

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 corporation, EAGLE POINT, 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 November 5, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, Complainant's Combined Sur-Reply, 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

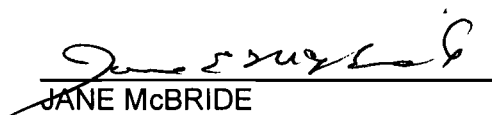
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BY: 
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Environmental Bureau

CERTIFICATE OF SERVICE

I hereby certify that I did on November 5, 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 Complainant's Combined Sur-Reply upon the persons listed on the Service List.



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This filing is submitted on recycled paper.

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quote the 2003 federal CAFO Rule in Complainant's response to Respondents' motions. This was in error. Nonetheless, as is set forth below, the 2003 federal CAFO Rule is relevant to the instant matter. This rule was published February 12, 2003 and came into effect April 14, 2003. 68 Fed. Reg. 7176 - 7274.

2. The current federal regulations ("2008 federal CAFO Rule") became effective on December 22, 2008. This regulation was published in the Federal Register on November 20, 2008. 73 Fed. Reg. 70418 - 70486.

3. All but one of the discharges that are the subject of the Amended Complaint occurred prior to December 22, 2008.

4. In paragraphs 9, 10 and 11 of their original motion, Respondent Facilities provide the history of the 2003 and 2008 federal regulations.

5. As stated in Respondents' motion, the 2003 "duty to apply" provision was challenged and vacated by the Second Circuit in *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005) ("*Waterkeeper*").

6. In the 2003 federal CAFO Rule, the US EPA eliminated what is known as the 25 year storm event exemption from the regulations. This exemption appears in the Illinois Subtitle E Regulations as Section 502.102 and 502.106(e), 35 Ill. Adm. Code 502.102, 502.106. The elimination of this exemption came into effect on April 14, 2003, and has since remained in effect.

7. Respondent PSM in its reply, contends that sections 502.102 and 502.106(e) of the Illinois Subtitle E regulations exempt a facility that was designed to contain waste in all conditions less than a 25-year, 24-hour storm event. This is incorrect. It clearly states that what is exempt is an actual discharge. The provision serves as a design standard only in the sense that the facilities had to be able to contain all effluent in anything less than 25-year,

24-hour precipitation event. The facility had to avoid actual discharges under such conditions, not merely be designed to a given capacity. However, any exemption provided by the provision was eliminated when the 2003 federal CAFO Rule came into effect (April 14, 2003).

8. The *Waterkeeper* court did not disturb the provision defining a Large CAFO, which depends primarily on the number of animals confined. The number that defines a Large CAFO in the federal rules, and a Very Large Operator in the state Subtitle E regulations, has remained consistent. For swine that number is 2,500 weighing over 55 pounds.

9. Thus, throughout the period from April 14, 2003 until December 22, 2008, pursuant to 40 CFR 122.23(b)(4), and 35 Ill. Adm. Code 502.103, an NPDES permit was required of facilities with 2,500 swine weighing 55 pounds or more.

10. Prior to April 13, 2003, Section 502.102 of the State's Subtitle E Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.102, was in effect and therefore, for any facility meeting the definition of a Very Large Operator that discharged, a permit was required unless it discharged only in the event of a 25-year, 24-hour storm. After April 14, 2003, this exemption was no longer available pursuant to federal rule.

11. After December 22, 2008, the 2008 federal CAFO rule "duty to apply" provision requiring CAFO's that "discharged or proposed to discharge" came into effect pursuant to federal rule.

12. As stated in Respondent Facilities' original motion, paragraph 6, the Clean Water Act ("CWA") generally prohibits the discharge of a pollutant from a point source into navigable waters of the United States except as authorized by a NPDES permit. See 33 U.S.C. § 1331 (a), 1342, 1362. Section 502(14) of the CWA specifically includes CAFOs in the definition of the term "point source" Section 502(12) defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source".

13. As stated in Respondent Facilities' original motion at paragraph 7, USEPA delegated authority to Illinois to implement the NPDES program in Illinois. As such, the Act authorizes the Illinois Environmental Protection Agency ("Illinois EPA") to issue NPDES permits "for the discharge of contaminants from point sources into navigable waters, all as defined in the Federal Water Pollution Control Act. . . ." 415 ILCS 5/39 (b).

14. The *Waterkeeper* court's invalidation of the federal governments 2003 "duty to apply" provision resulted in the State's Subtitle E provisions that were consistent with the 2003 federal CAFO Rule that had not been vacated, remaining in effect. The Clean Water Act provides, as stated above, and the *Waterkeeper* court held that, it is the actual discharge of a pollutant that triggers the requirement of authorization under a permit. Thus, if a facility discharged a pollutant to navigable waters of the United States, it could only do so as authorized by permit. Thus, pursuant to federal rule and the State's Subtitle E regulations, a facility that qualified as a Very Large Operator that discharged to navigable waters, without a permit, did so in violation of the CWA, the federal rules and Section 12(f) of the Illinois Environmental Protection Act. Further, in order not to be in violation at the time of discharge, the facility needed to have a permit prior to the discharge event.

15. After December 22, 2008, when the 2008 federal CAFO rule "duty to apply" provision of "discharge or propose to discharge" came into effect. The requirement to obtain a permit became subject to this "duty to apply" provision.

16. The "discharge or propose to discharge" provision operates as follows, pursuant to the 2008 federal CAFO rule, as published at 73 Fed. Reg. 70423:

. . . Therefore, revised § 122.23(d)(1) requires only CAFOs that actually discharge to seek permit coverage and clarifies that a CAFO proposes to discharge if based on an objective assessment it is designed, constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur. Consistent with the

Waterkeeper decision, CAFOs that are required to seek permit coverage must do so when they propose to discharge (see discussion of the provision relating to when a CAFO must seek permit coverage, 40 CFR 122.23(f)). Thus, it is the responsibility of the CAFO owner or operator to seek authorization to discharge at the time they propose to discharge. A CAFO that discharges without a permit is in violation of the CWA section 301(a) prohibition of such discharges and additionally has the burden of establishing that it did not propose to discharge prior to the discharge (unless the permitting authority has a current, complete certification from the CAFO as provided by 40 CFR 122.23(j)(2)). If it is determined that it did, in fact, propose to discharge prior to the discharge (that is, it was designed, constructed, operated, or maintained such that a discharge would occur), it is also in violation of the § 122.23 (d)(1) duty to apply. Section 122.23 (j)(2) also clarifies how a CAFO may satisfy the burden of establishing that it did not propose to discharge.

Under section 301(a) of the CWA, only those CAFO discharges authorized by an NPDES permit (or otherwise authorized by the statute), regardless of the volume or duration of the discharge, are allowed. Any discharge from a CAFO, even one that is unplanned or accidental, is illegal unless it is authorized by the terms of a permit or is agricultural stormwater . . .

17. Thus, an unpermitted unplanned or accidental discharge is a violation of the requirement that discharges may occur only under authorization of a permit, and may be a violation of the "duty to apply" provision if the Respondents cannot meet their burden of establishing that they did not propose to discharge, pursuant to Section 122.23 (j)(2).

18. Section 122.23(d), 40 CFR 122.23(d), (the 2008 federal regulation), states:

(d) Who must seek coverage under an NPDES permit?

(1) Permit Requirement. The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director. (Emphasis added).

(2) Information to submit with permit application or notice of intent. An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

19. Section 122.23 (e) of the 2008 federal CAFO rule, 40 CFR 122.23(e), stated, in pertinent part:

(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 permit 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.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land 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) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

20. Section 122.23(f), 40 CFR 122.23(f), (the 2008 federal regulations), states:

(f) When must the owner or operator of a CAFO seek coverage under an NPDES permit?

Any CAFO that is required to seek permit coverage under paragraph (d)(1) of this section must seek coverage when the CAFO proposes to discharge, unless a later deadline is specified below.

(1) Operations defined as CAFOs prior to April 14, 2003. For operations defined as CAFOs under regulations that were in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (g) of this section.

(2) Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date. For all operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by February 27, 2009.

(3) Operations that become defined as CAFOs after April 14, 2003, but which are not new sources. For a newly constructed CAFO and for an AFO that makes changes to its operations that result in its becoming defined as a CAFO for the first time after April 14, 2003, but is not a new source, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

(i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time CAFO commences operation;

(ii) For other operations (e.g., resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; or

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until February 27, 2009, or 90 days after becoming defined as a CAFO, whichever is later.

(4) New sources. The owner or operator of a new source must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.

(5) Operations that are designated as CAFOs. For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.

21. 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.

22. 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:

Number of Animals	Kind of Animals
* * *	* * *
2,500	Swine weighing over 55 pounds

23. Section 122.23 (b)(2) of the 2003 federal CAFO Rule stated, 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, . . .

24. Section 122.23(b)(4) of the 2003 federal CAFO rule stated, 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 . . .

25. Section 122.23 (a) of the 2003 federal CAFO rule, 40 CFR 122.23(a), stated

(with vacated portion struck), in applicable 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~~. . . .

26. As stated in the Region V report, page 9, (cited in Respondent Facilities reply, page 4, footnote ¹) federal regulation requires states that administer approved NPDES programs to revise their programs within one year after US EPA revises the relevant federal regulations. Ms. Hyde's letter to Ms. Wilhite, asking that the state's regulations be revised in 2009, is consistent with the regulation. Respondents acknowledge that the State's general NPDES permit for CAFOs, issued October 20, 2009, was revised to include language consistent with current federal regulation. The operative language "discharge or propose to discharge" does, in fact, exist in the State's general permit.

27. The Illinois EPA first endeavored to re-issue its CAFO general permit, and accomplished this task on October 20, 2009. It did so working in conjunction with stakeholders – no small or easy task even without severe limitations on resources. The re-issuance of the general permit allowed the Illinois EPA to begin issuing permits that met all of the requirements of the now final federal CAFO NPDES requirements. The State has not ignored its obligation to revise the Subtitle E regulations. On December 22, 2009, the State convened a CAFO Workgroup consisting of environmental and livestock stakeholders. A draft of the revised regulations is currently under review by the Workgroup members. The Workgroup members have until November 10, 2010 to respond with any comments. The revised regulations will be submitted to USEPA Region V on or about December 1, 2010, for approval prior to submission to the Illinois Pollution Control Board early in 2011.

Discharges to Navigable Waters

28. It is the Complainant's position that the *Rapanos* standard, relied upon by Respondents, was wholly established 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.

29. The plurality in the *Rapanos* matter went to great length to distinguish its finding from the standards applicable in Section 402 jurisdictional determinations. 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". This commenter clearly distinguished the Court's *Rapanos* decision as applicable to Section 404 jurisdictional determinations only.

30. The portion of the *Rapanos* plurality opinion, in which Justice Scalia distinguished the ruling in this Section 404 case is quoted at length in Complainant's response.

31. 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*", a document relied upon by Respondents, states, at page 12:

. . . 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)]

32. In the same document, on page 4, it is stated: "To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the *Rapanos* decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction." That is, the document is pertinent to Section 404

jurisdictional determinations only. A footnote associated with this quoted statement reads:

18 This guidance focuses only on those provisions of the agencies' regulations at issue in Rapanos – 33 CFR §§ 328.3(a)(1), (a)(5), and (a)(7); 40 CFR §§ 230.3(1), (s)(5), and (s)(7). This guidance does not address or affect other subparts of the agencies' regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of "waters of the United States." Indeed, the plurality opinion in Rapanos noted that ". . . there is no reason to suppose that our construction today significantly affects the enforcement of § 1342 . . . 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 water.'" (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional guidance on these and other provisions of the CWA that may be affected by the Rapanos decision.

Count By Count Sur-Reply

33. What follows is a count by count sur-reply, in light of the foregoing, setting forth the factual basis for Complainant's allegations of violation of the federal and State NPDES regulations.

Count I, Hilltop View

34. Hilltop View was constructed in 2006. The facility became populated at a time better known to Respondents, but it is believed hogs were brought to Hilltop View late in 2006 and early in 2007. The facility houses a total of 7,800 swine weighing over 55 pounds.

35. The date of the documented discharge was May 28, 2009, a time after the federal 2008 CAFO rule went into effect. The Illinois EPA inspector documented livestock waste runoff from a field where the facility had applied waste. At the time of the documented runoff event, the 2008 federal CAFO rule and state regulation requiring that any discharge from a facility with more than 2,500 swine over 55 pounds be covered by an NPDES permit was in effect. The federal rules clearly stated that land application discharges from a CAFO are

subject to NPDES requirements, 40 CFR 122.23(e) (quoted in full above), and set out detailed requirements to guide any claim of that such a runoff event might qualify as agriculture runoff. Respondents failed to obtain coverage of the discharge prior to the event of the discharge. Even if the discharge was unplanned and accidental, the Respondents, by rule set forth above, were obligated to obtain a permit prior to the event of the discharge.

36. The discharge was runoff containing livestock waste from a land application field associated with the Hilltop swine facility. The land application discharge was to the north road ditch of Meadowlark Lane which drains to an unnamed tributary of the West Branch of Sugar Creek. The unnamed tributary of the West Branch of Sugar Creek is identified as an intermittent creek on the USGS topographic map, and based on the Illinois EPA inspector's knowledge of the creek, water flows in this unnamed tributary for three months of the year. The West Branch of Sugar Creek is identified as a perennial creek on the USGS topographic map, that is, flow is maintained throughout the year. Both the unnamed tributary and the West Branch of Sugar Creek are navigable waters of the United States. As such, the discharge to the roadside ditch, a conveyance that discharges to navigable water, is a discharge in violation of the State and federal NPDES regulations.

37. To be exempt under the agricultural stormwater discharge allowance in the federal regulations, manure, litter or process wastewater must be applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater. (Emphasis added) If the livestock waste (manure, litter or process wastewater) leaves the application field, the nutrients contained within the livestock waste cannot be utilized appropriately and the site specific nutrient management practices were not adequate, therefore the discharge cannot be an agricultural stormwater discharge.

38. Hilltop View did not have an NPDES permit at the time of the discharge, however the language of the State general permit is instructive. The Illinois General NPDES CAFO permit for CAFOs echoes the same thing. Agricultural storm water discharge (found in the definition section of the permit) "means, a 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 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 by the conditions of this NPDES permit." Condition 4(c)(iv.) states "Livestock waste application shall not be permitted on land during precipitation when the land is saturated or when precipitation will produce runoff of livestock waste." The definition allows a precipitation-related discharge of livestock waste if the conditions of the permit are met, yet the condition of the permit does not allow land application of livestock waste when precipitation will produce runoff of livestock waste.

Count II Wildcat Farms

39. Wildcat Farms houses 6000 sows weighing more than 55 pounds. The subject discharge occurred on September 23, 2008, a date prior to the 2008 federal CAFO rule coming into effect.

40. The discharge flowed out of a cleanout pipe, creating a manure stream approximately two feet wide and 200 yards long, down the field in a northeasterly direction along a drainage channel where it entered an unnamed tributary to Wildcat Creek. Water was flowing in the unnamed tributary at the time of the discharge. The unnamed tributary flows into Wildcat Creek, a perennial stream. Although no dead fish were observed, the inspector experienced the odor of dead fish in the unnamed tributary of Wildcat Creek. The Illinois EPA inspector collected samples of the discharge and receiving waters. A sample was collected

from an accumulation of liquid in the flow path of the manure release. The liquid was turbid, dark-colored and contained a strong swine waste odor. Sample analysis indicated the following parameter levels: ammonia, 1220 mg/l; TSS, 810 mg/l; fecal coliform, 16,000 per 100 ml. A sample was collected from the unnamed tributary to Wildcat Creek 50 yards downstream of the previous sample collection site. There were black bottom deposits in the stream. The sample was collected after the bottom deposits were disturbed. Sample analysis indicated the following parameter levels: ammonia 28.5 mg/l; TSS, 590 mg/l; fecal coliform, 53,000 per 100 ml.

41. Clearly there was a pollution impact on the unnamed tributary of Wildcat Creek. There was physical, chemical and biological impact to the unnamed tributary – given the analytical results of the samples collected in the unnamed tributary and evidence of dead fish. The discharge to the unnamed tributary that flowed into Wildcat Creek was a discharge to navigable waters of the United States.

Count III High-Power Pork

42. The discharge from High Power occurred on November 10, 2008, a date prior to the effective date for the 2008 federal CAFO Rule. The facility houses 6,000 sows weighing more than 55 pounds. Swine waste discharged from the High-Power facility due to a break and/or leak in a six-inch diameter PVC pipeline between the High-Power facility's lift station and one of its approximately 3.5 million gallon capacity, above-ground manure storage tanks. During the incident, approximately 90,000 gallons of liquid swine waste was released from the PVC pipeline that was backfilled the week prior to November 10, 2008.

43. The break and/or leak in the PVC pipeline resulted in swine waste oozing out of the ground and then flowing down a grassed waterway, under the township road into an unnamed tributary of the South Branch of Cedar Creek and then into South Branch Cedar Creek and Cedar Creek, causing a fish kill. Cedar Creek is a navigable water of the United

States. It is clear there was a significant nexus between the discharge and biological, chemical and physical impact to the navigable water in the form of a fish kill. At the time of the discharge on November 10, 2008, neighbors observed discoloration and turbidity in Cedar Creek. They traced the contamination to the High Power facility.

Count IV Eagle Point Farms

44. Eagle Point houses 6,500 sows weighing more than 55 pounds. On May 10, 2007, a time prior to the effective date of the 2008 federal CFO Rule, the Illinois EPA inspected the Eagle Point facility. 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 indicates a fecal coliform level of 35,000 per 100 milliliters ("ml"). At the time of the May 10, 2007 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.

45. The perimeter tile and sewage disposal system discharged into a strip mine lake that is tributary to Otter Creek, a perennial stream that flows into the Illinois River. As such, the May 10, 2007 discharges were discharges to navigable waters of the United States.

Count V Lone Hollow

46. Lone Hollow houses 5,650 sows weighing over 55 pounds. On September 13, 2007, a date prior to the effective date of the 2008 federal CAFO Rule, 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. Upon discovering the release, facility employees stopped the flow at the point where it had reached the waterway using compost from the mortality area. An earthen dam was also constructed immediate east (downstream) from the release flow.

47. 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.

48. 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.

49. 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.

50. The waterways at Lone Hollow are tributary to an unnamed tributary of Panther Creek, which carries a water flow more than three months per year. Panther Creek is a perennial stream. Panther Creek is tributary to Bronson Creek which is tributary to the LaMoine River. The September 2007 discharges at Lone Hollow, described above, were discharges to navigable waters of the United States.

Count VI Timberline

51. Timberline, at the time of the discharge, housed 3,000 sows weighing over 55 pounds. 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. This September 11, 2008 discharge was a discharge that occurred prior to December 22, 2008 when the federal 2008 CAFO rule went into effect. 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.

52. The West Branch of Sugar Creek is identified as a perennial creek on the USGS topographic map, that is, flow is maintained throughout the year. It is a navigable water of the United States. As such, the discharge to dry dam and tributary to the West Branch of Sugar Creek, was a discharge to a conveyance that discharges to navigable waters of the United States.

Count VII Prairie State Gilts

53. Prairie State Gilts is a breeding and gestation operation. Approximately 2,500 head of swine weighing over 55 pounds are confined at the facility. 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. 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 discharges to an unnamed tributary of Honey Branch.

55. The unnamed tributary of Honey Creek is identified as an intermittent creek on the USGS topographic map. There is water flow in this unnamed tributary for three months each year. Honey Creek is identified as a perennial creek on the USGS topographic map and

therefore water flow exists in the creek all year. The unnamed tributary to the facility ponds and the facility ponds were conveyances that discharge to navigable waters of the United States.

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.

Count VIII North Fork

59. North Fork houses 8200 hogs weighing more than 55 pounds. On December 3, 2003, a date after the federal 2003 CAFO Rule came into effect but before the federal 2008 CAFO Rule came into effect, the Illinois EPA inspected the North Fork facility. At the time of the inspection, there was a discharge from a perimeter tile serving the facility's south gestation building. At the time of the inspection the tile was discharging into a ravine in the terraced field south of the facility. The field was served by a field tile that discharge to a stream that flows next to the North Fork facility. The discharge was to a conveyance that discharged to navigable waters of the United States.

60. At the time of the inspection, the south gestation building perimeter tile discharge had a strong swine waste odor. Black bottom deposits forming a thin layer of sludge were observed in the tile discharge channel. A sample of the discharge was collected. Analytical results indicated the following parameter levels: ammonia, 45 milligrams per liter ("mg/l"); biochemical oxygen demand ("BOD"), 55 mg/l; total suspended solids ("TSS"), 74 mg/l.

Count IX Little Timber

61. Little Timber houses 2600 sows weighing more than 55 pounds.

62. At the time of a June 1, 2004 inspection, a date after the effective date of the 2003 federal CAFO Rule but before the effective date of the 2008 federal CAFO Rule, 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. Both tributaries to Middle Creek that exist at the Little Timber facility have water flow for three months of every year. Middle Creek is a perennial stream. 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.

63. At the time of the June 1, 2004 inspection, 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.

64. At the time of the June 1, 2004 inspection, odors were observed from the swine confinement buildings, lagoon and dead livestock compost unit. The odor in the vicinity of the compost pile was very strong and offensive. Swine waste odors were observed off-site at County Road 2450 E. about 1 mile northeast of the facility. Wind direction was from the southwest.

65. 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.

66. 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.

67. 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.

68. 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.

69. 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.

70. 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.

71. All of the Little Timber discharges drained to the waterways on the property which are tributary to the two unnamed tributaries of Middle Creek that exist on the property and flow into Middle Creek. As such, all of the described discharges were discharges to navigable waters of the United States.

Hilltop View stormwater allegations

72. In its Reply, Respondent PSM contends that construction runoff is not considered a point source. This is not true. Congress amended the Clean Water Act in 1987, adding Section 402(p) to the Act to purposefully and specifically provided the US EPA with the permitting authority for stormwater. The stormwater regulations that have been coming into effect as Phase I and II are the result of that amendment to the federal agency's permitting authority. Stormwater has clearly been addressed as a point source as those regulations have come into effect.

73. Respondent PSM asserts that Complainant has not pled a sufficient factual basis for its allegation of violation of NPDES stormwater regulations, and has not pled a discharge to waters of the state relative to the stormwater NPDES violations. Complainant has pled facts indicating the site was under construction. No erosion controls were in place at the site at the time of inspection. Recent excavation had occurred adjacent to Sugar Creek on the north side of the Meadowlark Road bridge and adjacent to the west bank of Sugar Creek. At the time of the June 16, 2006 inspection, concrete materials were stockpiled at the site. The inspector

noted an eroded channel existed near the stockpile. The channel drained east for a distance of about 400 feet into Sugar Creek. This erosion channel is clear evidence that there have been construction stormwater runoff directly into Sugar Creek. Sugar Creek is a water of the state and a navigable water of the United States.

74. Illinois EPA Bureau of Water Field Operations Section inspectors performed a storm water inspection at Hilltop on November 15, 2006. They reported that minimal earthwork was underway and that silt fencing had been installed to minimize storm water erosion. The inspectors indicated the silt fencing present on site was inadequate to meet the requirements of the regulations and additional silt fence was needed in two areas of the site and that some existing silt fencing needed to be reset. The stormwater construction regulations require that controls be maintained.

Little Timber groundwater degradation allegation

75. Section 620.301 of the Board's Groundwater Quality Regulations, 35 Ill. Adm. Code 620.301, provides in pertinent part:

General Prohibition Against Use Impairment of Resource Groundwater

- a) No person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that:
 - 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater;
or
 - 2) An existing or potential use of such groundwater is precluded.

76. Well data from Little Timber indicated that nitrate levels rose in the southeast monitoring well downgradient of the lagoon from 1.14 and .91 milligrams per liter ("mg/l") in 1997 to 10 mg/l in 2002. Upon information and belief, the impacted groundwater is used for potable purposes and is Class I groundwater. The Class 1 groundwater standard for nitrate is

10 mg/l. Any level exceeding 10 mg/l is in violation of that standard. The nitrate standard is a human health based standard. Thus, the trend alleged in the Amended Complaint is sufficient to form the basis of the Complainant's allegation that Respondents threaten to cause or allow the release of contaminants that may preclude an existing use of the subject groundwater. Complainant has acquired additional data from monitoring reports submitted to the Illinois Department of Agriculture, but has yet to receive all information believed to potentially be available. The Illinois EPA has embarked on additional technical analysis of the trend exhibited by the monitoring results.

WHEREFORE, for the foregoing reasons and on the foregoing grounds, Complainant respectfully requests the Board deny Respondents' Motion to Dismiss and/or Strike and Motion for Partial Dismissal. 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,

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