

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 Service List

PLEASE TAKE NOTICE that on October 1, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a CERTIFICATE OF SERVICE and SUPPLEMENTAL FILING TO COMPLAINANT'S RESPONSE TO MOTION TO DISMISS AND/OR STRIKE copies of which are attached hereto and herewith served upon you.

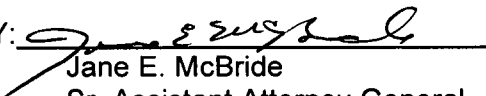
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

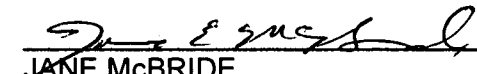
MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

Environmental Bureau
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BY: 
Jane E. McBride
Sr. Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I did on October 1, 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 and SUPPLEMENTAL FILING TO 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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qualifies as "agricultural stormwater", as that term is utilized in federal concentrated animal feeding operation ("CAFO") National Pollution Discharge Elimination System ("NPDES") permit and program requirements.

2. Respondent's claim fails, because, (1) the federal exemption is applicable only to precipitation related discharges; neither the documentation contained in the State's inspection reports nor do the assertions made by Respondent give any indication that the application event was impacted by precipitation; and (2) the Respondent fails to assert whether the Hilltop View facility, at the time of the alleged violation, had completed and implemented a comprehensive nutrient management plan consistent with the NPDES program requirements and, in turn, that this application event was conducted in compliance with that plan in a manner sufficient to meet the requirements of the exemption.

3. The following description of the use of "agricultural stormwater" in the federal statute and rules exists in the case of *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, at 506-507 (2nd Circ, 2005). The "Environmental Petitioners" in that case contended that the "agricultural stormwater" exemption violated the Clean Water Act and was otherwise arbitrary and capricious in violation of the Administrative Procedure Act because the Clean Water Act's definition of "point source" requires regulation of all CAFO discharges. The Court correctly pointed out that the term is applied only to discharges from land application areas under the control of a CAFO:

As stated in the background section, *supra*, the CAFO Rule generally provides that discharges from a land application area under the control of a CAFO are subject to NPDES requirements. See 40 C.F.R. § 122.23(e). However, the Rule, like the Clean Water Act itself, carves out an exception where the discharge in question is "an agricultural storm water discharge," *id.* - a category of discharges that the Act exempts from regulation via the statutory definition of "point source." See 33 USC § 1362(14). More specifically, the Rule classifies, as agricultural stormwater, any "precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO" where the "manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure

appropriate agricultural utilization.” 40 C.F.R. § 122.23(e).

4. The federal Clean Water Act defines the term “point source” as follows:

“Point source” means any discernible, confined, and discrete conveyance, including but not limited to 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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

5. The definition of land application discharges included in the CAFO Rule, 40

C.F.R. 122.23(e), states as follows:

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi-ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

6. Regulations found at 40 C.F.R. § 122.42(e)(1)(vi-ix) include requirements that any NPDES permit issued to a CAFO must include the development and implementation of a comprehensive nutrient management plan.

7. The Court held as follows in the *Waterkeeper* case:

... Contrary to the views of the Environmental Petitioners, we find that [33 U.S.C. § 1362(14)] is self-evidently ambiguous as to whether CAFO discharges can ever constitute agricultural stormwater. Here, the Act expressly defines the term point source to include “concentrated animal feeding operations;” The Act expressly defines “point source” to exclude “agricultural stormwater;” and the Act makes absolutely no attempt to reconcile the two. Congress has not addressed the precise issue the Environmental Petitioners put before us, and, as a result, the operative question we must consider becomes pursuant to *Chevron*, whether the CAFO Rule’s exemption for “precipitation-related” land application

discharges is ground in a "permissible construction" of the Clean Water Act. *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843, 104 S. Ct., 2778, 81 L.Ed.2d 694 (1984).

The EPA reads the Act's definition of "point source" as generally authorizing the regulation of CAFO discharges, but exempting such discharges from regulation to the extent that they constitute agricultural stormwater. We think this is a reasonable construction in light of the legislative purpose of the agricultural stormwater exemption and given precedent from this circuit. With respect to legislative purpose, we believe it reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean water Act, it was affirming the impropriety of imposing, on "any person," liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather – even when those discharges came from what would otherwise be point source. There is no authoritative legislative history to the contrary. . . .

Precedent from this circuit also supports the construction that the EPA advances and we here permit. In *Concerned Area Residents for the Environment v. Southview Farm*, this Court considered the agricultural stormwater exemption and its statutory relationship to point source discharges, specifically CAFO discharges, 34 F.3d 114(2nd Cir. 1994). The essence of the Court's holding was not, as Environmental Petitioner's contend, that discharge from an area under the control of a CAFO can never qualify for the agricultural stormwater exemption. Rather, the Court held that a discharge from an area under the control of a CAFO can be considered either a CAFO discharge that is subject to regulation or an agricultural stormwater discharge that is not subject to regulation. Whether or not a discharge is regulable (sic) turned, in the Court's view, on the primary cause of the discharge. That is why the Court wrote that a discharge could be regulated, and liability imposed, where "the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as "stormwater." *Id* at 121.

We believe that the CAFO Rule comports both with Congress' intent in enacting the agricultural stormwater exemption and with our holding in *Southview Farm*. So far as Congress' intent is concerned, while the Rule holds CAFOs liable for most land application discharges, it prevents CAFOs from being held liable for "precipitation-related discharge[s]" where "manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R § 122.23(e). In other words, like the Clean Water Act itself, the CAFO Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges. So far as our holding in *Southview Farm* is concerned, discharges from land areas under the control of a CAFO can and should generally be regulated, but where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of "precipitation."

. . . Additionally, we note again that the CAFO Rule classifies precipitation-related discharges as agricultural stormwater only where CAFOs have otherwise applied "manure, litter or process wastewater . . . in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e)(emphasis added).

399 F.3d at 507-509.

8. In the *Southview* case, the court upheld the jury's finding that two instances of discharge from land application fields were regulated discharges and not exempt agriculture stormwater discharges. The court's review follows:

"We think the real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation. Of course, all discharges eventually mix with precipitation run-off in ditches or streams or navigable waters so the fact that the discharge might have been mixed with run-off cannot be determinative. Accordingly, we must uphold the verdict to the extent that the jury had a reasonable basis for find that the discharges on September 29, 1990 and April 15, 1991, were not the result of rain, but rather simply occurred on days when it rained. . . .

As to the September 26 discharge, Karcheski testified that, "after a rain[] and manure had been applied on the field, [the manure] was literally running off everywhere up and down those field-type areas." Karcheski Testimony at 14-15. Similarly, Bly testified that he "could see the manure flowing, the tracks made by the equipment flowing off the end of the field where there was severe erosion. Bly Testimony at 16. The New York State Department of Environmental Conservation Report ("D.E.C. Report"), reprinted in Joint Appendix at 227, while indicating that the run-off was attributed to "heavy rain," also points out that the "[f]ields have been saturated with liquid manure and farm continues to spread in same area." Sally Hunt, a witness who is not a party but who lives near the Karcheskis, testified that Southview Farms had spread the manure which "had pooled in the corner of their field right next to our property – larger than I had seen before, and it had been pooled there, and then it rained . . . Then it drizzled into the ditch and through the drainage pipe." (Transcript of 5/5/93 at 4). We think the jury could properly find that the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as "stormwater."

As to the April 15, 1991, discharge, Karcheski testified that there was "a lot of manure [was] coming off the field through the areas where the banks had fallen away and . . . tractors had come in and out, and they leave culverts or furrows and that, There was primarily in the bottom it had a lot of manure coming off." Karcheski Testimony at 20. Bly testified that, on April 14, 1989, he "observed heavy manure applications, once again, to this field" and "brown" "water runoff flowing off the filed towards the fencepost." Bly Testimony at 28, 39.

Photographs were received in evidence, and, based upon these photographs and Bly's testimony, the jury could have found a discharge unaffected by rain "on or about April 15, 1991." Similarly, as to the April 15 incident, the D.E.C. Report, reprinted in Joint Appendix at 226, while attributing the incident to rain, noted that there was "[e]xtra heavy application of manure in fields" and a "heavy cover of liquid manure."

34 F.3d at 121.

WHEREFORE, with the addition of 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
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