



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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OCT 13 2012

STATE OF ILLINOIS
Pollution Control Board

PC#L

October 5, 2012

ORIGINAL
RETURN TO CLERK'S OFFICE

Dear Service List Member:

Re: In re Concentrated Animal Feeding Operations: Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502 and 504, IPCB #R12-23

Enclosed you will find Illinois EPA's Post Hearing Comments. If, in the future, you want to receive Illinois EPA filings in the above captioned rulemaking via email, please email me at joanne.olson@illinois.gov. Illinois EPA will deem any email submitted as a request for electronic service and your consent to accept electronic service from Illinois EPA, and as a waiver of traditional paper service.

Electronic service will save the State's valuable resources and provide the recipient with immediate access to the filed documents. If you consent to electronic service, you will receive an email with the Illinois EPA filing attached as a PDF on the same day that the filing is sent to the Illinois Pollution Control Board. Upon your consent to electronic service, you will no longer receive paper copies of Illinois EPA filings in this proceeding.

Sincerely

Joanne M. Olson
Assistant Counsel
Illinois EPA

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R12-23
CONCENTRATED ANIMAL FEEDING)
OPERATIONS (CAFOs): PROPOSED) (Rulemaking- Water)
AMENDMENTS TO 35 ILL. ADM. CODE)
PARTS 501, 502, AND 504)

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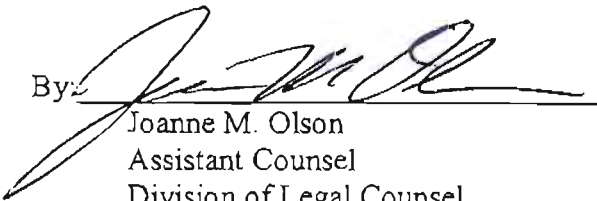
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board ILLINOIS EPA'S POST HEARING COMMENTS, AFFIDAVIT OF BRUCE J. YURDIN and ILLINOIS EPA'S MEMORANDUM OF LAW REGARDING AUTHORITY FOR AN ILLINOIS CAFO REGISTRATION REQUIREMENT, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Joanne M. Olson
Assistant Counsel
Division of Legal Counsel

DATED: October 5, 2012

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R12-23
CONCENTRATED ANIMAL FEEDING)
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ILLINOIS EPA'S POST HEARING COMMENTS

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (Illinois EPA), by and through its counsel, and pursuant to 35 Ill. Adm. Code 102.108 hereby submits its post hearing comments for the hearing held on August 21, 2012 in the above captioned rule making. In support thereof, the following statements are made:

1. Ms. Dexter asked the Illinois EPA whether "Illinois [has] the authority to adopt a reporting rule if necessary." (August 21, 2012 Hearing Transcript p 73).

2. The Illinois EPA responded that it would need to research whether Illinois has the authority to adopt a reporting rule independently of the Federal CAFO reporting rule that was withdrawn on July 20, 2012.

3. The attached Memorandum of Law sets forth the Illinois EPA's position on whether Illinois has the authority to adopt a reporting rule.

4. Ms. Dexter asked the Illinois EPA whether it was typical that 58% of the livestock facilities visited in a given year had one or more regulatory violations. (August 21, 2012 Hearing Transcript, pp 89-90).

5. Mr. Yurdin responded that the Agency would be able to review previous years' Annual Reports to furnish an accurate answer.

6. These annual reports are available on the Illinois EPA's web page at <http://www.epa.state.il.us/water/cafo/reports/index.html>. The following chart contains the percent of facilities visited that had one or more regulatory violations:

YEAR	%	Year	%
2011	58	2004	59
2010	67	2003	62
2009	48	2002	29
2008	46	2001	52
2007	59	2000	48
2006	70	1999	67
2005	36		

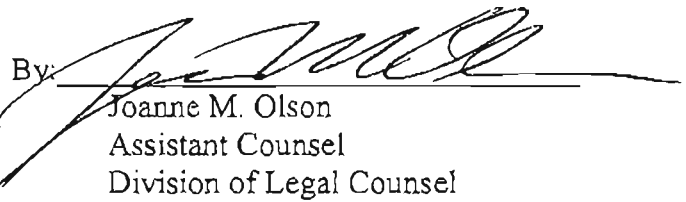
6. Ms. Knowles asked the Illinois EPA to estimate the number of large CAFOs in the Illinois. (August 21, 2012 Hearing Transcript p 147).

7. The Illinois EPA estimates that there are approximately 350 to 400 Large CAFOs in Illinois. (See Attachment 1, Yurdin Affidavit)

WHEREFORE, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY respectfully submits the foregoing post hearing comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Joanne M. Olson
Assistant Counsel
Division of Legal Counsel

DATED:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R12-23
CONCENTRATED ANIMAL FEEDING)
OPERATIONS (CAFOs): PROPOSED) (Rulemaking- Water)
AMENDMENTS TO 35 ILL. ADM. CODE)
PARTS 501, 502, AND 504)

**ILLINOIS EPA'S MEMORANDUM OF LAW REGARDING AUTHORITY FOR AN
ILLINOIS CAFO REGISTRATION REQUIREMENT**

In response to questions raised at the August 21, 2012 hearings in the above-captioned regulatory proceeding, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") submits this memorandum of law to the Pollution Control Board ("Board") addressing the issue of legal authority of the Agency or the Board to adopt a Concentrated Animal Feeding Operation ("CAFO") registration program or reporting requirement.

INTRODUCTION

Pursuant to authority under Section 308 of the Clean Water Act, U.S. EPA proposed a rulemaking that would have required submittal of information from certain CAFOs. *See*, 76 Fed. Reg. 65431 (Oct. 21, 2011). U.S. EPA withdrew this proposed rule on July 20, 2012. *See*, 77 Fed. Reg. 42679 (July 20, 2012). Section 502.505 of the Agency's proposal entitled "Requirements for Certain CAFOs to Submit Information" would require CAFOs subject to such a federal requirement, should U.S. EPA adopt one in the future, to submit the same information to Illinois EPA that is required to be submitted to U.S. EPA. The U.S. EPA proposal relied on authority under Section 308(a) of the Clean Water Act which provides that:

Whenever required to carry out the objective of this chapter...*the Administrator shall require the owner or operator of any point source* to (i) establish and

maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require...(emphasis added).

33 U.S.C. §1318(a). Section 502(14) of the Clean Water Act defines the term “point source” to include “concentrated animal feeding operation.” 33 U.S.C. §1362(14).

In discussing the former U.S. EPA proposal, Jessica Dexter from the Environmental Law and Policy Center asked the following question on behalf of the Environmental Groups: “[D]oes Illinois have authority to adopt a reporting rule if it is necessary?” August 21, 2012 Hearing Transcript at 73. It is the Agency’s understanding that the nature of this question was to ask whether or not authority exists under Illinois law for the Board or the Agency to adopt a registration or reporting requirement for all CAFOs or certain classes of CAFOs not subject to NPDES permitting as had previously been proposed by U.S. EPA pursuant to Section 308 of the Clean Water Act.

DISCUSSION

Administrative agencies do not possess inherent or common law powers. *Illinois Dep’t of Revenue v. Illinois Civil Serv. Comm’n*, 357 Ill.App.3d 352, 363-34 (2005). Instead, they are creatures of statute because their sources of power stem solely from their enabling statutes. *Id*; *Board of Trustees of Chicago Heights Police Pension Fund v. Department of Insurance*, 323 Ill. App. 3d 913,915 (2001). An agency’s rulemaking authority is defined by the enabling statute, and any rules promulgated by that agency must be in accordance with the standards and policy set forth in the enabling statute. *Id*. It is well settled that administrative agencies are limited to the rule-making power granted them by the legislature. *Peabody Coal Co. v. Illinois Pollution Control Board*, 36 Ill. App. 3d 5 (1976). An agency cannot “issue regulations which exceed or

alter its statutory power” or “are contrary to the legislative purpose and intent of the statute.” *Eastman Kodak Co. v. Fair Employment Practices Commission*, 86 Ill. 2d 60, 70 (1981). However, an agency does have the authority to promulgate rules that allow the agency to execute the provisions of its enabling statute and carry out the powers conferred upon it. *Id.* Properly promulgated rules have the force and effect of law, but rules promulgated without statutory authority are invalid. *Id.* *Board of Trustees of University of Illinois v. Illinois Educational Labor Relations Board*, 274 Ill. App. 3d 145, 148 (1995); *Landfill Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 553 (1978) (if the PCB lacks statutory authority to promulgate rules, the rules are void). Courts have also indicated that “an agency charged with enforcing a statute is given inherent authority and wide latitude to adopt regulations or policies reasonably necessary to perform the agency's statutory duty.” *Chemed Corp. Inc. v. Illinois Department of Revenue*, 186 Ill.App.3d 402, 410, 542 N.E.2d 492, 497, 134 Ill.Dec. 313, 318 (1989).

The Board and the Illinois EPA were both created by the Environmental Protection Act, 415 ILCS 5/1 et seq., to serve different functions. In *Landfill*, the Illinois Supreme Court articulated these differences:

The Board, which was created by the Act, serves both quasi-legislative and quasi-judicial functions within a statutorily established framework. It must determine, define, and implement the environmental control standards and may adopt rules and regulations. It has authority to conduct hearings upon, among other specified matters, complaints charging violations of the Act or of regulations thereunder and upon petitions for review of the Agency's denial of a permit as well as authority to hold other such hearings as may be provided by rule. It may adopt substantive regulations and procedural rules to accomplish the purposes of the Act.

The Agency too was created by the Act and performs technical, licensing, and enforcement functions. It has the duty to collect and disseminate information, acquire technical data, and conduct experiments to carry out the purposes of the Act. It has the authority to conduct surveillance and inspection of actual or potential pollution sources. It has the duty to investigate violations of the Act, regulations, and permits. The Agency must appear before the Board in hearings

on the denial of permits, among other specified instances, and may appear in any other hearing under the Act. The Agency has the duty to administer permit systems established by the Act or regulations and has the authority to require permit applicants to submit plans and specifications and reports regarding actual or potential violations of the Act, regulations or permits.

Landfill Inc., 74 Ill. 2d 541, 554-55.

Under the Environmental Protection Act, the Illinois EPA is not given general rulemaking authority. Instead, it is given specific and limited grants of authority.¹ Illinois EPA is given an obligation to collect information under Section 4 of the Environmental Protection Act. 415 ILCS 5/4 (2010). While this authority to collect information is very broad and general, it is expressed as a duty on the part of the Agency. There is no provision in the Environmental Protection Act explicitly granting the Agency authority to require submittal of information or data from otherwise unregulated or unpermitted potential sources of pollution.

The Board, on the other hand, has rulemaking authority which is much broader than that of the Agency. Under Section 5(b) of the Environmental Protection Act, “[t]he Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act.” 415 ILCS 5/5(b)(2010). Under Title VII, Section 27 (Rulemaking) of the Environmental Protection Act, the Board’s rulemaking authority is further explained by stating “(a) The Board may adopt substantive regulations as described in this Act....The generality of this grant of authority shall

¹ For water programs, the Agency is expressly authorized to promulgate (1) rules to accept, receive, and administer grants, gifts, and loans (415 ILCS 5/4(k)); (2) rules to certify laboratories (415 ILCS 5/4(o)); (3) rules to implement Section 31.1 of the Act, Administrative Citation (415 ILCS 5/4(u)); (4) rules to distribute and terminate grants (415 ILCS 5/4(x)); (5) procedural rules to obtain federal approval to issue NPDES permits and approval of the state UIC program (415 ILCS 5/11(b)); (6) rules to administer a fee program for NPDES and sludge permits (415 ILCS 5/12.5(i)); (7) rules for a market-based pretreatment pollutant reduction, banking, and trading system (415 ILCS 5/13.4(c)); (8) rules for the issuance and use of sewage works operator certifications (415 ILCS 5/13.5 (c)); (9) rules governing the collection of costs for permit or permit modification of underground injection of carbon dioxide (415 ILCS 5/13.7(d)); (10) rules for public water supplies demonstrating technical, financial, and managerial capacity (415 ILCS 5/15(b)); rules for community water supply testing fees (415 ILCS 5/17 7(e)); (11) rules governing the public water supply loan program (415 ILCS 5/19.4); (12) procedural rules to issue permits (415 ILCS 5/39(a)); and (13) rules for expedited permit review (415 ILCS 5/39.14).

only be limited by the specifications of particular class of regulations elsewhere in this Act.” 415 ILCS 5/27(a)(2010). Section 13(a) of the Environmental Protection Act also provides the Board specific rulemaking authority for water programs to “adopt regulations to promote the purposes and provisions of this Title.” 415 ILCS 5/13(a)(2010). Section 13(a) goes on to provide a non-inclusive list of areas the Board’s water regulations may address. None of the topics specifically enumerated in Section 13(a) seem to cover a CAFO reporting or registration program.

In addition to the rulemaking authority granted under the Environmental Protection Act, the General Assembly also granted certain rulemaking authority to the Board under the Livestock Facilities Management Act. This statute grants authority to the Board to adopt regulations “for the implementation of design and construction standards for livestock waste handling facilities.” 510 ILCS 77/55(c)(2010). Part 506 of the Board’s Subtitle E regulations were adopted in response to this grant of authority from the General Assembly.

While the legislature granted broad rulemaking authority to the Board in the Environmental Protection Act and additional limited rulemaking authority under the Livestock Facilities Management Act, the Agency has not been able to identify an explicit grant of rulemaking authority that would encompass a universal CAFO registration or reporting program. In the absence of an explicit statutory grant of rulemaking authority, the question to be addressed is whether there is an implied grant of authority to the Board to adopt a CAFO registration and reporting rulemaking as necessary to carry out the Board’s obligations under the Environmental Protection Act. It is not entirely clear whether a court would interpret the Board’s broad rulemaking authority to include the creation of a CAFO registration and reporting program since

the Board has not been specifically granted information collection authority under the Environmental Protection Act.

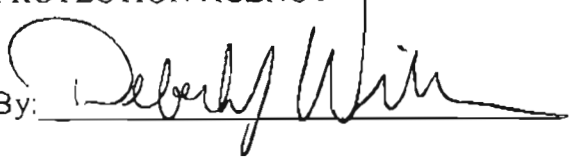
CONCLUSION

Analysis of the Environmental Protection Act shows that the legislature has not provided express authority to the Agency or the Board to adopt regulations establishing a CAFO registration or reporting program. The Agency believes that it cannot successfully argue that the legislature's grant of authority to the Agency to collect and disseminate information can be read to include implied authority to promulgate regulations that require submittal of information from sources not otherwise required to submit information to the Agency. Likewise, the Board has not been granted explicit statutory authority from the General Assembly to adopt a registration or reporting program for sources that do not have a discharge. However, one may be able to argue that such authority is implied from the broad, general grant of rulemaking authority given to the Board under the Environmental Protection Act. The Agency would defer to the Board's interpretation as to whether there is implied authority to adopt such a requirement or whether such authority is beyond that given to the Board by the General Assembly.

Given this legal uncertainty and the controversy surrounding the issue, the only way to assure that Illinois has clear authority to adopt a registration or reporting requirement for all CAFOs, or classes of unpermitted CAFOs, would be to obtain additional statutory authority from the General Assembly that either specifically authorizes the Agency to collect specified information or specifically authorizes the Board to adopt regulations requiring the submittal of specified information to the Agency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

Deborah J. Williams
Assistant Counsel
Division of Legal Counsel

DATED: October 5, 2012

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(217) 782-5544

STATE OF ILLINOIS) Illinois Pollution Control Board
) ss R12-23
COUNTY OF Sangamon)

AFFIDAVIT OF BRUCE J. YURDIN

I, Bruce J. Yurdin, being first duly sworn upon oath, state that I have personal knowledge of the facts set forth herein, and that to the best of my knowledge and belief, the statements contained herein are true, correct and complete.

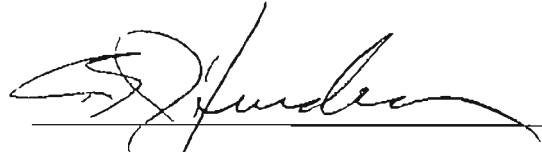
1. I am currently employed by the Illinois Environmental Protection Agency (Illinois EPA) as the manager of the Field Operation Section in the Division of Water Pollution Control.
2. I have been employed at the Illinois EPA for approximately 32 years.
3. My job duties include inspection and enforcement activities in the water pollution control program, including the inspection of livestock facilities in the state.
4. My testimony in the above captioned rulemaking was prefiled on June 18, 2012. I appeared before the Illinois Pollution Control Board on August 21, 2012 and provided additional sworn testimony.
5. During this testimony, I was asked to provide an estimate of the number of large CAFOs in the Illinois.
6. Under the Livestock Management Facilities Act (LMFA), the Illinois Department of Agriculture permits the design and construction of livestock facilities. The Agency has obtained from the Illinois Department of Agriculture a list of livestock facilities that have been permitted since the LMFA's inception in 1996.
7. Some livestock facilities are included in the list mentioned in paragraph 6 above more than one time.

8. Livestock facilities designed and constructed before 1996 are not included in the list mentioned in paragraph 6 above if they have not expanded since 1996.

9. Approximately 409 facilities appear on the list mentioned in paragraph 6 above have more than 1000 animal units.

10. However, because of the duplicate facilities on the list and the number of facilities built before 1996 that have not subsequently obtained a permit from the Illinois Department of Agriculture, the Illinois EPA estimates that there are approximately 350 to 400 Large CAFOs in Illinois.

AFFIANT SAYETH FURTHER NOT.



Bruce J. Yurdin

SUBSCRIBED and SWORN to before me this

20th day of September, 2012



Notary Public



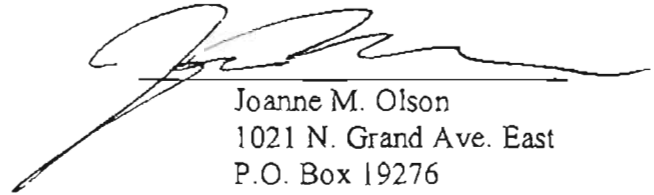
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STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF SERVICE

Joanne M. Olson, Assistant Counsel for the Illinois EPA, herein certifies that she has served a copy of the foregoing NOTICE OF FILING, ILLINOIS EPA'S POST HEARING COMMENTS, AFFIDAVIT OF BRUCE J. YURDIN, and ILLINOIS EPA'S MEMORANDUM OF LAW REGARDING AUTHORITY FOR AN ILLINOIS CAFO REGISTRATION REQUIREMENT upon persons listed on the Service List by mailing, unless otherwise noted on the Service List, a true copy thereof in an envelope duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on October 5, 2012.



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