

ILLINOIS POLLUTION CONTROL BOARD  
February 2, 2012

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 10-84  
) (Enforcement - Water)  
PROFESSIONAL SWINE MANAGEMENT, )  
LLC, HILLTOP VIEW LLC, WILDCAT )  
FARMS, LLC, HIGH-POWER PORK, LLC, )  
EAGLE POINT, LLC, LONE HOLLOW, )  
LLC, TIMBERLINE, LLC, PRAIRIE STATE )  
GILTS, LTD., NORTH FORK PORK, LLC, )  
and LITTLE TIMBER, LLC, )  
)  
Respondents. )

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

On April 15, 2010, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a nine-count complaint against Professional Swine Management, LLC, Hilltop View, LLC, Wildcat Farms, LLC, High-Power Pork, LLC, Eagle Point, LLC, Lone Hollow, LLC, Timberline, LLC, Prairie State Gilts, Ltd, North Fork Pork, LLC, Little Timber, LLC, and Twin Valley Pumping, Inc. On May 6, 2010, the Board issued an order accepting the complaint for hearing. On July 13, 2010, the People filed a motion for leave to file a nine-count first amended complaint, along with the amended complaint, which was accepted by the Board on August 5, 2010. The amended complaint voluntarily dismissed Twin Valley Pumping, Inc. (Twin Valley Pumping). North Fork Pork, LLC (North Fork Pork) has since settled.

In the nine-count first amended complaint, the People allege violations at livestock facilities located in several counties. Specifically, the People allege violations of Sections 12(a), 12(d), and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 12(f) (2008)) and Sections 302.203, 309.102(a), 501.403(a), and 620.301 of the Board's regulations (35 Ill. Adm. Code 302.203, 309.102(a), 501.403(a), 620.301) and the manner in which these provisions were violated.<sup>1</sup> The People seek an order requiring that respondents cease and desist from any further violations and pay the maximum statutory civil penalties.

On September 7, 2010, Hilltop View, LLC, Eagle Point Farms, LLC, Lone Hollow, LLC, Timberline, LLC, Prairie State Gilts, LTD and Little Timber LLC (collectively, the Owners) filed a motion for partial dismissal of the amended complaint. On September 10, 2010, Professional Swine Management, LLC (PSM), filed a motion to dismiss and/or strike the

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<sup>1</sup> The Board views as scrivener's error the first amended complaint's reference to Twin Valley in count VI's prayer for relief. Am. Comp. at 26.

amended complaint. For the reasons discussed below, the Board denies the Owners' motion for partial dismissal and denies PSM's motion to dismiss and/or strike.

### **PROCEDURAL HISTORY**

On April 15, 2010, the People filed a complaint (Compl.) against the respondents. On April 16, 2010, the People filed their certificate of service. On May 6, 2010, the Board accepted the complaint for hearing.

On June 1, 2010, North Fork Pork filed a motion for more time to attack the sufficiency of the pleading pursuant to Section 101.506 of the Board's regulations. On June 3, 2010, all the respondents except North Fork Pork and Twin Valley Pumping filed a motion for extension of time to attack the sufficiency of the pleading.

On July 13, 2010, the People filed a motion for leave to amend the complaint (Mot. Am. Compl.) and filed the first amended complaint (Am. Compl.) contemporaneously. Through the amended complaint, the People voluntarily dismissed claims against Twin Valley Pumping. On August 5, 2010, the Board granted the People's motion for leave and accepted the first amended complaint for hearing. Also on August 5, 2010, the Board provided that the respondents had until September 7, 2010 to file a motion attacking the sufficiency of the pleadings.

On September 7, 2010, the Owners filed a motion for partial dismissal. (Owners Mot.) On September 10, 2010, PSM filed a motion to dismiss and/or strike all allegations against PSM. (PSM Mot.).

On September 29, 2010, the People filed a response to the Owners' motion for partial dismissal (Owners Resp.) and PSM's motion to dismiss and/or strike (PSM Resp.). On October 1, 2010, the People filed a supplemental filing to the People's response to the motion to dismiss and/or strike. (Supp. PSM Resp.).

On October 21, 2010, the Owners filed a reply to the People's response to the Owners' motion for partial dismissal. (Owners Reply). Also on October 21, 2010, PSM filed a reply to the People's response to PSM's motion to dismiss and/or strike. (PSM Reply). On November 5, 2010, the People filed a combined sur-reply to the Owners' and PSM's respective replies. (Sur-reply).

On December 3, 2010, North Fork Pork filed a motion for partial dismissal and/or strike or sever claims. On December 17, 2010, the People filed a motion for extension of time in which to respond to North Fork Pork's motion and the hearing officer granted the request on December 21, 2010. On January 10, 2011, North Fork Pork filed a motion to withdraw the motion for partial dismissal.

On January 27, 2011, the People and North Fork Pork filed a stipulation and proposed settlement and a motion for relief from hearing requirements. On April 7, 2011, the Board

accepted and incorporated the stipulation and proposed settlement of the People and North Fork Pork.

On March 18, 2011, the Owners filed a motion for leave to supplement their reply to the People's response to the Owners' motion for partial dismissal. (Supp. Reply). On April 18, 2011, the People filed a motion for leave to file a response *instanter* along with a response to the Owners' supplemental filing (Supp. Reply Resp.).

### **PARTIES**

The People of the State of Illinois, *ex rel.* Lisa Madigan, the Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency (Agency or IEPA), bring this action against the respondents. Compl. at 2.

The IEPA is an agency of the State of Illinois created by the Illinois General Assembly and which is charged with the duty of enforcing the Illinois Environmental Protection Act. Compl. at 2.

Hilltop View, LLC (Hilltop), an Illinois limited liability corporation, owns a swine farrowing and gestation facility located in Oakland Township, Schuyler County. Compl. at 2. Professional Swine Management (PSM), an Illinois limited liability corporation, manages the site and all aspects of Hilltop's operation. *Id.* at 3.

Wildcat Farms, Inc. (Wildcat), an Illinois limited liability corporation, owns a swine farrowing and gestation facility located in Dallas City, Hancock County. Compl. at 7. PSM manages Wildcat's operations and the physical site. *Id.* at 8.

High-Power Pork, Inc. (High-Power Pork), an Illinois limited liability corporation, owns a swine farrowing and gestation facility located near LaPrairie, Adams County. Compl. at 13. PSM manages High-Power's operations and the physical site. *Id.*

Eagle Point, LLC (Eagle Point), an Illinois limited liability corporation, owns a farrow-to-wean facility in Vermont Township, Fulton County. Compl. at 16-17. PSM manages Eagle Point's operations and the physical site. *Id.* at 17.

Lone Hollow, Inc. (Lone Hollow), an Illinois limited liability corporation, owns a farrow-to-wean swine operation in Augusta Township, Hancock County. Compl. at 20. PSM manages Lone Hollow's operations and the physical site. *Id.* at 21.

Timberline, Inc. (Timberline), an Illinois limited liability corporation, owns a breed-to-farrow total confinement swine operation located east of Littleton in Schuyler County. Compl. at 24-25. PSM manages Timberline's operations and the physical site. *Id.* at 25.

Prairie State Gilts, Ltd. (Prairie State Gilts), an Illinois corporation, owns a sow breeding and gestation operation in Schuyler County. Compl. at 29. PSM manages Prairie State's operations and the physical site. *Id.* at 30.

North Fork Pork, LLC (North Fork Pork), an Illinois corporation, owns a sow, farrow to wean, total confinement swine facility located in St. Albans Township, Hancock County. Compl. at 34. PSM manages North Fork's operations and the physical site. *Id.* North Fork Pork is no longer a party to this action, but is included in relation to allegations against PSM.

Little Timber, LLC (Little Timber), an Illinois limited liability corporation, owns a sow, farrow to wean, total confinement swine operation near Carthage, Hancock County. Compl. at 39. PSM manages Little Timber's operations and the physical site. *Id.* at 40.

### **PROCEDURAL ISSUES**

The Board initially addresses procedural issues and motions with respect to the following: the People's motion for leave to file *instanter* a supplemental filing to the response to the motion to dismiss and/or strike the amended complaint; PSM's October 21, 2010 reply to the People's response to the motion to dismiss and/or strike amended complaint; the Owners' October 21, 2010 reply to the People's response to the motion for partial dismissal; the People's November 5, 2010 combined surr-reply; the Owners' March 18, 2011 motion to supplement the reply to the motion for partial dismissal; and the People's April 18, 2011 motion for leave to file a response *instanter* to the Owners' supplemental filing;

As noted in Section 101.500(e), "a motion for leave to file a reply must be filed with the Board within 14 days after service of the response." 415 ILCS 101.500(e). Furthermore, the moving party "will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." *Id.* Not all of the documents noted above were accompanied by motions for leave to file. However, in the interest of administrative efficiency and to prevent material prejudice resulting against any of the parties, the Board accepts the filings and considers the filings in making its final determination.

### **SUMMARY OF THE PEOPLE'S COMPLAINT**

The amended complaint contained nine counts, each count pertaining to a separate facility. Each count is summarized below.

#### **Count I – Hilltop View**

Count I lists the storm water pollution violations of Hilltop View in Schuyler County and PSM. Am. Compl. at 2. Hilltop owns a swine farrowing and gestation facility on Meadowlark Road inside the Sugar Creek watershed. *Id.* The facility is capable of holding several thousand sows. *Id.* At the time of the People's complaint, no construction had commenced and no swine were present at the site. *Id.*

On June 16, 2006, an IEPA Field Operations inspector inspected the facility. Am. Compl. at 3. At the time, no swine were present and no confinement buildings had been constructed. *Id.* However, earthwork had commenced. *Id.* Approximately 15 to 20 acres had been altered for the swine confinement buildings. *Id.* A raised parking area had also been constructed. *Id.* The inspector found that no erosion controls were in place at the site, though excavation had recently occurred. *Id.* The inspector did not observe any surface runoff. *Id.*

Also on June 16, 2006, the inspector observed a concrete batch plant, stockpiled concrete materials, an eroded channel near the stock pile and various semi-trucks delivering concrete materials to the site. Am. Compl. at 3. At the time, Hilltop and PSM did not have a National Pollution Discharge Elimination System (NPDES) Stormwater Permit. *Id.*

On June 20, 2006, the Agency issued the facility a Violation Notice (VN) for storm water violations and failure to obtain a NPDES storm water permit prior to construction activity based on the June 16, 2006 inspection. Am. Compl. On June 21, 2006, Hilltop sent the Agency a Notice of Intent to attain a General permit to Discharge Storm Water for construction Site Activities (NOI), and the Agency issued NPDES coverage for the site on July 21, 2006. *Id.* at 4.

On August 21, 2006, Joseph Connor, the site manager, responded to the VN. Mr. Connor stated that the excavation was halted until a NPDES permit was in place and that a NPDES permit was now in place. Am. Compl. at 4. Mr. Connor's response was a proposed Compliance Commitment Agreement. In letters dated September 7, 2006, the Agency rejected the Compliance Commitment Agreement "due to the nature and seriousness of the violations" committed by PSM and Hilltop. *Id.*

On November 15, 2006, more inspectors performed a storm water inspection at Hilltop. The inspectors reported that minimal earthwork was underway and that silt fencing had been installed to minimize storm water erosion. Am. Compl. at 4. The inspectors suggested that more silt fence was needed and some existing fencing needed to be reset. *Id.*

The Agency sent PSM a Notice of Intent to Pursue Legal Action (NIPLA) on April 23, 2007 and sent a NIPLA to Hilltop on January 14, 2008. Am. Compl. at 4. Hilltop and the Agency held a NIPLA meeting together on February 6, 2008. *Id.*

On May 28, 2009, an Agency inspector observed runoff containing livestock waste from a land application field. Am. Compl. at 4. The runoff was flowing into the north ditch of Meadowlark Lane and the inspector reasoned that the ditch had the potential to discharge into the waters of the State in the event of precipitation. *Id.*

The People reason that Hilltop and PSM caused or allowed the discharge of livestock waste runoff from a land application into a roadside ditch in such a manner as to threaten water pollution. Am. Compl. at 6. Therefore, the People allege that Hilltop and PSM have violated Section 12(d) of the Act.

The People state that Sugar Creek and its unnamed tributaries are “waters” of the State as defined in Section 3.550 of the Act 415 ILCS 5/3.550. Am. Compl. at 4. The People reason that PSM and Hilltop caused, threatening or allowed the discharge of sediments and eroded soils upon the land and into the waters of the State, thereby altering the physical or chemical properties of the waters and likely creating a nuisance and, therefore, PSM and Hilltop have caused or tended to cause water pollution in Illinois. *Id.* at 5-6.

The People contend that PSM and Hilltop have violated Sections 12(a) and 12(f) of the Act, 415 ILCS 5/12(a), (f), and 35 Ill. Adm. Code 309.102(a). Am. Compl. at 6. The People request that the Board enter an order against Hilltop and PSM authorizing a hearing for this case at which PSM and Hilltop will be required to answer the allegations, finding that PSM and Hilltop have violated the Act and regulations as alleged by the People, ordering PSM and Hilltop to cease and desist from any further violations of the Act or regulations. The People further request that the Board assess against PSM and Hilltop a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 6-7.

### **Count II – Wildcat Farms**

Count II regards the water pollution violations of Wildcat Farms in Hancock County. Am. Compl. at 7. Wildcat Farms is an Illinois limited liability corporation, registered and in good standing to do business in Illinois. *Id.* Wildcat owns a swine farrowing and gestation facility with a design capacity of 6,000 sows. *Id.* It is located at 2558 North County Road 2150, Dallas City, Hancock County. *Id.* Wildcat Farms is within the Wildcat Creek watershed. *Id.* PSM manages Wildcat’s operations and physical site. *Id.* at 8.

The Wildcat facility contains five buildings that house swine with below ground, four foot deep waste storage pits. Am. Compl. at 8. The facility also has two above-ground storage tanks. *Id.* The manure is pumped underground through sewer lines. *Id.*

The People contend that some of the drain pipe at Wildcat was damaged due to a mowing accident, which caused manure to flow out of the pipe and ultimately into an unnamed tributary to the Wildcat Creek. Am. Compl. at 10. On September 23, 2008, the Agency conducted an inspection of the Wildcat facility, which revealed an accumulation of swine manure in various locations along the drainage path at the facility. *Id.* The inspector collected samples that revealed an accumulation of liquid in the flow path of the manure release and black bottom deposits along the drainage channel. *Id.* Analysis proved that all the samples had high levels of fecal coliform. *Id.*

On December 16, 2008, the Agency sent a VN to Wildcat Farms and PSM for the water violations of September 18, 2008. Am. Compl. at 11. The Agency did not receive a response to either VN. *Id.* On April 9, 2009, the Agency sent Wildcat Farms and PSM NIPLAs, and Wildcat and PSM requested a meeting in response to the NIPLA. *Id.*

The People contend in Count II that Wildcat and PSM have caused or allowed the discharge of contaminants into the waters of the State that will or will be likely to create a nuisance. Am. Compl. at 11. The People claim that Wildcat and PSM violated Sections 12(a), 12(d), and 12(f) of the Act, and Sections 302.203 and 309.102(a) of the Board's regulations. *Id.* at 11-12.

The People request that the Board enter an order against Wildcat and PSM authorizing a hearing in this matter during which Wildcat and PSM will be required to answer the allegations, finding that Wildcat and PSM violated the Act and regulations as alleged, ordering Wildcat and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 12. The People further request that the Board assess against Wildcat and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 12.

### **Count III – High-Power Pork**

The People's third count regards the water pollution violations of High-Power Pork in Adams County. Am. Compl. at 13. High-Power Pork owns a swine farrowing and gestation facility designed to hold 6,000 sows. *Id.* The High-Power Pork site is in the Cedar Creek and LaMoine River watershed. *Id.* PSM manages High-Power Pork's operations and the physical site. *Id.*

High-Power Pork's facility contains five buildings that house swine. Am. Compl. at 13. Below each building are two-foot-deep waste storage pits. *Id.* There are also two above-ground storage tanks that receive the manure through underground sewers. *Id.* at 13-14.

The People allege that on November 10, 2008, swine waste discharged from High-Power Pork's facility due to a break or leak in a PVC pipeline on the way to the above-ground manure storage tanks. Am. Compl. at 14. The leak released approximately 90,000 gallons of liquid swine waste, which flowed down a grassed waterway and into Cedar Creek and South Branch Cedar Creek, causing a fish kill. *Id.* Neighbors of the facility observed the discoloration and turbidity in Cedar Creek, which they traced to High-Power Pork. *Id.*

The People contend that High-Power Pork and PSM violated Sections 12(a), 12(d), and 12(f) of the Act and Sections 302.203 and 309.102(a) of the Board's regulations. Am. Compl. at 14-15.

The People request that the Board enter an order against High-Power Pork and PSM authorizing a hearing in this matter during which High-Power Pork and PSM will be required to answer the allegations, finding that High-Power Pork and PSM violated the Act and regulations as alleged and ordering High-Power Pork and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 15-16. The People further request that the Board assess against High-Power Pork and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each

day during which each such violation continued thereafter and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 15-16.

#### **Count IV – Eagle Point Farms**

Count IV regards the water pollution violations of Eagle Point in Fulton County. Am. Compl. at 16. Eagle Point owns a farrow-to-wean facility with a design capacity of 6,500 sows. *Id.* at 17. The drainage from Eagle Point's facility flows directly into several ravines into final cut strip mine lakes. *Id.* PSM manages Eagle Point's operations and the physical site. *Id.*

Eagle Point's facility consists of five total confinement buildings to house swine. Am. Compl. at 17. The isolation building has underground waste storage pits, from which the waste is diverted to larger pits below the gilt grow-finish building. *Id.* The farrowing building has underground storage pits that also divert waste to larger pits beneath the gestation buildings. *Id.*

On May 10, 2007, the Agency inspected the Eagle Point facility. Am. Compl. at 17. The inspector observed discharge from the north gestation building perimeter tile onto the land in a manner in which the discharge drained into a strip mine lake. *Id.* The discharge was cloudy and smelled of livestock waste. *Id.* Analysis of a sample revealed a fecal coliform level of 35,000 per 100 milliliters. *Id.* at 17-18. The inspector also sampled the discharge from the private sewage disposal system, which indicated a fecal coliform level of 56,000 per 100 ml. *Id.* at 18.

The People allege that Eagle Point and PSM have violated Sections 12(a), 12(d) and 12(f) of the Act and Section 309.102(a) of the Board's regulations. Am. Compl. at 18-19.

The People request that the Board enter an order against Eagle Point and PSM authorizing a hearing in this matter during which Eagle Point and PSM will be required to answer the allegations, finding that Eagle Point and PSM violated the Act and regulations as alleged and ordering Eagle Point and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 15-16. The People further request that the Board assess against Eagle Point and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 15-16.

#### **Count V – Lone Hollow**

Count V regards the water pollution violations of Lone Hollow in Hancock County. Am. Compl. at 20. Lone Hollow owns a farrow to wean swine operation. *Id.* At the time of the September 25, 2007 Agency inspection, Lone Hollow maintained a sow herd of 5,650. *Id.* The facility is located at 539 N. County Road 2600, Bowen, Hancock County. *Id.* The facility is located within the watershed of Panther Creek, which is a tributary to Bronson Creek, which is a tributary to the LaMoine River. *Id.*

PSM manages Lone Hollow's operations and the physical site. Am. Compl. at 21.



Lone Hollow's facility consists of five total confinement buildings to house swine. Am. Compl. at 21. The waste is stored in pits under the building, and the liquid manure is hauled away by a contract hauler who applies the manure to cropland in the immediate vicinity. *Id.* The facility also contains a 10-bay compost structure for swine mortality. *Id.* At the time of the September 27, 2007 inspection, the structure was not covered, and the inspector observed leachate from the compost material on the north side of the structure. *Id.*

On September 13, 2007, a swine manure release occurred at the Lone Hollow facility. Am. Compl. at 21. Liquid swine manure drained out of a pit drainage pipe and flowed southeast across the gravel drive and into the waterway east of the swine confinement buildings. *Id.* The facility employees discovered the release and stopped the flow where it entered the waterway using compost from the mortality area; they also constructed a dam downstream of the release flow. *Id.*

An Agency inspector advised the facility to recover the released wastewater and compost. Am. Compl. at 21. On September 25, 2007, the Agency inspector conducted a follow-up inspection and collected samples from the facility. *Id.* Analysis of the samples revealed high levels of fecal coliform. *Id.* at 2.

The People contend that Lone Hollow and PSM have violated Sections 12(a), 12(d) and 12(f) of the Act and 309.102(a) of the Board's regulations. Am. Compl. at 22-23.

The People request that the Board enter an order against Lone Hollow and PSM authorizing a hearing in this matter during which Lone Hollow and PSM will be required to answer the allegations, finding that Lone Hollow and PSM violated the Act and regulations as alleged and ordering Lone Hollow and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 23-24. The People further request that the Board assess against Lone Hollow and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter, and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 23-24.

### **Count VI - Timberline**

Count VI regards the water pollution violations of Timberline in Schuyler County. Am. Compl. at 24. Timberline owns a breed to farrow total confinement swine operation with three buildings. *Id.* Two gestation buildings have underground deep waste pits beneath them and the farrowing building has a shallow waste pit beneath it which drains into the deep pit of the east gestation building. *Id.* at 24-25. Timberline is located within the watershed of the West Branch Sugar Creek. *Id.* at 25.

PSM manages Timberline's operations and the physical site. Am. Compl. at 25.

On September 11, 2008, the Agency conducted an inspection of the Timberline facility and the inspector observed a discharge of leachate from the facility's dead animal composting structure. Am. Compl. at 26. The inspector saw that the liquid was exiting the unroofed composting structure and entering a dry dam that discharges to an unnamed tributary of the West Branch of Sugar Creek. *Id.* Timberline's environmental specialist informed the Agency inspector that the leachate discharge had occurred during recent heavy rainfalls. *Id.* The facility's employees had attempted to prevent the leachate from entering the dry dam but their efforts were not adequate. *Id.*

In the evening of April 22, 2009, a fire broke out and was reported by a passing motorist. Am. Compl. at 27. The facility and the livestock were mostly destroyed. *Id.* The Agency inspector reviewed the handling of livestock waste and solid waste remaining after the fire and observed no waste releases. *Id.*

The People allege that Timberline and PSM violated Sections 12(a), 12(d), and 12(f) of the Act and Section 309.102(a) of the Board's regulations. Am. Compl. at 28.

The People request that the Board enter an order against Timberline and PSM authorizing a hearing in this matter during which Timberline and PSM will be required to answer the allegations, finding that Timberline and PSM violated the Act and regulations as alleged and ordering Timberline and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 28-29. The People further request that the Board assess against Timberline and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter, and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 28-29.

### **Count VII – Prairie State Gilts**

Count VII regards the water pollution violations of Prairie State Gilts in Schuyler County. Am. Compl. at 29. Prairie State Gilts owns a sow breeding and gestation operation with approximately 4,500 swine. *Id.* PSM manages Prairie State Gilts' operations and physical site. *Id.* at 30.

Prairie State Gilts' waste handling system consists of shallow pits under each confinement building except one, which has a deep pit. Am. Compl. at 30. The waste from the pits is pumped into a single-celled lagoon. *Id.*

The facility also contains two nursery buildings. Am. Compl. at 30. The waste from the nursery buildings drains to a reception pit and is then pumped into the lagoon through an underground transfer line. *Id.* Most of the transfer lines are underground except for two locations where they extend above ground. *Id.* A hayfield exists between the reception pit and the lagoon. *Id.*

The People allege that one of the above ground pipes was either knocked over or mowed over during hay baling operations, as the above ground pipes were completely exposed. Am. Compl. at 30. On July 7, 2008, livestock waste was being sent to the lagoon and the waste exited the pipeline at the damaged above ground pipe rather than the lagoon. *Id.* at 31. The waste flowed into an unnamed tributary of one of the facility's on-site ponds used for watering swine. *Id.* That pond discharges into an adjacent pond to the east and the east pond discharges into an unnamed tributary of Honey Branch. *Id.*

On July 24, 2008, the Agency inspected Prairie State Gilts' site in response to the reported release. Am. Compl. at 31. The inspector observed a rivulet of swine waste entering the receiving pond, which was covered with algae and emitted the odor of swine waste. *Id.* The facility personnel informed the inspector that Prairie State Gilts intended to pump the receiving pond and land-apply the contents to wheat. *Id.* On October 30, 2008, nothing had been pumped from the pond. *Id.*

The People allege that Prairie State Gilts and PSM violated Sections 12(a), 12(d) and 12(f) of the Act and Sections 302.203 and 309.102(a) of the Board's regulations. Am. Compl. at 31-33.

The People request that the Board enter an order against Prairie State Gilts and PSM authorizing a hearing in this matter during which Prairie State Gilts and PSM will be required to answer the allegations, finding that Prairie State Gilts and PSM violated the Act and regulations as alleged and ordering Prairie State Gilts and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 33. The People also request that the Board assess against Prairie State Gilts and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 33.

### **Count VIII – North Fork Pork**

The Board again notes that North Fork Pork is no longer a party to this case, but includes the summary as it pertains to ongoing allegations against PSM.

Count VIII regards the water pollution violations of North Fork Pork in Hancock County. Am. Compl. at 33. North Fork pork owns a 6,920 sow farrow to wean total confinement swine facility. *Id.* at 34. There are a total of 15,900 animals at the facility. *Id.* The facility itself consists of two breeding/gestation barns, a farrowing house, and a gilt developer building. The barns are underlain with waste pits, the developer with another deep waste pit and the farrowing house with a pit that ultimately drains to the gestation barn pits. *Id.*

PSM manages North Fork Pork's operations and physical site. Am. Compl. at 34. Twin Valley performs contract livestock waste land application for North Fork Pork. *Id.* at 35.

On December 3, 2003, the Agency inspected the North Fork Pork facility. Am. Compl. at 35. There was a discharge from a perimeter tile which was discharging into a ravine in the terraced field south of the facility. *Id.* After a sample of the discharge was analyzed, the Illinois Department of Agriculture and the Agency requested monthly samples be obtained for the subject tile. *Id.*

On May 25, 2004, the Agency conducted a follow-up inspection. Am. Compl. at 35. The inspector found that North Fork Pork and PSM had installed a way to pump the tile discharge back to the building waste pit and so the discharge into the ravine had been stopped. *Id.* The sludge deposits present in the first inspection had been cleaned up. *Id.*

On August 12, 2004, the Agency conducted another inspection in response to a reported manure spill. Am. Compl. at 36. A waste application hose had leaked and the manure was released into cropland about 1.5 miles from the facility. *Id.* The Agency inspector instructed North Fork Pork and PSM's personnel to clean up the waste material and land-apply it. *Id.*

On December 19, 2007, the Agency conducted another inspection, during which the inspector observed a flow of liquid draining between the swine farrowing building and the second gestation building. Am. Compl. at 36. The liquid smelled of diesel fuel and was covered in a sheen of oil. *Id.* The liquid drained into a pond on the north side of the property. *Id.*

The People allege that North Fork Pork and PSM have violated Sections 12(a), 12(d) and 12(f) of the Act and Section 309.102(a) of the Board's regulations. Am. Compl. at 36-38.

The People request that the Board enter an order against North Fork Pork and PSM authorizing a hearing in this matter during which North Fork Pork and PSM will be required to answer the allegations, finding that North Fork Pork and PSM violated the Act and regulations as alleged and ordering North Fork Pork and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 38. The People further request that the Board assess against North Fork Pork and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.* at 38.

### **Count IX – Little Timber**

Count IX regards the water pollution violations of Little Timber in Hancock County. Am. Compl. at 39. Little Timber owns a 2600 sow farrow-to-wean total confinement swine operation. *Id.* The facility is located in the Middle Creek watershed, which is a tributary to the LaMoine River. *Id.* The facility farrows approximately 1,200 pigs per week and there are approximately 3,000 pigs at all times at the sites. *Id.* There are four total confinement buildings plus one office. *Id.* The buildings include farrowing, breeding, gestation and gilt development units. *Id.* The buildings have shallow manure storage pits which drain into a single cell anaerobic lagoon. *Id.*

PSM manages Little Timber's operations and the physical site. Am. Compl. at 40.

On June 1, 2004, the Agency conducted an inspection of Little Timber. Am. Compl. at 40. The inspector observed that the lagoon had freeboard of approximately three to four feet, and the inspector advised the general manager of PSM to irrigate the lagoon soon to reduce hydraulic pressure on the lagoon. *Id.* The lagoons also contained tall weed growth, and the inspector advised the manager to mow the berms. *Id.* The inspector also observed dark leachate and surface runoff draining into a ditch of the gravel access lane and then flowing into a waterway which is a tributary of Middle Creek. *Id.* at 41. Further, the compost structure contained numerous bones, bone fragments and other skeletal remains near the compost building where it had been damaged. *Id.* The compost area was also not protected from precipitation. *Id.* The Agency inspector collected various samples of the drainages during that inspection. *Id.*

On June 23, 2004, the Agency sent a Noncompliance Advisory Letter to PSM regarding the observations from the June 1, 2004 inspection. Am. Compl. at 42.

On February 6, 2007 and on February 8, 2007, Little Timber and PSM reported the release of waste from their wastewater handling structures. Am. Compl. at 42. An inlet line entering the lagoon froze and wastewater was discharged into a ditch on the north side of the lagoon. *Id.* Little Timber and PSM constricted the spill and land-applied the spilled liquid. *Id.*

On February 21, 2007, the Agency conducted an inspection in response to the reported releases. Am. Compl. at 42. The inspector observed water running along the drainage path into the downstream waterway, which left brown manure residue in its path. *Id.* The inspector advised Little Timber and PSM to get the dirty snow and frozen wastewater into the lagoon. *Id.* The inspector observed that the flow in the drainage ditch was brown and turbid and that the ditch was discharging into the waterway in the adjacent field because the waterway was overflowing the dam. *Id.* at 43.

On August 24, 2007, the Agency conducted an inspection of the Little Timber facility and the inspector observed that several swine had been burned near the gravel road. Am. Compl. at 43. The skulls and bones still remained at the site and surface water flowed through the area and drained into a tributary of Middle Creek. *Id.* The inspector collected samples of the surface water. *Id.* The inspector also observed surface runoff draining from the mortality compost structure. *Id.*

The People allege that Little Timber and PSM have violated Sections 12(a), 12(d) and 12(f) and Sections 620.301, 302.203 and 309.102(a) of the Board's regulations. Am. Compl. at 43-44.

The People request that the Board enter an order against Little Timber and PSM authorizing a hearing in this matter during which the Little Timber and PSM will be required to answer the allegations, finding that Little Timber and PSM violated the Act and regulations as alleged and ordering Little Timber and PSM to cease and desist from any further violations of the Act and regulations. Am. Compl. at 45. The People further request that the Board assess

against Little Timber and PSM a civil penalty of fifty thousand dollars for each non-NPDES permit violation of the Act, an additional penalty of ten thousand dollars for each day during which each such violation continued thereafter, and a civil penalty of ten thousand dollars for each NPDES permit violation. *Id.*

### **THE OWNERS' MOTION FOR PARTIAL DISMISSAL**

On September 7, 2010, Respondents Hilltop View, Eagle Point, Lone Hollow, Timberline, Prairie State Gilts, and Little Timber (the Owners) filed a motion for partial dismissal.

First, the Owners address the People's allegation that the Owners violated Section 12(f) of the Act by causing or allowing livestock wastewater to discharge into the waters of the State without a NPDES permit. Owners Mot. at 1. The Owners assert that the People do not have sufficient facts to demonstrate that the Owners were required to obtain NPDES permits. *Id.* at 2. Additionally, the Owners claim that the People have not alleged sufficient facts to show that the Owners' facilities discharge into navigable waters of the State in any way. *Id.*

The Owners assert that the standard of review is based on a sufficiency of pleading and that all well-pled facts must be taken as true. Owners Mot. at 2. Further, the Owners state that the Board's regulations allow motions to dismiss based on insufficiency of pleading, which should be granted "where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested." *Id.*, citing Casanave v. Amoco Oil Co., PCB No. 97-84 at 60-7 (Nov. 20, 1997).

The Owners argue that, to prove a violation of Section 12(f), the People need to prove that the respondents needed to obtain NPDES permits. Owners Mot. at 3. The Owners then allege that the People do not have sufficient facts to prove that they needed to obtain a general NPDES permit for operating Concentrated Animal Feeding Operations (CAFO) because the People did not prove that the Owners discharged, discharge or will discharge into the navigable waters of the State. *Id.* at 4. The Owners acknowledge that any person who discharges or proposes to discharge has a general duty to obtain a NPDES permit, but the People have not alleged sufficient facts establishing that the facilities at issue have discharged, discharge or propose to discharge to waters of the state. *Id.*

The Owners then summarize the history of the "CAFO Rule" and ultimately conclude that there is no universal duty to obtain a permit or that one past discharge means that a CAFO must obtain a permit. Owners Mot. at 4-6, citing 40 CFR § 122.21(a); 40 CFR § 122.23(d)(1); 68 Fed. Reg. 7176-7274 (Feb. 12, 2003) ("the CAFO Rule"); Waterkeeper Alliance v. EPA, 399 F.3d 486 (2nd Cir. 2005); 73 Fed. Reg. 70418 (Nov. 20, 2008) ("the 2008 CAFO Rule"). Therefore, the Owners assert that Counts I, IV, V, VI, VII and IX do not allege facts that establish that the facilities will ever discharge in such a way as to require an NPDES permit. *Id.* at 6.

The Owners then argue that the People failed to allege facts sufficient to demonstrate that the respondents discharged, discharge or propose to discharge into the waters of the States. Owners Mot. at 6. The Owners contend that the People's allegation that they violated Section 12(f) is insufficient. *Id.* The Owners include a summary of "navigable waters" and use the "significant nexus test" to state that a navigable water or wetland must possess a significant nexus to a navigable-in-fact water. *Id.* at 8, citing Rapanos v. U.S., 547 U.S. 715 (2006); U.S. v. Gerke Excavating, Inc., 464 F.3d 723, 724, 729 (7th Cir. 2006); U.S. v. Lippold, 2007 U.S. Dist. LEXIS 80513 at 15 (C.D. Ill. 2007).

Next, the Owners lists the People's various facility-specific allegations. In Count I, the People allege that Hilltop is within the Sugar Creek watershed and that livestock waste runoff was present on the north ditch of Meadowlark Lane with the potential to discharge into the waters of the State in the event of precipitation. Owners Mot. at 8, citing Am. Compl. at 4. In Count IV, the People allege that Eagle Point's drainage flows into final cut strip mine lakes. *Id.* at 8, citing Am. Compl. at 16. In Count V, the People allege that Lone Hollow is within the Panther Creek watershed, which is a tributary to Bronson Creek which flows into the LaMoine River. *Id.* at 8, citing Am. Compl. at 19. Further, the People allege that manure flowed across a gravel lot to a waterway that is a tributary to Panther Creek and that a secondary discharge occurred from the perimeter tile for the isolation confinement building. *Id.* at 8, citing Am. Compl. at 20-22. In Count VI, the People allege that Timberline's facility is within West Branch Sugar Creek's watershed and that a discharge entered a dry dam which discharges into an unnamed tributary of the West Branch of Sugar Creek, but the Owners contend that the People do not allege sufficient facts to prove that the discharge entered the waters of the State. *Id.* at 9, citing Am. Compl. at 24. In Count VII, the People allege a discharge from Prairie State Gilts into a hay field, resulting in a discharge to an unnamed tributary to one of the facility's on-site ponds, which discharges into an adjacent pond, which discharges into an unnamed tributary of Honey Branch. *Id.* at 9, citing Am. Compl. at 29. The Owners again contend that the People do not allege a discharge to the waters of the United States. *Id.* at 9. In Count IX, the People allege that the Little Timber facility is in the Middle Creek watershed, which is a tributary to the LaMoine River. *Id.* at 9, citing Am. Compl. at 36. The People allege that the runoff with manure traces drained into a ditch, which connects to a waterway, which drains southeast and is a tributary to Middle Creek. *Id.* at 9, citing Am. Compl. at 38, 40. The People also allege that surface water flows through a burn area and into a tributary of Middle Creek, which flows into the LaMoine River. *Id.* at 9, citing Am. Compl. at 40. The Owners contend that the People did not allege a discharge into the States' waters. *Id.* at 10.

The Owners contend that the common element to each individual count above is that the People failed to allege discharges to the waters of the United States and that the amended complaint failed to mention the waters of the United States or demonstrate a significant nexus to navigable-in-fact water. Owners Mot. at 10. Thus, the Owners argue that the People failed to allege a basis for imposing obligations to obtain NPDES permits for the facilities at the time of the violations, specifically Section 12(f) of the Act. *Id.* The Owners conclude their motion for partial dismissal by stating that the People failed to properly allege violations of Section 12(f) of the Act and Section 309.102(a) of the Board's regulations in Counts I, IV, V, VI, VII and IX. *Id.* Therefore, The Owners move the Board to dismiss the alleged violations of Section 12(f) of the

Act and Section 309.102(a) of the Board's regulations in Counts I, IV, V, VI, VII and IX. *Id.* at 11.

**COMPLAINANT'S RESPONSE TO THE OWNERS'**  
**MOTION FOR PARTIAL DISMISSAL**

On September 29, 2010, the People filed a response to the Owners' Motion for Partial Dismissal.

First, the People set out the applicable law. Owners Resp. at 2. The People include Sections 502.101, 502.102 and 502.103 of the Board's regulations and Sections 122.23(b)(2), 122.23(b)(4), 122.23(a), 122.23(e) and 122.23(f) of the State's regulations. *Id.* at 2-3. The People use these regulations to argue that the NPDES permitting protocol and pollution discharges are linked and that a permit must be in place if a respondent threatens, causes or allows a discharge to occur. *Id.* at 4. The People contend that the Owners were under an obligation to obtain a permit before they caused, allowed or threatened a discharge. *Id.*

The People criticize the Owners' argument that their respective facilities were subject to the CAFO rules and were subject to a case-by-case evaluation regarding the potential to discharge. Owners Resp. at 4. The People argue that the facilities did not take the necessary step to allow for that evaluation. *Id.* Further, the State's allegations demonstrate that the State does not agree that those facilities were designed, constructed, operated and maintained so as not to discharge. *Id.*

Next, the People criticize the Owners' argument that Section 12(f) only applies to "navigable waters" of the State. Owners Resp. at 5. The People include language from Section 12(f) that specifically defines "waters" as being all accumulations of water which are in, flow through or border the State. *Id.*, citing 415 ILCS 5/3.550. The People cite case law to demonstrate that "navigable waters" is an arbitrary standard for pollution and that "waters of the State" means all waters located within the State. *Id.* at 5-6, citing Tri-County Landfill v. IPCB, 41 Ill. App. 3d 249, 253-254 (2nd Dist. 1976). The People cite further case law to reiterate the State's authority to address the broad range of pollution issues. *Id.* at 7, citing S.D. Warren v. Maine Bd. of Env. Protection, 126 S. Ct. 1843 (May 15, 2006).

The People argue that the facts they plead show that there have been discharges from the respective facilities to a ditch or waterway that was either a water of the State itself or was hydrologically connected to a water of the State. Owners Resp. at 7-8. However, the People state that courts have held that streams flowing into navigable rivers are waters of the United States. *Id.* at 8, citing United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325 (6th Cir. 1974). The People refute the Owners' reliance on Rapanos, stating that Rapanos was decided in the context of the Section 404 permitting process, not the Section 402 NPDES permitting program; the plurality in Rapanos distinguished its finding from standards applicable in Section 402 jurisdictional determinations. Owners Resp. at 8-9. The People also repudiate the Owners' reliance on U.S. v. Gerke Excavating, Inc., 464 F.3d 723, 724(7th Cir. 2006), saying that nothing in Gerke is relevant to a State's authority in the implementation of a Section 402 NPDES



permitting program and violation thereof. Resp. at 11. The People disapprove of the Owners' use of Justice Kennedy's writing in a ruling issued on a motion to dismiss in U.S. v. Lippold, C.D. Ill. 2007 because it is not part of a final decision. *Id.*

The People argue that the counts pled in the amended complaint were pled pursuant to existing case law for point source pollutional discharges to navigable waters subject to Sections 311 and 402 jurisdiction under the Clean Water Act (CWA) and the State's NPDES permitting program. Owners Resp. at 13, citing 33 U.S.C. §§ 1311 and 1342.

The People then turn to a count by count defense of the amended complaint.

### **Count I – Hilltop View**

As alleged in the Amended complaint, an Agency inspector observed runoff containing livestock waste from a land application field associated with Hilltop's facility. Owners Resp. at 12. That runoff had the potential to discharge from the ditch into the waters of the State in the event of precipitation, according to the inspector's observation. *Id.*

Second, as alleged in the Amended complaint, the land application discharge was to a ditch with a surface connection to the waters of the State. Owners Resp. at 12. The inspector will testify that the livestock waste was in the north road ditch of Meadowlark Lane, which drains into an unnamed tributary of the West Branch of Sugar Creek. *Id.*

### **Count IV – Eagle Point Farms**

The People reiterate that drainage from Eagle Point's facility flows directly through several ravines into final cut strip mine lakes. Owners Resp. at 13. On May 10, 2007, as alleged in the Amended complaint, the Agency inspector observed discharge from the north gestation building perimeter tile onto the land so that the discharge drained into a strip mine lake. *Id.* Analysis of a sample of the discharge indicated a fecal coliform level of 35,000 per 100 milliliters. *Id.* The inspector also took a sample of a discharge from the facility's private sewage disposal system, which revealed a fecal coliform level of 56,000 per 100 ml. *Id.* As noted in the allegations, the perimeter tile discharge was to a drainage formation that flowed into a strip mine lake, and the septic tank discharge was through a pipe into a lake. *Id.*

### **Count V – Lone Hollow**

As alleged in the Amended complaint, a swine manure release occurred at Lone Hollow on September 13, 2007. Owners Resp. at 13. Liquid swine manure drained across the drive and into a waterway east of the swine confinement buildings. *Id.* at 14. In response to the release, an Agency inspector advised the facility to recover the released materials as soon as possible. *Id.* During a follow-up inspection on September 25, 2007, the Agency inspector took many different samples from various locations at the facility and they all had high levels of fecal coliform and ammonia. *Id.* at 14-15.

The People contend that the wastewater from a discharge was not cleaned up, despite the inspector's explicit instructions to do so. Owners Resp. at 15. The People also contend that on the September 24, 2007 inspection, there were discharges from perimeter tiles and that Lone Hollow is located in the Panther Creek watershed, which is ultimately a tributary to the LaMoine River. *Id.*

#### **Count VI - Timberline**

As alleged in the Amended complaint, an Agency inspector inspected Timberline's facility on September 11, 2008. Owners Resp. at 15. The inspector observed a discharge of leachate, which entered a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek. *Id.* The People state that the factual allegations include a specific allegation of a hydrological connection to covered waters. *Id.*

#### **Count VII – Prairie State Gilts**

As alleged in the Amended complaint, a vertical clean-out pipe was knocked over or mowed over and livestock waste en route to the lagoon exited the pipeline and flowed into an unnamed tributary of one of the facility's on-site ponds. Owners Resp. at 16. The pond has the potential to discharge into an adjacent pond to the east during periods of high rainfall and that second pond ultimately discharges into an unnamed tributary of Honey Branch. *Id.* On July 24, 2008, an Agency inspector inspected the site in response to that reported release. *Id.* The inspector observed a channel of swine waste flowing into a receiving pond which was covered with algae and emitted a septic odor. *Id.* At that time, the facility personnel stated that they intended to land apply the contents of the receiving pond, but nothing had been pumped by October 29, 2008 when the inspector checked in with the facility personnel. *Id.* at 16-17. At this time, the facility personnel reiterated to the inspector that the receiving pond and the adjacent pond that flowed into the Honey Branch's tributary were interconnected, and that the two ponds become a single pond during periods of frequent or heavy rainfall. *Id.* at 17.

The People contend that the factual allegations "clearly set forth" a hydrologic surface connected to covered waters and thus the discharge waste remained in the system that is connected to covered waters. Owners Resp. at 17.

#### **Count IX – Little Timber**

As alleged in the complaint, on June 1, 2004, the Agency inspector observed leachate and surface runoff draining into a ditch of the gravel access lane and then into a north/south waterway, which is a tributary to Middle Creek. Owners Resp. at 17. The compost structure contained skeletal remains, bones and other organic material, the compost area was not protected from precipitation and the inspector found bones and bone fragments outside the compost structure. Owners Resp. at 17.

At the time of the inspection, the inspector collected various samples from the drainage channel, which all had high levels of fecal coliform. Owners Resp. at 17-18. On February 6 and

8, 2007, the respondents reported releases of waste from their wastewater handling structures. *Id.* at 18. The release was discharged from a pipe clean-out into a ditch on the north side of the lagoon. *Id.* In response, on February 21, 2007, an Agency inspector inspected the facility, observing running water along a drainage path which left brown manure residue in its wake. *Id.* The inspector advised Little Timber and PSM to pump all the contaminated material into the lagoon. *Id.* The inspector also observed that the flow in the drainage ditch was discharging into the waterway in the adjacent field. *Id.* at 19.

On August 24, 2007, the inspector re-inspected the facility. Owners Resp. at 19. The inspector collected a sample from the waterway downstream of the dead swine burn site and another from down gradient from the compost structures. Both had high levels of fecal coliform. *Id.*

The People contend that the factual allegations in Count IX “clearly set forth” the hydrologic connection. Owners Resp. at 20. The allegations also indicate that the February 2007 spill continued to flow through a waterway on site. *Id.* The factual allegations in the complaint include the allegation that surface water flows through the area and drains into a tributary of Middle Creek, which flows into the LaMoine River. *Id.*

For the aforementioned reasons, the People request that the Board deny the Owners’ motion for partial dismissal. Owners Resp. at 20.

#### **THE OWNERS’ REPLY TO PEOPLE’S RESPONSE TO MOTION FOR PARTIAL DISMISSAL**

On October 21, 2010, the Owners filed a reply to the People’s response to the Owners’ motion for partial dismissal.

In the reply, the Owners contend that the motion for partial dismissal challenged the Amended complaint on its face but the People responded with additional regulations and facts in an attempt to cure the Amended complaint’s deficiencies. Owners Reply at 2. The Owners argue that such information belongs in a second amended complaint rather than a response. *Id.* The Owners’ reply contains a request that the Board strike or disregard all references to State and federal regulations and facts not contained in the amended complaint and grant the Owners’ motion for partial dismissal. *Id.* at 3.

In support of the request, the Owners contend that the Board should disregard or strike any portions of the response that alleged violations of state CAFO regulations. Owners Reply at 3. The Owners argue that the amended complaint did not contain any references to Part 502 CAFO but the People’s response did, which the People are precluded from doing in their response. *Id.*, citing Curtis Casket Co. v. D.A. Brown & Co., 259 Ill. App. 3d 800, 804-05 (1st Dist. 1994).

The Owners also contend that the People’s statement that Part 502 CAFO Regulations are consistent with federal regulations is untrue. Owners Reply at 3. One of those inconsistencies is

that the General Illinois CAFO NPDES permit only requires CAFOs that discharge or propose to discharge to seek coverage under a permit. *Id.* at 4., citing Illinois General NPDES Permit for Concentrated Animal Feeding Operations, No. ILA01 at 2 (issued Oct. 20, 2009). The Owners state that this requirement is consistent with the CWA. *Id.*

The Owners further argue that the Board should disregard or strike any portions of the response that reference the outdated federal CAFO rule. Owners Reply at 5. Again, the Owners point out that the amended complaint did not contain any reference or citation to the federal CAFO rule at 40 CFR 122.23, but the People referred to it in the response. *Id.* The Owners reiterate that the People cannot introduce new allegations in the response. *Id.* Further, the Owners point out that the references to the CAFO rule in the response appear to be from a previous version of the CAFO rule, which was struck down in Waterkeeper. *Id.*, citing Waterkeeper Alliance, et al. v. EPA, 399 F.3d 488 (2d Cir. 2005). The CAFO rule was later amended by the USEPA in 2008. *Id.*, citing 73 Fed. Reg. 70418 (Nov. 20, 2008).

The Owners also argue that the People's allegation that there is a duty to obtain a NPDES permit if a facility threatens or causes or allows a discharge to occur is new to the response. Owners Reply at 5. Further, the Owners believe that the language confuses the requirement to obtain a NPDES permit with prohibitions under Sections 12(a) and 12(f) of the Act. *Id.* The Owners reiterate that CAFOs only have a duty to obtain a NPDES permit if they discharge or propose to discharge. *Id.* at 6, citing 40 CFR 122.23(d)(1).

The Owners argue further that the People failed to explain how the holding in Ashland Landfill Co. applies to the case at hand. Owners Reply at 6. The Owners reiterate that the People's response, even with all the "new references," fails to state an adequate theory for requiring the Owners to obtain NPDES permits. *Id.*

The Owners next contend that the Board should disregard or strike any portions of the response that attempt to introduce new facts. Owners Reply at 7. Again, the Owners reiterate that the People failed to allege facts in the amended complaint that establish the requisite discharge to navigable waters necessary to impose an obligation on the Group to obtain NPDES permits. *Id.* The Owners state that, in the response, the People did not point to any facts alleged in the amended complaint that establish discharges that result in violations. Further, the amended complaint does not include the term "navigable waters." *Id.* at 8.

The Owners then cite what they believe are new facts in the Response. Owners Reply at 8. Specifically, the People state in the response that an inspector will testify to livestock waste in the north road ditch of Meadowlark Lane, which is not in the amended complaint. *Id.* The People also state that the dry dam from Count VI has a surface connection to a tributary of the West Branch of Sugar Creek and a new conclusion regarding the hydrologic surface connections in Count VII. *Id.* at 8-9. However, the Owners contend that even these "new" facts fail to prove discharges to navigable waters. *Id.* at 9.

Therefore, the Owners request that the Board strike or disregard all “improper regulatory references and new factual allegations” in the People’s response and grant the Owners’ motion for partial dismissal. Owners Reply at 9.

### **THE PEOPLE’S COMBINED SUR-REPLY**

On November 5, 2010, the People filed a combined sur-reply. The document contains the sur-reply to the Owners’ reply to the People’s response to the Owners’ motion for partial dismissal and the sur-reply for PSM’s reply to the People’s response to PSM’s motion to dismiss and/or strike.

First, the People set out the applicable NPDES regulations. The People concede that Counsel for the People inadvertently and erroneously referenced an outdated version of the federal CAFO rule in the People’s response. Sur-reply at 1-2. Using the current version of the CAFO rule, the People reject PSM’s statement that facilities designed to contain waste in all conditions less than a 25-year, 24-hour storm event are exempt. *Id.* at 2. Such exemption was eliminated when the 2003 federal CAFO rule came into effect. *Id.* at 3. Further, the People argue that the court in Waterkeeper did not disturb the provision defining a “Very Large CAFO,” which is 2,500 swine weighing over 55 pounds. *Id.* Therefore, from April 14, 2003 until December 22, 2008, a NPDES permit was required for all facilities with 2,500 swine weighing 55 pounds or more. *Id.*

The People include language from Section 502(1) of the CWA to state that the term “point source” includes CAFOs. Sur-reply at 3. The People also use language from Section 39 to reiterate the State’s authority to issue NPDES permits. *Id.* at 4, citing 415 ILCS 5/39(b). The People distinguish PSM’s interpretation of Waterkeeper from their own, stating that “it is the actual discharge of a pollutant that triggers the requirement of authorization under a permit.” *Id.*, citing Waterkeeper. Therefore, any Very Large Operators that discharge into navigable waters, without a permit, did so in violation of the CWA, the federal rules and Section 12(f) of the Act. *Id.* at 5.

The People reiterate that, in 2008, a new federal CAFO rule “duty to apply” came into effect and the requirement to obtain a permit became subject to this provision. *Id.*, citing 73 Fed. Reg. 70423. Therefore, the respondents must demonstrate that they did not propose to discharge, pursuant to Section 122.23(j)(2). *Id.* at 6.

The People list Sections 122.23(a), 122.23(b)(2), 122.23(b)(4), 122.23(d), 122.23(e) and 122.23(f) of the Act and Sections 502.101 and 502.103 of the Board’s regulations as applicable rules. Sur-reply at 6-9. The People also state that the phrase “discharge or propose to discharge” is included in the State’s general permit. *Id.* at 9.

The People then address the issue of discharges to navigable waters. Sur-reply at 9. The People restate that the Rapanos standard was established in the context of the US Army Corps of Engineers’ (USACE) jurisdiction over the Section 404 permitting process and does not relate to the Section 402 NPDES permitting program. *Id.* at 9-10.

Next, the People break down the sur-reply by the separate counts. Sur-reply at 11.

### **Count I – Hilltop View**

Hilltop houses a total of 7,800 swine weighing over 55 pounds. Sur-reply at 11. The documented discharge occurred on May 28, 2009, after the federal 2008 CAFO rule went into effect. *Id.* At the time of the runoff event, the 2008 federal CAFO and state regulation required that any facility with more than 2,500 swine over 55 pounds and discharging be covered by an NPDES permit. *Id.* Also, land application discharges from a CAFO required a NPDES permit. *Id.* at 11-12. Even unplanned and accidental discharges require a permit prior to the event of the discharge. *Id.* at 12.

The People reiterate that the documented discharge contained livestock waste from a land application field. Sur-reply at 12. The discharge went into the north road ditch of Meadowlark Lane, which drains into an unnamed tributary of the West Branch of Sugar Creek. *Id.* That unnamed tributary is identified on a US Geological Services (USGS) topographic map and the Agency's inspector was aware that water flows into it for three months of the year. *Id.* Further, the West Branch of Sugar Creek is identified on the USGS topographic map. *Id.* The unnamed tributary and the West Branch of Sugar Creek are navigable waters. The People contend that, because the roadside ditch discharges into navigable water, the documented discharge is in violation of the State and federal NPDES regulations. *Id.* In order for Hilltop's discharge to qualify as agricultural stormwater discharge, the discharge would have had to be applied in accordance with site specific nutrient management practices to ensure appropriate utilization. *Id.* at 12. Once the livestock waste leaves the application field, the nutrients in the waste cannot be properly utilized and therefore, the discharge at Hilltop cannot have been agricultural stormwater discharge. *Id.*

The People repeat that Hilltop did not possess a NPDES permit at the time of the discharge and that the language of the State general permit and the Illinois General NPDES CAFO permit both require one. Sur-reply at 13. The People also state, in response to the respondents' defense of an agricultural stormwater runoff, that the permits do not allow land application of livestock waste when precipitation will produce runoff of livestock waste.

### **Count II – Wildcat Farms**

The People state that Wildcat Farms have 6,000 sows weighing more than 55 pounds. Sur-reply at 13. The discharge at issue occurred on September 24, 2008, prior to the 2008 federal CAFO rule. *Id.*

The People allege that discharge flowed out of a cleanout pipe, down a field into a drainage channel, then into an unnamed tributary of Wildcat Creek. Sur-reply at 13. The unnamed tributary contained flowing water at the time of the discharge, which flowed into Wildcat Creek, which is a perennial stream. *Id.* A sample of the discharge revealed high levels of ammonia and fecal coliform. *Id.* at 14.

The People argue that the discharge created a pollution impact on the unnamed tributary of Wildcat Creek through physical, chemical and biological additives. Sur-reply at 14. The analytical results of the samples and evidence of dead demonstrated as much. *Id.* The People also contend that the discharge into the unnamed tributary that flowed into Wildcat Creek was a discharge to the navigable waters of the United States. *Id.*

### **Count III – High-Power Pork**

The People state that High-Power Pork has 6,000 sows weighing more than 55 pounds. Sur-reply at 14. The discharge occurred on November 10, 2008, prior to the effective date for the 2008 federal CAFO rule. *Id.* The 90,000 gallon discharge flowed from a leak in a PVC pipe into an unnamed tributary, then into South Branch Cedar Creek and Cedar Creek, thereby causing a fish kill. *Id.* The People state that Cedar Creek is a navigable water of the United States. *Id.* There is a significant nexus between the discharge and the biological, chemical and physical impact on the navigable water, as demonstrated by the fish kill. *Id.* at 15.

### **Count IV – Eagle Point**

Eagle Point has 6,500 sows weighing over 55 pounds. Sur-reply at 15. The discharge in question occurred on May 10, 2007, prior to the effective date of the 2008 federal CAFO rule. *Id.* The discharge flowed from the north gestation building perimeter tile onto the land in such a manner that the discharge drained into a strip mine lake. *Id.* Analysis of a sample revealed a fecal coliform level of 35,000 per 100 ml. *Id.* The facility's private sewage disposal system also emitted a discharge flowing into a lake east of the facility with high levels of fecal coliform and ammonia. *Id.* The People state that the discharge flowing into the strip mine lake ultimately flows into Otter Creek, a perennial stream that flows into the Illinois River. *Id.* Therefore, the May 10, 2007 discharges went into the navigable waters of the United States. *Id.*

### **Count V – Lone Hollow**

Lone Hollow has 5,650 sows weighing over 55 pounds. Sur-reply at 15. The disputed discharge occurred on September 13, 2007 prior to the 2008 federal CAFO rule. *Id.* Liquid swine manure drained out of a pipe and flowed across the gravel drive into a waterway east of the swine confinement buildings. *Id.* at 16. The facility employees, upon discovering the release, constructed an earthen dam where the discharge flowed into the waterway. *Id.* The Agency inspector advised the facility to recover the released material and apply it to cropland as soon as possible. *Id.* During a follow-up inspection, the Agency inspector collected various samples from four locations, all of which had high levels of fecal coliform and other contaminants. *Id.* at 16-17.

The People state that the Lone Hollow waterways are tributaries to an unnamed tributary of Panther Creek, which is a perennial stream and tributary to Bronson Creek, which is a tributary to the LaMoine River. Sur-reply at 17. Therefore, all the discharges from September 2007 were discharges to navigable waters of the United States. *Id.*

### **Count VI - Timberline**

On September 11, 2008, at the time of discharge, Timberline had 3,000 sows weighing over 55 pounds. Sur-reply at 17. September 11, 2008 is prior to the federal 2008 CAFO rule effective date. *Id.* The Agency's inspector observed a discharge from leachate from the dead animal composting structure flowing into a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek. *Id.*

The USGS identifies the West Branch of Sugar Creek as a perennial creek, which is a navigable water of the United States. Sur-reply at 18. Therefore, the discharge was into a navigable water of the United States. *Id.*

### **Count VII – Prairie State Gilts**

Prairie State Gilts has 2,500 swine over 55 pounds. Sur-reply at 18. The People allege that, on July 7, 2008, a discharge exited a broken clean-out pipe and entered an unnamed tributary of an on-site pond, which is used occasionally to water the swine. *Id.* During periods of high rainfall, the pond merges with an adjacent pond to the east, which discharges to an unnamed tributary of Honey Branch. *Id.* That unnamed tributary is identified as an intermittent creek on the USGS's topographic map. *Id.* Further, Honey Creek is identified as a perennial creek. *Id.*

In response to that reported release, an Agency inspector inspected the site and observed swine waste entering the north end of the receiving pond, which was covered with algae and emitted a septic odor. Sur-reply at 19. The facility personnel informed the inspector that they intended to pump the receiving pond and land apply the contents to a field, but on October 29, 2008, the task had not been carried out. *Id.* The inspector was informed again that the two ponds were interconnected during periods of heavy rainfall. *Id.*

### **Count VIII – North Fork Pork**

North Fork Pork has 8,200 swine weighing more than 55 pounds. Sur-reply at 19. An Agency inspector inspected the facility on December 3, 2003, after the federal 2003 CAFO rule but before the federal 2008 CAFO rule. *Id.* On December 3, 2003, there was a discharge from a perimeter tile flowing into a ravine in the terraced field south of the facility which discharged into the navigable waters of the United States. *Id.* Samples of the discharge revealed high levels of ammonia and fecal coliform and other contaminants. *Id.* at 20.

### **Count IX – Little Timber**

Little Timber has 2,600 sows weighing over 55 pounds. Sur-reply at 20. On June 1, 2004, an Agency inspector observed leachate and surface runoff draining into a ditch and then into a north/south waterway. *Id.* That waterway drains into Middle Creek, which is a perennial stream. *Id.* There was a significant amount of skeletal remains in the compost structures and the



inspector observed further remains outside of the compost building. *Id.* Further, the compost area was not protected from the elements. *Id.* Samples of the discharge indicated high levels of ammonia and fecal coliform. *Id.*

Also during the June 1 inspection, the inspector noted “very strong and offensive” odors from the swine confinement buildings, lagoon and dead livestock compost unit. Sur-reply at 21.

On February 6 and 8, 2007, there were further releases at Little Timber. Sur-reply at 21. Wastewater discharged from a clean-out pipe into a ditch on the north side of the lagoon. *Id.* Little Timber and PSM constricted the spill with an earthen dike and applied sawdust to the spilled waste, which was then land applied. *Id.* The Agency inspector returned on February 21, 2007 and observed running water along that drainage path. *Id.* The water left brown manure residue in its path. *Id.* at 21-22. At that time, the inspector advised Little Timber and PSM to pump the snow, runoff and wastewater into the lagoon. *Id.* at 21.

The People state that, also on February 21, 2007, the ditch near the lagoon was discharging into the waterway of an adjacent field because the sawdust dam was not stopping the flow. Sur-reply at 21. A sample of the wastewater revealed high levels of ammonia. *Id.*

On August 24, 2007, the inspector conducted another inspection, during which the inspector observed that several swine had been burned near the gravel road. Sur-reply at 21. There were various bones and skulls still at the burn site. *Id.* Surface water flows through the burn site and drains into a waterway that is a tributary to Middle Creek, which flows into the LaMoine River. *Id.* The inspector also noted surface runoff draining from the mortality compost structure. *Id.* The inspector also collected samples from various locations which all revealed high levels of fecal coliform. *Id.*

The People assert that all the Little Timber discharges drained into the waterways on the property which are tributary to two unnamed tributaries of Middle Creek. Sur-reply at 23. Therefore, all the discharges were discharges into the navigable waters of the United States. *Id.*

For the above reasons and reasons discussed further below in response to PSM, the People respectfully request that the Board deny the respondents’ motion for partial dismissal and the motion to dismiss and/or strike. Sur-reply at 25.

### **THE OWNERS’ MOTION TO SUPPLEMENT REPLY**

On March 18, 2011, the Owners filed a motion for leave to supplement their reply to the People’s response to the Owners’ Motion for Partial Dismissal.

The Owners summarize the People’s argument from their sur-reply: the 2008 federal CAFO rule established a duty to apply for a NPDES permit. Supp. Reply at 2. The Owners contend that the 2008 CAFO rule replaced the duty to apply provision with a requirement that only CAFOs that “discharge or propose to discharge” are required to obtain a NPDES permit. *Id.*, citing 73 Fed. Reg. 70418, 70423. Therefore, the Owners argue that there is no duty to apply

provision in the 2008 CAFO rule and no duty for every CAFO owner or operator in Illinois to apply for a NPDES permit. *Id.* The Owners include a communication from the Director of the Agency, in which he wrote “[s]ince there is no ‘duty to apply’ for all CAFOs in the federal 2008 CAFO rule and Illinois has no separate state program, the [Agency] has no statutory authority to require all CAFOs to apply for a CAFO permit.” *Id.* at 3, citing Exh. A at 2. The Owners also cite to the Fifth Circuit’s opinion that “vacated the provisions of the 2008 CAFO rule that required CAFOs that propose to discharge to apply for an NPDES permit, and also vacated the provisions that create liability for failing to apply for an NPDES permit.” *Id.*, citing Nat’l Pork Producers Council v. USEPA, 2011 U.S. App. LEXIS 5018 \*46-47 (5th Cir. Mar. 15, 2011). The Owners paraphrase the court’s holding in stating that an existing discharge is required before the obligation to apply for and obtain a permit arises. *Id.* at 4.

The Owners argue that the exhibits attached to their motion are extremely relevant to the Board’s consideration of the pending motions in the proceeding and request the Board take the information into consideration. Suppl. Reply at 4-5. The exhibits are the Agency’s response to Region 5’s findings of NPDES permits and CAFOs and the text of Nat’l Pork Producers Council v. USEPA, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011). (Exh. A and Exh. B).

For the above reasons, the Owners request that the Board accept the Motion for Leave to Supplement their previously filed reply. Supp. Reply at 5-6.

### **PEOPLE’S RESPONSE TO THE OWNERS’ SUPPLEMENTAL FILING**

On April 18, 2011, the People filed a motion for leave to file a response *instanter* to the Owners’ motion for leave to supplement. The People failed to file a response on the due date, April 1, 2011, because counsel for the People took leave of office due to a family emergency. Supp. Reply Resp. at 1-2. However, the People’s counsel contacted the hearing officer, who granted a stay of the April 1 deadline. *Id.* at 2. As of April 18, 2011, the People’s counsel had returned to her office and requested leave to file the response *instanter*. *Id.*

Contemporaneously with the motion for leave to file the response *instanter*, the People filed a response to the Owners’ supplemental filing of March 18, 2011.

### **Objection**

The People object to the Owners’ supplemental filing, stating that the supplement is irrelevant to the issues at hand. Supp. Reply Resp. at 2. First, the People contend that the term “duty to apply” is twisted by the Group and is a “mincing of semantics.” *Id.* Second, the Owners’ reliance on Nat’l Pork Producers Council is potentially dispositive of the allegations of violation of Section 12(f) of the Act. *Id.* Third, the People object on the grounds that the Owners’ motion for leave to file a supplement is itself a supplement. Supp. Reply Resp. at 2.

**“Duty to Apply” Contention**

The People reference the “Nov. 2008 Compiled CAFO NPDES regulations and Effluent Limitations Guidelines and Standards” to demonstrate that the “duty to apply” to the NPDES permit program applies to “any person who discharges or proposed to discharge pollutants or who . . . . The requirements for concentrated animal feeding operations are described in Section 122.23(d).” Supp. Reply Resp. at 2, citing 40 CFR § 122.21.

The People also include a USEPA document, “Concentrated Animal Feeding Operations Final Rulemaking – Q&A,” to demonstrate that “[u]nder the final rule, CAFOs that discharge or propose to discharge have a duty to apply for NPDES permits.” Supp. Reply Resp. at 3, citing USEPA, *Concentrated Animal Feeding Operations Final Rulemaking – Q&A* (Dec. 3, 2008).

Additionally, the People cite the “2008 Final Federal CAFO Rule Frequently Asked Questions,” which state that “under the final federal rule . . . CAFOs that discharge or propose to discharge have a duty to apply for NPDES permits. Existing CAFOs must apply on or before February 27, 2009.” Supp. Reply Resp. at 3, citing IEPA, *2008 Final Federal CAFO Rule Frequently Asked Questions* (attached to Supp. Reply. Resp. as Exhibit C). The People cite all of the attached documents to support their argument that the term “duty to apply” refers to the “discharge or propose to discharge” 2008 Rule standard. *Id.*

**Holding on Failure to Apply Liability Inconsequential to Amended complaint Allegations of Discharging Without a Permit**

The People reject the Owners’ use of Nat’l Pork Producers, stating that it is “of little consequence” to a present case where each of the CAFOs involved experienced a discharge of a pollutant. Supp. Reply Resp. at 5. The People interpret Nat’l Pork Producers to stand for the distinction between a cause of action for failure to apply for a permit and a cause of action for discharging without a permit, ultimately eliminating the permitting authority’s ability to bring a cause of action for failure to apply for a permit but preserving a federal or state claim for discharging without a permit. *Id.*, citing Nat’l Pork Producers, 2011 U.S. App. LEXIS 5018, at 32. The People restate the allegations in Section 12(f) and clarify that each alleged violation in the amended complaint concerns a discharge without a permit, not a failure to apply for a permit. *Id.* at 6.

Therefore, the People respectfully request that the Board deny the Owners’ motion for leave to supplement, or alternatively, find the supplement to be unpersuasive and without merit. Supp. Reply Resp. at 6-7. Further, the People request that the Board deny the respondents’ motions to dismiss and/or strike the Amended complaint based on the People’s previous response and sur-reply to the respondents’ original motions. *Id.* at 7.

**PSM MOTION TO DISMISS AND/OR STRIKE**

On September 10, 2010, PSM filed a motion to dismiss and/or strike the amended complaint. First, PSM summarizes the background of the case, stating that the amended

complaint consists of nine counts of allegations against individual owners and PSM as manager of each facility. PSM Mot. at 3. Next, PSM sets out the pleading standards from Section 103.204(c) of the Board's regulations. *Id.* PSM states that each complaint must contain a reference to the provision of the Act and regulations that the respondents are allegedly violating, dates, locations, events, nature, extent, duration and strength of discharges or emissions and consequences alleged to constitute the violations and a statement of relief the complaint seeks. *Id.* at 3-4.

**Section 12(f) charges based on allegations that PSM did not have a NPDES permit at the time of the discharges must be dismissed**

PSM argues that all the Section 12(f) charges based on allegations that PSM did not have a NPDES permit at the time of the discharges must be dismissed. PSM Mot. at 4. PSM then summarizes the complainant's argument that PSM did not have a NPDES permit at the time livestock waste from each facility contaminated or threatened to contaminate the waters of the State. *Id.* However, PSM contends that, in order to prevail on a Section 12(f) charge, the complaint must plead and prove that a NPDES permit is required for each facility. *Id.* at 5. PSM states that the Clean Water Act (CWA) does not require potential dischargers to apply for NPDES permits. *Id.* at 5, citing Waterkeeper Alliance, Inc. v. USEPA, 399 F.3d 486, 506 n. 22 (2nd Cir. 2005).

PSM states that, although the Board has in the past held persons liable for discharging without a NPDES permit even though those persons were not required to obtain a NPDES permit, PSM believes the situation in the current case has not been before the Board before. PSM Mot. at 5. PSM requests that the Board consider the fundamental unfairness of holding persons liable under Section 12(f) for not having a permit they were not required to obtain. *Id.* PSM contends that none of the facilities in the case at hand were required to obtain NPDES permits and therefore all the counts of 12(f) violations should be dismissed. *Id.*

**Count I's charges concerning construction activities must be dismissed and/or stricken**

PSM argues that Count I's charges concerning construction activities must be dismissed and/or stricken. PSM Mot. at 6. PSM reports that an Agency inspector observed runoff from disturbed earth, but the inspector did not state what the runoff contained, if anything. *Id.* PSM also contends that, though Hilltop subsequently obtained a NPDES and proposed a compliance commitment agreement, the Agency rejected it due to "unspecified concerns." *Id.* Additionally, the inspector instructed Hilltop and PSM to follow certain storm water protocols. *Id.*

Specifically, the People allege that Hilltop and PSM did not comply with the construction storm water requirements. PSM Mot. at 6. PSM argues that that allegation should be stricken because it fails to refer to which provisions of the Act or regulations have been violated. *Id.* Further, PSM states that Count I fails to set forth the dates, location, events, nature, extent, duration and strength of the discharges or emissions and consequences alleged to constitute violations of the Act and regulations. *Id.* Next, PSM argues that the alleged Section 12(f) violation should be dismissed because the People based the allegation on engaging in

construction activities without a construction storm water NPDES permit, but Section 12(f) only regards discharges from point sources. *Id.* at 7, citing Am. Compl. at 6. PSM states that construction activity resulting in runoff is a nonpoint source of pollutants. *Id.*, citing 333 U.S.C. 1314(f)(C). PSM uses the same argument to contend that the alleged Section 309.102(a) violation should be dismissed, because the regulation regards discharges from point sources and sediment from construction sites is a nonpoint source. *Id.* at 7.

**Count I's charges concerning livestock waste runoff should be dismissed and other specified allegations stricken**

PSM argues that Count I's charges concerning livestock waste runoff should be dismissed and other specified allegations stricken. PSM Mot. at 7. PSM requests that the following sentence be stricken from Count I: "If unabated, the continued release of livestock waste during land application operations to the road ditch could lead to a discharge of livestock waste to waters of the State." *Id.* at 8, citing Am. Compl. at 4. PSM states that the sentence contains no relevant factual allegations to support Count I's charges because no facts are plead which suggest that the alleged release was unabated or continued during land application operations. PSM Mot. at 8. Similarly, all charges relating to the alleged runoff should be dismissed because they fail to contain factual allegations required by Section 103.204(C).

Further, PSM argues that the Section 12(f) violation should be dismissed because Count I does not allege that a particular point source discharged runoff into the ditch or that the livestock waste was improperly land applied. PSM Mot. at 8. The runoff from the field was "agricultural stormwater" and not a point source. *Id.*, citing 33 U.S.C. 1362(14); 40 CFR Parts 9, 122, and 412, p. 70420 (Nov. 20, 2008).

PSM states that the Section 309.102(a) violations should be dismissed because there is no allegation of a discharge from a point source nor any allegation of a discharge into the waters of the State or into a well. *Id.*

**Count II's allegations concerning the failure to apply for an NPDES permit must be stricken**

PSM argues that Count II's allegations concerning the failure to apply for a NPDES permit must be stricken. PSM Mot. at 8. PSM reiterates that Count II concerns the alleged release of livestock waste from a cleanout pipe damaged by a lawn mower. *Id.* at 8-9. PSM states that the allegation in Count II, stating that no NPDES permit had been applied for, should be stricken because no facts plead show that PSM was required to apply for a NPDES permit prior to the alleged release. *Id.*

**Count III's allegation concerning the failure to apply for an NPDES permit must be stricken**

PSM contends that Count III regards the alleged release of livestock waste from an underground transfer pipeline. PSM Mot. at 9. PSM argues that the allegation in Count III that

no NPDES permit had been applied for should be stricken because no facts plead show that PSM was required to apply for a NPDES permit. *Id.*

**Count IV's charge concerning the septic system must be dismissed and its allegation concerning failure to apply for a NPDES permit must be stricken**

Count IV alleges that an Agency inspector observed discharges from the facility flowing into a stripe mine lake and samples of both revealed contamination. PSM Mot. at 9. PSM argues that, if Count IV contains an allegation that the septic system discharge to the strip mine lake violates Section 12(f) due to a lack of a NPDES permit, that charge should be dismissed because septic system discharges are governed by Illinois Department of Public Health (IDPH) regulations. *Id.*, citing 77 Ill. Adm. Code 905.205. Those regulations allow the discharge to lakes or ponds from specified aerobic systems and Count IV's allegations are insufficient to support a charge that a discharge is prohibited under IDPH regulations. *Id.* PSM also contends that the Board does not have jurisdiction to adjudicate alleged violations of IDPH regulations. *Id.* at 10, citing 77 Ill. Adm. Code 905.110(a)(1). Further, PSM argues that Count IV's allegation that Eagle Point and PSM did not have a NPDES permit should be stricken because no factual allegation support the suggestion that Eagle Point and PSM were required to apply for a NPDES permit. *Id.* at 10.

**Count V must be dismissed and its allegations concerning failure to apply for a NPDES permit must be stricken**

Count V concerns a manure release flowing to a waterway east of a swine confinement building and an Agency inspector's finding that the discharge was contaminated. PSM Mot. at 10. Another discharge at the facility was also contaminated. *Id.* PSM argues that Count V does not include factual allegations demonstrating that Lone Hollow caused or allowed the discharge of contaminants to waters of the State, facts demonstrating that the workers did not properly clean up the release or facts demonstrating that the compost leachate could affect the waters of the State. *Id.* Therefore, PSM contends that the allegation that Lone Hollow caused or allowed the discharge of contaminants to waters of the State should be stricken. Further, PSM argues that all charges in Count V should be dismissed because Count V does not contain the allegations required by Section 103.204(C) since the Complainant did not inform Lone Hollow and PSM of the extent and nature of the alleged violations. *Id.* at 10-11.

PSM believes that the allegation that Lone Hollow and PSM had not applied for a NPDES permit should be stricken because there are no factual allegations to support a NPDES permit being required. PSM Mot. at 11. Additionally, PSM states that there are no factual allegations to support the conclusion that there was a discharge into the waters of the State and the Section 12(f) and Section 309.102(a) charges should be dismissed. *Id.*

**Specified allegations of Count VI must be stricken**

Count VI alleges that an Agency inspector observed leachate flowing from the facility's composting structure to a dry dam and ultimately into an unnamed tributary of the West Branch

of Sugar Creek. PSM Mot. at 11. Count VI also contains information about a fire in 2009 and PSM requests that the information be dismissed because those allegations are irrelevant to the charges. *Id.* Finally, PSM requests that the allegation that Timberline and PSM had not applied for a NPDES permit be stricken because there are no factual allegations to support the suggestion that Timberline and PSM needed a NPDES permit. *Id.* at 11-12.

**Count VII's allegation concerning the failure to apply for a NPDES permit must be stricken**

Count VII regards the alleged release of livestock waste from a damaged cleanout pipe. PSM Mot. at 12. PSM states that the allegation that Prairie State Gilts and PSM did not apply for a NPDES permit should be stricken because there were no factual allegations that demonstrated that a NPDES permit was required. *Id.*

**Count VIII must be dismissed and its allegation concerning failure to apply for a NPDES permit must be stricken**

An Agency inspector observed discharge from the building perimeter tiles, liquid with a diesel fuel odor and oil sheen draining into an on-site pond and leachate and runoff from the mortality compost structure. PSM Mot. at 12. PSM argues that Count VIII's charges must be dismissed because the allegations are not specific enough. *Id.* Further, PSM states that all NPDES charges related to events occurring after the Agency received the NPDES permit application should be dismissed because the application for a permit does not demonstrate a violation of Section 12(f) to discharge without a permit. *Id.* at 13. Finally, PSM argues that the allegation that North Fork Pork and PSM did not have a NPDES permit application as of December 3, 2003 should be stricken because there are not factual allegations that demonstrate that North Fork Pork and PSM required a permit. *Id.*

**Count IX's alleged groundwater violations must be dismissed and other specified allegations must be stricken**

Count IX alleges that Little Timber and PSM violated Section 620.301 by causing increased levels of nitrate in the groundwater. PSM Mot. at 14. PSM argues that that alleged violation should be dismissed because the recorded levels of nitrate in the allegedly impacted groundwater do not exceed the groundwater quality standards for Class I, potable resource groundwater. *Id.*, citing 35 Ill. Adm. Code 620.410(a). PSM also argues that any allegations concerning odors should be stricken because such allegations are not relevant to Count IX's charges. *Id.* at 14. Finally, Count IX's allegations that Little Timber and PSM did not apply for a NPDES permit should be stricken because there are no factual allegations suggesting that they were required to do so. *Id.*

In conclusion, PSM requests that the Motion to Dismiss and/or Strike be granted and that the Board grant such other and further relief as is just. PSM Mot. at 14.

**COMPLAINANT'S RESPONSE TO PSM'S  
MOTION TO DISMISS AND/OR STRIKE**

On September 29, 2010, the People filed a response to PSM's motion to dismiss and/or strike. The People cite Sections 502.101, 502.102, and 502.103 of the Board's regulations and Sections 122.23(b)(2), 122.23(b)(4), 122.23(a), 122.23(e), and 122.23(f) of the state's regulations. PSM Resp. at 2-4. The People conclude from this list of regulations that NPDES permitting and pollutional discharges go hand in hand and that a permit must be in place if a respondent threatens or causes or allows a discharge to occur. *Id.* at 4. Further, pursuant to the applicable regulations, the People argue that PSM was under an obligation to obtain a permit before PSM threatened a discharge or caused or allowed a discharge to occur. *Id.* PSM claimed that it was subject to CAFO rules, but the People state that the State does not agree that PSM's facilities were designed, constructed, operated and maintained so as not to discharge. *Id.*

The People assert that the State has the power to control NPDES permitting within its territory because it is a federally delegated program. PSM Resp. at 5. The People also lay out the definition of the term "waters of the State." *Id.* Specifically, the People used statutes and case law to demonstrate that "waters of the State" are all waters in, flowing through, or bordering the State. *Id.*, citing 415 ILCS 5.3.550, Tri-County Landfill v. IPCB, 41 Ill. App. 3d 249, 253-54 (2nd Dist. 1976). The People contend that the State's and the Board's interpretation of the term "waters of the State" are consistent with the People's interpretation. *Id.* at 6-7.

The People also state that PSM was aware of the references to "navigable waters" in Section 12(f). PSM Resp. at 7. The People argue that the Amended complaint demonstrates hydrologic connections to a water of the State or navigable water, which is all that is required by case law because navigable waters are waters of the State. *Id.* at 8, citing United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325 (6th Cir. 1974); United States v. Oxford Royal Mushroom Products, Inc., 487 F.Supp. 852, 855 (E.D.Pa. 1980); Driscoll v. Adams, 181 F.3d 1285, 1291 (11th Cir. 1999); Quivira Mining Co. v. USEPA, 765 F.2d 126, 129-30 (10th Cir. 1985).

Finally, the People argue that the subject counts pled in the amended complaint were pled consistently with existing case law for point source pollutional discharges to navigable waters that are subject to Sections 311 and 402 jurisdiction under the CWA and the State's NPDES permitting program. PSM Resp. at 9.

The People then give a count-by-count response.

**Count I – Hilltop View**

As alleged in the amended complaint, an Agency inspector observed runoff containing livestock waste from a land application field associated with Hilltop's facility. PSM Resp. at 9. That runoff had the potential to discharge from the ditch into the waters of the State in the event of precipitation, according to the inspector's observation. *Id.*



Second, as alleged in the amended complaint, the land application discharge was to a ditch with a surface connection to the waters of the State. PSM Resp. at 9. The inspector will testify that the livestock waste was in the north road ditch of Meadowlark Lane, which drains into an unnamed tributary of the West Branch of Sugar Creek. *Id.*

#### **Count IV – Eagle Point**

The People reiterate that drainage from Eagle Point’s facility flows directly through several ravines into final cut strip mine lakes. PSM Resp. at 10. On May 10, 2007, as alleged in the amended complaint, the Agency inspector observed discharge from the north gestation building perimeter tile onto the land so that the discharge drained into a strip mine lake. *Id.* Analysis of a sample of the discharge indicated a fecal coliform level of 35,000 per 100 milliliters. *Id.* The inspector also took a sample of a discharge from the facility’s private sewage disposal system, which revealed a fecal coliform level of 56,000 per 100 ml. *Id.* As noted in the allegations, the perimeter tile discharge was to a drainage formation that flowed into a strip mine lake, and the septic tank discharge was through a pipe into a lake. *Id.*

#### **Count V – Lone Hollow**

As alleged in the amended complaint, a swine manure release occurred at Lone Hollow on September 13, 2007. PSM Resp. at 10. Liquid swine manure drained across the drive and into a waterway east of the swine confinement buildings. *Id.* at 11. In response to the release, an Agency inspector advised the facility to recover the released materials as soon as possible. *Id.* During a follow-up inspection on September 25, 2007, the Agency inspector took many different samples from various locations at the facility and they all had high levels of fecal coliform and ammonia. *Id.* at 14-15.

The People contend that the wastewater from a discharge was not cleaned up, despite the inspector’s explicit instructions to do so. PSM Resp. at 12. The People contend that on the September 24, 2007 inspection, there were discharges from perimeter tiles and also that Lone Hollow is located in the Panther Creek watershed, which is ultimately a tributary to the LaMoine River. *Id.*

#### **Count VI - Timberline**

As alleged in the amended complaint, an Agency inspector inspected Timberline’s facility on September 11, 2008. PSM Resp. at 12. The inspector observed a discharge of leachate, which entered a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek. *Id.* The People stated that the factual allegations included a specific allegation of a hydrological connection to covered waters. *Id.*

#### **Count VII – Prairie State Gilts**

As alleged in the amended complaint, a vertical clean-out pipe was knocked over or mowed over and livestock waste en route to the lagoon exited the pipeline and flowed into an

unnamed tributary of one of the facility's on-site ponds. PSM Resp. at 13. The pond has the potential to discharge into an adjacent pond to the east during periods of high rainfall, and that second pond ultimately discharges into an unnamed tributary of Honey Branch. *Id.* On July 24, 2008, an Agency inspector inspected the site in response to that reported release. *Id.* The inspector observed a channel of swine waste flowing into a receiving pond which was covered with algae and emitted a septic odor. *Id.* At that time, the facility personnel stated that they intended to land apply the contents of the receiving pond, but nothing had been pumped by October 29, 2008 when the inspector checked in with the facility personnel. *Id.* at 14. At this time, the facility personnel reiterated to the inspector that the receiving pond and the adjacent pond that flowed into the Honey Branch tributary were interconnected, and that the two ponds become a single pond during periods of frequent or heavy rainfall. *Id.*

The People contend that the factual allegations “clearly set forth” a hydrologic surface connected to covered waters and that the discharge waste remained in the system that is connected to covered waters. PSM Resp. at 14.

### **Count IX – Little Timber**

As alleged in the complaint, on June 1, 2004, the Agency inspector observed leachate and surface runoff draining into a ditch of the gravel access lane and then into a north/south waterway, which is a tributary to Middle Creek. PSM Resp. at 14. The compost structure contained skeletal remains, bones and other organic material. The compost area was not protected from precipitation and the inspector found bones and bone fragments outside the compost structure. *Id.*

At the time of the inspection, the inspector collected various samples from the drainage channel, which all had high levels of fecal coliform. PSM Resp. at 14-15. On February 6 and 8, 2007, the respondents reported releases of waste from their wastewater handling structures. *Id.* The release was discharged from a pipe clean-out into a ditch on the north side of the lagoon. *Id.* In response, on February 21, 2007, an Agency inspector inspected the facility, observing running water along a drainage path which left brown manure residue in its wake. *Id.* The inspector advised Little Timber and PSM to pump all the contaminated material into the lagoon. *Id.* The inspector also observed that the flow in the drainage ditch was discharging into the waterway in the adjacent field. *Id.* at 15.

On August 24, 2007, the inspector re-inspected the facility. PSM Resp. at 15. The inspector collected a sample from the waterway downstream of the dead swine burn site and another from down gradient from the compost structures. Both had high levels of fecal coliform. *Id.*

The People contend that the factual allegations in Count IX “clearly set forth” the hydrologic connection. PSM Resp. at 20. The allegations also indicate that the February 2007 spill continued to flow through a waterway on site. *Id.* The factual allegations in the complaint include the allegation that surface water flows through the area and drains into a tributary of Middle Creek, which flows into the LaMoine River. *Id.* at 16.

The People next move into a count by count discussion of the stormwater violations.

### **Count I – Hilltop View**

The People argue that the storm water NPDES permit was to be in place and in effect at the time water pollution was threatened. PSM Resp. at 17. The People reiterate that the NPDES permit and polluttional discharges are linked in the regulation of storm water and a respondent must have a permit if the respondent threatens or causes or allows a discharge to occur. *Id.* Therefore, the People state that PSM was required to obtain a permit and develop and implement a storm water construction pollution prevention plan before PSM started construction at the site and threatened a discharge. *Id.* at 18. PSM’s violations stem from not properly implementing controls initially and continuing to not institute proper controls after PSM obtained the required permit. *Id.*

The People support their argument by citing to 40 CFR 122.26, which requires a party to obtain a NPDES permit and to implement a storm water pollution prevention plan for construction activity including clearing, grading and excavation. PSM Resp. at 19. Further, the People state that after March 2003, sites of one acre in size and larger were subject to regulations. *Id.* The People believe that the factual allegations in Count I clearly set forth the dates, location and nature of the violations. *Id.* at 20. Therefore, the People claim that the pleading requirements of Section 103.204(c) have been met. *Id.* at 21.

### **Count II (Wildcat Farms) and III (High-Power Pork) NPDES violation allegations**

The People reiterate that High-Power Pork and Wildcat own facilities with a design capacity of 6,000 cows and therefore they were under an obligation to obtain a NPDES permit. PSM Resp. at 21. That obligation is based on the given number of animals 55 pounds and heavier. *Id.* Therefore, because Wildcat and High-Power Pork did not have a NPDES permit and a discharge occurred, the People satisfied the factual basis for a violation of Section 12(f). *Id.*

### **Count IV (Eagle Point) NPDES permit allegation and septic system**

The People argue that PSM’s assertion that the septic discharges are covered by IDPH regulations and not subject to NPDES permit coverage is an affirmative defense and not an appropriate basis for a motion attacking the pleadings. PSM Resp. at 21.

### **Count V (Lone Hollow) Livestock Waste Discharge**

The People argue that PSM’s assertion that the livestock waste allegations do not meet the requirements of Section 103.204(c) is without merit. PSM Resp. at 21. The People set forth the factual allegations again: there are analytical results for both the wastewater release discharges and the perimeter tile discharge which include a description of the location, the date and the nature of the violations. *Id.*

### **Count VIII (North Fork Pork) NPDES allegations**

The People argue that North Fork Pork had an obligation to obtain a NPDES permit based on the number of animals 55 pounds and heavier maintained at the facility, which contained a total of 8,2000 hogs greater than 55 pounds and 7,7000 under 55 pounds. PSM Resp. at 22. Further, the People contend that PSM's assertion that its NPDES application prevents the People from asserting a NPDES violation for a discharge after the date of the application is an affirmative defense. *Id.* The People state that Section 12(f) reveals that a violation of any condition of the permit is also a violation of Section 12(f). *Id.*

### **The People's Allegation of Groundwater Impairment**

The People allege increasing levels of nitrate in the groundwater immediately downgradient of Little Timber's lagoon and state that the groundwater was classified as Class I. PSM Resp. at 22. In Class I, the nitrate standard is 1 to 10 mg/l. *Id.* Therefore, the trend the amended complaint describes sufficiently supports an allegation of the threat of impairment of the groundwater resource. *Id.*

For these reasons, the People request that the Board deny PSM's motion to dismiss and/or strike. PSM Resp. at 22-23.

### **COMPLAINANT'S SUPPLEMENTAL FILING TO RESPONSE TO PSM'S MOTION TO DISMISS AND/OR STRIKE**

On October 1, 2010, the People filed a supplemental document to the People's response to PSM's motion to dismiss and/or strike. The People state that the response erroneously omitted the People's original response. Supp. PSM Resp. at 1. Therefore, in the supplemental filing, the People include the People's response to PSM's assertion that the land application discharge violation alleged in Count I is exempt because it is "agricultural stormwater." *Id.*

The People argue that PSM's claim fails because the federal exemption only applies to precipitation related discharges and nothing in the record gives any indication that the application event was impacted by precipitation. Supp. PSM Resp. at 2. Second, PSM failed to assert whether Hilltop had completed and implemented a plan consistent with the NPDES program requirements and that the application event was conducted in compliance with a manner sufficient to meet the requirements of the exemption. *Id.*

Next, the People use case law and statutes to prove that the agricultural stormwater exemption is in violation of the CWA and the Administrative Procedure Act (APA) and that the exemption only applies to CAFOs. Supp. PSM Resp. at 2-6, citing Waterkeep Alliance, Inc. v. USEPA, 399 F.3d 486, 506-07 (2nd Cir. 2005); 40 CFR 122.23(e). Further, the People cite 40 CFR 122.23(e) to demonstrate that land application discharges from a CAFO are subject to NPDES requirements. *Id.* at 3, citing 40 CFR 122.23(e).

Therefore, the People request that the Board deny PSM's motion to dismiss and/or strike. Supp. PSM Resp. at 6.

**PSM'S REPLY TO PEOPLE'S RESPONSE TO  
MOTION TO DISMISS AND/OR STRIKE**

On October 21, 2010, PSM filed a reply to the People's response to PSM's motion to dismiss and/or strike. PSM's reply addresses the People's arguments from the People's response and supplemental filing. PSM Reply at 4.

PSM argues that the amended complaint's allegations do not establish that PSM was required to have CWA NPDES permits prior to or at the time of the alleged discharges and therefore, all Section 12(f) and Section 309.102(a) violations should be dismissed. PSM Reply at 4. Each count of the amended complaint alleged a violation of Section 12(f) and Section 309.102(a) by causing or allowing the discharge of livestock wastewater to waters of the State without a NPDES permit. *Id.* at 4-5.

PSM contends that in order to violate either Section 12(f) or Section 309.102(a), that person must have been obligated under the CWA to obtain a NPDES permit before the discharge occurred. PSM Reply at 5. PSM states that the CWA does not require any of the respondents to have NPDES permits based on ownership of a farm alone. *Id.* at 6. PSM disagrees with the People's argument that even if the respondents were not required to obtain NPDES permit pursuant to the CWA, Illinois' more stringent water regulations do require respondents to obtain NPDES permits. *Id.* Further, PSM argues that the People's response only properly argued Count VIII because the People actually included the size and number of swine kept at the facility but failed to argue the same way for each Count and farm; therefore, the People failed to state a cause of action for each violation and the amended complaint must be dismissed. *Id.*

PSM also argues that even if the People had included the appropriate facts, the argument would still fail because the Board's Agriculture Related Pollution Regulations state that no animal feeding operation shall require a NPDES permit if it only is designed to discharge in the event of a 25-year, 24-hour storm event. PSM Reply at 6, citing 35 Ill. Adm. Code 502.102, 502.106(e). PSM asserts that the respondents fit into this specific exception of the regulation on which the People rely and that the People never considered this exception. *Id.* at 6-7.

Further, PSM argues that even if the People amend their complaint properly, the People still could not allege a violation of Section 12(f) or Section 309.102(a) because those sections can only be violated if the CWA requires a NPDES permit and the person did not obtain one. PSM Reply at 7. Allegations under Section 502.102 are insufficient. *Id.*

PSM reiterates that the factual allegations in the amended complaint do not establish that PSM was required to obtain a CWA NPDES permit prior to or at the time of the alleged discharges. PSM Reply at 8. PSM disputes that any discharges were into navigable waters and that a "mere hydrologic connection" does not suffice as a nexus between wetlands and navigable waters of the State. *Id.* at 8-10.

For the above reasons, PSM states that all alleged violations of Section 12(f) and Section 309.101(a) should be dismissed and all allegations concerning PSM not seeking a CWA NPDES permit should be stricken. *Id.* at 10.

PSM then replies regarding specific charges.

PSM states that, regarding count I, PSM and the People disagree over whether the allegations are sufficient to meet the standards of Section 103.204(C). PSM Reply at 10-11. However, PSM states that even if the allegations are sufficient, the claims should be dismissed because Section 12(f) and Section 309.102(a) are concerned with point source discharges and construction activity is a nonpoint source. *Id.* at 11. Also, the Section 309.102(a) claim must be dismissed because there was no allegation of any discharge into a water of the State or a well. *Id.*

PSM contends that, regarding the livestock waste and NPDES permit in Counts I, II, III, V, VII, VIII and IX, those allegations should fail because there is no mention of a discharge into a navigable water of the United States. PSM Reply at 11. Similarly, this supports the dismissal of Section 12(f) and Section 309.102(a) charges. *Id.*

PSM addresses charges in Count IV regarding livestock waste, septic systems and NPDES permits. PSM Reply at 12-13. In response to the People's contention regarding PSM's defense about IDPH jurisdiction, PSM states that jurisdictional defenses are not affirmative defenses. *Id.*, citing 735 ILCS 5/2-619(1) and 5/2-613(c), (d).

PSM criticizes the charges in Count IX regarding livestock waste and NPDES permits. In addition to the contention discussed above, PSM argues that, regarding the groundwater discharge, allegations of a threat of impairment is not enough to establish a violation of Section 620.301. *Id.* at 14.

For the above reasons, PSM asks that the specific allegations in the amended complaint that are identified as improper in PSM's reply be stricken. PSM Reply at 14. Further, PSM asks for dismissal of the charges in the amended complaint that do not state a cause of action against PSM. *Id.*

### **THE PEOPLE'S COMBINED SUR-REPLY**

The Board has already addressed the majority of the People's combined sur-reply in response to the Owners' filings above. However, the People also make a number of contentions in response to arguments addressed by PSM.

The People first address PSM's responses to the People's stormwater allegations regarding Hilltop. Sur-reply at 23. The People dispute PSM's statement that construction runoff is not a point source. *Id.* The CWA's 1987 amendments grant the USEPA permitting authority for stormwater. *Id.* Therefore, stormwater has been clearly defined as a point source. *Id.*

PSM also assert that there was not a sufficient factual basis for violations of NPDES stormwater regulations. Sur-reply at 23. The People respond that the People pled facts indicating that the site was under construction and no erosion controls were in place. *Id.* Further, the IEPA Bureau of Water Field Operations Section inspectors performed another storm water inspection at Hilltop on November 15, 2006 and those inspectors reported that minimal earthwork was underway and that silt fencing had been installed to minimize storm water erosion. *Id.* at 24. Further, the inspectors opined that the silt fencing was inadequate to meet regulations and more fencing was needed. *Id.* The People contend that stormwater construction regulations require such controls be maintained. *Id.*

The People next address the groundwater degradation allegation of Little Timber. Sur-reply at 24. The People include language from Section 620.301 of the Board's Groundwater Quality Regulations to demonstrate that there is a general prohibition against use impairment of resource groundwater. *Id.* The People reiterate that well data indicated that nitrate levels rose from 1.14 to .91 mg/l in 1997 to 10 mg/l in 2002. *Id.* That groundwater is used as potable water and is Class I groundwater, which requires a nitrate level of 10 mg/l and any level exceeding 10 mg/l violates the permissible standard. *Id.* at 25. Therefore, the People reason that the trend alleged in the Amended complaint is sufficient to form the basis of the Complainant's allegation that Little Timber and PSM threaten to cause or allow the release of contaminants that may preclude an existing use of the subject groundwater. *Id.*

For the above reasons, the People respectfully request that the Board deny the respondents' motion for partial dismissal and the motion to dismiss and/or strike. Sur-reply at 25. Alternatively, the People request leave to amend should the Board find the Amended complaint insufficiently pled. *Id.*

## **DISCUSSION**

The Board notes that neither Wildcat nor High-Power Pork have filed motions attacking the sufficiency of the amended complaint at this time and therefore the case against both parties continues regardless of the outcome of today's decision. Similarly, the Owners and PSM only attack the Section 12(f) and 35 Ill. Adm. Code 309.102(a) allegations of the amended complaint. Therefore, regardless of the Board's decision, the case continues regarding other alleged violations.

### **Standard for Granting Motion to Dismiss**

The Board has often looked to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. 35 Ill. Adm. Code 101.100(b); *See also* United City of Yorkville, PCB 08-96, slip. op. at 14-15 (Oct. 16, 2008). In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584

(1989). “[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.” Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989). In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that “Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action.” Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993)). “[L]egal conclusions unsupported by allegations of specific facts are insufficient.” Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988)). A complaint’s allegations are “sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action.” People v. College Hills Co., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (March 16, 1982). Fact-pleading does not require a complainant to set out its evidence: “[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.” People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting* Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970)).

The respondents’ motions to dismiss and/or strike can be summarized to two main arguments: the People do not sufficiently contend that the respondents have discharged into waters of the state, and the People have not sufficiently pled that the respondents require NPDES permits, as is presumed by Section 12(f).

### **Motion and Request to Strike or Disregard Allegations**

The disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court. Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303.

Both PSM and the Owners request that the Board disregard or strike numerous portions of the People’s amended complaint and subsequent filings in response to the motions to dismiss. The Board is not persuaded that the allegations in question are either insufficient in law or contain immaterial matter. Lowe Transfer, Inc. and Marshall Lowe v. County Board of McHenry County, PCB 03-221, slip op. at 7 (Oct. 2, 2003).

When addressing the parties’ filings, the Board reviews only the relevant law and makes its determination based on that information. Any misrepresentations are recognized as argument and not fact which the Board bases its decision on.

The Board denies the motion and request to strike various portions of the People’s filings. However, the Board will disregard any irrelevant allegations.



### **Discharge into Waters of the State**

Section 12(f) of the Act states in part that no person shall “cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act....” 415 ILCS 5/12(f).

Section 309.102(a) of the Board’s regulations states that, “[e]xcept as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.”

The respondents collectively contend that the amended complaint must be dismissed because the People have not raised sufficient facts to demonstrate that the respondents discharged pollutants into waters of the State. Owners Mot. at 2, PSM Mot. at 3-4. PSM stated that the Board’s regulations require the People to allege dates, locations, events, nature, extent, duration and strength of discharges or emissions and consequences alleged to constitute the violations. PSM Mot. at 3-4, citing 35 Ill. Adm. Code 103.204(c).

A complainant is not required “to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action”. City of Wood River, PCB 98-43, slip op. at 2. A complaint’s allegations are “sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action.” College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467.

The respondents contend that the People have attempted to cure deficiencies in the amended complaint regarding discharges into waters of the state by introducing new facts in the responses to the motions to dismiss. Owners Reply at 2. However, the facts alleged in the amended complaint reasonably inform the respondents of the violations alleged.

“Waters” of the state are defined as “all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.” 415 ILCS 5/3.550.

In Count I, the People state that on June 16, 2006, an inspector noted an eroded channel near a concrete stockpile that drained into Sugar Creek. Am. Compl. at 3. Similarly, a May 28, 2009 inspection noted runoff containing livestock waste from a land application field associated with the Hilltop facility one-eighth mile west of the Hilltop facility. This runoff had the potential to discharge into waters of the State in the event of precipitation. *Id.* at 4.

In Count II, the People allege that on September 18, 2008, swine manure flowed from a cleanout pipe down a field and along a drainage channel where it entered an unnamed tributary to Wildcat Creek. Am. Compl. at 9.

In Count III, the People allege that, on November 10, 2008, due to a pipeline break or leak, swine waste discharged from the High-Power facility, down a grassed waterway, under a township road and into an unnamed tributary of the South Branch of Cedar Creek and then into South Branch Cedar Creek and Cedar Creek. Am. Compl. at 13.

In Count IV, the People allege that, at the time of a May 10, 2007 inspection, there was a discharge from a gestation building perimeter tile onto the land in a manner in which the discharge drained into a strip mine lake. Am. Compl. at 16.

In Count V, the People allege that on September 13, 2007, swine manure drained from a pipe and flowed along a gravel drive until it reached a waterway to the east of the swine confinement buildings. Am. Compl. at 20.

In Count VI, the People allege that, during a September 11, 2008 inspection, a discharge of leachate from the facility's dead animal composting structure was observed exiting the structure and entering a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek. Am. Compl. at 24.

In Count VII, the People allege that on July 7, 2008, livestock waste entered a small unnamed tributary of one of the facility's on-site ponds which discharges into an adjacent pond to the east during periods of high water discharges. Am. Compl. at 29. The eastern pond then discharges to an unnamed tributary of Honey Branch. *Id.* On July 24, 2008, an Agency inspector observed swine waste in the receiving pond. *Id.*

In Count VIII, the People allege that on December 3, 2003, a perimeter tile serving a facility gestation building was discharging into a ravine in a terraced field south of the facility. Am. Compl. at 33. On December 19, 2007, an Agency inspector also noted a liquid discharge into a pond on the north end of the facility and leachate runoff entering a small pond on the site. *Id.* at 34.

In Count IX, the People allege that on June 1, 2004, leachate was observed draining into a ditch of the gravel access lane which then flows into a waterway which drains under the gravel road and is tributary to Middle Creek. Am. Compl. at 38. On February 1, 2007, an Agency inspector observed manure residual in a drainage path north of the on-site lagoon and in the downstream waterway. *Id.* at 40. A further inspection on August 24, 2007 noted that surface waters from a burn area containing various swine bones drain into a waterway that is tributary to Middle Creek and ultimately flows into the LaMoine River. *Id.*

In determining a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004). Taking the allegations in the amended complaint as true, the People reasonably inform the respondents of the waters of Illinois which the discharges are alleged to run into. While it is true that the People do not specifically refer to "navigable waters" in the amended complaint (Owners Resp. at 7), the amended complaint does refer to "waters" of

the State which adequately addresses Section 12(f) of the Act and Section 309.102(a) of the Board's regulations.

### **NPDES Permit Requirement**

The Owners contend in their motion to dismiss that the People do not have sufficient facts in the amended complaint to demonstrate that they were required to obtain NPDES permits. Owners Mot. at 2.

Similarly, PSM contests a number of counts in the amended complaint on the basis that no facts stated in the amended complaint show that PSM was required to apply for a NPDES permit prior to the alleged release. PSM Mot. at 9-12.

Section 12(f) states in part that no person shall "cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act..." 415 ILCS 5/12(f).

As defined in the Federal Clean Water Act, a point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. 1362(14), 40 C.F.R. § 122.2.

The People contend that a discharge of a contaminant into waters of the State from a point source has occurred.

In Count I, the People allege that an eroded channel existing near a concrete stockpile drained into Sugar Creek. Am. Compl. at 3. Additionally, livestock waste associated with the facility and located in a ditch north of the facility had the potential to discharge into waters of the State in the event of precipitation. *Id.* at 4.

In Count II, the People allege swine manure flowed from a broken pipe down a field and into an unnamed tributary of Wildcat Creek. Am. Compl. at 9.

In Count III, the People allege that a break in a pipeline led to swine waste discharging down a grassed waterway, under the township road, into an unnamed tributary of the South Branch of Cedar Creek and eventually into South Branch Cedar Creek and Cedar Creek. Am. Compl. at 13.

In Count IV, the People allege that a discharge from a gestation building perimeter tile deposited on the land in a manner in which the discharge drained into a strip mine lake. Am. Compl. at 16.

In Count V, the People allege that liquid swine waste drained from a pipe and flowed across a gravel drive until it reached a waterway east of the swine confinement buildings. Am. Compl. at 20.

In Count VI, the People allege a discharge of leachate from the facility's dead animal composting structure exited the structure and entered a dry dam which discharges to an unnamed tributary of the West Branch of Sugar Creek. Am. Compl. at 24.

In Count VII, the People allege that livestock waste exited a pipeline and entered a small unnamed tributary of one of the facility's on-site ponds. Am. Compl. at 29. This pond in turn discharges into an adjacent pond during periods of heavy rainfall and ultimately discharges to an unnamed tributary of Honey Branch. *Id.*

In Count VIII, the People allege that a discharge from a perimeter tile entered a ravine in a terraced field south of the facility. Am. Compl. at 33. The People also allege that a discharge was observed flowing between two buildings on the site which then entered an on-site pond. *Id.* at 34.

In Count IX, the People allege leachate was observed draining from a mortality compost unit at the facility and entering a ditch to the gravel access lane, which flows into a waterway that is tributary to Middle Creek. Am. Compl. at 38.

The People's Section 12(f) and Section 309.102(a) allegations are sufficiently pled to survive the respondents' respective motions to dismiss.

The Owners, in their supplemental filing, contend that only CAFOs that "discharge or propose to discharge" are required to obtain a NPDES permit. Supp. Reply at 2, citing 75 Fed. Reg. 70418, 70423. The Owners also cite a federal Fifth Circuit decision, stating that the decision "vacated the provisions of the 2008 CAFO rule that required CAFOs that propose to discharge to apply for an NPDES permit, and also vacated the provisions that create liability for failing to apply for an NPDES permit." Supp. Reply at 2, citing Nat'l Pork Producers Council, 2011 U.S. App. LEXIS 5018 \*46-47. The group contends that the Fifth Circuit's decision should be interpreted to mean that an existing discharge is required before the obligation to apply for and obtain a permit arises. Supp. Reply at 4.

The People reject the Owners' argument and instead contend that the Fifth Circuit's decision should be interpreted as distinguishing between a cause of action for failure to apply for a permit and a cause of action for discharging without a permit. Supp. Reply Resp. at 5. The People distinguish the parties in the Fifth Circuit action to the parties here, where the amended complaint concerns a discharge without a permit. *Id.* at 6.

The Board is not required to reach a determination on this issue at this time. Reading the plain language of Section 12(f) and the violations alleged in the amended complaint, the People sufficiently allege facts to reasonably set forth a cause of action.

**CONCLUSION**

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true in favor of the non-movant. The People sufficiently allege facts to establish a cause of action and reasonably inform the respondents of the alleged violations. Therefore, PSM's motion to dismiss and the Owners' motion for partial dismissal are denied.

Further, the Board denies PSM's motion to strike and the Owners' request to strike portions of the People's response to the motion for partial dismissal, but acknowledges that only relevant facts will be considered.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 2, 2012, by a vote of 5-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board