

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

|                                       |   |                      |
|---------------------------------------|---|----------------------|
| PEOPLE OF THE STATE OF ILLINOIS       | ) |                      |
|                                       | ) |                      |
| Petitioner,                           | ) |                      |
|                                       | ) |                      |
| v.                                    | ) | PCB 10-084           |
|                                       | ) | (Enforcement – Land) |
| 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,                          | ) |                      |
|                                       | ) |                      |
| Respondents.                          | ) |                      |

**NOTICE OF FILING**

|                                  |                                  |
|----------------------------------|----------------------------------|
| TO: Mr. John T. Therriault       | Carol Webb, Esq.                 |
| Clerk of the Board               | Hearing Officer                  |
| Illinois Pollution Control Board | Illinois Pollution Control Board |
| 100 West Randolph Street         | 1021 North Grand Avenue East     |
| Suite 11-500                     | Post Office Box 19274            |
| Chicago, Illinois 60601          | Springfield, Illinois 62794-9276 |
| <b>(VIA ELECTRONIC MAIL)</b>     | <b>(VIA U.S. MAIL)</b>           |

**(PLEASE SEE ATTACHED SERVICE LIST)**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board RESPONDENTS' JOINT MOTION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINANT'S SECOND AMENDED COMPLAINT, and JOINT MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF, a copy of which is herewith served upon you.

Respectfully submitted,

HILLTOP VIEW, LLC, EAGLE POINT FARMS LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC,

Respondents,

Dated: February 11, 2013  
Edward W. Dwyer, #6197577  
Jennifer M. Martin, #6210218  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776  
(217) 523-4900

By:           /s/ Edward W. Dwyer            
One of Its Attorneys

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached RESPONDENTS' JOINT MOTION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINANT'S SECOND AMENDED COMPLAINT, and JOINT MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF upon:

Mr. John T. Therriault  
Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

via electronic mail on February 11, 2013; and upon:

Ms. Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, Illinois 62794-9274

Claire A. Manning, Esq.  
Brown, Hay & Stephens LLP  
700 First Mercantile Bank Building  
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Joel A. Benoit  
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Jane E. McBride, Esq.  
Office of the Attorney General  
500 South Second Street  
Springfield, Illinois 62706

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on February 11, 2013.

/s/Edward W. Dwyer

Edward W. Dwyer

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, )  
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 Complainant, )  
 v. )  
 )  
 PROFESSIONAL SWINE MANAGEMENT, LLC, )  
 HILLTOP VIEW, LLC, WILDCAT FARMS, LLC, )  
 HIGH-POWER PORK, LLC, EAGLE POINT )  
 FARMS LLC, LONE HOLLOW, LLC, )  
 TIMBERLINE, LLC, PRAIRIE STATE GILTS, )  
 LTD., LITTLE TIMBER, LLC, )  
 )  
 Respondents. )

PCB No. 2010-084  
(Enforcement – Land)

**RESPONDENTS' JOINT MOTION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINANT'S SECOND AMENDED COMPLAINT**

Respondents, PROFESSIONAL SWINE MANAGEMENT, LLC, HILLTOP VIEW, LLC, WILDCAT FARMS, LLC, HIGH-POWER PORK, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC, (hereinafter "Respondent" or collectively "Respondents"), by and through their attorneys, HODGE DWYER & DRIVER, BROWN HAY & STEPHENS, and MOHAN, ALEWELT, PRILLAMAN, AND ADAMI, hereby move the Illinois Pollution Control Board ("Board") or assigned hearing officer, as appropriate, pursuant to 35 Ill. Admin. Code § 101.522, to allow the Respondents an extension of time to file an Answer or otherwise plead in response to Complainant's Second Amended Complaint. Respondents request that a date to Answer or otherwise plead be set for 30 days after the Board rules on the Respondents' Joint Motion to Strike.

In support of this Joint Motion, Respondents state as follows:

1. Pursuant to agreement between the parties, and consistent with the Hearing Officer Order of December 10, 2012, the State of Illinois filed its Second Amended Complaint with the Board on December 13, 2012, with Respondents' Answers due 60 days from December 13, 2012, or by February 11, 2013.
2. The Second Amended Complaint contains, inter alia, additional facts and a prayer for additional relief. Specifically, the prayer for relief in each Count of the Second Amended Complaint now contains a request that the Board issue an Order requiring that each Respondent "...immediately apply for and obtain CAFO NPDES permit coverage..." See Second Amended Complaint, Counts I –VIII, Prayer for Relief, Paragraph C.
3. Simultaneous with the filing of this Joint Motion for Extension, Respondents are filing a Joint Motion to Strike Complainant's request in each Count of the Second Amended Complaint for an Order requiring each Respondent to "...immediately apply for and obtain CAFO NPDES permit coverage ...."
4. Respondents believe that, if their Joint Motion to Strike is granted, the issues to be addressed going forward will be narrowed and/or Complainant may seek to amend its Second Amended Complaint. Filing an Answer pending the Board's ruling on the Joint Motion to Strike could result in unnecessary litigation costs and an inefficient use of the resources of the Board and the parties if the Joint Motion to Strike is granted and the State's pleading is amended yet again.
5. If the Board denies Respondents' Joint Motion to Strike, Respondents will have 30 days from their receipt of the Board's Order denying the Joint Motion to Strike to file an Answer or other responsive pleading.

6. This Joint Motion for Extension is not made for the purpose of undue delay, and Respondents believe that no prejudice will result if the Board grants the Motion.

7. For the reasons stated above, Respondents request that this Board grant an extension of the February 11, 2013 date to file an Answer or other responsive pleading, to a date 30 days following the Board's ruling on Respondents' Joint Motion to Strike.

Respectfully submitted,

HILLTOP VIEW, LLC, EAGLE  
POINT FARMS, LLC, HIGH-POWER  
PORK, LLC, WILDCAT FARMS, LLC,  
LONE HOLLOW, LLC, TIMBERLINE, LLC,  
LITTLE TIMBER, LLC, and  
PRAIRIE STATE GILTS, LTD

PRAIRIE STATE GILTS, LTD,

By: /s/Edward W. Dwyer  
Edward W. Dwyer

By: /s/Claire A. Manning  
Claire A. Manning

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PROFESSIONAL SWINE MANAGEMENT, LLC

By: /s/Joel A. Benoit  
Joel A. Benoit

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(217) 528-2517

Dated: February 11, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, )  
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 Complainant, )  
 v. )  
 )  
 PROFESSIONAL SWINE MANAGEMENT, LLC, )  
 HILLTOP VIEW, LLC, WILDCAT FARMS, LLC, )  
 HIGH-POWER PORK, LLC, EAGLE POINT )  
 FARMS, LLC, LONE HOLLOW, LLC, TIMBER- )  
 LINE, LLC, PRAIRIE STATE GILTS, LTD., )  
 LITTLE TIMBER, LLC. )  
 )  
 Respondents. )

PCB No. 2010-084  
(Enforcement – Land)

**JOINT MOTION TO STRIKE PART OF COMPLAINANT’S PRAYER FOR RELIEF**

Respondents, PROFESSIONAL SWINE MANAGEMENT, LLC, HILLTOP VIEW, LLC, WILDCAT FARMS, LLC, HIGH-POWER PORK, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC, (hereinafter “Respondent” or collectively “Respondents”), by and through their attorneys, BROWN, HAY & STEPHENS, LLP., HODGE DWYER & DRIVER, and MOHAN, ALEWELT, PRILLAMAN, & ADAMI, move the Illinois Pollution Control Board (“Board”) pursuant to 35 Ill. Admin. Code § 101.506, to strike a portion of the People’s prayer for relief contained in Counts I-VIII of its Second Amended Complaint (“Second Amended Complaint”). Complainant’s Second Amended Complaint was filed by the People of the State of Illinois (“People”) on December 13, 2012. In support of its Motion, the Respondents state as follows.

**I. INTRODUCTION**

In the Second Amended Complaint the People allege, among other things, that Respondents violated Section 12(f) of the Illinois Environmental Protection Act (“Act”) 415 ILCS 5/12(f), and 35 Ill. Admin. Code § 309.102(a).

Specifically, in each of the counts contained in the Second Amended Complaint, the People add phraseology related to the *context* of alleged discharges that were initially pled in the Complaint (filed April 15, 2010) and the First Amended Complaint (filed July 13, 2010). The dates of those alleged discharges, which remain unchanged in the Second Amended Complaint, are: May 28, 2009 (Count I, ¶ 17); September 18, 2008 (Count II, ¶¶ 30-32); November 10, 2008 (Count III, ¶30) May 10, 2007 (Count IV ¶¶ 30-32); September 13, 2007 (Count V ¶¶ 29-33), September 11, 2008 (Count VI ¶ 29-30); July 7, 2008 (Count VII ¶ 32); June 1, 2004, February 21, 2007 and August 24, 2007 (Count VIII ¶¶ 33-44).

Significantly, no new facts related to any allegations of discharge are pled to have occurred subsequent to the above dates; yet, the People in their Second Amended Complaint add, at the end of each count, a new prayer for relief: “such order to include the requirement to immediately apply to obtain CAFO NPDES coverage for the subject facility.” This Joint Motion is narrow in scope: its only focus is on this portion of the relief sought.

For the following reasons, the Respondents jointly request that the Board strike the above-referenced prayer for relief.

**II. STANDARD OF REVIEW**

Section 101.506 of the Illinois Pollution Control Board’s procedural rules, (35 Ill. Admin. Code § 101.506) allows motions to strike a pleading or portion thereof based on alleged defects in the pleading. For purposes of ruling on such motions, all well-pled facts in the pleading must

be taken as true. *Strunk v. Williamson Energy LLC*, PCB 07-135 at 7 (Ill.Pol.Control.Bd., Nov. 15, 2007). While the Board recognizes Illinois as a fact-pleading state, it also has held that mere legal conclusions are inadequate for purposes of pleading. *People v. Waste Hauling, Inc.*, PCB 10-9 at 12 (Ill.Pol.Control.Bd., Dec. 3, 2009). If the facts pled do not support a portion of the relief sought, rendering that portion of the pleading legally insufficient, that portion should be stricken from the prayer for relief. *See McCall v. Health Care Service Corp.*, 117 Ill. App. 3d 107, 112 4th Dist. 1983) (Prayer for punitive damages stricken where conduct alleged did not support this relief). *See also Loschen v. Grist Mill*, PCB No. 97-174, 1997 Ill. ENV LEXIS 316, 11 (Ill.Pol.Control.Bd., June 5, 1997) (Board granted Motion to Strike citizen's prayer for monetary damages as beyond its authority and other portion of pleading for legal insufficiency.); *Yorkville v. Hamman Farms*, PCB No. 08-96, 2008 Ill. ENV LEXIS 352, 41, 67-68 (Ill.Pol.Control.Bd., Oct. 16, 2008) (Board granted Motion to Strike portion of Complaint as legally insufficient, i.e. Board unable to grant relief sought; prayer for attorneys' fees and costs also stricken.).

### III. ARGUMENT

#### A. The Clean Water Act and Regulations Promulgated Thereunder Establish Who Must Obtain a NPDES Permit.

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 an National Pollution Discharge Elimination System ("NPDES") permit. *See* 33 U.S.C. §§ 1311(a), 1342, and 1362. Generally, any person who discharges or proposes to discharge has a duty to apply for a NPDES permit. 40 C.F.R. § 122.21(a). The United States Environmental Protection Agency ("USEPA") delegated authority to the Illinois Environmental Protection Agency ("Ill. EPA") to



implement the federal NPDES program in Illinois. As such, the Act authorizes the Ill. 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). But, as discussed further below, no permit shall be required under Section 12(f) or Section 39(b) of the 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).

**B. Recent Changes to the Federal Regulations Have Clarified When A CAFO Must Obtain a NPDES Permit.**

As background, USEPA began regulating discharges from CAFOs in the 1970s. Over the last decade, regulations governing CAFOs have been the subject of significant rulemaking efforts and litigation.<sup>1</sup> The results of those rulemaking efforts and consequent legal challenges are pivotal to the instant Motion. Specifically, in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (hereafter “*Waterkeeper*”), the Court found that the “duty to apply” for an NPDES permit provision was invalid and determined that the CWA does not authorize the requirement that CAFOs must obtain NPDES permits if there is no actual discharge. *Id.* at 505.

In response to the *Waterkeeper* decision, USEPA proposed another version of its CAFO regulations that amended the “duty to apply” provision, in 2006. see 71 Fed. Reg. 37,744 (June 30, 2006), and later amended that proposal in 2008. *See* 73 Fed. Reg. 70,418 (Nov. 20,

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<sup>1</sup> *See generally: Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495-96 (2d Cir. 2005); *Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision*, 73 Fed. Reg. 70,418-01, 70,469 (Nov. 20, 2008) (to be codified at 40 C.F.R. pts. 9, 122, and 412); *National Pollution Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule*, 76 Fed. Reg. 65,431-01 (proposed Oct. 21, 2011) (to be codified at 40 C.F.R. pts. 9 and 122); *National Pork Producers Council v. EPA*, 635 F.3d 738, 748-52 (5th Cir. 2011); *National Pollution Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision* 77 Fed Register 44494 (July 30, 2012).

2008) (“2008 CAFO Rule”).<sup>2</sup> These rulemaking efforts amended the federal rule to require that only those CAFOs that “*discharge or propose to discharge*” must apply for an NPDES permit. *Id.* at 37,748. (Emphasis added.) This revision to the federal rule was also challenged in court.

On March 15, 2011, the United States Court of Appeals for the Fifth Circuit issued an opinion which vacated the provisions in the *2008 CAFO Rule* that required CAFOs that propose to discharge to apply for an NPDES permit, and also vacated the provisions that create liability for failing to apply for an NPDES permit. *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 748-52 (5th Cir. 2011) (hereinafter “*Nat’l Pork Producers*”). *Nat’l Pork Producers* consolidated various petitions for review of the *2008 CAFO Rule* which were filed in the Seventh, Eighth, Ninth, Tenth and District of Columbia Circuits. *Id.* at 741. The Fifth Circuit held that requiring CAFOs who were *not presently discharging* into navigable waters of the United States to apply for an NPDES permit went beyond the authority granted by the CWA. *Id.* at 750-52. However, the Fifth Circuit also stated that those CAFOs who *were discharging* could be required to obtain an NPDES permit because such a requirement was consistent with the CWA’s regulations of discharges. *Id.* at 751. (Emphasis added.) Thus, the Fifth Circuit concluded: “We hereby vacate those provisions of the 2008 Rule that require CAFOs that propose to discharge to apply for an NPDES permit, but we uphold the provisions of the 2008 Rule that impose a duty to apply on CAFOs that are discharging.” *Id.* at 756. Thus, an existing discharge is required before the obligation to apply for and obtain a CAFO NPDES permit arises.

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<sup>2</sup> Importantly, the preamble to the 2008 CAFO Rule also specifically addressed whether a past discharge, by itself, requires a CAFO owner or operator to apply for and obtain a CAFO NPDES permit. Specifically, USEPA noted that some commenters asserted that a prior discharge is not, by itself, a sufficient basis for requiring a permit and observed that it is quite possible that a CAFO may have eliminated the cause of the discharge. USEPA agreed that not every past discharge from a CAFO necessarily triggers a duty to apply for a permit; however, a past discharge may indicate that the CAFO discharges or proposes to discharge if the conditions that gave rise to the discharge have not been corrected. 73 Fed. Reg. 70,423.

As required by the ruling in *Nat'l Pork Producers*, USEPA revised its regulations for determining when a CAFO must apply for and obtain an NPDES permit. *See* 77 Fed Reg. 44494 (July 30, 2012). 40 C.F.R. § 122.23(d)(1) now provides that: "A CAFO must not discharge unless the discharge is authorized by an NPDES permit." Section 122.23(f) provides: By when must the owner or operator of a CAFO have an NPDES permit if it discharges? A CAFO must be covered by a permit *at the time that it discharges.*" *See* 40 C.F.R. 122.23 (f). (Emphasis added.)

**C. The Second Amended Complaint Only Alleges Discreet Past Discharges and Fails to Allege Any Ongoing or Current Discharge.**

Section 12(f) of the Act provides in pertinent part, as follows:

\* \* \*

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

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

The language of Section 12(f) and its reference to Section 39(b) of the Act make it clear that no NPDES permit is required for any discharge for which a permit is not required under federal law. It follows that the state may only require a CAFO to obtain an NPDES permit if it is required to do so under federal law. As set forth above, current federal regulations require a NPDES permit for CAFOs that are *discharging*. So, the next logical inquiry is: Does federal law require the CAFOs named in Counts I – VIII to obtain a CAFO NPDES Permit? The answer is: No.

The Second Amended Complaint allege that on specific dates between 2004 and 2009, a discharge(s) of wastewater<sup>3</sup> from each of the Respondent Farms occurred in violation of Section 12(f) of the Act (415 ILCS 5/12(f)) and 35 Ill. Adm. Code 309.102. *See* Second Amended Complaint: Count I, ¶ 17; Count II, ¶¶ 30-32; Count III, ¶30; Count IV ¶¶ 30-32; Count V ¶¶ 29-33; Count VI ¶ 29-30; Count VII ¶ 32; Count VIII ¶¶ 33-44. The People do not allege in any of Counts I – VIII of the Second Amended Complaint that any Respondent’s facility is *discharging* any waste to waters of the United States. The People do not even allege in Counts I-VIII that Respondents have failed to address the events or operational issues that gave rise to the discreet discharges that were the subject of the original Complaint. The current federal law and regulations and state law, i.e. the plain language of 12(f) of the Act, set forth above, only require CAFOs that *discharge* to seek coverage under an NPDES permit. A plain reading of the law and the People’s Second Amended Complaint demonstrates that there is no basis for the People’s requested prayer for relief that each of the Respondents “...immediately apply to obtain CAFO NPDES permit coverage for the subject facility.” Paragraph C, of the People’s prayer for relief in Counts I – VIII of its Complaint is legally insufficient and must be stricken.

#### IV. CONCLUSION

The sole issue presented in this Motion is whether, pursuant to applicable law, the People have pled sufficient factual allegations, when taken as true, to entitle them to the newly requested prayer for relief – a Board order that the Respondents immediately seek an NPDES CAFO permit. The Respondents maintain that, as a matter of law, the answer is “No,” and this portion of the relief should be stricken. Accordingly, Respondents respectfully request that the Board

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<sup>3</sup> In Count I, the People also allege that a discharge during the construction of the Farm before animals were present caused a violation of Sections 12(a) and (f) and required a Stormwater NPDES permit. The People do not allege that this release required a CAFO NPDES Permit. *See* Count I, ¶ 44.

rule on this narrow issue now, as such ruling will resolve an issue central to the resolution of this case, and will allow it to proceed in an efficient and cost effective manner to the benefit of all parties and the Board.

WHEREFORE, for the reasons stated above, the Respondents respectfully move the Board to strike paragraph C in the Prayer for Relief in Counts I – VIII of the People’s Second Amended Complaint, and provide such other relief as the Board deems appropriate.

Respectfully submitted,

HILLTOP VIEW, LLC, EAGLE  
POINT FARMS, LLC, HIGH-POWER  
PORK, LLC, WILDCAT FARMS, LLC,  
LONE HOLLOW, LLC, TIMBERLINE, LLC,  
LITTLE TIMBER, LLC, and  
PRAIRIE STATE GILTS, LTD

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By: /s/Edward W. Dwyer  
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By: /s/Claire A. Manning  
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PROFESSIONAL SWINE MANAGEMENT, LLC

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Joel A. Benoit

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Dated: February 11, 2013