ILLINOIS POLLUTION CONTROL BOARD
September 5, 2013

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 10-84
	)	(Enforcement - Water)
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., and LITTLE TIMBER, LLC,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by J.A. Burke):

On June 17, 2013, the Board received motions from seven of the respondents to sever specific counts concerning their individual activities from the second amended complaint. The movants are: Eagle Point Farms, LLC, Hilltop View, LLC, Little Timber, LLC, Timberline, LLC, Prairie State Gilts, Lone Hollow, LLC, High-Power Pork, LLC (collectively, "owners"). Respondent Professional Swine Management, LLC (PSM) responded to the motions on July 2, 2013. On August 2, 2013, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a response in opposition to the motions to sever.

For the reasons below, the Board denies each of the owners' motions to sever the counts concerning each of them from the second amended complaint.[1] The Board further denies PSM and the owners' joint motion to strike factual assertions in the People's combined response to the motion to sever.

PROCEDURAL HISTORY

On April 15, 2010, the People filed a nine-count complaint against 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, and Twin Valley Pumping, Inc. On May 6, 2010, the Board accepted the complaint for hearing.

[1] Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board's drafting or deliberation of any order or issue in this matter.

On July 13, 2010, the People filed a first amended complaint. The amended complaint voluntarily dismissed Twin Valley Pumping. On August 5, 2010, the Board accepted the first amended complaint for hearing. Motions to dismiss and strike the first amended complaint were filed on September 7, 2010 and September 10, 2010. On February 2, 2012, the Board denied the motions to dismiss or strike the first amended complaint.

As noted in various hearing officer orders, the parties have engaged in settlement discussions throughout these proceedings. *See, e.g.*, September 26, 2011 Hearing Officer Order. The Board accepted a settlement between the People and North Fork Pork on April 7, 2011.[2]

On December 13, 2012, the People filed a motion for leave to amend the first amended complaint, along with a second amended complaint (complaint). On February 2, 2013, respondents filed a joint motion to strike part of the People's request for relief. On May 2, 2013, the Board denied respondents' motion to strike part of the People's request for relief and accepted the second amended complaint for hearing.

On June 17, 2013, the Board received answers to the second amended complaint and motions to sever from that complaint claims concerning them from seven of the respondents: Eagle Point Farms, Hilltop View, Little Timber, Timberline, Prairie State Gilts, Lone Hollow, and High-Power Pork. Also on June 17, 2013, PSM filed an answer to the second amended complaint.

On July 2, 2013, PSM filed a response to the seven pending motions to sever. On August 2, 2013, the People filed their response. On August 9, 2013, the People filed proof of service of the response stating that the People's response was served by first class mail that day. The seven movants filed a joint motion for leave to file a reply (Mot. Reply) along with their joint reply (Reply) on August 27, 2013.

Also on August 27, 2013, the owners and PSM filed a joint motion to strike unsupported and/or untrue factual assertions in the combined response (Mot. Strike). On September 4, 2013, the People filed a motion for an extension of time to file a response to the motion to strike, as well as a response to the motion for leave to file a reply and the reply. Wildcat Farms is not a party to either the motion to strike or the motions to sever.

PRELIMINARY MATTER

The owners, in their joint motion for leave to file a reply, ask the Board to grant the motion for leave so that the owners can "fully and appropriately address the issues raised by [the People] in [their] Combined Response." Mot. Reply at 2. As the Board has previously noted in this case, "a motion for leave to file a reply must be filed with the Board within 14 days after

[2] Under the terms of the settlement, North Fork Pork did not affirmatively admit the violations of Sections 12(a), 12(d), and 12(f) of the Act (415 ILCS 5/12(a), 12(d), 12(f) (2012)) and Section 309.102(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.102(a)), but agreed to pay a civil penalty of $4,500.

service of the response." People v. Professional Swine Management, et al., PCB 10-84, slip op. at 2 (May 2, 2013), citing 35 Ill. Adm. Code 101.500(e). Further, the moving party "will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." *Id.*

The Board received the motion for leave to file a reply on August 27, 2013, which is 18 days after the Board received proof of service of the response. The motion does not state what day the response was received. However, under the Board's mailbox rule, the Board accepts the motion for leave to file a reply as timely. 35 Ill. Adm. Code 101.300(c). At the time of filing the reply, the Board had not rendered any decision on the motions to sever. Therefore, in the interest of administrative efficiency and to prevent material prejudice resulting against any of the parties, the Board accepts the filing and considers the reply in making its decision.

THE PEOPLE'S SECOND AMENDED COMPLAINT

The Board accepted the People's second amended complaint on May 2, 2013. The eight-count complaint alleges violations at livestock facilities located in four counties. Specifically, the People allege violations of Sections 12(a), 12(d), and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 12(f) (2008)) and Sections 302.203, 309.102(a), 501.403(a), and 620.301 of the Board's regulations (35 Ill. Adm. Code 302.203, 309.102(a), 501.403(a), 620.301).

PSM is a common respondent in each of the eight counts in the complaint. The owners are separated by count as follows: Hilltop View, LLC (Count I), Wildcat Farms, LLC (Count II), High-Power Pork, LLC (Count III), Eagle Point Farms, LLC (Count IV), Lone Hollow (Count V), Timberline, LLC (Count VI), Prairie State Gilts (Count VII), and Little Timber, LLC (Count VIII).

OWNERS' MOTIONS TO SEVER

On June 17, 2013, the owners each filed a separate motion to sever claims concerning itself from the second amended complaint. Respondents Hilltop View, Eagle Point Farms, Timberline, and Little Timber filed near-identical motions to sever.[3] Similarly, respondents High-Power Pork, Lone Hollow, and Prairie State Gilts filed near-identical motions.[4] Both sets of motions make similar arguments and the Board summarizes these motions generally. Wildcat Farms did not file a motion to sever.

[3] The Board cites to Hilltop View's June 17, 2013 motion to sever (Mot. 1) when generally referring to these four motions.

[4] The Board cites to High-Power Pork's June 17, 2013 motion to sever (Mot. 2) when generally referring to these three motions.

Unrelated Counts

The owners contend that

> [t]he facts alleged in [each count] of the Complaint do not pertain to, or in any way involve, the seven [Concentrated Animal Feedlot Operations (CAFOs)] which are the subjects of [the other seven counts] of the Complaint and are unrelated to the factual allegations in the remaining seven counts of the Complaint. Moreover, [each owner] is not a respondent with respect to the alleged violations in [the other seven counts] of the Complaint. Mot. 1 at 3.

The owners contend that the only common issue between the counts is that PSM manages each of the CAFOs that are the subjects of the complaint. Mot. 1 at 4, Mot. 2 at 4.

Section 41 of the Act

The owners state that the eight separate facilities are located across four different counties, specifically: Schuyler County (Counts I, VI and VII), Hancock County (Counts II, V and VIII), Fulton County (Count IV), and Adams County (Count III). Mot. 1 at 3, Mot. 2 at 2. The owners further state that the eight facilities are located in two different appellate districts (Third and Fourth). *Id.* The owners cite 415 ILCS 5/41(a) (2010), which provides that judicial review of enforcement decisions of the Board "shall be afforded directly in the Appellate Court for the District in which the cause of action arose." Mot. 1 at 4, Mot. 2 at 3. According to the owners, compliance with this requirement of the Act "will be impossible" if the counts are not severed from the balance of the complaint. Mot. 1 at 4, Mot. 2 at 4.

Notice and Location of Hearing

The owners also cite Part 101.600 of the Board's procedural rules, which states that hearings in enforcement proceedings "are generally held in the county in which the source or facility is located." Mot. 1 at 4, citing 35 Ill. Adm. Code § 101.600, *see also* Mot. 2 at 3. The owners contend that, because the complaint involves facilities in four different counties, any hearing held on the complaint will not comply with the Board's regulations regarding venue for the majority of the facilities. *Id.* The owners also cite Part 101.602, which states the Board's 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." Mot. 2 at 3, citing 35 Ill. Adm. Code 101.602.

Joinder

Further, the owners argue that the complaint violates the joinder rules set forth in Section 2-405 of the Illinois Code of Civil Procedure "because the cause of action against [one owner]

arises from an entirely separate and distinct transaction and set of facts than the causes of action set forth in [the other Counts]." Mot. 1 at 5 (citations omitted).[5]

The owners cite 35 Ill. Adm. Code § 101.408, which states:

> Upon motion of any party or on the Board's own motion, in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused, the Board may sever claims involving any number of parties. Mot. 1 at 6, Mot. 2 at 2.

Material Prejudice

The owners believe that requiring each of them to participate in the proceedings and hearing on the other counts of the complaint "will substantially prejudice" each owner as each owner is "forced to devote significant time and resources, including litigation costs, to the proceedings . . . which do not, in any way, involve [an owner or its facility]." Mot. 1 at 6. The owners conclude that

> [s]evering [each Count] from the remaining counts of the Complaint, and requiring the State to include the allegations of [each Count] in a separate complaint will expedite the resolution of claims involving [each owner and its facility], and will prevent the inconvenience and prejudice to [each owner] that will result from requiring it to participate in the discovery, proceedings, and hearings on [the other Counts] of the Complaint, in which it has no interest. *Id.* at 7 (citation omitted).

Negative Inference

The owners also argue that "a finding of violation against one of the other Respondents would create an impermissible negative inference toward [an owner] on the claims alleged against it." Mot. 2 at 5.

[5] 735 ILCS 5/2-405(b) states:

> It is not necessary that each defendant be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him or her; but the court may make any order that may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which sued defendant may have no interest.

PROFESSIONAL SWINE MANAGEMENT'S RESPONSE TO OWNERS' MOTIONS TO SEVER

PSM filed its response to the multiple motions to sever on July 2, 2013. PSM states that it "has no objection to the Board granting these motions" and believes that "severance is warranted if not required." PSM Resp. at 1.

PEOPLE'S RESPONSE TO OWNERS' MOTIONS TO SEVER

The People filed a single response to each owner's motion to sever.

Unrelated Counts

The People allege that PSM operates and manages each of the facilities. People Resp. at 4. The People contend that the alleged violations at the various facilities are related to PSM, as "these facilities in fact exist as the form and function of the entity of [PSM]." *Id.*[6] The People contend that, at all times relevant to the complaint, "all of the facilities were managed and operated and considered part of the [PSM] organization structure," noting that all of the respondents, except North Fork Pork, share the same registered agent. *Id.* at 6. According to the People, the People named the individual limited liability corporations as respondents because they own the individual facilities. *Id.* at 5.

Section 41 of the Act

The People contend that the language in Section 41 of the Act "indicat[ing] judicial review of final Board orders is afforded directly to the Appellate Court is a venue provision, not a jurisdictional provision." People Resp. at 3. The People state that, depending on the basis for appeal in this matter, the parties filing the appeal would have their choice of districts. *Id.* at 4.

Notice and Location of Hearing

The People contend that 35 Ill. Adm. Code 101.600, providing that hearings are "generally" held in the county where a facility is located, "clearly provides for discretion on the part of the hearing officer," and that "there is no absolute mandate as to the location of the hearing." People Resp. at 7. The People also believe that "the savings realized in the judicial economy and efficiency of hearing this case in one location are significant" and should be considered. *Id.*

The People also state that the notice provisions of 35 Ill. Adm. Code 101.601 "does not present insurmountable issues" as notice "could be published in all four counties" in which facilities are located. People Resp. at 8.

---

[6] To that effect, the People note that they will move to reinstate the count against North Fork Pork because the settlement concerned the facility only and not PSM. People Resp. at 5.

Joinder

The People believe that this case "is exactly the kind of case that the joinder provisions . . . of the Illinois Rules of Civil Procedure are meant to address." People Resp. at 11, citing 735 ILCS 5/2-405(a) and (b). The People contend that courts have severed claims from cases "when the transactions, sets of facts, and theories of law at issue are significantly divergent and unrelated." *Id.* at 12. The People state that, in this case, the counts are related and concern similar if not identical violations. *Id.* As stated by the People, "[t]here are no divergent questions or theories of law." *Id.* at 14.

The People state that

> [i]n the instant action, [PSM] was involved in each of the counts, the [Owners] have been brought in as necessary parties, and the factual basis for each count is a discharge or release, or multiple discharges or releases. The [Owners] must be joined for there to be a complete determination of liability. People Resp. at 14.

The People contend that joinder is "proper, appropriate and necessary" while distinguishing cases cited to by the owners. *Id.*at 14-17. The People state that maintaining the case as pled best serves "[t]he interest of convenience and an expeditious and complete determination of claims." *Id.* at 17.

Material Prejudice

The People state that each facility is involved in this case only to the extent of the allegations against it. People Resp. at 9. The People argue that each individual facility has been given notice of the allegations against it because the People have pled a single count for each facility. *Id.* at 10. Regarding discovery, each facility "is only obligated to produce documents in its possession and control that are responsive to the request" or "answer interrogatories or deposition questions with information in its possession and control." *Id.* at 9. Regarding the hearing, the People state that each owner need only attend the portion of the hearing pertaining to it. *Id*. at 10.

The People argue that severing the counts would be inappropriate because the counts are related with respect to PSM, and severance would be costly and less efficient. People Resp. at 10. Further, severing the counts "would mean [PSM] would need to participate in multiple hearings rather than one." *Id.* Were the Board to sever the counts, the People state that they "would suffer material prejudice" with regard to their case against PSM because the People "would not be allowed to properly present [their] allegation of multiple and repeat violations by [PSM] among the various facilities." *Id*. at 11.

Negative Inferences

With respect to the owners' claims that a finding of violation against one respondent would create a negative inference against the other respondents, the People state

> [i]t is [the People's] position that the Board is perfectly capable of hearing and weighing evidence regarding who was responsible for and has liability for what actions, or inaction, at each of the subject facilities and is capable of fairly determining liability among the named Respondents based on standards set forth in the Illinois Environmental Protection Act. People Resp. at 7.

OWNERS' JOINT REPLY

The owners state that the People, in their response, "assert[] and [rely] upon purported facts that have no evidentiary support or that are untrue, or both." Reply at 2. The owners also argue that the People's reliance on Board and Illinois court precedent is misplaced. *Id.*

The owners repeat that section 41(a) of the Act "is a mandatory jurisdictional provision requiring that review of final Board orders be afforded directly in the Appellate court in the district for which the cause of action arose." Reply at 2. The owners state that any doubt to the contrary has been resolved by the Illinois Supreme Court. *Id.* at 3, citing ESG Watts, Inc. v. PCB, 191 Ill.2d 26 (2000). The owners state that the term "shall" in Section 41(a) "clearly indicates that there is no choice of districts when [parties] seek review of a final Board order in the Appellate Court" and that the procedures contained therein "must be strictly adhered to." *Id.* at 4-5.[7] The owners argue that it will be impossible for any judicial review of the Board's final orders to comply with Section 41(a) of the Act's mandate that judicial review be afforded in the district where the cause of action arose because respondents are located in two different appellate districts. *Id.* at 6. The owners contend that a denial of this statutorily-entitled judicial review would "result in a violation of [the respondents'] due process rights." *Id.*

The owners also contend that the People's citations of Board precedent in support of their position are not instructive because "each of the Board opinions upon which [the People rely] involved only one individual respondent." *Id.*at 7, citing People v. L. Keller Oil Properties, Inc., PCB 93-58 (Oct. 20, 1994); People v. Clark Oil & Refining Corp., PCB 93-250 (Sept. 5, 1996). The owners also state that, in those cases, the respondents had their choice of appellate districts to appeal a final Board decision because each case only involved one respondent, therefore preventing any jurisdictional violation. *Id.* at 8.

The owners also contend that the single action "would create an impermissible negative inference as a result of a potential finding of a violation against a separate and distinct [owner]" that will "deny the due process that must be afforded to each individual [owner] in defending the separate charges alleged – charges that involve separate timeframes, separate incidents, and separate facilities with separate designs and owned by separate owners." Reply at 9. The owners state that their rights will be materially prejudiced if forced to defend their claims in a single action by being "forced to spend time and resources addressing issues arising from and involving the actions or inactions of other [owners]" and through evidentiary issues that "may

[7] Section 41(a) of the Act provides in part that "review shall be afforded directly in the Appellate Court for the District in which the cause of action arose." Reply at 5, citing 415 ILCS 5/41(a).

arise regarding one [owner] that could potentially result in substantial prejudice to another [owner's] defense to this action." *Id.* at 10. The owners believe that "[a] finding of liability against one Respondent will undoubtedly result in a negative inference of liability for another [owner]" and that such a negative inference "would prevent each [owner] from independently presenting its case to the Board." *Id.* The owners therefore argue that "[f]airness and due process dictate that the Board grant the [owners'] respective motions." *Id.*

JOINT MOTION TO STRIKE

On August 27, 2013, the owners and PSM (collectively, respondents) filed a joint motion to strike unsupported or untrue factual assertions in the response. Respondents state that the People "purport[] to require a Board finding that the farms are each part of a large, PSM organization" and that facts leading to such conclusion "have not been set forth in any complaint filed in this proceeding." Mot. Strike at 4. Respondents therefore request that these facts be stricken from the response because the People "attempt[] to set forth new facts which have not been subject to answer" and "which, quite simply, are either not true or have no evidentiary support." *Id.*

Respondents argue that the second amended complaint "contains only a few, vague, factual allegations" "[i]nsofar as the relationship between PSM and any of the farms are concerned." Mot. Strike at 6. Respondents state that PSM and the owners acknowledge that, "pursuant to contract, PSM provides services to the farms." *Id.* The owners state that, despite "the limited nature of the alleged and admitted facts in the pleadings," the response contains a "litany of unsupported factual assertions." *Id.* at 6-7. Respondents contend that, because these unsupported facts are not properly before the Board, they should be stricken from the response. *Id.* at 7.

Respondents argue that the "[c]ore facts" relied upon in the response should be stricken not only because they are not supported by any evidence before the Board, "but also because they are simply untrue." Mot. Strike at 8. Respondents state that the only true facts regarding the relationships between PSM and the owners are as follows:

(1) PSM did not own any of the swine raised at the farms;

(2) PSM did not have any ownership interest in any of the farms;

(3) PSM did not have an ownership interest in the farms' assets, real or personal;

(4) Each of the farms is a legally constituted business under Illinois law; and

(5) All services PSM provided to the farms relative to raising swine have been pursuant to a separate contract entered into with each farm. *Id.*

Respondents ask the Board to consider the above facts during the Board's resolution of the pending motions to sever, because they are supported by affidavit, and that any contrary and unsupported facts in the response by stricken and disregarded. Mot. Strike at 8.

DISCUSSION

Joint Motion to Strike

Respondents state that the People "purport[] to require a Board finding that the farms are each part of a large, PSM organization" and that facts leading to such conclusion "have not been set forth in any complaint filed in this proceeding." Mot. Strike at 4. Respondents therefore request that these facts be stricken from the response because the People "attempt[] to set forth new facts which have not been subject to answer" and "which, quite simply, are either not true or have no evidentiary support." *Id.*

As previously stated in this case, "the disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court." Professional Swine Management, PCB 10-84, slip op. at 7, citing National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993). The issue before the Board is whether the Board can sever the counts "in the interest of convenient, expeditious, and complete determination of the claims, and where no material prejudice will be caused." 35 Ill. Adm. Code 101.408. The Board does not consider the portions of the response that respondents seek to strike in making its determination. The Board is therefore not persuaded that it should strike the requested portions of the People's response, and the joint motion to strike is denied. Further, the People's motion for an extension of time to file a response is denied as unnecessary.

Motions to Sever

The Board denies each of the owners' motions to sever the claims concerning each from the second amended complaint. To the extent the motions are premised on Section 2-405 of the Illinois Code of Civil Procedure (Code) concerning the joinder of claims, the Board reminds that the Code does not expressly apply to proceedings before the Board, although the Board may look to it for guidance "where the Board's procedural rules are silent." *See* 35 Ill. Adm. Code 101.100(b). Board rules address both joinder and severance of claims. *See* 35 Ill. Adm. Code 101.403 and 101.408.

The owners have not shown that severance is necessary, nor have they shown that severance would not cause material prejudice.

The Board's procedural rules state:

> Upon motion of any party or on the Board's own motion, in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused, the Board may sever claims involving any number of parties. 35 Ill. Adm. Code 101.408.

Severing the claims would not further convenient, expeditious and complete determination of claims in this case. *See* People v. Community Landfill Company, Inc., and City of Morris, PCB 03-191, slip op. at 4 (March 15, 2007). While each count involves a separate facility and owner, PSM is a common respondent for each count. While the specific alleged facts differ for each facility, the theory of liability and alleged statutory and regulatory violations are similar. Based on the connection between the counts, hearing the counts together will be in the interest of administrative economy. *See* People v. Clark Oil & Refining Corporation, PCB 93-250, slip op. at 1 (Feb. 3, 1994). The Board finds that conducting seven or eight proceedings in various locations under the circumstances of this case would waste the resources of the Board and the parties involved.

The owners have not shown that severance would not materially prejudice the People. The People argue that they would suffer material prejudice if not allowed to present their case against PSM in one action. Further, the owners will not be materially prejudiced by defending the People's claims in a single action. The separate counts, outside of sharing PSM as a common respondent, "involve separate timeframes, separate incidents, and separate facilities with separate designs and owned by separate owners." Reply at 9. The Board's hearing officers are well able to manage a hearing involving multiple parties and the Board is well able to avoid carrying a negative influence over from one count to another. *See* People v. Union Pacific Railroad Co., PCB 08-07 slip op. at 6 (Aug. 20, 2009). Finally, the Board is not persuaded by the owners' arguments based on the appellate review provisions of Section 41 of the Act or based on the Board's rules on notice and location of hearing.

Because the Board today rules on the seven motions to sever, the People's motion for an extension of time to file a response to the motion for leave to file a reply and the reply is denied.

CONCLUSION

The Board denies the owners' motions to sever the counts in the second amended complaint. The Board also denies PSM and the owners' joint motion to strike unsupported or untrue factual assertions in the People's combined response. Finally, the Board denies the People's motion for an extension of time to file a response to the joint motion to strike, the motion for leave to file a reply, and the reply. The Board makes no determination at this time on the outstanding motions to strike affirmative defenses.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 5, 2013, by a vote of 4-0.

John Therriault, Clerk

Illinois Pollution Control Board