

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 August 2, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION TO STRIKE RESPONDENTS HILLTOP VIEW, LLC'S, EAGLE POINT FARMS, LLC'S, TIMBERLINE, LLC'S AND LITTLE TIMBER, LLC'S AFFIRMATIVE DEFENSES, a copy of which is attached hereto and herewith served upon you.

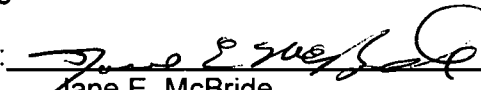
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

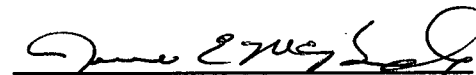
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BY: 
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CERTIFICATE OF SERVICE

I hereby certify that I did on August 2, 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 MOTION TO STRIKE RESPONDENTS HILLTOP VIEW, LLC'S, EAGLE POINT FARMS, LLC'S, TIMBERLINE, LLC'S AND LITTLE TIMBER, LLC'S AFFIRMATIVE DEFENSES upon the persons listed on the Service List.



JANE McBRIDE
Sr. Assistant Attorney General

This filing is submitted on recycled paper.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 PROFESSIONAL SWINE)
 MANAGEMENT, LLC, an Illinois)
 limited liability corporation, and)
 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)

**MOTION TO STRIKE RESPONDENTS HILLTOP VIEW, LLC'S, EAGLE POINT FARMS, LLC'S, TIMBERLINE, LLC'S AND LITTLE TIMBER, LLC'S
AFFIRMATIVE DEFENSES**

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel Lisa Madigan, Attorney General of the State of Illinois, and moves to strike Respondents Hilltop View, LLC's, Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's affirmative defenses on the following grounds:

1. Respondents Hilltop View, LLC, Eagle Point Farms, LLC, Timberline, LLC and Little Timber, LLC have pled identical affirmatives defenses to the counts pertinent to each of

the LLC's subject facility. Complainant's response to each is identical, and therefore moves to strike these Facility Respondents' affirmative defenses in this single filing.

Standard

2. The Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing" 35 Ill. Adm. Code 103.204(d).

3. The standard for affirmative defenses that has been established by the Board was set forth as follows in the matter of *People v. Heritage Coal Company, LLC (f/k/a Peabody Coal Company)*, PCB 99-134, slip op at 4 (June 5, 2003):

In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complain are true." *People v. Community Landfill Co.*, PCB 97-193, slip op at 3 (Aug 6, 1998). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100 slip op at 2 n. 1 (January 23, 1997) (quoting Black's Law Dictionary). Furthermore, if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. *Warner Agency v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E. 2d 663, 635 (4th Dist. 1984).

4. The Code of Civil Procedure provides the following guidance regarding pleading affirmative defenses. Section 2-613 (d), 735 ILCS 5/2-613(d), provides in part:

The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, should be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (2008).

The purpose of the above-quoted language is to specify the disputed legal issues before trial.

Handelman v. London Time, Ltd., 124 Ill. Ap. 3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984).

The parties are to be informed of the legal theories which will be presented by their respective opponents. *Id.* This is a prime function of pleading. *Id.*

5. Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735 ILCS 5/2-612, which provides:

Insufficient pleadings. (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.

(b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.

(c) All defects in pleadings, either in form or substance, not objected to in the trial court are waived.

6. A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. *Condon v. American Telephone and Telegram Co.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991), citing *The Worner Agency Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633 (4th Dist 1984).

7. "To set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. . . . In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact." *Richco Plastic Co. v. IMS Co.*, 288 Ill. App.3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997),

8. A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of

an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken.” *International Insurance Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854, 539 N.E. 2d 787, 791 (2nd Dist. 1989).

9. Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. See *International Ins. Co.*, 242 Ill. App. 3d at 635.

**Respondents Eagle Point Farms, LLC's, Timberline, LLC's
and Little Timber, LLC's First Affirmative Defense**

10. Respondents Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's first affirmative defense reads as follows

Proceeding the filing of its Complaint, the Complainant failed to comply with Sections 31 of the Act's required enforcement procedures. Instead of Section 31, Complainant states that Count IV (VI and VIII) is merely brought pursuant to Section 42(d) and (e) of the Act. Accordingly, Count IV fails and must be dismissed due to the Complainant's failure to comply with Section 31 of the Act.

11. Counts IV, VI and VIII are brought solely on the Attorney General's own motion. Based on the applicable case law, Respondents Eagle Point's, Timberline's and Little Timber's first affirmative defense is not affirmative matter that avoids the legal effect of or defeats the cause of action pled in Counts IV, VI and VIII.

12. The Illinois Pollution Control Board has extensively addressed the requirements of Section 31 of the Act, 415 ILCS 5/31. In considering the legislative history of the 1996 amendments to Section 31 the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation. See *People v. Chiquita*

Processed Foods, LLC, PCB 02-56 (November 21, 2002), *People v. Eagle-Picher-Boge*, PCB 99-152 (July 22, 1999); *People v. Geon*, PCB 97-62 (October 2, 1997); and *People v. Heuermann*, PCB 97-92 (September 18, 1997).

13. Rather, the written notice required by Section 31(a)(1) is a precondition to the Illinois EPA's referral of the alleged violations to the Attorney General. *People v. Chemetco*, PCB 96-76 (July 8, 1998). The legislative history of Section 31 indicates that the legislature did not intend to prevent the Attorney General from bringing enforcement actions that are not based on an agency referral. *Id.* Respondents Eagle Point, Timberline and Little Timber, in their first affirmative defense, have not alleged that the count is based on a referral to the Attorney General from the Illinois EPA, and, in fact, these counts are not.

Respondent Hilltop View LLC's First Affirmative Defense and Respondents Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's Second Affirmative Defense

14. Respondent Hilltop View LLC's first affirmative defense and Respondents Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's second affirmative defense reads as follows

Count I (IV, VI, VIII) fails to allege facts sufficient to support a finding that Hilltop (Eagle Point, Timberline, Little Timber) is discharging, and thus, required to obtain an NPDES permit. The Complainant's allegations in Count I (IV, VI, VIII) that Hilltop (Eagle Point, Timberline, Little Timber) is required to apply for an NPDES permit is based solely upon one isolated event. because this isolated event is insufficient to establish that Hilltop (Eagle Point, Timberline, Little Timber) is discharging in a manner sufficient to require an NPDES permit, Hilltop (Eagle Point, Timberline, Little Timber) is not required to apply for an NPDES permit.

15. Respondents' affirmative defense, first, is a claim of insufficient pleading and as such is not affirmative matter that will avoid the legal effect of or defeat the cause of action. Second, it is solely a legal conclusion and as such is not affirmative matter that will defeat the

claim. Further the question raised in Respondents assertion is the exact same question that served as the basis of Respondents' motion to strike a portion of the second amended complaint's request for relief, which was denied in the Board's Order dated May 2, 2013.

Respondents Hilltop View LLC's, Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's Third Affirmative Defense

16. Respondents Hilltop View LLC's, Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's Third Affirmative Defense reads as follows:

Hilltop View (Eagle Point, Timberline, Little Timber) reserves the right to amend its Answer to allege any additional defenses which discovery may reveal to be appropriate

Reply. This assertion is a reservation, which is appropriate as long as any additional affirmative defenses are pled sufficiently in advance of hearing to allow responsive pleadings.

Respondent Hilltop View LLC's Second Affirmative Defense and Respondents Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's Fourth Affirmative Defense

17. Respondent Hilltop View LLC's second affirmative defense and Respondents Eagle Point Farms, LLC's, Timberline, LLC's and Little Timber, LLC's fourth affirmative defense reads as follows:

The Complaint does not allege with specificity whether the federal and/or state statutes and regulations cited therein were in effect at the time of the alleged violations.

18. Respondents second affirmative defense is a claim of insufficient pleading and as such is not affirmative matter that will avoid the legal effect of or defeat the cause of action. It might be the basis for a motion challenging the pleading, but it is not affirmative matter that will defeat the claim, and thus must be struck as an affirmative defense.

19. Respondents assertion does not include the elements of a properly pled affirmative

defense. It does not include specific allegations of either fact and law.

20. Further, the state statute and regulations have not been altered by any means during the pendency of this action. The federal regulations have been pled as they existed at the time of the filings. If the Respondents believe their assertion is a legitimate issue and are indeed raising this question as a matter of insufficient pleading, and thus notice, it must be done in proper form pursuant to the Board's procedural rules and the Illinois Rules of Civil Procedure and not perpetuated as an alleged affirmative defense. It is not an affirmative defense.

21. The issue raised, if done so with necessary appropriate specificity – which has not been done in this alleged affirmative defense – will require significant briefing. Different portions of the federal regulations were vacated at different times. The bottom line is, Complainant has pled the regulations it believes to be applicable and the portions of the federal regulations that were ultimately vacated are not at issue in this case – as set forth in Complainant's briefings in response to Respondents' motion to strike a portion of the second amended complaint's request for relief.

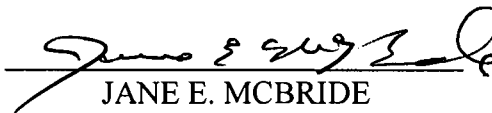
WHEREFORE, on the foregoing grounds and for the foregoing reasons, Complainant respectfully requests that the Board strike the affirmative defenses asserted by Respondents

Hilltop View LLC (for Count I), Eagle Point Farms, LLC (for Count IV), Timberline, LLC (for Count VI) and Little Timber, LLC (for Count VIII).

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:


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