OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 30, 2004

The Honorable Dorothy Gunn
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. The Highlands, LLC., et al.***
PCB No. 00-104

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT MURPHY FARMS, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT in regard to the above-captioned matter. Please file the original and return a file-stamped copy of the document to our office in the enclosed self-addressed, stamped envelope.

Thank you for your cooperation and consideration.

Very truly yours,

Jane E. McBride
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

JEM/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 00-104**
	)	**(Enforcement)**
THE HIGHLANDS, LLC, an Illinois limited liability corporation, MURPHY FARMS, INC., (a division of MURPHY-BROWN, LLC, a North Carolina limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation)	)	
	)	
Respondents.	)	

NOTICE OF FILING

To: Mr. Jeffery W. Tock
Harrington, Tock & Royse
201 W. Springfield Ave., Ste. 601
P.O. Box 1550
Champaign, IL 61824-1550

Mr. Charles M. Gering, Esq.
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, Complainant's Response to Respondent Murphy Farms, Inc.'s Motion to Dismiss Second Amended Complaint, 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

BY: _____
JANE McBRIDE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: November 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that I did on November 30, 2004, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT MURPHY FARMS, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

To: Mr. Jeffrey W. Tock
Harrington, Tock & Royse
201 W. Springfield Avenue, Ste. 601
P.O. Box 1550
Champaign, IL 61824-1550

Mr. Charles M. Gering, Esq.
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Mr. Brad Halloran, Hearing Officer
Illinois Pollution Control Board
State of Illinois Center, Ste. 11-500
100 West Randolph
Chicago, IL 60601

Jane E. McBride
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB No. 00-104**
	)	**(Enforcement)**
THE HIGHLANDS, LLC, an Illinois limited liability corporation, and MURPHY FARMS, INC., (a division of MURPHY-BROWN, LLC, a North Carolina limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation).	)	
	)	
Respondents.	)	

COMPLAINANT'S RESPONSE TO RESPONDENT MURPHY FARMS, INC.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel* Lisa Madigan, Attorney General of the State of Illinois, and responds as follows to Respondent Murphy Farms, Inc.'s Motion to Dismiss Second Amended Complaint:

I. INTRODUCTION

In response to Respondent Murphy Farms Inc.'s motion to dismiss, asserted based upon its contention, described as affirmative matter, that Respondent Murphy Farms Inc. ("Respondent Murphy", "Respondent", "Murphy Farms, Inc.", "Murphy Farms" or "Murphy") does not own the subject facility and does not control the subject facility, Complainant responds as follows (1) Respondent Murphy has sufficient ownership and control of the facility and operation to meet the premise set forth in *Phillips Petroleum Co. v. Illinois Environmental Protection Agency,* 72 Ill.App.3d 217 (2d Dist. 1979), 390 N.E.2d 620; (2) that, as the 3rd District held in the case of *People v. McFalls*, 313 Ill.App.3d 223 (3rd Dist. 2000), 728 N.E.2d 1152, ownership and control of the site is not the sole controlling factor in a determination of the

liability of the person who has caused pollution; (3) Respondent's reliance upon nuisance standards is misplaced in that the Illinois Pollution Control Board (the "Board") is not authorized by the legislature to determine and proceed against common law nuisances, and violations of the Act alleged in the complaint are not defined in terms of nuisance; and (4) Respondent's reliance upon the case of *Village of Goodfield v. Jamison,* 188 Ill.App.3d 851 (4th Dist. 1989), 544 N.E.2d 1229, regarding decisions concerning the concentration of large numbers of livestock, falls short in light of the recent decision of *Nickels v. Burnett*, 343 Ill.App.3d 654, 798 N.E.2d 817.

II. RESPONSE TO FACTUAL ASSERTIONS PRESENTED AS "BACKGROUND" IN RESPONDENT'S MEMORANDUM

As stated in Respondent's motion, Respondents The Highlands. LLC and Murphy Farms, Inc. operated the subject sow facility pursuant to an agreement. A true and correct copy of said agreement is attached hereto as Exhibit 1 attached to the Affidavit of Jane McBride.

Given the terms and conditions of its agreement with Respondent The Highlands, LLC ("Respondent The Highlands", "The Highlands, LLC" or "The Highlands"), the only swine that could be maintained at The Highlands facility were swine owned by Respondent Murphy. Respondent Murphy is identified as "Owner" pursuant to the conditions and terms of the agreement, and Respondent The Highlands is identified as "Producer". Pursuant to Item 18 on page 3 of the agreement, under the section entitled "Producer Hereby Agrees", The Highlands agreed not to own or have possession of, either as agent, producer or otherwise, any swine not owned by Respondent Murphy Farms. Item 14 of the "Producer Hereby Agrees" section of the agreement states: "To house the breeding stock delivered by Owner only for the purposes of producing weaned pigs for Owner and to own no swine." Respondent Murphy, and exclusively

Respondent Murphy, owned every hog on the site. Therefore, under this agreement, without Murphy's hogs, there is no swine facility because there are no hogs.

Under the agreement, pursuant to item 3 under the "Owner Hereby Agrees" section, appearing on page 3 of the agreement, Respondent Murphy had sole ownership and control of all supplies and feed that went in and on the hogs. Also, it had sole control of the management of all procedures for the care and productivity of the hogs, and reserved the right to change the management of these procedures from time to time (Item 2 under the "Owner Hereby Agrees" section, page 1 of the agreement). Item 15 of the "Producer Hereby Agrees" section of the agreement, states (page 3 of the agreement): "To take measures deemed necessary by Owner to provide for the herd." There is no definition of the term "measures" contained in the exhibit. It is apparent from the face of the document that this provision is purposefully broad and vague, with the intent of allowing Respondent Murphy to dictate any action it deems necessary for the care and production of its swine.

As is obvious from this agreement, Respondent Murphy owned all of the hogs maintained at The Highlands facility, and dictated all management procedures for the care and productivity of the breeding herd and all swine maintained at the facility.

Further evidence of the agreement between Respondent The Highlands and Respondent Murphy is found in Exhibit 4 attached to the Affidavit of Eric Ackerman, which is a true and correct copy of a description of The Highlands operation generated by The Highlands, LLC provided to the Illinois EPA. A description of the contractual arrangement between Murphy Family Farms and The Highlands is included on the fourth page of the exhibit. It is stated that Murphy Farms, Inc. provides the following: Feed, Breeding Stock, Training of Employees, Transportation of Pigs, Medication & Veterinary service and anything that goes in or on the animal, i.e. syringe, needles, marking sticks, etc.

In further support of this aspect of control exerted by Respondent Murphy in the

operation of the subject hog facility, attached as Exhibits 2 and 3 to the Affidavit of Jane McBride, are, as Exhibit 2, a memorandum from Doug Lenhart describing the terms and conditions of The Highlands' employee Don Bybee's training at the Murphy Missouri facility. Despite Respondent Murphy's claim that The Highlands' employees were not its employees, it is apparent from the content of Exhibit 2 that Mr. Bybee was to complete a Murphy of Missouri Application for Employment and would be receiving housing and a salary pursuant to Mr. Lenhart's instruction. Exhibit 3 is a Murphy Family Farms document listing training competencies of The Highlands' employees.

It is obvious that Respondent Murphy exerted control of The Highlands' operation by requiring that The Highlands' employees be trained at Murphy facilities by Murphy personnel regarding Murphy management procedures.

In its memorandum in support of its motion, on page 2 of the memorandum, Respondent states that no Murphy personnel were employed at The Highlands' farm. It states that The Highlands employed management personnel and workers to operate the farm, and The Highlands' management determined how the farm would be operated. Yet it is all too clear from the agreement between Respondents The Highlands and Murphy that Murphy had very significant managerial control of the operation, and even though the employees may have been paid by The Highlands, they were trained by Murphy in Murphy's management procedures.

Respondent's statement on page 2 of its memorandum in support of its motion, that The Highlands had "unfettered control of the operation of the farm," is a disturbing characterization. By the terms and conditions of its agreement with The Highlands, it is obvious that this characterization is blatantly untrue. It is noteworthy that Respondent Murphy did not include a copy of the agreement as an exhibit to Mr. Lenhart's affidavit.

It is also apparent from the agreement that Respondent Murphy was heavily involved in the financial management of The Highlands facility. In Exhibit 1, attached to and attested to in

the affidavit of Jane McBride, is a Contract Addendum to the agreement between The Highlands and Murphy Family Farms.

Item 1 of the Addendum states: "The parties herein agree that all terms and conditions under this addendum shall be effective May 1, 2001. All adjustments to the existing contract dated December 6, 1996 are subject to Highlands' agreement to the items listed under paragraph no. 4, which shall be mandatory criteria for continuance of the contract addendum."

Paragraph No. 4 states: "Highlands agrees to comply with the following criteria in consideration of an increase in production payment. The criteria is (sic) as follows:" Paragraphs "a" through "j" of Item 4 set forth financial information The Highlands was to submit to Murphy Farms, as well as transactions that were not to proceed without approval of Respondent Murphy Farms, such as all transactions executed between The Highlands and Baird Seed Farm (paragraph "e") and Baird Family Members (paragraph "f"). Exhibit 4 attached to the Affidavit of Jane McBride is the Illinois Secretary of State's registration of The Highlands, LLC. It shows that the make-up of this limited liability corporation exclusively consists of Baird family members.

Paragraph "g" states: All monthly repair and maintenance expenditures that exceed budgeted amount by $1,000 or more will require written explanation and cost justification to be included in the distribution of monthly financial statements to MFI (Murphy Farms, Inc.) and FCS (Farm Credit Services).

In its memorandum, Respondent Murphy represents that Respondent The Highlands determined where the farm would be sited and the inference is that Respondent Murphy had no control or participation in the siting of the facility. Complainant contends that Respondent Murphy did participate in the siting of the facility and exercised a very active role in the determination of the siting of the subject sow facility. As evidence of its participation, Complainant offers Exhibit 1 attached to the affidavit of Eric Ackerman, which is a

memorandum of a phone conversation with Doug Lenhart regarding the siting and establishment of a sow operation in the Illinois EPA's Peoria Region, dated July 5, 1996. In that phone conversation, Mr. Lenhart indicated that he himself would be moving to Illinois to become Director of Illinois Operations with Murphy Farms. Mr. Ackerman documents that Mr. Lenhart indicated "they" intended to construct a 3,600 sow operation in western Peoria County. Mr. Lenhart informed Mr. Ackerman of the particulars regarding the location and design of the facility, and how it would be operated. Mr. Lenhart was calling to discuss the requirements of the Illinois Pollution Control Board's Subtitle E: Agriculture Related Pollution Regulations. In that conversation, he advised Mr. Ackerman that Mr. Lenhart, personally, had previously contacted IDOA (Illinois Department of Agriculture) regarding the requirements of that department, which were, as stated in Mr. Ackerman's affidavit, the siting requirements the Illinois Department of Agriculture administered under the Livestock Management Facilities Act. Mr. Lenhart himself, as the Director of Illinois Operations for Murphy Farms, was ascertaining the siting requirements for this 3,600 sow operation and was also contacting the Illinois EPA about the Subtitle E requirements.

Exhibit 2 attached to the affidavit of Eric Ackerman is another phone memorandum, this one hand written. It is dated October 3, 1996. It documents a phone conversation with Doug Lenhart, in which Mr. Lenhart is inquiring as to whether any other state regulatory personnel should be brought out to the site. It clearly says that he, Doug Lenhart, was seeking regulatory agency input on site selection for the sow operation. Exhibit 3, attached to the Affidavit of Eric Ackerman, clearly states that Mr. Lenhart represented that Respondent Murphy operates hog production facilities in Illinois and conducts programs at these facilities that address environmental controls. This would lead agency personnel to believe Respondent Murphy does have control of operations at its facilities to the extent that programs it conducts impact local environmental concerns at these facilities. As attested to in Mr. Ackerman's affidavit, all of the

hog production facilities in which Respondent Murphy was involved in Illinois at the time were contract operations. Thus, based on Mr. Lenhart's letter, it could be garnered that Respondent Murphy considered itself to have operational control at its contract facilities and so represented itself in this letter to regulatory personnel.

Exhibit 4 attached to the affidavit of Bruce Yurdin, attested to as a true and accurate copy of an email written by Dan Heacock and received by Mr. Yurdin, documents a conversation in which Doug Lenhart, identifying himself as a representative of Murphy Farms, called regarding "a potential" Murphy Family Farm operation in Peoria County south of Elmwood.

If Mr. Lenhart truly had nothing to do with the siting of the sow production facility established as The Highlands facility, why was he calling state agencies, asking for their input in siting the facility and ascertaining the requirements of pertinent regulations? If he had no authority, no control, no influence, no participation in the determination of the siting of the facility, why would he be calling state agencies, extending invitations to view the site, requesting input and asking the questions documented in these exhibits? Were the state agencies to rely on his representations then, and provide him with the information he was seeking, cooperate with his requests at that time, in full acknowledgment of his representation that he had the authority of Murphy Farms, Inc. to be making these calls seeking assistance with the siting of the sow production facility, and yet now, in the case of an enforcement action, be told, under oath, that Mr. Lenhart had no authority to make these calls and make such representations to state regulatory personnel?

As is obvious from the terms and conditions of the agreement, the whole reason that the waste was at this facility, in the volume that existed at the facility, was due to the presence of Respondent Murphy's hogs and all the inputs Respondent Murphy delivered for the care of the animals. The facility was operated pursuant to management procedures dictated by

Respondent Murphy and executed by personnel trained by Murphy personnel, at Murphy facilities in Murphy management procedures. Respondent Murphy had the ability, under the provisions of the agreement to require any measure be undertaken at the facility "deemed necessary" by Respondent Murphy "to provide for the herd." It is clear from the exhibits, that Respondent Murphy intended to establish a 3,600 sow facility in the Peoria area in Illinois. See Exhibit 4 attached to the affidavit of Bruce Yurdin, a July 8, 1996 email from Dan Heacock documenting a conversation with Doug Lenhart, and Exhibit 1 attached to the affidavit of Eric Ackerman, a July 5, 1996 phone conversation record documented by Eric Ackerman, documenting Murphy's intention to construct a 3,600 sow operation. Respondent Murphy intended to establish a 3,600 sow facility, it was Respondent Murphy's target operating capacity, which thus would result in the generation of waste in the volume that exists at The Highlands facility.

Respondent Murphy had sole ownership and control of every interest that resulted in the production of waste at this facility. It controlled, solely, the source of the waste. In that it had supplied all the feed and inputs for the hogs, and had sole control of the management of all procedures for the care and productivity of the hogs, and reserved the right to change the management of these procedures from time to time (Item 2, page 1 of the agreement), it had sole ownership and control of the rate of production of the waste and the content of the waste.

If anything, such as, but not limited to, any aspect of the structure of the waste management system, fumes from the waste management system, or the ventilation system, were to impact the productivity of Respondent's Murphy's swine at The Highlands facility, it is very clear from the agreement that Murphy would have sufficient ownership and control of the operation to dictate a change in the operation for the benefit of the hogs.

To paint a picture as to how this might impact facts relevant to the Count I of the second amended complaint, it is obvious that Respondent Murphy ultimately had the final say as to the

rate of ventilation in the facility, to ensure a healthful environment for its hogs. On any given day, due to weather conditions, due to power failures, or any variety and combination of conditions arising in the interior of the hog confinement structures, Respondent Murphy could certainly dictate the rate of ventilation in the buildings should the well-being of the hogs become threatened in the buildings due to a build-up of unhealthful conditions, or should physical failures require compensatory adjustments to other portions of the operation. Respondent Murphy's control and ownership of the hogs, as well as its provision of and control over all feed and inputs for the hogs, as well as its ability to control all measures deemed necessary for the well-being of the herd, certainly gives Respondent Murphy control over the original rate of ventilation necessary to accommodate the inputs and procedures involved in the operation at the facility, as well as a change in the ventilation, which in turn certainly dictates the rate and composition of air emissions from the facility.

With regard to Count II of the second amended complaint, a count alleging water pollution due to the over application of waste, it is obvious from the terms of the agreement, that as long as Respondent Murphy maintained hogs at the facility, it owned and controlled the source of the waste and all of the components of the waste at the facility. Respondent Murphy owned and controlled every aspect of the source of the waste. Under the agreement, the very fact that this facility was a hog farm during the term of the agreement, is due to the components of the operation that Respondent Murphy owned and controlled.

Complainant also contends and believes that Respondent Murphy had a significant role in the selection of the BION waste management system for The Highlands facility. Complainant intends to pursue this theory further, in discovery. The basis of this contention includes information gathered in 1997 and 1998, documented in Exhibits 1, 2 and Group Exhibit 3 attached to the affidavit of Bruce Yurdin, wherein it is stated that information gathered to date indicated a strong relationship between BION Environmental Technologies, Inc. and Murphy

Family Farms and significant involvement on the part of Doug Lenhart with BION personnel with regard to the BION system installed at The Highlands facility. It is Complainant's contention that Respondent Murphy is responsible for the introduction of Doug Baird and The Highlands LLC to BION Technologies, and that Respondent Murphy had a significant role in the installation and operation of the BION system at The Highlands facility.

Given Respondent Murphy's level of participation in the selection and establishment of the BION system, there remains a question to be developed in discovery as to its participation in later modifications of the facility's waste management system. Given Respondent Murphy's interest in all hogs at the facility, and its capability, pursuant to its agreement with The Highlands, to control all management and procedures relative to the well being and productivity of the hogs, and the productivity and profitableness of the operation, it is a reasonable question, for development in discovery for the purpose of presentation of evidence at hearing, to inquire as to the extent of Respondent Murphy's involvement in modifications to The Highlands waste management system during the duration and term of its agreement with The Highlands.

Respondent Murphy claims in its memorandum that to the extent that The Highlands' waste management program involved land application of waste, Highlands controlled the land application process, and Murphy was not involved in any way with land application of waste materials from The Highlands' farm.

It is clear from the affidavits and exhibits attached thereto, that Respondent Murphy was most likely involved in the selection of the waste management system utilized at the facility, and certainly was involved with the establishment of that system at the facility. Thus, Respondent Murphy not only owned and controlled the source of the waste, but also participated in the control of how its waste was to be handled at The Highlands facility. Land application is a part and parcel of the waste handling system utilized at The Highlands. Respondent Murphy owned the source of the waste, it shared in the control of the planning, siting, design and

establishment of the facility, including the waste management system, and it retained control of all hogs maintained and delivered to the facility, including the number of hogs and composition of the herd during the term of its contract with the Highlands that resulted in the volume and composition of waste that was generated and handled at the site. Given the terms and conditions of its agreement with The Highlands, the facility would not be a swine production facility and the waste would not be at the site but for Respondent Murphy's participation in this sow operation. Respondent Murphy, and exclusively Respondent Murphy, owned every hog on the site.

In its memorandum, at the bottom of page 2, Respondent Murphy states that Highlands controlled all aspects of the operation of its farm, and Murphy had no ability to cause Highlands to make, or to refrain from making, any particular decision with respect to any issue concerning Highlands' farm. Complainant quotes this representation only to highlight the absurdity of the statement when held up against the actual terms and conditions of the agreement between The Highlands and Respondent Murphy.

In its memorandum, also on page 2, Respondent Murphy makes the statement that The Highlands determined whether it would follow Murphy's recommendations. Respondent goes on to represent that The Highlands sometimes did deviate from Murphy's recommendations.

First, the very fact that Respondent Murphy made recommendations, and took note when The Highlands did not follow its recommendation, indicates that Respondent Murphy had the right and ability to make recommendations, as is clear from the agreement now that the agreement is available for consideration in this proceeding, and that, pursuant to the provisions of the agreement, The Highlands was to follow these recommendations.

Further, it is clear from the terms and conditions of Respondent Murphy's agreement with The Highlands, that Respondent Murphy had control of management procedures concerning the care of the hogs, and pursuant to Item 15 of the "Producer Hereby Agrees"

section of the agreement, Respondent Highlands agreed "To take measures deemed necessary by Owner to provide for the herd." It is very apparent from the agreement, that, if Respondent Murphy so chose, it could claim a breach of contract at any time The Highlands deviated from Murphy's management procedures for the care and productivity of the breeding herd or measures deemed necessary by Respondent Murphy to provide for the herd, and Respondent Murphy could choose to enforce the contract or end the contract, thereby exerting significant control over the operation of the Highland sow production facility. In fact, as indicated in its memorandum, Respondent Murphy did ultimately terminate its contract with The Highlands.

III. LEGAL STANDARD FOR DISMISSAL

Generally, section 2-619 affords a "means of obtaining . . . a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact." *Kedzie and 103rd Currency Exchange, Inc., v Hodge*, 156 Ill.2d 112, 115 (1993), 619 .E.2d 732 citing Ill.Ann.Stat., ch. 110, par 2-619, Historical & Practice Notes, at 662 (Smith-Hurd 1983); see *Barber-Colman Co. v. A & K Midwest Insulation Co.* (1992), 236 Ill.App.3d 1065, 1071, 603 N.E.2d 1215.) Subsection (a)(9) . . . permits dismissal where "the claim asserted . . . is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Kedzie*, 156 Ill.2d at 115, citing Ill.Rev. State.1989, ch. 110, par 2-619(a)(9).

The phrase "affirmative matter" encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action. *Kedzie*, 156 Ill.2d at 115 (See 4 R. Michael, Illinois Practice § 41.7 (1989).) For that reason, it is recognized that a section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action much in the same way that a section 2-615 motion to dismiss admits a complaint's well-pleaded facts.

Kedzie, 156 Ill.2d at 115, citing *Barber-Colman*, 236 Ill.App.3d at 1073, 603 N.E.2d 1215.

The term "affirmative matter" as used in section 2-619(a)(9) has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Consumer Electric Company, v. Cobelcomex, Inc.*, 149 Ill.App.3d 699, 703 (1st Dist. 1986), 501 N.E.2d 156, citing *Ralston v. Casanov*, 129 Ill.App.3d 1050 (1984), 473 N.E.2d 444. By contrast, where the affirmative matter is merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint, section 2-619(a)(9) should not be used. *Consumer Electric Company, v. Cobelcomex, Inc.*, 149 Ill.App.3d 699, 703 (1st Dist. 1986), 501 N.E.2d 156, citing *Connelly v. Estate of Dooley,* 96 Ill.App.3d 1077 (1981), 422 N.E.2d 143.

If the "affirmative matter" asserted is not apparent on the face of the complaint, the motion must be supported by affidavit. *Kedzie*, 156 Ill.2d at 116, citing Ill.Rev.Stat 1989, ch 110, par 2-619(a); see also 4 R. Michael, Illinois Practice § 41.7 (1989) (observing that "materials of the same nature as are used to support motions for summary judgment" may serve as support for the motion). By presenting adequate affidavits supporting the asserted defense (see 134 Ill.2d R. 191), the defendant satisfied the initial burden of going forward on the motion. The burden then shifts to the plaintiff. *Kedzie*, 156 Ill.2d at 116.

The plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. The plaintiff may do so by "affidavit or other proof." *Kedzie*, 156 Ill.2d at 116, citing Ill.Rev.Stat 1989, ch 110, par 2-619(c).) A counter affidavit is necessary, however, to refute evidentiary facts properly asserted by affidavit supporting the motion else the facts are deemed admitted. *Kedzie*, 156 Ill.2d at 116.

Although similar to a summary judgment motion, a section 2-619 motion differs in that the court may, in its discretion, decide questions of fact "upon the hearing of the motion."

Consumer Electric Company, v. Cobelcomex, Inc., 149 Ill.App.3d 699, 703 (1st Dist. 1986), 501 N.E.2d 156, citing *North Park Bus Service, Inc. v. Pastor*, 39 Ill.App.3d 406 (1976), 349 N.E.2d 664; Ill.Rev.Stat 1985, ch 110, par 2-619(c). However, in deciding the merits of the motion, a trial court cannot determine disputed factual issues solely upon affidavits and counter-affidavits. If the affidavits presented disputed facts, the parties must be afforded the opportunity to have an evidentiary hearing. *Consumer Electric Company, v. Cobelcomex, Inc.*, 149 Ill.App.3d 699, 703-704 (1st Dist. 1986), 501 N.E.2d 156, citing *Premier Electrical Construction Co. v. LaSalle National Bank*, 132 Ill.App.3d 485 (1984), 477 N.E.2d 1249; *Dickman v. Country Mutual Insurance Co.*, 120 Ill.App.3d 470 (1983), 458 N.E.2d 199.

If it cannot be determined with reasonable certainty that the alleged defense exists, the motion should not be allowed. *Consumer Electric Company, v. Cobelcomex, Inc.*, 149 Ill.App.3d 699, 703 (1st Dist. 1986), 501 N.E.2d 156, citing *Dangeles v. Marcus*, 57 Ill.App.3d 662 (1978), 373 N.E.2d 645; *Loughman Cabinet Co. v. C. Iber & Sons, Inc.*, 46 Ill.App.3d 873 (1977), 361 N.E.2d 379; *House of Realty, Inc. v. Ziff*, 9 Ill.App.3d 419 (1973), 292 N.E.2d 71.

IV. CASE LAW REGARDING EVIDENCE OF OWNERSHIP OR CONTROL OF THE PREMISES OR CONTROL OVER THE SOURCE OF POLLUTION TO BE A SUFFICIENT CONDITION FOR A FINDING OF LIABILITY UNDER THE ACT.

In the case of *Perkinson v. the Illinois Pollution Control Board*, 187 Ill.App.3d 689, 693, (3rd Dist. 1989), 543 N.E.2d 901, the court reviewed case law pertinent to the concepts as ownership and control with regard to liability under the Act:

> Two cases involving railroad tank cars are cited by Perkinson in support of his contention that he neither caused nor allowed the swine waste discharge here. In *Phillips Petroleum Co. v. Illinois Environmental Protection Agency* [72 Ill.App.3d 217 (2d Dist. 1979), 390 N.E.2d 620], a tank of anhydrous ammonia owned by Phillips was under the sole control of the transporting railroad when it was punctured in a derailment and released poisonous gas into

the air. Since there was no evidence showing that Phillips, the alleged polluter, had the capability of controlling the pollution or was even in control of the premises where the pollution occurred, the appellate court affirmed a finding the Phillips did not cause or allow the pollution.

The second tank car case is *Union Petroleum Corp. v. United States* (Ct.Cl.1981), 651 F.2d 734, where the valves on two cars were opened by vandals during a labor strike. The cars were at a loading rack at Union's terminal in Massachusetts, and the spilled oil eventually reached Chelsea Creek. As soon as the oil spill was discovered, Union took appropriate measure to contain the spill and to clean up the oil. The litigation arose when Union sought to recover the cost of clean up from the United States government. The Court of Claims noted that, under the federal statute, a claimant cannot recover where a vandal or third party caused the spillage if the claimant does not prove that reasonable actions were taken to prevent or forestall such intervention by a third party. The trial judge ruled in favor of Union, concluding that the discharge was caused by unknown vandals in spite of the company's reasonable precautions against vandalism, and Court of Claims affirmed. Union had fenced in the most accessible part of its terminal, had installed 1000-watt mercury street lights in the vicinity of the tank cars, and had employed additional security guards to patrol the area during the strike. There was also persuasive evidence that Union had adequate oil containment facilities and took reasonable care to prevent the spill.

* * *

Many cases have held that the owner's lack of knowledge of the discharge is no defense under the Environmental Protection Act. The leading case is *Meadowlark Farms v. Illinois Pollution Control Board*, 17 Ill.App.3d 851 (5th Dist. 1974), 308 N.E.2d 829, where water pollution was caused by seepage through mine refuse piles. The PCB found that Meadowlark Farms owned the surface rights of the property and thus owned the source of the pollution and had the capability of controlling the pollutional discharge. The reviewing court affirmed and stated:

> "Petitioner's so-called lack of knowledge that the discharge existed provides no defense. The Environmental Protection Act is *malum prohibitum*, no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt." 17 Ill.App.3d at 861, 308 N.E.2d at 837.

A similar holding is found in *Freeman Coal Mining Corp. v. Illinois Pollution Control Board*, 21 Ill.App.3d 157 (5th Dist. 1974), 313 N.E.2d 616, another case where water pollution occurred when rainwater seeped through a mine refuse pile. Again, the court ruled that the fact that pollution came from the seepage off the owner's land was sufficient proof that the owner allowed the discharge within the meaning of the statute. It was no defense that the discharges were accidental and not intentional or that they were the result of an "Act of God" (rain) beyond its control. The court relied in part upon a case from another jurisdiction which held that the legislature had imposed a duty to take all prudent measures to prevent pollution.

> In *Hindman v. Environmental Protection Agency*, 42 Ill.App.3d 766 (5th Dist. 1976), 356 N.E.2d 669, the operator of a landfillI site was held accountable for a fire that was not started by either the operator or his employees. The court relied upon the Meadowlark Farms case and upon *Bath, Inc. v. Pollution Control Board*, 10 Ill.App.3d (4th Dist. 1973), 294 N.E.2d 778, and ruled that a violation is not predicated upon proof of guilty knowledge or intentional harm. In the Bath case, the owner of a landfill was held to be responsible for underground burning even though the cause was unknown and not the result of the owner's affirmative act.
>
> The case before us is controlled by the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts establish the owner either lacked the capability to control the source, as in *Phillips Petroleum* or had undertaken extensive precautions to prevent vandalism or other intervening causes, as in *Union Petroleum*. Here Perkinson plainly had control of the lagoons and the land where the pollutional discharge occurred. The PCB concluded that he is liable for the pollution that had its source on his land and in a waste facility under his control. Under well-established Illinois law, that is sufficient to support a finding of a violation of the Environmental Protection Act.

Complainant attaches hereto as Exhibit A, a copy of the United States District Court, Western District of Kentucky, opinion and order regarding issues raised in motions for summary judgment in the case of *Sierra Club, Inc. v. Tyson Foods.* 2003 WL 22595989, 299 F. Supp.2d 693. The decision included a ruling that found Tyson Chicken to be a "person in charge" under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and an "operator" under the Emergency Planning and Community Right-to-Know Act ("EPCRA") with respect to two facilities Tyson claimed to be independent contractors. The analysis and findings are found on page 718 through 721 of the decision. Tyson Chicken's contract and relationship with its growers is not identical to the working arrangement and agreement between Respondent Murphy and The Highlands. However, there are some similarities in the analysis the court undergoes in making its ruling and, to the extent the court's analysis in *Sierra Club v. Tyson* is relevant to questions currently before the Board in the instant matter, Complainant incorporates said analysis herein by reference.

V. *PEOPLE EX REL. RYAN V. MCFALLS*

In the case of *People ex rel Ryan v. McFalls*, 313 Ill.App.3d 223 (3rd Dist. 2000), 728 N.E.2d 1152, the court held that an off-site generator of waste to be a person who may cause open dumping within the plain meaning of Section 21(a) and 21(p)(1) of the Illinois Environmental Protection Act (the "Act"). 415 ILCS 5/21(a), (p)(1). The court provided the following analysis as the basis of its reasoning.

> The Act does not define "cause." In the absence of a statutory definition, "cause" should be given its plain and ordinary meaning. See *Moran Transportation Corp. v. Stroger*, 303 Ill.App.3d 459, 708 N.E.2d 508 (1999). The verb "cause" ordinarily means "to serve as cause or occasion of [or to] bring into existence . . . ." (Webster's Third New International Dictionary 356 (1993)).
>
> The Act contains a broad definition of "person." The definition contains no qualifying language limiting its scope to entities having an ownership interest in, or control over, a disposal site. Moreover, neither ownership, nor control, of an allegedly illegal disposal site is necessary to effect the consolidation of refuse there. Therefore, an off-site generator, as a "person," may "cause" "open dumping" within the plain meaning of subsections 21(a) and 21(p)(1). Accordingly, we hold that off-site generators fall within the class of persons who may violate these subsections.
>
> * * *
>
> Finally, we do not agree that a long line of precedent limits the scope of the subsections at issue to parties having an ownership interest in, or exercising control over, the allegedly illegal disposal site. Rather than establishing ownership or control of the premises as a necessary condition to liability under the Act, the cases cited by appellees merely hold that ownership or control of the premises or control over the source of pollution is a sufficient condition where an owner or operator is alleged to have passively permitted pollution to enter the environment. See *Perkinson v. Pollution Control Board*, 187 Ill..App.3d 689, 546 N.E.2d 901 (1989); *Phillips Petroleum Co. v. Pollution Control Board*, 72 Ill.App.3d 217, 390 N.E.2d 620 (1979); *Freeman Coal Min. Corp. v. Pollution Control Board*, 21 Ill.App.3d 157, 313 N.E.2d 616 (1974); *Meadowlark Farms, Inc.* 17 Ill.App.3d 851, 308 N.E.2d 829. Therefore, we must reject the argument that these cases control the disposition of the case at bar.

VI. RESPONDENT MURPHY'S APPLICATION OF NUISANCE PRINCIPLES TO AN ALLEGATION OF SECTION 9(A) IS IMPROPER, IN LIGHT OF THE COURTS HOLDINGS THAT THE ILLINOIS POLLUTION CONTROL BOARD IS NOT AUTHORIZED BY THE LEGISLATURE TO DETERMINE AND PROCEED AGAINST COMMON LAW NUISANCE, AND THAT THE BOARD IS TO APPLY STATUTORY CRITERIA IN ITS ANALYSIS OF A SECTION 9(A) ALLEGATION.

In its memorandum, Respondent Murphy asserts that a common law nuisance claim is analogous to the State's claim under Section 9(a) of the Act, and goes on to apply nuisance principles to the allegations of the complaint. Respondent Murphy's attempt to apply nuisance principles to an allegation of Section 9(a) is improper and incorrect.

The standards to be utilized in a Section 9(a) analysis were plainly set forth in the cases of *City of Monmouth v. Pollution Control Board*, 57 Ill.2d 482 (1974), 313 N.E.2d 1, *Incinerator, Inc. v. Pollution Control Board*, 59 Ill.2d 290 (1974), 319 N.E.2d 794; and *Mystik Tape v. Pollution Control Board,* 60 Ill.2d 330 (1975), 328 N.E.2d 5, wherein the Illinois Supreme Court held that section 9(a), when read in conjunction with section 3(b), 3(d) and 33(c),contained sufficient standards for determining what constitutes air pollution, that is, the unreasonable interference with the enjoyment of life or property. These standards were further defined in terms of the statutory criteria within the Act, specifically for causes brought before the Pollution Control Board, in the case of *Wells Manufacturing Company v. Pollution Control Board*, 73 Ill.2d 226 (1978), 383 N.E.2d 148.

The courts have held that the Illinois Pollution Control Board is not authorized by the legislature to determine and proceed against common law nuisance. Rather, it must proceed strictly within the authority defined by the Act. *Incinerator, Inc. v. Pollution Control Board*, 59 Ill.2d 290, 299 (1974), 319 N.E.2d 794, 799; *W.F. Hall Printing Company v. Environmental Protection Agency*, 16 Ill.App.3d 864, 869 (4th Dist. 1973), citing *Mystik Tape v. Illinois Pollution Control Board* 16 Ill.App.3d 778 (4th Dist. 1973), 306 N.E.2d 574, *aff'd in part and rev'd in part on other grounds*, 60 Ill.2d 330; 328 N.E.2d.

Therefore, Respondent's argument contained in the second paragraph of page 6 of its memorandum, in which it encourages the Board to rely on nuisance standards in its analysis of a claim of a Section 9(a) violation, and its contention in the first full paragraph of page 8 that Respondent Murphy's conduct must be the focus of the Board's analysis, is terribly flawed and outright incorrect.

VII. IN THE RECENT DECISION OF *NICKELS V. BURNETT*, BASED ON A SUFFICIENT SHOWING OF THE POTENTIAL HARMS AND SUBSTANTIAL CERTAINTY THAT THE HARMS WOULD OCCUR, THE COURT UPHELD THE GRANTING OF INJUNCTIVE RELIEF THAT PROHIBITED THE CONSTRUCTION AND OPERATION OF A FACILITY HOUSING A LARGE NUMBER OF HOGS.

Despite the fact that Respondent's reliance on nuisance standards is completely misplaced, Complainant cannot allow to go unchallenged Respondent's argument that it is "well settled" that the mere introduction of livestock into an area – even large numbers of animals – without more, does not establish the requisite conduct to support a nuisance claim.

In the instant matter, Complainant has pled and alleged all facts necessary to meet pleading standards. Respondent Murphy's motion is not based in a Section 2-615 claim, but rather Respondent's motion is a Section 2-619(a)(9) claim. Complainant has pled a sufficient factual basis for its allegation of unreasonable interference consistent with applicable statutory criteria, and, particularly, Complainant has alleged facts relevant to actual unreasonable interference experienced by neighbors of the subject facility. As such, Complainant's assertion of a concentration of a large number of hogs at the subject operation – an operation for which it is requisite that there be a concentration of over 3,000 sows – is one allegation among many specific factual allegations in support of its claim of unreasonable interference. As stated above, a section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action much in the same way that a section 2-615 motion to dismiss admits a

complaint's well-pleaded facts. *Kedzie*, 156 Ill.2d at 115, citing *Barber-Colman*, 236 Ill.App.3d at 1073, 603 N.E.2d 1215.

In the recent decision of *Nickels v. Burnett*, 343 Ill.App.3d 654, 798 N.E.2d 817, the court upheld a grant of injunctive relief prohibiting the construction and operation of a facility that housed a large number of hogs. *Nickels* was an action in which plaintiffs claimed prospective nuisance, and based on the record of the case, the court upheld the trial court's decision to grant a preliminary injunction enjoining defendants from constructing a hog confinement facility. The court found no abuse of discretion in the trial court's decision, and that injunctive relief was available in the matter to redress substantially certain prospective harm. Relying on the case of *Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 25 (1981), 426 N.E.2d 824, the court stated that it is well settled that a plaintiff may seek to enjoin an activity that may lead to substantial future harm. In *Nickels*, the court found that the plaintiffs had presented extensive evidence of the potential harms to their health and to the values of their lands should the hog facility begin to operate. Further, the court found the evidence submitted by the plaintiffs to indicate that the harms described were substantially certain to occur should the hog facility begin operations in its present proposed location. Therefore, with a sufficient showing of the potential harms and substantial certainty that the harms would occur should large numbers of hogs be moved into the proposed facility, the court upheld the lower court's finding of a prospective private and public nuisance and upheld the injunctive relief granted by the lower court.

VIII. ARGUMENT

As set forth above, section 2-619 affords a "means of obtaining . . . a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to

disputed questions of fact." *Kedzie*, 156 Ill.2d at 115. The term "affirmative matter" as used in section 2-619(a)(9) has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Consumer Electric*, 149 Ill.App.3d at 703. The plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Kedzie*, 156 Ill.2d at 116. If it cannot be determined with reasonable certainty that the alleged defense exists, the motion should not be allowed. *Consumer Electric,*, 149 Ill.App.3d at 703.

The terms and conditions of Respondent Murphy's and Respondent Highland's operating agreement certainly afforded Respondent Murphy, as the owner of the source of pollution, that being the hogs themselves and the hogs and all inputs into the hogs as the source of the waste at the facility, sufficient ownership and control to meet the standards for a finding of liability under the Illinois Environmental Protection Act, as defined in the cases of *People v. A.J. Davinroy Contractors,* 249 Ill. App.3d 788, 793 (5th Dist. 1993), 618 N.E.2d 1282 *Perkinson v. Pollution Control Board*, 187 Ill..App.3d 689, 546 N.E.2d 901 (1989); *Phillips Petroleum Co. v. Pollution Control Board*, 72 Ill.App.3d 217, 390 N.E.2d 620 (1979); *Freeman Coal Min. Corp. v. Pollution Control Board*, 21 Ill.App.3d 157, 313 N.E.2d 616 (1974); *Meadowlark Farms, Inc.* 17 Ill.App.3d 851, 308 N.E.2d 829.

In the case of *People ex rel Ryan v. McFalls*, 313 Ill.App.3d 223 (3rd Dist. 2000), 728 N.E.2d 1152, the court found that the Illinois Environmental Protection Act does not define "cause." In the absence of a statutory definition, "cause" should be given its plain and ordinary meaning. The verb "cause" ordinarily means "to serve as cause or occasion of [or to] bring into existence . . . ." (Webster's Third New International Dictionary 356 (1993)). Further, the Act contains a broad definition of "person." The definition contains no qualifying language limiting its scope to entities having an ownership interest in, or control over, a disposal site. Moreover,

neither ownership, nor control, of an allegedly illegal disposal site is necessary to affect the consolidation of refuse there. Not unlike the off-site generator that was the subject of *McFall*, a "person" that "caused" "open dumping" within the plain meaning of subsections 21(a) and 21(p)(1), Respondent Murphy has served as cause or occasion to bring into existence the source of pollution that existed at The Highlands facility, and thus, consistent with the holding in *McFall*, has liability under Section 9(a) of the Act, as a person who, as alleged in the second amended complaint, caused, threatened or allowed the discharge or emission of a contaminant so as to cause or tend to cause air pollution, and who failed to practice adequate odor control methods and technology at The Highlands livestock management facility and livestock waste-management facility so as not to cause air pollution.

With regard to Count II of the complaint, in that Respondent Murphy owns and controls the source of the pollution, that being the hogs and all elements of the generation of the waste, Respondent Murphy, under its agreement with The Highlands and in its actual participation in The Highlands facility operations, had sufficient ownership and control in the facility to meet the standards for a finding of liability under the Illinois Environmental Protection Act, as defined in the case law set forth above, including the *McFall* case. Respondent Murphy's participation in the planning, siting and design of the facility, a facility Respondent Murphy established with a requisite of over 3,000 sows, and which included the selection and establishment of the BION system, as well as any other system that might have later been installed at the facility, definitely qualifies as an allegation of specific facts that support Complainant's contention that Respondent Murphy is liable for the water pollution allegations contained in Count II of the second amended complaint.

As set forth in paragraph 22 of Count II of the second amended complaint, Respondents Highlands and Murphy were land applying waste from the facility via a traveling gun irrigation unit on June 18, 2002. On that date, Respondent Murphy had as much, if not more, of an

interest in land applying the facility's waste as part and parcel of the waste management system at the facility, as was the interest of The Highlands. For the production of swine at the facility, swine that it exclusively owned, Respondent Murphy had to move the waste out from under its hogs, into waste management structures and ultimately dispose of it upon the land in order to properly provide for its hogs and properly conduct a swine production operation and facility. Pursuant to Illinois law, Respondent Murphy, who owned and controlled the very source of the pollution, is liable for its compliance with the Illinois Environment Protection Act and regulations promulgated thereunder in the operation of this swine production facility.

With regard to Respondent Murphy's reliance on nuisance principles in its memorandum, it is obvious from the recitation of applicable case law that the analysis of an allegation of a Section 9(a) violation, in a case brought before the Board, and also in circuit court for that matter, is to be based upon statutory criteria. The case law sets forth, in detail, the considerations that are to be included in a proper analysis. Further support for Complainant's contention that the law is not nearly as favorable to Respondent Murphy's position as Respondent Murphy would like the Board to believe, is found in Respondent's misplaced reliance on the case of *Village of Goodfield v. Jamison,* 188 Ill.App.3d 851 (4th Dist. 1989), 544 N.E.2d 1229. It is obvious from the holding in *Nickels*, 343 Ill.App.3d at 663, that plaintiffs in this state have presented sufficient showings of potential harm and substantial certainty that the harms would occur should a large number of hogs be established in a given location, to uphold the grant of injunctive relief prohibiting construction and operation of facilities housing large numbers of hogs.

Respondent Murphy had sufficient ownership and control in The Highlands facility, and sufficient participation in the operation, siting, design, and establishment of both the facility and the waste management system to qualify as a person who caused or allowed both air pollution and water pollution under the statutory criteria applicable to the allegations contained in Count I

and II of the Act. In light of the affidavits and accompanying exhibits, attached hereto and incorporated herein by reference, Respondent Murphy's assertion of affirmative matter completely fails. If, *arguendo*, Complainant's response is found short of bringing to light the complete failure of Respondent Murphy's assertion, the affidavits presented with this response and attached exhibits certainly establish that, without completion of discovery and an evidentiary hearing, it cannot be determined with reasonable certainty that the alleged defense exists.

WHEREFORE, on the foregoing grounds and for the foregoing reasons, Complainant respectfully requests that the Board deny Respondent Murphy Farms, Inc.'s Motion to Dismiss.

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
Assistant Attorney General

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

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

AFFIDAVIT

I, JANE E. MCBRIDE, after being duly sworn and upon oath, state as follows:

1. I am the assistant attorney general assigned to the matter of *People v. The Highlands, LLC and Murphy Farms, Inc.*, PCB No. 00-104. I have been lead counsel representing the Complainant in this matter since the case was originally filed with the Illinois Pollution Control Board.

2. Included in the materials contained within the Office of the Attorney General's case file on this matter is a copy of the Weaned Pig Production Agreement dated December 6, 1996, signed by an executive vice president for Murphy Farms, Inc, and James R. Baird. This agreement includes a contract weaned pig payment schedule, attached to the agreement as Exhibit A. The agreement includes a contract addendum, signed by the same representative of Murphy Farms, Inc. and Douglas Baird for the Highlands, LLC, in April 2001. These documents were included in a response to a request for production, produced by the Thielen Law Offices, representing The Highlands, LLC in the matter of *Roy Kell and Diane Kell, v. The Highlands LLC and Murphy Family Farms, Inc.*, Knox County Circuit Court Case No. 99-L-62. The agreement, payment schedule and contract addendum are attached to this affidavit as Exhibit 1.

3. Included in the production from the Thielen Law Offices representing The Highlands, LLC in the matter of *Roy Kell and Diane Kell, v. The Highlands LLC and Murphy Family Farms, Inc.*, Knox County Circuit Court Case No. 99-L-62, was a copy of a memorandum from Doug Lenhart, dated January 12, 1998, regarding the training of Highlands' employee Don Bybee, and attached hereto as Exhibit 2, and a copy Murphy Family Farms employment training record, attached hereto as Exhibit 3, that reports the results of The

Highlands' employees competency tests. These two documents present evidence of the employee training agreement and arrangements between The Highlands and Murphy Farms, Inc., pursuant to their operating agreement.

4. The Attorney General's case file in this matter includes The Highlands articles of organization as a limited liability company, filed on December 4, 1996, a copy of a document filed with the Illinois Secretary of State to return The Highlands LLC to good standing in 1997, and copies of The Highlands LLC annual reports field in November 1997 and October 1998. These reports indicate the members of The Highlands LLC to be James R. Baird, Patricia A. Baird and Douglas B. Baird. The documents were obtained from the Illinois Secretary of States office upon request of the Illinois Attorney General's Office. The facsimile cover letter transmitting the documents from the Illinois Secretary of State's office to the Attorney General's office is included with the exhibit. The return cover transmission sheet is superimposed on the cover sheet utilized for the Attorney General's Office's original request for the documents. The documents are attached hereto as Exhibit 4.

5. Under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Further affiant sayeth not.

JANE E. MCBRIDE

Subscribed and sworn to before me
this 30th day of December, 2004.

NOTARY PUBLIC

OFFICIAL SEAL
PEGGY J. POITEVINT
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 4-16-2006

MURPHY FAMILY FARMS.

P. O. BOX 759
ROSE HILL, NORTH CAROLINA 28458

WEANED PIG PRODUCTION AGREEMENT

THIS AGREEMENT made this 6th day of December, 1996, between Murphy Farms, Inc. And/or Quarter M Farms, Inc. Doing business in Illinois as Murphy Family Farms, North Carolina Corporations with their principal place of business in Rose Hill, North Carolina (hereinafter- called Owner) and Highlands LLC., whose address is 1122 Knox Hwy. 18 Williamsfield, of Elba Township, Knox, IL. County, State of IL. (hereinafter called Producer) whose farm shall be known as "Highlands". Each party to this contract is an independent contractor and neither party has any responsibility or liability for any of the debts or obligations of the other party. Neither shall either party be liable to the other for failure to act in any way due to any unforseen circumstances beyond their control.

IN CONSIDERATION of the mutual benefits to evolve from Producer breeding, farrowing, and producing weaned pigs for Owner in facilities owned by Producer and from breeding stock owned and provided by Owner, the parties hereby agree to the following:

OWNER HEREBY AGREES:

1. To deliver to Producer's premises a total breeding herd of [redacted] gilts and the necessary boars for that size herd. The quality, time of delivery and number of animals of each delivery shall be the discretion of Owner which agrees to strive to deliver said stock for maximum utilization of Producer's facilities.

2. To provide management procedures for the care and productivity of the Breeding Herd which may change from time to time.

[redacted]

Exhibit 1

3. To provide all feed, medications and veterinary service deemed necessary at the discretion of Owner.

4. To provide from information furnished by Producer all records regarding herd productivity considered to be necessary by Owner.

5. To deliver and pick up all necessary Breeding Stock at Producer's premises and to haul all pigs to and from farm.

6. To pay producer in accordance with payment schedule attached marked "Exhibit A."

PRODUCER HEREBY AGREES:

1. To provide facilities, housing and equipment as specified by Owner, and bear all costs of producing weaned pigs except those covered by Owner described in item 3 under "OWNER HEREBY AGREES".

2. To receive the breeding herd and thereafter, provide the proper husbandry for maximum productivity by following the management's procedures specified by Owner.

3. To provide an all weather road from the public road to the premises suitable or the delivery and/or pick up of feed and breeding stock. If Owner incurs any wrecker bills due to poor road conditions, then to reimburse Owner for wrecker cost.

4. To deliver acceptable commercial weaned pigs to off-site nurseries as scheduled by Owner.

5. To select quality weaned pigs from those sows designated for replacement gilt production and place those pigs into the on-site nursery as scheduled by the Owner. These pigs will be raised to provide replacement gilts for the breeding herd.

6. To properly maintain the premises, including grass and weed mowing, adequate rat and fly control measures and provide security to facility such as to exclude access by outside animals, birds and unauthorized humans.

7. To follow the weaned pig production program furnished by Owner.

8. To provide Owner with information deemed necessary by Owner for maintenance of proper records.

9. To permit any authorized representative of Owner to enter the premises to inspect the animals and facilities at any time.

10. To recognize the security interest of any secured creditor in the feed, medication, breeding stock and its offspring as superior to and having priority over any rights which Producer may have therein: furthermore, Producer agrees to permit any secured creditors of Owner to have access to the premises and facilities at all reasonable times for the purpose of exercising any right, including the rights of inspection and possession; with respect to the secured creditors security interest.

11. To account for all death losses daily, submit a weekly mortality report to the Owner's accounting office in a timely manner and dispose of all dead animals according to ILLINOIS state regulations.

12. To dispose of all animal waste according to federal, state and county regulations.

13. To hold Owner harmless from any damages, loss or expense, including attorney fees and court costs, resulting from the negligent, unlawful or willful acts or omissions of Producer, Producer's employees, representatives or invitees or from Producer's failure to perform any obligation imposed upon Producer by law or by the provisions of this Agreement, with respect to the maintenance and operation of the facilities used for the production of weaned pigs for Owner.

14. To use the breeding stock delivered by Owner only for the purposes of producing weaned pigs for Owner and to own no swine.

15. To take measures deemed necessary by Owner to provide for the herd.

16. To allow Owner to withhold from proceeds under this contract any amounts due to Owner by Producer for the purchase of materials and supplies from Owner or for advances to Producer or to others for the benefit of Producer by Owner.

17. For the purpose of this agreement, a weaned pig shall be defined as a pig of sufficient age and size, as determined by owner, to survive in a nursery.

18. To not own or have possession of, either as agent, producer or otherwise, any swine not owned by Owner. Producer shall not permit any swine not owned and designated for the swine facilities herein contracted for, to come within 500 feet of the swine facilities, unless permitted in writing by Owner. It is specifically understood and agreed that under no circumstances shall the requirement for written approval be waived.

THIS AGREEMENT shall continue in force for a period of ten years from this date November 01, 1997. At the conclusion of this term, this agreement will automatically renew on an annual basis. Should either party wish to terminate the agreement, written notice will be required within 90 days of the expiration date of this agreement. In the event that Producer fails to provide necessary facilities, husbandry or security of the animals as set out in the management programs by Owner, Owner reserves the right, without notice to remove Owner's property from Producers premises.

MURPHY FARMS, INC

By: [signature]

Title: Exec VP Murphy Farms Inc
Pres Midwest

[signature]
Witness

PRODUCER

James R. Burd

SSN or FIN: 344-33-9933

Telephone: 309-639-2248

Douglas L. Lenhart
Witness

H:\USERS\STI\CONTRACT\CONTMRGE\LLWPA.DOC

EXHIBIT "A"
CONTRACT WEANED PIG PAYMENT SCHEDULE

Murphy Family Farms will pay Producer for the pigs produced and delivered by Producer to Murphy as follows:

Pigs accepted by Murphy and moved to a nursery from Producer's farrowing building will be paid [redacted] per pig moved. It is the intent of Murphy and the understanding of the Producer that pigs should weigh an average of 10 pounds. If Producer ships pigs weighing less than 8 pounds on an individual basis, then payment on those individual pigs are subject to a discount of [redacted] per pig at Murphy's discretion. Injured, ruptured or non viable pigs are subject to [redacted] payment. The net payment will be paid within 10 days of pig movement. Murphy's decision on discounted pigs is final.

Pigs accepted by Murphy and moved from Producer's Unit will also earn a [redacted] per pig reserve to be paid to Producer for essential repairs and maintenance on his Unit which are approved in advance by Murphy Farms, Inc. service representative.

A production incentive bonus will also be paid to Producer for production above [redacted] pigs per sow per year. This bonus will be paid within 30 days after the end of each of Murphy's fiscal quarters based upon pigs produced during that quarter. However, the bonus will not be paid until after the first quarter in which Producer was farrowing pigs in the first week of the quarter. Pigs produced during a quarter will be calculated by taking pigs shipped during the quarter, adding the end of quarter on farm pig inventory and subtracting the beginning of quarter on farm pig inventory. Pigs discounted for light weight will not be considered in calculating the pigs produced during the quarter. The average of weekly sow inventories for the quarter will be used in computing production level.

The production bonus per pig produced will be calculated by dividing the annualized pigs/sow/year for the quarter by [redacted] and subtracting [redacted] However, the maximum bonus per pig cannot exceed [redacted] per pig.

Example: [redacted] pigs/sow/year divided by [redacted] = [redacted] bonus per pig produced

This bonus will be paid for all eligible pigs produced during the quarter.

Before the Producer will have produced pigs for a full quarter, he probably will have farrowed pigs during the preceding quarter. At the time that the Producer is paid his first quarterly production bonus, he will also be paid a bonus at the same rate per pig for all pigs produced before the first full production quarter.

Murphy Family Farms will pay Producer for finished gilts produced in the on-site nursery and finishing facilities at the rate of [redacted] for each gilt placed back into the breeding herd or moved from the Producer's Unit. This gilt production fee is in addition to the pig payments described above and will be paid within 10 days of the gilt movement.

COPY

Highlands Sow Farm
Contract Addendum

1. The parties herein agree that all terms and conditions under this addendum shall be effective May 1, 2001. All adjustments to the existing contract dated December 6, 1996 are subject to Highlands agreement to the items listed under paragraph no. 4 which shall be mandatory criteria for continuance of the contract addendum.

    a. Failure to carry out the items listed will constitute a voiding of the new contract payment and an immediate return to the previous payment structure. Such violation of the criteria shall constitute a default under the contract addendum.

    b. Notice of default may be given by written notice by United States Mail or facsimile. Highlands shall have seven (7) days in which to cure such notice of default.

    c. It is agreed by all the parties herein that this agreement shall remain confidential in all respects. All information exchanged will remain confidential and will not be disclosed to any person or entity without the expressed written consent of the respective parties.

2. In response to cost of production unique to Illinois an adjustment for the remainder of the production contract will be made to the base payment in the amount of [redacted] per pig.

3. Recognizing that these costs have been incurred since the beginning of production, a payment equal to [redacted] per pig for all wean pigs shipped from the Highlands up to the date of implementing the new payment program will be made.

    a. The back payment will first of all retire all money due to Murphy Farms and the remainder will be distributed directly to the Highlands.

4. Highlands agrees to comply with the following criteria in consideration of an increase in production payment. The criteria is as follows:

    a. Highlands will prepare an Annual Operating Budget. The Budget will be reviewed by Murphy Farms, Inc. (MFI) and by Farm Credit Services (FCS) in its final copy before November 30th of each year. This review is for Highlands business purposes and benefit. It is understood and agreed that MFI and FCS review of the annual operating budget is for evaluation purposes and not for the purpose of giving advice or direction of the management of Highlands operations.

b. Highland shall provide monthly financial statements distributed to MFI and FCS by the 2nd Friday after month end. Statements will include:

1. Comparative balance sheet
2. Budget to actual income statement with a narrative explanation of significant variances
3. Cash flow statement
4. An aged A/P listing by vendor
5. Pay report by employee
6. Listing of all transactions between Highlands and Baird Seed Farm (BSF)
7. Listing of all transactions between Highlands and any Baird Family Member

c. Highland shall retain a professional accounting service who will be used to record all financial transactions and produce timely and accurate Financial Statements.

d. Highland agrees to provide a copy of the annual Highlands tax return and distribute to MFI and FCS no later than April 15 of each year.

e. Highland agrees to provide a schedule of the terms of all planned transactions between Highlands and BSF. No additional transactions will be executed without prior consent from MFI and FCS.

f. Highland agrees to provide a schedule of the terms of all planned transactions between Highlands and any Baird Family Member. No additional transactions will be executed without prior consent from MFI and FCS.

g. All monthly repair and maintenance expenditures that exceed budgeted amount by $1,000 or more will require written explanation and cost justification to be included in the distribution of monthly financial statements to MFI and FCS.

h. Capital expenditures or leases (operating or financing) which exceed $1,000 will require written explanation and cost justification to be included in the distribution of monthly financial statements to MFI and FCS.

i. Quarterly meetings to review Highlands financial statements will be conducted no later than the end of the month following the calendar quarter close. Attending will be Mr. & Mrs. Doug Baird, Mr. & Mrs. Jim Baird, Doug Lenhart, Mike Sherman and Cecil Cox.

j. Legal and professional fees will be segmented on the income statement between legal, accounting and secretarial costs. Copies of all professional service invoices will be forwarded to MFI and FCS monthly.

By: _____
Highlands LLC

April 3, 2001
Date

By _____
Murphy Farms Inc.

4/12/01
Date

M E M O R A N D U M

DATE: January 12, 1998

TO: Darra, Kay, Stacy, Dee

FROM: Doug Lenhart

RE: Highlands Employee getting Farrowing Training

Don Bybee of the Highlands Sow Farm would like to go to Missouri for farrowing training. He is available to begin at the earliest convenience for the Missouri Operations. He will be able to stay in Missouri until April 1, 1998.

I would like for him to be set up the same as we did with others as far as providing housing and a salary of $18,000. We have some Murphy of Missouri Applications for Employment in our office. I will have Don fill one out and forward it to Dee as soon as possible.

If anything else needs to be done by us, please contact Jackie.

Exhibit 2

M 00029

M 00005

MURPHY FAMILY FARMS

Farm Name: Highlands

Employee Name	Total Number of Breeding Competencies Trained	Total Number of Breeding Competencies Certified	Total Number of Farrowing Competencies Trained	Total Number of Farrowing Competencies Certified
Ken Walker	86	38	NA	NA
Terry Goodwin	~~80~~ ~~88~~ 89	40	NA	NA
working nights → Michael Johnson	63	Ø	NA	NA
Russell Gibbs	47	Ø	NA	NA
Larry Anderson	18	Ø	NA	NA
Gary Schick	129	129	119	119
Jeff Hertz	129	129	119	119

Return to Jennifer Keller by 5:00PM on Thursday, February 5.

Exhibit 3

MAY 13 '99 08:28AM P.2

Form LLC-5.5
January 1994

George H. Ryan
Secretary of State
Department of Business Services
Limited Liability Company Division
Room 357, Howlett Building
Springfield, IL 62756

Payment must be made by certified check, cashier's check, Illinois attorney's check, Illinois C.P.A.'s check or money order, payable to "Secretary of State."

Illinois
Limited Liability Company Act
Articles of Organization

Filing Fee $500.
SUBMIT IN DUPLICATE
Must be typewritten

This space for use by Secretary of State

Date 12-04-1996
Assigned File # 0009-352-1
Filing Fee $ 500.00
Approved: JB

This space for use by Secretary of State

FILED

DEC 04 1996

LIMITED LIABILITY CO. DIV.
GEORGE H. RYAN
SECRETARY OF STATE

PAID

DEC 4 1996

1. Limited Liability Company Name: The Highlands, L.L.C.

(The LLC name must contain the words limited liability company or L.L.C. and cannot contain the terms corporation, corp., incorporated, inc., ltd., co., limited partnership, or L.P.)

2. Transacting business under an assumed name ☐ Yes ☒ No.
(If YES, a Form LLC-1.20 is required to be completed and attached to these Articles.)

3. The address, including county, of its principal place of business. (Post office box alone and c/o are unacceptable.) 1122 Knox Highway 18, Williamsfield (Knox County), Illinois 61489.

4. Federal Employer Identification Number (F.E.I.N.): ~~Not yet obtained~~ 36-4127830

5. The Articles of Organization are effective on: (Check one)

a) X the filing date, or b) _____ another date later than but not more than 60 days subsequent to the filing date: _____ (month, day, year)

6. The registered agent's name and registered office address is:

Registered agent:	John	J.	Hattery
	First Name	Middle Initial	Last name
Registered Office: (P.O. Box alone and c/o are unacceptable)	Suite 402, Hill Arcade		
	Number	Street	Suite #
	Galesburg	61401	Knox
	City	Zip Code	County

7. Purpose or purposes for which the LLC is organized: Include the business code # (Form 1065)
(If not sufficient space to cover this point, add one or more sheets of this size.)

The production and marketing of livestock and agricultural commodities and the transaction of any or all lawful businesses for which limited liability companies may be organized under the Limited Liability Company Act. Code # 0260

8. The latest date the company is to dissolve 12-01-2016 (month, day, year), or upon the occurrence of events of dissolution stated in Section 35-1(3) of the Act.
And other events of dissolution enumerated on an attachment.

0009-352-1

Exhibit 4

LLC-5.5

9. Other provisions for the regulation of the internal affairs of the LLC per Section 5-5 (a) (8) included as attachment

☐ Yes ☒ No

10. a) Management is vested, in whole or in part, in managers ☐ Yes ☒ No
List their names and business addresses

b) Management is retained, in whole or in part, by the members ☒ Yes ☐ No
List their names and addresses

James R. Baird
2218 Knox Road 100N
Yates City, IL 61572

Patricia A. Baird
2218 Knox Road 100N
Yates City, IL 61572

Douglas B. Baird
1124 Knox Highway 18
Williamsfield, IL 61489

11. Name(s) & Address(es) of Organizer(s)

The undersigned affirms, under penalties of perjury, having authority to sign hereto, that this articles of organization is to the best of my knowledge and belief, true, correct and complete.

Dated December 3 19 96

Signature and Name	Business Address
1. _____ *Signature*	1. Suite 402, Hill Arcade *Number Street*
John J. Hattery, Organizer *(Type or print name and title)*	Galesburg *City/Town*
_____ *(Name if a corporation or other entity)*	Illinois 61401 *State Zip Code*
2. _____ *Signature*	2. _____ *Number Street*
_____ *(Type or print name and title)*	_____ *City/Town*
_____ *(Name if a corporation or other entity)*	_____ *State Zip Code*
3. _____ *Signature*	3. _____ *Number Street*
_____ *(Type or print name and title)*	_____ *City/Town*
_____ *(Name if a corporation or other entity)*	_____ *State Zip Code*

(Signatures must be in ink on an original document. Carbon copy, photocopy or rubber stamp signatures may only be used on conformed copies.)

LLC-4

Form **LLC-50.15**
January 1994

George H. Ryan
Secretary of State
Department of Business Services
Limited Liability Company Division
Room 357, Howlett Building
Springfield, IL 62756

Payment must be made by certified check, cashier's check, Illinois attorney's check, Illinois C.P.A.'s check or money order, payable to "Secretary of State."

Illinois
Limited Liability Company Act

PENALTY – RETURN TO GOOD STANDING

Submit in Duplicate
Must be typewritten

This space for use by Secretary of State
Date
Assigned File #
Filing Fee $
Approved:

This space for use by Secretary of State

RECEIVED
APR 22 1997
Limited Liability Co. Div.

1. Limited Liability Company name: The Highlands, L.L.C.

2. File number assigned by the Secretary of State: 00093521

3. Federal Employer Identification Number (F.E.I.N.): 36-4127830

4. The registered agent's name and registered office address is:

Registered agent:	John	J.	Hattery
	First Name	Middle Initial	Last Name
Registered Office: (P.O. Box alone and c/o are unacceptable)	Suite 402, Hill Arcade		
	Number	Street	Suite #
	Galesburg	61401	Knox
	City	ZIP Code	County

5. The penalties applicable to return the limited liability company to good standing are as follows: (Check and complete where appropriate)

a) $ _____ Failure to file the annual report and pay the requisite fee prior to the first day of the anniversary month.

b) $ _____ Failure to appoint and maintain a registered agent in Illinois as required.

c) $ _____ Failure to report the federal employer identification number within 90 days of the initial filing.

Total penalty amount (a through c) is $ _____

6. The undersigned affirms, under penalties of perjury, having authority to sign hereto, that this penalty form is to the best of my knowledge and belief, true, correct and complete.

Dated April 18, 1997.

James R. Baird
(Signature)

James R. Baird, Member/Manager
(Type or print Name and Title)

(If applicant is a company or other entity, state name of company and indicate whether it is a member or manager of the LLC.)

LLC-7

L.L.C. File Number: 00093521

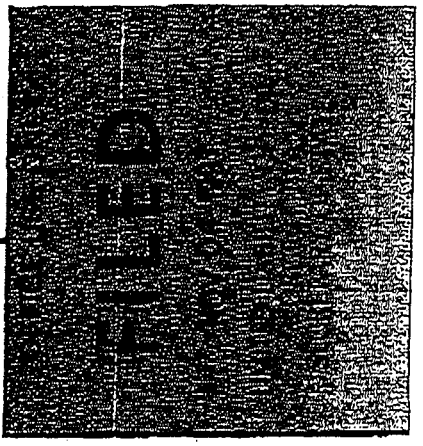
Filing Deadline is Prior to: 12/01/1997

This report must be RECEIVED in the office of the Secretary of State prior to the anniversary date to avoid late filing penalties and eventual administrative dissolution of its organization.

Form **LLC-50.1(D)** January 1994

George H. Ryan
Secretary of State – State of Illinois
Domestic Limited Liability Company Annual Report

Filing Fee $300
Submit in Duplicate
Must be typewritten



1. Limited Liability Company name: Registered Agent, Registered Office, City, IL., ZIP Code

THE HIGHLANDS, L.L.C.
JOHN J HATTERY
HILL ARCADE STE 402
GALESBURG IL, 61401-0000

2. CHANGES ONLY: REGISTERED AGENT

REGISTERED OFFICE

CITY, IL., ZIP CODE, COUNTY

PAID
NOV 04 1997

3. Federal Employer Identification Number: 36-4127830

4. Address of the office at which the records required by Section 1-40 are to be kept is:

1122	Knox Highway 18	
Number	Street	Suite
Williamsfield, IL	61489	Knox
City, State	ZIP Code	County

5. Names and addresses of the managers or, if none, the members:

Name	Number & Street	City, State	ZIP Code	Select MGR/MBR
James R. Baird	2218 Knox Road 100N	Williamsfield, IL	61489	MBR
Patricia A. Baird	2218 Knox Road 100N	Williamsfield, IL	61489	MBR
Douglas B. Baird	1124 Knox Highway 18	Williamsfield, IL	61489	MBR

6. The undersigned affirms, under penalties of perjury, having authority to sign thereto, that this annual report is to the best of my knowledge and belief, true, correct and complete.

Payment may be made by business firm check payable to Secretary of State. (If check is returned for any reason this filing will be nullified)

Return to:
Department of Business Services
Limited Liability Company Division
Room 359, Howlett Building
Springfield, IL 62756

Dated 10-31, 19 97

James R. Baird
(Signature)

James R. Baird, Member
(Type or print Name and Title)

(If applicant is a company or other entity, state name of company and indicate whether it is a member or manager of the LLC.)

LLC-22

L.L.C. File Number: 00093521

Filing Deadline is Prior to: 12/01/1998

This report must be RECEIVED in the office of the Secretary of State prior to the anniversary date to avoid late filing penalties and eventual administrative dissolution of its organization.

Form **LLC-50.1(D)** January 1994

George H. Ryan
Secretary of State – State of Illinois
Domestic Limited Liability Company Annual Report

SEE BELOW
Filing Fee $300
Submit in Duplicate
Must be typewritten

[redacted]

1. Limited Liability Company name: Registered Agent, Registered Office, City, IL., ZIP Code

THE HIGHLANDS, L.L.C.
JOHN J HATTERY
HILL ARCADE STE 402
GALESBURG IL, 61401-0000

FILING FEE :
HAS LLC ELECTED TO BE GOVERNED BY 1997 AMENDATORY ACT
YES ↔ FILING FEE $200
NO ↔ FILING FEE ~~$300~~

2. CHANGES ONLY: REGISTERED AGENT

REGISTERED OFFICE

CITY, IL., ZIP CODE, COUNTY

PAID
OCT 30 1998

3. Federal Employer Identification Number: 36-4127830

4. Address of the office at which the records required by Section 1-40 are to be kept is:

Number	Street	Suite
1122	Knox Highway 18	

City, State	ZIP Code	County
Williamsfield, IL	61489	Knox

5. Names and addresses of the managers or, if none, the members:

Name	Number & Street	City, State	ZIP Code	Select MGR/MBR
James R. Baird	2218 Knox Road 100N	Williamsfield, IL	61489	MBR
Patricia A. Baird	2218 Knox Road 100N	Williamsfield, IL	61489	MBR
Douglas B. Baird	1124 Knox Highway 18	Williamsfield, IL	61489	MBR

6. The undersigned affirms, under penalties of perjury, having authority to sign thereto, that this annual report is to the best of my knowledge and belief, true, correct and complete.

Payment may be made by business firm check payable to Secretary of State. (If check is returned for any reason this filing will be nullified)

Return to:
Department of Business Services
Limited Liability Company Division
Room 359, Howlett Building
Springfield, IL 62756

Dated Oct 22, 19 98

James R Baird
(Signature)

James R. Baird, Member
(Type or print Name and Title)

(If applicant is a company or other entity, state name of company and indicate whether it is a member or manager of the LLC.)

LLC-22

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

FACSIMILE COVER SHEET

TO: Secretary of State

OF:

FAX #: 524-3390

DATE: 5/6/99

FROM: Office of the Attorney General
Donna Lutes
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706

PHONE: 217/782-9031 (Voice)
217/524-7740 (Fax #)
217/782-1397 (Fax #)

Total number of pages, including cover sheet: 4 Hard copy to follow: Yes____ No____

SUBJECT:

MESSAGE:

Give To Donna Lutes

If all pages do not transmit properly, please contact the sender as soon as possible.

STATE OF ILLINOIS)
) **SS**
COUNTY OF PEORIA)

AFFIDAVIT

I, ERIC O. ACKERMAN, after being duly sworn and upon oath, state as follows:

1. I have firsthand knowledge of the matters stated herein, and could and would testify competently thereto if called as a witness.

2. I am employed by the Illinois Environmental Protection Agency ("Illinois EPA") as a field inspector and environmental protection engineer, stationed at the Peoria Regional Office of the Illinois Environmental Protection Agency. I have been employed with the Illinois EPA in this capacity for over twenty years. I am assigned to the Illinois EPA's agriculture pollution program and concentrate the vast majority of my time inspecting and evaluating agricultural facilities.

3. I am one of the inspectors that has been assigned to and involved in site investigations and inspections pertinent to allegations of air and water pollution violations at The Highlands facility, which is the facility that is the subject of the case of *People v. The Highlands, LLC and Murphy Farms, Inc.*, PCB No. 00-104.

4. As the environmental protection engineer assigned to the Illinois EPA's agriculture program, I am a custodian of the Illinois EPA's field office file regarding documentation accumulated pertinent to and regarding The Highlands facility. This file is kept in the ordinary course of business and it contains copies of all inspection reports generated regarding the facility, as well as copies of all other documentation of correspondence, communications, conversations and information generated and obtained by the office regarding the subject facility.

5. I have received communications and correspondence about Murphy Farms, Inc. interest and efforts to establish a sow facility in Illinois, since 1996. In 1996, I received

communication from Doug Lenhart, representing himself as Murphy Farm, Inc.'s designated agent for Illinois, regarding the siting and establishment of a sow facility in the vicinity of Peoria, in an area contained within the Illinois EPA's Peoria Region.

6. To my knowledge and belief, based on communications I received from Doug Lenhart, concerned citizens and David Inskeep, Murphy Farms, Inc., prior to establishing a relationship and contract with Doug Baird, entered into discussions with David Inskeep to locate a 3,600 head sow facility at or near the then proposed location of what later became Inwood Dairy near Elmwood, Illinois. At a point in time, it became apparent that Murphy Farms, Inc. was no longer considering contracting with David Inskeep, but in fact was working with Doug Baird in the establishment of a sow facility approximately three miles south of Williamsfield in Knox County that later did in fact become established as an operating sow facility known as The Highlands. It is this facility, the facility approximately three miles south of Williamsfield, that is the subject of the case of *People v. The Highlands, LLC and Murphy Farms, Inc.*, PCB No. 00-104.

7. Attached to this affidavit, are exhibits that are true and correct copies of documents contained in the Peoria Regional Office's file for The Highlands facility.

8. Exhibit 1, is a true and correct copy of a telephone conversation record that I wrote regarding a phone conversation I had with Doug Lenhart on July 5, 1996, at 10:15 a.m. regarding Murphy Farms, Inc.'s intent to establish a 3,600 sow operation in the vicinity of Peoria. The purpose of Mr. Lenhart's call was to discuss the requirements of the Subtitle E, Agriculture Pollution Related Regulations. In the course of the conversation, Mr. Lenhart indicated he personally had talked to the Illinois Department of Agriculture regarding the requirements of that department, which included siting requirements pursuant to the Illinois Livestock Management Facilities Act.

9. Exhibit 2, is a true and correct copy of a document retained in the Illinois EPA's

field office's file on The Highlands facility. It is a handwritten record of a phone conversation with Doug Lenhart. In that conversation, Mr. Lenhart requested Illinois Environmental Protection Agency input regarding site selection for The Highlands facility.

10. Exhibit 3 is a true and correct copy of a letter sent to A.G. Taylor of the Illinois Environmental Protection Agency by Doug Lenhart, Illinois Development Manager for Murphy Family Farms. This document is contained within the Illinois EPA Peoria Region field office's files, and is kept in this file pursuant to customary business practices in which the office accumulates copies all documentation relevant to a facility in its field file. In this letter, Mr. Lenhart states that Murphy Family Farms operates pork production facilities in several Midwestern states, including Illinois. The letter is an invitation to an environmental summit in which information is to be provided regarding Murphy Family Farms programs utilized at its operations for environmental protection. Upon information and belief, Murphy Family Farms' only involvement in hog production in Illinois has been with contract operations. That is, one entity owned the property and Murphy Farms, Inc. or Murphy Family Farms, which to my knowledge is essentially the same entity, owned the hogs. Thus, Mr. Lenhart's representation in this letter would be with regard to contract operations.

11. Exhibit 4, is a true and correct copy of a document provided by Doug Baird to me and other employees of the Illinois EPA outlining the design and construction of The Highlands facility and also outlining the contractual responsibility of The Highlands and Murphy Farms in the operation of The Highlands facility.

12. Based on information and belief, Murphy Farms, Inc. participated in the selection and establishment of waste management systems at The Highlands. Murphy Farms, Inc. facilitated Doug Baird's introduction to and exploration of the use of the BION system, and Doug Lenhart and other Murphy Farms, Inc. personnel were involved in the discussions pertinent to the establishment and operation of the BION system at the Highlands facility.

Further, upon information and belief, Murphy Farms, Inc. personnel have been involved in the analysis and design of modifications made to the waste management system at The Highlands since BION Technologies ended its contract at The Highlands.

13. Under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Further affiant sayeth not.

Eric Ackerman
ERIC O. ACKERMAN

Subscribed and sworn to before me
this 29 day of NOVEMBER, 2004.

Janette K. Godin
NOTARY PUBLIC

OFFICE SEAL
JANETTE K. GODIN
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXPIRES 07-25-2006

STATE OF ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY
DIVISION OF WATER POLLUTION CONTROL
PEORIA REGIONAL OFFICE

PEORIA
COUNTY

TELEPHONE CONVERSATION RECORD

RE: Murphy Farms - Sow Operation

CONVERSATION WITH: Doug Lenhart (417)667-3397

( ) I Called Party (X) Party Called Me

DATE: July 5, 1996 TIME: 10:15 A.M.

Doug Lenhart contacted the Peoria office to discuss the Subtitle E requirements. Mr. Lenhart is with Murphy Farms in Nevada, MO. He will be moving to Illinois to become Director of Illinois Operations with Murphy Farms. They intend to construct a 3,600 sow operation in western Peoria County. The facility is locally owned, but under contract MF supplies all pigs, feed, medication, etc. The facility proposes to utilize an anaerobic lagoon with center pivot irrigation unit. The facility will farrow daily with pigs taken off site at 17 days of age. Four separate off-site nurseries are proposed to take the pigs from 10 lbs. to 45 lbs. These nurseries will be within a 30-mile radius of the site and probably in Knox County. BDS Engineering will be on site in mid-July. Earthwork to begin in mid-August and first sows on site approximately January 1, 1997. I advised Mr. Lenhart of the need for a stormwater construction permit if greater than 5 acres were disturbed. We also discussed NPDES requirements and proper lagoon construction.

Mr. Lenhart advised that he had previously contacted IDOA regarding the requirements of that department.

Eric Ackerman
Signed

EOA/lb

cc:-DWPC/FOS & RU
-Bruce Yurdin/Dan Heacock
-A.G. Taylor

Exhibit 1

Williamsfield - Baird

Murphy Farms

10/3/96

1:25pm

Pre-site inspection is part of the new livestock Rules -

Murphy Family Farms
P.O. Box 198
Knoxville, IL 61448
— new office

Is there anyone else that should come out to the site? He has already had 2 from extension service to the site. He wants to have Agency input in site selection

I advised that we were not in a position to give site approval and would not be able to come out at this time. He thanked me, I thanked him.

1996

For Eric Date 9/30 Time 8:50

WHILE YOU WERE OUT

M Doug Lenhart
of Murphy Family Farms Phone (309) 289-9940

Telephoned	Called to See You	Wants to See You
Please Return Call	Will Call Again	Urgent

Remarks: Invitation to you & Jim to see proposed hog Confinement facility just South of Williamsfield

Signed LC

Advised that we are not able to make it out at this time

IL 532-0368
ADM 66

076-002

Exhibit 2

MURPHY
FAMILY FARMS

September 4, 1997

A.G. Taylor
Illinois Environmental Protection Agency
Fax: 217-785-1312

Dear Representative:

You and three members of your agency are invited to an "Environmental Summit" sponsored by Murphy Family Farms. The purpose of the meeting is to share information about the programs we use to protect our country's natural resources. Murphy Family Farms operates pork production facilities in several Midwestern states, including Illinois.

The meeting will be held on Tuesday, September 16, at the Crowne Plaza in Springfield, IL. We hope you can join this prestigious group.

The Environmental Summit was designed to inform you about how pro-active livestock producers and specifically Murphy Family Farms go to great lengths to operate responsibly. Our current programs which are in place throughout the company and our on-going research to reduce odor, use manure as fertilizer, and manage soil nutrients will be covered by featured speakers.

The speakers for the meeting are technically oriented professionals, not public relations pitch men. A roundtable discussion is also part of the meeting because we value the opportunity to learn more about the issues concerning the people of Illinois.

Since lunch will be provided, we will be calling to confirm your attendance. If you have any questions or require additional information regarding the Environmental Summit, please feel free to contact me at 309-344-4970. We hope you can join us on September 16 for an interesting and informative session.

Sincerely,

Doug Lenhart

Doug Lenhart
Illinois Development Manager
Murphy Family Farms

Enclosure:

256 South Sonagetaha Road, Galesburg, IL 61401, (309) 344-4970, FAX (309) 344-4973

Exhibit 3

THE HIGHLANDS LLC

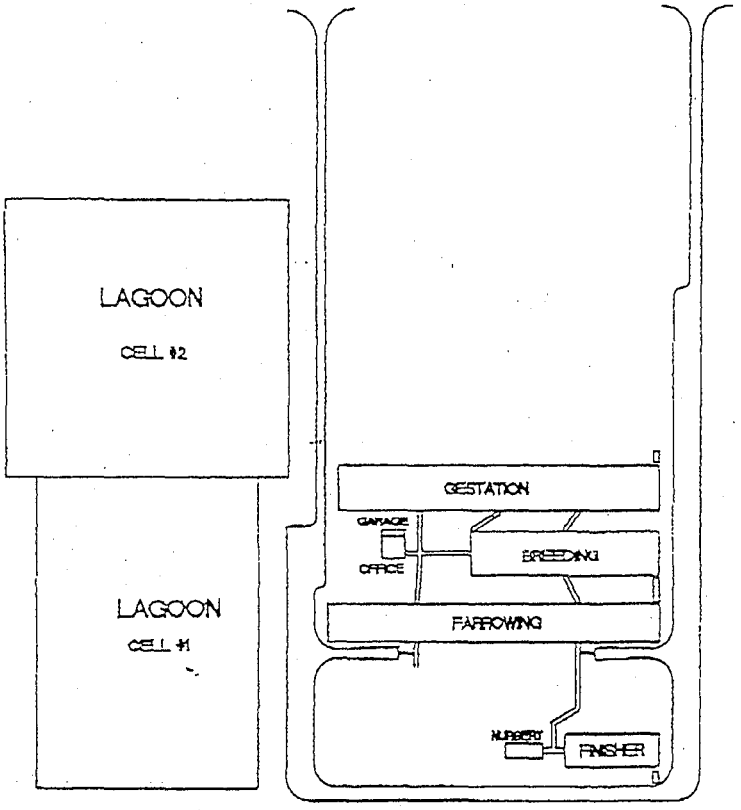
3600 SOW FARM

OWNED AND OPERATED BY

DOUGLAS B. AND JAMES R. BAIRD

CONTRACTED WITH

MURPHY FAMILY FARMS



Specifications

One time capacity

Sows Gestation	2900	head
Sows not bred	300	head
Boars	20	head
Sows Lactating	450	head
Replacement nursery	300	head
Replacement finisher	800	head
Total Animal Units	1810	head

Exhibit 4

Building Specifications

Gestation	78 X 578	feet
Breeding	76 X 341	feet
Farrowing	61 X 597	feet
(8 rooms - 72 crates each)		
Nursery	26 X 66	feet
Finisher	53 X 171	feet
Office and Shower room	40 X 40	feet
Garage	12 X 40	feet

These buildings are wood framed, metal covered with tunnel ventilation and curtain sides.

Labor Force

Annual projected payroll $380,000

15 Employee Positions:

Sow Farm Manager
Trainer
Breeding Supervisor
Farrowing Supervisor
2 Assistant Supervisors
9 Laborers

Entry level position starts at $6.50 per hour.

Employee Benefit Programs

Health Insurance
Life Insurance
Paid Vacation
7 paid Holidays / Funeral leave
Profit Share Plan
401K plan

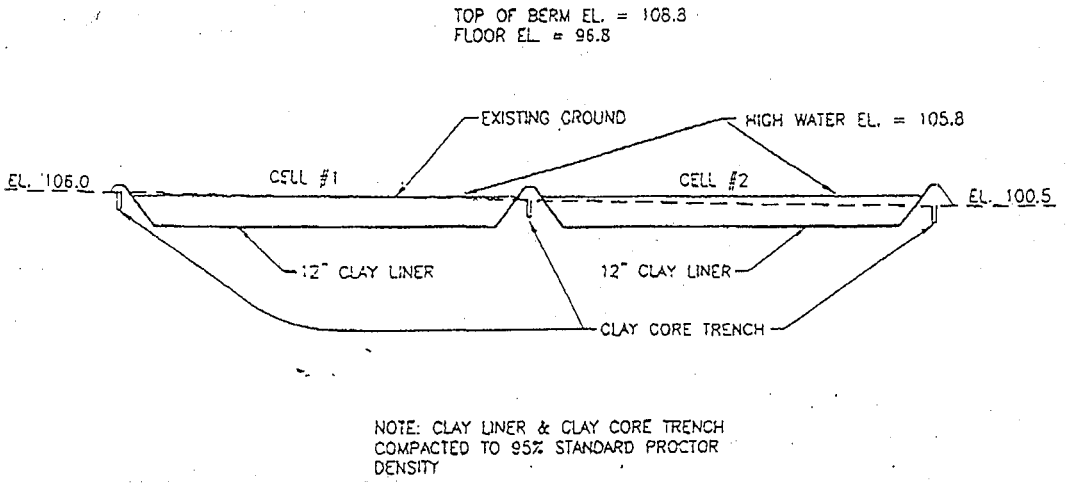
Manure Management

Building pits: 16 in. deep Pull plug system
Maximum effluent level 10 inches
Total gallons of effluent produced per year 2,506,775 gal
Two Stage Lagoon Capacity

Primary (Cell No. 1) 291 X 431 feet = 2.9 ac. - - 11,107,276 gal
(Anaerobic biological breakdown)

Secondary (Cell No. 2) 396 X 396 feet = 3.6 ac. - - 13,613,974 gal
(Water used for pit recharge and Irrigation)

Lagoon cells are lined with one foot packed clay liner to 95% compaction, top of berm covered with synthetic liner.
Illinois law required core bore sample 50 feet below the bottom of lagoon revealed solid clay soil, no aquifer material and seasonal water table one foot below the bottom of lagoon.



Nutrient Application

Total nutrients produced by this unit would be just over 9,000,000 gallons. Planned low pressure center pivot irrigation with drop nozzles for large droplet size - 220 acres needed to comply with Livestock Management Facilities Act. As new methods are developed and cost effective they will be introduced.

One acre inch of water equals 27,500 gal., 220 acres X 1 inch = 9,125,000 gallons

Annual Consumption

Water - -2 wells 687 - 690 feet deep	Total usage of 25,000 gal / day
Kilowatt hours electricity	80,000/month = 960,000 kwh/year
Propane gas	42,600 gal
Emergency power supply	175 kw genset
Corn	144,431 bu.
Soybean meal	756 tons = 37,778 bu.

Real-estate Taxes

County	$ 1,980.00
County Pension	$ 418.00
Elba	$ 3,696.00
Elba Township Pension	$ 110.00
Unit School Dist 210	$ 12,584.00
Unit 210 Pension	$ 528.00
Jr. College Dist 518	$ 1,320.00
Williamsfield Fire Dept.	$ 748.00
MTA	$ 154.00
Williamsfield Public Library	$ 374.00
Total	$ 21,912.00

The Highlands is a contract Sow Farm owned by Jim and Doug Baird contracting with Murphy Family Farms. The Highlands will artificially breed sows using fresh semen brought in daily. Boars will be used for checking heat . The Highlands will farrow 170 sows per week with the baby pig being weaned at 17 to 21 days weighing approximately 10#. The baby pigs are then sent to other locations in the state of Illinois to be raised to market weight.

The contractual arrangement between Murphy Family Farms and The Highlands can be briefly described as the following.

Jim and Doug Baird Provides	Murphy Family Farms Provides
Land & Buildings	Feed
Employees	Breeding Stock
Employee Benefits	Training of Employees
Responsible for Manure Management	Transportation of Pigs
Option to contract corn	Medication & Veterinary service
Non Pig Consumables, ie. pens, paper, soap, etc.	Anything that goes in or on the animal, ie. Syringe, needles, Marking sticks, etc.

The Highlands manure management plan meets or exceeds the Illinois Livestock Management Facilities Act. The Highlands will be applying manure nutrients at rates not to exceed plant utilization.

Dead Animal Disposal

Dead animals and afterbirth will be stored in a refrigerated trailer - Located at Baird Seed Farm, picked up regularly by National By-Products.

The Highlands

A partial listing of annual non pig consumables

Shampoo	46 bottles	Toilet paper	510 rolls
Liquid shower soap	9 gal	Band-aid	2 cases
Hand cleaner (orange)	9 gal	Push Brooms	7
Ear plugs	541 pairs	Clothes pins	1,235
Spray deodorant	47 cans	Heat lamps	300 bulbs
Underwear:		Incandescent 60 wt.	122 bulbs
mens briefs	38	Legal pads	69
mens boxers	17	Memo books 3 X 5	37
women's briefs	4	Assorted ink pens	258
women's sport bras	4	Pencils	50
T - shirts	54	Paper clips - large	450
Coveralls	60	- small	2 boxes
Socks	100 pairs	Computer paper	2 boxes
Bandanas	20	Particle mask	250
Sweet shirts	14	Coffee filters	350
Boots	40	Coffee	30 pounds
Boot insoles	40	Electrical tape	85 rolls
Bleach	22 gal	Duct tape	7 rolls
Laundry soap	1,000 pounds	OB lube	95 gal
Latex gloves	1,900 pairs	Paint sticks	1,132
Dish soap	7 bottles		

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

AFFIDAVIT

I, BRUCE YURDIN, after being duly sworn and upon oath, state as follows:

1. I have firsthand knowledge of the matters stated herein, and could and would testify competently thereto if called as a witness.

2. I am employed by the Illinois Environmental Protection Agency ("Illinois EPA") as the manager of the Watershed Management Section. In this position, I have managerial responsibilities for the administration of the National Pollution Elimination Discharge System ("NPDES") program as it applies to agricultural facilities.

3. In this capacity, I am at times requested to assist with questions pertinent to watershed pollutional issues. I also receive and respond to inquiries from the regulated community regarding the NPDES permit program as it pertains to agriculture facilities.

4. Exhibit 1, attached to this affidavit, is a true and correct copy of an email I wrote in which I documented a question that arose in the course of the Illinois EPA's discussions and communications with Doug Lenhart of Murphy Family Farms regarding the waste management system to be utilized at The Highlands sow facility. As is obvious from the subject line of the email that is attached hereto as Exhibit 1, the sow facility that is the topic of discussion is the Baird facility, which is also known as The Highlands and is the subject of the case of *People v. The Highlands, LLC and Murphy Farms, Inc.*, PCB No. 00-104.

5. Exhibit 2, attached to this affidavit, is a true and correct copy of an email I wrote in which I documented questions and issues that arose in the course of the Illinois EPA's discussions and communications with Doug Lenhart of Murphy Family Farms regarding the waste management system in use at The Highlands sow facility. It documents information

provided by Doug regarding his interactions with BION personnel regarding the system in place at The Highlands and information he wished to communicate to me regarding modifications made and issues that had arose relative to the BION system at The Highlands facility.

6. Group Exhibit 3 is a letter I sent to select state agriculture and environmental agencies seeking information pertinent to BION Technologies, Inc. waste management systems. The exact nature of the request is set out on the second page of my letter of June 25, 1998. Also, as set forth in the letter on the second page, upon information and belief, all of the BION systems involved in my inquiry, that were either under construction or in place and operating at the time, were installed at facilities affiliated with Murphy Family Farms. It was my understanding at the time, in part based on this inquiry, that the BION systems in use across the continental United States were commonly implemented for and at facilities affiliated with or owned by Murphy Family Farms.

7. Exhibit 4, attached to this affidavit, is a true and correct copy of an e-mail I received in my capacity as unit supervisor, written by Dan Heacock, an Illinois EPA engineer that I supervise within my unit. In the e-mail, Dan Heacock documented a conversation he had with Doug Lenhart of Murphy Family Farms in July of 1996, in which Mr. Lenhart was seeking information on stormwater permit requirements. In the course of the conversation, as documented in the email, Mr. Lenhart indicated Murphy Family Farms was calling regarding a potential swine operation to be located in Peoria County and he indicated the typical Murphy Family Farm operation to be a 3600-sow operation.

8. Under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Further affiant sayeth not.

BRUCE YURDIN

Subscribed and sworn to before me

this 29th day of November, 2004.

NOTARY PUBLIC

OFFICIAL SEAL
CYNTHIA L. WOLFE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 3-20-2007

— Knox County —

From: Bruce Yurdin
To: AG and FOS Ag Engineers, Rich Warrington
Date: 12/11/97 12:26pm
Subject: Baird Farm Ready to Sprout Pigs -Forwarded

AG-

I don't get the impression that this is the same waste system Lenhart talked to us about several weeks ago. I don't remember anything at that time about an aeration system--solids separation and a covered lagoon, but not aeration. Did I miss something?
bjy

copy. - Corps
- Jane

EXHIBIT 1

The Highlands, LLC
(Knox County)

From: Bruce Yurdin
To: AG Taylor, Eric Ackerman
Date: 6/25/98 1:55pm
Subject: Discussion with Doug Lenhart

I spoke to Doug this morning. He is having trouble getting IDOA's attention so a firm date has not been set on the meeting in Henry County. (In case I failed to mention this yesterday, Eric, the public meeting was to be in Atkinson, tentatively.) Due to conflicts and the holiday, Doug is leaning toward the week of 7/13. He will advise later.

Doug went on to discuss conversations he had yesterday with BION. He says he told them that there is a real problem at the Highlands and it has to be fixed. According to Doug, Duane Stutzman of BION countered that:

1. BION is disappointed that the owner has moved so slowly on installing the baffle and the last aerator, both in the 3rd cell.

2. BION seems to put high priority in the value of the quality of the recycled/flush water that is pumped into the pits from the 3rd cell. Their statement, through Doug, was that this high O2-low solids water has alot to do with the operations in cell #1. BION believes this cell is now overloaded, apparently due to the poor performance of the 3rd cell (this is an issue--the overloading of cel l#1-- that AG and I brought up when we talked to Doug on 6/24).

BION will be at the Highlands on 6/27 and Doug invited us to attend. I declined. Doug also suggested that he may arrange for BION, probably Steve Pagano--the BION rep. assigned to this project, to come in for a meeting with us in Spfld.

One last item: Doug is concerned about how FOS-Peoria will react. I attempted to explain that FOS is in a tight spot, they receive the complaints, don't have many options, etc, etc. He seems to view FOS as more reactive, maybe more eager to press an issue (my words, not his). Be advised.

One more last item: The letter to the states asking about BION goes out today, pretty much as you saw it. I'm thinking that a separate letter to BION may be useful, however Doug said yesterday that he would ask BION for more details on performance criteria. I may wait until we get to meet with BION, if that happens (Doug said Spfld, but a meeting at the site may be better--I'll advise you both when that gets set up).
bjy

CC: Dan Heacock, Tim Kluge

EXHIBIT 2

cop - Caryn Lane

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 Mary A. Gade, Director

217/782-0610

June 25, 1998

Mr. Robert Schoenecke
Oklahoma Department of Agriculture
2800 North Lincoln Boulevard
Oklahoma City, OK 73105

Mr. Donald Carlson
Kansas Department of Health and Environment
Building 283
Topeka, KS 66620

Mr. Dennis Ramsey
North Carolina Department of Water Quality
P.O. Box 29535
Raleigh, NC 27626-0535

Mr. Randy Clarkson
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102

Mr. Ubbo Agena
Iowa Department of Natural Resources
Nonpoint Source Pollution
Water Quality Section
Wallace State Office Building
900 East Grand
Des Moines, IA 50319

Mr. Kiran Bhayani
Utah Division of Water Quality
P.O. Box 144870
Salt Lake City, UT 84114

Mr. David Holm
Colorado Department of Health and Environment
Water Quality Control Division
WGCD-DO-B2
4300 Cherry Creek Drive South
Denver, CO 80222

Mr. N. G. Kaul
New York Department of Environmental Conservation
Division of Water
50 Wolf Road
Albany, NY 12233

Gentlemen:

The Illinois EPA is currently reviewing the operations of a new swine farm in the north-central part of this state. This facility is now operating at 3650 sows, farrow to wean (approximately 14 days old). The owner of the swine operation plans to expand this facility to approximately 7300 sows. Our interest in this facility in particular is in regard to the generation of odors. The livestock waste at this facility is treated under a system designed by BION Environmental Technologies, Inc. (BION).

Based on information filed by BION with the Securities and Exchange Commission in their May 1998 quarterly report, BION cites several examples where their designs are now under consideration or are in use. These locations/facilities are:

1. Multiple installations at Circle Four Farm, Phase II, Milford, Utah, for not less than 10,000 sows, 32,000 nursery pigs and 40,000 finishing hogs.

2. Three (3) installations in Kansas (one in Lane County and two in Hodgeman County), each for not less than 11,000 sows.

GROUP EXHIBIT 3

3. One (1) installation in Barton County, Missouri for not less than 75,000 sows.

4. Two to four (2-4) installations in the area of Laverne, Oklahoma for not less than 40,000 finishing hogs.

5. One (1) installation at the Squire sow farm in Bladen County, North Carolina for not less than 3600 sows. A separate demonstration unit is also cited, although the location and size are not specified.

6. One (1) demonstration installation in Iowa for not less than 3300 finishing hogs.

All of the above are facilities affiliated with Murphy Family Farms. In addition the SEC report also cites an agreement with Bowman Family farms of Wray, Colorado for 36 treatment units in two unspecified states, and a unit near Hermitage, New York (believed to be a dairy facility).

We are interested in obtaining any information submitted to your office by BION or the facility owners/operators regarding the basis of design for the facilities in your state. In addition to the BION plans and specifications for the facilities, please also provide information on the status or existence of state odor control standards, guidelines or monitoring to which these systems must adhere, and the existence of compliance or enforcement actions taken by your state against these facilities for problems associated with the livestock waste treatment system design or odor generation problems.

Thank you for your cooperation. We understand that in certain instances the information we have requested may be designated as proprietary or confidential by BION. If this is the case, please advise as to how the information may be obtained in accordance with your rules for this type of protected data. If you are interested in our compiled findings, please advise. I can be reached at the above phone number, address or by Email at epa1177@epa.state.il.us.

Sincerely,

Bruce J. Yurdin
Manager, Watershed Unit
Permit Section
Division of Water Pollution Control

cc: IEPA, DWPC, FOS, Peoria

State of Utah

DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY

Michael O. Leavitt
Governor
Dianne R. Nielson, Ph.D.
Executive Director
Don A. Ostler, P.E.
Director

288 North 1460 West
P.O. Box 144870
Salt Lake City, Utah 84114-4870
(801) 538-6146
(801) 538-6016 Fax
(801) 536-4414 T.D.D.
www.deq.state.ut.us Web

July 22, 1998

Mr. Bruce J Yurdin
Illinois Division of Water Pollution Control
P.O. Box 19276
Springfield, IL 62794-9276

Dear Mr. Yurdin:

SUBJECT; BION Technologies Inc.

BION Technologies Inc. currently has a single system proposed for permitting in Utah for a complex known as Circle Four Farms. It is to serve 40,000 finishing hogs. It consists of the usual reactors associated with BION systems. The general design basis for BION systems is confidential. However, BION's general criteria can obtained from them under certain conditions.

Neither the proposed permit nor this state currently have standards for odor control or the monitoring of such. An enforcement action was taken against the farm unrelated to BION systems. The most common problem occurring at these farms is accidental disconnection of the wastewater conveyance piping. This usually occurs due to the impact of vehicles with cleanout structures which are connected to pipelines.

If you have any further questions, please contact Mr. David Rupp of our office.

Sincerely,

Kiran L. Bhayani, P.E., D.E.E., Manager
Design Evaluation Section

DAR:dr

P:\wwsys\odorcontrol\Linquiry
FILE: Animal Waste Mngmt

STATE OF COLORADO

Roy Romer, Governor
Patti Shwayder, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

4300 Cherry Creek Dr. S.
Denver, Colorado 80246-1530
Phone (303) 692-2000
Located in Glendale, Colorado

Laboratory and Radiation Services Division
8100 Lowry Blvd.
Denver CO 80220-6928
(303) 692-3090

http://www.cdphe.state.co.us

Colorado Department of Public Health and Environment

July 13, 1998

Mr. Bruce J. Yurdin
Manager, Watershed Unit
Permit Section
Division of Water Pollution Control
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Re: Colorado's Experience with BION Environmental Technologies, Inc.

Dear Mr. Yurdin:

In reply to your request for information on Colorado's experience with BION designs, we have not received a submittal from BION as of this time. Your reference to the Bowman Family Farms proposal is still a proposal. We have only been provided limited information on the BION process much like your SEC information. However based on the limited information available, our impression of the process is that it is temperature dependent and as such it would be subject to reduced efficiency during cold periods.

Currently Colorado has no odor control standards for agricultural facilities because state law specifically exempts these facilities. However, there is an initiative underway to create such standards for corporate hog farm facilities. This initiative's focus for odors is anaerobic treatment processes and the need to capture and treat off gases.

Should you have any further questions of our program, please contact me at (303) 692-3561. Also, I would be interested in the outcome of your BION inquiry.

Sincerely,

Derald Lang

Derald Lang, P.E.

Gerald
could you please
respond?

D.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 — Mary A. Gade, Director

217/782-0610

June 25, 1998

Mr. Robert Schoenecke
Oklahoma Department of Agriculture
2800 North Lincoln Boulevard
Oklahoma City, OK 73105

Mr. Donald Carlson
Kansas Department of Health and Environment
Building 283
Topeka, KS 66620

Mr. Dennis Ramsey
North Carolina Department of Water Quality
P.O. Box 29535
Raleigh, NC 27626-0535

Mr. Randy Clarkson
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102

Mr. Ubbo Agena
Iowa Department of Natural Resources
Nonpoint Source Pollution
Water Quality Section
Wallace State Office Building
900 East Grand
Des Moines, IA 50319

Mr. Kiran Bhayani
Utah Division of Water Quality
P.O. Box 144870
Salt Lake City, UT 84114

Mr. David Holm
Colorado Department of Health and Environment
Water Quality Control Division
WQCD-DO-B2
4300 Cherry Creek Drive South
Denver, CO 80222

Mr. N. G. Kaul
New York Department of Environmental Conservation
Division of Water
50 Wolf Road
Albany, NY 12233

Gentlemen:

The Illinois EPA is currently reviewing the operations of a new swine farm in the north-central part of this state. This facility is now operating at 3650 sows, farrow to wean (approximately 14 days old). The owner of the swine operation plans to expand this facility to approximately 7300 sows. Our interest in this facility in particular is in regard to the generation of odors. The livestock waste at this facility is treated under a system designed by BION Environmental Technologies, Inc. (BION).

Based on information filed by BION with the Securities and Exchange Commission in their May 1998 quarterly report, BION cites several examples where their designs are now under consideration or are in use. These locations/facilities are:

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5. One (1) installation at the Squire sow farm in Bladen County, North Carolina for not less than 3600 sows. A separate demonstration unit is also cited, although the location and size are not specified.

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All of the above are facilities affiliated with Murphy Family Farms. In addition the SEC report also cites an agreement with Bowman Family farms of Wray, Colorado for 36 treatment units in two unspecified states, and a unit near Hermitage, New York (believed to be a dairy facility).

We are interested in obtaining any information submitted to your office by BION or the facility owners/operators regarding the basis of design for the facilities in your state. In addition to the BION plans and specifications for the facilities, please also provide information on the status or existence of state odor control standards, guidelines or monitoring to which these systems must adhere, and the existence of compliance or enforcement actions taken by your state against these facilities for problems associated with the livestock waste treatment system design or odor generation problems.

Thank you for your cooperation. We understand that in certain instances the information we have requested may be designated as proprietary or confidential by BION. If this is the case, please advise as to how the information may be obtained in accordance with your rules for this type of protected data. If you are interested in our compiled findings, please advise. I can be reached at the above phone number, address or by Email at epa1177@epa.state.il.us.

Sincerely,

Bruce I. Yurdin
Manager, Watershed Unit
Permit Section
Division of Water Pollution Control

cc: IEPA, DWPC, FOS, Peoria

STATE OF MISSOURI
Mel Carnahan, Governor • Stephen M. Mahfood, Director
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF ENVIRONMENTAL QUALITY
P.O. Box 176 Jefferson City, MO 65102-0176

July 24, 1998

Bruce J.Yurdin Manager, Watershed Unit
Division of Water Pollution Control
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

RE: Inquiry about Murphy Farms Use of BION Technology

Dear Mr. Yurdin:

Please find enclosed information that was submitted to Missouri Department of Natural Resources, Water Pollution Control Program by BION. Our interpretation of the data is that the system is basically a surface aerated lagoon using Aeration Industries aerator (page enclosed).

We have not seen a formal application for the system. The Murphy Farms have several permitting issues that must be resolved before approval of any treatment system.

The state of Missouri does not currently have odor regulations. There is a workgroup that has been formed to investigate agriculture odor regulations. You may contact the Air Pollution Control Program at (573) 751-4817 for additional information on odor issues.

You may contact me at (573) 751-6568 if you have additional questions.

Sincerely,

WATER POLLUTION CONTROL PROGRAM

Troy Chockley

Troy Chockley, P.E.
Agricultural Unit Chief

TC:lsm

Enclosures

BION TECHNOLOGIES INC.

TYPICAL BION NMS™ SYSTEM

PREPARED BY:

BION TECHNOLOGIES, INC.

619-C SOUTH THIRD STREET
SMITHFIELD, NC 27577
(919) 934-3066

COMPANY BACKGROUND

Bion Technologies, Inc., is a company uniquely qualified to deal profitably with the growing public concern and awareness of our environment. This concern has become a major cost factor of business in the 1990's due to intense regulatory pressure on the business community to adopt more efficient pollution control systems. While conventional solutions are expensive and frequently ineffective, Bion's patented and proprietary systems solve a broad range of disposal problems efficiently and at greatly reduced costs. In many cases, they also improve the profitability of the user. Bion systems rely on natural, biological processes and do not require the expensive structures of alternative waste treatment technologies. They also create self-contained natural habitats and significantly reduce odor.

Bion has offices in North Carolina, Colorado, New York and Florida. Bion Technologies, Inc. represents a unique opportunity as a company committed to providing ecological benefits to its clients and long-term economic returns to its shareholders.

BION NMS SYSTEM

The Bion NMS™ system is a patented process developed by Bion Technologies, Inc. (Bion) that treats both the solid and liquid fraction of the manure wastestream through a complex series of natural microbial processes. The system typically consists of Solids Ecoreactors, Bioreactors, Temporary Water Storage Areas and Polishing Ecoreactors. The Solids Ecoreactors are designed to capture and dewater waste solids which then undergo a biological conversion into an organic soil-like material. The Bioreactors are designed to be high intensity microbial action zones that contain aerobic, anaerobic, and facultative bacterial populations. They are designed to biologically assimilate nutrients as well as reduce Biological Oxygen Demand (BOD), suspended solids and odor. Water Storage Areas are designed to meet all local regulatory requirements and to provide final treatment prior to application onto a new or established sprayfield crop. The Polishing Ecoreactor is a wetland type component of the system designed to further remove nutrient by means of a vegetative-microbial complex, capable of producing final water quality that is suitable for reuse on the farm. The end-product water from the system can be treated to any desired standard level.

Solids are periodically harvested from the Solids Ecoreactor, processed, and subsequently removed from the farm site. The processed material, BionSoil™, will be sold by Bion as a commercial product. Utilization studies conducted on processed BionSoil have indicated great potential as a plant growth media or soil amendment product, as well as other potential uses which are currently being investigated. BionSoil has a ready market in home gardens, landscaping, potting soils, organic farms, soil remediation, golf courses, nurseries, sod farms, groves, field crops, and many other applications. Bion is committed to successfully marketing BionSoil as a renewable resource for the horticulture and agriculture industries.

TYPICAL HOG SOW, NURSERY, OR FINISHING BION SYSTEM

Bion has developed a Bion Nutrient Management System™ application specifically designed for typical hog sow, nursery, and/or finishing farm facilities. A typical Bion waste management process flow diagram is presented in Figure HE-1. The process flow diagram illustrates the primary features associated with the Bion treatment system and its potential coordination with a typical existing waste management system. The Bion NMS treatment system is designed to funtion with minimal operational and maintenance involvement of farm personnel. Where ever possible , the waste stream flows through the process by gravity. The entire system is located as close to the hog houses as possible to facilitate efficient waste collection and treatment, and is designed to contain wastewater as well as divert clean stormwater from entering the system.

The treatment process begins when the hog house wastes are flushed to an initial bioreactor (Bioreactor #1). Bioreactor #1 is an aerated earthen basin, which may be lined with a geomembrane synthetic liner, if required. The initial bioreactor has a short retention period and is designed to stimulate microbial growth. The microbes, in Bioreactor #1, begin to quickly assimilate the nuitrients available from the waste products. The microbes will utilize low molecular weight compounds first. The low molecular weight compounds are typically the unfavorable odor causing compounds often associated with hog farming. The effluent from Bioreactor #1 gravity flows or is pumped into one of two Solids Ecoreactor cells.

The Solids Ecoreactor is comprised of two deep earthen cells, each of which has been sized to contain waste manure generated from the hogs for a period of four to twelve months. The cells operate in parallel, such that as one cell is filling the other filled cell is left to cure and dry prior to harvesting. The Solids Ecoreactor cells are designed to capture and dewater waste solids. The nutrients in the waste solids undergo a biological conversion utilizing the natural microorganisms which are stimulated in Bioreactor #1. The resulting solids are organic material which can be used as a plant growth media or soil conditioner.

As with the bioreactors, the Solids Ecoreactor cells may be synthetically lined, if necessary. The Solids Ecoreactor is sloped to a flow control sump at the effluent end of the cell. The flow control sump at the outlet of the cell is designed to maintain a flow of water over flow control boards while retaining the solids in the Ecoreactor. Flow control boards are periodically added until the Solids Ecoreactor is filled to its maximum capacity.

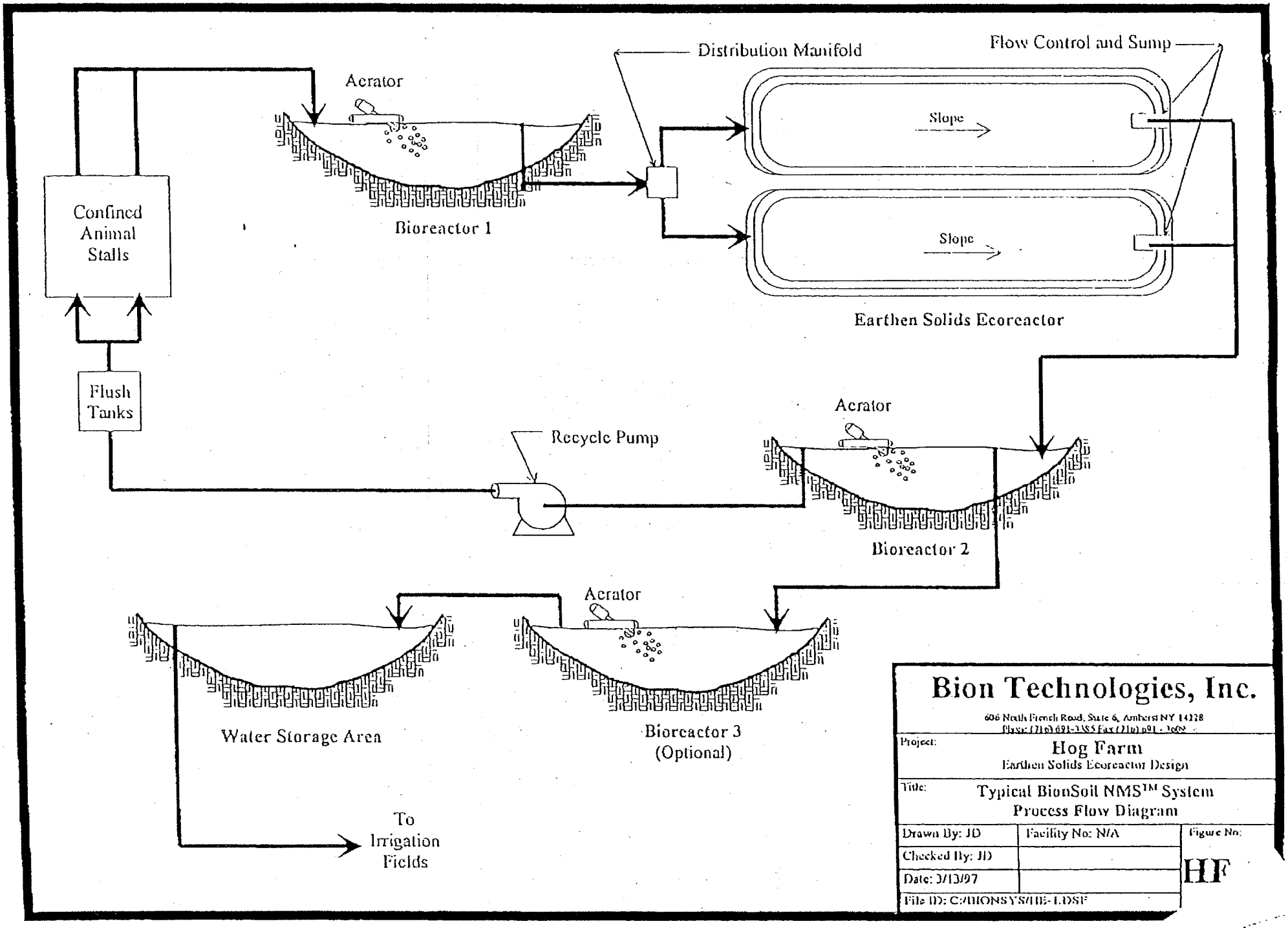
The solids are harvested from one of the Solids Ecoreactor cells at least once every four to twelve months. Based on previous operating experience, Bion estimates approximately 0.75 cubic yard per one finishing hog house occupancy space, per year. The solids may be pumped from the Solids Ecoreactor and processed, to be subsequently transported off the facility. The solids may also be utilized on the farm, depending on the specific requirements of each individual client.

The effluent from the Solids Ecoreactor cell gravity flows or is pumped into a second stage bioreactor (Bioreactor #2). Bioreactor #2 is also an aerated earthen basin and may also be

synthetically lined, if necessary. The second stage bioreactor has been designed to further the treatment process by stimulating additional microbial growth. Bioreactor #2 has a longer retention period than Bioreactor #1 and as such allows the microbes to further assimilate the nutrients in the waste stream. Water in Bioreactor #2 is recycled back to the hog houses for flushing or recharging the subslat pit. Depending upon required agronomic land application rates, excess water from Bioreactor #2 can be further treated in a third stage bioreactor (Bioreactor #3) or can be directed to a final Water Storage Area.

Bioreactor #3 is an aerated earthen basin and may also be synthetically lined if necessary. The bioreactor further treats the waste stream through a long retention period and extensive additional microbial nutrient utilization. Excess water from Bioreactor #3 gravity flows or is pumped to a final Water Storage Area which is used to provide an adequate temporary storage volume and polish the waste stream prior to final irrigation on the sprayfields.

If minimizing fresh water usage and/or minimizing sprayfield irrigation is desirable, Bion will design a Polishing Ecoreactor to complete the treatment process. The Polishing Ecoreactor is a constructed wetland type of treatment component, which is extremely effective for the low nutrient containing water typically created in a Bion NMS. The Polishing Ecoreactor is a flooded, vegetated area in which nutrients will be removed from the waste stream by means of a vegetative-microbial complex. The Polishing Ecoreactor consists of a series of cells separated by small internal berms with flow control structures to regulate water levels. A portion of the Polishing Ecoreactor may be used to produce nutrient rich plants and/or organic soil. The Polishing Ecoreactor has the appearance of a native wetland, which provides wetland habitat for wildlife, and in general, presents an attractive environmental image.



Bion Technologies, Inc.

606 North French Road, Suite 6, Amherst NY 14228
Phone: (716) 691-1555 Fax (716) 691-1609

Project:	Hog Farm Earthen Solids Ecoreactor Design
Title:	Typical BionSoil NMS™ System Process Flow Diagram
Drawn By: JD	Facility No: N/A
Checked By: JD	
Date: 3/13/97	
File ID: C:/BIONSYS/HF-EDSF	
Figure No:	HF

AIRE-O_2

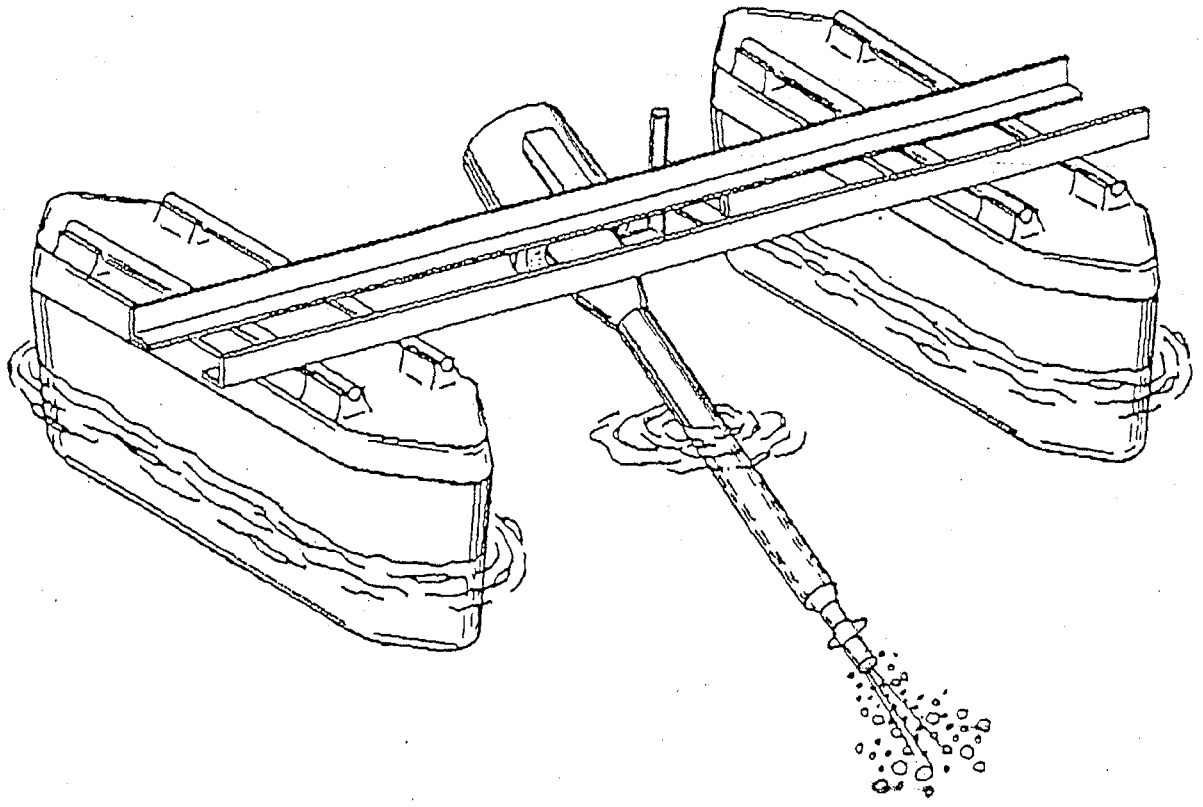
aeration industries, inc.

Hazeltine Gates • Chaska, Minnesota 55318

1-800-328-8287 (612) 448-6789

AIRE-O_2 AERATOR OPERATION, TROUBLESHOOTING AND INSTALLATION MANUAL

2, 3, 5 & 7.5 HP



From: Dan Heacock
To: EPA1177, ADMDO1.EPOPO1.EPA3569, REGDO1.PEOPO1.EPA1...
Date: 7/8/96 12:14pm
Subject: Murphy Family Farms - Peoria Co.

I received a call from Doug Lenhart of Murphy Family Farms regarding a potential swine contract operation in Peoria Co. south of Elmwood. Doug Lenhart indicated the following: The typical Murphy Family farm operation consists of a 3600 Sow operation and/or a seperate nursery operation with buildings each housing 2300 pigs from 17 days old to 40 lbs. each. The pigs are to be shipped out of state after they reach 40 lbs. They will be applying for a stormwater NPDES permit for the sow operation which will disturb approximately 10 acres. The facility (buildings, lagoons, etc.) will be owned by an individual operator, who raises Murphy's hogs. Doug Lenhart indicated that he could send in an application for the livestock NPDES permit, although he stated the facility would be designed with a "lagoon" and land application without a discharge to waters of the state. I stated that if he sent plans and an application for our review, and the review confirmed the "no discharge" plan for the facility the Agency would probably issue a no permit required letter. Mr. Lenhart had previously discussed with Eric Ackerman the proposed facility. Mr. Lenhart will be calling me to provide the name and address of the operator to send the stormwater applications to.

DLH

EXHIBIT 4

copy - Caryn
- Jane

Westlaw.

299 F.Supp.2d 693
299 F.Supp.2d 693, 2003 WL 22595989 (W.D.Ky.), 58 ERC 1076
(Cite as: 299 F.Supp.2d 693, 2003 WL 22595989 (W.D.Ky.))

C

United States District Court,
W.D. Kentucky,
Owensboro Division.

SIERRA CLUB, INC., Mary B. Edwards, Norma Caine, and Leesa Webster, Plaintiffs,
v.
TYSON FOODS, INC., Tyson Children Partnership, Adams Chicken Farms, Stirman Adams, Buchanan Livestock, Buchanan Farms, and Roland Buchanan, Defendants.

CIVIL ACTION NO. 4:02CV-73-M.

Nov. 7, 2003.

Background: Owners of land located near chicken production farms, together with environmental group, brought action against farm owners and operators, alleging failure to report releases of ammonia from chicken droppings in violation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA). Cross-motions for summary judgment were filed.

Holdings: The District Court, McKinley, J., held that:
(1) owners and environmental group had standing to bring action;
(2) farms were not exempt from reporting requirements of CERCLA and EPCRA;
(3) the whole farm site, rather than each poultry house, was a "facility";
(4) under CERCLA, wholly owned subsidiary of food production company was a "person in charge" of two chicken production facilities under contract with growers; and
(5) partnership that leased chicken production facility to chicken production farm was not "person in charge."
Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure ⚿103.2
170Ak103.2 Most Cited Cases
Standing is a core component of the case or controversy requirement of Article III of the United States Constitution. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] Federal Civil Procedure ⚿103.2
170Ak103.2 Most Cited Cases
The standing doctrine under Article III of the United States Constitution is designed to confine the courts to adjudicating actual cases and controversies by ensuring that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[3] Federal Civil Procedure ⚿103.2
170Ak103.2 Most Cited Cases
The injury in fact test to establish standing under Article III of the United States Constitution requires more than an injury to a cognizable interest; it requires that the party seeking review be himself among the injured. U.S.C.A. Const. Art. 3, § 2, cl. 1
.

[4] Associations ⚿20(1)
41k20(1) Most Cited Cases
An organization has standing under Article III of the United States Constitution to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[5] Federal Civil Procedure ⚿103.2
170Ak103.2 Most Cited Cases
The party invoking federal jurisdiction bears the burden of establishing that it has standing to pursue the action. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] Environmental Law ⚿656
149Ek656 Most Cited Cases
Allegations by owners of land located near chicken production farms that ammonia emitted by chicken

Exhibit A

droppings curtailed their activities and forced them to cancel outdoor events, and that failure of farm operators to report ammonia releases denied them access to critical information and impaired ability of government agencies to respond to releases, were sufficient to state injury in fact, as required to establish standing to sue farm operators under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA). U.S.C.A. Const. Art. 3, § 2, cl. 1; Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[7] Federal Civil Procedure ⚖103.2

170Ak103.2 Most Cited Cases

Injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[8] Environmental Law ⚖656

149Ek656 Most Cited Cases

Owners of land located near chicken production farms, alleging that farm operators failed to report dangerous levels of ammonia emitted from chicken droppings, did not, in order to establish standing to sue operators under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA), have to prove that a reportable quantity of ammonia to trigger the reporting requirements was released; owners presented evidence that poultry houses emitted ammonia and that studies existed estimating amount of ammonia a poultry house emits over a specific time period. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[9] Environmental Law ⚖656

149Ek656 Most Cited Cases

Alleged failure by operators of chicken production farms to give notice of ammonia released from chicken droppings caused alleged injury to nearby landowners, as required for landowners to establish standing under Article III of the United States Constitution to sue operators under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA); absent notice of releases, government agencies could not mitigate them and protect landowners from potential exposure. U.S.C.A. Const. Art. 3, § 2, cl. 1; Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[10] Federal Civil Procedure ⚖103.3

170Ak103.3 Most Cited Cases

The redressability requirement for establishing standing under Article III of the United States Constitution ensures that a plaintiff personally would benefit in a tangible way from the court's intervention. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[11] Injunction ⚖114(2)

212k114(2) Most Cited Cases

A plaintiff seeking injunctive relief demonstrates redressability, as required to establish standing under Article III of the United States Constitution, by alleging a continuing violation or the imminence of a future violation of the statute at issue. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[12] Environmental Law ⚖656

149Ek656 Most Cited Cases

A decision favorable to owners of land near chicken production farm that emitted ammonia from chicken droppings, in their action seeking injunctive relief against farm operators under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA), would redress owner's injuries, as required to establish standing; favorable decision would require farm operators to provide notice that a specific episodic release of ammonia had occurred or that specific continuous releases would occur in the future, allowing landowners to take precautionary steps to protect themselves from releases and allowing governmental agencies to respond. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[13] Environmental Law ⚖415

149Ek415 Most Cited Cases

[13] Environmental Law ⚿441
149Ek441 Most Cited Cases
Chicken production farms which released ammonia from chicken droppings were not exempt from reporting requirements of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act (EPCRA), despite fact that there was no generally accepted methodology or model for estimating the amount of ammonia chicken production facilities emit. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[14] Environmental Law ⚿460
149Ek460 Most Cited Cases
Fact that Environmental Protection Agency (EPA) had not enforced reporting requirements of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Emergency Planning and Community Right to Know Act (EPCRA) against animal production facilities did not prohibit citizen enforcement suit against chicken production farm operators for violation of such requirements. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[15] Environmental Law ⚿415
149Ek415 Most Cited Cases
[15] Environmental Law ⚿441
149Ek441 Most Cited Cases
Fact that government had knowledge of ammonia emissions from chicken production farm did not automatically exempt farm operators from reporting requirements under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act (EPCRA); notice of specific releases was required. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 103(a), 42 U.S.C.A. § 9603(a); Emergency Planning and Community Right-To-Know Act of 1986, § 304(3)(a), 42 U.S.C.A. § 11004(3)(a).

[16] Environmental Law ⚿415
149Ek415 Most Cited Cases
[16] Environmental Law ⚿441
149Ek441 Most Cited Cases
Actual or constructive knowledge of a release of a reportable quantity of a hazardous substance, rather than mere knowledge that some release occurred, creates a duty to report under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act (EPCRA). Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 103(a), 42 U.S.C.A. § 9603(a); Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[17] Environmental Law ⚿415
149Ek415 Most Cited Cases
[17] Environmental Law ⚿441
149Ek441 Most Cited Cases
Where chicken production farms which released ammonia from chicken droppings consisted of several poultry houses on a contiguous site, the whole farm site, rather than each poultry house, was the regulated "facility" for purposes of reporting requirements under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act (EPCRA); all poultry houses at a site were operated together for a singular purpose. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101(9), 42 U.S.C.A. § 9601(9); Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[18] Environmental Law ⚿415
149Ek415 Most Cited Cases
[18] Environmental Law ⚿441
149Ek441 Most Cited Cases
In instances where a hazardous substance or contamination is confined to an individual building or structure, the "facility," for purposes of reporting requirements under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act (EPCRA), is properly limited to this unit; however, when multiple sources of hazardous substances are grouped together, the "facility" encompasses the entire area and extends to the bounds of the contamination. Comprehensive Environmental Response, Compensation and Liability Act of 1980,

§ 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[19] Environmental Law ⚿415
149Ek415 Most Cited Cases
[19] Environmental Law ⚿441
149Ek441 Most Cited Cases
Release of ammonia from chicken production farms was not a continuous release subject to reduced reporting requirements under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and exempt from Emergency Planning and Community Right to Know Act (EPCRA) requirements; person in charge of farm operations had not notified any agency of any releases, or established that releases were continuous rather than episodic. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 103, 42 U.S.C.A. § 9603; 40 C.F.R. § 302.8(e); Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[20] Environmental Law ⚿415
149Ek415 Most Cited Cases
Chicken production farms which released ammonia from chicken droppings were not exempt from reporting requirements of Emergency Planning and Community Right to Know Act (EPCRA) as "routine agricultural operations"; exemption applied only to substances stored or used by the agricultural user, and alleged reporting violation was based on venting of gaseous ammonia into the atmosphere, not storage of chicken manure or application of chicken manure to farm fields. Emergency Planning and Community Right-To-Know Act of 1986, § 311, 42 U.S.C.A. § 11021.

[21] Environmental Law ⚿415
149Ek415 Most Cited Cases
[21] Environmental Law ⚿441
149Ek441 Most Cited Cases
Chicken production farms which released ammonia from chicken droppings were not exempt from reporting requirements of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act (EPCRA) as the normal application of fertilizer; challenged release was venting of gaseous ammonia into the atmosphere from the chicken houses, not from storage of chicken manure or the application of chicken manure to farm fields. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 101, 42 U.S.C.A. § 9601; Emergency Planning and Community Right-To-Know Act of 1986, § 301, 42 U.S.C.A. § 11001.

[22] Environmental Law ⚿441
149Ek441 Most Cited Cases
The owner or operator of a facility is not always a "person in charge" for purposes of reporting requirements under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); proper inquiry is whether owner/operator occupies positions of responsibility and power, and whether they are in a position to make timely discovery of a release, direct the activities that result in the pollution, and have the capacity to prevent and abate the environmental damage. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 103, 42 U.S.C.A. § 9603.

[23] Environmental Law ⚿441
149Ek441 Most Cited Cases
Wholly owned subsidiary of food production company was a "person in charge" of a chicken production facility which released ammonia from chicken droppings, for purposes of reporting requirements under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), where subsidiary leased facility, subsidiary employees performed all duties necessary to raise chickens there, and subsidiary clearly occupied a position of responsibility and power and was in a position to make timely discovery of ammonia releases. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 103, 42 U.S.C.A. § 9603.

[24] Environmental Law ⚿441
149Ek441 Most Cited Cases
Wholly owned subsidiary of food production company was a "person in charge" of two chicken production facilities for which it had contracts with chicken growers, for purposes of reporting alleged ammonia releases from facilities under Comprehensive Environmental Response, and Liability Act (CERCLA), though subsidiary merely provided chicks, feed, veterinary services, medication, and technical advice to growers;

subsidiary had its own technical advisors who monitored facilities on weekly basis, subsidiary was involved in facility design and equipment specifications, directed growers how to build and orient chicken houses, how to heat, cool, and ventilate buildings, and how to illuminate houses to ensure optimum chicken growth. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 103, 42 U.S.C.A. § 9603.

[25] Environmental Law ⚿415
149Ek415 Most Cited Cases
Wholly owned subsidiary of food production company was an "operator" of chicken production farms which released ammonia from chicken droppings, for purposes of reporting requirements under Emergency Planning and Community Right to Know Act (EPCRA); subsidiary managed and directed many of the operations related to the venting of ammonia. Emergency Planning and Community Right-To-Know Act of 1986, § 304(a), 42 U.S.C.A. § 11004(a).

[26] Environmental Law ⚿415
149Ek415 Most Cited Cases
For purposes of reporting requirements under Emergency Planning and Community Right to Know Act (EPCRA), an "operator" is someone who directs the workings of, manages, or conducts the affairs of a facility. Emergency Planning and Community Right-To-Know Act of 1986, § 304(a), 42 U.S.C.A. § 11004(a).

[27] Environmental Law ⚿441
149Ek441 Most Cited Cases
Partnership that leased chicken production facility to chicken production farm was not "person in charge" of facility, as required for partnership to be liable for alleged failure to report ammonia releases from farm in violation of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); partnership was not involved in daily production operations and was not in a position to detect, prevent and abate a release of hazardous substances. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 103, 42 U.S.C.A. § 9603.

[28] Environmental Law ⚿415
149Ek415 Most Cited Cases
Partnership that leased chicken production facility to chicken production farm was not an "owner" or "operator" of facility, as required for partnership to be liable for alleged failure to report ammonia releases from farm in violation of Emergency Planning and Community Right to Know Act (EPCRA); there was no evidence that partnership managed, directed, or conducted activities of facility related to pollution. Emergency Planning and Community Right-To-Know Act of 1986, § 304(a), 42 U.S.C.A. § 11004(a).

***698** Aaron Isherwood, Barclay Rogers, Patrick Gallagher, San Francisco, CA, John Harbison, Ronald Shems, Shems Dunkiel & Kassel, Burlington, VT, Phillip J. Shepherd, Frankfort, KY, for Plaintiffs.

***699** James Wendell Taylor, Lexington, KY, Judith A. Villines, Frankfort, KY, Laura D. Keller, Louisville, KY, Stites & Harbison, Flem Gordon, Gordon & Gordon, P.S.C., Madisonville, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

McKINLEY, District Judge.

***1** This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment as to the First and Second Causes of Action [DN 44]; on a motion by Defendants for summary judgment on the CERCLA and EPCRA issues [DN 49]; on a motion by Defendants, Tyson Food on its behalf and on behalf of Tyson Chicken for partial summary judgment on the issue of "person in charge" [DN 50]; on a motion by Defendant, Tyson Children Partnership, for partial summary judgment on the issue of "person in charge" [DN 48]; on a motion by Plaintiff to stay consideration of Tyson Food's motion for partial summary judgment on the issue of "person in charge" [DN 61]. Plaintiffs allege that Defendants have failed to report ammonia emissions from certain chicken production operations in Kentucky in violation of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11001-11050, and also allege that the operations constitute nuisances under state law. Plaintiffs seek damages and penalties, as well as declaratory and injunctive relief. By agreement of

the parties, the parties are attempting to simplify the litigation by submitting dispositive motions on certain threshold issues at the initial phase of the litigation. *See* Joint Status Report and Rule 26(f) Report of Counsel, September 10, 2002 [DN 18]. A limited amount of discovery has been conducted. Fully briefed, these matters are ripe for decision.

STANDARD OF REVIEW

In order to grant a motion for summary judgment or for partial summary judgment, the Court must find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party is required to do more than simply show that there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Co.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Rule requires the non-moving party to present "*specific facts* showing there is a *genuine* issue for trial." Fed.R.Civ.P. 56(e) (emphasis added). Moreover, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505.

FACTS

**2 There are four chicken production operations at issue in this case: (1) the "Tyson *700 Operation," consisting of 24 poultry houses, is located at or near 4200 Ilsey Road in Earlington, Hopkins County, Kentucky, and is owned by Tyson Children Partnership and leased by Tyson Chicken, Inc.; (2) the "Adams Operation," consisting of 16 poultry houses, is located near 2300 Kentucky 593 in Calhoun, McLean County, Kentucky, and is owned by Adams; (3) "Buchanan # 1 Operation," consisting of 24 poultry houses, is located at or near 1886 Gravel Pit Road and/or 53 Honeysuckle Lane, and/or 63 Davis Road in Sebree, Webster County, Kentucky, and is owned by Buchanan; and (4) the "Buchanan # 2 Operation," consisting of 16 poultry houses, is located at or near 1061 Collins Road and/or 1097 Collins Road in Sebree, Webster County, Kentucky, and is owned by Buchanan. *See* Declaration of John Blair, Exhibits A-D [DN 45].

The broiler houses are generally 40 to 43 feet wide and 400 to 500 feet long and generally 50 to 60 feet apart. The houses are roofed and insulated, and constructed to prevent entry of other animals. The chicken production farms share common access roads and interconnecting roads. Tyson Chicken [FN1] typically delivers between 160,000 and 180,000 chickens to a farm at a time, roughly enough to fill 8 chicken houses. Tyson Chicken delivers feed to all of Defendants' operations almost daily. Tyson Chicken formulates, makes, and owns the feed and maintains feed delivery records. Tyson Chicken retains ownership of the chickens and feed while at the chicken production operations. Through its contracts with the growers, Adams and Buchanan, Tyson Chicken mandates that they cooperate with it in adopting and/or installing recommended management practices and equipment. Tyson Chicken provides their growers with a "Broiler Growing Guide" to ensure that they raise the chickens according to Tyson Chicken standards. Under the contract, Tyson Chicken reserves the right to unfettered access to the growers' property. Tyson Chicken technical advisors visit the Adams and Buchanan operations on approximately a weekly basis. The chickens are fed, watered, and cared for by the growers--e.g. Adams and Buchanan [FN2]--for approximately forty-nine to fifty-one days. At that time, Tyson Chicken picks up the chickens from the facilities.

FN1. As discussed more fully below, because of the early stage of this litigation, the Court is unable at this time to determine the role Tyson Foods plays in

both the operation of its subsidiary Tyson Chicken and in the operation/management of the poultry houses in question.

FN2. The grower for the Tyson Operation is Tyson Chicken. Tyson Chicken leases the operation from Tyson Children Partnership.

Ammonia is a colorless, irritant gas produced by decomposing animal waste. For purposes of chicken production operations, the growers grow chickens in houses on a floor of litter, generally a layer of rice hulls. When the birds defecate, their waste collects in the litter. Ventilation in the poultry houses is necessary to protect the health of the chickens and is accomplished by a combination of exhaust fans and vents. The grower controls ventilation by adjusting which fans are operating and which vents are open. Many of the ventilation tasks, along with feed, water, and heating or cooling tasks, are automated. After a flock is caught and removed for processing, the grower generally will remove a small layer of 1 or 2 inches of the litter that is usually found below the watering lines and that is found in clumps due to higher moisture content; this process of removal is called "decaking." Proper decaking is necessary to provide a ***701** suitable environment for the placement of baby chicks for the next production cycle. The growers decake the litter after every flock, but they do a total cleanout--that is, removal of the litter, about every two years.

STATUTORY BACKGROUND

***3** Plaintiffs complaint alleges the chicken production operations discharge dangerous quantities of ammonia into the environment. Plaintiffs allege that Defendants have failed to report these releases to the appropriate authorities in violation of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 and the Emergency Planning and Community Right to Know Act ("EPCRA"), 42 U.S.C. §§ 11001-11050.

CERCLA and EPCRA provide, in combination, for federal, state, and local governments to receive immediate notification of releases of hazardous substances into the environment so that these government agencies can initiate appropriate responses. Specifically, Section 103 of CERCLA provides that any person in charge of a facility from which a hazardous substance has been released in a reportable quantity (RQ) must immediately notify the National Response Center ("NRC"). 42 U.S.C. § 9603(a). Releases that exceed 100 pounds per day must be reported under section 103. 42 U.S.C. § 9603; 40 C.F.R. § 302.4. Section 103(f)(2) of CERCLA further provides for relaxed reporting requirements for substances that are classified as a continuous release. 42 U.S.C. § 9603(f).

EPCRA requires owners or operators of facilities to provide immediate notice of the release of an extremely hazardous substance or CERCLA hazardous substance to the designated state emergency response commission ("SERC") and the emergency coordinator for the appropriate local emergency planning commission ("LEPC"). 42 U.S.C. § 11004(a); 40 C.F.R. § 355.40(b)(1). The statute also requires a written follow-up emergency notice to the SERC and the LEPC "[a]s soon as practicable after a release." 42 U.S.C. § 11004(c).

CERCLA authorizes any person to "commence a civil action on his own behalf ... against any person .... who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter...." 42 U.S.C. § 9659(a)(1). Similarly, enforcement of EPCRA can occur through the citizen-suit provision, 42 U.S.C. § 11046(a)(1), which authorizes civil penalties and injunctive relief against "[a]n owner or operator of a facility for failure," among other things, to "[s]ubmit a followup emergency notice" as required under Section 304(c) of EPCRA. 42 U.S.C. § 11046(a)(1)(A)(i).

DISCUSSION

Plaintiffs have moved for partial summary judgment as to the First and Second Causes of Action set forth in the First Amended Complaint arguing that (1) a "facility" under the definitions contained in both CERCLA and EPCRA includes multiple chicken houses that are located on single or adjacent sites within a concentrated area; and (2) that Tyson Foods, including its wholly owned subsidiary, Tyson Chicken, Inc., is an operator and

thus liable under CERCLA for the unreported ammonia releases occurring at the chicken production facilities. [DN 44]. Defendants have moved for summary judgment on the CERCLA and EPCRA claims as well arguing that (1) the Plaintiffs lack standing to assert their federal statutory claims because they cannot demonstrate that non-reporting of ammonia emissions ***702** under CERCLA and EPCRA has caused them any injury in fact; (2) that the Defendants are not in violation of CERCLA and EPCRA because they have no knowledge that a reportable quantity of ammonia has been released from any facility at issue herein; (3) that no reporting of releases under EPCRA and CERCLA is required because if any releases from chicken production operations are reportable, they are continuous; (4) that the Defendants are not required to report ammonia releases from chicken production operations because it is used in routine agricultural operations; (5) that each poultry house or litter shed is a separate facility under CERCLA and EPCRA; (6) that notification of the EPA and other agencies is not necessary because those agencies have actual knowledge of the releases in question; (7) that Defendants have been denied fair notice of any requirement to report ammonia emissions from poultry waste; (8) that the Defendants are not required to report ammonia releases from the chicken production operations because the release falls within the Fertilizer Exception under CERCLA; (9) that Tyson Foods and Tyson Chicken are not persons in charge of the Adams and Buchanan Facilities; and (10) that Tyson Children Partnership is not a person in charge of the Tyson Facility [DN 48, DN 49, DN 50].

I. STANDING

****4** [1][2][3] Before the Court can examine the other issues raised by the parties, the Court must address whether the Plaintiffs have standing to assert claims under CERCLA and EPCRA. A party may not bring a suit in federal court without standing. Standing is a "core component" of the "case or controversy" requirement of Article III of the United States Constitution. *Broadened Horizons Riverkeepers v. United States Army Corps of Engineers,* 8 F.Supp.2d 730, 733 (E.D.Tenn.1998). The standing doctrine is designed to confine the courts to adjudicating actual cases and controversies by ensuring that the "plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)(quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). To establish Article III standing to sue in federal court, an individual plaintiff must establish three elements:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized ..., and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ".... Second, there must be a causal connection between the injury and the conduct complained of--and the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."..... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Broadened Horizons Riverkeepers, 8 F.Supp.2d at 733 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted)); *see also Bennett v. Spear,* 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *Cox v. City of Dallas, Texas,* 256 F.3d 281, 304 (5th Cir.2001); *Friends of the Earth v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." ***703***Lujan,* 504 U.S. at 563, 112 S.Ct. 2130. In short, the three constitutional requirements are injury, causation, and redressability.

[4][5] An organization has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Com'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The party invoking federal jurisdiction bears the burden of establishing that it has standing to pursue the action. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct.

596, 107 L.Ed.2d 603 (1990).

Defendants allege that Plaintiffs are unable to establish an injury in fact. Defendants maintain that the only injury that could result from the alleged reporting violation of CERCLA and EPCRA would be that the EPA would not have sufficient information to evaluate the need for action. Defendants contend that the EPA has knowledge concerning ammonia releases from chicken houses since it is now attempting to ascertain whether the current state of scientific knowledge is sufficient for establishing a reliable emission factor that could be used to determine whether reporting is required at all. Additionally, Defendants argue that Plaintiffs do not contend that they have any current evidence of the amount of any release on any particular day in a reportable amount at the farms in question-they merely contend that if they are allowed to test at the farms they believe they can show the farms will have reportable emissions. Defendants assert that Plaintiffs' claims are therefore purely hypothetical and conjectural. Further, Defendants contend that Plaintiffs cannot establish that they have an injury that will not be redressed without a decision favorable to the Plaintiffs. Except for the argument that the individual Plaintiffs do not have standing, the Defendants have not challenged whether the organization has met the other standing requirements.

A. Injury in Fact

**5 [6] Plaintiffs have plainly demonstrated injury in fact. The individual Plaintiffs have alleged a violation of their right to use the area around the chicken production operations without being exposed, either knowingly or unknowingly, to harmful pollutants allegedly released without proper notice. Plaintiffs allege that the ammonia emitted by Defendants' operations greatly diminish their ability to use and enjoy their property. Odors associated with the Defendants' operations force the Plaintiffs to curtail their activities on their farms and often force them to cancel outdoor events because of the odors and potentially dangerous chemicals allegedly released from Defendants' facilities. Plaintiffs have both detailed their use of the affected area, as well as the ways in which their use is threatened by the alleged releases of ammonia. [FN3] The facts alleged in these declarations are sufficient to meet the injury in fact requirement under *Lujan. Lujan,* 504 U.S. at 560, 112 S.Ct. 2130; *Heart of America Northwest v. Westinghouse Hanford,* 820 F.Supp. 1265, 1266-70 (E.D.Wash.1993).

FN3. Defendants argue that Plaintiffs have failed to allege injury in fact because the alleged injury results from releases, not from the failure to give notice. The Court will consider this argument in the discussion of causality.

[7] Further, Plaintiffs also allege an injury to their right to be informed in a timely manner of any releases from the *704 operations so that they may take whatever precautionary steps are necessary. Plaintiffs argue that Defendants' failure to report the ammonia releases has harmed the Plaintiffs because it has denied them access to critical information and has impaired the ability of government agencies to properly respond to releases. Plaintiffs have alleged precisely the type of injury--failure to receive information--that Congress intended to prevent by enacting the reporting requirements of both CERCLA and EPCRA. Notably, the Supreme Court in discussing the purpose of EPCRA has stated as follows: "EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening releases." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 86, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). It is well established that the "injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth,* 422 U.S. at 500, 95 S.Ct. 2197 (citations omitted); *see also Lujan,* 504 U.S. at 578, 112 S.Ct. 2130; *Federal Election Com'n v. Akins,* 524 U.S. 11, 20, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998)(Supreme Court noted that it "has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* at 21, 118 S.Ct. 1777). [FN4]

FN4. The Court recognizes that the Supreme Court in *Steel Co.* noted that they had "not had occasion to decide whether

being deprived of information that is supposed to be disclosed under EPCRA-or at least being deprived of it when one has a particular plan for its use-is a concrete injury in fact that satisfied Article III." *Steel Co.*, 523 U.S. at 105, 118 S.Ct. 1003. The Supreme Court declined to reach that question because it found that the complaint in that case failed the third test of standing, redressibility. From a review of the case law, and as discussed above, the Court believes that under the facts of the present case, the Supreme Court would find an injury in fact that satisfies Article III.

[8] The Defendants further argue that Plaintiffs have failed to allege an injury in fact because they can not prove that the Defendants have released a reportable quantity of ammonia triggering the reporting requirement under either CERCLA or EPCRA. Requiring the Plaintiffs at this stage of the litigation to show the exact amount of the release of ammonia from the chicken production operations as a condition for standing "confuses the jurisdictional inquiry (does the court have power under Article III to hear the case?) with the merits inquiry (did the defendant[s] violate the law?)." *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir.2000). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 182, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Plaintiffs have presented evidence that poultry houses emit ammonia and that studies exist that estimate the amount of ammonia a poultry house emits over a specific period of time. Whether this will be sufficient to establish violations of the reporting requirements of CERCLA and EPCRA remains to be seen. However, considering that little discovery has been conducted at this stage of the litigation, the Plaintiffs need not prove that the Defendants have, in fact, violated the reporting requirements in order to obtain standing; this is instead a question of whether Plaintiffs can prove their case. *Id.*

****6** For these reasons, the Court concludes that the Plaintiffs have alleged facts, supported by declarations, which demonstrate a concrete, actual injury and thus satisfy the first standing requirement--injury in fact.

***705 B. Causality**

[9] Similarly, the Court finds that Plaintiffs have demonstrated a causal connection between the injury and the conduct complained of. The Court rejects the Defendants argument that the injury in question results from the release of the ammonia and not the Defendants failure to give notice of the release.

The purpose of CERCLA notice requirement is to provide the EPA and other regulatory agencies with the information they need to assess hazards and mitigate potential injury from releases. Similarly, EPCRA establishes a framework of agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide emergency response in the event of health-threatening releases. Without the required notices of alleged releases, regulatory agencies are without knowledge of the releases; and are consequently impeded from adequately mitigating the releases. As a result, Plaintiffs who use the affected environment are therefore injured by potential exposure to the hazardous releases. *See Heart of America Northwest,* 820 F.Supp. at 1271. The procedures which Plaintiffs seek to enforce are designed to protect Plaintiffs' interest in avoiding exposure to hazardous substances in the environment. *Id.* at 1273. Therefore, the Court finds that Plaintiffs' alleged injury is fairly traceable to the challenged actions of Defendants and thus satisfies the second standing requirement.

C. Redressability

[10][11] The redressability requirement ensures that a plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth,* 422 U.S. at 508, 95 S.Ct. 2197; *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir.2000). A plaintiff seeking injunctive relief, as in the present case, demonstrates redressability by "alleg[ing] a continuing violation or the imminence of a future violation" of the statute at issue. *Steel Co.*, 523 U.S at 108, 118 S.Ct. 1003. Plaintiffs seek injunctive and other relief for Defendants alleged continuing and threatened future violations of the reporting requirements.

[12] In the present case, a decision favorable to the Plaintiffs would redress their injuries because it would require the Defendants to provide notice that a specific episodic release of a hazardous substance has occurred or that specific continuous releases will occur in the future which would allow the Plaintiffs to take whatever precautionary steps necessary to protect themselves from the ammonia releases.

Furthermore, although the EPA, along with other governmental agencies, may already know that the poultry houses emit high levels of ammonia and, as Defendants argue, may be studying ways to effectively measure such release, such defense is inappropriate to challenge standing where what the Plaintiffs seek is enforcement of statutes Congress designed in part for Plaintiffs' benefit. *See Heart of America Northwest,* 820 F.Supp. at 1273 (citing *Women's Equity Action League v. Cavazos,* 879 F.2d 880, 886 (D.C.Cir.1989)). The notice requirements under CERCLA and EPCRA are designed to enable the appropriate governmental agencies to respond to hazardous releases and under EPCRA, specifically, to notify the public of such releases. It is therefore reasonable for the Court to also find that if Defendants complied with the notice requirements, then the appropriate governmental agencies might respond to the release.

**7 For these reasons, the Court finds that Plaintiffs' alleged injury is likely to be *706 redressed by a decision on the merits that is favorable to Plaintiffs.

Based on the above discussion, the Court finds that the individual Plaintiffs, as well as Sierra Club, have standing to assert claims under CERCLA and EPCRA.

II. EXEMPTION FOR ANIMAL PRODUCTION OPERATIONS

[13] Defendants argue that there is no generally accepted methodology or model for estimating the amount of ammonia chicken production facilities emit. According to Defendants, the EPA is currently addressing the issue of whether there is reliable science to determine whether reporting is required for these type of facilities, and as a result, they are not required to report ammonia releases. The problem with this argument is that Defendants cite no authority which exempts animal production facilities from the reporting requirements of EPCRA and CERCLA. If Congress had intended such a result, it could have excluded animal production facilities, such as poultry and swine, from the reporting requirements. Congress clearly knew how to exempt certain items from the reporting requirements of CERCLA and EPCRA as demonstrated by the fertilizer exclusion under CERCLA Section 101(22)(D) which exempts "the normal application of fertilizer" from the definition of release. 42 U.S.C. § 9601(22)(D).

[14] Furthermore, the fact that the EPA has not chosen to enforce these provisions against animal production facilities does not prohibit a citizen enforcement suit for violation of the reporting requirements. The Supreme Court has recognized that the purpose of citizen suits is not to supplant governmental enforcement by subjecting a defendant to duplicative enforcement, but to step in when local agencies fail to exercise their enforcement responsibility. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,* 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). If the EPA were enforcing these provisions, this suit would not be necessary.

[15] Similarly, the fact that the government has knowledge of ammonia emissions from chicken houses does not necessarily exempt Defendants from the reporting requirements. The Government would not require notice of specific releases of hazardous substances if it was not already aware that such substances at or above the reportable quantity were harmful. [FN5]

FN5. The Defendants do not dispute that both CERCLA and EPCRA require persons in charge or owners and operators of facilities to report releases of ammonia in excess of 100 pounds per day to the appropriate federal, state and local authorities. 42 U.S.C. § 9603(a); 40 C.F.R. § 302.6; 42 U.S.C. § 11004(a)(3). What is in dispute in this case is whether these notice requirements apply to releases of ammonia from chicken production operations.

Additionally, the Defendants maintain that if the Court determines that reporting of poultry emissions is required, it would be a violation of due process to penalize them because the laws and regulations do not provide fair warning that they must file emergency reports for routine agricultural emissions. The Defendants ask that the Plaintiffs' claim for penalties be dismissed. As stated above, it appears to the Court that statute clearly does not exclude the release of ammonia from chicken or livestock production operations, and as a result, Defendants are required to report releases that meet or exceed the reportable quantity. For purposes of the motion for summary judgment, the Court denies *707 Defendants' motion to dismiss the civil penalties with leave to reargue this issue at a later date after the liability of Defendants has been determined.

III. KNOWLEDGE

**8 [16] Plaintiffs have alleged that the Defendants have violated the reporting requirements of CERCLA and EPCRA. Plaintiffs maintain that they need only demonstrate that Defendants knew of a release of ammonia, not that the Defendants knew that it was of a reportable quantity. Defendants disagree.

CERCLA Section 103(a) provides:

> Any person in charge of ... an onshore facility shall, as soon as **he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such ... facility in quantities equal to or greater than those determined pursuant to section 9602 of this title,** immediately notify the National Response Center....

42 U.S.C. § 9603(a). The language in the statute is plain. To prove a violation of the reporting requirements, Plaintiffs must show not merely that Defendants knew of a release, but that Defendants knew that a reportable quantity of ammonia was released. The EPA, administrative law judges, and other courts have indicated that knowledge that a release is of a reportable quantity is necessary to impose a requirement to file a report. *See United States v. Buckley,* 934 F.2d 84, 89 (6th Cir.1991) ("The district court properly charged jurors that to prove Buckley guilty of failure to notify, the government needed to prove that Buckley '*knew* of the release of more than one [1] pound of asbestos....' " *Id.*).

However, the cases cited by the Defendants reflect that courts interpreting the knowledge requirement have indicated that knowledge can be either actual knowledge or constructive knowledge. *See In the Matter of Thoro Products Co.,* 1992 EPA ALJ LEXIS 523, 1992 WL 143993 (May 19, 1992). The Administrative Law Judge in *Thoro Products* held that to establish a violation of the reporting provisions, a plaintiff must present facts which show the following:

> first, that the owner or operator [or person in charge] of the ... facility had actual knowledge of a release of an RQ or more of [a hazardous substance] or that he or she possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of a release of an RQ or more of [a hazardous substance] ..., and, second, that the owner or operator failed to report the release immediately after such knowledge was acquired or may be constructed....

Id. Therefore, actual or constructive knowledge of a release of a reportable quantity creates a duty to report.

Defendants also argue that Plaintiffs have failed to set forth proof that emissions from the poultry houses exceed the reportable quantities, and as a result, Plaintiffs' claims fail. Plaintiffs have presented evidence that poultry houses emit ammonia and that studies exist that estimate the amount of ammonia a poultry house emits over a specific period of time. For example, Plaintiffs' have alleged that a 24-house chicken production facility, like the Tyson Facility, releases at the lowest estimate approximately 235 pounds of ammonia into the environment every day. As noted above, whether this will be sufficient to establish violations of the reporting requirements of CERCLA and EPCRA remains to be seen. However, considering that little discovery has been conducted at this stage of the litigation, the Plaintiffs *708 need not prove that the Defendants have, in fact, violated the reporting requirements in order to survive this initial motion. There are currently genuine issues of material fact regarding the amount of ammonia released by each facility

and whether "the owner or operator" or "person in charge" had knowledge or was aware of such release.

IV. FACILITY

**9 One of the main issues before the Court is whether under the emergency reporting requirements of both CERCLA and EPCRA the term "facility" includes every poultry house or litter shed at the farm site. Plaintiffs argue that each farm site, consisting of several poultry houses on a contiguous site, releases more than 100 pounds of ammonia daily. Plaintiffs maintain that the whole farm site is the proper regulated entity for purposes of the CERCLA and EPCRA reporting requirements. The Court agrees.

A. CERCLA

CERCLA Section 101(9) defines "facility" as follows:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

[17] Defendants maintain that under CERCLA each poultry house is a "facility" for purposes of CERCLA's Section 103 reporting requirement. Defendants argue that because CERCLA defines "facility" as "any building" each poultry house is a facility. Defendants contend that each case relied upon by the Plaintiffs addresses cost recovery actions under Section 107 and/or Section 113(f) of CERCLA and, therefore, none of those cases have any applicability to this case. Defendants argue that the detailed definition set forth in definition (A) of "facility" should be selected to accomplish the purpose of CERCLA Section 103 which is prompt notification of emergency releases, rather than the broad definition set forth in definition (B). Defendants rely on an unpublished Western District of Oklahoma case in which the district court held that "facility" refers to each separate building or structure, not the entire site. *Sierra Club v. Seaboard Farms, Inc.,* No. CIV-00-997-C (W.D.Okla. July 18, 2002).

After a review of the parties arguments and case law, the Court finds that a whole chicken farm site is a facility from which releases must be reported under CERCLA. First, Defendants are correct that CERCLA § 101(9)(A), defines facility to mean "any building, structure, installation, equipment,...." 42 U.S.C. 9601(9)(A). But in relying on this provision, they ignore CERCLA § 101(9)(B) which defines a facility as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located...." 42 U.S.C. § 9601(9)(A). Under CERCLA § 101(9)(B), the entire farm site, including all the chicken houses on a single site, qualifies as a facility.

[18] Courts have consistently interpreted the term "facility" broadly. In instances where the hazardous substance or contamination is confined to an individual building or structure, the facility is properly limited to this unit. However, when multiple sources of hazardous substances ***709** are grouped together, the facility encompasses the entire area and extends to "the bounds of the contamination." *United States v. Township of Brighton,* 153 F.3d 307, 313 (6th Cir.1998). Under the case law, if an area is managed as a whole, it is a single facility for CERCLA purposes. *Id.; United States v. 150 Acres of Land,* 204 F.3d 698, 709 (6th Cir.2000); *Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.,* 191 F.3d 409, 417-18 (4th Cir.1999) (because "a property could be divided [into multiple facilities] does not, however, mean that it must be so divided for CERCLA purposes"); *Akzo Coatings, Inc. v. Aigner Corp.,* 960 F.Supp. 1354, 1359 (N.D.Ind.1996), *aff'd in part, vacated in part by,* 197 F.3d 302 (7th Cir.1999) (rejecting the argument that each contamination source is a separate facility because such argument "could have disastrous consequences, for ultimately every separate instance of contamination, down to each separate barrel of hazardous waste, could feasibly be construed to constitute a separate CERCLA facility"); *Cytec Industries v. B.F. Goodrich Co.,* 232 F.Supp.2d 821 (S.D.Ohio.2002)("This court concludes that usually, although perhaps not

always, the definition of facility will be the entire site or area, including single or contiguous properties, where hazardous wastes have been deposited as part of the same operation or management." *Id.* at 836); *Clear Lake Properties v. Rockwell Int'l Corp.,* 959 F.Supp. 763, 767-68 (S.D.Tex.1997)(rejecting an attempt to create unnatural boundaries between a building and the site on which it is located). Under the facts of the present case, each of the four chicken production operations, encompassing all the poultry houses at one site, is operated together for a singular purpose. The poultry houses at a particular site function together to produce chickens. Chickens of an identical age typically occupy multiple chicken houses at once. They are delivered and picked up from the site as a whole. Tyson Chicken's technical advisors visit the multiple houses within the site during their periodic visits. Since each chicken production operation operates as a single operation, it is a single facility for CERCLA purposes. *Id.*

****10** Second, the Defendants are correct in that the cases upon which both the Plaintiffs and the Court rely to support the expansive definition of "facility" have involved Section 107 and Section 113(f) cost recovery actions. CERCLA permits government agencies and private parties that have incurred cleanup costs to sue potentially responsible parties to recover their costs pursuant to CERCLA Sections 107 and 113(f). 42 U.S.C. §§ 9607, 9613(f). While the Defendants are correct that none of these cases that have explored the definition of "facility" were Section 103 reporting requirements cases, the Court can find no rational reason to disregard these cases in discussing the definition of the term "facility" in a Section 103 reporting case. The Supreme Court has recognized that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of Treasury,* 475 U.S. 851, 860, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986). CERCLA defines "facility" once in the definition section of the statute and its meaning should be interpreted consistently throughout the entire statute. Accordingly, "facility" for reporting purposes, cleanup purposes or any other statutory purpose extend under the case law to the bounds of the contamination.

Defendants cite *Sierra Club v. Seaboard Farms, Inc.* in support of their position. *Seaboard Farms* is the only federal court opinion cited to the Court that deals with the term "facility" under Section 103 of CERCLA. The district court in *Seaboard Farms* held that "facility" refers to each ***710** separate building and structure, not the entire site. *Sierra Club v. Seaboard Farms, Inc.,* No. Civ-00-997-C (W.D. Okla. February 5, 2002 and July 18, 2002). This case is currently on appeal to the Tenth Circuit. Specifically, in *Sierra Club v. Seaboard Farms, Inc.,* the district court examined Section 103 reporting of ammonia releases from hog waste. The site at issue contained multiple wastewater lagoons and sow barns. The Sierra Club argued that the entire site was the "facility" from which the alleged releases occurred, and that all emissions from the lagoons and barns should be aggregated before determining whether the reportable quantity for ammonia had been reached or exceeded. Ultimately, the district court concluded that each lagoon and barn was a separate facility under CERCLA relying on the fact that facility was defined to mean "any buildings," not "all buildings." Ultimately, the problem with the district court opinion in *Seaboard Farms* is that while the court quoted the entire definition of facility under 42 U.S.C. § 9601, the court did not address whether the hog farm, including the lagoons or barns, was "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located." 42 U.S.C. § 9601(9)(B).

Third, contrary to the Defendants' argument, the purpose of Section 103 is best served by a broad definition. CERCLA is a remedial statute designed to protect human health and the environment from potentially hazardous substances. The purpose of Section 103 has been described by the EPA as "to alert the appropriate government officials to releases of hazardous substances that may require rapid response to protect public health and welfare and the environment." 50 Fed.Reg. 13,456 (1985). Including all chicken houses on a single site within one facility will further the purposes of the statute by determining the aggregate emission from the chicken houses on that site. Plaintiffs' have alleged that a 24-house chicken production facility, like the Tyson Facility, releases approximately 235 pounds of ammonia into the environment every day. Under the Defendants' interpretation, the Tyson Facility would not be required to report any releases

because each chicken house only releases approximately 10 pounds of ammonia per day, even though each site as a whole releases more than twice the reporting threshold. A definition of a facility that encompasses the entire chicken production facility is the only interpretation of the statute that meets CERCLA's basis purpose: to protect and preserve public health and the environment. The Court finds no reason to treat the definition of facility any differently in emergency reporting cases.

**11 Finally, both parties cite EPA regulations and guides in support of their respective positions. The Court has reviewed these references and finds arguable support for both of their positions. While the Court is cognizant that where a statute is unclear, the Court must defer to the EPA's interpretation so long as it is based on a permissible construction of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). However, where as here, the EPA regulations are not helpful in answering the question before the Court, no deference is required. Congress has defined the term "facility" and courts have interpreted that provision. The Court shall instead defer to this case law.

Therefore, for purposes of the CERCLA Section 103 reporting requirements, each chicken production operation, including the separate chicken houses, is a facility. Emissions from the separate poultry houses are required to be added together to *711 determine if a reportable quantity has been reached for the facility.

B. EPCRA

Under EPCRA, an owner or operator of a facility must report to state and local emergency planning committees the release of a hazardous substance. 42 U.S.C. § 11004(a)(1), (3). Specifically, EPCRA provides that "[i]f a release of an extremely hazardous substance referred to in Section 11002(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires notification under section 103(a) of [CERCLA], the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section." 42 U.S.C. § 11004(a)(1). EPCRA defines "facility" as follows:

> The term "facility" means all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person). For purposes of section 11004 of this title, the term includes motor vehicles, rolling stock, and aircraft.

42 U.S.C. § 11049(4).

Each of defendants' chicken production operations is a facility under this definition. The chicken production operations include multiple chicken houses that are located on single or adjacent sites within a concentrated area. These chicken houses are owned by the same person for purposes of producing chickens. Accordingly, each of defendants' chicken production operations is clearly a facility under EPCRA from which ammonia releases must be reported on a site-wide basis.

For the reasons set forth above, the Court concludes that a whole chicken farm site is a facility under both CERCLA and EPCRA for which releases must be reported.

V. EPISODIC OR CONTINUOUS RELEASES

Under CERCLA, a continuous release is subject to reduced reporting requirements. Specifically, Section 103(f) provides that "[n]o notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance .... (2) which is a continuous release, stable in quantity and rate ...." and has been qualified as a continuous release. 42 U.S.C. § 9603(f)(2). In order to qualify for reduced reporting under CERCLA § 103(f), the person in charge must demonstrate a "sound technical basis" for claiming that a release is continuous rather than episodic. 40 C.F.R. § 302.8(e). Specifically, the EPA has provided that

> **12 [t]o qualify a release for reporting as a continuous release, you must establish a basis for asserting that the release is continuous and stable in quantity and rate. The Continuous Release Rule provides you with flexibility in establishing this basis. You may report the release to either

> the NRC (for CERCLA hazardous substances) or the appropriate SERC and LEPC (for CERCLA hazardous substances and non-CERCLA EHSs) on a per-occurrence basis for the period of time necessary to establish that the pattern of the release is continuous and stable. However, if you have a sufficient basis for establishing the continuity, quantity, and regularity of a release, multiple reports are not necessary. A one-time telephone call to each of the appropriate authorities (the NRC, SERC, and LEPC for CERCLA hazardous substances, or only the SERC and LEPC for non-CERCLA EHSs) will *712 alert them to your intent to report the release as a continuous release.

EPA Guide, Reporting Requirements for Continuous Releases of Hazardous Substances at 5 (1997). Additionally, the EPA has provided that "[i]f the person in charge does not have a basis supported by existing data, engineering estimates, operating history and experience, or professional judgment sufficient to qualify for reporting under section 103(f)(2), the release must be reported under section 103(a) for the length of time necessary to establish it as continuous and stable under the definition in today's rule." 55 Fed.Reg. 30172 n. 5 (1990). Therefore, the person in charge must "qualify releases as continuous and stable" to benefit from the reduced reporting requirement of CERCLA § 103(f). If the person in charge fails to do so, any release equaling or exceeding the reportable quantity must be reported as episodic release under CERCLA § 103(a).

Similarly, the regulations implementing EPCRA provide that the reporting requirements of this section do not apply to "[a]ny release that is continuous and stable in quantity and rate under the definitions of 40 C.F.R. 302.8(b). Exemption from notification under this subsection does not include exemption from: (A) Initial notifications as defined in 40 C.F.R. 302.8(d) and (e)...." 40 C.F.R. § 355.40(a)(2)(iii)(A).

[19] Defendants argue that any releases occurring at the facilities are continuous releases subject to reduced CERCLA reporting requirements and entitled to full exemption from EPCRA reporting requirements. Defendants further contend that even if initial reporting of continuous releases is required under EPCRA under § 304(a) and (b), no follow-up notification under § 304(c) is required. Defendants maintain that because citizen suits under EPCRA are only authorized to enforce § 304(c), not §§ 304(a) and (b), Plaintiffs' claims under EPCRA must be dismissed.

First, and most significantly, Defendants have not met the requirements necessary to classify the releases as continuous under § 103(f)(2). The person in charge (or the owner or operator) has not notified any agency of any releases, let alone established that these releases are continuous rather than episodic and warrant reduced reporting requirements. The person in charge under CERCLA or the owner or operator under EPCRA has the responsibility to qualify the releases as continuous and stable. Since the person in charge has not done so, any release equaling or exceeding the reportable quantity must be reported as an episodic release under both CERCLA and EPCRA.

**13 Second, if the Defendants had complied with Section 103(f) and the ammonia releases were classified as continuous, the reduced reporting requirements under CERCLA and EPCRA would apply. Defendants have argued that EPCRA requires no reporting of continuous releases because the initial notification referenced at 40 C.F.R. § 355.40 require initial telephone notification and initial written notification only under CERCLA Section 103. *See* 40 C.F.R. § 302.8(d) and (e). Additionally, the Defendants argue that even if initial notification is required, follow-up notification under Section 304(c) is not required for continuous releases under EPCRA. However, after a review of the regulations, the Court concludes that initial notification under Section 304(a) and (b) and follow-up written notification under Section 304(c) of EPCRA are still required for continuous releases.

The regulations provide that "initial notifications as defined in 40 C.F.R. 302.8(d) and (e)" are not exempt from the EPCRA reporting requirements. *713 40 C.F.R. § 355.40(a)(2)(iii)(A). Title 40 C.F.R. Section 302.8(e) provides that in addition to the CERCLA initial reporting requirements, the reporting requirements of EPCRA require "initial telephone and written notifications of continuous releases to be submitted to the appropriate" SERC and LEPC. Therefore, under EPCRA, the initial telephone notification occurs under Section 304(a)

and (b) and written notification occurs in an "emergency follow-up report" pursuant to Section 304(c). The Court's interpretation of this regulation is confirmed by the EPA's comments concerning continuous release reporting requirements:

> To the extent that releases are continuous and stable in quantity and rate as defined by CERCLA section 103(f)(2) and today's final rule, they do not occur in a manner that requires notification under CERCLA section 103(a). Accordingly, when persons in charge of facilities or vessels releasing EHSs or CERCLA hazardous substances submit the initial notification reports **(including the initial written reports, which should be submitted with the follow-up report required by SARA Title III section 304(c))** to the appropriate SERC and LEPC, identifying releases of EHSs and CERCLA hazardous substances as continuous and stable in quantity and rate under the definition in today's final rule, they need not report again to SERC and LEPC, except for reports of SSIs [Statistically Significant Increase]. No CERCLA section 103(f)(2) follow-up reports are required under SARA Title III section 304.

55 Fed.Reg. 30166, 30179 (emphasis added). Therefore, under the regulations, both initial telephone notification under Section 304(a) and (b) and follow-up written notification under Section 304(c) are required under EPCRA. Therefore, Plaintiffs may maintain a claim against Defendants for their alleged violation of EPCRA's § 304(c) reporting requirements even if the releases could be characterized as continuous.

****14** As discussed above, however, Defendants have not met the requirements of § 103(f)(2), the appropriate initial notification has not been made, and as result, the ammonia releases from Defendants' facilities have not been classified as continuous. Accordingly, episodic reporting appears to be required if the ammonia releases from the facilities in question equal or exceed the reportable quantity. Defendants' motion for summary judgment on Plaintiffs' EPCRA claims is denied.

VI. ROUTINE AGRICULTURAL OPERATIONS

[20] Defendants argue that as "routine agricultural operations" poultry production operations are exempt from EPCRA reporting. EPCRA Section 311 provides an exemption for reporting releases when the regulated substance "is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate consumer." 42 U.S.C. § 11021(e)(5). Defendants claim that the EPCRA exemption applies because chicken waste is removed from chicken production operations and used on other farms for fertilizer. The Court disagrees.

The EPA has indicated that this exemption is intended to "eliminate reporting of fertilizers, pesticides, and other chemical substances when applied, administered, or otherwise used as part of routine agricultural activities ... The exemption for substances used in routine agricultural operations applies only to substances stored or used by the agricultural user." 52 Fed.Reg. 38344, 38349 (1987). In the present case, Plaintiffs contend that the venting of gaseous ammonia into the atmosphere ***714** must be reported under EPCRA, not that the storage of chicken manure or the application of chicken manure to farm fields is subject to the reporting requirements. The Defendants do not store gaseous ammonia in their chicken houses for agricultural use. They do not use this ammonia in an agricultural operation. Instead, as pointed out by the Plaintiffs, the Defendants try to get rid of it because it is harmful to the chickens. Accordingly, the Court finds that the routine agricultural use exemption does not apply to the facts of this case.

VII. APPLICATION OF FERTILIZER EXEMPTION

[21] CERCLA § 101(22)(D) exempts "the normal application of fertilizer" from the definition of "release." 42 U.S.C. § 9601(22)(D). This exemption is incorporated into EPCRA by 40 C.F.R. § 355.40(a)(2)(v). Defendants argue that under this exemption their releases of ammonia to soils, water or air as a consequence of spreading chicken waste on fields as fertilizer do not require reporting under either CERCLA or EPCRA.

The Plaintiffs state in response to this argument that they do not allege that the land application of chicken manure as fertilizer is a release under CERCLA or EPCRA. Instead, the Plaintiffs allege

that venting gaseous ammonia into the atmosphere from the chicken houses is subject to the reporting requirements of CERCLA and EPCRA. The Defendants are not applying ammonia to farm fields when they vent it into the atmosphere, and as a result, the exemption for land application of fertilizer does not apply.

**15 It should be noted that the Plaintiffs have stated that they are not alleging in their complaint that the storage of chicken manure or the application of chicken manure to farm fields is subject to CERCLA or EPCRA. The case is therefore limited to the allegations that the venting of gaseous ammonia into the atmosphere from the chicken houses must be reported under these statutes.

VIII. PERSON IN CHARGE/OWNER OR OPERATOR

Plaintiffs have filed a motion for partial summary judgment on the issue of whether Tyson Foods, Inc., including its wholly owned subsidiary, Tyson Chicken, Inc., is a person in charge or "operator" of the chicken production facilities at issue in this case, and thus liable for unreported ammonia discharges under CERCLA and EPCRA [DN 44]. Defendant, Tyson Foods, on its behalf and on behalf of its wholly owned subsidiary, Tyson Chicken, Inc., has filed a motion for partial summary judgment on the issue of whether it is a "person in charge" of a facility and on other issues related to corporate liability [DN 50]. Tyson Foods argues that it is neither a person in charge under CERCLA or an owner or operator under EPCRA of any of the chicken production operations at issue in this matter. Similarly, it argues that Tyson Chicken is neither a person in charge nor an owner or operator of the chicken production operations owned by Adams or Buchanan. Defendant, Tyson Children Partnership, has also filed a motion for partial summary judgment on the issue of whether it is a "person in charge" of a facility and on other issues related to corporate liability [DN 48].

The relationships between Tyson Foods, Tyson Chicken, and Tyson Children Partnership and the chicken production operations at issue in this case are central to the determination of whether these Defendants are persons in charge or owners or operators of the chicken production facilities in question. Generally, Tyson Foods *715 produces, distributes, and markets chicken, beef, pork, prepared foods and related products. Tyson Chicken, Inc., is a wholly owned subsidiary of Tyson Foods. Under the facts currently available, Tyson Chicken manages the Tyson Facility and supplies, pursuant to contract, chicks, feed, technical advise and veterinary services, among other things, to both the Adams and Buchanan Facilities. Tyson Chicken, Inc. operated under the Hudson Foods name until January 1, 2001, when it changed its name to Tyson Chicken. All shares of Tyson Chicken are owned by Tyson Foods and Tyson Chicken is identified as a subsidiary of Tyson Foods, Inc. Additionally, Tyson Chicken currently leases property on which the Tyson Facility is located from Tyson Children Partnership.

A. Definitions

1. Person in Charge

[22] Plaintiffs contend that the Defendants violated CERCLA, 42 U.S.C. § 9603(a), which provides that:

> Any **person in charge** of ... an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such ... facility in quantities equal to or greater than those determined pursuant to section § 9602 of this title, immediately notify the National Response Center....

**16 42 U.S.C. § 9603(a). Therefore, to be liable under 42 U.S.C. § 9603(a), a Defendant must be considered a person in charge of a facility. A corporation is included in the definition of "person" under CERCLA. 42 U.S.C. § 9601(21). Unfortunately, "person in charge" is not defined either in CERCLA or its implementing regulation. Plaintiffs contend that a "person in charge" under CERCLA includes not only supervisory personnel who have the responsibility for the facility, but also the owner or operator of a facility. Defendants disagree that an owner or operator is automatically a "person in charge" under CERCLA.

In *United States v. Carr,* 880 F.2d 1550 (2d Cir.1989), the Second Circuit discussed the definition of "person in charge" under 42 U.S.C. §

9603(a) in the context of a criminal action against a supervisor who directed a work crew to dispose of waste cans of paint at an Army base in an improper manner and failed to report the release of hazardous substances under CERCLA. A jury convicted the supervisor of CERCLA reporting violations. The supervisor appealed on the basis of the jury instruction regarding the meaning of "in charge." The question before the Second Circuit was whether an employee who had actual supervisory control over the releases of hazardous materials could be held liable as a "person in charge."

After recognizing that CERCLA contained no definition for the term "in charge," the Second Circuit turned to CERCLA's legislative history, which showed that this provision of CERCLA was modeled after the reporting requirement section of the Clean Water Act, 33 U.S.C. § 1321(b)(5). The Second Circuit held:

> The legislative history of section 311 bears out appellant's argument that CERCLA's reporting requirements should not be extended to *all* employees involved in a release. "The term 'person in charge' [was] deliberately designed to cover only supervisory personnel who have the responsibility for the particular vessel or facility and not to include other employees." H.R. Conf. Rep. No. 940, 91st Cong., 2d Sess. 34 (1970), *reprinted in* 1970 U.S.Code Cong. & Admin. News 2691, 2712, 2719. Indeed, as the Fifth Circuit has stated, "to the extent that legislative history ***716** does shed light on the meaning of 'persons in charge,' it suggests at the very most that Congress intended the provisions of [section 311] to extend, not to every person who might have knowledge of [a release] (mere employees, for example), but only to persons who occupy positions of responsibility and power." *United States v. Mobil Oil Corp.,* 464 F.2d 1124, 1128 (5th Cir.1972).
>
> That is not to say, however, that section 311 of the Clean Water Act--and section 103 of CERCLA--do not reach lower-level supervisory employees. The reporting requirements of the two statutes do not apply only to owners and operators, *see United States v. Greer,* 850 F.2d 1447, 1453 (11th Cir.1988), but instead extend to any person who is "responsible for the operation" of a facility from which there is a release, *Apex Oil Co. v. United States,* 530 F.2d 1291, 1294 (8th Cir.), *cert. denied,* 429 U.S. 827, 97 S.Ct. 84, 50 L.Ed.2d 90 ... (1976). As the Fifth Circuit noted in *Mobil Oil,* imposing liability on those "responsible" for a facility is fully consistent with Congress' purpose in enacting the reporting requirements. Those in charge of an offending facility can make timely discovery of a release, direct the activities that result in the pollution, and have the capacity to prevent and abate the environmental damage. *See Mobil Oil,* 464 F.2d at 1127.

****17** *Carr,* 880 F.2d at 1554. Plaintiffs claim that under *Carr,* an owner and operator is always a "person in charge" for CERCLA reporting purposes. According to Plaintiffs, in addition to imposing reporting requirements on owners and operators, CERCLA also extends reporting obligations to other persons who are likewise in a position to detect the release, including those of relatively low rank. *See also United States v. Mobil Oil Corp.,* 464 F.2d 1124, 1126 (5th Cir.1972).

The Court has reviewed *Carr,* as well as the cases cited by the Second Circuit in *Carr,* and finds that in each case the courts focused on the fact that the "person" in question was "actively involved in the daily operation of the business," had "the capacity to make timely discovery of oil discharges," and had the "power to direct the activities of persons who control the mechanisms causing the pollution." *See Greer,* 850 F.2d at 1453; *Mobil Oil,* 464 F.2d at 1127. Each of the powers of the "owner-operator" discussed in these cases concerns the element of *control* exerted over the facility. From a review of this case law, the Court concludes that the proper inquiry in determining whether the Defendants qualify as a "person in charge" should be whether the Defendants "occupy positions of responsibility and power" and whether they are in a position to "make timely discovery of a release, direct the activities that result in the pollution, and have the capacity to prevent and abate the environmental damage." *Carr,* 880 F.2d at 1554. Therefore, the Court declines to define person in charge to always include "owner or operator." While in most cases an owner or operator will qualify as a "person in charge," this determination will depend on the nature and degree of control the person has over the facility in question.

2. Operator

Plaintiffs contend that the Defendants violated EPCRA, 42 U.S.C. § 11004(a), which provides that:

> If a release of an extremely hazardous substance referred to in section 11002(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such releases requires notification under section 103(a) of [CERCLA] ..., the owner or operator ***717** of the facility shall immediately provide notice....

42 U.S.C. § 11004(a). Therefore, to be liable under 42 U.S.C. § 11004(a), a Defendant must be considered an "owner or operator" of the facility. The term operator is not defined in either EPCRA or its regulations. However, in light of EPCRA's close connection with CERCLA, the Supreme Court's analysis of "operator" found in *United States v. Bestfoods* is also applicable to EPCRA. *United States v. Bestfoods,* 524 U.S. 51, 66- 67, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). The Supreme Court has held that

> [A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

****18** *Id.* at 66-67, 118 S.Ct. 1876.

B. Tyson Foods

Plaintiffs have moved to stay consideration of Tyson Foods, Inc.'s motion for partial summary judgment on the issue of whether it is a "person in charge" of a facility and other issues related to corporate liability [DN 61]. Plaintiffs maintain that Tyson Foods has not meaningfully responded to the Plaintiffs' discovery requests regarding Tyson Foods involvement with the chicken production facilities at issue in this litigation, including its relationship with its subsidiary, Tyson Chicken. Specifically, Plaintiffs complain that Tyson Foods did not produce the documents requested by Plaintiffs until after it filed its motion for summary judgment. And when Tyson Foods did finally produce the additional documents, Plaintiffs maintain that its limited production did not satisfy the Plaintiffs' request. As a result, Plaintiffs claim that they lack essential facts to oppose Tyson Foods' motion for partial summary judgment on the issue of "person in charge."

Summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery. *Vance v. United States,* 90 F.3d 1145, 1148 (6th Cir.1996). Rule 56(f) of the Federal Rules of Civil Procedure provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed.R.Civ.P. 56(f).

Plaintiffs have informed the Court that additional discovery is needed to defend against Tyson Foods' motion for partial summary judgment. Because of the limited amount of discovery conducted, the Court will allow Plaintiffs the opportunity to seek further discovery regarding the relationship between Tyson Foods and the chicken production facilities, including Tyson Chicken. The Court is cognizant of Defendants' claims that Plaintiffs have failed to file a motion to compel discovery of this information. However, with discovery limited to select threshold issues and given the recent addition of Tyson Chicken into this litigation, [FN6] the Court is reluctant ***718** to conclude that the Plaintiffs have not been diligent in seeking the discovery necessary to respond to Tyson Foods' motion for summary judgment.

> FN6. In November of 2002, the Court granted Defendant Tyson Foods' motion to amend its answer to assert that Tyson Chicken was actually the corporation involved with the chicken production facilities. The motions for summary judgment were filed in March of 2003.

The Plaintiffs are reminded that under CERCLA and EPCRA, they are required to prove that Tyson Foods is a person in charge or an operator as the Court has defined these terms in order to impose the reporting requirements of CERCLA and EPCRA on

Tyson Foods. Plaintiffs have repeatedly stated that they need more discovery to determine the relationship between Tyson Foods and Tyson Chicken. However, the Court would caution the Plaintiffs that the United States Supreme Court in *Bestfoods,* 524 U.S. 51, 118 S.Ct. 1876, has held that the focus should instead rest "on the relationship between [the parent corporation] and the ... facility itself." *Id.* at 68, 118 S.Ct. 1876.

**19 For the reasons set forth above, Tyson Foods' motion for summary judgment on the "person in charge" issue is denied with leave to refile after completion of discovery. Because the Court has chosen to reexamine this issue as it relates to Tyson Foods after completion of discovery, Plaintiffs' motion to stay consideration of Tyson Foods' motion on the issue of person in charge is therefore denied as moot. Plaintiffs should seek appropriate discovery motions to obtain the information allegedly withheld by the Defendants pursuant to the new scheduling order which shall be prepared by the Magistrate Judge.

C. Tyson Chicken

Tyson Foods on behalf of its wholly owned subsidiary, Tyson Chicken, has filed a motion for partial summary judgment arguing that Tyson Chicken is not liable for the alleged unreported ammonia releases under CERCLA and EPCRA because it is not a person in charge, owner or operator of the Adams and Buchanan Facilities. Plaintiffs have also filed a motion for summary judgment against Tyson Chicken arguing that it is a person in charge and operator of the Adams, Buchanan, and Tyson Facilities.

1. CERCLA

As discussed above, to be held liable under CERCLA section 103(a), a Defendant must be considered a "person in charge" of a facility. The factors that determine whether Tyson Chicken is a "person in charge" of a facility include whether Tyson Chicken "occupies [a] position[ ] of responsibility and power," and whether Tyson Chicken is in a position to "make timely discovery of a release, direct the activities that result in the pollution, and have the capacity to prevent and abate the environmental damage" at the facility in question. *Carr,* 880 F.2d at 1554.

[23] Tyson Chicken is clearly a person in charge of the Tyson Facility and is directly responsible for the alleged ammonia discharges from that chicken production facility. Tyson Chicken leases this facility from the Tyson Children Partnership, and Tyson employees perform all the duties necessary to raise the chickens at this facility. It clearly occupies a position of responsibility and power and is in a position to make timely discovery of releases, directs the activities that result in the pollution, and has the capacity to prevent and abate the environmental damage. *Carr,* 880 F.2d at 1554. Tyson Chicken appears to concede its role as a "person in charge" of the Tyson Facility.

[24] As to the Adams and Buchanan facilities, Tyson Chicken asserts that it is not a "person in charge" of those facilities. Tyson Chicken argues that under the *719 terms of its Grower Contracts with the Adams and Buchanan farms, Tyson Chicken merely provides chicks, feed, veterinary services, medication, and technical advice to the contract growers. According to Defendants, the Broiler Growing Guide only provides written guidelines that have proven effective. The technical advisors are the only employees of Tyson Chicken who have regular contact with the farms and the farm managers. Defendants assert that the technical advisors visit the farms periodically to observe the growing conditions and to make recommendations to aid in the contract grower's performance. According to Defendants, these technical advisors are not at the farms every day, and even when they are there, they are not present for an entire day--they may visit one or more farms in a day. Defendants argue that the broiler visitation reports reflect that the technical advisors do not have sufficient involvement with the farms so as to be considered persons in charge of the facilities as that term is applied for purposes of the CERCLA reporting requirement. [FN7] Defendants argue that since the technical advisors who are Tyson Chicken employees are only present on the farms a few days during a grow cycle, they are not involved in the daily operations of the farms, and they are not in the **best** position to detect, prevent or abate a release of a substance. As a result, Defendants argue that Tyson Chicken is not a person in charge of the Adams and Buchanan Farms. The Court disagrees.

FN7. Specifically, Defendants point to the documents presented in Jeffrey Power's deposition which showed that a technical advisor visited the Onton # 1 farm six times in connection with one flock. One of the six visits was for a pre-brood report and one was on the day of placement, on June 14, 2002. These reports suggest that once the chicks were placed on the farm, the technical advisor, who is an employee of Tyson Chicken, visited the farm only four more times during the 49 to 51 day grow period, on June 18, 20, 25 and July 24, 2001. Similar frequencies of visits are suggested by other reports.

****20** Contrary to Defendants' argument, the standard is not whether Tyson Chicken is in the **best** position to detect, prevent or abate a release of ammonia. Instead, the reporting requirements apply to any person who is a position to detect, prevent, and abate a release of hazardous substance. There may be several "persons in charge" at the same facility. *See United States v. Hansen,* 262 F.3d 1217, 1253-54 (11th Cir.2001), *cert. denied,* 535 U.S. 1111, 122 S.Ct. 2326, 122 S.Ct. 2327, 153 L.Ed.2d 158 (2002). Therefore, under the definition of person in charge both the growers and Tyson Chicken could be found to be a person in charge.

Tyson Chicken seeks to insulate itself from the reporting requirements of both CERCLA and EPCRA by claiming that Adams and Buchanan are independent contractors solely responsible for environmental compliance at the chicken production facilities. Whether Tyson Chicken is a person in charge is determined by examining the relationship between it and the facility and not by how the parties choose to characterize their relationship. The Alabama Supreme Court in *Tyson Foods, Inc. v. Stevens,* 783 So.2d 804, 809 (Ala.2000) addressed a similar issue. In *Stevens,* the Alabama Supreme Court found Tyson's control of its growers so complete that it held that an individual that raised hogs for Tyson was its "agent" and upheld a $25,000 punitive damages verdict against Tyson and its grower for mismanagement of the hog operation. Interpreting a contract similar to the ones in this case, the Alabama Supreme Court refused to find the grower to be an "independent contractor," as the contract provided. The Supreme Court noted stated that:

> ***720** The [plaintiffs] presented evidence indicating that Tyson specified where the hog houses should be located and how large each house should be, and that Tyson even arranged for financing of the houses. Tyson required that [the growers] implement a specific waste-management system. It inspected [the grower's] hog operation almost every week and, as evidenced by the inspection reports and photographs, recommended solutions for Burnett's waste-management problems. Tyson provided the hogs and provided food, veterinary supplies, and veterinary care for the hogs. [The grower's] primary responsibility was to feed, water, and otherwise care for the animals. The evidence was sufficient to create a jury question as to the existence of an agency. Therefore, the trial court did not err in sustaining the jury's verdict as to this issue.

Stevens, 783 So.2d at 809. While the *Stevens* case does not address liability under CERCLA or EPCRA, the Court finds that it does adequately describe the Tyson's relationship, or in this case Tyson Chicken's relationship, with its growers.

After a review of the record, the Court concludes that no reasonable juror could differ on the issue of whether Tyson Chicken is a person in charge of both the Adams and Buchanan Facilities. Tyson Chicken is clearly in a position of responsibility and power with respect to each facility and is in a position to make a timely discovery of a release, direct the activities that result in the ammonia releases, and has the capacity to prevent and abate the alleged environmental damage. *See Carr,* 880 F.2d at 1554.

****21** Tyson Chicken is involved in the facility design and equipment specifications. Tyson Chicken directs growers how to build and orient the houses, how to heat, cool, ventilate the buildings, and how to illuminate the house to ensure optimum chicken growth. Tyson Chicken provides exacting equipment specification and advises growers as to the proper retailers from which to purchase this equipment. If a grower chooses to deviate from Tyson Chicken's specification or growing instructions, Tyson Chicken reserves the right to refuse to deliver chicks or seize the property in

question. Tyson Chicken owns the chickens throughout the production process, including the period the chickens are located at the chicken production facility. In fact, Tyson Chicken provides not only the chicks, but the feed, technical support, medicine, and veterinary care for the chicks. Additionally, the evidence reflects Tyson Chicken not only controls the product, but payment and some expenditures at the chicken production facilities.

Most importantly, Tyson Chicken technical advisors monitor the Adams and Buchanan facilities. They provide detailed instructions to the growers. Tyson technical advisors test ammonia levels inside the house and direct ventilation program to exhaust ammonia into the environment. The record reflects that Tyson Chicken directs its growers to discharge ammonia from the chicken houses at the production facilities. The Broiler Growing Guide specifically instructs growers to exhaust ammonia into the environment to limit ammonia buildup inside the chicken houses. Tyson technical advisors also routinely visit the production facilities and tell the growers to discharge ammonia into the environment. For example, (1) one Tyson Chicken technical advisor noted in his broiler visitation report that "[a]mmonia is in all of the houses" and instructed Adams to "up the ventilation to thirty more seconds," (Rogers Decl. ¶ 11, Exh. I Broiler Visitation Report, TY-BVR-000104); (2) another Tyson Chicken technical adviser noted in a broiler visitation report that ***721** "[t]he ventilation set up [at the Adams facility] looks good and is according to our program," (Rogers Decl. ¶ 11, Exh. I Broiler Visitation Report, TY-BVR-000120); (3) another Tyson Chicken technical advisor directed Adams to "[r]un [ventilation fans] 30 sec[onds] out of 10 min[utes] to evacuate ammonia," (Rogers Decl. ¶ 11, Exh. I Broiler Visitation Report, TY-BVR-000159); (4) one Tyson Chicken technical advisor informed Buchanan "I tested the Ammonia Levels in houses 1 & 8.... These levels are too high," (Rogers Decl. ¶ 11, Exh. I Broiler Visitation Report, TY BVR 000669); and (5) a different Tyson Chicken technical advisor told Buchanan "to increase Fan time. I am starting to see some blind birds in the houses. We need to get the Ammonia out of these houses." (Rogers Decl. ¶ 11, Exh. I Broiler Visitation Report, TY BVR 000602). Tyson Chicken technical advisers are present at the facility on weekly basis and are in a position to make a timely discovery of some of the releases, Tyson Chicken directs the discharge of ammonia from the chicken production facility through the Broiler Growing Guide and individual instructions from the technical advisors, and Tyson Chicken has the capacity to prevent and abate the alleged environmental damage.

****22** For these reasons, the Court concludes that Tyson Chicken is a "person in charge" of the Tyson, Adams, and Buchanan Facilities and is subject to the reporting requirements of CERCLA.

2. EPCRA

[25] As discussed above, to be held liable under EPCRA section 304(a), a defendant must be considered an "owner or operator" of a facility. The parties agree that Tyson Chicken is not the owner of the Tyson, Adams or Buchanan Facilities. Therefore, the question is whether Tyson Chicken is an operator of those facilities.

[26] "[A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods,* 524 U.S. at 66, 118 S.Ct. 1876. More specifically, the Supreme Court has held that to be considered an operator a defendant must "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67, 118 S.Ct. 1876. Clearly, Tyson Chicken is an operator of the Tyson Facility. It manages, directs and conducts the affairs of the facility. Similarly, for the reasons set forth in the Court's discussion of "person in charge," the Court concludes that these facts clearly demonstrate that Tyson Chicken is an operator of the chicken production facilities owned by Adams and Buchanan as well. Tyson Chicken manages and/or directs many of the operations related to the venting of ammonia. Finding that no reasonable juror could differ on this issue, the Court concludes that Tyson Chicken is an operator of the Adams and Buchanan Facilities and is subject to the reporting requirements of EPCRA.

For all the reasons set forth above and finding no

genuine issues of material fact with respect to these issues, the Court grants Plaintiffs' motion for summary judgment with respect to whether Tyson Chicken is a "person in charge" or an "operator" of the Adams, Buchanan, and Tyson Facilities under CERCLA and EPCRA.

D. Tyson Children Partnership

Tyson Children Partnership has filed a motion for partial summary judgment arguing that it is not liable for alleged unreported ammonia releases at the Tyson Facility ***722** under CERCLA or EPCRA. The Partnership leases the "Tyson Facility" property to Tyson Chicken, a wholly owned subsidiary of Tyson Foods, Inc. The Partnership acquired the property from owners who were parties to a grow contract with Hudson Foods, the predecessor of Tyson Chicken. The former owners informed Hudson that they intended to abandon the property and the flocks of chicken then housed there. Exercising its rights under the contracts, Hudson stepped in to manage the flocks until the birds reached maturity. The Partnership bought the property, and by lease dated September 15, 2000, leased it to Hudson for fifteen years. Tyson Chicken is now the lessee.

The Partnership is only a lessor of property and has no other role in these broiler production facilities. The question before the Court is whether the Partnership is liable under CERCLA or EPCRA for the alleged failure to report ammonia releases at the Tyson Facility. The Partnership's role, or lack of role, at the Adams and Buchanan Facilities is not at issue.

1. CERCLA

****23** As discussed above, to be held liable under CERCLA section 103(a), a Defendant must be considered a "person in charge" of a facility. In order for the Partnership to be deemed a "person in charge" of the Tyson Facility, the Partnership must "occupy [a] position[ ] of responsibility and power," and must be in a position to "make timely discovery of a release, direct the activities that result in the pollution, and have the capacity to prevent and abate the environmental damage." *Carr,* 880 F.2d at 1554.

[27] The Partnership is not involved in the daily operations of the chicken production operations and is not in a position to detect, prevent and abate a release of hazardous substances. The Partnership does not contract with any growers. No evidence suggests that the Partnership plays any role in the chicken production operations at issue on a routine basis such that it could be said that it is responsible for the operations or that it is a position to detect, prevent, and abate the release of hazardous substances. For these reasons, as a lessor of the property in question with no active role in managing the property, the Partnership is not a "person in charge" of the Tyson Facility and as result, had no responsibility under CERCLA to report the alleged releases of ammonia. *See, e.g., Neighbors for a Toxic Free Community v. Vulcan Materials Co.,* 964 F.Supp. 1448, 1454 (D.Colo.1997). All claims against Tyson Children Partnership under CERCLA are dismissed.

2. EPCRA

[28] As discussed above, to be held liable under EPCRA section 304(a), a Defendant must be considered an "owner or operator" of a facility. "[A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods,* 524 U.S. at 66, 118 S.Ct. 1876 . Specifically, the Supreme Court has held that to be deemed an operator a defendant "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67, 118 S.Ct. 1876. For the reasons set forth in the Court's discussion of the Partnership's liability under CERCLA, no evidence suggest that the Partnership manages, directs, or conducts the activities of the Tyson Facility related to pollution. Therefore, the Partnership is not an "operator" of the Tyson Facility.

***723** Plaintiffs argue that Tyson Children Partnership is still liable under the EPCRA reporting statutes because of the clear statutory requirements that owners of facilities must report releases of hazardous substances. Plaintiffs maintain that it is clear that the Partnership owns the Tyson Facility and leases it to Tyson Chicken, Inc.

The Court agrees with the Plaintiffs that Tyson Children Partnership owns the land and its buildings on which the Tyson Facility is located. However, this fact alone does not resolve the question of whether Tyson Children Partnership is subject to the reporting requirements of EPCRA. In *Neighbors for a Toxic Free Community v. Vulcan Materials Co.,* 964 F.Supp. 1448 (D.Colo.1997), the court rejected arguments similar to those made by the Plaintiffs. In that case, General American Transportation Corporation (GATC) owned a railroad tank car that it leased to Vulcan Material Company. Toxic materials were released from the tank car while it was at the Vulcan terminal. In determining the liability of the lessor under the EPCRA reporting statute, the district court held that "[s]ince GATC was not in charge and had no knowledge, notification by GATC was not required." *Vulcan Materials,* 964 F.Supp. at 1454. The district court further held that the plaintiff's interpretation of the statute and regulations unreasonable "since it would require any lessor of any type of equipment to file a full EPCRA report when a toxic spill occurs, even when the lessor has no knowledge or ability to do this." *Id.*

***24** Applying the principle in *Vulcan Materials* to this case, a lessor of property who has no control over the operations of a facility or knowledge of a release of a reportable quantity of a hazardous substance is not subject to the reporting requirements of EPCRA. This is consistent with the purpose of EPCRA which is to establish a framework of agencies designed to inform the public about the presence of hazards and toxic chemicals, and to provide emergency reporting in the event of health-threatening releases. Under the facts of this case, it is clear that Tyson Children Partnership is a lessor of the property and that Tyson Chicken is the lessee of the property and is the "operator" of the chicken production facility in question. A question of fact exists concerning whether Tyson Children Partnership, as the lessor of the property, is in a position to have knowledge of the alleged releases or the ability to report the alleged releases. The facts may reveal that the Partnership is not in such a position. However, at this stage of the litigation, the Court finds that a genuine issue of material fact exists concerning whether the Partnership had knowledge of releases of ammonia at or above the reportable quantity or had the ability to report such releases from the Tyson Facility.

For these reasons, the motion by Defendant, Tyson Children Partnership, for partial summary judgment against Plaintiffs on the issue of "person in charge" and "operator" is granted and the motion by Defendant for partial summary judgment on the issue of "owner" is denied.

IX. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** as follows:

(1) The motion by plaintiffs for partial summary judgment as to the First and Second Causes of Action [DN 44] is **granted in part and denied in part.;**

(2) The motion by Defendants for summary judgment on the CERCLA and EPCRA issues [DN 49] is **denied;**

(3) The motion by Defendant, Tyson Foods on its behalf, for partial summary ***724** judgment on the issue of "person in charge" [DN 50] is **denied with leave to refile** after discovery;

(4) The motion by Defendant, Tyson Foods on behalf of Tyson Chicken, for partial summary judgment on the issue of "person in charge" [DN 50] is **denied;**

(5) The motion by Defendant, Tyson Children Partnership, for partial summary judgment on the issue of "person in charge" [DN 48] is **granted** and the motion by Defendant, Tyson Children Partnership, for partial summary judgment on the issue of "owner and operator" [DN 48] is **granted in part and denied in part.**

(6) The motion by Plaintiff to stay consideration of Tyson Foods' motion for partial summary judgment on the issue of "person in charge" [DN 61] is **denied as moot.**

299 F.Supp.2d 693, 2003 WL 22595989 (W.D.Ky.), 58 ERC 1076

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