BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A MUNICIPAL CORPORATION, Complainant, v. HAMMAN FARMS,, Respondents.	)	PCB No. 08-96

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on March 12, 2012, we electronically filed with the Clerk of the Illinois Pollution Control Board, ***Respondent Hamman Farms' Reply in Support of Motion for Summary Judgment***, a copy of which is attached hereto and hereby served upon you.

Dated: March 12, 2012

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/Charles F. Helsten
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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 March 12, 2012, she caused to be served a copy of ***Respondent Hamman Farms' Reply in Support of Motion for Summary Judgment*** upon the following:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A MUNICIPAL CORPORATION, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and HAMMAN FARMS, Respondents.	)	PCB No. 08-96

RESPONDENT HAMMAN FARMS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

BACKGROUND

1. On December 6, 2011, Respondent Hamman Farms ("Hamman") filed its Motion for Summary Judgment on the Amended Complaint filed by Petitioner The United City of Yorkville ("Yorkville"). Hamman's Motion is based on the force and effect of the Consent Order entered into on March 10, 2011, between Hamman and the State of Illinois in Kendall County Circuit Court case number 2008 CH 811 ("Kendall County case"). Hamman argues that the Order was a final and conclusive judgment on the merits, which, pursuant to the doctrine of *res judicata*, operates as an absolute bar to all subsequent actions involving the same claims by privies of the State, including Yorkville.

2. On January 19, 2012, Yorkville filed its Response to Hamman's Motion for Summary Judgment. Yorkville contends that its claim against Hamman is not barred by *res judicata* for three reasons: (a) there is no identity of causes of action between its claims and the

State's; (b) Yorkville and the State are not in privity; and (c) the Court previously ruled that Yorkville's claims are not duplicative of the State's.

3. Yorkville's arguments are unavailing in all respects. First, the allegations made by the State and by Yorkville are based upon the same operative facts, and so there is identity of causes of action between the claims in this case. Second, both the State of Illinois and the City of Yorkville are charged with representing and protecting the citizens of Yorkville, and so there is privity between the former claimant and the current claimant in this case. Third, Yorkville mischaracterizes the Board's prior ruling: there, the Board held that the causes of action were not duplicative based solely on the Amended Complaint. Here, Hamman's Motion is based instead upon the Consent Order, which was created months after the Board's decision and which presents new evidence establishing that the claims are clearly duplicative. Accordingly, Yorkville's arguments in its Response should be rejected, and the Amended Complaint should be dismissed.

ARGUMENT

A. There is Identify of Causes of Action, Because Yorkville's Claim Arises from the Same Transaction As the State's Claim.

4. Yorkville argues that there is no identity of causes of action in this case because the claims do not meet the "same evidence test." (Ptr.'s Resp., pp. 3-5). In 1998, however, the Illinois Supreme Court expressly and conclusively rejected the "same evidence test" in favor of "the more liberal transactional test" for determining identity of causes of action. *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 311 (1998) ("[O]ur approval of the transactional test necessitates a rejection of the same evidence test."). In other words, while it is true that "Illinois courts [had] *traditionally* relied on two separate tests," this is no longer the case: only the "transactional test" is to be used in Illinois. *Lane v. Kalcheim*, 394 Ill.App.3d 324, 332 (1st Dist.

2009) (emphasis added). Whether by oversight or subterfuge, Yorkville has failed to note this important fact. Instead, it has stated the "same evidence test" as if it is good law. As a result, Yorkville's argument is misleading and should be disregarded by the Court.[1] Further, the record shows that there ***is*** identity of causes of action in this case under the "more liberal transactional test."

5. There is identity of causes of action in this case so long as Yorkville's claims and the State's claims "**arise from a single group of operative facts**, regardless of whether they assert different theories of relief." *River Park,* 184 Ill.2d at 311 (emphasis added). In other words, the claims will "be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.* What constitutes a "transaction" is

> to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Doe v. Gleicher, 393 Ill. App. 3d 31, 38 (1st Dist. 2009), *quoting River Park,* 184 Ill.2d at 312 (*quoting* Restatement (Second) of Judgments § 24, at 196 (1982).) As a result, "**[t]he focus of the inquiry ... is on whether the relief requested is based on substantially the same facts.**" *Langone v. Schad, Diamond & Shedden,* P.C., 406 Ill.App.3d 820, 833 (1st Dist. 2010), *app. den'd*, 949 N.E.2d 1098 (Ill. 2011) (emphasis added), *citing Jackson v. Callan Publishing, Inc.*, 356 Ill.App.3d 326, 337 (2005); *see also Doe*, 393 Ill.App.3d 31 (finding identity of causes of

[1] For example, Yorkville contends that parts of Hamman's argument regarding relief should be rejected because "the relief sought is not relevant to the issue of 'whether the evidence needed to sustain the second cause of action would have sustained the first'" (Ptr.'s Resp., p. 4.) Clearly, this statement is based upon the rejected legal standard and is therefore misleading. *See also Agolf, LLC v. Vill. of Arlington Heights*, 409 Ill. App. 3d 211, 226, (1st Dist. 2011), *app. den'd*, 955 N.E.2d 468 (Ill. 2011) (finding it significant to issue of *res judicata* that parties sought the same relief in their complaints).

action where both claims involved alleged mishandling of patients' embryos); *Nelson v. Chicago Park Dist.*, 408 Ill.App.3d (1st Dist. 2011) *app. den'd*, 955 N.E.2d 472 (Ill. 2011) (finding identity of causes of action where both claims stemmed from school's contract to build soccer field on public land); *Lane*, 394 Ill.App.3d at 332 (finding identity of causes of action where both claims arose out of attorney's representation of client).

6. In the instant case, Yorkville's claim arises from the same transaction as the State's claim against Hamman, and the relief that it seeks is based on substantially the same facts. As discussed in Hamman's motion, the allegations in the State's First Amended Complaint are virtually identical to the allegations in Yorkville's Amended Complaint: both claims are based upon the same alleged violations of the Illinois Environmental Protection Act at Hamman's facility in Kendall County. Further, the State and Yorkville seek nearly identical relief for Hamman's alleged violations: both claims seek orders that (a) require Hamman to cease and desist from violation of the Act, (b) levy a civil penalty of $50,000 per violation, and (c) order an additional $10,000 penalty for each day on which the alleged violations continue. And although the State did not specifically allege air pollution or water pollution violations, those issues are directly addressed in the Consent Order entered into between Hamman and the State. Clearly, therefore, this is a case in which the facts alleged in the two claims "are related in time, space, origin, or motivation," *Doe*, 393 Ill.App.3d at 38, and in which, as a result, "the relief requested is based on substantially the same facts" as the claim that was previously decided. *Langone*, 406 Ill.App.3d at 833.

7. "*Res judicata* is an equitable doctrine designed to prevent multiple lawsuits ... where the facts and issues are the same." *Gurga v. Roth*, 2011 IL App (2d) 100444 ¶17, *citing Murneigh v. Gainer*, 177 Ill.2d 287, 299 (1997). In this case, if the doctrine of *res judicata* is

not followed, Hamman will be relitigating the very same operative facts and issues that were previously subjected to final judgment by its Consent Order with the State in the Kane County case. Yorkville's argument otherwise in its Response – based upon an incorrect legal standard – should be disregarded by the Court. There is identity of causes of action between Yorkville's claims and the State's claims, and the Motion for Summary Judgment should therefore be granted.

B. <u>There is Privity Between the State of Illinois and Yorkville, Because Both Parties Represent the Interests of the Citizens of Yorkville.</u>

8. Yorkville argues that there is no privity between it and the State in this case, because (a) the relationship does not fall within one of the clearly-delineated legal categories often identified by courts as establishing privity and (b) there is (allegedly) insufficient evidence of a "mutuality of interests" in this case. In making these arguments, Yorkville presents an overly narrow view of what is required to establish privity and understates the evidence in this case. The First District just recently summarized the law of privity in the context of *res judicata*:

> Simply put, privity exists between a party to the prior suit and a nonparty when the party to the prior suit adequately represent[ed] the same legal interests of the nonparty.... Ultimately, a nonparty to a prior suit may be bound pursuant to privity **if its interests are so closely aligned to those of a party in that prior suit that the party was, essentially, a virtual representative** of the nonparty.

Agolf, 409 Ill. App. 3d at 220 (emphasis added) (internal citations omitted). Using this test, Illinois courts have found that privity exists where the first and second claimants were both groups of taxpayers opposing the same bond resolution, *People ex rel. Castle v. Wright*, 8 Ill.2d 454, 459 (1956), and where the first and second claimants were both complaining factions of the same workers' compensation self-insurance pool, *Illinois Non-Profit Risk Mgmt. Ass'n v. Human Serv. Ctr. of S. Metro-E.*, 378 Ill.App.3d 713, 741 (4th Dist. 2008). On the other hand, Illinois courts have refused to find privity between a public agency and a citizen where the public agency

(the first claimant) sought only to recoup public aid and therefore was not an advocate for the interests of the citizen (the second claimant), *In re Marriage of Mesecher*, 272 Ill.App.3d 73, 77 (4th Dist. 1995), and between a school superintendent and the State Board of Education where the superintendent (the first claimant) had interests that were not always and necessarily the same as members of the Board (the second claimant). *Hayes v. State Teacher Certification Bd.*, 359 Ill.App.3d 1153, 1164 (5th Dist. 2005).

9. In this case involving the protection of the citizens of Yorkville from alleged environmental concerns, the City of Yorkville and the State of Illinois have identical interests at all times and in all ways. The Illinois Supreme Court has recognized that the Illinois Attorney General – a party to the Consent Order in this case – "has an obligation to represent the interests of the People so as to ensure a healthful environment for **all** the citizens of the State." *People v. NL Indus.*, 152 Ill.2d 82, 103 (1992), *citing Pioneer Processing, Inc. v. E.P.A.*, 102 Ill.2d 119, 138 (1984). This interest in "all" citizens would, presumably, include the citizens of Yorkville, who logically are also "People" of the State of Illinois. Yet Yorkville curiously argues in its Response that, while "**some** overlap **may** exist" (emphasis added) between its interests and the State's, "the [State's] interests do not include the promotion of the interests of Yorkville's citizens." (Ptr.'s Resp., pp. 6). This is clearly incorrect. Here, as in other cases where Illinois courts have recognized privity based upon a mutuality of interest, the interests of Yorkville's citizens were "so closely aligned to those of" the State that the State "was, essentially, a virtual representative." *Agolf*, 409 Ill.App.3d at 220. In fact, this is a *stronger* case for privity than the cases referenced above, because the State was a *literal* – not just a virtual – representative of the citizens of Yorkville.

10. Further, there are policy reasons that Yorkville should not be permitted to bring this case after the Attorney General has already done so. It is the public policy of the State of Illinois to maintain a healthful environment for all citizens. Ill. Const. art. XI, §§ 1-2. The State therefore has an interest in all environmental disputes, including localized ones. *People v. Pollution Control Bd.*, 83 Ill.App.3d 802, 806 (1980) (rejecting claim that noise pollution from rural speedway was "not sufficiently statewide" to warrant State's interest). "[T]he Attorney General, as the constitutionally designated officer of the state, is the only person authorized to represent the state in matters when the state is the real party in interest." *County of Cook ex rel. Rifkin v. Bear Stearns & Co., Inc.*, 215 Ill.2d 466, 474 (2005), *citing Fuchs v. Bidwill*, 65 Ill.2d 503, 510 (1976). As a result, "the Attorney General is the **sole officer entitled to represent the interests of the State in litigation conducted before the Pollution Control Board**." *People ex rel. Scott v. Briceland*, 65 Ill.2d 485, 500 (1976) (emphasis added) (finding that legislature could not grant Illinois EPA authority to prosecute claims before Pollution Control Board because Attorney General has exclusive authority under Constitution).

11. Allowing municipalities and/or agencies individually to enforce the Environmental Protection Act before the Board – as Yorkville seeks to do in this case – would violate both the case law and the public policy of the State of Illinois. First, such actions would undermine the Attorney General's primacy as the legal officer of the State and would thereby depart from nearly a century of Illinois Supreme Court precedent. *See Fergus v. Russel*, 270 Ill. 304 (1915) (holding that Attorney General was only officer empowered to represent the State's interests); *Lyons v. Ryan*, 201 Ill.2d 529, 535-36 (2002) (affirming *Fergus* and its progeny). Second, individual enforcement would lead to a patchwork system of environmental decisions that would not adequately promote the state's public policy interest in public health and

conservation. *See Pollution Control Bd.*, 83 Ill.App.3d at 806 (finding that constitutional provisions "demonstrate that the State's interest in reducing pollution generally ... is sufficiently great" to allow the Attorney General to maintain suit).

12. By virtue of the Attorney General's participation in the Kendall County case, the interests of all citizens of the State of Illinois (including those residing in Yorkville) were represented. Yorkville's argument in its Response (i.e., that there is a genuine issue of material fact on this point) should therefore be rejected – as a matter of law, Yorkville is a privy of the State of Illinois because the parties share identical interests in the protection of the citizens of Yorkville. In other words, the legal interests of the citizens of Yorkville were adequately and directly represented in the prior case. Further, it is the policy of the State of Illinois that such important interests should be represented by its legal officer, the Attorney General. A finding of *res judicata* is therefore appropriate, and the Motion for Summary Judgment should be granted.

C. Hamman Is Not Estopped from Making Its Arguments, Because the Board's Previous Ruling Did Not Consider the Consent Order.

13. Yorkville argues in its Response that Hamman should be judicially estopped from raising the issue of *res judicata* because "[t]he Board has ruled previously that the actions are not duplicative" in its Order of April 2, 2009 (Ptr.'s Resp., p. 8). This argument mischaracterizes the Board's prior ruling: the Board held at that time that the causes of action were not rendered duplicative by the Amended Complaint that Yorkville had filed. That holding regarding the effect of the Amended Complaint is not determinative of this Motion. This Motion is based upon the Consent Order entered into by the State of Illinois and Hamman eleven (11) months after the Board's prior Order. The Consent Order, unlike the Amended Complaint, demonstrates that all of the allegations made by Yorkville in its Amended Complaint were already subjected to a final judgment on the merits. Accordingly, Hamman is not estopped from making its

arguments. The Board's prior order has no relevance to Hamman's current Motion for Summary Judgment, which should therefore be immediately granted.

WHEREFORE, the Respondent, HAMMAN FARMS LLC, respectfully requests that the Pollution Control Board enter an Order granting summary judgment in its favor, and for such further relief as the Board deems necessary and proper.

Dated: March 12, 2012

Respectfully submitted,

On behalf of HAMMAN FARMS LLC

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