

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, and 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)
HALLOW, 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 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 HILLTOP VIEW, LLC'S ANSWER TO

COMPLAINANT'S SECOND AMENDED COMPLAINT and RESPONDENT
HILLTOP VIEW, LLC'S MOTION TO SEVER, copies of which are herewith served
upon you.

Respectfully submitted,

HILLTOP VIEW LLC,

Respondents,

Dated: June 17, 2013

By: /s/ Edward W. Dwyer
One of Its Attorneys

Edward W. Dwyer, #6197577
Jennifer M. Martin, #6210218
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached HILLTOP VIEW LLC'S ANSWER TO COMPLAINANT'S SECOND AMENDED COMPLAINT and RESPONDENT HILLTOP VIEW, LLC'S MOTION TO SEVER upon:

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 on June 17, 2013; and upon:

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

Jane E. McBride, Esq.
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Mohan, Alewelt, Prillaman & Adami
#1 North Old State Capital Plaza
Suite 325
Springfield, Illinois 62701-1323

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on June 17, 2013.

/s/Edward W. Dwyer

Edward W. Dwyer

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)	
Respondents.)	

**HILLTOP VIEW, LLC'S ANSWER
TO COMPLAINANT'S SECOND AMENDED COMPLAINT**

NOW COMES Respondent, HILLTOP VIEW, LLC, an Illinois limited liability company (hereinafter referred to as "Hilltop"), by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code § 103.204(d), and hereby submits its Answer and Affirmative Defenses to Complainant's Second Amended Complaint ("Complaint") as follows:

COUNT I

WATER POLLUTION VIOLATIONS – HILLTOP VIEW, SCHUYLER COUNTY

1. This Count is brought on behalf of the People of the State of Illinois, ex rel. LISA MADIGAN, the Attorney General of the State of Illinois, on her own motion

pursuant to Sections 42(d) and (e) of the Illinois Environmental Act ("Act"), 415 ILCS 5/42(d) and (e).

ANSWER: Hilltop admits the allegations of paragraph 1.

2. The Illinois Environmental Protection Agency ("Illinois EPA") is an agency of the State of Illinois created by the Illinois General Assembly in Section 4 of the Act, 415 ILCS 5/4, and which is charged, *inter alia*, with the duty of enforcing the Act.

ANSWER: Hilltop admits the allegations of paragraph 2.

3. The Respondent HILLTOP VIEW, LLC ("Hilltop") is and was at all times relevant to this Complaint an Illinois limited liability corporation, registered and in good standing with the Illinois Secretary of State to do business in Illinois. The registered agent for Hilltop is Gary L. Donley, 303 N. Second St., POB 220, Carthage, IL 62321.

ANSWER: Hilltop admits the allegations of paragraph 3.

4. Respondent Hilltop owns a swine farrowing and gestation facility located along Meadowlark Road several miles east of Littleton and west of the Vermont-Rushville Blacktop, in the Southeast quarter of Section 9, T.4N, R.1W in Oakland Township, Schuyler County, Illinois (the "Hilltop site" and "Hilltop facility"). The site is within the Sugar Creek watershed. The Hilltop facility design capacity is several thousand sows.

ANSWER: Hilltop admits all allegations in paragraph 4, except that Hilltop affirmatively states that the facility is located in Section 16 in Oakland Township, Schuyler County, Illinois. Hilltop View has insufficient knowledge to admit or deny that the site is within the Sugar Creek watershed, and therefore denies that allegation.

5. The Respondent PROFESSIONAL SWINE MANAGEMENT, LLC ("PSM") is and was at all times relevant to this Complaint, an Illinois limited liability corporation, registered and in good standing with the Illinois Secretary of State to do business in Illinois. The registered agent for Respondent PSM is Gary L. Donley, 303 N. Second St., POB 220, Carthage, IL 62321.

ANSWER: Hilltop admits the allegations of paragraph 5.

6. Respondent PSM manages the site and all aspects of Hilltop's operation.

ANSWER: Hilltop admits that, in accordance with an agreement between it and Respondent PSM, PSM provides management services to Hilltop for the Hilltop facility. Hilltop denies the remaining factual allegations of paragraph 6.

7. On June 16, 2006, an inspector from the Illinois EPA Field Operations Section, Peoria Regional Office, inspected the facility. No swine were present at the site and no confinement buildings had been constructed, but earthwork had been started. An estimated 15 to 20 acres had been disturbed as a footprint for the swine confinement buildings. A raised entrance/parking area had been constructed. No erosion controls were in place at the site at the time of inspection. Recent excavation had occurred adjacent to Sugar Creek on the north side of the Meadowlark Road bridge and adjacent to the west bank of Sugar Creek. Due to dry conditions, no surface runoff was observed.

ANSWER: Hilltop admits that an Illinois EPA representative was present at the facility on June 16, 2006, and that on June 16, 2006, no swine were present at the site, no confinement buildings had been constructed, and earthwork had started. Hilltop denies the remaining allegations of paragraph 7.

8. At the time of the June 16, 2006 inspection, a concrete batch plant was set

up at the site. Concrete materials were stockpiled at the site. The inspector observed that an eroded channel existed near the stockpile. The channel drained east for a distance of about 400 feet into Sugar Creek. Sugar Creek is a water of the state and a water of the United States. During the inspection, numerous semi trucks arrived with concrete materials, dumped the concrete material and departed.

ANSWER: Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 8 with regard to what the Illinois EPA “inspector observed” during the June 16, 2006 inspection, and therefore denies these allegations. The allegations of paragraph 8 regarding Sugar Creek constituting a “water of the state and a water of the United States” state a legal conclusion to which no response is required. To the extent that paragraph 8 states any further allegations of fact, Hilltop denies the same.

9. Respondants Hilltop and PSM did not have a National Pollution Discharge Elimination System (“NPDES”) Storm Water Permit at the time of the June 16, 2006 inspection.

ANSWER: Hilltop admits the allegations of paragraph 9 as to Hilltop, but has insufficient knowledge to either admit or deny the allegations of paragraph 9 as to PSM.

10. On June 20, 2006, the Illinois EPA issued a Violation Notice (“VN”) to the facility for storm water violations and for failure to obtain a NPDES storm water permit prior to construction activity. A copy of the VN was sent to both Hilltop View, LLC and Professional Swine Management, LLC. These VNs were based on the June 16, 2006 storm water inspection.

ANSWER: Hilltop admits the allegations of paragraph 10 as to Hilltop. Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 10

regarding Illinois EPA sending a copy of the VN to PSM. Furthermore, Hilltop affirmatively states that Illinois EPA also issued a VN to Prairie Landworks, but Illinois EPA accepted Prairie Landworks' Compliance Commitment Agreement ("CCA") and rejected Hilltop and PSM's proposed CCA for the same alleged violations.

11. On June 21, 2006, the Illinois EPA received a completed Notice of Intent for attaining a General Permit to Discharge Storm Water for Construction Site Activities ("NOI"). The Illinois EPA issued NPDES coverage to the site on July 21, 2006.

ANSWER: Hilltop admits the allegations of paragraph 11.

12. On August 21, 2006, site manager Joseph Connor responded to the VN on behalf of Respondents. In the proposed Compliance Commitment Agreement, Respondents stated that excavation was halted until a NPDES permit was in place and that a NPDES permit was now in place.

ANSWER: Hilltop admits the allegations of paragraph 12, except that Hilltop has insufficient knowledge to either admit or deny the allegation of paragraph 12 regarding the meaning of "site manager" as used therein, and therefore Hilltop denies that portion of paragraph 12.

13. By letters dated September 7, 2006, the Illinois EPA rejected the Compliance Commitment Agreement proposed by the Respondents, "due to the nature and seriousness of the violations" committed by PSM and Hilltop.

ANSWER: Hilltop admits the allegations of paragraph 13.

14. Illinois EPA Bureau of Water Field Operations Section inspectors performed a storm water inspection at Hilltop on November 15, 2006. They reported that minimal earthwork was underway and that silt fencing had been installed to minimize

storm water erosion. The inspectors indicated the silt fencing present on site was inadequate to meet the requirements of the regulations and additional silt fence was needed in two areas of the site and that some existing site fencing needed to be reset. The storm water construction regulations require that controls be maintained.

ANSWER: Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 14 with regard to Illinois EPA's alleged inspection on November 15, 2006 and what the inspectors "reported" or "indicated" during the same, and therefore denies these allegations. The portion of paragraph 14 asserting that storm water construction regulations require that controls be maintained states a legal conclusion that requires no response. To the extent that paragraph 14 states any further allegations of fact, Hilltop denies the same.

15. On April 23, 2007, the Illinois EPA sent Respondent PSM a Notice of Intent to Pursue Legal Action ("NIPLA"). On January 14, 2008, the Illinois EPA sent Respondent Hilltop a NIPLA. In response to the NIPLA letters, Hilltop requested a meeting with the Illinois EPA. The NIPLA meeting was held on February 6, 2008.

ANSWER: Hilltop admits that it received a NIPLA, that it requested a meeting with Illinois EPA in response to the NIPLA, and that a NIPLA meeting was held. Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 15 with regard to the exact dates alleged therein. Furthermore, Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 15 as to PSM.

16. On June 18, 2007, the Illinois EPA conducted an inspection at the Hilltop facility. The June 18, 2007 inspection is documented in an Illinois EPA report dated August 31, 2007. At the time of the June 18, 2007 inspection, the Hilltop facility

consisted of five confinement buildings and a dead animal composting structure. Starting on the west side of the facility and progressing eastward are a breeding/gestation building, a farrowing building, another breeding/gestation building, a grower-finisher building and an isolation nursery. The facility houses a total of 7,800 swine weighing over 55 pounds.

ANSWER: Hilltop admits the allegations of paragraph 16, except that it has insufficient knowledge to either admit or deny the allegations of paragraph 16 regarding whether the June 18, 2007 inspection is documented in an Illinois EPA report dated August 31, 2007, and therefore denies that allegation.

17. On May 28, 2009, an Illinois EPA inspector observed runoff containing livestock waste from a land application field associated with the Hilltop swine facility in the north ditch of Meadowlark Lane approximately one-eighth mile west of the Hilltop swine facility. The north ditch of Meadowlark Lane drains to an unnamed tributary of the West Branch of Sugar Creek. The unnamed tributary of the West Branch of Sugar Creek is identified as an intermittent creek on the USGS topographic map. The West Branch of Sugar Creek is identified as a perennial creek on the USGS topographic map, that is, flow is maintained throughout the year. The roadside ditch has a surface hydrological connection to the unnamed tributary and the West Branch of Sugar Creek. The discharge to the roadside ditch was a discharge to waters of the United States and, as such, it was a discharge in violation of the State and federal NPDES regulations.

ANSWER: Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 17 with regard to what "an Illinois EPA inspector observed" during his or her inspection that allegedly occurred on May 28, 2009, and therefore

denies these allegations. Moreover, Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 17 with regard to the hydrological characteristics and identifications of the bodies of water described in paragraph 17, and therefore denies these allegations. The final portion of paragraph 17 regarding a discharge to waters of the United States and associated alleged violation are legal conclusions that require no response. To the extent that the last sentence of paragraph 17 alleges facts, Hilltop denies the same.

18. On May 28, 2009, the Hilltop facility did not have an NPDES permit for point source discharges.

ANSWER: Hilltop admits the allegations of paragraph 18. Furthermore, Hilltop affirmatively states that it does not believe it was required to have an NPDES permit on May 28, 2009.

19. A discharge from a facility with more than 2,500 swine over 55 pounds must be covered by an NPDES permit. Land application discharges from a Confined Animal Feeding Operation (“CAFO”) are subject to NPDES requirements, cited below (40 CFR 122.23(e)). Respondents failed to obtain coverage for the discharge prior to the event of the discharge.

ANSWER: The allegations of paragraph 19 state legal conclusions that require no response. To the extent that paragraph 19 states any allegations of fact, Hilltop denies the same.

20. Section 3.165 of the Act, 415 ILCS 5/3.165, provides:

“CONTAMINANT” is any solid, liquid, or gaseous matter, any odor or any form of energy, from whatever source.

ANSWER: The statutory section cited in paragraph 20 speaks for itself and requires no response.

21. Section 3.545 of the Act, 415 ILCS 5/3.545, provides the following definition:

“Water pollution” is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

ANSWER: The statutory section cited in paragraph 21 speaks for itself and requires no response.

22. Section 3.550 of the Act, 415 ILCS 5/3.550, provides the following definition:

“WATERS” means 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.

ANSWER: The statutory section cited in paragraph 22 speaks for itself and requires no response.

23. Section 12 of the Act, 415 ILCS 5/12, provides the following prohibitions:

No person shall:

- (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

* * *

- (d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

* * *

- (f) 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, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

No permit shall be required under this subsection and under Section 39(b) of this Act for any discharges for which a permit is not required under the Federal Water Pollution Control Act, as now or hereafter amended, and regulations pursuant thereto.

ANSWER: The statutory section cited in paragraph 23 speaks for itself and requires no response.

24. Section 309.102(a) of the Board's Water Pollution Regulations, 35. Ill. Adm. Code 309.102(a), provides:

Except 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.

ANSWER: The regulatory section cited in paragraph 24 speaks for itself and requires no response.

25. The USEPA has authorized the State of Illinois to issue storm water NPDES permits through the Illinois EPA in compliance with federal regulations (40 CFR 122.25). Storm water discharges are regulated by 40 CFR 122.26, which requires a

person to obtain an NPDES permit and to implement a storm water pollution prevention plan for construction activity including clearing, grading and excavation:

(a) Permit requirement.

(1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(ii) A discharge associated with industrial activity . . .

* * *

(b) Definitions.

* * *

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. . . . The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

* * *

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

* * *

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

(I) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area

that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres.

ANSWER: The allegations of paragraph 25 state a legal conclusion to which no response is required. To the extent that paragraph 25 cites a regulatory section, that regulatory section speaks for itself and requires no response.

26. Section 502.101 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.101, provides:

No person specified in Sections 502.102, 502.103 or 502.104 or required to have a permit under the conditions of Section 502.106 shall cause or allow the operation of any new livestock management facility or livestock waste-handling facility, or cause or allow the modification of any livestock management facility or livestock waste-handling facility, or cause or allow the operation of any existing livestock management facility of livestock waste-handling facility without a National Pollutant Discharge elimination System ("NPDES") permit. Facility expansions, production increases, and process modifications which significantly increase the amount of livestock waste over the level authorized by the NPDES permit must be reported by submission of a new NPDES application.

ANSWER: The regulatory section cited in paragraph 26 speaks for itself and requires no response.

27. Section 502.103 of the Board's Agriculture Related Regulations, 35 Ill. Adm. Code 501.103, provides:

Very Large Operations

An NPDES permit is required if more than the numbers of animals specified in any of the following categories are confined:

* * *

2,500 Swine weighing over 55 pounds

* * *

1,000 Animal units

ANSWER: The regulatory section cited in paragraph 27 speaks for itself and requires no response.

28. Section 502.104 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.104, provides:

Large Operations

- a) An NPDES permit is required if more than the following numbers and types of animals are confined and either condition (b) or (c) below is met:
 - * * *
 - 750 Swine weighing over 55 pounds
- b) Pollutants are discharged into navigable waters through a man-made ditch, flushing system, or other similar man-made devices; or
- c) Pollutants are discharged directly into navigable waters which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

ANSWER: The regulatory section cited in paragraph 28 speaks for itself and requires no response.

29. Section 502.106 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.106, provides:

- a) Notwithstanding any other provision of this Part, the Agency may require any animal feeding operation not falling within Sections 502.201, 502.103 or 502.104 to obtain a permit. In making such designation the Agency shall consider the following facts:
 - 1) The size of the animal feeding operation and the amount of wastes reaching navigable waters;

- 2) The location of the animal feeding operation relative to navigable waters;
 - 3) The means of conveyance of animal wastes and process wastewaters into navigable waters;
 - 4) The slope, vegetation, rainfall and other factors relative to the likelihood or frequency of discharge of animal wastes and process wastewaters into navigable waters; and
 - 5) Other such factors bearing on the significance of the pollution problem sought to be regulated.
- b) The Agency, however, may not require a permit under paragraph a) for any animal feeding operation with less than the number of animal units (300) set forth in Section 502.104 above, unless it meets either of the following conditions:
- 1) Pollutants are discharged into navigable waters through a man-made ditch, flushing system, or other similar man-made devices; or
 - 2) Pollutants are discharged directly into navigable waters which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

ANSWER: The regulatory section cited in paragraph 29 speaks for itself and requires no response.

30. Section 122.21, 40 CFR 122.21, provides, in pertinent part, as follows:

Application for a permit (applicable to State programs see Section 123.25)

- (a) *Duty to apply.*
- (1) Any person who discharges . . . pollutants . . . must submit a complete application to the Director in accordance with this section and part 124 of this chapter. The requirements for concentrated animal feeding operations are described in Section 122.23.(d).

ANSWER: The regulatory section cited in paragraph 30 speaks for itself and requires no response.

31. Section 122.23, 40 CFR 122.23, provides, in pertinent part, as follows

Concentrated animal feeding operations

(A) *Scope.* Concentrated animal feeding operations (“CAFOs”), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

ANSWER: The regulatory section cited in paragraph 31 speaks for itself and requires no response.

32. Section 122.23 (b)(1), 40 CFR 122.23(b)(1), provides, in pertinent part:

(b) Definitions applicable to this section:

(1) *Animal feeding operation* (“AFO”) means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

ANSWER: The regulatory section cited in paragraph 32 speaks for itself and requires no response.

33. Section 122.23(b)(2), 40 CFR 122.23(b)(2), provided, in pertinent part:

(2) *Concentrated animal feeding operation* (“CAFO”) means an AFO that is defined as a Large CAFO or as a Medium CAFO by the

terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

ANSWER: The regulatory section cited in paragraph 33 speaks for itself and requires no response.

34. Section 122.23 (b)(3), 40 CFR 122.23(b)(5), provides, in pertinent part:

- (3) The term *land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production are is or may be applied.

ANSWER: The regulatory section cited in paragraph 34 speaks for itself and requires no response.

35. Section 122.23 (b)(4), 40 CFR 122.23(b)(4), provides, in pertinent part:

- (4) *Large concentrated animal feeding operation* ("Large CAFO"), An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

* * *

(iv) 2,500 swine each weighing 55 pounds or more,

* * *

ANSWER: The regulatory section cited in paragraph 35 speaks for itself and requires no response.

36. Section 122.23 (b)(5), 40 CFR 122.23(b)(5), provides, in pertinent part:

- (5) The term *manure* is defined to include manure, bedding, compost and raw materials or other materials comingled with manure or set aside for disposal.

ANSWER: The regulatory section cited in paragraph 36 speaks for itself and requires no response.

37. Section 122.23 (b)(6), 40 CFR 122.23(b)(6), provides, in pertinent part:

(6) *Medium concentrated animal feeding operation* ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(1) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

* * *

(D) 750 to 2,499 swine each weighing 55 pounds or more,

* * *

(ii) Either one of the following conditions are met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made devices; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

ANSWER: The regulatory section cited in paragraph 37 speaks for itself and requires no response.

38. Section 122.23 (b)(7), 40 CFR 122.23(b)(1), provides, in pertinent part:

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which

comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding

ANSWER: The regulatory section cited in paragraph 38 speaks for itself and requires no response.

39. Section 122.23 (b)(8), 40 CFR 122.23(b)(1), provides, in pertinent part:

- (8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any eff washing or egg processing facility, and any area used in the storage, handling, treatment or disposal of mortalities.

ANSWER: The regulatory section cited in paragraph 39 speaks for itself and requires no response.

40. Section 122.23 (c), 40 CFR 122.23(c), provides, in pertinent part:

- (c) *How may an AFO be designated as a CAFO?* The appropriate authority (i.e. State Director or Regional Administrator, or both, as specified in paragraph (c) (1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.
- (2) In making this designation, the State Director or the Regional Administrator shall consider the following

factors:

- i) The size of the AFO and the amount of wastes reaching waters of the United States;
 - ii) The location of the AFO relative to waters of the United States;
 - iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;
 - iv) The slope, vegetation, rainfall and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and
 - v) Other relevant factors.
- (3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an onsite inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:
- (i) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made devices; or
 - (ii) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

ANSWER: The regulatory section cited in paragraph 40 speaks for itself and requires no response.

41. Section 122.23(d) (1), 40 CFR 122.23(d)(1), provides, in pertinent part:

(d) *NPDES permit authorization*

(1) *Permit requirement.* A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

ANSWER: The regulatory section cited in paragraph 41 speaks for itself and requires no response.

42. Section 122.23(e), 40 CFR 122.23(e), provides, in pertinent part:

e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi-ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural storm water discharge.

ANSWER: The regulatory section cited in paragraph 42 speaks for itself and requires no response.

43. By causing, threatening or allowing the discharge of sediments and eroded soils upon the land and into waters of the State so as to alter the physical or chemical properties of the waters and create or likely create a nuisance, the Respondents have

caused or tended to cause water pollution in Illinois.

ANSWER: Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 43 regarding PSM. The allegations of paragraph 43 state a legal conclusion to which no response is required. To the extent that paragraph 43 states any allegations of fact regarding Hilltop, Hilltop denies the same.

44. By threatening, causing or allowing storm water run-off and sediment and soil erosion to discharge from the facility construction site without obtaining a construction storm water NPDES permit or otherwise complying with construction storm water requirements, Respondents Hilltop and PSM have caused, threatened or allowed the discharge of contaminants into the environment so as to cause or tend to cause water pollution in Illinois, and so as to violate the regulations or standards adopted by the Pollution Control Board, and thereby 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).

ANSWER: Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 44 regarding PSM. The allegations of paragraph 44 state a legal conclusion to which no response is required. To the extent that paragraph 44 states any allegations of fact regarding Hilltop, Hilltop denies the same.

45. By causing or allowing the discharge of livestock waste runoff from a land application field into a roadside ditch in such a manner as to threaten water pollution, Respondents Hilltop and PSM have violated Sections 12(a) and 12(d) of the Act, 415 ILCS 5/12(a), (d).

ANSWER: Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 45 regarding PSM. The allegations of paragraph 45 state a legal

conclusion to which no response is required. To the extent that paragraph 45 states any allegations of fact regarding Hilltop, Hilltop denies the same.

46. By causing or allowing the discharge of livestock waste runoff from a land application field into a ditch that is a surface hydrological connection to waters of the United States without CAFO NPDES permit coverage, Respondents Hilltop and PSM have violated Section 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

ANSWER: Hilltop has insufficient knowledge to either admit or deny the allegations of paragraph 46 regarding PSM. The allegations of paragraph 46 state a legal conclusion to which no response is required. To the extent that paragraph 46 states any allegations of fact regarding Hilltop, Hilltop denies the same.

PRAYER FOR RELIEF

WHEREFORE, Respondent, HILLTOP VIEW, LLC, asserts that Complainant is not entitled to the relief sought by Count I of its Complaint, and prays that Complainant take nothing by Count I of its Complaint, that the Board enter judgment in favor of HILLTOP VIEW, LLC as to Count I of Complainant's Complaint, and that the Board award HILLTOP VIEW, LLC its costs and all other relief just and proper in the premises.

COUNT II

WATER POLLUTION VIOLATIONS – WILDCAT FARMS, HANCOCK COUNTY

ANSWER: With respect to paragraphs 1-41 of Count II, Hilltop provides no response because the allegations of Count II are directed toward another party. To the extent that Count II contains any allegations directed toward Hilltop, Hilltop denies the same.

COUNT III

WATER POLLUTION VIOLATIONS -- HIGH-POWER PORK, ADAMS COUNTY

ANSWER: With respect to paragraphs 1-39 of Count III, Hilltop provides no response because the allegations of Count III are directed toward another party. To the extent that Count III contains any allegations directed toward Hilltop, Hilltop denies the same.

COUNT IV

WATER POLLUTION VIOLATIONS – EAGLE POINT FARMS, FULTON COUNTY

ANSWER: With respect to paragraphs 1-38 of Count IV, Hilltop provides no response because the allegations of Count IV are directed toward another party. To the extent that Count IV contains any allegations directed toward Hilltop, Hilltop denies the same.

COUNT V

WATER POLLUTION VIOLATIONS – LONE HOLLOW, HANCOCK COUNTY

ANSWER: With respect to paragraphs 1-39 of Count V, Hilltop provides no response because the allegations of Count V are directed toward another party. To the extent that Count V contains any allegations directed toward Hilltop, Hilltop denies the same.

COUNT VI

WATER POLLUTION VIOLATIONS - TIMBERLINE, SCHUYLER COUNTY

ANSWER: With respect to paragraphs 1-38 of Count VI, Hilltop provides no response because the allegations of Count VI are directed toward another party. To the extent that Count VI contains any allegations directed toward Hilltop, Hilltop denies the same.

COUNT VII

WATER POLLUTION VIOLATIONS – PRAIRIE STATE GILTS, SCHUYLER COUNTY

ANSWER: With respect to paragraphs 1-44 of Count VII, Hilltop provides no response because the allegations of Count VII are directed toward another party. To the extent that Count VII contains any allegations directed toward Hilltop, Hilltop denies the same.

COUNT VIII

WATER POLLUTION VIOLATIONS – LITTLE TIMBER, HANCOCK COUNTY

ANSWER: With respect to paragraphs 1-52 of Count VIII, Hilltop provides no response because the allegations of Count VIII are directed toward another party. To the extent that Count VIII contains any allegations directed toward Hilltop, Hilltop denies the same.

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

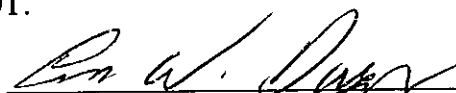
Edward W. Dwyer on oath, deposes and states as follows:

1. That I am one of the attorneys representing the party on whose behalf this Answer was prepared.

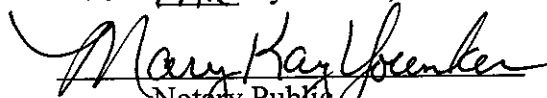
2. That the Answer to Count I in paragraphs 4, 8-10, 12, 14-17, and 43-46 contains certain statements claiming insufficient knowledge upon which to base a belief as to the truth or falsity of the allegations contained in the Complaint.

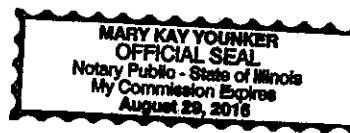
3. That said allegations of insufficient knowledge are true and correct to the best of his information, knowledge and belief.

FURTHER AFFIANT SAYETH NOT.


Edward W. Dwyer

Subscribed and sworn to before me this 17th day of June, 2013.


Notary Public



HILLTOP VIEW, LLC AFFIRMATIVE DEFENSES

1. Count I fails to allege facts sufficient to support a finding that Hilltop is discharging, and thus, required to obtain an NPDES permit. The Complainant's allegations in Count I that Hilltop is required to apply for an NPDES permit is based on two isolated events. Because these two isolated events are insufficient to establish that Hilltop is discharging in a manner sufficient to require an NPDES permit, Hilltop is not required to apply for an NPDES permit.
2. The Complaint does not allege with specificity whether the federal and/or state statutes and regulations cited therein were in effect at the time of the alleged violations.
3. Hilltop reserves the right to amend this Answer to allege any additional defenses which discovery may reveal to be appropriate.

CONCLUSION

WHEREFORE, Respondent, HILLTOP VIEW, LLC, by its attorneys, HODGE DWYER & DRIVER, prays that Complainant take nothing by way of its Complaint, and that the Board award HILLTOP VIEW, LLC all relief just and proper in the premises.

Respectfully submitted,

HILLTOP VIEW, LLC,

Respondent,

By: /s/ Edward W. Dwyer
One of Its Attorneys

Dated: June 17, 2013
Edward W. Dwyer, #6197577
Jennifer M. Martin, #6210218
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(217) 523-4900

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, and 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)

HALLOW, 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.)

RESPONDENT HILLTOP VIEW, LLC'S MOTION TO SEVER

NOW COMES Respondent, HILLTOP VIEW, LLC ("Respondent" or "Hilltop View"), by and through its attorneys, HODGE DWYER & DRIVER, and hereby moves the Illinois Pollution Control Board ("Board") to sever the claims in Count I of the Complaint filed in the above enforcement matter. In support of its Motion, Hilltop View states as follows:

A. Procedural History

1. The State of Illinois (hereinafter the "State") filed its original Complaint in the instant matter on April 15, 2010.

2. Subsequently, a series of motions challenging the sufficiency of the pleadings were filed by multiple Respondents, which resulted in the State amending its Complaint, most recently with its Second Amended Complaint filed on December 13, 2012 (hereinafter "Complaint").

3. On February 11, 2013, all Respondents filed a Joint Motion for Extension of Time to Respond to the Complaint and a Joint Motion to Strike Part of the Complaint's Prayer for Relief.

4. On May 2, 2013, the Board denied Respondents' Joint Motion to Strike Part of the Complaint's Prayer for Relief and directed Respondents to answer the Complaint by June 17, 2013.

5. In light of the Board's decisions regarding the factual and legal arguments raised in the Respondents' motions, as well as the Board's procedural rules, Hilltop View has determined that the filing of this Motion to Sever is necessary.

B. Count I Against Hilltop View Should Be Severed from the Remaining Counts

6. The Complaint filed by the State in the instant matter contains eight separate counts. Each count alleges violations of the Illinois Environmental Protection Act ("Act") and Board regulations at a different concentrated animal feeding operation ("CAFO") in Illinois.

7. The CAFOs which are the subjects of the separate counts of the Complaint are owned by separate entities. Hilltop View is the owner of the Hilltop View CAFO, which is located in Schuyler County, Illinois.

8. Two of the other CAFOs which are the subject of the Complaint are located in Schuyler County (Counts VI and VII); three of the CAFOs are located in Hancock County (Counts II, V, and VIII); one CAFO is located in Fulton County (Count IV); and one CAFO is located in Adams County (Count III).

9. Moreover, the CAFOs which are the subject of the Complaint are located in two different appellate districts, the Third (Fulton, Hancock) and the Fourth (Adams, Schuyler).

10. The allegations against Hilltop View relate only to the Hilltop View CAFO and are found in Count I of the Complaint. The allegations against Hilltop View are based on a June 16, 2006 inspection of the Hilltop View CAFO by the Illinois Environmental Protection Agency ("IEPA"), and a later inspection of an agriculture field near the Hilltop View facility on May 28, 2009. Complaint at 2-3, 5. The June 16, 2006 inspection took place before the Hilltop View facility was in operation. Following the June 16, 2006 inspection, the IEPA issued a Violation Notice to Hilltop View, and Respondent Professional Swine Management, LLC. Complaint at 3.

11. The facts alleged in Count I of the Complaint do not pertain to, or in any way involve, the seven CAFOs which are the subjects of Counts II through VIII of the Complaint and are unrelated to the factual allegations in the remaining seven counts of the Complaint. Moreover, Hilltop View is not a respondent with respect to the alleged violations in Counts II through VIII of the Complaint.

12. The only common issue between Count I and the other counts of the Complaint is the allegation that Respondent, Professional Swine Management, LLC,

manages the Hilltop View CAFO as well as the CAFOs which are the subjects of Counts II through VIII of the Complaint.

13. Pursuant to Section 41 of the Act, judicial review of enforcement decisions of the Board “shall be afforded directly in the Appellate Court for the District in which the cause of action arose” 415 ILCS 5/41(a).

14. Because the Complaint contains separate counts and allegations, involving CAFOs located in two different appellate districts in Illinois, it will be impossible for any judicial review of the Board’s enforcement decisions to comply with the Act’s mandate that judicial review be afforded in the appellate district where the “cause of action arose” for each CAFO.

15. The Board’s procedural rules provide that hearings in enforcement proceedings “are generally held in the county in which the source or facility is located. . . .” 35 Ill. Admin. Code § 101.600.

16. Because the Complaint contains separate counts and allegations, involving CAFOs located in four different counties in Illinois, any hearing held on the Complaint will not comply with the Board’s procedural rule regarding venue for the majority of the CAFOs which are the subject of the Complaint.

17. Section 2-405 of the Illinois Code of Civil Procedure permits the joinder of defendants who are alleged to have, or claim an interest “in the transaction or series of transactions out of which the controversy arose,” and further provides as follow:

(b) It is not necessary that each defendant be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him or her; but the court may make any order that may be just to

prevent any defendant from being embarrassed or put to expense by requiring to attend any proceedings in which such defendant may have no interest.

735 ILCS 5/2-405(b).

18. The Board's procedural rules address joinder of parties (35 Ill. Admin. Code § 101.403), but do not specifically address the joinder of defendants. Therefore, it is appropriate for the Board to look to Section 2-405(b) of the Illinois Code of Civil Procedure (735 ILCS 5/2-405(b)) and cases interpreting the same for guidance in the issue presented by the State's joinder of its claim against Hilltop View with its claims against the multiple, unrelated Respondents named in Counts II through VIII of the Complaint. 35 Ill. Admin. Code § 101.100(b).

19. The State's Complaint violates the joinder rules set forth in Section 2-405 of the Illinois Code of Civil Procedure because the cause of action against Hilltop View arises from an entirely separate and distinct transaction and set of facts than the causes of action set forth in Counts II through VIII of the Complaint. *Rogala v. Silva*, 16 Ill. App. 3d 63, 305 N.E.2d 571, 575 (1st Dist. 1973) (affirming severance of counts with one common defendant because counts involved entirely separate transactions, different parties, and different theories); *Sommers v. Korona*, 54 Ill. App. 2d 425, 203 N.E.2d 768, 774 (1st Dist. 1964) (appellate court affirmed dismissal of count in suit against multiple defendants for injuries arising out of separate and unrelated car accidents, noting that plaintiff would not be prejudiced by having to file separate suits); *Preferred Personnel v. Meltzer*, 387 Ill. App. 3d 933, 902 N.E.2d 146, 150 (1st Dist. 2009) (a cause of action against multiple defendants must arise from the same transactions in order to permit joinder of the defendants).

20. The Board's procedural rules provide that:

Upon motion of any party or on the Board's own motion, in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused, the Board may sever claims involving any number of parties.

35 Ill. Admin. Code § 101.408.

21. Requiring Hilltop View to participate in the proceedings and hearing on Counts II through VIII of the Complaint, in which Hilltop View has no interest, will substantially prejudice Hilltop View. In particular, Hilltop View will be forced to devote significant time and resources, including litigation costs, to the proceedings involving Counts II through VIII, which do not, in any way, involve either Hilltop View or the Hilltop View CAFO. For example, if Count I is not severed from the remaining counts, Hilltop View could be forced to participate in depositions, discovery, and hearings that are completely unrelated to the allegations of Count I.¹

22. Moreover, as noted above, there is a strong likelihood that any hearing involving the allegations of Count I of the Complaint will not be held in Schuyler County, in contravention of the Board's procedural rules.

23. The joinder of Hilltop View with the multiple, unrelated Respondents named in Counts II through VIII of the Complaint violates the rules governing joinder of defendants set forth in the Code of Civil Procedure (735 ILCS 5/2-405).²

¹ Indeed, the State has already served discovery requests that are very broad in nature and not tailored to the claims in Count I against Hilltop View. For example, in paragraphs 3, 4, and 6 of its First Request for Production of Documents, it seeks records for the last 15 years. The Hilltop View Farm has only been in existence since 2006, a fact known to the State.

² It may well be that the State selected the Board as its forum to seek to file a single complaint against 9 corporations located in 4 different counties, since such filing in a lone Circuit Court would not be possible under the Illinois Code of Civil Procedure's rules regarding venue, *i.e.*, 735 ILCS 5/2-101,102.

24. Severing Count I from the remaining counts of the Complaint, and requiring the State to include the allegations of Count I in a separate complaint will expedite the resolution of claims involving Hilltop View and the Hilltop View CAFO, and will prevent the inconvenience and prejudice to Hilltop View that will result from requiring it to participate in the discovery, proceedings, and hearing on Counts II through VIII of the Complaint, in which it has no interest. *See City of Kankakee v. County of Kankakee, et al.*, PCB Nos. 03-125, 03-133, 03-134, 03-135, 03-144 (Consolidated) (Ill.Pol.Control.Bd., April 17, 2003) (Board granted severance of claims against Waste Management, Inc. based on Waste Management, Inc.'s assertion that "the consolidation of the cases does materially prejudice Waste Management, Inc. because of discovery deadlines and potential briefing schedules in the other cases.).

25. Severing Count I from the remaining counts of the Complaint, and requiring the State to include the allegations of Count I in a separate complaint will allow the Board to hold any hearing involving the allegations of Count I in Schuyler County, in accordance with the Board's procedural rule governing venue. 35 Ill. Admin. Code § 101.600. Further, it will ensure that the appellate rights of Hilltop View and any other Respondent are not circumscribed by being improperly joined in this case.

WHEREFORE, for the reasons stated above, Respondent Hilltop View respectfully moves the Board to enter an order severing Count I of the

State's Complaint from the remaining counts, and requiring the State to bring Count I as a separate action, and providing such other relief as the Board deems appropriate.

Respectfully submitted,

HILLTOP VIEW, LLC,

Respondent,

Dated: June 17, 2013

By: /s/ Edward W. Dwyer
One of Its Attorneys

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