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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Mr. John T. Therriault
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
Springfield, Illinois 62794-9276
(VIA U.S. MAIL)

(PLEASE SEE ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, ***Motion For Leave To File Reply Brief*** and ***Respondents' Joint Reply To People's Combined Response To Respondents' Motions To Sever***, a copy of which is herewith served upon you.

Respectfully submitted,

BROWN, HAY & STEPHENS, LLP

Dated: August 27, 2013

By: /s/ Claire A. Manning

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon:

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

Ms. Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
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Ms. Jane McBride
Illinois Attorney General's Office
500 South Second Street
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Fred C. Prillaman
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1 North Old State Capitol Plaza, Suite 325
Springfield, IL 62701

Edward W. Dwyer
Jennifer M. Martin
Hodge Dwyer & Driver
3150 Roland Avenue
Post Office Box 5776
Springfield, IL 62705-5776

by enclosing the same in an envelope addressed to such party at the above address, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office mailbox in Springfield, Illinois, at 5:00 p.m. on this 27th day of August, 2013.

/s/ Claire A. Manning
Claire A. Manning

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. PROFESSIONAL SWINE MANAGEMENT, LLC, HILLTOP VIEW, LLC, WILDCAT FARMS, LLC , HIGH POWER PORK, LLC, LONE HOLLOW, LLC, EAGLE POINT, LLC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, Ltd, AND LITTLE TIMBER, LLC, Respondents.	)	PCB NO. 10-84 Enforcement

MOTION FOR LEAVE TO FILE REPLY BRIEF

NOW COME Respondents, Hilltop View, LLC, Eagle Point Farms, LLC, Timberline, LLC, and Little Timber, LLC, by and through their attorneys Hodge, Dwyer and Driver; and Lone Hollow, LLC, Prairie State Gilts, LLC, and High Power Pork, LLC, by and through their attorneys, Brown, Hay & Stephens, LLP, and as for their Motion for Leave to File Reply Brief, state as follows:

1. Except for Wildcat Farms, LLC and Professional Swine Management, each Respondent filed an individual Motion to Sever with the Illinois Pollution Control Board ("Board") requesting that the Board sever that count in the Second Amended Complaint ("Complaint") containing factual allegations focused solely on its farm from the other counts, each of which likewise contains factual allegations focused solely on one of the other farms.

2. Complainant responded to all of the Farm Respondents' individual Motions to Sever by filing a single Combined Response.

3. In order for Respondents to fully and appropriately address the issues raised by Complainant in its Combined Response, Respondents request that the Board allow Respondents leave to file a joint reply, which is attached hereto, instanter.

WHEREFORE, Respondents, Hilltop View, LLC, Eagle Point Farms, LLC, Timberline, LLC, Little Timber, LLC, by and through their attorneys Hodge, Dwyer and Driver; Lone Hollow, LLC, Prairie State Gilts, LLC, and High Power Pork, LLC, by and through their attorneys, Brown, Hay & Stephens, LLP, pray for leave to file the attached Reply Brief, instanter.

HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, TIMBERLINE, LLC, and LITTLE TIMBER, LLC

/s/ Edward W. Dwyer
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PRAIRIE STATE GILTS, LLC, LONE HOLLOW, LLC, and HIGH POWER PORK, LLC

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon:

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

Ms. Carol Webb
Hearing Officer
Illinois Pollution Control Board
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Springfield, IL 62701

by enclosing the same in an envelope addressed to such party at the above address, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office mailbox in Springfield, Illinois, at 5:00 p.m. on this 27th day of August, 2013.

/s/ Claire A. Manning

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. PROFESSIONAL SWINE MANAGEMENT, LLC, HILLTOP VIEW, LLC, WILDCAT FARMS, LLC , HIGH POWER PORK, LLC, LONE HOLLOW, LLC, EAGLE POINT, LCC, LONE HOLLOW, LLC, TIMBERLINE, LLC, PRAIRIE STATE GILTS, Ltd, AND LITTLE TIMBER, LLC, Respondents.	)	PCB NO. 10-84 Enforcement

<u>RESPONDENTS' JOINT REPLY TO PEOPLE'S COMBINED RESPONSE TO RESPONDENTS' MOTIONS TO SEVER</u>

NOW COMES Respondents, Hilltop View, LLC ("Hilltop"), Eagle Point Farms, LLC ("Eagle Point"), Timberline, LLC ("Timberline"), and Little Timber, LLC ("Little Timber"), by and through their attorneys Hodge Dwyer & Driver; and Lone Hollow, LLC ("Lone Hollow"), Prairie State Gilts, LLC ("Prairie State"), and High Power Pork, LLC ("High Power"), by and through their attorneys, Brown, Hay & Stephens, LLP, (collectively, the "Farm Respondents"), and for their Joint Reply to the Combined Response to Respondents' Motion to Sever filed by Complainant, the People of the State of Illinois ("Complainant"), hereby state as follows:

Introduction

1. Except for Wildcat Farms, LLC, each Farm Respondent filed an individual Motion to Sever with the Illinois Pollution Control Board ("Board") requesting that the Board sever that count in the Second Amended Complaint ("Complaint") containing factual allegations

focused solely on its farm from the other counts, each of which likewise contains factual allegations focused solely on one of the other farms.

2. Complainant responded to all of the Farm Respondents' individual Motions to Sever by filing a single Combined Response.

3. In its Combined Response, Complainant asserts and relies upon purported facts that have no evidentiary support or that are untrue, or both. To clearly address those unsupported and/or untrue factual assertions, Farm Respondents, along with Respondent Professional Swine Management ("PSM") have contemporaneously filed with this Joint Reply a separate Joint Motion to Strike Unsupported and/or Untrue Factual Assertions in Complainant's Combined Response to Respondents' Motion to Sever.

4. Complainant's Combined Response also attempts to apply precedent of the Board and Illinois courts in support of its assertion that severance is not warranted in this case. However, Complainant's reliance upon those cases is misplaced. Accordingly, Farm Respondents are compelled to file this Joint Reply to Complainant's Combined Response.

Reply to Complainant's Argument That Section 41(a) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/41(a), Is Merely a Venue Provision

5. As the Farm Respondents already explained in their Motions to Sever, Section 41(a) of the Act is a mandatory jurisdictional provision requiring that review of final Board orders be afforded directly in the Appellate Court in the district for which the cause of action arose.

6. However, in its Combined Response, Complainant took the erroneous position that "the language of Section 41 of the Act that indicates judicial review of final Board orders is afforded directly to the Appellate Court is a venue provision, not a jurisdiction provision."

Combined Response, ¶ 3. Notably, Complainant fails to cite any authority in support of its position that Section 41 of the Act is merely a venue provision.

7. Although Farm Respondents maintain that the plain language of Section 41clearly indicates that judicial review of final Board orders directly to the Appellate Court is a mandatory jurisdictional requirement, any doubt on the Complainant's behalf as to the jurisdictional nature of Section 41 has been succinctly resolved by the Illinois Supreme Court.

8. In *ESG Watts, Inc. v. Pollution Control Board*, 191 Ill.2d 26 (2000), the Illinois Supreme Court noted that ESG Watts, Inc. ("Watts") had filed its petition for review of the Board's final order in that case "directly to the appellate court, as *required* by the Act." *Id.* at 28 (emphasis added) (citing 415 ILCS 5/41(a)).

9. While assessing the effect of Watts' failure to name the State of Illinois as a respondent in its petition for review in the appellate court, the Court explained the mandatory jurisdictional nature of Section 41(a) of the Act:

> Although the Illinois Constitution grants an appeal as a matter of right from all final judgments of the circuit court, there is no constitutional right to appeal administrative decisions. Rather, the appellate and circuit courts have only such powers to review administrative actions "as provided by law." In this case, the statute which provides for judicial review is section 41(a) of the [Act].
>
> * * *
>
> [T]his court has held that administrative review actions, whether taken to the circuit court or directly to the appellate court, involve the exercise of "*special statutory jurisdiction*." When a court is exercising special statutory jurisdiction, the language of the act conferring jurisdiction delimits the court's power to hear the case. A party seeking to invoke special statutory jurisdiction thus "must *strictly* adhere to the prescribed procedures" in the statute.
>
> * * *
>
> Accordingly, absent strict compliance with section 41(a) of the Act, including the provisions of the [Illinois Administrative] Review Law and the rules adopted

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> pursuant thereto, which section 41(a) incorporates by reference, the appellate court cannot consider the appeal.

Id. at 29-31(emphasis added) (internal citations omitted).[1]

10. Thus, pursuant to both the plain language of Section 41(a) of the Act and the Illinois Supreme Court, Section 41(a) is indeed a jurisdictional requirement, and not, as posited by Complainant, a mere venue provision. As the Illinois Supreme Court noted, due to the special statutory jurisdictional nature of Section 41(a), the procedures contained therein must be strictly adhered to.

11. Despite the Illinois Supreme Court's mandate, Complainant expounds upon its misunderstanding of Section 41(a) by asserting that "the party(ies) filing the appeal would have their *choice of districts*," and Complainant even goes so far as to suggest that the Third District would be the "obvious choice" merely because "Respondent Professional Swine Management's [("PSM")] headquarters is in Carthage and the location of the first violations (dating back to 2004), Little Timber, is in Hancock County." Combined Response, ¶ 3.

12. Complainant's assertions, however, ignore Section 41(a)'s plain language and the Illinois Supreme Court's interpretation in *Watts*. Nowhere does the language of Section 41(a) provide for a choice of appellate districts. Rather, the mandatory language of Section 41(a), applicable when any of the individual Respondents have rights to appeal[2], clearly states that

[1] Notably, unlike the Complainant's attempts here, the People appropriately filed separate enforcement actions with the Board against ESG Watts–individually against it at its various landfills, in various locations of the State. *See* PCB 96-237 (Sangamon Valley Landfill), PCB 96-107 (Taylor Ridge Landfill), and PCB 96-233 (Viola Landfill).

[2] This is in contrast to judicial review of regulatory decisions pursuant to Section 29, which are not subject to the same limitations. *See* 415 ILCS 5/41(a); ("Review of any rule or regulation promulgated by the Board shall not be limited by this section but may also be had as provided in Section 29 of this Act."); 415 ILCS 5/29(a). Moreover, except for site-specific rules, regulatory appeals do not generally concern any individual respondent or site but rather concern rules of statewide impact. Thus, in that context, the key language in Section 41 ("review shall be afforded

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"review *shall* be afforded directly in the Appellate Court *for the District in which the cause of action arose* . . ." 415 ILCS 5/41(a) (emphasis added). Rather than opting to provide charged parties with a choice of appellate districts when appealing final Board orders, the Illinois Legislature's use of the term "shall" in the above provision clearly indicates that there is no choice of districts when they seek review of a final Board order in the Appellate Court. Rather, the appropriate district for review in this circumstance is in the "District in which the cause of action arose." *Id.* The Illinois Supreme Court affirmed this position in *Watts*. *See Watts*, 191 Ill.2d at 31(noting that "absent strict compliance with section 41(a) of the Act . . . the appellate court cannot consider the appeal.").

13. Moreover, Complainant's assertion that the Third District is the "obvious" district for all Respondents to seek appellate review of a final Board order in this case, based merely upon the fact that PSM's headquarters are in Carthage and the earliest alleged violation occurred at Respondent Little Timber's facility in Hancock County, fails to consider that Complainant's causes of actions alleged against half of the Farm Respondents in four of the counts of the Complaint arose outside of the Third District's jurisdiction. Because Section 41(a) is a mandatory jurisdictional statute requiring review of final Board orders in the appellate district in which the cause of action arose, those Farm Respondents located outside of the Third District are statutorily prohibited from seeking review in the Third District. As the Illinois Supreme Court explained in *Watts*, if those Farm Respondents located outside of the Third District fail to strictly adhere to the procedural requirements of Section 41(a), the Appellate Court would not be able to consider their appeal.

directly in the Appellate Court for the District in which the cause of action arose") does not confine jurisdiction to one particular appellate district.

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14. Because the Complaint contains separate counts and allegations involving Farm Respondents located in two different appellate districts in Illinois, it will be impossible for any judicial review of the Board's final orders to comply with Section 41(a) of the Act's mandate that judicial review be afforded in the appellate district where the "cause of action arose" for each Farm Respondent. Furthermore, Farm Respondents are statutorily entitled to judicial review in the appellate district where the "cause of action arose," and a denial of such would result in a violation of their due process rights. Accordingly, the Board should sever the counts of the Complaint to avoid such conflict with the Act's mandatory jurisdictional requirement and Illinois Supreme Court precedent interpreting the same.

Reply to the Complainant's Argument
That the Counts of the Complaint Are Related

15. In its Combined Response, Complainant asserts and relies upon purported facts that have no evidentiary support or that are untrue, or both, in support of Complainant's belief that all of the counts of the Complaint against all eight individual Farm Respondents are related. To clearly address those unsupported and/or untrue factual assertions, Farm Respondents and Respondent PSM have contemporaneously filed with this Joint Reply a separate Joint Motion to Strike Unsupported and/or Untrue Factual Assertions in Complainant's Combined Response to Respondents' Motion to Sever. Thus, to the extent that Complainant relies upon those unsupported and/or untrue factual assertions in support of its argument that the counts of the Complaint are related, Farm Respondents refer the Board to the aforementioned Joint Motion to Strike in support of their contention that those factual assertions do not support the Board denying severance in this matter.

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16. In addition to the unsupported and/or untrue factual assertions, Complainant also supports its contention that the counts of the Complaint are related by citing Board precedent in which the Board allowed suits against individual entities alleging violations at those entities' various facilities throughout Illinois. Combined Response, ¶¶ 8-10. However, Complainant fails to recognize that, unlike the instant matter involving eight counts against nine individual respondents, each of the Board opinions upon which Complainant relies involved only one individual respondent. *See People v. L. Keller Oil Properties, Inc.*, PCB 93-58 (Oct. 20, 1994) (sole respondent was L. Keller Oil Properties, Inc.); *People v. Clark Oil & Refining Corp.*, PCB 93-250 (Sept. 5, 1996) (sole respondent was Clark Oil & Refining Corporation).

17. Because both *Keller* and *Clark* involved only one respondent, those cases are not instructive on whether severance is warranted in a case such as the instant matter where a complainant chooses to file a complaint against nine different respondents based on alleged causes of action arising at different times and occurring at eight separately owned facilities located in four different counties.

18. For example, in *Clark*, the complaint contained four counts, all against Clark Oil. *See Clark*, PCB 93-250 (Sept. 5, 1996).

19. Although the first three counts alleged violations occurring only at Clark Oil's Hartford refinery in Madison County, the fourth count involved violations that allegedly occurred at both the Hartford refinery and Clark Oil's Blue Island refinery in Cook County. *Id.* Count IV alleged that Clark violated Section 25b-2(a) of the Act by failing to include benzene and toluene on its 1988 toxic chemical release forms for both its Hartford and Blue Island refineries. *Id.*

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20. Clark Oil filed a motion for severance that, in part, requested that the portion of Count IV containing allegations related to the Blue Island refinery be severed from docket PCB 93-250. *See Clark*, PCB 93-250 (Feb. 3, 1994). While discussing its reasoning for denying Clark Oil's motion, the Board explained that, because "[t]he allegations in Count IV are *factually identical* for the Blue Island and the [Hartford] facilities," severance would "duplicate" the efforts of the Board and the parties. *Id*. (emphasis added).

21. Thus, in *Clark*, the Board denied a motion for severance of *identical* allegations in the *same* count involving two facilities owned and operated by the *same* respondent. That situation, however, stands in stark contrast to the situation created by Complainant in the instant matter. Here, the Complainant filed a Complaint containing eight counts against nine separate respondents that are based on causes of action arising from different times and at facilities of different owners. Accordingly, unlike *Clark*, the motions to sever filed by the Farm Respondents in the instant matter are requesting severance of *different* allegations contained in *different* counts against *different* owners.

22. Because *Keller* and *Clark* each only involved one respondent, those cases do not support Complainant's argument that all eight counts in the instant matter against nine respondents are related, and the Board should disregard Complainant's assertions to the contrary.

23. In addition, also because *Keller* and *Clark* each only involved one respondent, the respondents in those consolidated cases essentially had a choice of appellate districts for which to appeal a final Board decision, which prevented any jurisdictional violation as presented in the Farm Respondents' argument above.

24. Therefore, the Board should sever the counts in the Complaint because each count contains a cause of action against an individually owned Farm Respondent that arises from an

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entirely separate and distinct transaction and set of facts than the causes of action set forth in the other counts of the Complaint. Complainant's assertion to the contrary, based upon unsupported and/or untrue factual assertions and non-analogous Board precedent, is unpersuasive.

Reply to Complainant's Argument that the Farming Respondents Will Not Be Negatively Prejudiced

25. Requiring each Farm Respondent to defend the claims against it in a single action would create an impermissible negative inference as a result of a potential finding of a violation against a separate and distinct Farm Respondent. More succinctly, it will deny the due process that must be afforded to each individual Farm Respondent in defending the separate charges alleged–charges that involve separate timeframes, separate incidents, and separate facilities with separate designs and owned by separate owners.

26. In its Combined Response, Complainant states that no negative inference will result because the Board will fairly determine liability among the Respondents. Combined Response, ¶ 12.

27. The Board intended to emulate the procedural rules of the Illinois Civil Practice Act when it promulgated its procedural rules regarding severance. "The Board continues to base its procedural rules on federal and State codes of civil procedure, rules of the Illinois Supreme Court, and procedural requirements of various environmental laws." *See* In the Matter of Board's Revisions of Procedural Rules, R00-20 (March 16, 2000), slip. Op. p. 3.

28. Illinois civil law provides that "[a]n action may be severed, and actions pending in the same court may be consolidated, as an aid to convenience, *whenever it can be done without prejudice to a substantial right*." 735 ILCS § 5/2-1006. (emphasis added).

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29. The Farm Respondents' rights will be materially prejudiced in a number of ways if forced to defend their claims in a single action. First, the Farm Respondents will be forced to spend time and resources addressing issues arising from and involving the actions or inactions of other Farm Respondents, which are entirely unrelated. Further, evidentiary issues may arise regarding one Farm Respondent that could potentially result in substantial prejudice to another Farm Respondent's defense to this action.

30. In addition, the alleged violations in this action involve eight distinct livestock operations and entirely separate and distinct occurrences. A finding of liability against one Respondent will undoubtedly result in a negative inference of liability for another Farm Respondent. Such a negative inference would prevent each Farm Respondent from independently presenting its case to the Board.

31. While the Farm Respondents have full faith in the Board to fairly determine liability when possible, such a possibility does not exist in this case when allegations, evidence, testimony, and other independent variables are undoubtedly intermingled in a single action. The potential for prejudice is too great to allow a single action to move forward when it is clear that the alleged liability for each Farm Respondent is entirely separate and distinct. It is for this reason that the Farm Respondents have filed the respective Motions to Sever. Fairness and due process dictate that the Board grant the Farm Respondents' respective motions.

WHEREFORE, Respondents, Hilltop View, LLC, Eagle Point Farms, LLC, Timberline, LLC, Little Timber, LLC, by and through their attorneys Hodge, Dwyer and Driver; and Lone Hollow, LLC, Prairie State Gilts, LLC, and High Power Pork, LLC, by and through their attorneys, Brown, Hay & Stephens, LLP, prays for the Board to grant their respective Motions to

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Sever and to require the State to bring separate causes of action, and for any other and further relief that the Board deems just and proper.

HILLTOP VIEW, LLC, EAGLE POINT FARMS, LLC, TIMBERLINE, LLC, and LITTLE TIMBER, LLC

/s/ Edward W. Dwyer

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PRAIRIE STATE GILTS, LLC, LONE HOLLOW, LLC, and HIGH POWER PORK, LLC

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