

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
)  
CONCENTRATED ANIMAL FEEDING ) R-2012-023  
OPERATIONS (CAFOS): PROPOSED )  
AMENDMENTS TO 35 ILL. ADM. CODE )  
501, 502 AND 504 )

**ILLINOIS AGRICULTURAL COALITION'S QUESTIONS FOR THE  
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

In accordance with the Hearing Officer Order of March 23, 2012, the Illinois Agricultural Coalition files the following questions for the Illinois Environmental Protection Agency (IEPA):

Questions related to Testimony of Bruce Yurdin:

**1. On page 1 and 2 you generally discuss IEPA inspections: "The purpose of any inspection conducted by IEPA is to determine compliance with applicable state law, Illinois Pollution Control Board regulations and permit conditions, to the extent that any given facility or location holds a permit." You then recite IEPA expectations of livestock facilities.**

- (a) What are the IEPA plans for inspections of livestock facilities upon the promulgation of these rules?
- (b) Does IEPA plan to inspect unpermitted facilities and, if so, under what circumstances?
- (c) As producers have legitimate concerns related to the biosecurity of their facilities, as well as the safety of their animals, please explain the IEPA's protocol regarding notifying a producer and gaining access to the facility prior to any inspection.

**2. On page 2 you state "Most of the elements in proposed sections 502.505, 502.510 and 502.515 are required in the federal CAFO rule."**

- (a) Please identify which part of these proposed rules are *not* required by the federal CAFO rule;
- (b) Please identify which part of these proposed rules are derived from existing livestock management regulations from the Livestock Management Facilities Act;

- (c) Please identify which of these proposed rules is completely new (i.e., not derived from the federal CAFO rule and not part of the existing state LMFA rules or existing Subtitle E rules).

**3. On page 4 you state the following: “The terms of the NMP, as provided in the Approach used by the livestock producer can be reviewed by the Illinois EPA during an on-site visit. Diversion of clean water, to use the same example, would be an important factor if our field review of discharges or a potential to discharge were observed. A review of the NMP may be necessary to determine if diversions were planned or if new adjustments to the NMP or to the design, construction, operation and maintenance of the facility were needed.”**

- (a) What do you mean by the “Approach” used by the livestock producer?
- (b) What would form the basis for an IEPA observation of “a potential to discharge”?
- (c) If the IEPA inspector, in his or her judgment, believes there is insufficient diversion of clean water at the facility, or otherwise observes a “potential to discharge,” is such observation sufficient reason enough to cite the facility for violation, and, if so, what violation? Does the IEPA consider inadequate “diversion of clean water” to itself constitute a discharge? Is it sufficient reason for an IEPA determination (or designation under Section 502.106) that the facility needs an NPDES permit? How is such determination/designation made – and challenged, if the producer disagrees?
- (d) Under what circumstances, if any, would an unpermitted CAFO be cited with a violation of the Illinois Environmental Protection Act or, more specifically, of these proposed rules? Under what circumstances, if any, would an unpermitted CAFO be subject to an IEPA inspection?

**4. Definition and Interpretation of Discharge.**

- (a) Please identify, with specificity, what the IEPA regards as a discharge that requires: (a) regulation by permit; and/or (b) a violation notice.
- (b) Under what circumstances will a producer receive a violation notice or a discharge from a permitted facility (i.e., what effluent limits are contemplated in Illinois’ general NPDES CAFO permit)?

**5. On page 6, first full paragraph, you discuss “six criteria that must be met in the fields before application can begin.”**

- (a) Please explain those six criteria and where they are found in the proposed rules – and where they are found in the corresponding federal CAFO rule.

- (b) Does the IEPA expect that each of these six criteria must be met prior to each and every application of manure? Please explain.
- (c) What obligation does the IEPA expect of a producer who contracts with a grain farmer, or other person not associated with the CAFO, as it relates to the proper application of manure to lands not controlled by the CAFO owner or operator?

**6. On pages 6 through 8 (and also on pages 8 - 10 of Sanjay Sofat's testimony) IEPA discusses land application requirements and limitations applicable to large CAFO facilities that are *not regulated* under an NPDES permit. In IEPA's Statement of Reasons, IEPA recognizes that it is well-established, under federal case law, that only facilities that discharge are required to apply for an NPDES permit. More to the point, a potential to discharge has specifically been determined NOT to be sufficient regulatory basis for an NPDES permit requirement.**

As the IEPA also recognizes, under the federal rules, when a discharge occurs, the discharge might well be an exempt stormwater discharge (not subject to permitting) if the producer has engaged in the best management practices set forth in 40 CFR 122.42(e)(1)(vi) through (ix), specifically, that the producer has done the following:

- identified appropriate site specific conservation practices to be implemented, including buffers or equivalent practices to control runoff of pollutants (40 CFR 122.42(e)(1)(vi));
- identified protocols for appropriate testing of manure, litter, processed wastewater and soil (40 CFR 122.42(e)(1)(vii))
- established protocols to land apply manure, litter or processed wastewater in accordance with site specific nutrient management practices that encourage agricultural utilization of the nutrients (40 CFR 122.42(e)(1)(viii));
- identified specific records that were maintained to document the above implementation practices (40 CFR 122.42(e)(1)(ix)).

Here, the IEPA proposes to require that an unpermitted large CAFO (one that does not expect or intend to discharge livestock waste) must meet the identical regulatory provisions required of permitted facilities, as set forth in Section 502.510(b) - regardless of whether there is (or will be) a discharge – and without actually requiring a permit proposal.

- (a) What is the basis and authority for IEPA's requirement that a large CAFO that is not discharging be required to meet identical requirements to those prescribed for permitted facilities that are discharging?
- (b) Is it the IEPA's expectation, as envisioned in the federal rules, that the NMP is something maintained by the producer at his facility and utilized if necessary to

justify an exempt discharge -- or does the IEPA envision submission of the NMP to the IEPA for review and public participation, as with an NPDES permit? If the latter, please point out the appropriate section in these rules setting forth such requirement – as well as authority for any such requirement.

- (c) If a large CAFO does not have an NMP – or its NMP does not meet one or more of the provisions in proposed Section 502.510(b), will the IEPA cite the large CAFO with a violation – even if there has been no discharge? What violation?
- (d) Does IEPA agree that the federal regulations do not require the submission of an NMP, or the adherence to strict state-created one-size-fits all technical standards, in order to demonstrate proper nutrient management? Does IEPA agree that there are other ways to demonstrate proper nutrient management plan and therefore properly distinguish a livestock waste discharge from an exempt agricultural stormwater discharge, even for a large CAFO, without the required implementation of a standardized and regulatory-driven NMP?
- (e) Does IEPA understand that the requirement for an NMP for CAFOs which do not discharge will create increased costs of compliance? Has IEPA estimated that cost of compliance? Has IEPA reviewed the USEPA's estimated costs of compliance in its lengthy federal rule proposal and preamble? What is IEPA's rationale for requiring greater costs for Illinois producers?

**7. On page 8 you discuss how IEPA might make “a designation” as to the need for a permit at a particular facility. The designation provision is found at Section 502.106 of the proposed rules.**

- (a) Please explain how IEPA will make a determination related to a facility's need for a permit. Please explain how the *Waterkeeper* and *National Pork Producer* cases, both recognized in the IEPA's Statement of Reasons, will guide the IEPA.
- (b) In proposed Section 502.106, IEPA eliminated the requirement that a producer be notified in writing of any such designation. What was IEPA's rationale for this elimination?
- (c) Does IEPA consider such designation a final agency action subject to appeal to the Pollution Control Board? If not, how does the producer challenge such designation?
- (d) Has IEPA ever before utilized this “designation” process to identify and require NPDES permitting for CAFOs? If so, please explain when and how.

**8. On page 9, you discuss record keeping requirements. The following requirements do not appear to be a part of the federal rule: subsurface draining systems, quantity of waste removed during de-watering, and soil conditions at the time of application to fields (especially non-winter).**

- (a) Please explain each of these requirements and provide justification for each.
- (b) Please explain how a producer records a visual observation of a subsurface drainage system, as suggested on page 10.

Questions related to Testimony of Sanjay Sofat:

**9. On pages 4 and 5, you state that the federal CAFO rule requires small and medium CAFOs to comply with technology-based requirements developed by the permitting authority on a case-by-case basis. You then explain that instead of taking this case-by-case approach, the IEPA chose to develop one set of technical standards for all, regardless of size or type.**

- (a) How does IEPA distinguish between requiring a General Permit for CAFOs and an Individual Permit for CAFOs?
- (b) Does IEPA envision that all CAFOs that are required to be permitted will be required to be permitted via the General Permit? (The rules only refer to the General Permit.) Under what, if any, circumstances will IEPA expect (or allow) an Individual Permit?
- (c) How does IEPA distinguish between a permit condition pursuant to the IEPA-developed General NPDES CAFO permit – and the proposed Board rules relevant to CAFO facilities? Does IEPA envision changes to its general permit on the basis of these rules?
- (d) For purposes of the record, would the IEPA submit, in this proceeding, the IEPA's (i) current General NPDES permit for CAFOs; and (ii) General Permit that it would require adherence to upon promulgation of these rules?
- (d) How does a producer appeal, to the Board, a permit condition set forth in a General Permit, as envisioned by Section 39 of the Illinois Environmental Protection Act?

**10. On page 4 you state: "The Agency's proposal includes best management practices identified by the federal regulations when found adequate and protective of water quality. However, the Agency's proposal goes beyond these requirements where the Agency finds it necessary to protect waters of the U.S. The Agency relied on the well-established best management practices provided in the Livestock Management Facilities Act where it found them to be proper and effective to meet federal requirements and state technical standards."**

- (a) Please identify, and provide rationale for, whatever specific provisions of the proposed rules the IEPA (i) derived from regulations pursuant to the LMFA and

(ii) derived from the federal regulations in a manner contrary to the regulations established by the LMFA.

Questions related to Testimony of Daniel Heacock:

**12. On page 3, you state “In accordance with federal CAFO regulations, the Agency must provide a period of opportunity to the public to review the permit application and the NMP and submit comments and request a hearing.”**

- (a) We assume that your testimony related to IEPA and public review of CNMPs is related directly to those CNMPs that are submitted to IEPA in the context of a permit application, not CNMPs required of a large CAFO in order to demonstrate an agricultural stormwater discharge exemption. Is that a correct assumption?
- (b) Please provide the reference to the Clean Water Act law or regulations which require an opportunity for public review and comment regarding anything other than an application for an individual NPDES permit.

**13. The IEPA envisions a 30 day period for the public to review these “complex NMP’s”. The IEPA compares such NMP’s to “complex individual NPDES permits”. Under Illinois law, an individual NPDES permit is subject to public comment and also subject to appeal to the Illinois Pollution Control Board.**

- (a) What procedure does the IEPA envision for review of its determinations as they related to NMP’s and general NPDES CAFO permits?
- (b) What is the expected review time for the IEPA to issue a determination on (a) a general NPDES CAFO permit application; and (b) an individual NPDES CAFO permit application?

Questions General to all Testimony, the Proposed Rules and the Statement of Reasons.

**14. Section 501.252. Frozen Ground. Currently, the definition reads: “Soil that is frozen anywhere between the first ½ inch to 8 inches of soil as measured from the ground surface.” During discussions with the Stakeholder Group, IEPA proposed to model this definition from that of a neighboring state. Despite objections, the IEPA chose Wisconsin.**

(a) Please explain the IEPA’s rationale for this choice instead of a state with more similar climate and agricultural environment, such as Iowa?

**15. Section 501.262. Incorporation. Currently, the definition reads: “A method of land application of livestock waste in which the livestock waste is thoroughly mixed or completely covered with the soil within 24 hours. Any ponded liquid livestock waste remaining on the site after application is not considered to be thoroughly mixed or completely covered with this soil.”**

- (a) Does the definition allow for the use of newly developed tillage tools, or those yet to be developed, that may incorporate livestock waste with minimal soil disturbance?
- (b) How will the proposed definition be interpreted when there is a rain event within 24 hours of application, but incorporation was nonetheless accomplished?

**16. Section 501.295. Livestock Waste. Currently, the definition reads: “Manure, litter, process wastewater, overflow from watering systems, wash waters, sprinkling waters from livestock cooking, precipitation polluted by falling on or flowing onto an animal feeding operation and other materials polluted by livestock, including but limited to sludge and contaminated soils from storage structures. Livestock waste does not include agricultural stormwater discharge.” This definition is much different than the current Illinois and federal definitions of Livestock Waste – and includes such new concepts as “contaminated soils” – concepts that are confusing in the context of the Clean Water Act.**

- (a) How is the IEPA’s proposed definition different than the federal definition of livestock waste? Why is it different?
- (b) How will the IEPA interpret “contaminated soils” in the context of this definition and its regulation of CAFOs?
- (c) How does the IEPA differentiate between livestock waste, as here defined, and agricultural stormwater?

**17. Section 501.401. Purpose and Scope of Operational Rules for Livestock Management Facilities and Livestock Waste-Handling Facilities.**

- (a) Section 501.401(b). How will the IEPA evaluate whether a producer has made such a self-evaluation? If the producer does so, and draws a different conclusion than IEPA as to permit applicability, will he be charged with a violation of this rule?
- (b) Section 501.401(d). How will the IEPA determine whether runoff or overflow from a livestock facility causes a water quality violation? How is the agricultural stormwater exemption relevant to this determination? In the context of a non-point source, as here, where does the IEPA believe it is appropriate to sample – such that analytical results will be reflective of an actual water quality violation as to surface waters regulated by the Clean Water Act?

**18. Section 501.404(c). Handling and Storage of Livestock Waste.**

- (a) Please explain whether the proposed change would include chronic storm events or only those meeting the 25-year standard in a 24 hour period.
- (b) How does this change relate to the federal CAFO rules?

**19. Section 501.405. Field Application of Livestock Waste.**

- (a) Please explain how this provision will be applied to non-discharging facilities that are not required to be permitted.
- (b) Please explain how this provision segues with Section 502.305 and, more generally, Part 502, Subpart F.

**20. Section 502.101. NPDES Permit and Duty to Maintain Permit Coverage.**

- (a) Section 502.101(b)(1) appropriately mirrors the USEPA CAFO rule preamble that states that a past discharge does not necessarily trigger a future permit obligation, since the producer could have corrected the problem that gave rise to the discharge. Please explain the circumstances under which the IEPA would be willing to accept a Compliance Commitment Agreement (related to a discharge violation) that does not require a producer to seek an NPDES permit.
- (b) This provision, at section (f) appears to require a farm to have a permit for all types of livestock production, not just that production which results in a discharge. Is this a correct reading? Can the IEPA explain a situation where this provision would be relevant?

**21. Section 502.615. Phosphorus**

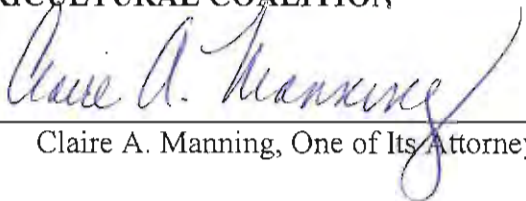
- (a) How is this section different than existing state regulations (pursuant to the LMFA) regarding land application nutrient standards? How are those differences reconciled, legally?
- (b) Has the IEPA consulted with NRCS or other agricultural experts in the development of the proposed nutrient standards? If so, please explain how.
- (c) Has the IEPA reviewed other state's nutrient standards? How does this proposed rule compare to those found in other states?
- (d) In Section 502.514(d)(2)(F) and (e) (2)(D), please comment on how a producer demonstrates "consideration of multi-year phosphorus application."



Dated: July 17, 2012

Respectfully submitted,

**AGRICULTURAL COALITION**

By:   
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Claire A. Manning, One of Its Attorneys

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**PROOF OF SERVICE**

I, Claire A. Manning, certify that I have served the attached Agricultural Coalition's Questions to the Illinois Environmental Protection Agency, by U.S. Mail, first class postage prepaid, on July 17, 2012 to the following:

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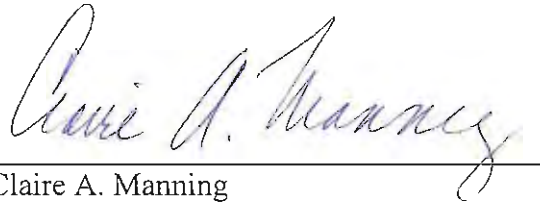
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A handwritten signature in blue ink that reads "Claire A. Manning". The signature is written in a cursive style and is positioned above a horizontal line.

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