

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ORIGINAL

PEOPLE OF THE STATE OF ILLINOIS,)
 Petitioner,)
 vs.)
 PROFESSIONAL SWINE MANAGEMENT,)
 LLC; HILLTOP VIEW, LLC; WILDCAT FARMS,)
 LLC; HIGH-POWER PORK, LLC; EAGLE)
 POINT, LLC; LONE HOLLOW, LLC;)
 TIMBERLINE, LLC; PRAIRIE STATE GILTS,)
 LTD; NORTH FORK PORK, LLC; LITTLE)
 TIMBER, LLC; and TWIN VALLEY PUMPING,)
 INC.,)
 Respondents.)

PCB No. 2010-084
(Enforcement)

RECEIVED
CLERK'S OFFICE
OCT 21 2010
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

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

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 21st day of October, 2010.

ORIGINAL

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

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Joel A. Benoit

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PEOPLE OF THE STATE OF ILLINOIS,)
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REPLY TO COMPLAINANT'S RESPONSE
TO MOTION TO DISMISS AND/OR STRIKE

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

I. Background

The First Amended Complaint consists of nine counts. Each count concerns a separate hog farm. Each count alleges that the farm and its manager, Respondent PSM, violated laws designed to protect against water pollution.

Respondent PSM filed a Motion to Dismiss and/or Strike ("PSM's Motion"). Several of the Farm Respondents filed a Motion for Partial Dismissal ("Farms' Motion"). In response to Respondent PSM's Motion, Complainant filed a Response to Motion to Dismiss and/or Strike ("Response 1") and a Supplemental Filing to Complainant's Response to Motion to Dismiss and/or Strike ("Supplemental Filing"). In response to the Farms' Motion, Complainant filed

Complainant's Response To Respondents' Motion for Partial Dismissal ("Response 2").

The primary argument raised in the Farms' Motion is that the Section 12(f) charges and the 35 Ill. Admin. Code 309.102(a) charges should be dismissed because the Amended Complaint failed to contain allegations that the discharges were to navigable waters of the United States. Absent such allegations, CWA NPDES permits were not required for the discharges, and, accordingly, violations of neither Section 12(f) nor 35 Ill. Admin. Code 309.102(a) have been properly pled. This argument similarly warrants the dismissal of all Section 12(f) and Section 309.102(a) charges against Respondent PSM concerning livestock waste.

Complainant's Response 1 addresses the navigable waters issue. (Response 1, pp. 8-9). Respondent PSM addresses the navigable waters issue in Section II (below).

Additionally, this Reply addresses Complainant's arguments set forth in its Response 1 and in its Supplemental Filing in opposition to Respondent PSM's requests that certain allegations be stricken and certain charges be dismissed.

II. The Amended Complaint's allegations do not establish that Respondent PSM was required to have CWA NPDES permits prior to or at the time of the alleged discharges and, therefore, all Section 12(f) and 35 Ill. Admin. Code 309.102(a) violations should be dismissed.

Each Count of the Amended Complaint alleges that Respondent PSM violated the Illinois Illinois Environmental Protection Act and Board regulations concerning NPDES permits in regard to alleged discharges of livestock wastes. Count I alleges that by causing or allowing the discharge of livestock waste runoff from a land application field into a roadside ditch in such a manner as to threaten water pollution, Respondent PSM violated Section 12(f) and 35 Ill. Adm. Code 309.102(a). (Count I, para. 25). The remaining counts in the Amended Complaint each

allege that Respondent PSM violated Section 12(f) of the Act and 35 Ill. Adm. Code 309.102(a) by causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit. (Count 2, para. 24; Count III, para. 22; Count IV, para. 20; Count V, para. 22; Count VI, para. 22; Count VII, para. 27; Count VIII, para. 23; Count IX, para. 33).

In part, Section 12(f) provides:

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

No permit shall be required under this subsection and under Section 39(b) of this Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act, as now or hereafter amended, and regulations pursuant thereto.

415 ILCS 5/12(f).

Subpart A of Part 39 of the Board's regulations governing NPDES permits states, at Section 309.102(a): "Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful." Section 309.101(a) states that Subpart A "regulates discharges into navigable waters as defined by the CWA."

Thus, in order for a person to violate either Section 12(f) or Section 309.102(a), that person must have been obligated under the CWA to obtain an NPDES permit before the discharge occurred.

The Clean Water Act did not require any of the Respondents to have NPDES permits simply because they owned or managed a farm. (PSM's Motion, p. 5; Farms' Motion, pp. 5-6).

The Complainant, however, argues that even if the Clean Water Act did not require Respondents to have NPDES permits, it can enforce Illinois' more stringent water regulations which purportedly did require Respondents to have NPDES permits prior to the alleged discharges at issue. (Response 1, p. 5).

Complainant's Response states that, due to the size and number of swine kept on the farms as alleged in the Amended Complaint, pursuant to the Board's Agriculture Related Pollution Regulations, Section 502.102, the Respondents were required to have NPDES permits. Thus, and using only Count VIII as illustrative of this argument of Complainant, Complainant states that as Count VIII alleges that the North Fork Pork farm confined over 2,500 swine weighing over 55 pounds at its farm, an NPDES permit was required which was not obtained, a discharge occurred, and this is the factual basis for the Complainant's allegation of a violation of Section 12(f). (Response 1, p. 22, para. 81). However, since Complainant failed to include these factual allegations in each count, the Amended Complaint fails to state a cause of action for such violation, and must be dismissed.

Even if Complainant had included these facts in each count, however, Complainant's argument would fail because it ignores the Board's Agriculture Related Pollution Regulations which state that no animal feeding operation shall require an NPDES permit if it is designed to discharge only in the event of a 25-year 24-hour storm event. 35 Ill. Adm. Code 502.102 and 502.106(e). This is a specific exception to the regulation now relied upon by Complainant.

The Amended Complaint does not allege whether the farms were or were not designed to

discharge only in the event of a 25-year 24-hour storm event. Thus, it contains insufficient factual allegations to support Complainant's claim set forth in Response 1 that the farms were required to have NPDES permits under Illinois law at the time of the alleged discharges and, accordingly, insufficient factual allegations to support what Complainant now states is the factual basis for the alleged violations of Section 12(f).

The Complainant cannot simply conclude that Respondent PSM was required to have a permit and failed to obtain one, but not support its conclusion with allegations of specific facts in the Amended Complaint. LaSalle National Trust, N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557 (2nd Dist. 1993). To set forth a good and sufficient claim, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action. In determining the sufficiency of any claim, conclusions of fact that are not supported by allegations of specific fact should be disregarded. Richco Plastic Co., 288 Ill. App. 3d 782, 784-85 (1st Dist. 1997). Thus, if the Complainant wants to claim that Respondent PSM was required by Section 502.102 to obtain an NPDES Permit, then it must set forth how it is that Respondent PSM meets the requirements of those described in that rule who are required to obtain a permit, including allegations that Respondent PSM does not qualify for any of the exemptions.

However, even if the Complainant were to so amend its Complaint, Complainant still could not plead a violation of Section 12(f) or of Section 309.102(a) because they are only violated if an NPDES permit required by the CWA is not obtained. Alleging that Respondents did not obtain a permit required by Section 502.102 is insufficient.

Each Section 12(f) charge and each 309.101(a) charge, accordingly, should be dismissed for failure to properly plead an alleged violation. There are no factual allegations in the

Amended Complaint supporting the assertion that Respondent PSM was required to have CWA NPDES permits. And, all allegations that Respondent PSM failed to apply for CWA NPDES permits should be stricken as no allegations support the suggestion that Respondent PSM was required to apply for CWA NPDES permits.

Unsurprisingly, persons not required to obtain permits generally do not seek to obtain permits. Respondent PSM respectfully requests the Board to consider the fundamental unfairness of holding someone liable under Section 12(f) for doing anything without a permit they were not required to have in the first place. Holding persons liable under such circumstances will not tend to cause others similarly situated to act differently. Finding a person liable under Section 12(f) and Section 309.101(a) under such circumstances serves no purpose, then, other than perhaps to increase the total amount of the penalty imposed for the same underlying act.

In the present case, the factual allegations in the Amended Complaint do not establish that Respondent PSM was required to obtain a CWA NPDES permit prior to or at the time of the alleged discharges.

Before a CWA NPDES permit is required for a discharge, the discharge at issue must be into navigable waters, as defined in the Federal Water Pollution Control Act. The Federal Water Pollution Control Act (a/k/a Clean Water Act) defines navigable waters as “waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7). Navigable waters have been held to include waters that are “navigable in fact” or readily susceptible of being rendered so, wetlands that abut on traditional navigable waters, and permanently flowing streams connected to navigable waters. Rapanos v. United States, 547 U.S. 715, 723, 725, 732 n. 5 (2006). On the

other hand, non-navigable, isolated, intrastate waters, such as ponds, that do not actually abut a navigable waterway, are not waters of the United States, id. at 726, nor are swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) or ditches (including roadside ditches). See USEPA/Army Corps of Engineers publication, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States”(December 02, 2008). Somewhere in between are wetlands that do not contain and are not adjacent to waters that are navigable in fact and intermittent streams. As set forth in the Farms’ Motion at page 5, currently, whether these waters are waters of the United States turns upon whether they have a significant nexus to waters that are navigable in fact.

“[J]urisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense....wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’” Rapanos, 547 U.S. at 779; United States v. Lippold, 2007 U.S. Dist. LEXIS 80513 (October 30, 2007)(intermittent streams); See USEPA/Arm Corps of Engineers publication, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States (December 02, 2008)(significant nexus test government employs to wetlands and intermittent streams to assess its jurisdiction).

Complainant contends that it is sufficient if a hydrologic connection is alleged between the discharge area and a covered water. See Response, p. 12, para. 45. A mere hydrologic connection does not suffice, however, as the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood. Rapanos, 547 U.S. at 784-785 (Kennedy, concurring).

All counts in the Amended Complaint fail to contain factual allegations establishing that the discharge complained of is into a navigable water of the United States. Indeed, many allegations in the Amended Complaint strongly suggest that the waters at issue is not a navigable water of the United States. See, e.g., Count I (ditch), Count IV (strip mine lake), Count V (field), Count VII (pond), and Count VIII (pond) . Absent these critical allegations concerning navigable waters, there is nothing to support the requisite element that a CWA NPDES permit was required for the discharge. And, again, if a permit was not required, there can be no violation of Section 12(f) or Section 309.102(a).

WHEREFORE, all alleged violations of Section 12(f) and Section 309.101(a) concerning livestock waste should be dismissed and all allegations concerning Respondent PSM not seeking to obtain a CWA NPDES permit should be stricken.

III. Reply regarding specific charges.

A. Count I/Hilltop View: Construction Activities/NPDES storm water permit.

The grounds for dismissal of the NPDES/construction activity claims are set forth in PSM's Motion at pages 6-7. The Complainant's arguments in opposition to dismissal are set forth in Response 1 at pages 17-21. Respondent PSM is not contending that an NPDES storm water permit was not required. The parties disagree, however, as to whether the allegations are

sufficient to meet the standards of 35 Ill. Admin. Code 103.204(c). Even if they were, however, the claims cannot withstand dismissal because Section 12(f) and Section 309.102(a) are concerned with point source discharges, and construction activity resulting in runoff from facilities is a nonpoint source of pollutants. (PSM's Motion, p. 7). Further, the Section 309.102(a) claim must be dismissed because there is no allegation of any discharge into a water of the State or a well. (PSM Motion, p. 7).

B. Count I/Hilltop View: Livestock waste/NPDES permit.

The grounds for dismissal of this livestock waste claim are set forth in PSM's Motion at pages 7-8. Complainant's arguments are set forth in Response 1 at page 9 and in its Supplemental Filing. Additionally, the absence of an allegation of a discharge to a navigable water of the United States also supports dismissal of the Section 2(f) and Section 309.102(a) charges. See Section II (above).

The Section 309.102(a) violation is also subject to dismissal because there is no allegation of an actual discharge into waters of the State or into a well. (PSM's Motion, p. 8). Complainant does not address this point.

C. Count II/Wildcat Farms: Livestock waste/NPDES permit.

Section II (above) explains why the allegation regarding the failure to apply for a CWA NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

D. Count III/High-Power Power: Livestock waste/NPDES permit.

Section II (above) explains why the allegation regarding the failure to apply for a CWA

NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

E. Count IV/Eagle Point Farms: Livestock waste/Septic system/NPDES

Count IV concerns the discharge from a building perimeter tile onto the ground, from which the discharge drained into a strip mine lake. (Count IV, para. 13). Count IV also concerns a discharge from a septic system into a lake. Because Count IV contains no allegations that these lakes are navigable waters of the United States, for the reasons set forth in Section II (above), the allegation regarding the failure to apply for a CWA NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

Respondent PSM also sought dismissal of the charges concerning the septic system on the ground that the Illinois Department of Public Health governs septic systems. (PSM Motion's, p. 9). Complainant contends that this is not a ground for dismissal, but is instead an affirmative defense. (Response 1, p. 21). Jurisdictional defenses are not affirmative defenses. 735 ILCS 5/2-619(1) and 5/2-613(c) & (d).

F. Count V/Lone Hollow: Livestock waste/NPDES permit.

The grounds for the dismissal of Count V are set forth in PSM's Motion at pages 10-11. Complainant's arguments in opposition are set forth in Response 1 at page 21. Section II (above) provides further explanation as to why the allegation regarding the failure to apply for a CWA NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

G. Count VI/Timberline: Livestock waste/NPDES permit.

The grounds for dismissal of these claims are set forth in PSM's Motion at pages 11-12. Complainant's arguments in opposition are set forth in Response 1 at page 12. Section II (above) provides further explanation as to why the allegation regarding the failure to apply for a CWA NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

H. Count VII/Prairie State Gilts: Livestock waste/NPDES permit.

Section II (above) explains why the allegation regarding the failure to apply for a CWA NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

I. Count VIII/North Fork Pork: Livestock waste/NPDES permit.

The grounds for dismissal of these claims are set forth in PSM's Motion at pages 12-13. Complainant's arguments are set forth in Response 1 at pages 21-22. Section II (above) provides further explanation as to why the allegation regarding the failure to apply for a CWA NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

J. Count IX/Little Timber: Livestock waste/NPDES/groundwater.

Respondent PSM's arguments concerning Count IX are set forth in the PSM Motion at pages 13-14. Complainant's arguments are set forth in Response 1 at pages 14-17 and 22. Section II (above) provides further explanation as to why the allegation regarding the failure to apply for a CWA NPDES permit should be stricken and the Section 12(f) and Section 309.102(a) charges dismissed.

In regard to the groundwater charge, the Complainant argues that the increasing nitrate

trend described in Count IX sufficiently supports an allegation of the threat of impairment of the groundwater resource. (Response 1, p. 22). Allegations of a threat of an impairment, however, do not establish a violation of Section 620.301. Complainant must allege either: (a) treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or (b) an existing or potential use of such groundwater is precluded. 35 Ill. Admin. Code 620.301. As Count IX contains no such factual allegations, dismissal of the Section 620.301 charge is warranted.

IV. Conclusion

WHEREFORE, Respondent PSM prays that specific allegations in the Amended Complaint identified as improper in PSM's Motion be stricken.

Respondent further prays for the dismissal of those charges in the Amended Complaint that do not state a cause of action against Respondent PSM, all as identified in PSM's Motion and in this Reply.

Finally, Respondent prays for such other and further relief as the Board deems just.

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

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CERTIFICATE OF SERVICE

I hereby certify that I did on the 21st day of October, 2010, send by First Class Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instrument entitled **REPLY TO COMPLAINANT'S RESPONSE TO MOTION TO DISMISS AND/OR STRIKE:**

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

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\\Terry\Mapa\Professional Swine Management\REPLY TO AG RESPONSE.wpd/crk 10/22/10 9:07 AM

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