

Electronic Filing - Received, Clerk's Office, July 7, 2008

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED CITY OF YORKVILLE, A)
MUNICIPAL CORPORATION,)

Complainant,)

v.)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY, and HAMMAN)
FARMS,)

Respondents.

PCB No. 08-95
(Appeal of Agency Action)

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on July 7, 2008, we electronically filed with the Clerk of the Illinois Pollution Control Board, Hamman Farms' Motion to Dismiss and Hamman Farms Memorandum of Law in Support of its Motion to Dismiss, copies of which are attached hereto and hereby served upon you.

Dated: July 7, 2008

Respectfully submitted,

On behalf of HAMMAN FARMS

/s/

Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
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)	(Appeal of Agency Action)
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PROTECTION AGENCY and HAMMAN)	
FARMS,)	
)	
Respondents.)	

HAMMAN FARMS' MOTION TO DISMISS

NOW COMES Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, and for its Motion to Dismiss the petition filed by the United City of Yorkville, states as follows:

1. As an administrative agency created by statute, the Pollution Control Board's jurisdictional authority is limited to that granted by its enabling statute. *Bevis v. Pollution Control Bd.*, 289 Ill.App.3d 432, 437, 681 N.E.2d 1096, 1099-1100, 224 Ill.Dec. 475 (5th Dist. 1997).

2. The Illinois Environmental Protection Act ("the Act") authorizes the following kinds of proceedings by the Pollution Control Board ("the Board"):

(d) The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. (415 ILCS 5/5(d)). (emphasis added).

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3. On June 4, 2008, the United City of Yorkville (hereinafter "Yorkville") filed what is purported to be a Petition for Review seeking review of a "final determination" made pursuant to the Act. (Yorkville's Petition at III (J)).

4. The so-called "final determination" at issue is a technical finding by the Illinois Environmental Protection Agency ("IEPA") pursuant to Section 21 of the Illinois Environmental Protection Act, that the soil characteristics and/or crop needs of the farmland owned by Hamman Farms justified a particular rate of agronomic application of landscape waste.

5. The Act does not require a permit for the agronomic application of landscape waste. The Act defines the term "agronomic rate" to mean "the application of not more than 20 tons per acre per year, except that the Agency may allow a higher rate for individual sites where the owner or operator has demonstrated to the Agency that the site's soil characteristics or crop needs require a higher rate." 415 ILCS 5/21(q) (emphasis added). In other words, no permit is required for the application of landscape waste at either the default agronomic rate, or at a higher agronomic rate if the Agency finds that a site's soil characteristics or crop needs justify a higher rate.

6. The Act does not require that the IEPA follow a particular protocol in reaching its technical findings concerning a farm's soil characteristics or crop needs. *See id.*

7. Because the IEPA's technical determination of the soil characteristics or crop needs of a farm is not "a subject which the Board is authorized to regulate," the Board's enabling statute does not authorize it to conduct proceedings concerning the Agency's findings which are challenged by Yorkville in its Petition.

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8. Similarly, the Board is not authorized to grant the relief requested by Yorkville ("reversal" of the Agency's technical determination of the appropriate agronomic rate for the subject farm).

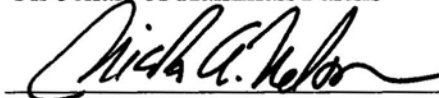
9. For these reasons, and as further articulated and discussed in the Memorandum of Law filed concurrently with this Motion, Hamman Farms respectfully requests that the Board dismiss the Petition filed by Yorkville.

WHEREFORE, HAMMAN FARMS respectfully requests that the Board enter an order dismissing this action and granting such other and further relief as it deems appropriate and just.

Dated: July 7, 2008

Respectfully submitted,

On behalf of Hamman Farms



One of Its Attorneys

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**HAMMAN FARMS' MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS**

NOW COMES Respondent, HAMMAN FARMS, by and through its attorneys, Charles F. Helsten and HINSHAW & CULBERTSON LLP, and for its Memorandum of Law in Support of its Motion to Dismiss, states as follows:

BACKGROUND FACTS

In the spring of 2008, Hamman Farms requested that the Illinois Environmental Protection Agency ("IEPA") allow the agronomic application of landscape waste at Hamman Farms at a rate higher than the statutory default rate of 20 tons per acre per year, based on the farm's soil characteristics and the nutritional needs of its crops; the IEPA is authorized to allow a higher agronomic rate under 415 ILCS 5/21(q), where the higher rate is justified by soil characteristics or crop needs. IEPA responded by asking for additional information. *See generally*, Complaint at III(B) through (D).

On April 10, 2008, Hamman Farms responded to the IEPA's request for additional information with a four (4) page letter and twenty-two (22) pages of attachments that addressed, in detail, each of the questions raised by IEPA. After reviewing the information provided by Hamman Farms, IEPA dispatched representatives from the Agency to personally inspect and assess the Hamman Farms property and farming operation. Eventually, on May 1, 2008, the

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IEPA notified Hamman Farms that its soil characteristics and crop needs justified a higher agronomic rate. *See* Exh. A to Yorkville's Petition.

The Agency authorized an agronomic rate of up to 80 tons per acre per year, based on its analysis of the data, however the Agency required that the agronomic application be done in conformity with the procedures Hamman Farms had detailed in its prior submission to the Agency, and as long as the application also complied with eight (8) additional conditions which were designed to provide enhanced environmental safeguards. *Id.* Thereafter, the Agency has dispatched inspectors on an ongoing basis to ensure that the application was being performed in compliance with all required conditions.

ARGUMENT

The jurisdictional authority of the Pollution Control Board (the "Board") is limited. *Chemetco, Inc. v. PCB*, 140 Ill. App. 3d 283, 286 (5th Dist. 1986); 415 ILCS 5/5. As an administrative agency created by statute, the Board's jurisdictional authority is limited to that granted by its enabling statute. *Bevis v. Pollution Control Bd.*, 289 Ill.App.3d 432, 437, 681 N.E.2d 1096, 1099-1100, 224 Ill.Dec. 475 (5th Dist. 1997).

The Illinois Environmental Protection Act ("the Act") authorizes the Board to conduct proceedings only for the following matters:

(d) The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. (415 ILCS 5/5(d)) (emphasis added).

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No statutory or regulatory provision authorizes the Board to regulate IEPA's technical analysis and determination of the appropriate agronomic rate for individual farms based on their soil characteristics and/or crop needs. Thus, the IEPA's technical findings concerning the soil characteristics and/or nutritional needs of crops at Hamman Farms, and, in turn, its determination of the appropriate agronomic rate based on that technical analysis, is not "a subject which the Board is authorized to regulate." *See id.*

In addition to the description of authorized proceedings that appears at 415 ILCS 5/5(d), the relevant implementing regulations also circumscribe the limits of the Board's jurisdiction to conduct adjudicatory proceedings, and 2 Ill. Adm. Code 2175.600(a) delineates the types of cases the Board is specifically authorized to hear:

a) The Board is authorized to hear the following types of adjudicatory cases: (See 35 Ill. Adm. Code 101-130 for procedural rules governing the processing of these cases.)

1) Enforcement Action. The Illinois Attorney General, any State's Attorney, or any person may initiate an enforcement action by the filing of a complaint pursuant to Section 31 of the Act (415 ILCS 5/31). (See 35 Ill. Adm. Code 103.)

2) Permit Appeal. Any person who, pursuant to Section 39 of the Act (415 ILCS 5/39), has been denied a permit by the Agency, or issued a permit by the Agency with one or more conditions to which that person objects, may file a petition with the Board for review of the Agency's action. If the Agency grants a RCRA permit for a hazardous waste disposal site or grants or denies a National Pollutant Discharge Elimination System (NPDES) permit, certain third parties may petition the Board for a hearing to contest the decision of the Agency (415 ILCS 5/40(b), (e)(1)). (See 35 Ill. Adm. Code 105.)

3) Pollution Control Facility Siting Review. An applicant for local siting approval of a pollution control facility who has been denied such approval or granted conditional approval by a county board or the governing body of a municipality may contest that decision by filing a petition for hearing pursuant to Section 40.1(a) of the Act (415 ILCS 5/40.1(a)). A third party who participated in the public hearing conducted by a county board or the governing body of a municipality may contest a grant of local siting approval by filing a petition for hearing pursuant to Section 40.1(b) of the Act (415 ILCS 5/40.1(b)). (See 35 Ill. Adm. Code 107.)

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- 4) Variances/Adjusted Standards. Any person adversely affected by a Board rule or order may file a petition for a variance pursuant to Section 37 of the Act (415 ILCS 5/37) or a petition for an adjusted standard pursuant to Section 28.1 of the Act (415 ILCS 5/28.1). (See 35 Ill. Adm. Code 104.)
- 5) Trade Secret Determination. Any person who is adversely affected by a trade secret determination made by the Agency or the Department may contest that determination before the Board. (See 35 Ill. Adm. Code 130.)
- 6) Appeal of Office of the State Fire Marshal (OSFM) UST Fund Eligibility or Deductibility Determination. Owners or operators of USTs who have been denied eligibility by the OSFM to access the UST reimbursement fund, or who disagree with an OSFM determination of the applicable deductible for UST Fund reimbursement, may petition for review pursuant to Section 57.9(c) of the Act (415 ILCS 5/57.9(c)). (See 35 Ill. Adm. Code 105.)
- 7) Appeal of Agency Decisions Regarding UST Program. Owners or operators of USTs who have been denied requested UST Fund reimbursement or UST cleanup approvals by the Agency may petition for review pursuant to Section 40 of the Act (415 ILCS 5/40). (See 35 Ill. Adm. Code 105.)
- 8) Tax Certifications. Under the Property Tax Code, the Board may issue a certificate finding that a facility is a “pollution control facility” or that a device is a “low sulfur dioxide emission coal fueled device” for property tax purposes (35 ILCS 200/11-10, 11-40). A person seeking a tax certificate must first submit an application to the Agency. The Agency is then required to file with the Board a recommendation on whether the Board should issue the certificate. An applicant who wishes to contest an Agency recommendation that the Board deny tax certification may file a petition with the Board. (See 35 Ill. Adm. Code 125.)
- 9) Administrative Citations. The Agency or a unit of local government delegated authority by the Agency may issue administrative citations for violations of Sections 21(o) and (p) of the Act (415 ILCS 5/21(o) and (p)). These citations are enforceable by filing copies with the Board pursuant to Section 31.1 of the Act (415 ILCS 5/31.1). The respondent named in the administrative citation may file a petition for review with the Board. (See 35 Ill. Adm. Code 108.)
- 10) Water Well Setback Exceptions. A water well owner may petition the Board for an exception from the water well setback requirements of the Act by filing a petition with the Board pursuant to Section 14.2 of the Act (415 ILCS 5/14.2.). (See 35 Ill. Adm. Code 106.)
- 11) Other. Any other proceedings authorized by the Act or the Board’s procedural rules may be brought before the Board pursuant to statutory authority and any Board regulations adopted thereunder.

Id. (emphasis added).

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Under the implementing regulations at 2 Ill.Adm.Code 2175, the only vaguely plausible category that might provide a basis for the Board's jurisdictional authority to hear and decide Yorkville's Petition would be category "11 – Other." However, no "statutory authority" or "Board regulations adopted thereunder" exist which authorize Board proceedings to review, and potentially "reverse," IEPA's technical findings concerning a particular farm's soil characteristics or the nutritional needs of its crops, thus, this is not a subject the Board is authorized to regulate.

Here, Yorkville seeks to characterize its action as a petition for review of the Agency's final decision in a permit-related matter. *See, e.g.*, Petition at paragraphs G and J. However, no permit is required for the agronomic application of landscape waste at either the statutory default rate of 20 tons per acre per year, or at a higher rate if the higher rate is justified by a farm's soil characteristics or by the nutritional needs of its crops. *See* 415 ILCS 5/21(q).

Moreover, even assuming, *arguendo*, that the Agency's decision had involved the issuance of a permit (which, again, it did not), the Supreme Court has observed that the legislature delegated to IEPA the authority to perform "technical, licensing, and enforcement functions." *Landfill, Inc. v. Pollution Control Bd.*, 74 Ill.2d 541, 554, 387 N.E.2d 258, 262-263, 25 Ill.Dec. 602, 606-607 (Ill. 1978). The Agency is, therefore, vested by the legislature with "the duty to collect and disseminate information, acquire technical data, and conduct experiments to carry out the purposes of the Act...[and to] conduct surveillance and inspection of actual or potential pollution sources." *Id.* The Agency also has the non-delegable duty to "administer permit systems established by the Act or regulations and has the authority to require permit applicants to submit plans and specifications and reports regarding actual or potential violations of the Act, regulations or permits." *Id.*

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Illinois courts have observed that “[t]he need for a technical staff capable of performing independent investigations dictates that the job of administering the permit system be entrusted to the Agency rather than the Board. If the Board were to become involved as the overseer of the Agency’s decision-making process through evaluation of challenges to permits, it would become the permit-granting authority, a function not delegated to the Board by the Act.” *Citizens Utilities Co. of Illinois v. PCB*, 265 Ill.App.3d 773, 780, 639 N.E.2d 1306, 203 Ill.Dec. 487 (3rd Dist. 1994), *citing Landfill*, 74 Ill.2d at 557.

The one exception is the Board’s role in hearing petitions by permit applicants whose permits have been denied. *Id.* “There are no comparable statutory provisions for Board review on either substantive or technical grounds of the Agency’s grant of a permit, thus indicating a legislative intent not to provide for such a proceeding.” *Citizens Utilities*, 265 Ill.App.3d at 780, *citing Landfill*, 74 Ill.2d at 557 (emphasis added). The Supreme Court has expressly rejected the idea that third parties have a right to a Board hearing on the Agency’s granting of a permit. *Id.* Moreover, there is a sound public policy reason for disallowing such challenges, inasmuch as the Board could otherwise find itself deluged by hundreds, if not thousands, of actions each year by third parties who are disgruntled about the granting of a permit. Such a system would be unworkable and would place an undue burden on State resources.

Most importantly, however, the agronomic application of landscape waste in compliance with 415 ILCS 5/21(q) does not require a permit, and therefore Hamman Farms did not seek a “permit,” but instead sought a technical determination from IEPA of the appropriate agronomic rate, in light of the farm’s particular soil characteristics and crops. In response, the Agency made that technical, factual determination after its experts had analyzed the data.

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Because this technical analysis is a matter left exclusively to the jurisdiction of the Agency, there is no jurisdictional authority for the Board to hear and decide Yorkville's Petition, and the Board similarly lacks authority to grant the relief sought: reversal of the IEPA's technical findings.

CONCLUSION

Yorkville's purported "Petition for Review" asks this Board to review a technical, analytical finding reached by the IEPA concerning the nutritional crop needs and soil characteristics of a particular farm. Although the Board clearly possesses technical expertise of its own, the technical determination at issue here is one that the Illinois legislature has expressly left to the discretion of the Agency. *See* 415 ILCS 5/21(q). When it comes to calculating the appropriate agronomic rate, the legislature chose to vest IEPA with exclusive authority to review the scientific data on a case by case basis, and it did not authorize the Board to conduct proceedings to second-guess the Agency's technical findings, or to enter orders "reversing" such findings.

Because the Board is not "authorized to regulate" the Agency's technical findings under 415 ILCS 5/21(q) as to the appropriate agronomic rate in light of a farm's soil characteristics or the nutritional needs of crops, the Board is not authorized by either 415 ILCS 5/5(d) or by 2 Ill.Adm.Code 2175.600(a) to hear and decide the matter challenged by Yorkville in its Petition.

For these reasons, and as set forth in Hamman Farms' Motion to Dismiss, Hamman Farms respectfully requests that the Board dismiss the Petition filed by Yorkville.

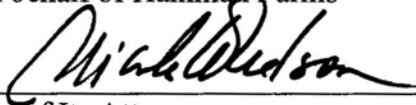
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AFFIDAVIT OF SERVICE

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 July 7, 2008, she caused to be served a copy of the foregoing upon:

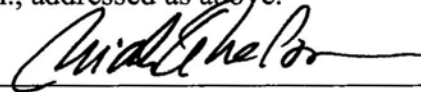
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A copy of the same was enclosed in an envelope in the United States mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.



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