

ILLINOIS POLLUTION CONTROL BOARD  
November 7, 2013

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. )  
) PCB 10-84  
) (Enforcement – Water)  
PROFESSIONAL SWINE MANAGEMENT, )  
LLC, HILLTOP VIEW, LLC, WILDCAT )  
FARMS, LLC, HIGH-POWER PORK, LLC, )  
EAGLE POINT, LLC, LONE HOLLOW, )  
LLC, TIMBERLINE, LLC, PRAIRIE STATE )  
GILTS, LTD., 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 their second amended complaint. On June 17, 2013, the Board received answers and affirmative defenses from Professional Swine Management, LLC, Eagle Point Farms, LLC, Hilltop View, LLC, Little Timber, LLC, Timberline, LLC, High-Power Pork, LLC, Lone Hollow, LLC, and Prairie State Gilts, LTD (collectively, “respondents”). The time for Wildcat Farms, LLC, to file an answer has been stayed pending settlement discussions with the People and, therefore, Wildcat Farms, LLC is not addressed by this order.

On August 2, 2013, the People filed three separate motions to strike respondents’ affirmative defenses. No responses to the motions to strike have been received. For the reasons below, the Board grants the People’s three motions to strike respondents’ affirmative defenses.<sup>1</sup>

**PROCEDURAL BACKGROUND**

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

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<sup>1</sup> 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.

On July 13, 2010, the People filed a first amended complaint. The amended complaint voluntarily dismissed Twin Valley Pumping. On August 5, 2010, the Board accepted the first amended complaint for hearing. The owners filed motions to dismiss and strike the first amended complaint 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. The Board accepted a settlement between the People and North Fork Pork on April 7, 2011.

On December 13, 2012, the People filed a motion for leave to amend the first amended complaint, along with a second amended complaint (complaint). On February 2, 2013, the remaining owners filed a joint motion to strike part of the People's request for relief. On May 2, 2013, the Board denied respondents' motion to strike part of the People's request for relief and accepted the second amended complaint for hearing.

On June 17, 2013, the Board received answers to the second amended complaint and motions to sever from that complaint claims concerning them from: Eagle Point (EP Ans.), Hilltop (HV Ans.), Little Timber (LT Ans.), Timberline (T Ans.), Prairie State Gilts (PSG Ans.), Lone Hollow (LH Ans.), and High-Power Pork (HPP Ans.). Also on June 17, 2013, PSM filed an answer to the second amended complaint (PSM Ans.). On June 30, 2013, the parties agreed that the deadline for Wildcat Farms to answer the second amended complaint is stayed pending settlement discussions.

On July 2, 2013, PSM filed a response to the seven motions to sever. On August 2, 2013, the People filed their combined response to the motions to sever. Also on August 2, 2013, the People filed three motions to strike the affirmative defenses of: respondents High-Power Pork, Lone Hollow, and Prairie State Gilts (Mot. 1); respondents Hilltop, Eagle Point, Timberline, and Little Timber (Mot. 2); and those of respondent Professional Swine Management (Mot. 3). The seven movants timely filed a joint motion for leave to file a reply along with their joint reply to the response to motions to sever on August 27, 2013. At a September 30, 2013, status conference, the respondents stated that they did not intend to file responses to the motions to strike.

On September 5, 2013, the Board denied each of the owners' motions to sever the counts concerning each of them from the second amended complaint. The Board further denied PSM's and the owners' joint motion to strike factual assertions in the People's combined response to the motion to sever. The Board's September 5, 2013 Order did not address the three outstanding motions to strike affirmative defenses, which the Board rules on today.

### **THE PEOPLE'S SECOND AMENDED COMPLAINT**

The Board accepted the People's second amended complaint on May 2, 2013. The eight-count complaint alleges violations at eight livestock facilities located in four 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) (2012)) 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).

PSM is a common respondent in each of the eight counts in the complaint. PSM manages each of the owner's on-site operations, variously located in Schuyler, Hancock, Adams, and Fulton counties as detailed below. The owners are separated by count as follows: Hilltop (Count I), Wildcat Farms (Count II), High-Power Pork (Count III), Eagle Point (Count IV), Lone Hollow (Count V), Timberline (Count VI), Prairie State Gilts (Count VII), and Little Timber (Count VIII).

### **Count I – Hilltop**

Count I alleges land application of livestock waste and storm water discharge violations by Hilltop and PSM in Schuyler County. Compl. at 2. Hilltop owns a swine farrowing and gestation facility on Meadowlark Road in the Sugar Creek watershed. *Id.* The facility is capable of holding several thousand sows. *Id.* PSM manages the site and “all aspects of Hilltop's operation.” *Id.*

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

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

On June 20, 2006, the Agency issued the facility a Violation Notice (VN) for storm water violations and failure to obtain an NPDES storm water permit prior to construction activity based on the June 16, 2006 inspection. Compl. at 3. On June 21, 2006, Hilltop sent the Agency a Notice of Intent (NOI) to attain a general permit to discharge storm water for construction site activities. *Id.* The Agency issued an NPDES permit for the site on July 21, 2006. *Id.*

On August 21, 2006, Joseph Connor, the site manager for Hilltop, responded to the VN. Compl. at 3-4. Mr. Connor stated that the excavation was halted until an NPDES permit was in place and that an NPDES permit was now in place. *Id.* at 4. Mr. Connor's response proposed a compliance commitment agreement. *Id.* In letters dated September 7, 2006, the Agency rejected the compliance commitment agreement “due to the nature and seriousness of the violations” committed by PSM and Hilltop. *Id.*

On November 15, 2006, more inspectors performed a storm water inspection at Hilltop. Compl. at 4. The inspectors reported that minimal earthwork was underway and that silt fencing

had been installed to minimize storm water erosion. *Id.* The inspectors suggested that more silt fence was needed and some existing fencing needed to be reset. *Id.*

The Agency sent a NOI to pursue legal action to PSM on April 23, 2007 and to Hilltop on January 14, 2008. Compl. at 4. Hilltop and the Agency held a meeting on February 6, 2008. *Id.*

On May 28, 2009, an Agency inspector observed runoff containing livestock waste from a land application field. Compl. at 5. The runoff was flowing into the north ditch of Meadowlark Lane. *Id.* The ditch allegedly drains to an unnamed tributary of the West Branch of Sugar Creek. *Id.* The People contend that the discharge to the ditch was a discharge to waters of the United States in violation of state and federal NPDES regulations. *Id.*

The People allege that Hilltop and PSM caused or allowed the discharge of livestock waste runoff from land application to a roadside ditch in such a manner as to threaten water pollution. Compl. at 5. The People contend that Hilltop did not have an NPDES permit and failed to obtain such a permit prior to discharging. *Id.* Further, the People allege that Hilltop and PSM violated the Act by causing or allowing discharge of livestock waste and stormwater runoff during construction activities. *Id.* at 14-15. Specifically, the People contend that Hilltop and PSM violated Sections 12(a), 12 (d), and 12(f) of the Act (415 ILCS 5/12(a), (d), (f) (2012)), and 35 Ill. Adm. Code 309.102(a). *Id.*

### **Count II – Wildcat Farms**

Count II alleges water pollution violations by Wildcat Farms and PSM in Hancock County. Compl. at 16. The Board does not summarize this count because Wildcat Farms is not addressed in this order.

### **Count III – High-Power Pork**

The People's third count alleges water pollution violations by High-Power Pork and PSM in Adams County. Compl. at 21. High-Power Pork owns a swine farrowing and gestation facility designed to hold 6,000 sows. *Id.* The High-Power Pork site is in the Cedar Creek and LaMoine River watershed. *Id.* PSM manages High-Power Pork's operations and the physical site. *Id.* at 22.

High-Power Pork's facility contains five buildings that house swine. Compl. at 22. Below each building are two-foot-deep waste storage pits. *Id.* There are also two above-ground storage tanks that receive the manure through underground sewers. *Id.*

The People allege that on November 10, 2008, swine waste discharged from High-Power Pork's facility due to a leak in a pipeline on the way to the above-ground manure storage tanks. Compl. at 22. The leak released approximately 90,000 gallons of liquid swine waste, which flowed down a grassed waterway and into Cedar Creek and South Branch Cedar Creek, causing a fish kill. *Id.* Neighbors of the facility observed discoloration and turbidity in Cedar Creek, which they traced to High-Power Pork. *Id.* at 23.

The People contend that High-Power Pork and PSM violated Sections 12(a), 12(d), and 12(f) of the Act (415 ILCS 5/12(a), (d), (f) (2012)) and Sections 302.203 and 309.102(a) of the Board's regulations (35 Ill. Adm. Code 302.203, 309.102(a)). Compl. at 23-24.

#### **Count IV – Eagle Point**

Count IV alleges water pollution violations of Eagle Point and PSM in Fulton County. Compl. at 25. Eagle Point owns a farrow-to-wean facility with a design capacity of 6,500 sows. *Id.* The drainage from Eagle Point's facility flows directly into several ravines into final cut strip mine lakes. *Id.* PSM manages Eagle Point's operations and the physical site. *Id.*

Eagle Point's facility consists of five total confinement buildings to house swine. Compl. at 26. The isolation building has underground waste storage pits, from which the waste is diverted to larger pits below the gilt grow-finish building. *Id.* The farrowing building has underground storage pits that also divert waste to larger pits beneath the gestation buildings. *Id.*

On May 10, 2007, the Agency inspected the Eagle Point facility. Compl. at 27. The inspector observed discharge from the north gestation building perimeter tile onto the land in a manner causing the discharge to drain into a strip mine lake. *Id.* The discharge was cloudy and smelled of livestock waste. *Id.* Analysis of a sample revealed a fecal coliform level of 35,000 per 100 milliliters. *Id.* The inspector also sampled the discharge from the private sewage disposal system, which indicated a fecal coliform level of 56,000 per 100 ml. *Id.*

The People allege that the strip mine lake is a tributary to Otter Creek. Compl. at 27. The People allege that Eagle Point and PSM have violated Sections 12(a), 12(d) and 12(f) of the Act (415 ILCS 5/12(a), (d), (f) (2012)) and Section 309.102(a) of the Board's regulations (35 Ill. Adm. Code 309.102(a)). *Id.* at 28.

#### **Count V – Lone Hollow**

Count V regards alleged water pollution violations of Lone Hollow and PSM in Hancock County. Compl. at 29. Lone Hollow owns a farrow to wean swine operation. *Id.* at 30. At the time of the September 25, 2007 Agency inspection, Lone Hollow maintained a sow herd of 5,650. *Id.* The facility is located within the watershed of Panther Creek, which is a tributary to Bronson Creek, which is a tributary to the LaMoine River. *Id.* PSM manages Lone Hollow's operations and the physical site. *Id.* at 30.

Lone Hollow's facility consists of five total confinement buildings to house swine. Compl. at 30. The waste is stored in pits under the building, and the liquid manure is hauled away by a contract hauler who applies the manure to cropland in the immediate vicinity. *Id.* The facility also contains a 10-bay compost structure for swine mortality. *Id.* At the time of the September 27, 2007 inspection, the structure was not covered, and the inspector observed leachate from the compost material on the north side of the structure. *Id.*

On September 13, 2007, a swine manure release occurred at the Lone Hollow facility. Compl. at 30. Liquid swine manure drained out of a pit drainage pipe and flowed southeast across the gravel drive and into the waterway east of the swine confinement buildings. *Id.* at 31. The facility employees discovered the release and stopped the flow where it entered the waterway using compost from the mortality area. *Id.* The employees also constructed a dam downstream of the release flow. *Id.* The People allege that the waterways at the facility drain to an unnamed tributary of Panther Creek which is tributary to Bronson Creek which is tributary to LaMoine River. *Id.* at 32.

An Agency inspector advised the facility to recover the released wastewater and compost. Compl. at 31. On September 25, 2007, the Agency inspector conducted a follow-up inspection and collected samples. *Id.* The samples were analyzed for ammonia, biological oxygen demand, total suspended solids, and fecal coliform. *Id.*

The People contend that Lone Hollow and PSM have violated Sections 12(a), 12(d) and 12(f) of the Act (415 ILCS 5/12(a), (d), (f) (2012)) and 309.102(a) of the Board's regulations (35 Ill. Adm. Code 309.102(a)). Compl. at 33.

#### **Count VI – Timberline**

Count VI alleges water pollution violations by Timberline and PSM in Schuyler County. Compl. at 34. Timberline owns a breed to farrow total confinement swine operation with three buildings. *Id.* at 35. Two gestation buildings have underground deep waste pits beneath them and the farrowing building has a shallow waste pit beneath it which drains into the deep pit of the east gestation building. *Id.* Timberline is located within the watershed of the West Branch of Sugar Creek. *Id.* PSM manages Timberline's operations and the physical site. *Id.*

On September 11, 2008, the Agency conducted an inspection of the Timberline facility and the inspector observed a discharge of leachate from the facility's dead animal composting structure. Compl. at 35-36. The inspector saw that purple liquid was exiting the unroofed composting structure and entering a dry dam that discharges to an unnamed tributary of the West Branch of Sugar Creek. *Id.* at 36. Timberline's environmental specialist informed the Agency inspector that the leachate discharge had occurred during recent heavy rainfalls. *Id.* The facility's employees had attempted to prevent the leachate from entering the dry dam but their efforts were not adequate to prevent the leachate from exiting the composting structure. *Id.*

The People allege that Timberline and PSM violated Sections 12(a), 12(d), and 12(f) of the Act (415 ILCS 5/12(a), (d), (f) (2012)) and Section 309.102(a) of the Board's regulations (35 Ill. Adm. Code 309.102(a)). Compl. at 37.

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

Count VII alleges water pollution violations of Prairie State Gilts and PSM in Schuyler County. Compl. at 38. Prairie State Gilts owns a sow breeding and gestation operation with approximately 4,500 swine. *Id.* at 39. PSM manages Prairie State Gilts' operations and physical site. *Id.*

Prairie State Gilts' waste handling system consists of shallow pits under each confinement building except one, which has a deep pit. Compl. at 39. The waste from the pits is pumped into a single-celled lagoon. *Id.*

The facility also contains two nursery buildings. Compl. at 40. The waste from the nursery buildings drains to a reception pit and is then pumped into the lagoon through an underground transfer line. *Id.* Most of the transfer lines are underground except for two locations where they extend above ground. *Id.* A hayfield exists between the reception pit and the lagoon. *Id.*

The People allege that one of the above ground pipes was either knocked over or mowed over during hay baling operations, as the above ground pipes were completely exposed. Compl. at 40. On July 7, 2008, livestock waste was being sent to the lagoon and the waste exited the pipeline at the damaged above ground pipe rather than the lagoon. *Id.* The waste flowed into an unnamed tributary of one of the facility's on-site ponds used for watering swine. *Id.* That pond discharges into an adjacent pond to the east and the east pond discharges into an unnamed tributary of Honey Branch. *Id.*

On July 24, 2008, the Agency inspected Prairie State Gilts' site in response to the reported release. Compl. at 41. The inspector observed a rivulet of swine waste entering the receiving pond, which was covered with algae and emitted the odor of swine waste. *Id.* The facility personnel informed the inspector that Prairie State Gilts intended to pump the receiving pond and land-apply the contents to wheat. *Id.* On October 30, 2008, nothing had been pumped from the pond. *Id.*

The People allege that Prairie State Gilts and PSM violated Sections 12(a), 12(d) and 12(f) of the Act (415 ILCS 5/12(a), (d), (f) (2012)) and Sections 302.203 and 309.102(a) of the Board's regulations (35 Ill. Adm. Code 302.203, 309.102(a)). Compl. at 42.

### **Count VIII – Little Timber**

Count VIII alleges water pollution violations by Little Timber and PSM in Hancock County. Compl. at 43. Little Timber owns a 2,600 sow farrow-to-wean total confinement swine operation. *Id.* at 44. The facility is located in the Middle Creek watershed, which is a tributary to the LaMoine River. *Id.* The facility farrows approximately 1,200 pigs per week and there are approximately 3,000 pigs at all times at the sites. *Id.* There are four total confinement buildings plus one office. *Id.* The buildings include farrowing, breeding, gestation and gilt development units. *Id.* The buildings have shallow manure storage pits which drain into a single cell anaerobic lagoon. *Id.* PSM manages Little Timber's operations and the physical site. *Id.* at 45.

On June 1, 2004, the Agency conducted an inspection of the Little Timber facility. Compl. at 46. The inspector observed that the lagoon had freeboard of approximately three to four feet, and the inspector advised the general manager of PSM to irrigate the lagoon soon to reduce hydraulic pressure on the lagoon. *Id.* The lagoons also contained tall weed growth, and the inspector advised the manager to mow the berms. *Id.* The inspector also observed dark

leachate and surface runoff draining into a ditch of the gravel access lane and then flowing into a waterway which is a tributary of Middle Creek. *Id.* Further, the compost structure contained numerous bones, bone fragments and other skeletal remains near the compost building where it had been damaged. *Id.* The compost area was also not protected from precipitation. *Id.* The Agency inspector collected various samples of the drainages during that inspection. *Id.* at 46-47.

On June 23, 2004, the Agency sent a noncompliance advisory letter to PSM regarding the observations from the June 1, 2004 inspection. Compl. at 47.

On February 6, 2007 and on February 8, 2007, Little Timber and PSM reported the release of waste from their wastewater handling structures. Compl. at 48. An inlet line entering the lagoon froze and wastewater was discharged into a ditch on the north side of the lagoon. *Id.* Little Timber and PSM constricted the spill and land-applied the spilled liquid. *Id.*

On February 21, 2007, the Agency conducted an inspection in response to the reported releases. Compl. at 48. The inspector observed water running along the drainage path into the downstream waterway, which left brown manure residue in its path. *Id.* The inspector advised Little Timber and PSM to get the dirty snow and frozen wastewater into the lagoon. *Id.* The inspector observed that the flow in the drainage ditch was brown and turbid and that the ditch was discharging into the waterway in the adjacent field because the waterway was overflowing the dam. *Id.*

On August 24, 2007, the Agency conducted an inspection of the Little Timber facility and the inspector observed that several swine had been burned near the gravel road. Compl. at 48. The skulls and bones still remained at the site and surface water flowed through the area and drained into a tributary of Middle Creek. *Id.* at 48-49. The inspector collected samples of the surface water. *Id.* at 49. The inspector also observed surface runoff draining from the mortality compost structure. *Id.*

The People allege that Little Timber and PSM have violated Sections 12(a), 12(d) and 12(f) of the Act (415 ILCS 5/12(a), (d), (f) (2012)) and Sections 620.301, 302.203 and 309.102(a) of the Board's regulations (35 Ill. Adm. Code 302.203, 309.102(a), 620.301). Compl. at 50-51.

## **RESPONDENTS' AFFIRMATIVE DEFENSES**

### **Hilltop's Affirmative Defenses**

Hilltop's answer to the second amended complaint raises three affirmative defenses. Hilltop first asserts as an affirmative defense to Count I that:

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. HV Ans. at 31.

The second affirmative defense raised by Hilltop is that the complaint “does not allege with specificity whether the federal and/or state statutes and regulations cited were in effect at the time of the violations.” HV Ans. at 31.

Hilltop’s third affirmative defense is “Hilltop reserves the right to amend this Answer to allege any additional defenses which discovery may reveal to be appropriate.” HV Ans. at 31.

### **High-Power Pork’s Affirmative Defenses**

High-Power Pork’s answer to the second amended complaint raises two affirmative defenses. High-Power Pork first asserts as an affirmative defense to Count III that:

The Complaint, which alleges a discrete discharge which occurred in 2008, is defective in that it has not been properly filed or processed pursuant to the Act’s relevant enforcement mechanism, contained in Title VII of the Act. Count III is filed pursuant to Section 42(d) and (e) of the Act, not Section 31, where the Board derives its enforcement authority. Any references to Title VII and Section 31 are noticeably absent from Count III, and as Section 31 is expressly relevant to the Board’s enforcement authority, the failure to properly plead and meet the requirements of Section 31 is a fatal flaw that requires dismissal. HPP Ans. at 15.

High-Power Pork’s second affirmative defense is

[t]he alleged discharge described in Count III occurred because of a discrete incident that occurred in 2008. There have been no discharges from the facility following this singular incident; thus there is no duty to apply for an NPDES permit. HPP Ans. at 16.

### **Eagle Point’s Affirmative Defenses**

Eagle Point’s answer to the second amended complaint raises four affirmative defenses. Eagle Point first asserts as an affirmative defense to Count IV that:

Preceding the filing of its Complaint, the Complainant failed to comply with Section 31 of the Act’s required enforcement procedures. Instead of Section 31, Complainant states that Count IV is merely brought pursuant to Sections 42(d) and (e) of the Act. Accordingly, Count IV fails and must be dismissed due to the Complainant’s failure to comply with Section 31 of the Act. EP Ans. at 28.

The second affirmative defense raised by Eagle Point to Count IV is that:

Count IV fails to allege facts sufficient to support a finding that Eagle Point is discharging, and thus, required to obtain an NPDES permit. The Complainant’s

allegations in Count IV that Eagle Point is required to apply for an NPDES permit is based solely upon one isolated event. Because this isolated event is insufficient to establish that Eagle Point is discharging in a manner sufficient to require an NPDES permit, Eagle Point is not required to apply for an NPDES permit. EP Ans. at 28.

Eagle Point's third affirmative defense is "Eagle Point reserves the right to amend its Answer to allege any additional defenses which discovery may reveal to be appropriate." EP Ans. at 28.

The fourth affirmative defense raised by Eagle Point to Count IV is that:

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. EP Ans. at 28.

### **Lone Hollow's Affirmative Defenses**

Lone Hollow's answer to the second amended complaint raises two affirmative defenses. Lone Hollow first asserts as an affirmative defense to Count V that:

The Complaint, which alleges a discrete discharge which occurred in 2007, is defective in that it has not been properly filed or processed pursuant to the Act's relevant enforcement mechanism, contained in Title VII of the Act. Count V is filed pursuant to Section 21(d) and (e) of the Act, not Section 31, where the Board derives its enforcement authority. Any references to Title VII and Section 31 are noticeably absent from Count V, and as Section 31 is expressly relevant to the Board's enforcement authority, the failure to properly plead and meet the requirements of Section 31 is a fatal flaw that requires dismissal. LH Ans. at 16-17.

The second affirmative defense raised by Lone Hollow to Count V is that:

The alleged discharge described in Count III occurred because of a discrete incident that occurred in 2008. There have been no discharges from the facility following this singular incident; thus there is no duty to apply for an NPDES permit. LH Ans. at 17.

### **Timberline's Affirmative Defenses**

Timberline's answer to the second amended complaint raises four affirmative defenses. Timberline first asserts as an affirmative defense to Count VI that:

Preceding the filing of its Complaint, the Complainant failed to comply with Section 31 of the Act's required enforcement procedures. Instead of Section 31, Complainant states that Count VI is merely brought pursuant to Sections 42(d)

and (e) of the Act. Accordingly, Count VI fails and must be dismissed due to the Complainant's failure to comply with Section 31 of the Act. T Ans. at 27.

The second affirmative defense raised by Timberline to Count VI is that:

Count VI fails to allege facts sufficient to support a finding that Timberline is discharging, and thus, required to obtain an NPDES permit. The Complainant's allegations in Count VI that Timberline is required to apply for an NPDES permit is based solely upon one isolated event. Because this isolated event is insufficient to establish that Timberline is discharging in a manner sufficient to require an NPDES permit, Timberline is not required to apply for an NPDES permit. T Ans. at 27.

Timberline's third affirmative defense is "Timberline reserves the right to amend its Answer to allege any additional defenses which discovery may reveal to be appropriate." T Ans. at 27.

The fourth affirmative defense raised by Timberline to Count VI is that:

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. T Ans. at 27.

### **Prairie State Gilts' Affirmative Defenses**

Prairie State Gilts' answer to the second amended complaint raises two affirmative defenses. Prairies State Gilts first asserts as an affirmative defense to Count VII that:

The Complaint, which alleges a discrete discharge which occurred in July 2008, is defective in that it has not been properly filed or processed pursuant to the Act's relevant enforcement mechanism, contained in Title VII of the Act. Count VII is filed pursuant to Section 42(d) and (e) of the Act, not Section 31, where the Board derives its enforcement authority. Any references to Title VII and Section 31 are noticeably absent from Count VII, and as Section 31 is expressly relevant to the Board's enforcement authority, the failure to properly plead and meet the requirements of Section 31 is a fatal flaw that requires dismissal. PSG Ans. at 18-19.

The second affirmative defense raised by Prairie State Gilts to Count VII is that:

The alleged discharge described in Count VII occurred because of a discrete incident that occurred in 2008. There have been no discharges from the facility following this singular incident; thus there is no duty to apply for an NPDES permit. PSG Ans. at 19.

### **Little Timber's Affirmative Defenses**

Little Timber's answer to the second amended complaint raises four affirmative defenses. Little Timber first asserts as an affirmative defense to Count VIII that:

Preceding the filing of its Complaint, the Complainant failed to comply with Section 31 of the Act's required enforcement procedures. Instead of Section 31, Complainant states that Count VIII is merely brought pursuant to Sections 42(d) and (e) of the Act. Accordingly, Count VIII fails and must be dismissed due to the Complainant's failure to comply with Section 31 of the Act. LT Ans. at 35.

The second affirmative defense raised by Little Timber is that:

Count VIII fails to allege facts sufficient to support a finding that Little Timber is discharging, and thus, required to obtain an NPDES permit. The Complainant's allegations in Count VIII that Little Timber is required to apply for an NPDES permit is based solely upon isolated events. Because these isolated events are insufficient to establish that Little Timber is discharging in a manner sufficient to require an NPDES permit, Little Timber is not required to apply for an NPDES permit. LT Ans. at 35.

Little Timber's third affirmative defense is "Little Timber reserves the right to amend its Answer to allege any additional defenses which discovery may reveal to be appropriate." LT Ans. at 35.

The fourth affirmative defense raised by Little Timber is that: "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." LT Ans. at 35.

### **Professional Swine Management's Answer and Affirmative Defenses**

As a common respondent to all counts in the second amended complaint, PSM raises affirmative defenses to certain counts of the complaint. With regards to Counts III through VIII of the second amended complaint, PSM raises the same affirmative defense:

As Complainant did not follow the procedures set forth in 415 ILCS 5/31 prior to filing this enforcement action, [Counts III through VIII] must be dismissed with prejudice. PSM Ans. at 11, 13, 16, 18, 21, 24.

PSM did not assert any affirmative defense for Counts I and II.

### **PEOPLE'S MOTIONS TO STRIKE AFFIRMATIVE DEFENSES**

On August 2, 2013, the People filed three motions to strike respondents' affirmative defenses, grouping similar defenses together.

**People’s Motion to Strike Affirmative Defenses of Respondents High-Power Pork,  
Lone Hollow, and Prairie State Gilts**

The People describe respondents High-Power Pork, Lone Hollow, and Prairie State Gilts, as having pled two identical affirmative defenses to the counts pertinent to each. Mot. 1 at 1-2. Accordingly, the People move to strike these respondents’ affirmative defenses in a single motion.

The People first address these respondents’ first affirmative defense which concludes that the People’s “failure to properly plead and meet the requirements of Section 31 is a fatal flaw that requires dismissal.” Mot. 1 at 4. The People assert that this affirmative defense “is not affirmative matter that avoids the legal effect of or defeats the cause of action.” *Id.* The People contend that the Board repeatedly has found that the requirements of Section 31 of the Act “were not intended to bar the Attorney General from prosecuting an environmental violation.” *Id.* at 4-5 (citations omitted). The People explain that “the written notice required by Section 31(a)(1) is a precondition to the [Agency’s] referral of the alleged violations to the Attorney General.” *Id.* at 5, *citing* People v. Chemetco, PCB 96-76 (July, 1998). The People state that these counts of the complaint are not based on a referral from the Agency to the Attorney General. *Id.* Rather, the counts against these respondents are brought solely on the Attorney General’s own motion under Section 42(d) and (e) of the Act, and therefore do not require the written notice required under Section 31(a)(1). *Id.* at 4-5.

The People next address these respondents’ second affirmative defense which provides:

The alleged discharge described in Count III (V, VII) occurred because of a discrete incident that occurred in 2008 (Count V 2007, Count VII 2008). There have been no discharges from the facility following this singular incident, thus there is no duty to apply for an NPDES permit. Mot. 1 at 5.

The People argue that this defense is a legal conclusion and not affirmative matter to defeat the claim. Mot. 1 at 5. The People further argue that the issues raised in this defense were raised in the respondents’ motion to strike the second amended complaint’s request for relief, which the Board denied. *Id.*

**People’s Motion to Strike Affirmative Defenses of Respondents Hilltop,  
Eagle Point, Timberline, and Little Timber**

The People describe respondents Hilltop, Eagle Point, Timberline, and Little Timber as having pled identical affirmative defenses to the counts pertinent to each subject facility. Mot. 2 at 1-2. Accordingly, the People move to strike these respondents’ affirmative defenses in a single motion. *Id.*

The People first address Eagle Point, Timberline, and Little Timber’s affirmative defense which alleges that the People failed to comply with Section 31 of the Act prior to filing the complaint. Mot. 2 at 4. Hilltop did not raise this defense. As in the above motion, the People argue that this defense “is not affirmative matter that avoids the legal effect of or defeats the

cause of action” and explain that Section 31(a)(1) is a precondition for Agency’s enforcement referrals to the Attorney General but does not bar the Attorney General from bringing actions on her own motion. *Id.* at 4-5.

Next, the People move to strike the affirmative defense alleging that these respondents were not required to obtain NPDES permits for the isolated events alleged in the counts of the complaint applying to each of their facilities. Mot. 2 at 5. The People argue that this defense “is a claim of insufficient pleading” and a legal conclusion. *Id.* Accordingly, the People conclude that this defense “is not affirmative matter that will avoid the legal effect of or defeat the cause of action.” *Id.* at 5-6.

The People then move to strike the respondents’ affirmative defense purporting to reserve the right to amend their answers to add any defenses revealed during discovery. Mot. 2 at 6. The People argue that this reservation “is appropriate as long as any additional affirmative defenses are pled sufficiently in advance of hearing to allow responsive pleadings.” *Id.*

Finally, the People address these respondents’ affirmative defense that 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.” Mot. 2 at 6. The People argue that this defense also is a claim that the complaint is insufficient and is not affirmative matter to defeat the cause of action. *Id.* The People assert that the statutes and regulations have not been altered during the current action. *Id.* at 7.

### **People’s Motion to Strike Affirmative Defenses of Respondent Professional Swine Management**

The People move to dismiss PSM’s affirmative defense to Counts III through VIII which alleges that the People did not follow the procedures set forth in Section 31 of the Act prior to filing the complaint. Mot. 3 at 4. As in the above two motions, the People argue that this defense “is not affirmative matter that avoids the legal effect of or defeats the cause of action.” Mot. 3 at 4. Rather, Section 31(a)(1) is a precondition for enforcement referrals from the Agency to the Attorney General but does not bar the Attorney General from bringing actions on her own motion. *Id.*

### **BOARD DISCUSSION**

Pursuant to the Board’s procedural rules, “facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.” 35 Ill. Adm. Code 103.204(d); *see also* 735 ILCS 5/2-613(d). In an affirmative defense, a respondent alleges “new facts or arguments that, if true, will defeat . . . [a complainant’s] claim even if all allegations in the complaint are true.” *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). A defense that merely attacks the sufficiency of a claim fails to be an affirmative defense. *Worner Agency v. Doyle*, 121 Ill. App. 3d 219, 222-223, 459 N.E.2d 633, 636 (4th Dist. 1984). The Illinois Appellate Court states that “[t]he test of whether a defense is affirmative and must be pleaded by a defendant is whether the defense gives color to the opposing party’s claim and then

asserts new matter by which the apparent right is defeated.” Worner, 121 Ill. App. 3d at 222, 459 N.E.2d at 636.

In addition, the party asserting the affirmative defense must plead it with the same degree of specificity necessary for establishing a cause of action. International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609, N.E. 2d 842, 853 (1st Dist. 1993). The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts to be proved. People v. Carriage 5 Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E. 2d 1005, 1008-09 (1981). However, legal conclusions that are not supported by allegations of specific facts are insufficient. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297 (2d Dist. 1993).

“A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts.” Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989). An affirmative defense should not be stricken “[w]here the well-pleaded facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail . . . .” Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

Respondents have not filed responses to the People’s motions. “If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d). The Board finds that respondents have therefore waived their objection to the granting of this motion.

**Motion to Strike Affirmative Defenses of Respondents High-Power Pork,  
Lone Hollow, and Prairie State Gilts**

**Section 31 of the Act**

Respondents High-Power Pork, Lone Hollow, and Prairie State Gilts argue that, prior to filing the complaint, the People failed to comply with the requirements of Section 31 of the Act. This section requires, among other things, that the Agency provide written notice to respondents of alleged violations. Respondents argue that the counts against them should be dismissed for failure to follow Section 31.

The People respond that the requirements of Section 31 of the Act only apply when the action is referred from the Agency to the Attorney General. The People argue that the pre-complaint notice requirements in Section 31 do not apply in this case because the Attorney General filed the complaint on her own motion under Section 42(d) and (e) of the Act.

The Board previously addressed the requirements of Section 31 of the Act and consistently found that the Section 31 requirements were not intended to bar the Attorney General from prosecuting an environmental violation. *See e.g.*, People v. Town of Cortland, PCB 11-67, slip op. at 4 (Nov. 3, 2011); People v. Sheridan Sand & Gravel Co., PCB 06-177, slip op. at 14 (June 7, 2007); People v. Barger Engineering, Inc., PCB No. 06-82, slip op. at 3

(March 16, 2006). The procedures in Section 31 are a precondition to the Agency's referral of alleged violations to the Attorney General. Barger, slip op. at 2. The Attorney General's authority to bring an enforcement action is not limited by Section 31. *Id.* at 3. Here, the Attorney General brings the complaint against these respondents on her own motion. Accordingly, whether the Agency complied with Section 31 of the Act has no bearing on the allegations in the complaint. Therefore, the Board strikes this affirmative defense.

### **Duty to Apply for NPDES Permit**

These respondents also argue that the alleged discharges for each facility were discrete incidents and there have been no such subsequent discharges. Respondents argue that because these were discrete, singular incidents, there is no duty to apply for an NPDES permit.

The People respond that this defense is a legal conclusion and is not affirmative matter that will defeat the claim. The People further argue that this claim was addressed in respondents' motion to strike a portion of the second amended complaint's request for relief, which was denied in the Board's Order dated May 2, 2013.

Respondents' defense "pertains to remedy, not the cause of action," and therefore is not affirmative matter that will defeat the claim. *See People v. Texaco Refining and Marketing, Inc.*, PCB 02-3, slip op. at 6 (Nov. 6, 2003). The Board notes that respondents are not precluded from raising this argument in a remedy analysis, should there be one.

For these reasons, the Board grants the People's motion to strike both affirmative defenses asserted by respondents High-Power Pork, Lone Hollow, and Prairie State Gilts.

### **Motion to Strike Affirmative Defenses of Respondents Hilltop, Eagle Point, Timberline, and Little Timber**

#### **Section 31 of the Act**

Eagle Point, Timberline, and Little Timber make similar arguments as above that, prior to the filing of the complaint, the People failed to comply with Section 31 of the Act. For the same reasons as discussed above, the Board grants the People's motion to strike Eagle Point, Timberline, and Little Timber's defense concerning Section 31 of the Act.

### **Duty to Apply for NPDES Permit**

Hilltop, Eagle Point, Timberline, and Little Timber make similar arguments as above that the isolated discharge allegations in the complaint are not sufficient to establish that respondents were required to apply for NPDES permits. For the same reasons as discussed above, the Board grants the People's motion to strike Hilltop, Eagle Point, Timberline, and Little Timber's defense concerning the duty to apply for an NPDES permit.



### **Reservation of Rights**

Hilltop, Eagle Point, Timberline, and Little Timber, as an affirmative defense, reserved the right to amend their answers to allege defenses which may be revealed during discovery. This asserted defense is a reservation of rights and not an affirmative defense. Accordingly, the Board strikes this defense. The Board notes that, under Section 103.204(d) of the Board's procedural rules, respondents may raise additional affirmative defenses if the affirmative defense "could not have been known before hearing." 35 Ill. Adm. Code 103.204(d).

### **Effective Date of Statutes and Regulations**

These respondents raise an affirmative defense that the complaint does not allege with specificity whether the cited federal and state statutes and regulations were in effect at the time of the alleged violations. The People respond that this affirmative defense "is a claim of insufficient pleading and as such is not affirmative matter that will avoid the legal effect of or defeat the cause of action." Mot. 2 at 6. The People further state that "the state statute and regulations have not been altered by any means during the pendency of this action" and that the "federal regulations have been pled as they existed at the time of the filings." *Id.* at 7. The People state that "the portions of the federal regulations that were ultimately vacated are not at issue in this case." *Id.*

The Board agrees with the People that the affirmative defense is insufficient. Respondents have not alleged any "new facts or arguments that, if true, will defeat . . . the [People's] claim even if all allegations in the complaint are true." Community Landfill, PCB 97-193, slip op. at 3. Furthermore, respondents' point that a regulation or statute was not in effect at the time of the alleged activities is a denial of that allegation in the complaint not an affirmative defense. The Board therefore grants the People's motion to dismiss this affirmative defense.

For these reasons, the Board grants the People's motion to strike each of the affirmative defenses asserted by respondents Hilltop, Eagle Point, Timberline, and Little Timber.

### **Motion to Strike Affirmative Defenses of Respondent Professional Swine Management**

PSM assert an affirmative defense to counts III through VIII that prior to the filing of the complaint, the People failed to comply with Section 31 of the Act. For the same reasons as discussed above, the Board grants the People's motion to strike PSM's defense concerning Section 31 of the Act.

### **CONCLUSION**

For the reasons above, the Board grants the People's three motions to strike the respondents' affirmative defenses. The Board therefore strikes the affirmative defenses of Professional Swine Management, High-Power Pork, Lone Hollow, Prairie State Gilts, Timberline, Little Timber, Hilltop, and Eagle Point.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2013, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

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John Therriault, Clerk  
Illinois Pollution Control Board