., Suite 950
Chicago, IL 60604
312-362-0000
Atty ID: 29637

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

AUG 11 2009

STATE OF ILLINOIS
Pollution Control Board

UNITED CITY OF YORKVILLE,
A MUNICIPAL CORPORATION,

Complainant,

v.

HAMMAN FARMS,

Respondent.

PCB No. 08-96

(Enforcement- Land, Air, Water)

COMPLAINANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE

NOW COMES, the Complainant, UNITED CITY OF YORKVILLE, by and through its attorneys, Gardiner Koch Weisberg & Wrona, and for its Reply in Support of its Motion to Strike, it states as follows:

I. HAMMAN FARMS'S MOTION WAS UNTIMELY AND SHOULD BE STRICKEN.

The Illinois Pollution Control Board (hereinafter referred to as "Board") did not grant Respondent Hamman Farms additional time beyond the thirty-day time period to file a motion to dismiss. The Board's Order of April 2, 2009 states that Hamman Farms could file an *answer* on or before July 6, 2009.¹ The Board's Order granted no additional time for Hamman Farms to file any motion to dismiss or other motion challenging the sufficiency of the complaint. In fact, the Board's Order of June 18, 2009 specifically references the thirty-day time limit for filing a motion to dismiss and finds that Hamman Farms failed to file any motion responsive to the amended complaint. See pg. 2 of the Board's Order of June 18, 2009 attached hereto as Exhibit 1. The Board's order of April 2, 2009 is consistent with the Illinois Administrative Code, which

¹ After Hamman agreed to an extension and the hearing officer Bradley Halloran granted Yorkville's request for a three-day extension in his Order dated May 6, 2009, the Board granted Hamman Farms three additional days to file its Answer to Yorkville's Amended Complaint. Pursuant to the Board's Order of June 18, 2009, Hamman Farms' Answer was due on or before July 10, 2009.

grants respondents sixty days to file an answer to the complaint and only thirty days to file any motions to dismiss pursuant to 35 Ill. Adm. Code §§ 101.506 and 103.212(b). Because the Board did not grant Hamman Farms additional, any motion challenging Yorkville's complaint pursuant to 35 Ill. Adm. Code §§ 101.506 and 103.212(b) should have been filed on or before June 8, 2009. Because Hamman Farms filed its motion to dismiss more than three weeks later, the motion was untimely and should be stricken.

II. HAMMAN FARMS' MOTION TO DISMISS IS MERELY AN ATTEMPT TO PROTRACT LITIGATION

Hamman Farms filed its motion to dismiss solely to protract litigation by making new arguments that could have and should have been raised in its first motion to dismiss. Hamman Farms attempts to argue that because Yorkville filed an amended complaint, Hamman Farms must preserve its objections to the amended complaint. If Hamman Farms were seeking to preserve its former objections for the record, its arguments should have been identical to the ones that were contained in its original motion. However, Hamman Farms now attempts to have Counts I and II of Yorkville's Amended Complaint dismissed on completely new grounds. Counts I and II of the Amended Complaint are identical to Counts I and II of Yorkville's original complaint. Hamman Farms did not make the arguments contained in its Motion to Dismiss Counts I-III of Amended Complaint in its original two motions to dismiss.² Had Hamman Farms believed it was necessary to preserve these arguments, it should have raised the new arguments now contained in the when it filed its motion to dismiss following the original complaint. Hamman Farms is merely trying to have a second bite at the apple after its first two attempts failed. Because Hamman Farms failed to raise its new arguments in its original motions to

² Hamman Farms filed its Motion to Strike and/or Dismiss on July 8, 2008. Then on November 17, 2008, it filed Respondent's Motion to Dismiss Counts I and II as Duplicative.

dismiss, the Board should find that the arguments waived and strike Hamman Farms' Motion to Dismiss Counts I-III of the Amended Complaint.

WHEREFORE, the United City of Yorkville respectfully requests the Board grant United City of Yorkville's Motion to Strike, and grant such other relief as the Board deems just and equitable.

Dated: August 11, 2009

Respectfully submitted,

On behalf of UNITED CITY OF YORKVILLE

A handwritten signature in dark ink, appearing to read "Michelle M. LaGrotta", is written over a solid horizontal line.

One of Its Attorneys

Thomas G. Gardiner
Michelle M. LaGrotta
GARDINER KOCH WESIBERG & WRONA
53 W. Jackson Blvd., Suite 950
Chicago, IL 60604
312-362-0000

Atty ID: 29637

ILLINOIS POLLUTION CONTROL BOARD

June 18, 2009

UNITED CITY OF YORKVILLE, a municipal)
corporation,)

Complainant,)

v.)

HAMMAN FARMS,)

Respondent.)

PCB 08-96

(Citizen's Enforcement – Land, Air, Water)

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

Today the Board finds that United City of Yorkville's amended complaint is neither duplicative nor frivolous and accepts the amended complaint for hearing. In this order, the Board first provides the procedural history of the case. The Board then addresses the amended complaint, after which the Board discusses hearing and gives Hamman Farms until July 9, 2009, to file an answer to the amended complaint.

PROCEDURAL HISTORY

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 alleged that Hamman violated provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2006)) prohibiting land, air, and water pollution and unpermitted waste handling activities. On October 16, 2008, the Board ruled on Hamman's July 8, 2008 motion to strike or dismiss most of Yorkville's complaint. Specifically, the Board dismissed without prejudice count III ("Air Pollution Violations") of Yorkville's complaint as insufficiently pled, but denied Hamman's motion to dismiss counts II ("Landscape Waste Violations") and IV ("Water Pollution Violations"). In addition, the Board granted Hamman's motion to strike with prejudice both paragraph 49 of count II (alleging violations by the Illinois Environmental Protection Agency) and Yorkville's requests for attorney fees and costs. The Board also accepted for hearing Yorkville's complaint as modified by the Board's order.

On April 2, 2009, the Board denied Hamman's November 14, 2008 motion to reconsider the Board's October 16, 2008 decision denying Hamman's motion for dismissal of count IV of Yorkville's complaint. The Board also denied Hamman's November 12, 2008 motion to dismiss counts I ("Open Dumping Violations") and II as duplicative. In addition, the Board denied Yorkville's December 1, 2008 motion for leave to file an amended complaint setting forth a modified count III, finding that Yorkville's proposed amendment would not cure all of the deficiencies identified in the Board's October 16, 2008 order. However, the Board granted Yorkville leave to file an amended complaint by May 4, 2009, to remedy count III in accordance

EXHIBIT

1

with the Board's order. On May 7, 2009, Yorkville filed an amended complaint. Although Yorkville's amended complaint was filed three days late and not accompanied by a motion for leave to file *instantly*, the Board accepts the filing in the interest of administrative economy and as no material prejudice to Hamman will result.

AMENDED COMPLAINT

Yorkville's four-count amended complaint alleges that Hamman violated Sections 9(a), 12(a), 12(d), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), and 21(q) of the Act (415 ILCS 5/9(a), 12(a), 12(d), 21(a), 21(d)(1), 21(d)(2), 21(e), 21(p)(1), 21(q) (2006)). Yorkville further alleges that Hamman violated these provisions by (1) applying landscape waste mixed with litter and general refuse to Hamman's farm fields and then allowing the litter and general refuse to remain; (2) allowing open dumping, conducting waste-storage and waste-disposal operations without a permit, allowing Hamman's farm to become a waste disposal site without a permit, and failing to obtain a landscape waste composting operation permit or qualify for an exemption from permitting; (3) allowing the discharge of odor into the environment so as to cause air pollution by unreasonably interfering with Yorkville residents' use and enjoyment of life and property; and (4) allowing 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. 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 the violation continued.

Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2006)) allows any person to file a complaint with the Board. Section 31(d)(1) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; 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.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Hamman has filed no motion responsive to the amended complaint. No evidence before the Board indicates that Yorkville's amended complaint is duplicative or frivolous.

HEARING AND ANSWER

The Board accepts the amended complaint for hearing. See 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.212(a). The Board's April 2, 2009 order made any answer from Hamman to any amended complaint due by July 6, 2009. Because the amended complaint was filed three days late, the Board now makes any answer to the amended complaint due by July 9, 2009. A respondent's failure to timely file an answer to a complaint may have severe consequences. Generally, if Hamman fails to timely file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the amended complaint, the Board will consider Hamman to have admitted the allegation. See 35 Ill. Adm. Code 103.204(d).

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 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 or 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.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 18, 2009, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is fluid and cursive, with a long horizontal stroke at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board

