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, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD, NORTH FORK PORK, LLC, LITTLE TIMBER, LLC, TWIN VALLEY PUMPING, INC., Respondents.	)	PCB. NO. 10-84 (Enforcement)

NOTICE OF FILING

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

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19724
Springfield, IL 62794-9276

(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 an original and nine (9) copies of the **MOTION FOR PARTIAL DISMISSAL AND/OR STRIKE OR SEVER CLAIMS**, a copy of which is herewith served upon you.

Respectfully submitted,

NORTH FORK PORK, Respondent,

By: Claire A. Manning
One of Its Attorneys

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that service of the foregoing **Motion for Partial Dismissal and/or Strike or Sever Claims** was made by mailing a true and correct copy thereof in a sealed envelope, postage fully prepaid and addressed to:

Mr. John T. Therriault
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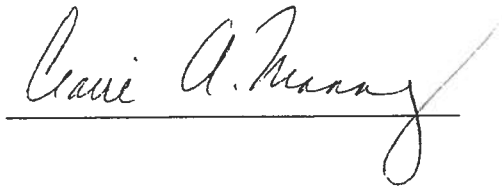
by placing same in the United States Mail on this 30th day of November, 2010.



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MOTION FOR PARTIAL DISMISSAL AND/OR STRIKE OR SEVERE CLAIMS

NOW COMES Respondents, NORTH FORK PORK, LLP ("North Fork") and, pursuant to Ill. Admin. Code 101.506 and in response to the First Amended Complaint ("Complaint") filed by the Office of Attorney General ("People") on July 13, 2010, submits this MOTION FOR PARTIAL DISMISSAL AND/OR STRIKE OR SEVER CLAIMS.

In regard to this Motion, NORTH FORK fully joins the arguments made by co-respondents HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD. AND LITTLE TIMBER, LLC ("Varied Respondents") in their September 7th and October 21st 2010 filings and co-respondent PROFESSIONAL SWINE MANAGEMENT ("PSM") in its September 10th and October 22nd filings. With this Motion, and for the following stated reasons,

NORTH FORK seeks to dismiss the portion of the Complaint specific to NORTH FORK (Count VIII) or, alternatively, seeks to severe this portion of the Complaint pursuant to Section 101.408 of the Board's procedural rules. See 35 Ill. Adm. Code 101.408.

NORTH FORK specifically joins the arguments made by its co-Respondents in their respective Motions to Dismiss and does not repeat those arguments, but files this Motion separately, in order to emphasis and/or supplement the points made in those motions.

A. ***The Act does not contemplate or authorize the Board to proceed in the manner in which this action has been filed.***

The sole portion of the Complaint relative to NORTH FORK is Count VIII. NORTH FORK is located in Hancock County, which is in the Third Appellate District. As the Board can take judicial notice, the various respondents are located in three different counties (Schuyler, Hancock, Fulton) which, in turn, are located in two different appellate districts, the Fourth (Schuyler) and the Third (Hancock, Fulton). See: http://www.state.il.us/court/appellatecourt/DistrictMap.asp.

The Illinois Environmental Protection Act ("Act") neither contemplates nor authorizes this type of complaint before the Board and the Board, as a creature of statute, can only process that which the Act authorizes. Admittedly, where there is an express grant of authority, the Board can do whatever is reasonably necessary to execute the power or perform the duty specifically conferred. See *Chemetco, Inc. v. Illinois Pollution Control Board,* 488 N. E. 2d 639 at 642, *citing A.E. Staley Manufacturing Co. v. Environmental Protection Agency* (1972), 8 Ill. App. 3d 1018, 290 N.E. 2d 892, 896 and also see *Freedom Oil v. Illinois Pollution Control Board*, 275 Ill.App.3d 508, 655 N.E.2d 1184 (4th Dist., 1995).

However, where there is an express grant of authority, the Board must act "in furtherance of the intention of the legislature as stated within the four corners of the statute." See *Chemetco*, 488 N.E. 2d 639 at 6412.

Clearly, the legislature has granted the Board clear and express authority to "conduct proceedings upon complaints charging violations" of the Act. 415 ILCS 5/5(d). That express authority, however, is not without limitation or restraint. The legislature has provided that enforcement decisions of the Board may be directly appealed to the appellate court, but the Act also provides that such appeal would be to *the district where the "cause of action" occurred.* This site of the cause of action requirement also drives the Board's Notice and Hearing requirements, which are set forth in the Board's procedural rules, and which have been developed pursuant to the Act. See 35 Ill. Adm. Code 101.602 ("The Clerk will provide notice of all hearings…in a newspaper of general circulation in the county in which the facility or pollution source is located, or where the activity in question occurred.") and 35 Ill. Adm. Code 101.600 ("The hearings are generally held in the county in which the source or facility is located unless otherwise ordered by the hearing officer.")

While the above language does not apply to regulatory proceedings, which often concern state-wide issues of general regulatory import, enforcement actions are necessarily different procedural creatures, which require procedural due process in the context of an adjudicatory proceeding. Moreover, the filing itself is antithetical to the entire concept of "cause of action" since such terminology generally refers to an event or incident that arises out of the same transaction or series of transactions, and the existence of a common question of law or fact. See Illinois Law & Practice, Parties, Section 23.

Here, in what might well be the first time in the history of environmental enforcement in Illinois, the Complaint alleges violations of the Act at nine separate facilities, owned by nine separate companies and located in three distinct counties and two different appellate districts. The sole commonality is the fact that the respondents are all owners or operators of swine facilities and, at least at some time, contracted with PSM as its operator. It is not unlike a complaint that would be filed against various landfills (or chemical companies, or power plants) in Illinois, located throughout the state, owned by distinct companies, alleging separate and distinct violations of the Act. Such litigation is simply not contemplated by the Act or the Board's rules, as the statutory enabling language is not consistent with this type of industry- driven, industry-specific complaint. Thus, the Board should dismiss this matter, as filed. If the People choose to properly re-file this matter, against some or all of the respondents, it can do so – in standard fashion, as contemplated by the Act and the Board's rules, so that facility-specific determinations can appropriately be made.

B. The Complaint is defective in that it has not been properly filed, pursuant to the enforcement mechanisms of the Act, contained in Title VII.

The Board's express legislative authority concerning enforcement proceedings (and therefore the provision that must be utilized to engage the Board as an appropriate forum) is found in Title VII of the Act ("Enforcement"), particularly at Section 31. See 415 ICLS 5/31. Section 31 (c) contains specific notification procedures and other pre-complaint procedural requirements, which have neither been pled nor met. See 415 ILCS 5/31(c) (1).

Although NORTH FORK recognizes that the Board has repeatedly held that the pre-referral procedures contained in Section (a) and (b) of the Act do not operate to

defeat the ability of the Office of Attorney General ("OAG") to file a complaint on its own motion, those cases contemplate that the OAG will nonetheless proceed pursuant to Section 31(d) – and presumably still meet the requirements relative to fact-pleading, notice, etc. See *People v. Waste Hauling Landfill, Inc.*, et. al, PCB No. 10-9 (Dec. 3, 2009), citing *People v. Barger*, PCB 06-82 (Mar. 16, 2006):

> The Attorney General may bring an enforcement action pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)) on the Attorney General's own motion regardless of the Agency's actions. *People v. Community Landfill Company, Inc.*, PCB 97-193 slip. op. at 4 (Mar. 16, 2000). *Barger* PCB 06-82 slip. op. at 3.

Here, not only does the Complaint allege charges that have been the subject of the Section 31 settlement process many years ago (and are therefore arguably "stale" pursuant to a literal reading of the Act), Count VIII is filed pursuant to Section 42 (d) and (e) of the Act, not Section 31. Section 42 (d) and (e) of the Act involve civil actions (specifically injunctive relief in circuit court) and do not constitute the legislative vehicle within the four corners of the Act that drive the Board's jurisdiction over this action. Sections 42 (d) and (e) read:

> d) The penalties provided for in this Section may be recovered in a civil action.
>
> (e) The State's Attorney of the county in which the violation occurred, or the Attorney General, may, at the request of the Agency or on his own motion, *institute a civil action for an injunction, prohibitory or mandatory*, to restrain violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or to require such other actions as may be necessary to address violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. 415 ILCS 5/42(d) and (e)

There is nothing in the above-cited provisions which authorizes the OAG to bring separate causes of action alleging violations of Section 12 of the Act under one umbrella, nor is there any language in Section 42 (d) or (e) which speaks to the Board's authority in enforcement actions. That specific enabling language is contained in Title VII of the Act,

and any references to that Title, and Section 31, are noticeably absent from this Complaint. As it is Section 31 which is expressly relevant to the Board's enforcement authority in this matter, the failure to properly plead and meet the requirements of Section 31 is a fatal flaw that requires dismissal.

C. ***The charges regarding NPDES permitting against North Fork should be dismissed or stricken.***

NORTH FORK specifically joins the arguments made by its co-Respondents on the question of the applicability of an NPDES permit to the various respondents, including those made specifically as to NORTH FORK, by PSM. See PSM Motion to Dismiss And/Or Strike, filed September 7, 2010, at pages 12- 13.

NORTH FORK further argues that, even with the promulgation of the Combined Animal Feedlot Operation ("CAFO") rules by the United States Environmental Protection Agency ("USEPA"), the question of whether an NPDES permit is required demands a case-by-case, site-by-site, analysis. See 35 Ill. Adm. Code Subtitle E, in particular, Section 502.106 ("Case-by-case Designation Requiring NPDES Permits"). As the Board has not yet promulgated rules pursuant to the federal CAFO rules, the applicable Board regulations are found in Subtitle E. 35 Ill. Adm. Code, Subtitle E. Those rules, still the law in Illinois, clearly provide, at Section 502.106(e) that no animal feeding operation may be required to have a permit if it discharges only in the event of a 25-year 24-hour storm event.

Nonetheless, as the Complaint admits (Count VIII, paragraph 22, p. 35), NORTH FORK applied for an NPDES permit from the Illinois Environmental Protection Agency ("IEPA") over six years ago, on June 24, 2004. It did so without any admission that it was required to have such permit, but pursuant to a commitment that it made in the

enforcement settlement process provided for in Section 31 of the Act, 415 ILCS 5/31, which process was initiated as a result of the 2003 events that the People now attempt to bring to the Board.

NORTH FORK's permit application is still pending at the Illinois Environmental Protection Agency. Certainly, NORTH FORK cannot be held responsible for not having an NPDES permit during the period of time the application has been pending, without grant or denial, at the IEPA.

Nor can NORTH FORK be legitimately determined, in the context of this proceeding, to have been under a duty to apply for an NPDES permit prior to its 2004 voluntary consent to apply. First, Subtitle E was (and is) the relevant regulatory structure and, as explained above, Subtitle E does not require an NPDES permit for a facility that is designed to withstand a 25-year, 24-hour storm event. Second, given the litigation that occurred in the development of federal rules for NPDES permits relevant to CAFOs, the final federal rule related to NPDES permits for CAFO's was not promulgated until November, 2008. Third, the IEPA's General NPDES Permit for CAFO's, which is not yet authorized by any relevant state regulation, was not available for use until October 20, 2009. Fourth and finally, as further argued below, the People have not pled any facts which establish that NORTH FORK was under an obligation to have an NPDES permit prior to its actual 2004 filing for such permit.

Moreover, the question of whether (and when) an NPDES permit was (or is) needed for any of the nine named facilities is both facility-specific and dependent on applicable state regulations. Further, the People's position (that a facility that has previously discharged, albeit inadvertently, is absolutely and at that moment, under an

obligation to pursue an NPDES permit, no matter whether the problem which led to the discharge has been corrected) is at odds with the federal position espoused by the USEPA in promulgating its CAFO rules. See 73 Fed. Reg. 70418, at p. 70423 (Nov. 20, 2008):

> "[USEPA] 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."

In response to PSM's arguments as to NORTH FORK's permit application status, the OAG responded that a "close reading of Section 12(f) will reveal that a violation of any condition of the permit is also a violation of Section 12(f)." See COMPLAINANT'S RESPONSE TO MOTION TO DISMISS AND/OR STRIKE (September 29, 2010), at p. 22, paragraphs 82 and 83. That may be so but, here, the OAG charges NORTH FORK not with a violation of a permit condition, but with a violation for not having NPDES coverage while there was no statutory or regulatory obligation to pursue such permit under state law and, in any event, as explained previously, while its NPDES permit application was under review by the IEPA.

For the above stated reasons, NORTH FORK requests that all allegations concerning its NPDES permit obligations be dismissed or stricken.

D. Count VIII should be dismissed because it fails to allege sufficient facts to set forth a cognizable violation.

As the other co-respondents have argued, Illinois is a fact pleading state and the Board has long required specificity sufficient for a respondent to adequately posit a defense to the charges. Section 103.204 of the Board's procedural rules requires, beyond simply naming various statutory provisions alleged, that the complaint sufficiently set forth "dates, location, events, nature, extent, duration, and strength of discharges or

emissions and consequences alleged to constitute violations of the Act and regulation" and that the complaint "advise respondents of the extent and nature of the alleged violations" in order "to reasonably allow preparation of a defense." See 35 Ill. Adm. Code 103.204. The Illinois Pollution Control Board ("Board") has recently reemphasized that mere legal conclusions are not sufficient for purposes of pleading before the Board. See *People v. Waste Hauling, Inc.*, PCB 10-9, 12 (Dec. 3, 2009) (Board dismissed Caterpillar from an action filed against multiple respondents.)

Here, the allegations contained in Count VIII (the sole count specific to North Fork) are general in nature and do not constitute an allegation of facts sufficient to support the legal theory that North Fork was, or is, under *any* obligation to obtain or be covered by an NPDES permit or was, or is, discharging contaminants in violation of the Act or the Board's rules.

For example, the Complaint, at paragraph 13 states that there was a "discharge" from a "perimeter tile" that was "discharging into a ravine in the terraced field south of the facility". At paragraph 14, the Complaint charges that the "perimeter tile discharge" had a "strong swine waste odor" and that black bottom deposits forming sludge were observed in the "tile discharge channel." Neither "perimeter tile discharge" nor "tile discharge channel" is defined. Nor does the Complaint set forth the name of any relevant water body.

As further examples, in paragraph 14 and paragraph 17, the Complaint states that manure and "leachate" from onsite compost structures were high in BOD, ammonia, nitrate, and fecal coliform – on two discrete occasions, once in December 2003 and once in December 2007. Yet, without tying these parameters to an actual release to a regulated

water body, there is no cognizable violation alleged. There is no water quality standard applicable to NORTH FORK, and there is no actual water body alleged to have received any unlawful constituents.

Read another way, the People here charge NORTH FORK because its manure contained high levels of BOD, ammonia, nitrate, and fecal coliform. It is not a violation of the Act for manure, or stormwater containing manure, to be present on farm property. It is typical for manure to contain the named constituents, in concentrations of that magnitude. Absent facts specifically drawing a nexus between manure and a regulated water body, NORTH FORK simply cannot effectively defend itself.

For these reasons, the Board should dismiss Count VIII of the Complaint.

E. Should the Board not dismiss the allegations as to NORTH FORK, NORTH FORK requests that the Board sever Count VIII from the complaint, pursuant to Section 101.408 of the Board's procedural rules, 35 Ill. Adm. Code 101.408.

Section 101.408 of the Board's procedural rules allows the Board to sever claims involving numerous parties "in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused." Should the Board not dismiss this matter, allowing for its refiling in separate complaints, the Board should at least sever NORTH FORK from this action, as it is distinct from the other respondents for two reasons.

First, as set forth above (and in the Complaint), NORTH FORK is unique in that it *has* applied for an NPDES permit and, accordingly, does not wish to expend further effort and expense arguing the propriety or impropriety of the NPDES permit obligation in the context of this enforcement action. As such argument appears to be at the heart of PSM's filings, it would serve the interests of justice to sever Count VIII from this action.

Second, NORTH FORK is distinct from the other owner co-respondents because it no longer has any relationship with PSM. Admittedly, PSM operated the NORTH FORK facility during the timeframe of the alleged violations (2003, 2007). However, that relationship ceased in February of 2008 and, since that time, NORTH FORK has employed a different operator. Thus, any commonality of interests between NORTH FORK and the other respondents is limited to that former relationship. As such, it would serve the interests of expediency and justice to sever Count VIII from the claims against the other owner respondents, who continue to contract with PSM as the operating entity.

For the above stated reasons, NORTH FORK respectfully moves that the Board dismiss, strike and/or sever the claims filed against it in this action.

NORTH FORK, Respondent,

By: _____
One of Its Attorneys

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