

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

NOTICE OF ELECTRONIC FILING

To: **Attached Service List**

PLEASE TAKE NOTICE that on February 21, 2014, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois: **ENVIRONMENTAL GROUPS' RESPONSE TO FIRST NOTICE COMMENTS** on behalf of Prairie Rivers Network, Illinois Citizens for Clean Air and Water, Environmental Integrity Project and Environmental Law & Policy Center (collectively, "Environmental Groups") copies of which are attached hereto and herewith served upon you.

Respectfully Submitted,



Jessica Dexter
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ENVIRONMENTAL GROUPS' RESPONSE TO FIRST NOTICE COMMENTS

I. Response to Board Issue No. 1 of 2/7/14 Order

In its latest round of comments, the Agricultural Coalition has asked the Board to exempt unpermitted large CAFOs claiming the agricultural stormwater exemption from the requirements in 502.510(b), including the requirement to land apply livestock waste using nutrient management practices that ensure appropriate agricultural utilization of nutrients. We find this a bit curious given the Agricultural Coalition's repeated insistence that the Illinois rule be consistent with the federal CAFO rule.

Under the federal rule, in order to qualify for the agricultural stormwater exemption, a CAFO must *comply* with minimum elements set forth in 40 CFR 122.42 (e)(1)(vi)-(ix).¹ These elements include, like the Board's First Notice Opinion and Order, mandates to 1) identify appropriate site specific conservation practices, 2) identify protocols for appropriate testing of livestock waste and soil, 3) establish protocols to land apply livestock waste in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in livestock waste and 4) identify and maintain specific records documenting the implementation of these elements. As shown here, keeping records documenting implementation of the minimum elements is an *additional* requirement for qualification for the exemption under the federal rule. An Illinois rule that requires only record keeping is clearly not consistent with the federal CAFO rule, not to mention nonsensical. How does a CAFO keep records consistent with minimum requirements if those requirements do not apply to the CAFO?

The Agricultural Coalition proposes these latest amendments in the name of flexibility, yet there is already great flexibility within 502.510(b). For instance, 502.510(b), (2) and (3) require only "adequate" land application area and storage, with no specific mandate for determining adequacy. 502.510 (b) (5), (8), (9), (10) and (4) leave it to the CAFO operator to determine

¹ For unpermitted large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § [122.42\(e\)\(1\)\(vi\)](#) through (ix). 40 CFR 122.23(e)(1).

appropriate clean water diversions, conservation practices, testing protocols, site specific nutrient management practices and the proper method of managing mortalities to ensure safe disposal.

In addition, many of the requirements in 502.510(b) provide basic, fundamental protections for water quality and people. 502.510(b)(4) requires “proper” handling of mortalities, (b)(6) prohibits direct contact of animals with waters, (b)(7) requires safe handling of chemicals and contaminants, (b)(11) provides a buffer between livestock waste application and nearby homes, and (b)(14) requires a pollution prevention and control plan in the event of spills. It is hard to see how these basic protections could be trumped by an apparent desire for unbridled flexibility.

The Agricultural Coalition also wants the agricultural stormwater exemption to apply to stormwater related discharges from areas under the CAFO’s control in addition to land application areas. For these discharges they don’t want any of the 502.510(b) requirements to apply and they don’t want to maintain any records whatsoever regarding management of these areas. There is no explanation offered to support the complete lack of oversight proposed by the Agricultural Coalition. Although the Coalition cites the *Alt* case to support its expansion of the agricultural stormwater exemption to additional land areas, even the discharges from the farmyard that qualified for the agricultural stormwater exemption in the *Alt* case were subject to the federal minimum elements regarding agricultural stormwater discharges. See *Alt v. U.S. EPA*, 2:12-CV-42, 2013 WL 5744778, at 2-3 (N.D.W. Va. Oct. 23, 2013).

Moreover, it’s a bit late in the proceedings to propose an expansion of the stormwater exemption that is not currently recognized by any Illinois court or by the 7th Circuit Court of Appeals. The *Alt* case is a West Virginia case currently under appeal in the 4th Circuit. (*Alt v. U.S. EPA*, 4th Cir., No. 13-2534, *appeal filed* 12/23/13), and the Board has had no opportunity to hear testimony from any witness regarding the implications of expanding the agricultural stormwater exemption as proposed.

The provisions in Section 502.510(b) are basic best management practices to control water pollution. According to the Illinois EPA, these practices are necessary requirements for large unpermitted CAFOs “to ensure that contribution of pollutants from these facilities into waters of the U.S. is minimal.”²

Given the high degree of flexibility already provided to unpermitted large CAFOs claiming the agricultural stormwater exemption and the importance of providing basic protections, we urge the Board to reject the proposed amendments to 501.405, 502.500, and 502.600, and to retain the language proposed in the First Notice.

² Illinois EPA, Prefiled Answers to prefiled questions of the Agricultural Coalition, August 14, 2013, at 7.

II. Response to Board Issue No. 3 of 2/7/14 Order

The Board's First Notice Opinion and Order prohibits the application of livestock waste on steep slopes greater than 15% (Section 502.620(g)). The Illinois EPA originally proposed this prohibition because at the time such a prohibition was contained within the Illinois NRCS Waste Utilization 633 Conservation Practice Standard (p. 31, Technical Support Document). This standard is no longer being used in Illinois, and the Agricultural Coalition was correct to point out that the new Illinois NRCS Nutrient Management 590 Standard does allow for application on slopes greater than 15% provided injection or incorporation is utilized (590-5).

The NRCS 590 Standard was modified in 2013, with some changes reflecting input from multiple stakeholders, including members of the Agricultural Coalition and the Environmental Groups. In some cases, input was provided privately to NRCS. The exact provision in the 590 Standard cited by the Agricultural Groups was not included in the drafts we reviewed as a stakeholder. The last draft we saw was in November 2012, and the only similar provision it contained was: "Manure may be surface applied to *pasture* without injection or incorporation on slopes up to 15%" (emphasis added). We do not know why NRCS switched from a prohibition in the 633 Standard to a conditional restriction in the 590 Standard. Since we have not seen scientific evidence to support the weakening of NRCS's standards, nor did the Agricultural Coalition provide scientific evidence of their own, we caution the Board against removing the prohibition of waste on slopes greater than 15%. Runoff likelihood increases with slope, and Illinois EPA is on record as saying they believe a prohibition of waste application on slopes greater than 15% is essential (p. 31, Technical Support Document).

Illinois' livestock regulations have not been written to achieve complete consistency with NRCS standards. Moreover, the 590 Standard defers to state regulations by requiring manure application to meet all applicable state regulations (590-5). As such, the state regulations control. Rather than deleting 502.620(g) as proposed by the Agricultural Coalition, the Board might consider the following amendment:

- g) Land application of livestock waste is prohibited on slopes greater than 15% unless injected or incorporated within 24 hours.

We do not believe this would be duplicative of 502.620(f), but rather a more stringent criterion on slopes greater than 15%. However, this amendment poses pollution threats. While incorporation is considered a best management practice, our fear is that on such steep slopes the soil disturbance caused by incorporation could lead to greater erosion and associated waste loss. We recommend that the Board keep the language of the First Opinion and Order.

Dated: February 21, 2014

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'JD', with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have filed the attached **NOTICE OF FILING and ENVIRONMENTAL GROUPS' RESPONSE TO FIRST NOTICE COMMENTS** upon the attached service list by depositing said documents in the United States Mail, postage prepaid (or via email where indicated) in Chicago, Illinois on February 21, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JD', with a long horizontal flourish extending to the right.

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