

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached Board JOINT MOTION FOR LEAVE TO FILE REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF, and RESPONDENTS' JOINT REPLY AND OBJECTION TO COMPLAINT'S RESPONSE TO RESPONDENTS' MOTION TO STRIKE PART OF COMPLAINT'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 March 25, 2013; and upon:

Ms. Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on March 25, 2013.

/s/Edward W. Dwyer
Edward W. Dwyer

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 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)

**JOINT MOTION FOR LEAVE TO FILE REPLY TO
COMPLAINANT’S RESPONSE TO RESPONDENTS’ MOTION
TO STRIKE PART OF COMPLAINANT’S PRAYER FOR RELIEF**

NOW COME 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, (“Respondents”), by and through their attorneys, BROWN, HAY & STEPHENS, LLP., HODGE DWYER & DRIVER, and MOHAN, ALEWELT, PRILLAMAN & ADAMI, and for their Joint Motion for Leave to File Reply to Complainant’s Response to Respondents’ Motion to Strike Part of Complainant’s Prayer for Relief (“Response”), brought pursuant to 35 Ill. Admin. Code § 101.502, state as follows:

1. On February 11, 2013, Respondents filed their Joint Motion to Strike Part of Complainant’s Prayer for Relief, (hereinafter “Joint Motion”) in response to a portion of the prayer for relief included at the end of Counts I-VIII of the Second Amended Complaint

("Second Amended Complaint"), filed by the Complainant, People of the State of Illinois ("Complainant") on December 13, 2012.

2. The Complainant, with agreement by the Respondents, sought and obtained an extension of time to file and did file a "Response to Respondents' Joint Motion to Strike Part of Complainant's Prayer for Relief" (hereinafter "Response") on March 11, 2013.

3. In its Response, the Complainant: 1) argues that certain federal register preambles and case law are at best instructive but more likely irrelevant to the question of whether the Respondents' confined animal feeding operations ("CAFO" or "CAFOs") are required by applicable state and federal laws and regulations to immediately obtain National Pollution Discharge Elimination System ("NPDES") permits; 2) introduces facts not contained in the Second Amended Pleading that is the subject of Respondents' Motion to Strike; and 3) inappropriately references conduct and statements exchanged in the course of "confidential settlement discussions" with no request or notice to Respondents of its unilateral decision to breach such confidentiality.

4. Respondents will be materially prejudiced if they are not allowed to respond to the above arguments made and inappropriate action taken by the Complainant.

5. Simultaneous with the filing of this Motion, Respondents are filing Respondents' Joint Reply and Objection to Complainant's Response to Respondents Motion to Strike Part of Complainant's Prayer for Relief.

WHEREFORE, for the reasons stated above, the Respondents respectfully request that the Board grant their Joint Motion for Leave to File Reply to Complainant's Response to Respondents' Motion to Strike Part of Complaint's Prayer for Relief 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,
and LITTLE TIMBER, LLC

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Dated: March 25, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

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 REPLY AND OBJECTION TO
COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION
TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF**

NOW COME 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 "Farm," or collectively, "Respondents" or "Respondent Farms"), by and through their attorneys, HODGE DWYER & DRIVER, BROWN HAY & STEPHENS, and MOHAN, ALEWELT, PRILLAMAN & ADAMI, pursuant to 35 Ill. Admin. Code § 101.500, and submit Respondents' Joint Reply and Objection to Complainant's Response to Respondents' Motion to Strike Part of Complainant's Prayer for Relief ("Response"), stating follows:

1. On February 11, 2013, Respondents filed their Joint Motion to Strike Part of Complainant's Prayer for Relief, included in Counts I-VIII of the Second Amended Complaint

("Second Amended Complaint"), filed by the Complainant, People of the State of Illinois ("Complainant") on December 13, 2012 (hereinafter "Joint Motion").

2. Respondents' Joint Motion requests that the Board strike that portion of the relief sought in the Second Amended Complaint praying for a Board order requiring each Respondent confined animal feeding operation ("CAFO") to immediately obtain a National Pollution Discharge Elimination System permit ("NPDES") permit. The Joint Motion notes that only those CAFOs that currently discharge are required to have NPDES CAFO permits. The Second Amended Complaint does not allege that any of the Respondents are currently discharging.

3. The Complainant, with agreement by the Respondents, sought and obtained an extension of time to file and did file a "Response to Respondents' Joint Motion to Strike Part of Complainant's Prayer for Relief" (hereinafter "Response") on March 11, 2013.

4. In its Response, the Complainant makes three curious "arguments:"
- a. The federal case law cited by Respondents in the Joint Motion are irrelevant to the federal CAFO Rule as revised and published on July 30, 2012 (Response at paras. 8-10);
 - b. The preamble language cited by the Respondents is "interpretive law" at best and was only applicable to provisions that have since been vacated and, therefore, it is irrelevant (Response at paras. 8-10); and
 - c. The Second Amended Complaint's allegations show that the Respondents' CAFOs discharged in the past, and this supports the proposition that they are designed and constructed in a manner that accidents or incidents result in discharges, and these are sufficient allegations to demonstrate that the Farms do discharge. (Response at para. 11).
 - d. If the Board determines that Complainant has not pled that the Respondent CAFOs are currently discharging, Complainant requests that the Board grant it leave to again amend its complaint. (See Response, paragraph 12.)

5. More disconcerting are the Complainant's statements in paragraph 12. If the Joint Motion is granted, the Complainant seeks leave to amend, yet again. The Complainant asserts that it will certainly "... be able to allege that Respondents have failed to address the events or operational issues that gave rise to the discharges that are the subject of the Second Amended Complaint." The Complainant then cavalierly notes that the source of the additional facts that it will allege to cure the pleading defects are "...details being shrouded in the privilege of settlement discussions...." And, apparently, the Complainant has no qualms about breaching the confidentiality of settlement negotiations and referencing conduct and statements of the Parties obtained in the course of what Respondents at least thought were "confidential settlement discussions." See Response, Paragraph 12. This is the first time that Respondents have been put on notice that the Complainant does not intend to honor the confidential nature of settlement discussions.

6. As set forth below, as well as in Respondents' Motion to Strike, the authority cited in its Joint Motion is more than "interpretive," and makes clear along with the current federal regulations that only CAFOs that discharge are required to seek coverage under an NPDES permit. And, Respondents object to the Complainant's breaching the confidentiality of settlement negotiations in a manner wholly inconsistent with good faith negotiations and Illinois Rule of Evidence 408.

I. ARGUMENT

A. The Federal Case Law and the Preamble Language Cited by Respondents in the Joint Motion Are Relevant to the Federal CAFO Rule as Revised and Published on July 30, 2012.

7. As detailed in Respondents' Joint Motion, the last decade of regulatory proceedings and consequent court decisions governing CAFOs are relevant to the question

before the Board. The evolution of the regulation of CAFOs, in particular whether and which CAFOs must obtain NPDES Permits, provides the roadmap to the current regulation. 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.

8. USEPA proposed subsequent versions of its CAFO regulations that amended the “duty to apply” for an NPDES Permit in 2006. *See* 71 Fed. Reg. 37,744 (June 30, 2006); and later in 2008. *See* 73 Fed. Reg. 70,418 (Nov. 20, 2008) (“*2008 CAFO Rule*”). 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.) Again, a court challenge followed.

9. In 2011, the *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 748-52 (5th Cir. 2011) (hereinafter “*Nat'l Pork Producers*”) Court 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 court 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.

10. Effective July 30, 2012, USEPA revised its regulations addressing when a CAFO must apply for and obtain an NPDES permit. The applicable language regarding whether and when a CAFO must apply for NPDES Permit is at 40 C.F.R. § 122.23(d)(1) and § 122.23(f). The first regulation provides that: “A CAFO must not discharge unless the discharge is authorized by an NPDES permit.” *See* 40 C.F.R. 122.23 (d) (1). 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.) The rulemaking proceedings and the cases cited above are all relevant to understanding and applying the current and applicable federal regulation to the Second Amended Complaint. Applying the current regulation to the allegations in the Second Amended Complaint, it is clear that the Second Amended Complaint does not allege that any of the Respondent Farms discharge. Complainant does not contest that this is the current standard. (See Response, page 5).

B. The Allegations Included In Counts I – VIII of the Second Amended Complaint, Do Not Show That the Farms Are Discharging and Require NPDES Permits.

11. The Second Amended Complaint alleges that on specific dates between 2004 and 2009, a discharge(s) of wastewater¹ from each of the Respondent Farms occurred. 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 occurrences date back almost a decade. The Complainant does 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 Complainant does not contest that since at least July 30, 2012, the applicable regulation states that a facility must have a permit when it discharges. See 40 C.F.R. 122.23(f). (Emphasis added.) The language of the rule is clear. Nowhere in the rule does it state that if a facility had a discharge prior to the effective date of this rule, then it is deemed to

¹ In Count I, the Complainant also alleges 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 Complainant does not allege that this release required a CAFO NPDES Permit. See Count I, ¶ 44.

be currently discharging and therefore it requires a NPDES Permit. That might be what the Complainant would like the rule to say, but it is not what it says.

12. The Complainant's assertions in Paragraph 11 of the Reply that it has plead that the Respondent Farms are currently discharging are absolute nonsense. The Complainant acknowledges the correct standard, i.e. CAFOs that discharge are required to have an NPDES permit—and then states that it has alleged facts that the Respondent Farms discharge. But in support, the Complainant refers to:

- a. unspecified "detailed factual allegations" that "caused"—past tense—the Farms to discharge;
- b. unspecified, conclusory allegations showing that the Respondent Farms are designed and constructed in a manner that "can" result in discharge; and
- c. unspecified, conclusory allegations showing that the "normal course" of operation of the Farm have "resulted"—past tense—in discharge.

(See Response, paragraph 11.)

13. None of these unspecified and conclusory allegations support the Complainant's position. Allegations concerning discrete discharges occurring years ago from various causes do not constitute factual allegations that the Farms are currently discharging. Worse yet, vague and conclusory allegations contending that poor design or construction of a Farm suggests that it can or might discharge in the future similarly do not constitute factual allegations that the Farms are currently discharging. (See Response paragraphs 11-12.) A review of the Second Amended Complaint makes clear that it does not allege that any Respondent Farm is discharging, thus requiring an NPDES Permit.

C. **The Complainant's Reference to Statements and/or Information Exchanged During Confidential Settlement Negotiations Should Be Stricken From Plaintiffs' Response.**

14. As is common in enforcement proceedings, the parties have attempted to reach a settlement. At various times, the Hearing Officer was informed of the status of settlement negotiations. See, *e.g.*, Hearing Officer Order, Sept. 10, 2012. As part of those settlement negotiations, Respondents provided information to the Complainant in confidence and for settlement purposes only.

15. Confidential settlement negotiations are protected by Ill. Rule of Evid. 408. The Complainant's Reply recognizes that this information is protected by the privilege. (See Response, paragraph 12.) But then the Complainant disregards the privilege and sets forth why it believes the information was provided; how the Complainant's counsel construed the information; and a heretofore unknown standard the Complainant's counsel employed when assessing the information. These statements in the Reply should be stricken because, as the Complainant acknowledges, such action and concomitant statements violate the privilege. Additionally, they should not be considered by the Board when determining the sole issue presented in the Joint Motion to Strike Part of Complainant's Prayer for Relief, *i.e.* whether each count of the Second Amended Complaint contains sufficient factual allegation, when taken as true, to support a Board order that the Respondents immediately seek an NPDES CAFO permit. Facts the Complainant might later plead, if allowed to amend the Second Amended Complaint, are irrelevant to the issue presented.

16. The Complainant's willingness to breach the confidential nature of the settlement discussions should not be countenanced here. More broadly, such extraordinary disregard of the privilege has the potential for a chilling effect on future discussions between the Complainant

and parties in enforcement matters. This is significant since, in the experience of the counsel for the Respondents, the majority of enforcement cases are resolved via settlement discussions. For those discussions to be candid and productive, parties engaging in such discussions should be able to do so with the confidence that there will be fidelity to the privilege by all parties.

II. CONCLUSION

17. The rulemaking proceedings and the cases cited in Respondents' Motion to Strike and in this Reply are all relevant and pivotal to understanding and applying the current and applicable federal regulations to the Second Amended Complaint. Applying the current federal regulation to the allegations in the Second Amended Complaint, it is clear that the Second Amended Complaint does not allege that any of the Respondent Farms discharge. Complainant does not contest that this is the current standard. The Second Amended Complaint must survive on the allegations set forth therein. Vague and conclusory statements interpreting what the Complainant believes the allegations show, e.g. that they show poor design or construction of a facility, which in turn suggest that it can or might discharge in the future, do not constitute factual allegations that the Respondent Farms are currently discharging. The Complainant's references to conduct and information that is the subject of confidential settlement negotiations should be stricken as not relevant to whether the Second Amended Complaint states sufficient facts to supports its request for an order requiring each Respondent Farm to obtain a CAFO NPDES Permit. The references should also be stricken as inappropriate and a breach of the privilege governing confidential settlement negotiations.

WHEREFORE, for the reasons stated above, the Respondents respectfully request that the Board grant their Motion to Strike Part of Complainant's Prayer for Relief; find that the Complainant's reference in its Reply to conduct and statements related to information that was

the subject of confidential settlement discussions was improper and, accordingly, will not be considered by the Board; and provide Respondents 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,
and LITTLE TIMBER, LLC,

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