

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
Petitioner,)
vs.) PCB No. 2010-084
) (Enforcement)
PROFESSIONAL SWINE MANAGEMENT,)
LLC; HILLTOP VIEW, LLC; WILDCAT FARMS,))
LLC; HIGH-POWER PORK, LLC; EAGLE)
POINT, LLC; LONE HOLLOW, LLC;)
TIMBERLINE, LLC; PRAIRIE STATE GILTS,)
LTD; NORTH FORK PORK, LLC; LITTLE)
TIMBER, LLC; and TWIN VALLEY PUMPING,)
INC.,)
Respondents.)

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Pollution Control Board

NOTICE OF FILING

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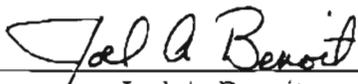
PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a Motion to Dismiss and/or Strike, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said

envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 7th day of September, 2010.

Respectfully submitted,
PROFESSIONAL SWINE MANAGEMENT, LLC,
One of the Respondents

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PCB No. 2010-084
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MOTION TO DISMISS AND/OR STRIKE

NOW COMES Respondent Professional Swine Management, LLC, (PSM) by and through its attorneys, Mohan, Alewelt, Prillaman & Adami, and for its Motion to Dismiss and/or Strike, states as follows:

I. Background.

The First Amended Complaint consists of nine counts. It contains allegations concerning nine separate hog farms. Each count is directed against two Respondents: the owner of a particular hog farm and Respondent PSM as the manager of that particular farm. Each count alleges that farm operations violated laws designed to protect against water pollution.

II. Mandatory pleading requirements.

Section 103.204(c) of the Board's regulations states that a complaint must contain:

- 1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;
- 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and

3) A concise statement of the relief that the complainant seeks.

35 Ill. Admin. Code 103.204(c).

III. All Section 12(f) charges based on allegations that Respondent PSM did not have an NPDES permit at the time of discharges must be dismissed.

In each count, Complainant alleges that Respondent PSM violated 415 ILCS 5/12(f) because it did not have an NPDES permit at the time livestock waste at a particular farm contaminated or threatened to contaminate the waters of the State.

For example, Count I alleges that:

- (a) an unspecified amount of runoff containing livestock waste from a land application field was observed in a road ditch that, in the event of precipitation, had the potential to discharge from the ditch into the waters of the State. (Count I, para. 16);
- (b) the farm did not have a NPDES permit for point source discharges. (Count I, para. 17); and
- (c) this threatened water pollution in violation of 415 ILCS 5/12(f). (Count I, para. 25).

In part, Section 12(f) provides:

No person shall: Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

No permit shall be required under this subsection and under Section 39(b) of this

Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act, as now or hereafter amended, and regulations pursuant thereto.

415 ILCS 5/12(f)(emphasis added).

To prevail on a Section 12(f) charge, then, the Complainant must plead and prove that a NPDES permit for the point source discharge complained of was required to have been applied for or obtained prior to the occurrence of the discharge complained of. 415 ILCS 5/12(f). This is because the Clean Water Act regulates and controls only actual discharges from point sources—not potential discharges or point sources themselves. *Waterkeeper Alliance, Inc. v. USEPA*, 399 F.3d 486, 505 (2nd Cir. 2005). “[U]nless there is a ‘discharge of any pollutant,’ there is no violation of the [Clean Water] Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.” *Id.* at 504. The Clean Water Act does not require potential dischargers to apply for NPDES permits. *Id.* at 506, n. 22.

Respondent PSM recognizes that persons not required to obtain NPDES have been held liable by the Board under Section 12(f) for discharging without an NPDES permit. Respondent PSM is unaware, though, if the issue presented here has previously been raised with the Board. Respondent PSM requests that the Board consider the fundamental unfairness of holding persons liable under Section 12(f) for not having a permit they were not required to obtain in the first place.

Accordingly, as to the alleged Section 12(f) violations, as it is not alleged that the farms or Respondent PSM were required to obtain an NPDES permit prior to the alleged discharges, the Section 12(f) charges in each of the nine counts must be dismissed.

IV. Count I's charges concerning construction activities must be dismissed and/or stricken.

According to Count I, on June 16, 2006, an IEPA inspector observed that earth had been disturbed to prepare for the construction of a swine confinement building at Respondent Hilltop's farm. No erosion controls were present, but no erosion was observed. No NPDES storm water permit for construction activities had previously been obtained. The IEPA inspector observed an eroded channel near a stockpile of concrete materials, which drained about 400 feet into Sugar Creek. It is not alleged what, if anything, the inspector observed in the channel.

The Respondents halted all excavation, and obtained an NPDES permit. The IEPA rejected a proposed compliance commitment agreement because of unspecified concerns over the nature and seriousness of the alleged violations. On November 15, 2006, an IEPA inspector inspected the site, observed minimal earthwork underway, observed that silt fencing had been installed to minimize storm water erosion, and suggested additional silt fencing in two area and the resetting of other silt fencing.

Count I alleges violations of Sections 12(a) and 12(f) of the Act and 35 Ill. Adm. Code 309.102(a).

The allegation in Paragraph 24 of Count I that Respondents did not "otherwise comply[] with construction storm water requirements" should be stricken as it fails to reference which provisions of the Act or regulations are alleged to have been violated. Further, Count I fails to set forth the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations as a result of the unspecified noncompliance. Further, the significance of the channel noted in Paragraph 8 is not

apparent.

The alleged Section 12(f) violation should be dismissed because the basis for the violation is engaging in construction activities without a construction storm water NPDES permit. (Count I, para. 24). Section 12(f), however, is concerned with discharges from any *point source* within the State without an NPDES permit for *point source* discharges. 415 ILCS 5/12(f). Construction activity which results in runoff from facilities is a *nonpoint* source of pollutants. 333 U.S.C. 1314(f)(C); *see* <http://water.epa.gov/polwaste/nps/whatis.cfm> (“Nonpoint source” means any source of water pollution that does not meet the legal definition of “point source” in Section 502(14) of the Clean Water Act, 33 U.S.C. 1362(14), such as sediment from improperly managed construction sites.).

The alleged 35 Ill. Adm. Code 309.102(a) violation should similarly be dismissed, as this regulation is concerned with discharges from point sources, and sediment from construction sites is a nonpoint source. Dismissal is further warranted because Count I contains no allegation that any contaminant or pollutant was discharged into the waters of the State or into a well. 35 Ill. Adm. Code 309.102(a).

V. Count I’s charges concerning livestock waste runoff should be dismissed and other specified allegations stricken.

According to Count I, on May 28, 2009, an IEPA inspector observed an unspecified amount of runoff containing livestock waste from a land application field in a road ditch that, in the event of precipitation, had the potential to discharge from the ditch into the waters of the State. The farm did not have an NPDES permit for point source discharges. These activities allegedly threatened water pollution in violation of Sections 12(a), 12(d), 12(f), and 35 Ill. Adm.

Code 309.102(a).

Initially, Respondent PSM requests that the following sentence in Paragraph 16 of Count I be stricken: "If unabated, the continued release of livestock waste during land application operations to the road ditch could lead to a discharge of livestock waste to waters of the State." As no facts are plead which suggest that the alleged release was unabated or continued during land application operations, the sentence contains no relevant factual allegations that can support Count I's charges.

All charges related to the alleged runoff should be dismissed as they fail to contain the factual allegations required by 35 Ill. Admin. Code 103.204(c).

The Section 12(f) violation should be dismissed because Count I does not allege that a particular point source discharged the runoff into the ditch. *Cf.* Count II, Para. 23 ("The discharge from the cleanout at the Wildcat facility is a point source discharge."). Count I contains no allegation that the livestock waste had been improperly land applied, e.g., at an improper rate. Thus, the runoff from the field was "agricultural stormwater" and, thus, not a "point source." 33 USC 1362(14); 40 CFR Parts 9, 122, and 412, p. 70420 (Nov. 20, 2008). Absent a point source discharge, there can be no violation of Section 12(f).

The 35 Ill. Adm. Code 309.102(a) violation should be dismissed because there is no allegation of a discharge from a point source, nor is there any allegation of a discharge into the waters of the State or into a well.

VI. Count II's allegations concerning the failure to apply for an NPDES permit must be stricken.

Count II concerns the alleged release of livestock waste from a cleanout pipe damaged by

a lawn mower.

The allegation in Paragraph 23 of Count II that no NPDES permit had been applied for should be stricken, as no facts plead show that Respondent PSM was required to apply for an NPDES permit prior to the alleged release..

VII. Count III's allegation concerning the failure to apply for an NPDES permit must be stricken.

Count III concerns the alleged release of livestock waste from an underground transfer pipeline.

The allegation in Paragraph 21 of Count III that no NPDES permit had been applied for should be stricken, as no facts plead show that Respondent PSM was required to apply for an NPDES permit.

VIII. Count IV's charge concerning the septic system must be dismissed and its allegation concerning failure to apply for an NPDES permit must be stricken.

According to Count IV's allegations, on May 10, 2007, an IEPA inspector observed a discharge from a building's perimeter tile, which drained onto the land in a manner in which the discharged then drained into a strip mine lake; sample results of the discharge showed it was contaminated. During the same inspection, the IEPA inspector observed the farm's septic tank system discharging into a lake; samples of this discharge revealed contamination.

If Paragraph 20 alleges that the septic system discharge to the strip mine lake violates Section 12(f) because of the absence of an NPDES permit, that charge should be dismissed because septic system discharges are governed by the Illinois Department of Public Health regulations. 77 Ill. Adm. Code 905.205. The IDPH regulations allow the discharge to lakes or ponds from specified aerobic systems. 77 Ill Adm. Code 905.110(a)(1). Count IV's allegations

are insufficient to support a charge that the discharge is prohibited under IDPH regulations and, even if it were, the Board is without jurisdiction to adjudicate alleged violations of IDPH regulations..

The allegation in Paragraph 19 of Count IV that Respondents had not applied for a NPDES permit should be stricken, as no factual allegations support the suggestion that Respondents were required to apply for an NPDES permit prior to the events alleged.

IX. Count V must be dismissed and its allegation concerning failure to apply for an NPDES permit must be stricken.

According to Count V, on September 13, 2007, manure was accidentally released and flowed to a waterway to the east of a swine confinement building, where farm employees stopped the flow. On September 25, 2007, an IEPA inspector took samples from the area where the discharge occurred and found contamination. The IEPA inspector also took samples from building perimeter tile discharge; the results indicated contamination. The discharge from these tiles was a low flow of clear liquid or unspecified. On September 27, 2007, it was noted that the compost structure was not covered, and leachate material from the compost material was on the north side of the structure.

Count V alleges that the Respondents have caused or allowed the discharge of contaminants to waters of the State, but does not include any factual allegations supporting this assertion. The accidental release was stopped, and there is no allegation that the workers did not follow the IEPA inspector's instruction to clean up the release. Count V suggests the flow from the tiles was low. Count V does not contain factual allegations concerning the compost leachate to suggest that it could possibly affect the waters of the State. Wherefore, the allegation that the

Respondents caused or allowed the discharge of contaminants to waters of the State should be stricken.

All charges in Count V should be dismissed because Count V does not contain the allegations required by 35 Ill. Admin. Code 103.204(c). The complaint must advise Respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense. *Id.* For example, the Complainant needs to provide factual allegations which support the bare allegations of harm set forth in Paragraph 17.

The allegation that Respondents had not applied for a NPDES permit should be stricken, as no factual allegations support the suggestion that Respondents were required to apply for an NPDES permit prior to the events alleged.

Finally, because there are no factual allegations supporting the conclusion that there was a discharge into the waters of the State, the Section 12(f) and 35 Ill Adm. Code 309.102(a) charges should be dismissed.

X. Specified allegations of Count VI must be stricken.

According to Count VI, an IEPA inspector visited the Timberline facility on September 11, 2008, and observed leachate flowing from the facility's mortality composting structure, to a dry dam, and then onto an unnamed tributary of the West Branch of Sugar Creek.

Respondent PSM requests that Paragraph 15 of Count VI, primarily concerning a fire at the farm in 2009, be dismissed as its allegations are irrelevant to the charges set forth in Count VI.

The allegation that Respondents had not applied for a NPDES permit should be stricken, as no factual allegations support the suggestion that Respondents were required to apply for an

NPDES permit prior to the violations alleged.

XI. Count VII's allegation concerning the failure to apply for an NPDES permit must be stricken.

Count VII concerns the alleged release of livestock waste from a cleanout pipe damaged during hail bailing operations.

The allegation in Paragraph 26 that Respondents had not applied for a NPDES permit should be stricken, as no factual allegations support the suggestion that Respondents were required to apply for an NPDES permit prior to the events alleged.

XII. Count VIII must be dismissed and its allegation concerning failure to apply for an NPDES permit must be stricken.

According to Count VIII, in 2003, an IEPA inspector collected samples from one of the building perimeter tiles which discharged into a ravine in a field south of the facility; contamination was noted. The IEPA requested monthly samples. At a follow up inspection in 2004, the IEPA inspector noted that the discharge to the ravine had been stopped through the installation of a lift station that pumped the tile discharge to a waste pit.

On June 28, 2004, the IEPA received an NPDES permit application for the North Fork facility.

On December 19, 2007, an IEPA inspector observed liquid with a diesel fuel odor and slight oil sheen draining into an on-site pond. On the same date, an IEPA inspector observed leachate and runoff draining from the mortality compost structure to an on-site pond.

All charges in Count VIII should be dismissed because Count VIII does not contain the allegations required by 35 Ill. Admin. Code 103.204(c). For example, it is impossible to determine what the reference to livestock wastewater means in Paragraph 23. It could be the

perimeter tile discharge, the liquid containing a diesel fuel odor, compost runoff, or all of these.

All NPDES charges related to events occurring after the IEPA received the NPDES permit application should be dismissed. 415 ILCS 5/12(f)(Where a permit has been applied for, it is generally not a violation of Section 12(f) to discharge without a permit.).

The allegation that Respondents had not applied for an NPDES permit application as of December 3, 2003, should be stricken, as there are no factual allegations suggesting that they were required to apply for such a permit.

XIII. Count IX's alleged groundwater violations must be dismissed and other specified allegations must be stricken.

According to Count IX, on June 1, 2004, an IEPA inspector observed leachate and surface runoff draining west from a mortality compost unit into a waterway that is a tributary to Middle Creek. Later in June, the IEPA sought and received monitoring well data indicating that, since 1997, nitrate levels rose in the southeast monitoring well downgradient of a waste lagoon. The IEPA believes that the impacted groundwater is used for potable purposes and is Class I groundwater.

In early February, 2007, waste was released from a wastewater handling structure due to a frozen inlet. Respondents constricted the spill with a dike, and cleaned up the release. On February 21, 2007, an IEPA inspector recommended that Respondents undertake additional cleanup measures.

On August 24, 2007, an IEPA inspector observed that several swine had been burned in a fire near the gravel road at the facility. Surface water flows through this area into a waterway draining to waters of the State. The IEPA inspector also observed surface runoff draining west

from a mortality compost structure and into the same waterway.

Based on the alleged increasing levels of nitrate in the groundwater, Count IX seeks a finding that Respondents violated 35 Ill. Admin. Code 620.301, which prohibits causing, threatening, or allowing the release of any contaminant to a resource groundwater such that treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or an existing or potential use of such groundwater is precluded. This alleged Section 620.301 violation should be dismissed because the recorded levels of nitrate in the allegedly impacted groundwater does not exceed the groundwater quality standards for Class I, potable resource groundwater. 35 Ill. Adm. Code 620.410.(a).

Paragraph 18 allegations concerning odors noticed on June 1, 2004, should be stricken, as such allegations are not relevant to Count IX's charges.

Paragraph 32's allegation that Respondents had not applied for an NPDES permit application should be stricken, as there are no factual allegations suggesting that they were required to apply for such a permit.

XIV. Conclusion.

WHEREFORE, for the reasons set forth herein, Respondent PSM prays that this Motion to Dismiss and/or Strike be granted and that the Board grant it such other and further relief as is just.

Respectfully submitted,
PROFESSIONAL SWINE MANAGEMENT, LLC,
One of the Respondents

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CERTIFICATE OF SERVICE

I hereby certify that I did on the 7th day of September, 2010, send by First Class Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instrument entitled **MOTION TO DISMISS AND/OR STRIKE**:

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and the original and nine copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

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