

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 FARMS, )  
 LLC, an Illinois limited liability corporation, )  
 LONE HOLLOW, LLC, an Illinois limited liability )  
 corporation, TIMBERLINE, LLC, an Illinois )  
 limited liability corporation, PRAIRIE STATE )  
 GILTS, LTD, an Illinois corporation, LITTLE )  
 TIMBER, LLC, an Illinois limited liability )  
 corporation, )  
 Respondents. )

PCB NO. 10-84  
(Enforcement)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on April 4, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a MOTION FOR LEAVE TO FILE SUR-REPLY TO RESPONDENTS' JOINT REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' JOINT MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF, a copy of which is attached hereto and herewith served upon you.

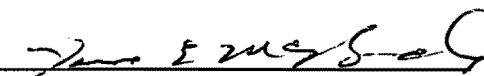
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

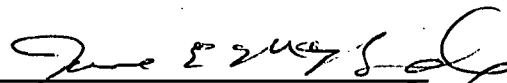
MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

500 S. Second St.  
Springfield, IL 62706  
217/782-9031

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

**CERTIFICATE OF SERVICE**

I hereby certify that I did on April 4, 2013, 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 MOTION FOR LEAVE TO FILE SUR-REPLY TO RESPONDENTS' JOINT REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' JOINT MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF upon the persons listed on the Service List.

  
\_\_\_\_\_  
JANE McBRIDE  
Sr. Assistant Attorney General

This filing is submitted on recycled paper.

**SERVICE LIST**

Edward W. Dwyer  
Jennifer M. Martin  
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3150 Roland Avenue  
P.O. Box 5776  
Springfield, IL 62705

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Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794



3. The Joint Reply allowed the Respondents to respond to Complainant's position regarding the authority cited in Respondents' Joint Motion. Complainant's Sur-Reply further clarifies the Complainant's position regarding authority relied upon by Respondents and also clarifies and contrasts (from Respondents' assertions) Complainant's position as to the legal and factual basis for the amended request for relief.

4. It is Complainant's position that these pleadings have helped to identify and narrow the issues in this matter and leave should be granted.

5. Further, based on the fact that Respondents' filed their Joint Reply without yet receiving leave from the Board, Complainant will be materially prejudiced if it is not allowed to respond to the Joint Reply as well as respond to the objection stated therein.

6. As stated above, Complainant has prepared a Sur-Reply and is filing it simultaneously with the filing of this Motion.

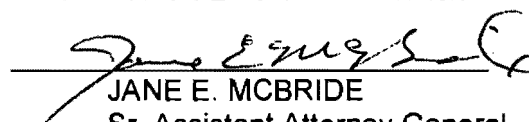
WHEREFORE, on the grounds and for the reasons stated above, the Complainant respectfully requests that the Board grant its motion for leave to file a Sur-Reply and provide any such other relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. LISA MADIGAN, Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY:

  
JANE E. MCBRIDE  
Sr. Assistant Attorney General

500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031



3. In its Joint Motion and Joint Reply, Respondents contend that pursuant to applicable law, the Complainant has failed to plead sufficient factual allegations in the Second Amended Complaint to entitle it to the amendment to the prayer for relief in each count, that being, that Respondents be ordered to obtain NPDES CAFO permit coverage for each facility.

4. As set forth in Complainant's Response, Respondents' reliance on the Preamble of the 2008 Federal CAFO Rule and their interpretation of the *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 ("*Nat'l Pork*") decision for the analysis that is to be undertaken in a determination as to whether or not a CAFO must get permit coverage, is misguided and incorrect. As stated in Complainant's Response, the language relied upon in the Preamble applies to the federal government's proposed "duty to apply" obligation, which was twice vacated by the courts. Language in a preamble of a **final** federal rule is interpretive law, at best (emphasis added). The 2008 Federal CAFO Rule proved not to be a final rule. The Federal CAFO rule was finalized in 2012.

5. The *Nat'l Pork* court did not reach the question as to what was meant by "discharge" or "discharging". Thus, *Nat'l Pork* cannot be relied upon for authority regarding the term "discharge" or "discharging". If Respondents' are relying on *Nat'l Pork* for their argument that the Second Amended Complaint is legally insufficient, *Nat'l Pork* does not define "discharge" and Respondents' argument fails.

6. Respondents have twice quoted the *Nat'l Pork* decision indicating the 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 Clean Water Act ("CWA"), citing to the case at pages 750-52. Joint Motion at page 5, Joint Reply at page 4. It is an important distinction that no where in the "duty to apply" analysis, found on pages 750-52 in the decision, does the term "presently" modifying "discharge" or "discharging" appear.

7. It is the Complainant's position that the applicable, current state regulations as well as the 2012 Federal CAFO Rule continue to, as the CAFO NPDES regulations have since they were first promulgated in the 1970s, trigger a regulatory analysis once a facility has discharged pollutants to waters of the United States. The permitting authority undergoes a determination pursuant to 35 Ill. Adm. 502.101, 103, 502.104 and 502.106, and 40 CFR 122.21, 122.23(b)(4), 122.23 (b)(6) and 122.23 ( c ), based on the size of the facilities and other relevant factor as to whether the subject facility(ies) must obtain permit coverage.

8. It is the Complainant's position that the entire federal effort to establish a separate obligation, that is, a duty to apply prior to there being a discharge, has no bearing on the obligation that it is a violation if a facility discharges and does not have permit coverage at the time of the discharge. As has always been the case under the CAFO regulations, the regulatory framework continues to be that facilities who operate without permit coverage do so at their own risk should they discharge. However, once they do discharge, the fact of the discharge triggers a determination on the part of the permitting authority to determine if the facility must have permit coverage. This determination, pursuant to the above-cited regulations, is based on the size of the operation and other factors both specifically identified in the regulations as well as other factors the agency finds to be relevant.

9. Any language, analysis, or explanation that was part of federal rulemaking and associated court decisions regarding the federal effort to create a duty to apply obligation is, under existing applicable rules, both state and federal, irrelevant to the obligation to have a permit at the time of discharge of pollutants to waters of the United States and the determination triggered by the fact of the discharge.

10. It is the Complainant's position that the section of the Preamble to the 2008 Federal Rules regarding the federal effort to create a "duty to apply" obligation is wholly irrelevant to the 2012 Federal Rule and the applicable state regulations.



11. If the Board decides that additional allegation of fact is needed to support the prayer for relief asking the Board to order the facilities to obtain permit coverage, based on the elements and requirements of the existing applicable regulations, Complainant would request leave to amend.

12. Factors bearing on the basis for the determination made concerning the subject facilities include the record of operation of these facilities, the fact one management firm operates all of the subject facilities and there have been violations at multiple facilities, the fact of similar repeat violations facility to facility under the same management firm, design concerns including contaminant levels in perimeter tiles (the under building waste pits and waste handling systems are designed by the same consultant engineer and it is known to the Illinois EPA inspectors that the various facilities were built per similar design and construction plans), concerns that the facilities have failed to address the events and operational issues that gave rise to the discharges as well as concerns as to whether the facilities have adequate nutrient management plans in place.

13. In their Joint Reply, Respondents allege that the above referenced factors are unspecified, vague and conclusory. The Board will judge this for itself. It is Complainant's position that they are not. They constitute observations and determinations made by the inspectors, who also during applicable time periods have served as permit reviewers and writers for the agency, specific to the subject facilities. On the other hand, it is Complainant's position that the Respondents' broad assertion that they facilities do not discharge could be considered a conclusory statement.

14. Settlement discussions between the parties have broken down. It is not a breach of settlement confidentiality to make the factual allegation that the facilities have failed to address the events or operational issues that gave rise to the discharges, or to allege that the Respondents' do not have adequate nutrient management plans for these facilities. These

are factual allegations that have been the basis of the agency's determination that the facilities must obtain permit coverage since the time the original complaint was filed, and they continue to be the factual basis for the agency's determination.

15. Complainant is in the same position post-settlement discussion as it was before the settlement discussions took place, that of needing to seek and obtain additional information from the Respondents' via formal discovery that will either further substantiate Complainant's assertion and serve as evidence at hearing, or serve to convince Complainant and the Board that permit coverage is not necessary.

16. It is not the fact of the settlement discussions that have caused the Complainant to amend the prayer for relief. The amendment is made to include the specific relief that has always been sought in this matter. The Complainant failed to include the specific prayer in the original and first amended complaint, because it is not counsel's normal practice to include it even if sought. However, in this case, when it appeared the case would be proceeding to litigation, the Complainant sought to amend the prayer for relief so there was clarity as to the relief sought as well as clarity as to the relevancy of anticipated discovery requests.

WHEREFORE, on the grounds and for the reasons stated above, the Complainant respectfully requests that the Board deny Respondents' Joint Motion to Strike Part of Complainant's Prayer for Relief, or, in the alternative, should the Board find, based on current, existing applicable law, that the Complainant has failed to plead sufficient factual allegations to

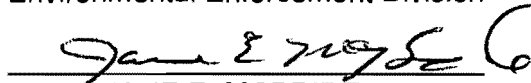
support the requested relief, Complainant seeks leave to amend the Second Amended Complaint.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. LISA MADIGAN, Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY:

  
\_\_\_\_\_  
JANE E. MCBRIDE  
Sr. Assistant Attorney General

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