

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,)	
)	
Respondent.)	

**RESPONDENT'S MOTION TO STRIKE YORKVILLE'S ANSWER TO
HAMMAN FARMS' AFFIRMATIVE DEFENSES TO COUNT IV**

NOW COMES the Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, pursuant to 35 Ill.Adm.Code 101.500(a), and hereby moves to strike Yorkville's Answer to Affirmative Defenses to Count IV, stating as follows:

1. On June 30, 2009, Hamman Farms filed its Answer and Affirmative Defenses to Count IV of Yorkville's Amended Complaint.
2. On August 28, 2009, Yorkville filed its Answer to Hamman Farms' Affirmative Defenses.
3. Yorkville's Answer "moves to strike" both Affirmative Defenses raised by Hamman Farms; however, this request to strike Hamman Farms' Affirmative Defenses was not made by motion, in violation of 35 Ill.Adm.Code 500(b).
4. Although Yorkville's Answer "moves to strike" Hamman Farms' Affirmative Defenses, it fails to indicate whether its request is directed to the Board or to the Hearing Officer, in violation of 35 Ill.Adm.Code 500(b).
5. Moreover, Yorkville fails to provide the legal basis upon which it "moves to strike" the Affirmative Defenses, in violation of 35 Ill.Adm.Code 504.

6. Although all requests to strike a pleading must be filed within 30 days after the service of the challenged document, pursuant to 35 Ill.Adm.Code 101.506, Yorkville nevertheless “moved to strike” Hamman Farms’ Affirmative Defenses 58 days after being served with them, without seeking leave to untimely file its request.

7. Yorkville “moves to strike” both of Hamman Farms’ Affirmative Defenses because each of them “calls for [a] legal conclusion.” This contention is patently frivolous, inasmuch as it is well-established under Board precedent that Section 2-613(d) of the Code of Civil Procedure applies to Board proceedings and requires that a respondent’s answer set forth affirmative matter that avoids or defeats the cause of action set forth in the complaint, and therefore legal assertions or conclusions are properly pled as affirmative defenses. *See People v. Midwest Grain Prod’s of Illinois, Inc.*, (Aug. 21, 1997), PCB 97-179, slip op at 3.

8. In *Midwest Grain*, the Board made clear that legal conclusions are properly pled in a party’s affirmative defenses, explaining that “[c]learly the purpose of [Section 2-613(d)] is to specify the disputed legal issues before trial. The parties are to be informed of the legal theories which will be presented by their respective opponents. This is a prime function of pleading.” *Id*; see also *People v. Geon Co., Inc.*, (Oct. 2, 1997), PCB 97-062, 1997 WL 621493, slip op. at 3 (emphasis added) (holding that pleading legal conclusions is appropriate because “[a]s the Board has previously stated, allowance of liberal pleading of defenses serves to inform parties of the legal theories to be presented by their opponents, prevents confusion as to whether a defense has been waived as not timely raised, and avoids taking an opponent by surprise later in the proceedings.”)

9. Yorkville’s request for this improper relief is yet another example of its abject disregard for the Board’s procedural rules in this litigation, and in filing its frivolous request

Yorkville has once again forced both Hamman Farms and the Board to unnecessarily expend resources in responding to something that should never have been filed in the first place. (*See, e.g.,* Board's Order of Oct. 16, 2008, holding that "[t]he Board grants Hamman's motion to strike from Yorkville's complaint the allegation that the Illinois Environmental Protection Agency (Agency) has violated the Act. ... Further, the Board grants Hamman's motion to strike as frivolous Yorkville's requests for attorney fees and costs.")

10. As set forth hereinabove, Yorkville's Answer to Affirmative Defenses violates the Board's rules by improperly requesting that a pleading be stricken without filing a written motion, by failing to indicate whether its request to strike is directed at the Board or at the Hearing Officer, by failing to provide the basis in the rules upon which Yorkville was "moving to strike," and by requesting to strike a pleading more than 30 days after it was filed without seeking leave to do so. Moreover, the request to strike on the basis that the Affirmative Defenses include legal conclusions runs completely contrary to well-established Board precedent. Yorkville's Answer should, accordingly, be stricken.

WHEREFORE: Respondent, Hamman Farms, respectfully requests that the Board strike Yorkville's Answer to Hamman Farms' Affirmative Defenses, and grant such other and further relief as the Board deems fitting and proper.

Dated: September 2, 2009

Respectfully submitted,
On behalf of HAMMAN FARMS

/s/Charles F. Helsten
One of Its Attorneys

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

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 September 2, 2009, she caused to be served a copy of the foregoing upon:

<p>Mr. John T. Therriault, Assistant Clerk Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601 (via electronic filing)</p>	<p>Thomas G. Gardiner Michelle M. LaGrotta GARDINER KOCH & WEISBERG 53 W. Jackson Blvd., Ste. 950 Chicago, IL 60604 via email to: tgardiner@gkw-law.com mlagrotta@gkw-law.com</p>
<p>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)</p>	

Via electronic filing and/or e-mail delivery.

/s/ Joan Lane

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