

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 PROFESSIONAL SWINE MANAGEMENT,)
 LLC, an Illinois limited liability corporation,)
 HILLTOP VIEW, LLC, an Illinois limited)
 liability corporation, WILDCAT FARMS, LLC,)
 an Illinois limited liability corporation,)
 HIGH-POWER PORK, LLC, an Illinois limited)
 liability corp., EAGLE POINT FARMS, LLC, an)
 Illinois limited liability corporation, LONE)
 HOLLOW, LLC, an Illinois limited liability)
 corporation, TIMBERLINE, LLC, an Illinois)
 limited liability corporation, PRAIRIE STATE)
 GILTS, LTD, an Illinois corporation, NORTH)
 FORK PORK, LLC, an Illinois limited liability)
 corporation, LITTLE TIMBER, LLC, an Illinois)
 limited liability corporation, TWIN VALLEY)
 PUMPING, INC., an Illinois corporation,)
)
 Respondents.)

**PCB NO. 10-84
(Enforcement)**

NOTICE OF ELECTRONIC FILING

To: See Attached Amended Service List

PLEASE TAKE NOTICE that on September 28, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a CERTIFICATE OF SERVICE, COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL DISMISSAL and COMPLAINANT'S RESPONSE TO MOTION TO DISMISS AND/OR STRIKE copies of which are attached hereto and herewith served upon you.

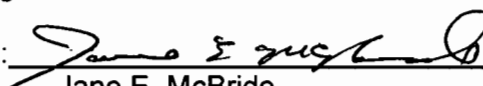
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

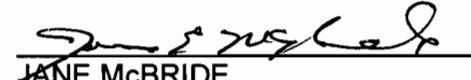
MATTHEW J. DUNN, Chief
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BY: 
Jane E. McBride
Sr. Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I did on September 28, 2010, cause to be served 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 instruments entitled NOTICE OF ELECTRONIC FILING, COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL DISMISSAL and COMPLAINANT'S RESPONSE TO MOTION TO DISMISS AND/OR STRIKE upon the persons listed on the Service List.



JANE McBRIDE
Sr. Assistant Attorney General

This filing is submitted on recycled paper.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB NO. 10-84
)	(Enforcement)
PROFESSIONAL SWINE)	
MANAGEMENT, LLC, an Illinois)	
limited liability corporation, and)	
HILLTOP VIEW, LLC, an Illinois)	
limited liability corporation, WILDCAT)	
FARMS, LLC, an Illinois limited)	
liability corporation, HIGH-POWER)	
PORK, LLC, an Illinois limited liability)	
corporation, EAGLE POINT FARMS, LLC, an)	
Illinois limited liability corporation,)	
LONE HOLLOW, LLC, an Illinois limited)	
liability corporation, TIMBERLINE, LLC,)	
an Illinois limited liability corporation,)	
PRAIRIE STATE GILTS, LTD, an Illinois)	
corporation, NORTH FORK PORK, LLC, an)	
Illinois limited liability corporation, LITTLE)	
TIMBER, LLC, and Illinois limited liability)	
corporation,)	
Respondents.)	

COMPLAINANT’S RESPONSE TO RESPONDENTS’ MOTION FOR PARTIAL DIMISSAL

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel Lisa Madigan, Attorney General of the State of Illinois, and responds to the Motion for Partial Dismissal of the Amended Complaint filed by Respondents HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD, and LITTLE TIMBER, LLC (“Respondents”), as follows:

Introduction

1. Respondents move for partial dismissal on the basis of their assertion that Complainant has failed, in Counts I, IV, V, VI, VII and IX, to plead facts sufficient to constitute an allegation of violation of Section 12(f) and 35 Ill. Admin. Code § 309.102(a).

Applicable Law and Argument Regarding

2. Section 502.101 of the Board's Agriculture Related Pollution Regulations, 35 Ill.

Adm. Code 502.101, provides

No person specified in Sections 502.102, 502.103 or 502.104 or required to have a permit under the conditions of Section 502.106 shall cause or allow the operation of any new livestock management facility or livestock waste-handling facility, or cause or allow the modification of any livestock management facility or livestock waste-handling facility, or cause or allow the operation of any existing livestock management facility of livestock waste-handling facility without a National Pollutant Discharge elimination System ("NPDES") permit. Facility expansions, production increases, and process modifications which significantly increase the amount of livestock waste over the level authorized by the NPDES permit must be reported by submission of a new NPDES application.

3. Section 502.102 of the Board's Agriculture Related Pollution Regulations, 35 Ill.

Adm. Code 502.102, provides:

An NPDES permit shall be required for an animal feeding operation which falls within the criteria set forth in Section 502.103 or Section 502.104 below, provided, however, that no animal feeding operation shall require a permit if it discharges only in the event of a 25-year 24-hour storm event.

4. Section 502.103 of the Board's Agriculture Related Pollution Regulations, 35 Ill.

Adm. Code 502.103, provides

An NPDES permit is required if more than the numbers of animal specified in any of the following categories are confined:

<u>Number of Animals</u>	<u>Kind of Animals</u>
***	***
2,500	Swine weighing over 55 pounds

5. The state regulations are consistent with, and indeed based upon, the federal regulations.

6. Section 122.23 (b)(2), 40 CFR 122.23(b)(2), states, in pertinent part:
 - (2) Concentrated animal feeding operation (CAFO) means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, . . .
7. Section 122.23(b)(4), 40 CFR 122.23(b)(4), states, in pertinent part:
 - (4) Large concentrated animal feeding operations (Large CAFO). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories: . . . (iv) 2,500 swine each weighing 55 pounds or more . . .
8. Section 122.23 (a), 40 CFR 122.23(a), states, in pertinent part:
 - (a) Permit requirement for CAFOs. Concentrated animal feeding operations, as defined in paragraph (b) of this section, are point sources that require NPDES permits for discharges or potential discharges. Once an operation is defined as a CAFO, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter and process wastewater generated by those animals of the production of those animal, regardless of the type of animal.
9. Section 122.23 (e), 40 CFR 122.23(e), states, in pertinent part:
 - (e) Land application discharges from a CAFO are subject to NPDES requirements. . . .
10. Section 122.23 (f), 40 CFR 122.23(f), states, in pertinent part:
 - (f) . . . In no case may the CAFO be determined to have no potential to discharge if it has had a discharge within the 5 years prior to the date of the request submitted under paragraph (f)(2) of this section.
11. Pursuant to 40 CFR 122.23(f), a facility may take the affirmative step of submitting information, the nature of which is described in detail in the rules, in application for a "determination of no potential to discharge" if it seeks the ability to avoid the requirement to obtain an NPDES permit. Respondents have not pled that they have done so. The Illinois EPA has no record of any such submission from the subject facilities.
12. Section 122.23(f)(5), 40 CFR 122.23(f)(6), states, in pertinent part:
 - (5) . . . Any unpermitted CAFO that discharges pollutants into the waters of the United States is in violation of the Clean Water Act even if it has received a no potential to discharge determination from the Director.

13. As is apparent from the above-referenced regulations, the NPDES permit and pollutional discharges are intricately tied together. A permit must be in place if Respondent threatens or indeed causes or allows a discharge to occur. If there is a pollution discharge without a permit in place, it's too late. So, in order to be in compliance with the regulations, a livestock production facility must obtain a permit prior to any threat of discharge or actual discharge occurs.

14. Section 502.103 of the Board's Agriculture Related Pollution Regulations includes no requirement that the Illinois EPA notify the facility that it must get a permit. The regulation simply reads that a facility maintaining a specified number of animals is required to get a permit.

15. Pursuant to applicable regulations, Respondents were under an obligation to obtain a permit before Respondents threatened a discharge or caused or allowed a discharge to occur.

16. Respondents claim that the Respondents' facilities are subject to the provision of the CAFO rules that allow for a case-by-case evaluation as to whether or not the CAFO "discharges or proposes to discharge". As stated above, the subject facilities have not taken the step necessary to allow that evaluation. From the State's allegations, it is apparent that the State does not agree that these facilities are designed, constructed, operated and maintained so as not to discharge. The facilities have discharged through perimeter tiles, potentially indicating the pits are not sufficiently sealed (representing design and construction problems), they have discharged from waste structures (at two facilities, personnel mowed over clean-out structures ultimately causing a discharge, representing operational and maintenance problems), they have had discharges from composting structures (representing operation, design and construction problems), and they have had land application discharges (representing operational problems).

17. The NPDES permitting program that is the subject of the instant matter is a federally delegated program that has been implemented under state authority for 40 years.

18. The federal act provides that 'nothing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce . . . (B) any requirement respecting control or abatement of pollution. 33 U.S.C. § 1370. The only qualification is that the states may not enforce limitations or standards which are less stringent than those adopted under federal law. *Peabody Coal Company v. Illinois Pollution Control Board*, 36 Ill.App.3d 5, 11 (5th Dist. 1976)

19. Pursuant to Section 12(f) of the Act, 415 ILCS 5/12(f), a facility is in violation if it threatens to, or causes or allows a discharge to waters of the State, without a permit. Section 12(f) specifically refers, in its general prohibition of a discharge without a permit, to 'waters of the State'.

20. Section 3.550 of the Act, 415 ILCS 5/3.550, provides the following definition:

"WATERS" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

21. With regard to the question as to whether waters of the State must be shown to be navigable waters, the court in the matter of *Tri-County Landfill v. Illinois Pollution Control Board*, 41 Ill. App. 3d 249, 253-254 (2nd Dist. 1976) held:

Tri-County contends that waters on private land are not 'waters of the State'. It argues that before the waters can be waters of the State, they must be shown to be navigable for useful commerce.

The term 'waters of the State' could, in a sense, mean waters belonging to the State. Or it can simply mean waters located within the State. And in determining which meaning should be given to the statutory provision, we should look at the whole Act and the purpose for which it was enacted. *Ford v. Environmental Protection Agency* (1973), 9 Ill.App.3d 711, 292 N.E.2d 540; 34 Illinois Law and Practice, States, §123.

Section 11 of the Act, states that:

- (a) The General Assembly finds:
 - (i) that pollution of the Waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish,

and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses.' (emphasis added)

It is doubtful that the legislature believed that wildlife is so discriminating that pollution of navigable waters would be harmful to them but pollution of non-navigable waters would not. And certainly stagnant water privately owned may constitute a menace to public health through the breeding of disease. Thus in this sentence the words 'waters of the State' would appear to mean waters located within the State.

That section continues by stating:

- (b) It is the purpose of this Title to restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life, and to assure that no contaminants are discharged 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 source within the State of Illinois, without being given the degree of treatment or control necessary to prevent pollution, or without being made subject to such conditions as are required to achieve and maintain compliance with State and Federal law; and to authorize, empower, and direct the Board and the Agency to adopt such regulations and procedures as will enable the State to secure federal approval to issue NPDES permits pursuant to the provisions of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and federal regulations pursuant thereto.'

Again, it would appear clear that the intent of the legislature was to enact sweeping legislation covering all sources of pollution both public and private. Furthermore, the legislature in this section refers us to the definitions, which are found in section 3, Illinois Revised Statutes, 1973, ch. 111 1/2, par. 1003. Only 'waters' is defined and it is defined to mean

'all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.'

It is interesting to note that the Federal Water Pollution Control Act is equally wide sweeping in its language enjoining the Administrator to prepare or develop comprehensive programs for preventing, reducing or eliminating the pollution of 'the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.'

22. The State's policy decisions in its choice of the use of the term "waters of the State", the statutory definition of that term, as well as the Board's interpretation of the term, are all relevant to the question presented by Respondents' motion in light of the State's ability,

pursuant to 33 U.S.C. § 1370, to implement a program that includes additional protections for state waters.

23. As commenters have pointed out (See "Which Way Federalism Under Section 402", Robin Kundis Craig, *Natural Resources & Environmental*, Volume 22, Number 1, Summer 2007, American Bar Association), only one month before it issued its "fractured" opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006), the U.S. Supreme Court decided *S.D. Warren v. Maine Board of Environmental Protection*, 126 S.Ct. 1843 (May 15, 2006) in which the Court unanimously upheld the state's authority "to address the broad range of pollution".

24. Section 12(f) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/12(f), states, in pertinent part:

No person shall:

* * *

(f) 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.

25. Complainant is certainly cognizant, in its enforcement of Section 12(f) of the Act, that Section 39(b) references "navigable waters".

26. Complainant has pled facts as the basis for allegations of violation of Section 12(f) and 35 Ill. Adm. Code 309.102(a) that show that there had been a discharge from the subject facility to a ditch or waterway that was either a water of the State itself and/or was a

conveyance of surface flow to a water of the State and navigable water, that is, the State has pled facts showing hydrologic connections based on observation of surface water connections that would result in the discharge ultimately reaching covered waters. If the Board finds that the State's factual allegations of hydrologic connection are insufficient, Complainant requests that it be allowed leave to amend the Amended Complaint to plead in greater specificity.

27. As set forth by the Court in *U.S. v. Lippold*, C.D.Ill 2007, 2007 WL 3232483 (C.D.Ill.), cited in the Respondents' motion, courts have held that streams flowing into navigable rivers are waters of the United States. See, e.g., *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir.1974) ("Certainly the Congressional language must be read to apply to our instant case involving pollution of one of the tributaries of a navigable river."); *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F.Supp. 852, 855 (E.D.Pa.1980) (classifying a non-navigable stream as a water of the United States). Courts have even held that streams flowing only intermittently and arroyos that are often dry are covered. See, e.g., *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir.1999) (intermittent stream); *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126, 129-30 (10th Cir.1985) (occasionally-flowing arroyo). These cases are on point, in that they concern Section 402 pollutional discharges.

28. The USEPA/US Army Corp of Engineers Guidance, entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States and Carabell v. United States*", page 12, states:

. . . Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g. swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e. "discernible, confined, and discrete conveyances:), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g. CWA §§ 311 and 402) [citing 33 U.S.C. § 1362(14)]

29. Respondents rely on *Rapanos* for the standard they claim is to be applied to a

discharge from a non-permitted facility. *Rapanos* was decided wholly in the context of the U.S. Army Corps of Engineers' jurisdiction over the Section 404 permitting process, not in the context of the Section 402 NPDES permitting program.

30. As is generally well known, the plurality in the *Rapanos* matter went to great length to distinguish its finding from the standards applicable in Section 402 jurisdictional determinations.

31. The portion of the *Rapanos* plurality opinion, in which Justice Scalia distinguished the ruling in this Section 404 case, is helpful in the instant matter:

Respondents and their *amici* urge that such restrictions on the scope of "navigable waters" will frustrate enforcement against traditional water polluters under 33 U.S.C. §§ 1311 and 1342. Because the same definition of "navigable waters" applies to the entire statute, respondents contend that water polluters will be able to evade the permitting requirement of § 1342(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters. See Tr. of Oral Arg. 74-75.

That is not so. Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of § 1342, inasmuch as lower courts applying § 1342 have not characterized intermittent channels as "waters of the United States." The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." § 1362(12)(A) (emphasis added); § 1311(a). Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between. *United States v. Velsicol Chemical Corp.*, 438 F.Supp. 945, 946-947 (W.D.Tenn.1976) (a municipal sewer system separated the "point source" and covered navigable waters). See also *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (C.A.10 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters").

In fact, many courts have held that such upstream, intermittently flowing channels themselves constitute "point sources" under the Act. The definition of "point source" includes "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). We have held that the Act "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004). Cases holding the intervening channel to be a point source include *United States v. Ortiz*, 427 F.3d 1278, 1281 (C.A.10 2005) (a storm drain that carried flushed

chemicals from a toilet to the Colorado River was a "point source"), and *Dague v. Burlington*, 935 F.2d 1343, 1354-1355 (C.A.2 1991) (a culvert connecting two bodies of navigable water was a "point source"), rev'd on other grounds, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). Some courts have even adopted both the "indirect discharge" rationale and the "point source" rationale in the alternative, applied to the same facts. See, e.g., *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118-119 (C.A.2 1994). On either view, however, the lower courts have seen no need to classify the intervening conduits as "waters of the United States."

In contrast to the pollutants normally covered by the permitting requirement of § 1342(a), "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an "addition ... to navigable waters" when deposited in upstream isolated wetlands. §§ 1344(a), 1362(12). The Act recognizes this distinction by providing a separate permitting program for such discharges in § 1344(a). It does not appear, therefore, that the interpretation we adopt today significantly reduces the scope of § 1342.

The dissent argues that "the very existence of words like 'alluvium' and 'silt' in our language suggests that at least some [dredged or fill material] makes its way downstream," *post*, at 2263 (citation omitted). See also *post*, at 2244-2245 (opinion of KENNEDY, J.). By contrast, *amici* cite multiple empirical analyses that contradict the dissent's philological approach to sediment erosion-including one which concludes that "[t]he idea that the discharge of dredged or fill material into isolated waters, ephemeral drains or non-tidal ditches will pollute navigable waters located any appreciable distance from them lacks credibility." R. Pierce, Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act 34-40 (Apr.2003), available at <http://www.wetlandtraining.com/tpreljswa.pdf>, cited in Brief for International Council of Shopping Centers et al. as *Amici Curiae* 26-27; Brief for Pulte Homes, Inc., et al. as *Amici Curiae* 20-21; Brief for Foundation for Environmental and Economic Progress et al. as *Amici Curiae* 29, and n. 53 ("Fill material does not migrate"). Such scientific analysis is entirely unnecessary, however, to reach the unremarkable conclusion that the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an "addition ... to navigable waters," 33 U.S.C. § 1362(12), while the deposit of *stationary* fill material generally is not.

Respondents also urge that the narrower interpretation of "waters" will impose a more difficult burden of proof in enforcement proceedings under §§ 1311(a) and 1342(a), by requiring the agency to demonstrate the downstream flow of the pollutant along the intermittent channel to traditional "waters." See Tr. of Oral Arg. 57. But, as noted above, the lower courts do not generally rely on characterization of intervening channels as "waters of the United States" in applying § 1311 to the traditional pollutants subject to § 1342. Moreover, the proof of downstream flow of pollutants required under § 1342 appears substantially similar, if not identical, to the proof of a hydrologic connection that would be required, on the Sixth Circuit's theory of jurisdiction, to prove that an upstream channel or wetland is a "wate[r] of the United States." See *Rapanos II*, 376 F.3d, at 639. Compare, e.g., App. to Pet. for Cert. in No. 04-1034, at B11, B20, B26 (testimony of hydrologic connections based on observation of surface water connections), with *Southview Farm*, *supra*, at 118-121 (testimony of discharges based on observation of

the flow of polluted water). In either case, the agency must prove that the contaminant-laden waters ultimately reach covered waters.

32. As Respondents assert, it is true that the Seventh Circuit held, in the case *U.S. v. Gerke Excavating, Inc.* 464 F.3d 723, 724 (7th Cir. 2006), that it would follow Justice Kennedy's opinion in cases in which the *Rapanos* precedent might be applicable. *Gerke* was a matter concerning Corps of Engineers' Section 404 permitting jurisdiction, and the court clearly stated that the issue at hand was federal authority over wetlands. There is nothing in the *Gerke* decision relevant to a state's authority in the implementation of a Section 402 NPDES permitting program, and a violation of a state permit requirement.

33. Respondents rely on an interpretation of Justice Kennedy's standards, issued by a federal trial court in the matter of *U.S. v. Lippold*, C.D.Ill 2007, on October 31, 2007, to be applicable in the instant matter. The opinion relied on is a ruling issued on a motion to dismiss. It is not an appellate decision, it is not even a final trial court decision. It is not a reported opinion.

34. *Lippold* is a federal matter, brought pursuant to federal authority, prosecuted by the U.S. Attorney's office. The court clearly states that at the time *Lippold* allegedly discharged pollutants into the subject streams, *Rapanos* had not yet been decided and existing case law established that both permanent and intermittent streams were waters of the United States. The court also stated "The facts at issue [in the *Rapanos* matters] were not on point with those of the instant case, but the Court's opinions are instructive." The Court then proceeded with what appears to be a freelance review of case law concerning waters of the United States, in support of its finding that the waters that were the subject of the *Lippold* matter were indeed waters of the United States and Defendant could not raise a defense of unconstitutionally vague. Again, this opinion relied upon by Respondents is not a published appellate opinion. It is a trial court opinion on a motion to dismiss.

35. The subject counts pled in the Amended Complaint were pled in a manner consistent with existing case law for point source pollutorial discharges to navigable waters that are subject to Section 311 and 402 jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and the State's NPDES permitting program.

Count by Count Response

Count I

36. Pursuant to an Illinois Environmental Protection Agency inspection conducted on June 18, 2007, documented in a report dated August 31, 2007, the Hilltop facility consists of five confinement buildings and a dead animal composting structure. Starting on the west side of the facility and progressing eastward are a breeding/gestation building, a farrowing building, another breeding/gestation building, a grower-finisher building and an isolation nursery. Animals weighing more than 55 pounds are confined in the breeding/gestation buildings (2,600 head each), the farrowing building (1,050 head) and the grower/finisher building (1,550 head) for a total of 7,800 head.

37. As alleged in the Amended Complaint, on May 28, 2009, an Illinois EPA inspector observed runoff containing livestock waste from a land application field associated with the Hilltop swine facility in the north ditch of Meadowlark Lane approximately one-eighth mile west of the Hilltop swine facility. The runoff, as it existed in the ditch at the time of the Illinois EPA's inspector's observation, had the potential to discharge from the ditch into waters of the State in the event of precipitation.

38. As pled in the complaint, the land application discharge was to a ditch that had a surface connection to waters of the State. As the inspector will testify, the livestock waste was in the north road ditch of Meadowlark Lane which drains to an unnamed tributary of the West Branch of Sugar Creek.

Count IV

39. Respondent Eagle Point owns a farrow-to-wean facility with a design capacity of 6,500 sows. Breeding stock, i.e. sows, weigh over 55 pounds. Drainage from the Eagle Point site flows directly through several ravines into final cut strip mine lakes.

40. As alleged in the Amended Complaint, the Illinois EPA inspected the Eagle Point facility on May 10, 2007. At the time of the inspection, there was a discharge from the north gestation building perimeter tile onto the land in a manner in which the discharge drained into a strip mine lake. The discharge was slightly cloudy and had a slight livestock waste odor. Analysis of a sample collected from the discharge indicated a fecal coliform level of 35,000 per 100 milliliters ("ml").

41. At the time of the inspection, the Illinois EPA inspector sampled a discharge from the facility's private sewage disposal system, that being an aerated septic tank that serves the office restrooms and showers. This system discharges through a 4-inch diameter line into a lake located east of the facility structures. At the time of the inspection, the discharge was slightly turbid and had a septic odor. The sample analysis results indicated a fecal coliform level of 56,000 per 100 ml, and ammonia level of 41.8 milligrams per liter ("mg/l"), and a biological oxygen demand level of 48 mg/l.

42. As set forth in the allegations, the perimeter tile discharge was to a drainage formation that flowed into a strip mine lake. The septic tank discharge was through a pipe into a lake.

Count V

43. The Lone Hollow is a farrow to wean facility that maintains a sow herd of 5,650 head.

44. As alleged in the Amended Complaint, on September 13, 2007, a swine manure release occurred at the Lone Hollow facility. On that date, in an attempt to unplug a pit

drainage pipe, liquid was being added to the pit of the farrowing unit in an attempt to correct the plugging problem. The main farrowing building is equipped with an 8-inch diameter pit access/pump out pipe at the southeast corner of the building. The level of wastewater built up within the shallow pit beneath the farrowing building until it reached an outlet at the 8-inch diameter pipe. Liquid swine manure drained out of the 8-inch pipe at the southeast corner of the farrowing building and flowed southeast across the gravel drive. The manure continued to flow east until it reached the waterway to the east of the swine confinement buildings.

45. An Illinois EPA inspector advised the facility to recover the released wastewater and compost material from the drainage channel/waterway and apply it to cropland as soon as possible.

46. On September 25, 2007, at the time of a follow-up inspection, the Illinois EPA inspector collected samples at four locations at the facility. A sample was collected from the wastewater release from the manure pit. The sample was taken from a waterway/drainage channel about 150 yards east of the confinement buildings. The liquid was turbid, light brown in color and odorous. Analytical results of this sample indicate an ammonia level of 54.8 milligrams per liter ("mg/l"); biological oxygen demand of 780 mg/l; total suspended solids of 1130 mg/l and fecal coliform of 5,900,000 per 100 ml. Another sample was taken from a second location at the waterway/drainage channel that received the waste release, 150 yards east of the confinement buildings. The liquid was turbid, light brown in color and odorous. Analytical results of this sample indicate an ammonia level of 934 milligrams per liter ("mg/l"); biological oxygen demand of 8100 mg/l; total suspended solids of 2130 mg/l and fecal coliform of 5,700,000 per 100 ml.

47. At the time of the September 25, 2007 inspection, the Illinois EPA inspector also took samples of discharges that were occurring from building perimeter tiles. A very low flow of clear liquid was discharging from the perimeter tile for the isolation confinement building. The

tile outlet is located about 50 yards north of the isolation building. Analytical results of this sample indicate fecal coliform of 5,400 per 100 ml. A second perimeter tile sample was taken from a perimeter tile serving the facility's gestation building #1. The tile outlet is located north of gestation building #1. Analytical results of this sample indicate fecal coliform of 11,700 per 100 ml.

48. In this count, the discharge was alleged to be to a waterway east of the swine confinement buildings. Despite the Illinois EPA's instructions to recover the released wastewater issued on September 13, 2007, there remained wastewater in the waterway when the Illinois EPA inspector returned on September 25, 2007. At the time of the September 25, 2007 inspection, there were also discharges from perimeter tiles. As alleged in the Amended Complaint, the Lone Hollow facility is located within the watershed of Panther Creek which is tributary to Bronson Creek which is tributary to the LaMoine River.

Count VI

49. The Timberline facility is a breed to farrow operation. The facility maintains approximately 3,000 sows on site.

50. As alleged in the Amended Complaint, on September 11, 2008, the Illinois EPA conducted an inspection of the Timberline facility and at the time of the inspection, the Illinois EPA inspector observed a discharge of leachate from the facility's dead animal composting structure. The purple colored liquid was observed exiting the unroofed composting structure and entering a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek.

51. The allegations included with this count indicate that the leachate from the compost structure was observed to be entering a dry dam that has a surface connection to an unnamed tributary of the West Branch of Sugar Creek. The factual allegations include a specific allegation hydrologic connection to covered waters.

Count VII

52. Prairie State Gilts is a breeding and gestation operation. Approximately 2,500 head of swine weighing over 55 pounds are confined at the facility.

53. As alleged in the Amended Complaint, one of the vertical clean-out pipes was knocked over or mowed over during hay baling operations on the subject hay field between the reception pit and the lagoon. The vertical clean-out pipes were not protected by bollards, fence posts, gates, fencing or other means of marking and protecting the pipes.

54. On July 7, 2008, with the event of a drain pull plug being removed in one of the nursery buildings to release waste, livestock waste entered the reception pit to a level that activated the pumps that transfer the contents of the reception pit to the lagoon. Livestock waste exited the pipeline at the decapitated clean-out pipe rather than at the lagoon, and entered a small unnamed tributary of one of the facility's on-site ponds. The pond is used to provide water for the swine in the fall when it is dry and the on-site well does not yield adequate water.

55. The pond that received the swine waste has a surface area of .5 to .75 acres and during periods of high water discharges into an adjacent pond to the east. The east pond ultimately discharges to an unnamed tributary of Honey Branch.

56. On July 24, 2008, the Illinois EPA conducted an inspection of the Prairie State Gilts site in response to a report of the release. A narrow channel of swine waste was observed entering the north end of the receiving pond. The pond was covered with algae and had a septic odor consistent with that of swine waste. The north end of the pond was observed to have a dark gray/black color and to be turbid. An overflow pipe existed on the site, between the receiving pond and adjacent pond to the east.

57. At the time of the inspection, facility personnel indicated the facility intended to pump down the receiving pond and land apply the contents to wheat ground.

58. On October 29, 2008, the Illinois EPA inspector spoke to facility personnel to determine if the contents of the receiving pond had been land applied. On October 30, 2008, the facility responded that nothing had been pumped from the pond. Facility personnel reiterated the that two ponds were interconnected and periods of heavy or frequent rainfall result in a single pond.

59. The factual allegations included with this count clearly set forth a hydrologic surface connection to covered waters, as well as facts that indicate the facility did not land apply the contents of the receiving pond and thus the discharge waste remained in the system that is connected to covered waters.

Count IX

60. Respondent Little Timber owns a 2600 sow, farrow-to-wean, total confinement swine operation located southeast of Carthage, IL

61. At the time of the June 1, 2004 inspection, the inspector observed dark colored, turbid, odorous leachate and surface runoff draining west from the mortality compost unit at the Little Timber facility. The runoff drains west in a ditch of the gravel access lane, then flows into a north/south waterway. The waterway drains southeast and passes under the gravel road, and is tributary to Middle Creek. At the time of the inspection, there was a significant amount of skeletal remains, bones and other mortality material in the compost structure, and the inspector observed that there were bones, bone fragments and various skeletal remains exterior of the compost building where the back of the building had been damaged. The compost area, at the time of the June 1, 2004 inspection was fenced on three sides and not protected from precipitation.

62. As alleged in the Amended Complaints, at the time of a June 1, 2004 inspection at the facility, the Illinois EPA inspector collected samples from the drainage channel leading from the dead swine compost unit. A sample collected 20 yards downstream from the compost

unit consisted of liquid that was dark colored, very turbid with a strong, offensive, nauseating odor. The analytical results indicated the following parameter levels: ammonia, 1340 mg/l; BOD, 3500 mg/l; TSS, 8550 mg/l; fecal coliform, 130,000 per 100 ml. Another sample was collected from a waterway at a point downstream of the dead swine compost unit. At the location at which the sample was collected, the liquid in the waterway was slightly turbid. The analytical results indicated the following parameter levels: nitrate/nitrite, 33.1 mg/l; fecal coliform, 520 per 100 ml. Another sample was collected from a small, unnamed tributary to Middle Creek. The stream is located southeast of Little Timber and is downstream from the dead swine compost area. The collection point is located on the south side of the gravel road. At the collection location the stream was slightly turbid with a dark color. The analytical results indicated the following parameter levels: BOD, 22 mg/l; TSS, 145 mg/l; fecal coliform, 7,500 per 100 ml.

63. On February 6, 2007 and then again on February 8, 2007, the Respondents reported the release of waste from their wastewater handling structures at the Little Timber facility. The release was caused when an 8-inch inlet line entering the wastewater lagoon froze. Wastewater was discharged from a pipe clean-out into a ditch on the north side of the lagoon. The Respondents constricted the spill with an earthen dike and applied sawdust to the spilled waste. The waste/sawdust slurry was then collected and land applied.

64. On February 21, 2007, the Illinois EPA conducted an inspection in response to the release report. At the time of the inspection, the Illinois EPA inspector observed running water, comprised primarily of snowmelt, along the drainage path north of the lagoon and in the downstream waterway. A brown manure residual was observed in the grass on this drainage path. Also, some snow containing brown frozen wastewater was observed along the path. The Respondents were advised to pump this snow and frozen wastewater into the lagoon. Also, the stormwater runoff, contaminated by the residual, was to be pumped into the lagoon.

65. At the time of the February 21, 2007 inspection, the flow in the drainage ditch located north of the lagoon was brown and slightly turbid. The ditch was discharging into the waterway in the adjacent field. The waterway was overflowing the sawdust dam due to the volume of snowmelt. The inspector observed a swine waste odor coming from the waterway downstream of the release site. A sample was collected from the waterway. The analytical results indicated the following parameter levels: ammonia, 34.5 mg/l; BOD, 120 mg/l; TSS, 104 mg/l.

66. On August 24, 2007, the Illinois EPA conducted an inspection of the Little Timber facility. At the time of the inspection, the Illinois EPA inspector observed that several swine had been burned in a fire near the gravel road at the facility. The inspector observed skulls and various bones of swine in a burn area adjacent to a large stump. Surface water flows through this area and drains to the southeast. This waterway is tributary to Middle Creek which flows into the LaMoine River. Surface water samples were collected.

67. At the time of the August 24, 2007 inspection, the Illinois EPA inspector also observed the mortality compost structure at the site, which was in use. The inspector observed surface runoff draining west from the mortality compost structure.

68. At the time of the August 24, 2007 inspection, the Illinois EPA inspector collected a water sample from the waterway downstream of the dead swine burn site which was directly in the waterway downstream from the compost structure. The sample was collected from a low flow of a slightly turbid, light brown colored liquid with slight foam. The analytical results indicated the following parameter levels: TSS, 50 mg/l; fecal coliform, 20,000 per 100 ml. Another sample was collected directly down gradient from the compost structure. It was liquid collected from runoff from the dead swine compost structure. The liquid was turbid and dark colored. The analytical results indicated the following parameter levels: nitrate/nitrite, 51.2 mg/l; BOD, 17 mg/l; TSS, 33 mg/l; fecal coliform, 68,000 per 100 ml.

69. The factual allegations included in this count clearly set forth the hydrologic connection that was the receiving conveyance and ultimate covered water for the compost structure discharge and the burn pile discharge. The allegations of the count also indicate that the February 2007 spill from the facility's waste handling system continued to flow through a waterway on site. Factual allegations in the complaint include the allegation that surface water flows through the area and drains to the southeast, tributary to Middle Creek which flows into the LaMoine River.

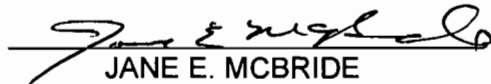
WHEREFORE, for the foregoing reasons and on the foregoing grounds, Complainant respectfully requests the Board deny Respondents' Motion for Partial Dismissal. In the alternative, should the Board find that the Amended Complaint is insufficiently pled with regard to the referenced counts, Complainant respectfully requests leave to amend.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

BY:



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB NO. 10-84
)	(Enforcement)
PROFESSIONAL SWINE)	
MANAGEMENT, LLC, an Illinois)	
limited liability corporation, and)	
HILLTOP VIEW, LLC, an Illinois)	
limited liability corporation, WILDCAT)	
FARMS, LLC, an Illinois limited)	
liability corporation, HIGH-POWER)	
PORK, LLC, an Illinois limited liability)	
corporation, EAGLE POINT FARMS, LLC, an)	
Illinois limited liability corporation,)	
LONE HOLLOW, LLC, an Illinois limited)	
liability corporation, TIMBERLINE, LLC,)	
an Illinois limited liability corporation,)	
PRAIRIE STATE GILTS, LTD, an Illinois)	
corporation, NORTH FORK PORK, LLC, an)	
Illinois limited liability corporation, LITTLE)	
TIMBER, LLC, and Illinois limited liability)	
corporation,)	
Respondents.)	

COMPLAINANT'S RESPONSE TO MOTION TO DISMISS AND/OR STRIKE

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel Lisa Madigan, Attorney General of the State of Illinois, and responds to the Respondent Professional Swine Management's ("Respondent") Motion to Dismiss and/or Strike, as follows:

Introduction

1. Respondent moves that allegations of violation be dismissed or struck based on an assertion that Complainant has failed to plead facts sufficient to constitute violation of Section 12(f) and 35 Ill. Admin. Code § 309.102(a) for all counts, and has also pled a variety of claims asserting the insufficiency of the complaint on other assorted grounds.

**Allegations of Violation of Section 12(f) and 35 Ill. Adm. Code 309.102(a) Concerning
Livestock Waste Runoff
Applicable Law and Argument Regarding**

2. Section 502.101 of the Board's Agriculture Related Pollution Regulations, 35 Ill.

Adm. Code 502.101, provides

No person specified in Sections 502.102, 502.103 or 502.104 or required to have a permit under the conditions of Section 502.106 shall cause or allow the operation of any new livestock management facility or livestock waste-handling facility, or cause or allow the modification of any livestock management facility or livestock waste-handling facility, or cause or allow the operation of any existing livestock management facility of livestock waste-handling facility without a National Pollutant Discharge elimination System ("NPDES") permit. Facility expansions, production increases, and process modifications which significantly increase the amount of livestock waste over the level authorized by the NPDES permit must be reported by submission of a new NPDES application.

3. Section 502.102 of the Board's Agriculture Related Pollution Regulations, 35 Ill.

Adm. Code 502.102, provides:

An NPDES permit shall be required for an animal feeding operation which falls within the criteria set forth in Section 502.103 or Section 502.104 below, provided, however, that no animal feeding operation shall require a permit if it discharges only in the event of a 25-year 24-hour storm event.

4. Section 502.103 of the Board's Agriculture Related Pollution Regulations, 35 Ill.

Adm. Code 502.103, provides

An NPDES permit is required if more than the numbers of animal specified in any of the following categories are confined:

<u>Number of Animals</u>	<u>Kind of Animals</u>
***	***
2,500	Swine weighing over 55 pounds

5. The state regulations are consistent with, and indeed based upon, the federal

regulations.

6. Section 122.23 (b)(2), 40 CFR 122.23(b)(2), states, in pertinent part:
 - (2) Concentrated animal feeding operation (CAFO) means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, . . .
7. Section 122.23(b)(4), 40 CFR 122.23(b)(4), states, in pertinent part:
 - (4) Large concentrated animal feeding operations (Large CAFO). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories: . . . (iv) 2,500 swine each weighing 55 pounds or more . . .
8. Section 122.23 (a), 40 CFR 122.23(a), states, in pertinent part:
 - (a) Permit requirement for CAFOs. Concentrated animal feeding operations, as defined in paragraph (b) of this section, are point sources that require NPDES permits for discharges or potential discharges. Once an operation is defined as a CAFO, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter and process wastewater generated by those animals of the production of those animal, regardless of the type of animal.
9. Section 122.23 (e), 40 CFR 122.23(e), states, in pertinent part:
 - (e) Land application discharges from a CAFO are subject to NPDES requirements. . . .
10. Section 122.23 (f), 40 CFR 122.23(f), states, in pertinent part:
 - (f) . . . In no case may the CAFO be determined to have no potential to discharge if it has had a discharge within the 5 years prior to the date of the request submitted under paragraph (f)(2) of this section.
11. Pursuant to 40 CFR 122.23(f), a facility may take the affirmative step of submitting information, the nature of which is described in detail in the rules, in application for a "determination of no potential to discharge" if it seeks the ability to avoid the requirement to obtain an NPDES permit. Respondent has not pled that it has done so. The Illinois EPA has no record of any such submission from the subject facilities.
12. Section 122.23(f)(5), 40 CFR 122.23(f)(6), states, in pertinent part:

- (5) . . . Any unpermitted CAFO that discharges pollutants into the waters of the United States is in violation of the Clean Water Act even if it has received a no potential to discharge determination from the Director.

13. As is apparent from the above-referenced regulations, the NPDES permit and polluttional discharges are intricately tied together. A permit must be in place if Respondent threatens or indeed causes or allows a discharge to occur. If there is a pollution discharge without a permit in place, it's too late. So, in order to be in compliance with the regulations, a livestock production facility must obtain a permit prior to any threat of discharge or actual discharge occurs.

14. Section 502.103 of the Board's Agriculture Related Pollution Regulations includes no requirement that the Illinois EPA notify the facility that it must get a permit. The regulation simply reads that a facility maintaining a specified number of animals is required to get a permit.

15. Pursuant to applicable regulations, Respondent was under an obligation to obtain a permit before Respondent threatened a discharge or caused or allowed a discharge to occur.

16. Respondent claims that the facilities Respondent manages are subject to the provision of the CAFO rules that allow for a case-by-case evaluation as to whether or not the CAFO "discharges or proposes to discharge". As stated above, the subject facilities have not taken the step necessary to allow that evaluation. From the State's allegations, it is apparent that the State does not agree that these facilities are designed, constructed, operated and maintained so as not to discharge. The facilities have discharged through perimeter tiles, potentially indicating the pits are not sufficiently sealed (representing design and construction problems), they have discharged from waste structures (at two facilities, personnel mowed over clean-out structures ultimately causing a discharge, representing operational and maintenance problems), they have had discharges from composting structures (representing operation,

design and construction problems), and they have had land application discharges (representing operational problems).

17. The NPDES permitting program that is the subject of the instant matter is a federally delegated program that has been implemented under state authority for 40 years.

18. The federal act provides that 'nothing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce . . . (B) any requirement respecting control or abatement of pollution. 33 U.S.C. § 1370. The only qualification is that the states may not enforce limitations or standards which are less stringent than those adopted under federal law. *Peabody Coal Company v. Illinois Pollution Control Board*, 36 Ill.App.3d 5, 11 (5th Dist. 1976)

19. Pursuant to Section 12(f) of the Act, 415 ILCS 5/12(f), a facility is in violation if it threatens to, or causes or allows a discharge to waters of the State, without a permit. Section 12(f) specifically refers, in its general prohibition of a discharge without a permit, to 'waters of the State'.

20. Section 3.550 of the Act, 415 ILCS 5/3.550, provides the following definition:

"WATERS" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

21. With regard to the question as to whether waters of the State must be shown to be navigable waters, the court in the matter of *Tri-County Landfill v. Illinois Pollution Control Board*, 41 Ill. App. 3d 249, 253-254 (2nd Dist. 1976) held:

Tri-County contends that waters on private land are not 'waters of the State'. It argues that before the waters can be waters of the State, they must be shown to be navigable for useful commerce.

The term 'waters of the State' could, in a sense, mean waters belonging to the State. Or it can simply mean waters located within the State. And in determining which meaning should be given to the statutory provision, we should look at the whole Act and the purpose for which it was enacted. *Ford v. Environmental Protection Agency* (1973), 9 Ill.App.3d 711, 292 N.E.2d 540; 34 Illinois Law and Practice, States, §123.

Section 11 of the Act, states that:

- (a) The General Assembly finds:
 - (i) that pollution of the Waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses.' (emphasis added)

It is doubtful that the legislature believed that wildlife is so discriminating that pollution of navigable waters would be harmful to them but pollution of non-navigable waters would not. And certainly stagnant water privately owned may constitute a menace to public health through the breeding of disease. Thus in this sentence the words 'waters of the State' would appear to mean waters located within the State.

That section continues by stating:

- (b) It is the purpose of this Title to restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life, and to assure that no contaminants are discharged 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 source within the State of Illinois, without being given the degree of treatment or control necessary to prevent pollution, or without being made subject to such conditions as are required to achieve and maintain compliance with State and Federal law; and to authorize, empower, and direct the Board and the Agency to adopt such regulations and procedures as will enable the State to secure federal approval to issue NPDES permits pursuant to the provisions of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and federal regulations pursuant thereto.'

Again, it would appear clear that the intent of the legislature was to enact sweeping legislation covering all sources of pollution both public and private. Furthermore, the legislature in this section refers us to the definitions, which are found in section 3, Illinois Revised Statutes, 1973, ch. 111 1/2, par. 1003. Only 'waters' is defined and it is defined to mean

'all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.'

It is interesting to note that the Federal Water Pollution Control Act is equally wide sweeping in its language enjoining the Administrator to prepare or develop comprehensive programs for preventing, reducing or eliminating the pollution of 'the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.'

- 22. The State's policy decisions in its choice of the use of the term "waters of the

State", the statutory definition of that term, as well as the Board's interpretation of the term, are all relevant to the question presented by Respondents' motion in light of the State's ability, pursuant to 33 U.S.C. § 1370, to implement a program that includes additional protections for state waters.

23. As commenters have pointed out (See "Which Way Federalism Under Section 402", Robin Kundis Craig, *Natural Resources & Environmental*, Volume 22, Number 1, Summer 2007, American Bar Association), only one month before it issued its "fractured" opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006), the U.S. Supreme Court decided *S.D. Warren v. Maine Board of Environmental Protection*, 126 S.Ct. 1843 (May 15, 2006) in which the Court unanimously upheld the state's authority "to address the broad range of pollution".

24. Section 12(f) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/12(f), states, in pertinent part:

No person shall:

* * *

- (f) 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.

25. Complainant is certainly cognizant, in its enforcement of Section 12(f) of the Act, that Section 39(b) references "navigable waters".

26. Complainant has pled facts as the basis for allegations of violation of Section

12(f) and 35 Ill. Adm. Code 309.102(a) that show that there had been a discharge from the subject facility to a ditch or waterway that was either a water of the State itself and/or was a conveyance of surface flow to a water of the State and navigable water, that is, the State has pled facts showing hydrologic connections based on observation of surface water connections that would result in the discharge ultimately reaching covered waters. If the Board finds that the State's factual allegations of hydrologic connection are insufficient, Complainant requests that it be allowed leave to amend the Amended Complaint to plead in greater specificity.

27. Courts have held that streams flowing into navigable rivers are waters of the United States. See, e.g., *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir.1974) ("Certainly the Congressional language must be read to apply to our instant case involving pollution of one of the tributaries of a navigable river."); *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F.Supp. 852, 855 (E.D.Pa.1980) (classifying a non-navigable stream as a water of the United States). Courts have even held that streams flowing only intermittently and arroyos that are often dry are covered. See, e.g., *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir.1999) (intermittent stream); *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126, 129-30 (10th Cir.1985) (occasionally-flowing arroyo). These cases are on point, in that they concern Section 402 pollutional discharges.

28. The USEPA/US Army Corp of Engineers Guidance, entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States and Carabell v. United States*", page 12, states:

. . . Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g. swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e. "discernible, confined, and discrete conveyances:), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g. CWA §§ 311 and 402) [citing 33 U.S.C. § 1362(14)]

29. The subject counts pled in the Amended Complaint were pled in a manner consistent with existing case law for point source pollutional discharges to navigable waters that are subject to Section 311 and 402 jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and the State's NPDES permitting program.

Count by Count Response

Count I

30. Pursuant to an Illinois Environmental Protection Agency inspection conducted on June 18, 2007, documented in a report dated August 31, 2007, the Hilltop facility consists of five confinement buildings and a dead animal composting structure. Starting on the west side of the facility and progressing eastward are a breeding/gestation building, a farrowing building, another breeding/gestation building, a grower-finisher building and an isolation nursery. Animals weighing more than 55 pounds are confined in the breeding/gestation buildings (2,600 head each), the farrowing building (1,050 head) and the grower/finisher building (1,550 head) for a total of 7,800 head.

31. As alleged in the Amend Complaint, on May 28, 2009, an Illinois EPA inspector observed runoff containing livestock waste from a land application field associated with the Hilltop swine facility in the north ditch of Meadowlark Lane approximately one-eighth mile west of the Hilltop swine facility. The runoff, as it existed in the ditch at the time of the Illinois EPA's inspector's observation, had the potential to discharge from the ditch into waters of the State in the event of precipitation.

32. As pled in the complaint, the land application discharge was to a ditch that had a surface connection to waters of the State. As the inspector will testify, the livestock waste was in the north road ditch of Meadowlark Lane which drains to an unnamed tributary of the West Branch of Sugar Creek.

Count IV

33. Respondent Eagle Point owns a farrow-to-wean facility with a design capacity of 6,500 sows. Breeding stock, i.e. sows, weigh over 55 pounds. Drainage from the Eagle Point site flows directly through several ravines into final cut strip mine lakes.

34. As alleged in the Amended Complaint, the Illinois EPA inspected the Eagle Point facility on May 10, 2007. At the time of the inspection, there was a discharge from the north gestation building perimeter tile onto the land in a manner in which the discharge drained into a strip mine lake. The discharge was slightly cloudy and had a slight livestock waste odor. Analysis of a sample collected from the discharge indicated a fecal coliform level of 35,000 per 100 milliliters ("ml").

35. At the time of the inspection, the Illinois EPA inspector sampled a discharge from the facility's private sewage disposal system, that being an aerated septic tank that serves the office restrooms and showers. This system discharges through a 4-inch diameter line into a lake located east of the facility structures. At the time of the inspection, the discharge was slightly turbid and had a septic odor. The sample analysis results indicated a fecal coliform level of 56,000 per 100 ml, and ammonia level of 41.8 milligrams per liter ("mg/l"), and a biological oxygen demand level of 48 mg/l.

36. As set forth in the allegations, the perimeter tile discharge was to a drainage formation that flowed into a strip mine lake. The septic tank discharge was through a pipe into a lake.

Count V

37. The Lone Hollow is a farrow to wean facility that maintains a sow herd of 5,650 head.

38. As alleged in the Amended Complaint, on September 13, 2007, a swine manure release occurred at the Lone Hollow facility. On that date, in an attempt to unplug a pit

drainage pipe, liquid was being added to the pit of the farrowing unit in an attempt to correct the plugging problem. The main farrowing building is equipped with an 8-inch diameter pit access/pump out pipe at the southeast corner of the building. The level of wastewater built up within the shallow pit beneath the farrowing building until it reached an outlet at the 8-inch diameter pipe. Liquid swine manure drained out of the 8-inch pipe at the southeast corner of the farrowing building and flowed southeast across the gravel drive. The manure continued to flow east until it reached the waterway to the east of the swine confinement buildings.

39. An Illinois EPA inspector advised the facility to recover the released wastewater and compost material from the drainage channel/waterway and apply it to cropland as soon as possible.

40. On September 25, 2007, at the time of a follow-up inspection, the Illinois EPA inspector collected samples at four locations at the facility. A sample was collected from the wastewater release from the manure pit. The sample was taken from a waterway/drainage channel about 150 yards east of the confinement buildings. The liquid was turbid, light brown in color and odorous. Analytical results of this sample indicate an ammonia level of 54.8 milligrams per liter ("mg/l"); biological oxygen demand of 780 mg/l; total suspended solids of 1130 mg/l and fecal coliform of 5,900,000 per 100 ml. Another sample was taken from a second location at the waterway/drainage channel that received the waste release, 150 yards east of the confinement buildings. The liquid was turbid, light brown in color and odorous. Analytical results of this sample indicate an ammonia level of 934 milligrams per liter ("mg/l"); biological oxygen demand of 8100 mg/l; total suspended solids of 2130 mg/l and fecal coliform of 5,700,000 per 100 ml.

41. At the time of the September 25, 2007 inspection, the Illinois EPA inspector also took samples of discharges that were occurring from building perimeter tiles. A very low flow of clear liquid was discharging from the perimeter tile for the isolation confinement building. The

tile outlet is located about 50 yards north of the isolation building. Analytical results of this sample indicate fecal coliform of 5,400 per 100 ml. A second perimeter tile sample was taken from a perimeter tile serving the facility's gestation building #1. The tile outlet is located north of gestation building #1. Analytical results of this sample indicate fecal coliform of 11,700 per 100 ml.

42. In this count, the discharge was alleged to be to a waterway east of the swine confinement buildings. Despite the Illinois EPA's instructions to recover the released wastewater issued on September 13, 2007, there remained wastewater in the waterway when the Illinois EPA inspector returned on September 25, 2007. At the time of the September 25, 2007 inspection, there were also discharges from perimeter tiles. As alleged in the Amended Complaint, the Lone Hollow facility is located within the watershed of Panther Creek which is tributary to Bronson Creek which is tributary to the LaMoine River.

Count VI

43. The Timberline facility is a breed to farrow operation. The facility maintains approximately 3,000 sows on site.

44. As alleged in the Amended Complaint, on September 11, 2008, the Illinois EPA conducted an inspection of the Timberline facility and at the time of the inspection, the Illinois EPA inspector observed a discharge of leachate from the facility's dead animal composting structure. The purple colored liquid was observed exiting the unroofed composting structure and entering a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek.

45. The allegations included with this count indicate that the leachate from the compost structure was observed to be entering a dry dam that has a surface connection to an unnamed tributary of the West Branch of Sugar Creek. The factual allegations include a specific allegation hydrologic connection to covered waters.

Count VII

46. Prairie State Gilts is a breeding and gestation operation. Approximately 2,500 head of swine weighing over 55 pounds are confined at the facility.

47. As alleged in the Amended Complaint, one of the vertical clean-out pipes was knocked over or mowed over during hay baling operations on the subject hay field between the reception pit and the lagoon. The vertical clean-out pipes were not protected by bollards, fence posts, gates, fencing or other means of marking and protecting the pipes.

48. On July 7, 2008, with the event of a drain pull plug being removed in one of the nursery buildings to release waste, livestock waste entered the reception pit to a level that activated the pumps that transfer the contents of the reception pit to the lagoon. Livestock waste exited the pipeline at the decapitated clean-out pipe rather than at the lagoon, and entered a small unnamed tributary of one of the facility's on-site ponds. The pond is used to provide water for the swine in the fall when it is dry and the on-site well does not yield adequate water.

49. The pond that received the swine waste has a surface area of .5 to .75 acres and during periods of high water discharges into an adjacent pond to the east. The east pond ultimately discharges to an unnamed tributary of Honey Branch.

50. On July 24, 2008, the Illinois EPA conducted an inspection of the Prairie State Gilts site in response to a report of the release. A narrow channel of swine waste was observed entering the north end of the receiving pond. The pond was covered with algae and had a septic odor consistent with that of swine waste. The north end of the pond was observed to have a dark gray/black color and to be turbid. An overflow pipe existed on the site, between the receiving pond and adjacent pond to the east.

51. At the time of the inspection, facility personnel indicated the facility intended to pump down the receiving pond and land apply the contents to wheat ground.

52. On October 29, 2008, the Illinois EPA inspector spoke to facility personnel to determine if the contents of the receiving pond had been land applied. On October 30, 2008, the facility responded that nothing had been pumped from the pond. Facility personnel reiterated the that two ponds were interconnected and periods of heavy or frequent rainfall result in a single pond.

53. The factual allegations included with this count clearly set forth a hydrologic surface connection to covered waters, as well as facts that indicate the facility did not land apply the contents of the receiving pond and thus the discharge waste remained in the system that is connected to covered waters.

Count IX

54. Respondent Little Timber owns a 2600 sow, farrow-to-wean, total confinement swine operation located southeast of Carthage, IL

55. At the time of the June 1, 2004 inspection, the inspector observed dark colored, turbid, odorous leachate and surface runoff draining west from the mortality compost unit at the Little Timber facility. The runoff drains west in a ditch of the gravel access lane, then flows into a north/south waterway. The waterway drains southeast and passes under the gravel road, and is tributary to Middle Creek. At the time of the inspection, there was a significant amount of skeletal remains, bones and other mortality material in the compost structure, and the inspector observed that there were bones, bone fragments and various skeletal remains exterior of the compost building where the back of the building had been damaged. The compost area, at the time of the June 1, 2004 inspection was fenced on three sides and not protected from precipitation.

56. As alleged in the Amended Complaints, at the time of a June 1, 2004 inspection at the facility, the Illinois EPA inspector collected samples from the drainage channel leading from the dead swine compost unit. A sample collected 20 yards downstream from the compost

unit consisted of liquid that was dark colored, very turbid with a strong, offensive, nauseating odor. The analytical results indicated the following parameter levels: ammonia, 1340 mg/l; BOD, 3500 mg/l; TSS, 8550 mg/l; fecal coliform, 130,000 per 100 ml. Another sample was collected from a waterway at a point downstream of the dead swine compost unit. At the location at which the sample was collected, the liquid in the waterway was slightly turbid. The analytical results indicated the following parameter levels: nitrate/nitrite, 33.1 mg/l; fecal coliform, 520 per 100 ml. Another sample was collected from a small, unnamed tributary to Middle Creek. The stream is located southeast of Little Timber and is downstream from the dead swine compost area. The collection point is located on the south side of the gravel road. At the collection location the stream was slightly turbid with a dark color. The analytical results indicated the following parameter levels: BOD, 22 mg/l; TSS, 145 mg/l; fecal coliform, 7,500 per 100 ml.

57. On February 6, 2007 and then again on February 8, 2007, the Respondents reported the release of waste from their wastewater handling structures at the Little Timber facility. The release was caused when an 8-inch inlet line entering the wastewater lagoon froze. Wastewater was discharged from a pipe clean-out into a ditch on the north side of the lagoon. The Respondents constricted the spill with an earthen dike and applied sawdust to the spilled waste. The waste/sawdust slurry was then collected and land applied.

58. On February 21, 2007, the Illinois EPA conducted an inspection in response to the release report. At the time of the inspection, the Illinois EPA inspector observed running water, comprised primarily of snowmelt, along the drainage path north of the lagoon and in the downstream waterway. A brown manure residual was observed in the grass on this drainage path. Also, some snow containing brown frozen wastewater was observed along the path. The Respondents were advised to pump this snow and frozen wastewater into the lagoon. Also, the stormwater runoff, contaminated by the residual, was to be pumped into the lagoon.

59. At the time of the February 21, 2007 inspection, the flow in the drainage ditch located north of the lagoon was brown and slightly turbid. The ditch was discharging into the waterway in the adjacent field. The waterway was overflowing the sawdust dam due to the volume of snowmelt. The inspector observed a swine waste odor coming from the waterway downstream of the release site. A sample was collected from the waterway. The analytical results indicated the following parameter levels: ammonia, 34.5 mg/l; BOD, 120 mg/l; TSS, 104 mg/l.

60. On August 24, 2007, the Illinois EPA conducted an inspection of the Little Timber facility. At the time of the inspection, the Illinois EPA inspector observed that several swine had been burned in a fire near the gravel road at the facility. The inspector observed skulls and various bones of swine in a burn area adjacent to a large stump. Surface water flows through this area and drains to the southeast. This waterway is tributary to Middle Creek which flows into the LaMoine River. Surface water samples were collected.

61. At the time of the August 24, 2007 inspection, the Illinois EPA inspector also observed the mortality compost structure at the site, which was in use. The inspector observed surface runoff draining west from the mortality compost structure.

62. At the time of the August 24, 2007 inspection, the Illinois EPA inspector collected a water sample from the waterway downstream of the dead swine burn site which was directly in the waterway downstream from the compost structure. The sample was collected from a low flow of a slightly turbid, light brown colored liquid with slight foam. The analytical results indicated the following parameter levels: TSS, 50 mg/l; fecal coliform, 20,000 per 100 ml. Another sample was collected directly down gradient from the compost structure. It was liquid collected from runoff from the dead swine compost structure. The liquid was turbid and dark colored. The analytical results indicated the following parameter levels: nitrate/nitrite, 51.2 mg/l; BOD, 17 mg/l; TSS, 33 mg/l; fecal coliform, 68,000 per 100 ml.

63. The factual allegations included in this count clearly set forth the hydrologic connection that was the receiving conveyance and ultimate covered water for the compost structure discharge and the burn pile discharge. The allegations of the count also indicate that the February 2007 spill from the facility's waste handling system continued to flow through a waterway on site. Factual allegations in the complaint include the allegation that surface water flows through the area and drains to the southeast, tributary to Middle Creek which flows into the LaMoine River.

Count I Stormwater Violations

Applicable Law and Argument

64. The storm water NPDES permit, by law, was to be in place and in effect at the instance water pollution was threatened. Water pollution was threatened because of the Respondent's failure to implement proper controls. In that in this matter the permit was not in place, an initial violation occurred and was ongoing until the Respondent finally obtained a permit. The issuance of the permit does not cure violations that occurred and were ongoing since the initial instance of a threat of a, or incidence of an actual, pollutional discharge.

65. The NPDES permit and pollutional discharges are intricately tied together in the regulation of storm water. A permit must be in place if the Respondent threatens or indeed causes or allows a discharge to occur. If there is a pollution discharge without a permit in place, it's too late. The violation has occurred and the violation of a threat of discharge or actual discharge will continue to occur until proper controls are put in place to avoid and stop discharges and a permit is obtained. So, in order to be in compliance with the regulations, a developer must have submitted a plan, and obtain a permit prior to any threat of discharge occurring. In essence, any developer of a construction site, as that term is defined in the regulations, should have a plan and permit in place at the time of construction to ensure

compliance with the law.

66. In the instant action, the means of correcting violations at the site were the same as obtaining a permit, that being, submit a plan, obtain a permit, conduct required inspections and implement controls that will address and eliminate the threat of or cause of pollutorial discharges. It was not one in the same as the facts played out in this case, because the Respondent failed to timely get the permit, and also failed to bring the site into compliance once it obtained the permit.

67. Pursuant to applicable regulations, Respondent was under an obligation to obtain a permit and develop and implement a storm water construction pollution prevention plan before Respondent started construction at the site and threatened a discharge. Further, it was obligated to have the permit in place, implement the plan and conduct storm water inspections during construction. Further, as alleged in the complaint, even after the Respondent finally obtained the permit, it continued to fail to properly implement storm water controls. The permit is not a license to pollute. Compliance with permit requirements is a vehicle to avoid polluting. The fact the Respondent failed to properly implement controls, in fact, resulted in the Respondent causing and allowing pollutorial discharges as evidenced by the eroded channel, and thus violate the State's water pollution provision. The Respondent's continuing failure to institute proper controls after it obtained the permit, resulted in additional permit violations.

68. The federal Clean Water Act regulates the discharge of pollutants from a point source into navigable waters and prohibits such point source discharges without an NPDES permit. The United States Environmental Protection Agency ("USEPA") administers the NPDES program in each State unless the USEPA has delegated authority to do so to that State. The USEPA has authorized the State of Illinois to issue NPDES permits through the Illinois EPA in compliance with federal regulations, including 40 CFR 122.26.

69. Storm water discharges are regulated by 40 CFR 122.26, which requires a person to obtain an NPDES permit and to implement a storm water pollution prevention plan for construction activity including clearing, grading and excavation:

(a) Permit requirement.

(1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

* * *

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

* * *

(4) Discharges through large and medium municipal separate storm sewer systems. . . .

* * *

(9) (I) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

* * *

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

* * *

(b) Definitions.

* * *

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. . . . The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

* * *

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of

development or sale if the larger common plan will ultimately disturb five acres or more;

* * *

- (15) Storm water discharge associated with small construction activity means the discharge of storm water from:
- (l) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres.

* * *

70. Prior to March 2003, the above-referenced 40 CFR 122.26(b)(15) did not exist in the regulations. Paragraph 14(x) of the regulation governed construction sites. In March 2003, Phase II of the storm water regulations went into effect and paragraph 15 was added to the regulations. Thus, after March 2003, sites of 1 acre in size and larger were subject to regulation.

71. The violations alleged in the instant matter occurred in 2006.

72. Contrary to Respondent's assertion that Complainant failed to specifically allege the basis for the stormwater violation at the time of the November 16, 2006 inspection, in paragraph 14 Complainant alleged that additional silt fences were needed in two areas and that some of the existing silt fencing needed to be reset. The factual allegations contained in this count clearly set forth the dates, location, and nature of the violations.

73. Respondent contends that the significance of the allegation of an eroded channel is not apparent. Complainant certainly can plead with more specificity, but the very definition of eroded would indicate that the channel was the result of the wearing away of the land by flowing water. Webster's New World Dictionary, Second College Edition, provides the following definition: "to form by wearing away gradually, the running water *eroded* a gully."

74. Given the law pertinent to stormwater NPDES requirements, Complainant has met the pleading requirements of Section 103.204 (c) of the Board's regulations, 35 Ill. Adm. Code 103.204 (c).

Assertion regarding Count II and III NPDES violation allegations

75. Respondent Wildcat owns a swine farrowing and gestation facility with a design capacity of 6,000 sows. Respondent High-Power owns a swine farrowing and gestation facility with a design capacity of 6,000 sows .

76. As such, given the number of animals 55 pounds and heavier maintained at the facilities, Wildcat and High-Power were under an obligation to obtain an NPDES permit. The fact that they did not, and a discharge occurred, serves as the factual basis for the Complainant's allegation of violation of Section 12(f).

Assertion regarding Count IV NPDES permit allegation and septic system

77. Respondent's assertion that the septic discharge is covered by Illinois Department of Public Health regulations, and is not subject to NPDES permit coverage, is in the nature of an affirmative defense and is not appropriately the basis for a motion attacking the pleadings.

Respondent's Assertion regarding Count V Livestock Waste Discharge Allegations

78. Respondent's assertion that Complainant's livestock waste allegations do not meet the requirements of 35 Ill. Adm. Code 103.204(c) are completely without merit.

79. The factual allegations include analytical results for both the wastewater release discharges and the perimeter tile discharge. The allegations include a description of the location, the date, and the nature of the violations.

Respondent's Assertions Concerning VIII NPDES allegations

80. As alleged in the Complaint, Respondent North Fork Pork owns a 6920 sow,

farrow to wean, total confinement swine facility located in St. Albans Township (Section 8), just south of the intersection of 450N and 1400E, approximately 3 miles west of West Point, Hancock County, IL ("North Fork facility" or "North Fork site"). According to North Fork's NPDES application, submitted in 2004, there are a total of 8200 hogs greater than 55 pounds maintained at this facility, and 7700 under 55 pounds.

81. As such, given the number of animals 55 pounds and heavier maintained at the facility, North Fork was under an obligation to obtain an NPDES permit. The fact that it did not, and a discharge occurred, serves as the factual basis for the Complainant's allegation of violation of Section 12(f).

82. Respondent's assertion that its NPDES application prevents the Complainant from asserting a NPDES violation for a discharge after the date of the application, is in the nature of an affirmative defense.

83. A close reading of Section 12(f) will reveal that violation of any condition of the permit is also a violation of Section 12(f).

**Respondent's Assertion Concerning Complainant's Allegation of Groundwater
Impairment**

84. Complainant has alleged increasing levels of nitrate in the groundwater immediately downgradient of the Little Timber lagoon and has alleged the groundwater classification to be Class I. The nitrate standard for Class 1 is 10 mg/l. The trend that has been described in the Amended Complaint sufficiently supports an allegation of the threat of impairment of the groundwater resource.

WHEREFORE, for the foregoing reasons and on the foregoing grounds, Complainant respectfully requests the Board deny Respondent's Motion to Dismiss and/or Strike. In the

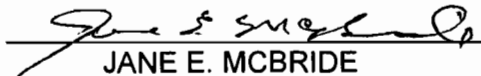
alternative, should the Board find that the Amended Complaint is insufficiently pled with regard to any alleged violation, Complainant respectfully requests leave to amend.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

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