

**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 )

**NOTICE OF FILING**

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board, and Agricultural Coalition's Motion Proposing Changes To The Illinois Environmental Protection Agency Proposed Rules, copies of which are also herewith sent to the attached service list.

Dated: September 25, 2012

Respectfully submitted,

---

Claire A. Manning

**BROWN, HAY & STEPHENS, LLP**

Claire A. Manning  
Registration No. 3124724  
205 S. Fifth Street, Suite 700  
P.O. Box 2459  
Springfield, IL 62705-2459  
(217) 544-8491  
[cmanning@bhsllaw.com](mailto:cmanning@bhsllaw.com)

**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 )

**AGRICULTURAL COALITION'S MOTION PROPOSING CHANGES TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY PROPOSED RULES**

NOW COMES the Agricultural Coalition (ILLINOIS PORK PRODUCERS ASSOCIATION, ILLINOIS BEEF ASSOCIATION, ILLINOIS MILK PRODUCERS ASSOCIATION and the ILLINOIS FARM BUREAU), and on the basis of the record of hearing thus far in the above-referenced proceeding, moves that the Illinois Pollution Control Board ("Board"), make the following changes to the rules proposed by the Illinois Environmental Protection Agency ("IEPA"), prior to advancing them, as Board rules, to First Notice. These changes are requested in order to make the rules more consistent with the federal Combined Animal Feedlot Operations ("CAFO") program and regulations, as well as existing Illinois statutes and regulations.

**1. Section 501.325. (Applicable Waters)**

The Illinois Environmental Protection Agency (IEPA) proposes the deletion of the current definition in the Board rules related to applicable waters, which was developed in 1978 on the basis of then existing federal Clean Water Act ("CWA") regulations. As the Board rule

currently reads, the waters applicable for purposes of NPDES permitting are “navigable waters” defined as follows:

**Section 501.325 Navigable Waters**

All waters of the United States as defined in Criteria and Standards for the National Pollutant Discharge Elimination System (40 CFR 125.1(p)):

- a) All navigable waters of the United States;
- b) Tributaries of navigable water of the United States;
- c) Interstate waters;
- d) Intrastate lakes, rivers and streams which are utilized by interstate travelers for recreational or other purposes;
- e) Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce; and
- f) Intrastate lakes, rivers and streams which are utilized for industrial purposes by industries in interstate commerce.

(Source: Added at 2 Ill. Reg. 44, p. 137, effective October 30, 1978)

The IEPA proposes no substitute definition, although it has stated throughout the hearing, and in its Statement of Reasons, that these proposed rules are intended to mirror the federal CAFO program and apply only to “waters of the United States”. See Trans. of August 21, 2012 Hearing at p. 75. Accordingly, and consistent with this framework, the Agricultural Coalition requests that the Board either (a) retain the current definition of navigable waters or (b) amend the language to read as follows:

**501.325 Waters of the United States. All waters of the United States as defined in the Federal Clean Water Act.**

**2. Section 501.252 (Frozen Ground/Application of Manure)**

The IEPA's proposed definition would prohibit land application of manure whenever land conditions are such that the ground is frozen up to ½ inch. Although winter application is not optimal, sometimes it is necessary. With the IEPA's proposed language, anyone who has the need to land apply in cold weather months would be subject to enforcement and fines if such application occurred when the land was minimally frozen.

At the Illinois Pollution Control Board hearing on August 21, 2012 Bruce Yurdin testified that IEPA adopted its definition for "Frozen Ground" from Wisconsin regulations, after reviewing comparable regulations in Iowa and in several other states in the Midwest. When asked why IEPA selected Wisconsin's definition, since Iowa is more similar to Illinois in terms of weather, climate, and agricultural sources, Mr. Yurdin responded:

I don't think we looked at those factors necessarily. I think we assumed that Iowa agriculture and Wisconsin in general in the Midwest was essentially the same as far as we could tell. There was no great distinction although there are differences in the regulations.

So the rationale, I think we discussed the one-half to eight inch depth measurement for frozen soil and frozen ground. We thought it was reasonable and a very practical application of that term, that term being Frozen Ground.

Trans. of August 21, 2012 Hearing at pp. 63-65.

Per Mr. Yurdin's testimony, IEPA did not consider climate or weather when adopting Wisconsin's frozen ground standard – nor agricultural similarities. The Agricultural Coalition asserts that such considerations are essential to a sensible regulation related to land application of manure in Illinois. As Iowa is much more similar to the vast majority of agricultural land in Illinois in terms of climate, growing season and type of crops and combined animal feedlot

operations (CAFOs), the Agricultural Coalition suggests that the Iowa approach provides a more reasonable basis for the application than does the Wisconsin approach.<sup>1</sup> Accordingly, the Agricultural Coalition proposes that the Board amend this Section to read:

**501.252 Frozen Ground. Soil that is impenetrable due to frozen soil moisture but does not include soil that is only frozen to a depth of 2 inches or less.**

**3. Section 501.295 (Definition of Livestock Waste)**

The IEPA proposes to modify the current definition of livestock waste, contained at Section 501.295. The proposed definition would modify the existing definition as follows:

Manure, litter, process wastewater, overflow from watering systems, wash waters, sprinkling waters from livestock cooling, precipitation polluted by falling on or flowing onto an animal feeding operation and other materials polluted by livestock, including but not limited to sludge and contaminated soils from storage structures. Livestock waste does not include agricultural stormwater discharge.

The Agricultural Coalition supports the inclusion of the last sentence of the definition, related to agricultural stormwater, since such inclusion is consistent with the agricultural stormwater exception contained in 33 U.S.C. § 1362 and provides clarity to the regulated community. However the Agricultural believes that the inclusion of the language “including but not limited to sludge and contaminated soils from storage structures” must be eliminated. As this rule proposal derives from the CWA, waste-type definitions related to contaminated soils have no place in this rule and will no doubt lead to confusing enforcement priorities or initiatives that cross the traditional framework of water pollution resulting from the waste product of confined animals.

<sup>1</sup> See WI ADC s NR 243.14; Iowa Admin. Code r. 567-65.1(459,459B)

Instead, the Agricultural Coalition proposes that the Board's rule proposal for First Notice read as follows:

**Manure, litter, process wastewater, overflow from watering systems, wash waters, sprinkling waters from livestock cooling, precipitation polluted by falling on or flowing onto an animal feeding operation and other materials polluted by livestock. Livestock waste does not include agricultural stormwater discharge.**

**4. NPDES permits for non-discharging CAFOs; Case-By-Case Designation**

As the IEPA admits in testimony (p. 45-46) and in its Statement of Reasons (p. 15), the courts have clearly concluded that the CWA does not authorize the relevant regulating agency, here IEPA through delegation, to require a non-discharging facility to obtain an NPDES permit, whatever its size or CAFO classification. See *National Pork Producers Council, American Farm Bureau Federation, et. al v. United States Environmental Protection Agency*, 635 F. 3d 738 (5<sup>th</sup> Cir., 2011) which reads:

there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of CAFOs that discharge. Any attempt to do otherwise exceeds the EPA's statutory authority. Accordingly, we conclude that the EPA's requirement that CAFOs that "propose" to discharge apply for an NPDES permit is *ultra vires* and cannot be upheld.

635 F. 3d at 751. See also *Waterkeeper Alliance, et. al. v. United States Environmental Protection Agency*, 399 F. 3d 486 (2<sup>nd</sup> Cir., 2011) which reads:

in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

399 F. 3d at 505. Thus, in order to codify the IEPA's testimony and ensure consistency with federal law, the Agricultural Coalition urges the following two changes prior to First Notice.

a) Non-Discharging CAFOs

First, to address the issue of requiring NPDES permits for a non-discharging CAFO, the Agricultural Coalition proposes to add a new Section 502.107 to read as follows:

**Section 502.107. No NPDES CAFO permit shall be required for any facility which is not discharging or has not yet received livestock.**

This particular language is necessary to confirm the testimony of the IEPA at hearing and based upon recent experience of members of the Agricultural Coalition. That experience indicates that permits are routinely required, as a condition of settlement, whenever a CAFO is accused of a discharge, regardless of whether the facts can clearly establish that the discharge was not ongoing, was inadvertent or was a one-time occurrence.

Further, the experience of Agricultural Coalition members indicates that permits are also urged upon CAFOs where livestock is not even yet present. For example, a recent new facility was cited with a violation for not having an NPDES CAFO permit during its construction phase, *prior to the receipt of any animals*, based upon allegations that can better be described as allegations of construction stormwater related discharges. While there may be some instances where a construction project at an agricultural facility might require a general NPDES stormwater permit, a CAFO that is not yet operational cannot be required to have an NPDES CAFO permit.

b) Designation and Required Permitting

Second, the Agricultural Coalition has serious concerns with the IEPA's proposed rules, at Section 502.106, related to "designation" of CAFOs needing permits. The provisions are

inconsistent with the federal rules upon which they are drawn and, moreover, are antithetical to the carefully crafted environmental decision-making scheme underlying the Illinois Environmental Protection Act (Act”), which requires that final decisions of the IEPA are appealable to the Board and, thereafter, to the appellate courts.

The corresponding federal rule is found at 40 CFR 122.23(c)(3). It pre-existed the *Waterkeepers* and *National Pork* decisions and therefore must be read in the context of those decisions. The gist of the federal rule is to allow for the designation of certain small facilities (animal feeding lots or “AFOs”) as CAFOs given certain conditions, including discharge. The 2008 CAFO Rule (73 FR 70418 (November 20, 2008)) discusses Section 122.23(c) at page 70421 where it seems to assume important procedural steps in making the designation. Those are first an actual onsite inspection and, thereafter, a *finding* that the facility “is a significant contributor of pollutants to waters of the United States.” Simply put, that latter clause means an actual discharger and, moreover, an actual finding of such. It seems that making such a finding would be the end procedural point of what should be a somewhat formal document pathway for forcing a facility into the permit regulated universe when it otherwise would be permit exempt. The IEPA’s modifications of 40 CFR 122.23(c)(3) would turn this state rule into an unbridled procedural mechanism for IEPA to make (unappealable) findings that a specific facility *must* obtain a permit.

As such, proposed Section 502.106 is inconsistent with environmental and administrative decision-making in the State of Illinois and must be stricken or modified. The Agricultural Coalition is concerned with IEPA’s position that a producer who disagrees with the IEPA’s designation would have no right to appeal that designation to the Board but instead must accept (without review) the IEPA’s finding and seek a permit. States the IEPA: only after the permit is



*granted* may review (as to the necessity for the permit) be had. Such position is antithetical to the Act, the Board's procedural rules (35 Ill. Adm. Code 105, Subpart B, Appeal of Agency Permit Decisions and Other Final Decisions of the Agency) and the Administrative Review Law (735 ILCS 5/3-101 *et seq.*).

The Agricultural Coalition is further concerned that IEPA's position will directly conflict with the outcome of the recent decision of the United States Supreme Court in *Sackett v. EPA*, 132 S.Ct. 1367 (2012). In that case, the Sacketts faced almost exactly the same situation that a "designated" producer would face under the IEPA's proposed Rule—*i.e.*, apply for a permit that it denies it needs or face enforcement penalties. The United States Supreme Court unanimously decided that due process requires that review be allowed for final agency action pursuant to the Clean Water Act. A "finding" by the IEPA pursuant to proposed Section 502.106 constitutes such final action, as it leaves the producer with only one real choice: apply for the permit that the producer contests the facility needs. The IEPA position that appeal to the IPBC would be allowed *subsequent* to the permit process is nonsensical, as the IEPA permit applicability decision has, for all intents and purposes, become a *fait accompli*.

The Illinois Environmental Protection Act was carefully crafted to provide a system of checks and balances, with the IEPA being the agency responsible for the administration of environmental laws and programs, including the CWA permitting program, and the IPCB the agency responsible for promulgation of substantive regulations relevant to those programs and, importantly, for the adoption and *interpretation* of rules and requirements related to those programs. The courts have clearly drawn a distinction between the agencies' respective authorities in the permitting context. See *Illinois Power Company v. Illinois Pollution Control Board and Illinois EPA*, 100 Ill. App. 3d 528 (3<sup>rd</sup> Dist., 1981):

In the context of petitioner's appeal, it is important to distinguish between the roles the Board and Agency assume in the resolution of permit issuance and disputes arising therefrom. The Board is a creature of the legislature (Ill.Rev.Stat.1979, ch. 1111/2, par. 1005). As such, it undertakes both quasi-legislative and quasi-judicial functions. In the former capacity, it drafts procedural rules and may adopt substantive regulations pursuant to its rule making authority, as long as such are consistent with the purposes of the Act. In its adjudicative role, the Board has the authority to conduct hearings concerning violations of the Act, its regulations, or the denial of a permit. In the latter instance it is the Board's principal function to interpret regulations defining the requirements of the permit system. [Landfill, Inc. v. Pollution Control Board \(1978\), 74 Ill.2d 541, 557, 25 Ill.Dec. 602, 387 N.E.2d 258.](#)

Although the courts have historically dealt with the checks and balances imbedded in the State's permitting system upon appeal of a permit denial, the "finding" of permit applicability sought by the IEPA in its proposed Section 502.106 is certainly cognizable as a matter subject to appeal to the Board. In crafting the responsibilities of the IEPA, the General Assembly stated:

*The Agency shall appear before the Board in any hearing upon a petition for variance, the denial of a permit, or the validity or effect of a rule or regulation of the Board, and shall have the authority to appear before the Board in any hearing under the Act. 415 ILCS 5/4(f) Emphasis Added.*

Meanwhile, in crafting the authority of the IPCB, the General Assembly declared:

*The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. 415 ILCS 5/5(d) Emphasis Added.*

Clear from the above cited statutory authority provisions is the framework for appeal to the Board of any final decision of the IEPA and, thereafter, appeal to the appellate courts

pursuant to Section 41 of the Act. 415 ILCS 5/41. For the above-stated reasons, the Agricultural Coalition requests that the Board modify proposed Section 502.106, specifically to provide for Board review of an IEPA finding of permit applicability, consistent with the Illinois statutory framework.

**5. Applicability of Proposed Nutrient Management Plans to Unpermitted Large CAFOs**

The IEPA testified to its intended scope of the proposed rules: “our proposal, Part 502 sets out the requirement for the permitted world and outlined that if unpermitted large CAFOs want to seek [the agricultural] stormwater exemption, then they must comply with certain requirements.” Trans. of August 21, 2012 Hearing at pp. 183 (Sanjay Sofat Test.). Thus, there are aspects of these rules, as proposed, that apply to permitted and unpermitted CAFOs alike. Specifically, proposed Section 502 would require that in order for an unpermitted large CAFO to assert that its land application constitutes an exempt agricultural stormwater discharge, the producer must develop a Nutrient Management Plan consistent with those required of permitted CAFOs and consistent with the requirements set forth in the IEPA’s proposed rule.

Yet, these proposed requirements are duplicative of existing statutory and regulatory requirements proscribed in the Livestock Management Facilities Act (“LMFA”) and associated regulations. See *Livestock Management Facilities Act* (“LMFA”), at 510 ILCS 77/1 et. seq. and associated regulations, at 8 Ill. Adm. Code Part 900. Under these LMFA provisions any large CAFO is required to develop and utilize a Waste Management Plan which must contain specific items – regardless of NPDES permitting requirements or status. Moreover, the LMFA and associated regulations at 8 Ill. Adm. Code 900.803 set forth specific and applicable land

application requirements, especially as they relate to phosphorous. See 510 ILCS 77/20(f)(1)-(10) and 8 Ill. Adm. Code 900.803.

The Board must recognize and modify these inconsistent requirements, so that producers are clear as to the State's expectations and so that those expectations are reasonable and not duplicative. The Agricultural Coalition requests that, as to unpermitted Large CAFOs, the proposed regulatory requirements mirror those that are already set forth in Illinois law and regulations and, accordingly, proposes the following changes to the IEPA's rule proposal:

Section 502.102 Land Application Discharges and Agricultural Stormwater

b) Where livestock waste has been land applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the livestock waste and in compliance with Section 502.510 for permitted CAFOs ~~and Section 502.510(b)~~ or 510 ILCS 20(f) and 8 Ill. Adm. Code 900.803 for unpermitted Large CAFOs, a precipitation-related discharge of livestock waste from land application areas of an unpermitted large CAFO or a permitted CAFO, is an agricultural stormwater discharge.

c) Unpermitted Large CAFOs must maintain the documentation related to the contents of the Livestock Management Plan specified in 8 Ill. Adm. Code Part 900, Subpart H 35-III-Adm Code 502.5-10(b)(15) either on site or at a nearby office or otherwise make such documentation readily available to the Agency upon request.

Section 502.500 Purpose, Scope and Applicability

a) The requirements in this Subpart apply to CAFOs required to obtain an NPDES permit. ~~Unpermitted Large CAFOs, claiming an agricultural stormwater exemption consistent with Section 502.102, are subject to the requirements in Section 502.510(b).~~

Section 502.600 Applicability

This Subpart provides livestock waste discharge limitations and technical standards for permitted CAFOs. Permitted CAFOs must achieve the livestock waste discharge limitations and technical standards in this Subpart as of the date of permit coverage. ~~Unpermitted Large CAFOs claiming an agricultural stormwater exemption consistent with Section 502.102 are also subject to portions of this Subpart.~~ This Subpart does not apply to CAFOs that stable or confine Horses, Sheep or Ducks. Horses or Sheep CAFOs are subject to applicable production area livestock waste discharge limitations and

technical standards found in Section 502.720. CAFOs that confine Ducks in either a Dry Lot or Wet Lot are subject to applicable production area livestock waste discharge limitations and technical standards found in Section 502.730.6.

CONCLUSION

The Agricultural Coalition appreciates the opportunity to participate in this proceeding and respectfully requests that the Board modify the IEPA proposed rules as sought herein.

Respectfully submitted,  
**BROWN, HAY & STEPHENS, LLP**

By: cmanning  
Claire A. Manning

Dated: September 25, 2012

**BROWN, HAY & STEPHENS, LLP**

Claire A. Manning  
Registration No. 3124724  
William D. Ingersoll  
Registration No. 6186363  
Stephanie M. Radliff  
Registration No. 6302800  
205 S. Fifth Street, Suite 700  
P.O. Box 2459  
Springfield, IL 62705-2459  
(217) 544-8491  
[cmanning@bhslaw.com](mailto:cmanning@bhslaw.com)

**PROOF OF SERVICE**

I, Claire A. Manning, certify that I have served the attached Agricultural Coalition's Motion Proposing Changes To The Illinois Environmental Protection Agency Proposed Rules, by U.S. Mail, first class postage prepaid, on September 25, 2012 to the following:

Matthew J. Dunn  
Office of the Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602

Deborah J. Williams  
Assistant Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19726  
Springfield, IL 62704-9276

Joanne M. Olson  
Assistant Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19726  
Springfield, IL 62704-9276

Alec M. Davis  
Illinois Environmental Regulatory Group  
215 East Adams Street  
Springfield, IL 62701

Nancy Erickson  
Illinois Farm Bureau  
1701 N. Towanda Avenue  
P.O. Box 2901  
Bloomington, IL 61702-2901

Bart Bittner  
Illinois Farm Bureau  
1701 N. Towanda Avenue  
P.O. Box 2901  
Bloomington, IL 61702-2901

Paul Cope  
Illinois Farm Bureau  
1701 N. Towanda Avenue  
P.O. Box 2901  
Bloomington, IL 61702-2901

Warren Goetsch  
Illinois Department of Agriculture  
P.O. Box 19281  
801 E. Sangamon Avenue  
Springfield, IL 62794

Ann Alexander  
Illinois Environmental Law and Policy  
Center  
35 E. Wacker Drive, Suite 1600  
Chicago, IL 60601

Jack Darin  
Sierra Club  
70 E. Lake Street, Suite 1500  
Chicago, IL 60601

Lindsay Record  
Executive Director  
Illinois Stewardship Alliance  
401 W. Jackson Parkway  
Springfield, IL 62704

Mitchell Cohen  
Illinois Department of Natural Resources  
One Natural Resources Way  
Springfield, IL 62702

Virginia Yang  
Illinois Department of Natural Resources  
One Natural Resources Way  
Springfield, IL 62702

Stacy James  
Prairie Rivers Network  
1902 Fox Drive, Suite G  
Champaign, IL 61820

Kim Knowles  
Prairie Rivers Network  
1902 Fox Drive, Suite G

*Electronic Filing - Received, Clerk's Office, 09/25/2012*

Champaign, IL 61820

Albert Ettinger  
53 W. Jackson, Suite 1664  
Chicago, IL 60604

Marvin Traylor  
Executive Director  
Illinois Association of Wastewater Agencies  
241 N. Fifth Street  
Springfield, IL 62701

Brett Roberts  
US Department of Agriculture  
2118 W. Park Court  
Champaign, IL 61821

Matt Roberts  
US Department of Agriculture  
2118 W. Park Court  
Champaign, IL 61821

Ted Funk  
Extension Specialist  
University of Illinois Extension  
332E Ag Eng Science Bldg.  
1304 W. Pennsylvania Avenue  
Urbana, IL 61801

Randy Fonner  
University of Illinois Extension  
332E Ag Eng Science Bldg.  
1304 W. Pennsylvania Avenue  
Urbana, IL 61801

Jim Fraley  
Illinois Milk Producers Association  
1701 N. Towanda Avenue

Bloomington, IL 61701

Laurie Ann Dougherty  
Executive Director  
Illinois Section of the American Water  
Works  
545 S. Randall Road  
St. Charles, IL 60174

Karen Hudson  
Families Against Rural Messes Inc.  
22514 W. Claybaugh Road  
Elmwood, IL 61529

Kendall Thu  
Illinois Citizens for Clean Air and Water  
609 Parkside Drive  
Sycamore, IL 60178

Jeff Keiser  
Director of Engineering  
Illinois American Water Company  
100 North Water Drive  
Belleville, IL 62223

Danielle Diamond  
Illinois Citizens for Clean Air and Water  
3431 W. Elm Street  
McHenry, IL 60050

Arnie Leder  
1022 N. 40<sup>th</sup> Road  
Mendota, IL 61342

Brian J. Sauder  
Illinois Interfaith Power & Light Campaign  
1001 South Wright Street, Room 7  
Champaign, IL 61802

cmanning

Claire A. Manning  
Brown Hay & Stephens, LLP  
205 S. Fifth Street, Suite 700  
Springfield, Illinois 62701  
(217) 544-8491