

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Petitioner,)	
)	
v.)	PCB 10-084
)	(Enforcement – Land)
PROFESSIONAL SWINE MANAGEMENT,)	
LLC; HILLTOP VIEW, LLC; WILDCAT)	
FARMS, LLC; HIGH-POWER PORK, LLC;)	
EAGLE POINT, LLC; LONE HOLLOW, LLC;)	
TIMBERLINE, LLC; PRAIRIE STATE GILTS,)	
LTD; NORTH FORK PORK, LLC; LITTLE)	
TIMBER, LLC,)	
)	
Respondents.)	

NOTICE OF FILING

TO: Mr. John T. Therriault	Carol Webb, Esq.
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	1021 North Grand Avenue East
Suite 11-500	Post Office Box 19274
Chicago, Illinois 60601	Springfield, Illinois 62794-9276
(VIA ELECTRONIC MAIL)	(VIA U.S. MAIL)

(PLEASE SEE ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL DISMISSAL, a copy of which is herewith served upon you.

Respectfully submitted,

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

Respondents,

Dated: October 21, 2010
Edward W. Dwyer, #6197577
Jennifer M. Martin, #6210218
HODGE DWYER & DRIVER
3150 Roland Avenue
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By: /s/ Edward W. Dwyer
One of Its Attorneys

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL DISMISSAL upon:

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

via electronic mail on October 21, 2010; and upon:

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

Fred C. Prillaman, Esq.
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on October 21, 2010.

/s/Edward W. Dwyer
Edward W. Dwyer

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**REPLY TO COMPLAINANT'S RESPONSE TO
RESPONDENTS' MOTION FOR PARTIAL DISMISSAL**

HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC,
TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC
("Respondents"), by and through their attorneys, HODGE DWYER & DRIVER, and
pursuant to 35 Ill. Admin. Code § 101.500(e), submit this Reply to Complainant's
Response to Respondents' Motion for Partial Dismissal ("Reply"). Respondents submit
the following as their Reply:

1. On July 13, 2010, the People of the State of Illinois ("People") filed the
First Amended Complaint ("Amended Complaint") with the Illinois Pollution Control
Board ("Board"), alleging, among other things, that Respondents violated Section 12(f)
of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/12(f), and 35 Ill.
Admin. Code § 309.102(a) "[b]y causing or allowing the discharge of livestock
wastewater to waters of the State without an NPDES permit." Amended Complaint,
Count IV ¶ 20, Count V ¶ 22, Count VI ¶ 22, Count VII ¶ 27, Count IX ¶ 33; *see also*

Count I ¶ 25. Respondents filed a Motion for Partial Dismissal of the Amended Complaint on September 7, 2010, explaining that “[t]he People do not allege facts sufficient to show that Respondents were, at the time of the alleged violations, or are now, required to obtain National Pollution Discharge Elimination System (“NPDES”) permits.” Motion for Partial Dismissal, ¶ 2. In response, the People filed Complainant’s Response to Respondents’ Motion for Partial Dismissal (“Response”), which was received by Respondents on September 30, 2010.

2. On October 12, 2010, the Hearing Officer issued an order granting leave to file a reply and set October 21, 2010 as the due date for such a reply. Board Order, *People v. Professional Swine Management, LLC, et al.*, PCB 10-84 at 1 (Ill.Pol.Control.Bd. Oct. 12, 2010).

3. Section 101.506 of the Board’s procedural rules, 35 Ill. Admin. Code § 101.506, provides for motions to dismiss based on the sufficiency of a pleading. For purposes of ruling on such a motion, all well-pled facts in the pleading must be taken as true. *Strunk v. Williamson Energy LLC*, PCB 07-135 at 7 (Ill.Pol.Control.Bd., Nov. 15, 2007). Information beyond the pleading may not be considered when ruling on a motion to dismiss that challenges the facial sufficiency of the pleadings, as is the case here. *Curtis Casket Co. v. D.A. Brown & Co.*, 259 Ill. App. 3d 800, 804-805, 632 N.E.2d 204, 208, 198 Ill. Dec. 145 (1st Dist. 1994).

4. Respondents’ Motion for Partial Dismissal challenged the Amended Complaint on its face. The People responded with additional regulations and facts beyond those contained in the Amended Complaint in an attempt to cure deficiencies. Such additional information more appropriately belongs in a second amended complaint.

5. For the reasons set forth below, Respondents request that the Board strike or disregard all references to State and federal regulations and facts that were not contained in the Amended Complaint, and grant Respondents' Motion for Partial Dismissal.

I. THE BOARD SHOULD DISREGARD OR STRIKE THOSE PORTIONS OF THE RESPONSE THAT ATTEMPT TO ALLEGE VIOLATIONS OF STATE CAFO REGULATIONS.

6. In the Response, the People refer to Board regulations regarding NPDES permits for concentrated animal feeding operations ("CAFO") at 35 Ill. Admin. Code Part 502 (hereafter "Part 502 CAFO Regulations"). Response, ¶¶ 2, 3, 4, 5, 13, 14, 15. However, the Amended Complaint does not contain any reference to Part 502 CAFO Regulations. It appears that the People are attempting to introduce new alleged violations of Part 502 CAFO Regulations into the Amended Complaint through the Response. It is axiomatic that the People are precluded from adding facts or law to the Amended Complaint when responding to a motion to dismiss. *See Curtis Casket Co.*, 259 Ill. App. 3d. at 804-805. Therefore, the Part 502 CAFO Regulations should not be considered when determining the adequacy of the Amended Complaint.

7. Moreover, the People claim that Part 502 CAFO Regulations "are consistent with, and indeed based upon, the federal regulations." Response, ¶ 5. However, a comparison between Part 502 CAFO Regulations and the current federal rule for CAFOs at 40 C.F.R. § 122.23 ("CAFO Rule") reveals enormous differences between the two. This is not surprising since the Board adopted Part 502 CAFO Regulations in 1978. *In the Matter of: Amendments to the Agriculture Related Pollution Regulations of Illinois Pollution Control Board*, R76-15 (Ill.Pol.Control.Bd. Sep. 21, 1978). As noted in

the Motion for Partial Dismissal, the United States Environmental Protection Agency (“USEPA”) has since revised its CAFO Rule in 2003, 68 Fed. Reg. 7176 (Feb. 12, 2003), and 2008, 73 Fed. Reg. 70418 (Nov. 20, 2008). But the Part 502 CAFO Regulations have not been revised.¹

8. The most significant inconsistency appears at 40 C.F.R. § 122.23(d) and requires only CAFO owners and operators that discharge or propose to discharge to seek coverage under an NPDES permit. 73 Fed. Reg. 70418, 70422 (Nov. 20, 2008). Likewise, the General Illinois CAFO NPDES Permit only requires CAFOs that discharge or propose to discharge to seek coverage under a permit. Illinois General NPDES Permit for Concentrated Animal Feeding Operations, No. ILA01 at 2 (Issued Oct. 20, 2009). As explained in Respondents’ Motion for Partial Dismissal, the federal CAFO Rule and the General Illinois CAFO NPDES Permit are consistent with the Clean Water Act, which requires an NPDES permit for the discharge of any pollutant, or combination of pollutants, from any point source into navigable waters, which are defined as waters of the United States. 33 U.S.C. §§ 1342, 1362(7). Motion for Partial Dismissal, ¶ 14.

9. Because the Part 502 CAFO Regulations were not cited in the People’s Amended Complaint and are not consistent with the current federal CAFO Rule and the General Illinois CAFO NPDES Permit, Respondents request that the Board disregard or

¹ USEPA recently sent a letter and accompanying report to the Illinois Environmental Protection Agency (“Illinois EPA”) that address Illinois’ CAFO program. Letter from Susan Hedman, USEPA Region V Administrator to Douglas Scott, Director of Illinois EPA regarding the Petition to Withdraw the Illinois NPDES Program at 1 (Sep. 28, 2010) (letter and report available at: <http://www.epa.gov/region5/illinoiscafo/>). In the report, USEPA points out that Part 502 CAFO Regulations have not been revised to incorporate the 2003 or 2008 revisions. Initial Results of an Informal Investigation of the National Pollution Discharge Elimination System Program for Concentrated Animal Feeding Operations in the State of Illinois, USEPA Region V at 9 (Sep. 2010).

strike all arguments and allegations in the Response that are based on Part 502 CAFO Regulations.

II. THE BOARD SHOULD DISREGARD OR STRIKE THOSE PORTIONS OF THE RESPONSE THAT REFERENCE THE OUTDATED FEDERAL CAFO RULE.

10. The Amended Complaint contains no reference or citation to the federal CAFO Rule at 40 C.F.R. § 122.23, but now the People refer to it in the Response. Response, ¶¶ 6, 7, 8, 9, 10, 11, 12, 13, 15, 16. The People cannot introduce any new allegations into its Amended Complaint through its Response. *See Curtis Casket Co.* at 804-805. Therefore, the CAFO Rule cannot be considered when determining the adequacy of the Amended Complaint, and any references to it in the response should be struck or disregarded.

11. In addition, references to the CAFO Rule in the Response appear to quote and refer to language from a previous version of the CAFO Rule. Response, ¶¶ 8, 10, 11, 12, 16. This previous version of the CAFO Rule was struck down by the Second Circuit in *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 488 (2d Cir. 2005), and later amended by USEPA in 2008. *See* 73 Fed. Reg. 70418 (Nov. 20, 2008). The People offer no explanation for referring to outdated and overturned regulations.

12. New since the Amended Complaint, the People attempt to allege that there is a duty to obtain an NPDES permit if a facility “threatens or indeed causes or allows a discharge to occur.” *See* Response, ¶¶ 13, 15. However, this language appears to confuse the requirement to obtain an NPDES permit with prohibitions under Sections 12(a) and 12(f) of the Act. 415 ILCS 5/12(a), (f). Instead, as noted above, the CAFO

Rule only imposes a duty to obtain an NPDES permit on CAFOs that discharge or propose to discharge. *See* 40 C.F.R. § 122.23(d)(1).

13. The People attempt to demonstrate how courts have broadly construed waters of the State. Response, ¶ 21. In doing so, the People quote language from a case that extends Board authority to waters on private lands for purposes of enforcing Section 12(a) of the Act, 415 ILCS 5/12(a), for causing water pollution and Section 12(d) of the Act, 415 ILCS 5/12(d), for causing a water pollution hazard. *Id.* (quoting *Tri-County Landfill Co. v. The Pollution Control Board*, 4 Ill. App. 3d 249, 353 N.E.2d 316 (2d Dist. 1976)). However, the People fail to explain how such an interpretation of waters of the State imposes an obligation on Respondents to obtain an NPDES permit under federal law in the context of navigable waters.

14. Because the People failed to include any allegations based on the CAFO Rule in their Amended Complaint and improperly refer to outdated and overturned regulations in their Response, Respondents request that the Board disregard or strike all arguments and allegations in the Response that are based on the CAFO Rule.

15. Notwithstanding the People's attempt to introduce new references to State and federal regulations in their Response, the People still do not state an adequate theory for requiring Respondents to obtain NPDES permits. That is, the People fail to allege that Respondents discharged or proposed to discharge to navigable waters. *See* 40 C.F.R. § 122.23(d)(1). For this reason, the allegations of Section 12(f), 415 ILCS 5/12(f), and 35 Ill. Admin. Code § 309.102(a) violations in the Amended Complaint should be dismissed. Motion for Partial Dismissal, ¶¶ 14-22.

III. THE BOARD SHOULD DISREGARD OR STRIKE THOSE PORTIONS OF THE RESPONSE THAT ATTEMPT TO INTRODUCE NEW FACTS.

16. The People acknowledge that “[n]o permit shall be required under [Section 12(f)] and under Section 39(b) of this Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act, as now or hereafter amended, and regulations pursuant thereto.” Response, ¶ 24 (quoting 415 ILCS 5/12(f)). Federal regulations require any person who discharges or proposes to discharge to apply for an NPDES permit. *See* 40 C.F.R. §§ 122.21(a), 122.23(d)(1). In this context, discharge means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Similarly, the Act authorizes Illinois EPA to issue NPDES permits “for the discharge of contaminants from point sources into navigable waters, all as defined in the Federal Water Pollution Control Act....” 415 ILCS 5/39(b); *see also* Response, ¶ 25. However, as explained in Respondents’ Motion for Partial Dismissal, the People fail to allege facts in the Amended Complaint that establish the requisite discharge to navigable waters necessary to impose an obligation on Respondents to obtain NPDES permits.

17. The People state that facts have been pled that “show that there had been a discharge from the subject facility to a ditch or waterway that was either a water of the State itself and/or was a conveyance of surface flow to a water of the State and navigable water, that is, the State has pled facts showing hydrologic connections based on observation of surface water connections that would result in the discharge ultimately reaching covered waters.” Response, ¶ 26. Similarly, the People state that the pleadings were pled in “a manner consistent with existing case law for point source pollution

discharges to navigable waters that are subject to Section 311 and 402 jurisdiction under the Clean Water Act....” Response, ¶ 35.² However, the People fail to point to any facts alleged in the Amended Complaint establishing such discharges. In fact, the term “navigable waters” does not appear in the Amended Complaint. Thus, the People fail to allege discharges to navigable waters or to waters with the requisite nexus to such waters.

18. In the Response, the People attempt to correct deficiencies in the Amended Complaint by alleging new facts that were not originally pled in the Amended Complaint. For example, in the discussion of Count I, the People state that a discharge occurred to a ditch “that had a surface connection to waters of the State.” Response, ¶ 38. The People go on to state that “[a]s the inspector will testify, the livestock waste was in the north road ditch of Meadowlark Lane which drains to an unnamed tributary of the West Branch of Sugar Creek.” *Id.* Likewise, when discussing Count VI, the People state that a dry dam “has a surface connection to an unnamed tributary of the West Branch of Sugar Creek.” Response, ¶ 51. With regard to Count VII, the People conclude that “factual allegations included with this count clearly set forth a hydrologic surface connection” and that the system is “connected to covered waters.” Response, ¶ 59. The People state in regard to Count IX that “[t]he factual allegations included in this count clearly set forth the hydrologic connection that was receiving conveyance and ultimate covered water for the compost structure discharge and the burn pile discharges.” Response, ¶ 69.

² The People attempt to limit the holding in *Rapanos v. U.S.*, 547 U.S. 715 (2006), to the context of permitting under Section 404, 33 U.S.C. § 1344, when in fact *Rapanos* addresses the definition of navigable waters under 33 U.S.C. § 1362, which is also applicable to NPDES permitting.

19. These allegations regarding “surface connections,” “connections to covered water,” or “hydrologic connections,” were not stated in the Amended Complaint. As such, these allegations cannot be considered when determining the adequacy of the Amended Complaint. *See Curtis Casket Co.* at 804-805.

20. Respondents request that the Board disregard or strike all arguments and allegations in the Response that are based on new factual allegations in the Response, and require the People to present any new factual allegations in an amended complaint.

21. Despite introducing these additional allegations, the People still fail to allege discharges to navigable waters. *See* 40 C.F.R. § 122.23(d)(1). As such, the People fail to allege facts that, if true, establish an obligation for Respondents to obtain NPDES permits. For this reason, the allegations of Section 12(f), 415 ILCS 5/12(f), and 35 Ill. Admin. Code § 309.102(a) violations in the Amended Complaint should be dismissed. Motion for Partial Dismissal, ¶¶ 14-22.

WHEREFORE, for the reasons stated above and those stated in Respondents’ Motion for Partial Dismissal, the above Respondents respectfully request that the Board strike or disregard all improper regulatory references and new factual allegations in the People’s Response, and grant Respondents’ Motion for Partial Dismissal and dismiss the alleged violations of Section 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Admin. Code § 309.102(a) in Counts I, IV, V, VI, VII, and IX by Respondents HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, LTD., and LITTLE TIMBER, LLC, and provide such other relief as the Board deems appropriate.

Respectfully submitted,

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

Dated: October 21, 2010

Respondents.

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