BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 10-84**
	)	**(Enforcement)**
PROFESSIONAL SWINE MANAGEMENT, LLC, an Illinois limited liability corporation, HILLTOP VIEW, LLC, an Illinois limited liability corporation, WILDCAT FARMS, LLC, an Illinois limited liability corporation, HIGH-POWER PORK, LLC, an Illinois limited liability corporation, EAGLE POINT FARMS, LLC, an Illinois limited liability corporation, LONE HOLLOW, LLC, an Illinois limited liability corporation, TIMBERLINE, LLC, an Illinois limited liability corporation, PRAIRIE STATE GILTS, LTD, an Illinois corporation, LITTLE TIMBER, LLC, an Illinois limited liability corporation,	)	
	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on March 11, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a RESPONSE TO RESPONDENTS' MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
Jane E. McBride
Sr. Assistant Attorney General
Environmental Bureau

500 S. Second St.
Springfield, IL 62706
217/782-9031

CERTIFICATE OF SERVICE

I hereby certify that I did on March 11, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and RESPONSE TO RESPONDENTS' MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF upon the persons listed on the Service List.

JANE McBRIDE
Sr. Assistant Attorney General

SERVICE LIST

Edward W. Dwyer
Jennifer M. Martin
Hodge Dwyer Driver
3150 Roland Avenue
P.O. Box 5776
Springfield, IL 62705

Fred C. Prillaman
Joel A. Benoit
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

Claire A. Manning
Brown, Hay & Stephens, LLP
205 S. Fifth Street, Ste. 700
P.O. Box 2459
Springfield, IL 62705-2459

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

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	)	
Respondents.	)	

RESPONSE TO RESPONDENTS' MOTION TO STRIKE PART OF COMPLAINANT'S PRAYER FOR RELIEF

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, and responds to Respondent's Motion to Strike Part of Complainant's Prayer for Relief as follows:

1. On December 13, 2012, Complainant filed a Motion for Leave to Amend First Amended Complaint and a Seconded Amended Complaint.

2. On February 11, 2013, Respondents filed a Joint Motion to Strike Part of Complainant's Prayer for Relief.

3. On February 25, 2013, Complainant was granted an extension of time, until March 11, 2013, in which to respond to Respondents' Joint Motion to Strike.

4. Respondents' motion to strike claims that the discharges alleged in each count

of the Second Amended Complaint were "discreet discharges" and that the Second Amended Complaint is insufficient to support the prayer for relief that the Respondents be required to obtain National Pollution Elimination Discharge System ("NPDES") permit coverage for each of the subject facilities. Respondents assert that the Second Amended Complaint is insufficient to support the relief sought because the Complainant has not alleged that the Respondents have failed to address the events or operational issues that gave rise to the subject discharges. Respondents rely on language contained in the preamble of the 2008 proposed federal CAFO regulations ("2008 CAFO Rule"), 73 Fed Reg. 70,418, 70,423, as authority. The 2008 CAFO Rule preamble language relied upon by Respondents states that the federal US EPA believes that not every past discharge necessarily triggers a duty to apply for a permit if the conditions that gave rise to the discharge have been corrected. See Footnote 2 on Page 5 of Respondents' Joint Motion to Strike.

Authority

5. Language that appears in the preamble to a final rule is considered interpretive law. The language relied on is not part of a final rule, it is the preamble to a proposed rule. As stated in *Fertilizer Institute v. US EPA, et al*, 935 F. 2d 1303, 1308:

> " . . . This court's holding in *General Motors [v. Ruckelshaus]* that an agency's action is deemed to be legislative when the agency " *intends* to create new . . . duties," 742 F.2d [1561], 1565 [(D.C. Cir. 1984) (emphasis added), does not mean that an agency's action is legislative whenever it has the effect of creating new duties. To the contrary, as we reasoned in *United Technologies Crop. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987), the proper focus in determining whether an agency's act is legislative is the source of the agency's action, not the implications of that action:
>
> > If the rule is based on specific statutory provisions . . . . it is an interpretive rule. If, however, the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.
>
> Accordingly, the fact that the preamble may affect how parties act does not make the rule legislative – regardless of the consequences of a rulemaking, a rule will be considered interpretative if it represents an agency's explanation of a statutory provision.

6. Legislative rules, adopted through notice and comment proceedings, bind the agency and reviewing courts. E.g. *Metropolitan School District of Wayne Township, Marion County, Indiana v. Davila*, 969 F.2d 485, at 490 (7th Cir. 1992) ("legislative rules have the force and effect of law – they are as binding upon courts as congressional enactments. Interpretive rules, although they are entitled to deference, do not bind reviewing courts.") (internal citation omitted). By contrast, interpretive rules "carry no more weight on judicial review than their inherent persuasiveness commands." *Batterton v. Marshall*, 648 F.2d 702 (D.C. Cir. 1980); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140. See also *Alcarez* v. *Block et al*, 746 F.2d 593, 614 (9th Cir. 1984) (Although interpretive rules do not necessarily bind agencies and reviewing courts, they are "binding on the regulated parties in the sense that they set, for the time, the legal minima of behavioral standards".)

7. The preamble language cited by Respondents is stated in reference to the "propose to discharge" provisions that were ultimately vacated by the Fifth Circuit. Thus, there is a legitimate question as to whether the cited language is relevant and carries any weight, at all. As discussed by Respondents in their joint motion, in the case of *Nat'l Pork Producers Council v. EPA*, 635 F. 3d 738, 748-52 (5th Cir. 2011) ("*Nat'l Pork*"), the Court vacated the provisions in the 2008 CAFO Rule relevant to the "proposed to discharge" language. In context, it is obvious that the language Respondents cite as authority for their position, appears in the preamble to the 2008 CAFO Rule in reference to the "propose to discharge" language. Reference in the 2008 CAFO Rule to the standard of "design, construction, operation or maintenance in such a way as to prevent discharge" was relevant to Sections 122.23(I) and (j), which allowed owners and operators to voluntarily certify that a CAFO did not discharge or propose to discharge. These sections were removed from the regulation in the

final 2012 CAFO Rule. See 77 Fed. Reg. 44494-44497 ("2012 CAFO Rule"). The language "design, construction, operation or maintenance in such a way as to prevent discharge" is language of the rule and not found in the cited case law. The context of the 2008 CAFO Rule language (73 Fed. Reg. 70,423) relied upon by Respondent for authority, includes:

> It is well established that "discharge" is not limited to continuous discharges of pollutants from a point source to waters of the U.S., but also includes intermittent and sporadic discharges. "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition. " *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989). Such intermittent, sporadic, even occasional, discharges may in fact be the norm for many CAFOs, but they are nonetheless "discharges" under the CWA and are prohibited unless authorized under the terms of an NPDES permit. CAFOS that have had such intermittent or sporadic discharges in the past would generally be expected to have such discharges in the future, and therefore be expected to obtain a permit, unless they have modified their design, construction, operation, or maintenance in such a way as to prevent all discharges from occurring.
>
> EPA received a number of comments concerning past discharges. Some commenters asserted that a prior discharge is not, by itself, a sufficient basis for requiring a permit and observed that it is quite possible that a CAFO may have eliminated the cause of the discharge. EPA agrees that not every past discharge from a CAFO necessarily triggers a duty to apply for a permit; however, a past discharge may indicate that the CAFO discharges or proposes to discharge if the conditions that gave rise to the discharge have not be changed of been corrected. See., e.g. *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation,* 484 U.S. 49, 57 (1987) ("a reasonable likelihood that a past polluter will continue to pollute in the future" is a continuous or intermittent violation); *American Canoe Ass'n v. Murphy Farms, Inc*. 412 F.2d 536 (4th Cir. 2005) (CWA violation continues where corrective measure are insufficient to eliminate real likelihood of repeated discharges). The same rationale that led the courts in these cases to conclude that the point sources in question were discharging in violation of the CWA underlies the final rule's requirement that CAFOs must seek permit coverage when they discharge or propose to discharge (i.e. are designed, constructed, operated, or maintained such that a discharge will occur). Sections 122.23 (d)(1) and (f).

As noted in Respondents' joint motion, Section 122..23 (d)(1) and (f) were wholly revised in the 2012 CAFO Rule in response to the *Nat'l Pork* decision.

8. The case law cited in the above excerpt concerned the courts' interpretation of the provision of the Clean Water Act authoring private citizens to bring civil actions for injunctive relief and/or the imposition of civil penalties. The question was an interpretation of

whether or not the statutory language conferred federal jurisdiction in a citizens suit for wholly past violations. Thus, the question decided in these cases was not whether or not an entity was required to obtain NPDES permit coverage, and thus these cases are not on point in regard to the instant matter.

9. Whereas the *Nat'l Pork* court addressed the question as to whether a CAFO can be required to get a permit prior to a discharge, or on the basis of whether it "proposed to discharge", the court did not reach the question as to what was meant by "discharge" or "discharging". Thus, *Nat'l Pork* cannot be relied upon for authority regarding the term "discharge" or "discharging".

10. Authority cited by Respondents is irrelevant to the federal rule as revised and published on July 30, 2012. The language cited is interpretive law at best; however, it is applicable to provisions that have since been vacated and therefore it is irrelevant.

Response

11. As stated on Page 7 of Respondents' Joint Motion, the current federal law and regulations and state law, i.e. the plain language of 12(f) of the Act, require CAFOS that discharge to seek coverage under an NPDES permit. Complainant has alleged facts that the subject facilities discharge. The detailed factual allegations included in the Second Amended Complaint indicate operational practices and incidents that caused the facilities to discharge. The facts show that these facilities are designed and constructed in a manner that can result in accidents or incidents that result in discharge, and that the normal course of operation of the facilities have resulted in discharge. Hence, these facilities do discharge. The Second Amended Complaint includes sufficient allegation of fact to support the Complainant's request that the Board order each facility to obtain NPDES coverage. Complainant has met its pleading burden and Respondents' joint motion must be denied.

12. Notwithstanding the shortcomings of the authority cited and the fact the Second Amended Complaint contains sufficient allegation of fact to support the request for relief, should the Board be persuaded by Respondents' motion, Complainant seeks leave to amend. Complainant is certainly able to allege that Respondents have failed to address the events or operational issues that gave rise to the discharges that are the subject of the Second Amended Complaint. Despite the details being shrouded in the privilege of settlement discussions, Respondents are all too aware that Complainant has allowed Respondents the opportunity to attempt to prove they have addressed the events and operational issues that gave rise to the discharges, and (1) they have failed to do so, and (2) they have failed to prove that they have adequate plans in place to provide the Complainant with confidence that the facilities are properly operated and the possibility of discharge has been eliminated.

Conclusion

In the Second Amended Complaint, Complainant has included sufficient factual allegations to support its requested prayer of relief that the Board order that each of the subject facilities obtain NPDES CAFO permit coverage.

WHEREFORE, on the grounds and for the reasons stated above, the Complainant respectfully requests that the Board deny Respondents' Joint Motion to Strike Part of Complainant's Prayer for Relief, or, in the alternative should the Board grant Respondents' motion, Complainant seeks leave to amend the Second Amended Complaint so as to

incorporate allegations of failure to address the events and operational issues that gave rise to the subject discharges. .

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

BY: _____
JANE E. MCBRIDE
Sr. Assistant Attorney General

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