

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., NORTH FORK )  
PORK, LLC, LITTLE TIMBER, LLC, TWIN )  
VALLEY PUMPING, INC. )  
)  
Respondents. )

PCB No. 2010-084  
(Enforcement – Land)

**NOTICE OF FILING**

TO: Mr. John T. Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601  
(VIA ELECTRONIC MAIL)

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, Illinois 62794-9276  
(VIA U.S. MAIL)

**(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 HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLCs, MOTION FOR PARTIAL DISMISSAL, a copy of which is herewith served upon you.

Respectfully submitted,

HILLTOP VIEW, LLC  
Respondents,

Dated: September 7, 2010

Edward W. Dwyer, #6197577  
Jennifer M. Martin, #6210218  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776

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

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 FARMS, LLC, LONE HOLLOW, LLC, TIMBER- )  
 LINE, LLC, PRAIRIE STATE GILTS, LTD., )  
 NORTH FORK PORK, LLC, LITTLE TIMBER, )  
 LLC, TWIN VALLEY PUMPING, INC. )  
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 Respondents. )

PCB No. 2010-084  
(Enforcement – Land)

**MOTION FOR PARTIAL DISMISSAL**

NOW COMES Respondents, HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC (“Respondents”), by and through their attorneys, HODGE DWYER & DRIVER, and pursuant to 35 Ill. Admin. Code § 101.506, submit this Motion for Partial Dismissal of the First Amended Complaint (“Amended Complaint”) filed by the People of the State of Illinois (“People”) on July 13, 2010. In support of its Motion, Respondents’ state as follows.

**I. INTRODUCTION**

1. 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), “[b]y causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit.” Amended Complaint Count IV ¶ 20, Count V ¶ 22, Count VI ¶ 22, Count VII ¶ 27, Count IX ¶ 33.<sup>1</sup>

<sup>1</sup> It is not clear in Count I whether the People allege violations of Section 12(f) (415 ILCS 5/12(f)), for the alleged May 28, 2009 alleged runoff, since the only statutory reference to the violation occurs after an accusation of “causing or allowing the discharge of livestock waste runoff from a land application field into a roadside ditch in

2. The People do not allege facts sufficient to show that Respondents were, at the time of the alleged violations, or are now, required to obtain National Pollution Discharge Elimination System (“NPDES”) permits.

3. Specifically, the People do not allege facts sufficient to show that Respondents’ facilities (A) discharged, discharge or propose to discharge to (B) navigable waters of the United States.

## II. STANDARD OF REVIEW

4. Section 101.506 of the Illinois Pollution Control Board’s procedural rules (35 Ill. Admin. Code § 101.506), allows motions to dismiss based on the sufficiency of any 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). Motion to dismiss should be granted “where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested.” *Casanave v. Amoco Oil Co.*, PCB No. 97-84 at 60-7 (Ill.Pol.Control.Bd., Nov. 20, 1997). The Illinois Pollution Control Board (“Board”) recognizes Illinois as a fact-pleading state and explains 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).

## III. ARGUMENT

5. The People allege violations of Section 12(f) of the Act (415 ILCS 5/12(f)), which prohibits anyone from causing, threatening, or allowing “the discharge of any contaminant into

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such a manner as to threaten water pollution,” which appears to suggest an alleged violation of Section 12(a). 415 ILCS 5/12(a). However, to the extent that the People allege a violation of Section 12(f) based on the May 2009 alleged runoff (415 ILCS 5/12(f), Hilltop View, LLC (“Hilltop View”) contends that the People failed to allege facts sufficient to establish an obligation to obtain a NPDES permit and a violation under Section 12(f).

the waters of the State, as defined herein...without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act...” However, the People fail to allege facts sufficient to demonstrate that the facilities at issue in Counts I, IV, V, VI, VII, and IX were, at the time of the alleged discharge, or are now, required to obtain NPDES permits. Therefore, the people fail to allege facts sufficient to establish violations under Section 12(f). 415 ILCS 5/12(f).

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. § 1311(a), 1342, 1362. Generally, any person who discharges or proposes to discharge has a general duty to apply for a NPDES permit. 40 CFR § 122.21(a). The United States Environmental Protection Agency (“USEPA”) also promulgated specific regulations for determining when an animal feeding operation (“AFO”) must apply for and obtain an NPDES permit. *See* 40 CFR § 122.23(d)(1). Specifically, “[t]he owner or operator of a CAFO must seek coverage under a NPDES permit if the CAFO discharges or proposes to discharge.” *Id.*

7. USEPA delegated authority to Illinois to implement the NPDES program in Illinois. As such, the Act authorizes the Illinois Environmental Protection Agency (“IEPA”) 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). Furthermore, “[t]he Agency may issue general NPDES permits for discharges from categories of point sources which are subject to the same permit limitations and conditions. Such general permits...shall conform to regulations promulgated under Section 402 of the Federal Water Pollution Control Act...” *Id.* Pursuant to this authority, in October 2009, IEPA promulgated a CAFO NPDES general permit. *See* Illinois Environmental Protection Agency National Pollution

Discharge Elimination System General Permit for Concentrated Animal Feeding Operations, Permit No. ILA01 (October 20, 2009) (hereafter referred to as "Illinois CAFO General Permit").

Similar to the federal regulations, the Illinois CAFO General Permit requires CAFOs "that discharge or propose to discharge" to seek coverage under the Illinois CAFO General Permit.

*Id.* at Special Condition 1. However, the People do not allege facts sufficient to demonstrate that Respondents were, at the time of the alleged discharge, or are now, required to seek a permit from IEPA pursuant to IEPA's authority under Section 39(b) (415 ILCS 5/39(b)), under the general federal NPDES permit regulations, the federal CAFO regulations, the Illinois CAFO General Permit, or any other statutes or regulations, since they fail to allege facts that show Respondents' facilities (A) discharged, discharge, or propose to discharge to (B) navigable waters of the United States. Accordingly, the People do not allege facts sufficient to establish violations of Section 12(f) and 35 Ill. Admin. Code § 309.102(a).

**A. The People Fail to Allege Facts Sufficient to Demonstrate that Respondents Discharged, Discharge, or Propose to Discharge.**

8. Generally, any person who discharges or proposes to discharge has a general duty to apply for a NPDES permit. 40 CFR § 122.21(a). Likewise, owners and operators of CAFOs must only seek coverage under a NPDES permit if the CAFO discharges or proposes to discharge. 40 CFR § 122.23(d)(1). "A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur." *Id.* However, the People do not allege facts sufficient to establish that the facilities at issue discharged, discharge, or propose to discharge to waters of the United States.

9. As background, USEPA began regulating discharges from CAFOs in the 1970s, and in February 2003, USEPA revised these regulations to "focus[] on 5% of the nation's AFO's

that presented the highest risk of impairing water quality and public health.” 73 Fed. Reg. 70418, 70419 (citing 68 Fed. Reg. 7176-7274 (Feb. 12, 2003) (“the CAFO Rule”). The 2003 CAFO Rule required all owners or operators of CAFOs to apply for a NPDES permit (called the “duty to apply”), unless they could demonstrate there was no potential to discharge. 73 Fed. Reg. 70419. The 2003 CAFO Rule was challenged by environmental groups and industry groups, resulting in the decision by the Second Circuit court of *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005) (hereafter “*Waterkeeper*”). The court in *Waterkeeper* found that the “duty to apply” provision was invalid and determined that the CWA does not authorize USEPA to require all CAFOs to obtain NPDES permits unless there is an *actual* discharge. *Id.* at 505.

10. In response to the *Waterkeeper* decision, USEPA proposed another version of regulations that amended the “duty to apply” provision in 2006. 71 Fed. Reg. 37744 (June 30, 2006). This rule required that only those CAFOs that “discharge or propose to discharge” must apply for an NPDES permit. *Id.* at 37748. USEPA reasoned that this would hold CAFO owners and operators to the same “duty to apply” requirement as already existed for point sources under 40 CFR § 122.21(a)(1). *Id.*

11. In 2008, USEPA supplemented and finalized the rule to clarify the circumstances when an NPDES permit is necessary. 73 Fed. Reg. 70418 (Nov. 20, 2008) (“the 2008 CAFO Rule”). Specifically, the 2008 CAFO Rule calls for a case-by-case evaluation by the CAFO owner or operator as to whether the CAFO “discharges or proposes to discharge from its production area or land application area based on actual design, construction, operation, and maintenance.” *Id.* at 70423. Different from the 2003 CAFO Rule, this does not systematically require a permit from a CAFO with merely a potential to discharge. *Id.* The preamble to the

2008 CAFO Rule also made clear that this “objective assessment” should determine whether the CAFO is “designed, constructed, operated, or maintained such that a discharge will occur, not simply that it might occur.” *Id.*

12. Additionally, the preamble to the 2008 CAFO Rule addressed whether a past discharge, by itself, requires a CAFO owner or operator to apply for and obtain an NPDES permit. *Id.* A past discharge alone does not categorically require a CAFO owner or operator to apply for and obtain an NPDES permit so long as the “conditions that gave rise to the discharge” have been “changed or corrected.” *Id.* 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. EPA agrees 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.

*Id.* (Emphasis added.)

13. Even if the allegations made by the People are taken as true, they do not establish that Respondents discharged, discharge, or propose to discharge. Counts I, IV, V, VI, VII, and IX do not allege facts that establish that the facilities were, at the time of the alleged discharge, or are now, designed, constructed, operated, or maintained such that a discharge will occur. Accordingly, the People fail to allege facts sufficient to establish an obligation, at the time of the alleged discharges or now, to obtain NPDES permits.

**B. The People Fail to Allege Facts Sufficient to Demonstrate that Respondents Discharged, Discharge, or Propose to Discharge to the Waters of the United States**

14. The People allege violations of Section 12(f) of the Act (415 ILCS 5/12(f)), which prohibits anyone from causing, threatening, or allowing “the discharge of any contaminant into

the waters of the State, as defined herein...without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act...” Under Section 39(b) (415 ILCS 5/39(b)), IEPA only has the authority 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, as now or hereafter amended, within the jurisdiction of the State, or into any well.” Likewise, Section 12(f) of the Act (415 ILCS 5/12(f)), explains that NPDES permits are not required under Sections 12(f) or 39(b) of the Act (415 ILCS 5/39(b)), “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.” The CWA (or the Federal Water Pollution Control Act) requires a NPDES permit for the discharge of any pollutant, or combination of pollutants, from any point source into navigable waters, which are defined as waters of the United States. 33 U.S.C. §§ 1342, 1362(7). The People fail to allege facts sufficient to establish that Respondents’ facilities discharged, discharge, or propose to discharge to waters of the United States. Therefore, the People fail to allege facts sufficient to establish that the Respondents were, at the time of the alleged violations, or are now, obligated to obtain NPDES permits; and, therefore, the People fail to allege facts sufficient to demonstrate violations of Section 12(f).

15. As background, the Supreme Court has specifically interpreted the term navigable waters in a plurality opinion. *See Rapanos v. U.S.*, 547 U.S. 715 (2006). The Seventh Circuit follows Justice Kennedy’s opinion in *Rapanos* and applies the significant nexus test. *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006). Under the significant nexus test, to qualify as a navigable water, a water or wetland must have a significant nexus to waters that are, were, or could reasonable be made navigable-in-fact. *Rapanos* at 759. Under this test, “an



intermittent stream is a water of the United States only if the Government can prove that the stream possesses a significant nexus to a navigable-in-fact water.” *U.S. v. Lippold*, 2007 U.S. Dist. LEXIS 80513 at 15 (C.D. Ill. 2007).

16. In Count I, the People allege that the Hilltop View facility is within the Sugar Creek watershed. Amended Complaint, Count I ¶ 4. Furthermore, the People allege that runoff containing livestock waste was present on the north ditch of Meadowlark Lane, approximately one-eighth mile from the facility, and that the runoff had the potential “to discharge from the ditch into waters of the State in the event of precipitation.” Amended Complaint, Count I ¶ 16. However, the People do not allege a discharge to the waters of the United States.

17. In Count IV, the People allege that “drainage from the Eagle Point site flows directly through several ravines into final cut strip mine lakes.” Amended Complaint, Count IV ¶ 4. Furthermore, the People alleged a discharge “onto the land in a manner in which the discharge drained into a strip mine lake.” Amended Complaint, Count IV ¶ 13. However, the People do not allege a discharge to the waters of the United States.

18. Similarly, in Count V, the People allege that “[t]he Lone Hollow facility is located within the watershed of Panther Creek which is a tributary to Bronson Creek which is a tributary to the LaMoine River.” Amended Complaint, Count V ¶ 4. The People further allege that manure flowed across a gravel lot to “the waterway to the east of the swine confinement buildings,” which is a tributary to Panther Creek. Amended Complaint, Count V ¶¶ 14, 21. Additionally, the People allege that a second discharge occurred “from the perimeter tile for the isolation confinement building.” Amended Complaint, Count V ¶ 16. However, the People do not allege a discharge to the waters of the United States.

19. In Count VI, the People allege that the Timberline facility is “within the watershed of West Branch Sugar Creek.” Amended Complaint, Count VI ¶ 4. Furthermore, the People allege that a discharge entered “a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek.” Amended Complaint, Count VI ¶ 13. However, the People do not allege a discharge to the waters of the United States.

20. In Count VII, the People allege a discharge from the Prairie State Gilts facility to a hay field, which is located between a reception pit and a lagoon, resulting in a discharge to a “small unnamed tributary of one of the facility’s on-site ponds,” which discharges to an adjacent pond to the east during high water discharges, and the east pond ultimately discharges to an unnamed tributary of Honey Branch. Amended Complaint, Count VII ¶¶ 15-17. However, the People do not allege a discharge to the waters of the United States.

21. In Count IX, the People allege that the Little Timber facility is “located within the watershed of Middle Creek, which is a tributary to the LaMoine River.” Amended Complaint, Count IX ¶ 4. In Count IX, the People first allege a runoff that drained in a ditch of the gravel access lane, which connects to a “north/south waterway,” which in turn “drains southeast and passes under the gravel road, and is a tributary to Middle Creek.” Amended Complaint, Count IX ¶ 16. Next, the People allege the existence of manure residue in the grass of the drainage path and brown frozen wastewater along the path. Amended Complaint, Count IX ¶ 21. Furthermore, the People allege that a brown and slightly turbid flow in a drainage ditch north of the lagoon discharged into the waterway in the adjacent field. Amended Complaint, Count IX ¶ 22. Finally, the People allege that surface water flows through a burn area to the southeast, and “[t]his is tributary to Middle Creek which flows into the LaMoine River.” Amended Complaint, Count IX ¶ 23. The People allege “surface runoff draining west from the

mortality compost structure.” Amended Complaint, Count IX ¶ 24. However, the People do not allege a discharge to the waters of the United States.

22. Common to all the allegations described above, the People fail to allege discharges to waters of the United States. In fact, the entire Amended Complaint fails to mention waters of the United States or describe any water with a significant nexus to navigable-in-fact water. Instead, the Amended Complaint alleges discharges on land and through ravines, across a gravel lot and from perimeter tile, onto a dry dam, and into a hay field. *See* Amended Complaint at Counts I, IV, V, VI, and VII. Likewise, the People allege discharges to a ditch and drainage path. *See* Amended Complaint at Count IX. Therefore, the People fail to allege facts that establish that Respondents discharged, discharge, or proposed to discharge to waters of the United States, and thus, the People fail to allege a basis for imposing obligations to obtain NPDES permits on the facilities at the time of the alleged violations or now, and, therefore, fail to allege violations of Section 12(f). 415 ILCS 5/12(f) and 35 Ill. Admin. Code § 309.102(a).

#### **IV. CONCLUSION**

23. As demonstrated above, the People fail to allege facts that show Respondents’ facilities (A) discharged, discharge, or propose to discharge to (B) navigable waters of the United States. The People fail to allege facts sufficient to establish the obligation to obtain NPDES permits and therefore, fail to properly allege violations of Section 12(f) and 35 Ill. Admin. Code § 309.102(a) in Counts I, IV, V, VI, VII, and IX.

WHEREFORE, for the reasons stated above, the above Respondents respectfully move the Board to dismiss the alleged violations of Section 12(f) of the Act (415 ILCS 5/12(f) and 35 Ill. Admin. Code § 309.102(a) in Counts I, IV, V, VI, VII, and IX by Respondents HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC, and provide such other relief as the Board deems appropriate.

Respectfully submitted,

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

Dated: September 7, 2010

Respondents.

Edward W. Dwyer, #6197577  
Jennifer M. Martin, #6210218  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776

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

**CERTIFICATE OF SERVICE**

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached  
RESPONDENTS HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW,  
LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC's  
MOTION FOR PARTIAL DISMISSAL upon:

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

via electronic mail on September 7, 2010; and upon:

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

Jane E. McBride, Esq.  
Office of the Attorney General  
State of Illinois  
500 South Second Street  
Springfield, Illinois 62706

James A. Hansen, Esq.  
Schmiedeskamp, Robertson, Neu & Mitchell, LLP  
525 Jersey Street  
Post Office Box 1069  
Quincy, Illinois 62306

Claire Manning, Esq.  
Brown Hay & Stephens, LLC  
205 South Fifth Street, Suite 700  
Post Office Box 2459  
Springfield, Illinois 62705-2459

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois,  
on September 7, 2010.

/s/ Edward W. Dwyer