ILLINOIS POLLUTION CONTROL BOARD
May 2, 2013

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

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

On December 13, 2012, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion for leave to amend the first amended complaint, along with the People's second amended complaint. On February 2, 2013, Professional Swine Management, LLC, Hilltop View, LLC, Wildcat Farms, LLC, High-Power Pork, LLC, Eagle Point, LLC, Lone Hollow, LLC, Timberline, LLC, Prairie State Gilts, Ltd, and Little Timber, LLC (Respondents), filed a joint motion to strike part of the People's request for relief (Mot.) and a motion for extension of time to respond to the second amended complaint (Mot. Ext.).

The eight-count second amended complaint alleges 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).

For the reasons below, the Board denies Respondents' motion to strike part of the People's request for relief and accepts the second amended complaint for hearing. The Board grants Respondents until June 17, 2013, to file an answer to the second amended complaint, if they so choose.[1]

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

## PROCEDURAL HISTORY

On April 15, 2010, the People filed a nine-count complaint against Professional Swine Management, LLC, Hilltop View, LLC, Wildcat Farms, LLC, High-Power Pork, LLC, Eagle Point, LLC, Lone Hollow, LLC, Timberline, LLC, Prairie State Gilts, Ltd, North Fork Pork, LLC, Little Timber, LLC, and Twin Valley Pumping, Inc. On May 6, 2010, the Board accepted the complaint for hearing.

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

As noted in various hearing officer orders, the parties have engaged in settlement discussions throughout these proceedings. *See, e.g.*, September 26, 2011 Hearing Officer Order.

On December 13, 2012, the People filed a motion for leave to amend the first amended complaint, along with a second amended complaint. On February 2, 2013, Respondents filed a joint motion for extension of time to respond to the second amended complaint, and a joint motion to strike part of the People's request for relief. On March 11, 2013, the People filed a response to Respondents' motion to strike. On March 25, 2013, Respondents filed a reply to the People's response. On April 4, 2013, the People filed a sur-reply. The Board also received the People's notice of service of discovery documents on April 17, 2013.

## PROCEDURAL ISSUES

The Board initially addresses procedural motions with respect to the following: Respondents' joint motion for leave to file reply to the People's response; and the People's motion for leave to file a sur-reply.

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.* 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 decision.

## THE PEOPLE'S SECOND AMENDED COMPLAINT

The second amended complaint contains eight counts, each count pertaining to a separate facility. Respondents do not challenge the entirety of the second amended complaint. Rather, Respondents' current motion to strike pertains only to a specific portion of the second amended complaint's request for relief for each of the counts. The request for relief for each count of the second amended complaint includes the following:

> Ordering Respondent to cease and desist from any further violations of the Act and associated regulations, *such order to include the requirement to immediately apply to obtain [Confined Animal Feeding Operation (CAFO)] [National Pollutant Discharge Elimination System (NPDES)] permit coverage for the subject facility . . . . See, e.g.*, Sec. Am. Compl. at 15 (emphasis added).

Respondents do not at this time challenge the rest of the second amended complaint and the Board therefore does not include a summary here. However, the eight counts are similar to Counts I through VII and Count IX in the People's first amended complaint, which the Board summarized in its February 2, 2012 order.

## RESPONDENTS' JOINT MOTION TO STRIKE PART OF COMPLAINANT'S REQUEST FOR RELIEF

Respondents note that the People, in the second amended complaint, add a new clause to the request for relief at the end of each count. Mot. at 2. This relief requests "such order to include the requirement to immediately apply to obtain CAFO NPDES coverage for the subject facility." *Id.* Respondents state that their motion is narrow in scope and focused specifically on this portion of the relief sought. *Id.*

Respondents state that the Clean Water Act (CWA) generally prohibits the discharge of a pollutant from a point source into navigable waters of the United States except as authorized by a NPDES permit. Mot. at 3, citing 33 U.S.C. §§ 1311(a), 1342, and 1362. However, Respondents contend that no permit is required under Section 12(f) or Section 39(b) of the Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act, and regulations pursuant thereto. Mot. at 4, citing 415 ILCS 5/12(f).

Respondents emphasize the "significant rulemaking efforts and litigation" surrounding regulations governing CAFOs over the last decade. Mot. at 4. Respondents cite a recent United States Court of Appeals for the Fifth Circuit opinion vacating the provisions of the 2008 CAFO Rule (73 Fed. Reg. 70418 (Nov. 20, 2008))

> 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. Mot. at 5, citing National Pork Producers Council v. EPA, 635 F.3d 738, 748-752 (5th Cir. 2011) (National Pork Producers).

Respondents contend that the National Pork Producers decision held that

> requiring CAFOs who were not presently discharging into navigable waters of the United States to apply for an NPDES permit went beyond the authority granted by the CWA. Mot. at 5.

Respondents further cite the National Pork Producers court as stating

> We hereby vacate those provisions of the 2008 Rule that require CAFOs that propose to discharge to apply for an NPDES permit, but we uphold the provisions of the 2008 Rule that impose a duty to apply on CAFOs that are discharging. *Id.*, citing National Pork Producers at 756.

Respondents interpret the Fifth Circuit decision to require an existing discharge before the obligation to apply for and obtain a CAFO NPDES permit arises. Mot .at 5.

Respondents also state that the preamble to the 2008 CAFO Rule specifically addressed whether a past discharge, by itself, requires a CAFO owner or operator to apply for and obtain a CAFO NPDES permit. Mot. at 5, n. 2. Respondents state that

> USEPA agreed 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 been corrected. *Id.*, citing 73 Fed. Reg. 70423.

Respondents state that, under the latest USEPA revisions for determining when a CAFO must apply for and obtain an NPDES permit, that 40 C.F.R. § 122.23(d)(1) now provides that "A CAFO must not discharge unless the discharge is authorized by an NPDES permit." Mot. at 6. Respondents also cite 40 C.F.R. § 122.23(f), which states "[b]y when must the owner or operator of a CAFO have an NPDES permit if it discharges? A CAFO must be covered by a permit at the time that it discharges." Mot. at 6.

Respondents further contend that the second amended complaint only alleges past discharges and does not allege any ongoing or current discharge. Mot. at 6. Respondents state that, under 415 ILCS 5/12(f), the state may only require a CAFO to obtain an NPDES permit if it is required to do so under federal law. *Id.* Respondents state that, under federal law, the CAFOs named in this case are not required to obtain a CAFO NPDES permit. *Id.* Respondents contend that the People do not allege in any of the counts that any subject facility is discharging any waste into waters of the State, but rather that the discharges occurred between 2004 and 2009. *Id.* at 7. Respondents therefore contend that there is no basis for the People's request for relief that each of the respondents "immediately apply to obtain CAFO NPDES permit coverage for the subject facility." *Id.*

## PEOPLE'S RESPONSE TO RESPONDENTS' MOTION TO STRIKE

The People state that language that appears in the preamble to a final rule is considered interpretive law and is not part of the final rule. Resp. at 2, citing Fertilizer Institute v. USEPA, *et al.*, 935 F.2d 1303, 1308. Further, the People contend that the preamble language cited by the respondents is stated in reference to "propose to discharge" provisions that were vacated by the Fifth Circuit decision. Resp. at 3. The People therefore question whether the cited language is relevant. *Id.* The People contend that the language was relevant to Sections 122.23(i) and (j) of the 2008 CAFO Rule, which were removed from the regulation in the final 2012 CAFO Rule. *Id.* at 3-4, citing 77 Fed. Reg. 44494-44497 (2012 CAFO Rule).

The People further contend that the National Pork Producers court addressed the question of whether a CAFO can be required to get a permit prior to a discharge, or on the basis of whether it proposed to discharge. Resp. at 5. However, the People argue that the Fifth Circuit did not address the question as to what was meant by "discharge" or "discharging," and therefore the case cannot be relied upon for authority regarding the terms "discharge" or "discharging." *Id.* The People contend that authority cited by the respondents "is irrelevant to the federal rule as revised and published on July 30, 2012." *Id.*

The People conclude that

> [t]he 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. Resp. at 5.

The People seek leave to amend their complaint should the Board grant the respondents' motion to strike. Resp. at 6.

## RESPONDENTS' JOINT REPLY AND OBJECTION TO THE PEOPLE'S RESPONSE

Respondents repeat the case law cited to in their motion to strike, stating that the cases and prior rulemaking proceedings "are relevant to understanding and applying the current and applicable federal regulation to the Second Amended Complaint." Reply at 5. Respondents contend that, by applying the current regulation to the allegations in the second amended complaint, "it is clear that the Second Amended Complaint does not allege that any of the Respondent Farms discharge." *Id.*

Respondents argue that the discharges referred to in the second amended complaint date back "almost a decade" and that the People do not allege in any of the counts that any Respondent's facility is "discharging" any waste to waters of the United States. Reply at 5. Respondents contest that 40 C.F.R. § 122.23(f) does not state that, if a facility had a discharge prior to the effective date of the rule, then it is deemed to be currently discharging and therefore it requires an NPDES permit. *Id.* at 5-6. Respondents argue that the People's allegations concerning discrete discharges that occurred years prior from various causes "do not constitute factual allegations that the Farms are currently discharging." *Id.* at 6. Respondents further contend that

> vague and conclusory allegations contending that poor design or construction of a Farm suggests that it can or might discharge in the future similarly do not constitute factual allegations that the Farms are currently discharging. *Id.*

Respondents also request that statements in the People's response that refer to information exchanged during confidential settlement negotiations should be stricken and not considered by the Board. Reply at 7. Respondents contend that such statements would violate the privilege of settlement discussions and regardless, facts that the People may later plead are irrelevant to the issue currently presented. *Id.* Respondents also raise concern regarding the "chilling effect" that such disregard for the privilege of settlement discussions may have between the People and parties in enforcement matters. *Id.* at 7-8.

**PEOPLE'S SUR-REPLY TO RESPONDENTS' JOINT REPLY**

The People repeat that the language relied upon by Respondents in the 2008 CAFO Rule is preamble language and that "[l]anguage in a preamble of a final federal rule is interpretive law, at best." Sur-Reply at 2. The People also state that this language is "wholly irrelevant" to the 2012 Rule and the applicable state regulations. *Id.* at 3.

The People also repeat that National Pork Producers "did not reach the question as to what was meant by 'discharge' or 'discharging.'" *Id.* The People contend that nowhere in the National Pork Producers "duty to apply" analysis does the term "presently" modifying "discharge" or "discharging" appear. Sur-Reply at 2.

In describing part of their position, the People state that

> the entire federal effort to establish a separate obligation, that is, a duty to apply prior to there being a discharge, has no bearing on the obligation that it is a violation if a facility discharges and does not have permit coverage at the time of the discharge. Sur-Reply at 3.

The People also describe the factors that bear on their determination made concerning Respondents' facilities, including

> the record of operation of these facilities, the fact one management firm operates all of the subject facilities and there have been violations at multiple facilities, the fact of similar repeat violations facility to facility under the same management firm, design concerns including contaminant levels in perimeter tiles (the under building waste pits and waste handling systems are designed by the same consultant engineer and it is known to the [Agency] inspectors that the various facilities were built per similar design and construction plans), concerns that the facilities have failed to address the events and operational issues that gave rise to the discharges as well as concerns as to whether the facilities have adequate nutrient management plans in place. Sur-Reply at 4.

The People state that they have not breached settlement negotiations by making the allegation that the facilities have not addressed the events or operational issues that gave rise to the discharges, or the allegation that the facilities do not have adequate nutrient management plans. Sur-Reply at 4. The People also contend that they have not amended their complaint as a

result of the settlement discussions, but rather amended the request for relief once it appeared that the case would be proceeding to litigation. *Id.* at 5.

## DISCUSSION

### Standard for Granting Motion to Strike

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 v. Hamman Farms, 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). The disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court. National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993).

### Motion to Strike Specific Portion of the People's Request for Relief

Respondents request that the Board strike a portion of the request for relief in each count of the second amended complaint, which requests "the requirement to immediately apply to obtain CAFO NPDES permit coverage for the subject facility." *See, e.g.*, Sec. Am. Compl. at 15. In support, Respondents contend that no permit is required under Section 12(f) or Section 39(b) of the Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act and regulations pursuant thereto. Mot. at 4. Respondents also cite various rulemaking efforts and litigation relating to CAFOs over the past decade in support of their position. *Id.* The People respond by challenging Respondents' interpretation of the case law and regulations.

The Board is not persuaded that the allegations in question are insufficient or require the Board to strike the requested relief. Respondents' argument as to the applicability of the requirement to obtain an NPDES permit was raised in their prior motion to dismiss the first amended complaint as well as here in the instant motion. The Board previously found that reading the plain language of Section 12(f), the People sufficiently alleged facts setting forth a cause of action. People v. Professional Swine Management, *et al.*, PCB 10-84, slip op. at 43-44 (Feb. 2, 2013). These allegations, if proven, may support granting the relief requested in the second amended complaint. The Board therefore denies Respondents' motion to strike portion of the People's second amended complaint's request for relief.

### Accept for Hearing

The second amended complaint meets the applicable content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c). The Board has received no responses to the People's motion for leave to amend the first amended complaint. Therefore, any objection to

granting the motion is deemed waived. *Id.* The Board grants the People's unopposed motion for leave to amend the first amended complaint and accepts the second amended complaint for hearing. *See* 35 Ill. Adm. Code 103.206(d), (e).

Respondents request an extension of time to file an answer to the second amended complaint. Respondents seek this relief because they believe that, were the motion to strike granted, "the issues to be addressed going forward will be narrowed and/or Complainant may seek to amend its Second Amended Complaint." Mot. Ext. at 2. Respondents sought a thirty day extension from receipt of this order to file their answer, noting that the joint motion for extension "is not made for the purpose of undue delay." *Id.* at 3.

The Board's regulations provide that a respondent may file an answer to a complaint within sixty days after receipt of the complaint. 35 Ill. Adm. Code 103.204(d). Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. *Id.* A timely filed motion contesting the first amended complaint will stay the movant's sixty-day period to file an answer until the Board disposes of the motion. *See* 35 Ill. Adm. Code 101.506, 103.204(e). Respondents seek an extension of thirty days from receipt of this Board order to file their answer. To this effect, the Board grants the respondents until June 17, 2013, which is the first business day following the forty-fifth day after this Board order, to file an answer to the second amended complaint, if they so choose.

## CONCLUSION

When ruling on a motion to strike, 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. Therefore, Respondents' motion to strike a portion of the second amended complaint's request for relief is denied.

The Board grants the People's motion for leave to amend the first amended complaint and accepts the second amended complaint for hearing. The Board grants Respondents until June 17, 2013, to file an answer to the second amended complaint, if they so choose.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 2, 2013, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board