

ILLINOIS POLLUTION CONTROL BOARD

June 18, 2015

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

OPINION AND ORDER OF THE BOARD (by J.A. Burke):

The Board previously adopted amendments to Parts 501, 502, and 504 of its pollution regulations related to livestock facilities. The Board opened this subdocket for further consideration of whether to require certain Concentrated Animal Feeding Operations (CAFOs) to submit identifying information to the Illinois Environmental Protection Agency (IEPA). Federal regulations for the National Pollutant Discharge Elimination System (NPDES) require Illinois to maintain “a program which is capable of making comprehensive surveys of all facilities and activities subject to [IEPA’s] authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements.” 40 C.F.R. § 123.26(b)(1). IEPA has developed a CAFO inventory and a process for updating. IEPA maintains that the Board’s previously proposed information requirement is not necessary. The Board finds that its previously proposed 35 Ill. Adm. Code 501.505 is not warranted at this time and closes the docket.

SUBDOCKET “A” PROCEDURAL BACKGROUND

On March 1, 2012, IEPA initiated a rulemaking to amend the Board’s rules relating to CAFOs. *See Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504, R12-23 (CAFO Amendments)*. On August 7, 2014, the Board adopted amendments to Parts 501, 502, and 504 in *CAFO Amendments*. The Board also established this subdocket to address a proposed requirement not adopted in the final rules that unpermitted Large CAFOs (as defined at 35 Ill. Adm. Code 502.103) submit identifying information to IEPA. Specifically, the Board proposed Section 501.505 at first and second notice, but removed that proposed section from its final order.

On October 2, 2014, the Board directed IEPA to submit written comments on fifteen issues related to proposed Section 501.505. IEPA filed responses (First Resp.) to the Board’s questions on December 3, 2014.

On May 7, 2015, the Board directed IEPA to update the Board on its compliance with a September 5, 2014 work plan with the United States Environmental Protection Agency (USEPA). IEPA filed its response (Sec. Resp.) on May 28, 2015.

In *CAFO Amendments*, prior to the Board establishing this subdocket, the Board received more than 3,000 comments relating to the rulemaking. These comments can be found

in docket R12-23PC and are discussed in prior Board opinions in CAFO Amendments. After the Board's August 7, 2014 order, the Board received fourteen comments in this subdocket and one additional comment in CAFO Amendments.

DEVELOPMENT OF PROPOSED SECTION 501.505

First Notice in CAFO Amendments (November 7, 2013)

In 2011, USEPA proposed a new 40 C.F.R. § 122.23(k) requiring certain CAFOs to provide information to USEPA. 76 Fed. Reg. at 65431 (Oct. 21, 2011). USEPA's proposal was an outcome of a settlement agreement in National Pork Producers Council, et al. v. USEPA, 635 F.3d 738 (5th Cir. 2011). *Id.* at 65435-36. USEPA later withdrew its proposed rule. 77 Fed. Reg. 42679 (July 20, 2012). USEPA stated that it was

withdrawing the proposal to collect CAFO information by rule. Instead, the EPA, where appropriate, will collect CAFO information using existing sources of information, including state NPDES programs, other regulations, and other programs at the federal, state, and local level. The EPA believes, at this time, it is more appropriate to obtain CAFO information by working with federal, state, and local partners instead of requiring CAFO information to be submitted pursuant to a rule. *Id.* at 42679.

Thus, there is no current USEPA regulation expressly requiring unpermitted CAFOs to submit information to USEPA or delegated states such as Illinois.

In CAFO Amendments, IEPA initially proposed adding Section 501.505 to require CAFOs to comply with any future USEPA rule. CAFO Amendments, R12-23, slip op. at 38-39 (Nov. 7, 2013). IEPA intended that facilities required to report under a federal rule would submit the same information to IEPA. *Id.* at 39. IEPA characterized its proposed Section 501.505 as a "place-holder." *Id.* at 38. When USEPA withdrew its proposed rule on July 20, 2012, IEPA decided not to amend its proposed Section 501.505 and instead continued to propose the place-holder language. *Id.* at 178.

Prairie Rivers Network, Illinois Citizens for Clean Air and Water, Natural Resources Defense Council, and Environmental Law and Policy Center (collectively, Environmental Groups) suggested striking most of IEPA's proposed Section 501.505 and replacing it with alternate language requiring unpermitted Large CAFOs to submit sixteen types of information to IEPA. CAFO Amendments, R12-23, slip op. at 142 (Nov. 7, 2013). In general, the Environmental Groups argued that existing sources of information on CAFOs were inadequate to develop a comprehensive CAFO inventory. *Id.* at 178-179. According to the Environmental Groups, a registration or reporting requirement is necessary to identify CAFOs to determine whether facilities require NPDES permits. *Id.*

The Agricultural Coalition, consisting of Illinois Pork Producers Association, Illinois Beef Association, Illinois Milk Producers' Association, and Illinois Farm Bureau, argued that the Board lacks authority to adopt, and IEPA lacks authority to implement, a reporting requirement

for unpermitted CAFOs. CAFO Amendments, R12-23, slip op. at 179 (Nov. 7, 2013). Further, the Agricultural Coalition claimed that (1) there is no need to register CAFOs that do not discharge, and (2) information on CAFOs that do discharge is already publicly available. *Id.*

In CAFO Amendments, the Board found that requiring unpermitted Large CAFOs to submit information to IEPA as enumerated in the sixteen points suggested by the Environmental Groups was not required for Illinois to maintain authority over the NPDES program. CAFO Amendments, R12-23, slip op. at 182 (Nov. 7, 2013). There is no federal rule requiring unpermitted Large CAFOs to submit such information to a permitting authority such as IEPA. Accordingly, the Board found no legal authority for USEPA to require Illinois to establish the type of reporting requirement suggested by the Groups when USEPA itself had withdrawn its own proposed rule. *Id.* Furthermore, the Groups' sixteen required items went beyond USEPA's proposed, but withdrawn, five items. *Id.*

Faced with the question of whether Illinois should promulgate a rule to gather information from unpermitted Large CAFOs to implement the NPDES program for CAFOs in Illinois, the Board found that a requirement to submit limited information to IEPA was necessary and appropriate to implement the NPDES program for CAFOs. CAFO Amendments, R12-23, slip op. at 184 (Nov. 7, 2013). The Board acknowledged that IEPA's efforts to develop a CAFO inventory from existing databases and sister agencies may be sufficient to constitute a comprehensive survey under the federal NPDES rules. *Id.*

However, in examining the record in CAFO Amendments, the Board found possible gaps in information available to IEPA as of November 2013 when the Board issued its first notice version of Section 501.505. CAFO Amendments, R12-23, slip op. at 184 (Nov. 7, 2013). The Board also acknowledged IEPA's view that an appropriate purpose of the CAFO inventory is to have a list that IEPA can use to prioritize facilities for inspection. *Id.* The Board further acknowledged that a CAFO inventory may not address the question of which facilities would need permits because only facilities with actual discharges need permits. *Id.* To serve these purposes, the Board proposed in Section 501.505 a rule for unpermitted Large CAFOs to submit identifying information to IEPA.

Second Notice in CAFO Amendments (April 17, 2014)

After first notice publication, the Board received various comments on Section 501.505's proposed requirement for unpermitted Large CAFOs to submit information to IEPA. The Environmental Groups suggested additional information be collected from facilities. CAFO Amendments, R12-23, slip op. at 25-27 (Apr. 17, 2014). The Agricultural Coalition opposed the requirement to submit information to IEPA. *Id.* at 23-25. IEPA provided no comment on proposed Section 501.505.

The Board reiterated the basis for its authority to require unpermitted Large CAFOs to submit information to IEPA. CAFO Amendments, R12-23, slip op. at 28-29 (Apr. 17, 2014). The Board explained that it carefully tailored the required information to meet federal NPDES requirements. *Id.* at 29. Specifically, 40 C.F.R. § 123.26(b)(1) requires Illinois to maintain "a program which is capable of making comprehensive surveys of all facilities and activities subject

to [IEPA's] authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements." 40 C.F.R. § 123.26(b)(1). The Board's proposal closely followed the requirements of both IEPA's early draft rule and the withdrawn USEPA proposal. *Id.* The Board noted that the Agricultural Coalition opposed this proposed section, while the Environment Groups sought additional types of information. *Id.*

At second notice, the Board proposed in Section 501.505 that unpermitted Large CAFOs be required to submit the following information to IEPA:

- a) name of all owners and operators of the facility and their mailing addresses and phone numbers;
- b) location of the facility identified by the street address or latitude and longitude;
- c) location of the facility according to township, county, section, and quarter section;
- d) for the previous 12-month period, identification of each animal type stabled or confined at the facility and maximum number of each animal type;
- e) identification of types of animal holding areas, including pastures, confinement barns, and open lots;
- f) identification of types and capacity of livestock waste containment and storage units, including, but not limited to, anaerobic lagoons, manure stacks, underground storage pits, and storage tanks; and
- g) date the information in this subsection (c) is submitted to the Agency.

CAFO Amendments, R12-23, slip op. at 103-104 (Apr. 17, 2014).

Joint Committee on Administrative Rules Review

After submitting a second notice proposal to JCAR in CAFO Amendments, on July 3, 2014, the Illinois General Assembly's Joint Committee on Administrative Rules (JCAR) informed the Board that JCAR was unclear as to whether the information sought in proposed Section 501.505 is the same information IEPA already collects under an agreement with USEPA from the Illinois Department of Agriculture (IDOA) and the Illinois Department of Public Health (IDPH). CAFO Amendments, R12-23, Public Comment 3047 at 1 (July 3, 2014). JCAR added that, with two partial exceptions, IEPA stated that the information sought under proposed Section 501.505 was already part of IEPA's database. *Id.* JCAR acknowledged that the Board's proposal pre-dated IEPA's current data collection process. *Id.* JCAR concluded that Section 501.505 appeared redundant, adding that "redundancy in State government programs is rarely considered by JCAR to be appropriate." *Id.* at 2.

Adopted Rule in CAFO Amendments (August 7, 2014)

On August 7, 2014, in CAFO Amendments, the Board adopted amendments to Parts 501, 502, and 504. The Board did not adopt proposed Section 501.505. Instead, the Board established this subdocket to address the proposed requirement in Section 501.505 that Large CAFOs submit identifying information to IEPA. The Board issued questions to IEPA seeking input on issues raised by JCAR and information provided to JCAR but not contained in the CAFO Amendments record. *See* Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504 (CAFO Subdocket), R12-23A, slip op. at 14-15 (Oct. 2, 2014).

SUBDOCKET “A” RECORD

IEPA Responses to Board Questions

In the Board’s first notice order on November 7, 2013, the Board noted possible data gaps in IEPA’s inventory of CAFOs evident in the CAFO Amendments record. CAFO Amendments, R12-23, slip op. at 184 (Nov. 7, 2013). JCAR later noted possible new information it had received that may address the data gaps observed by the Board. CAFO Amendments, R12-23, PC 3047 (July 3, 2014). Accordingly, the Board asked questions of IEPA to resolve these concerns. *See* CAFO Subdocket, R12-23A, slip op. at 14-15 (Oct. 2, 2014). The Board asked additional questions on May 7, 2015. CAFO Subdocket, R12-23A, slip op. at 2-3 (May 7, 2015). IEPA’s responses are summarized below.

Agreement Between IEPA and USEPA (September 2014)

IEPA and USEPA have been engaged in discussions concerning IEPA’s administration of the NPDES program as it applies to CAFOs. Most recently, on September 5, 2014, IEPA entered into a work plan with USEPA titled Illinois Program Work Plan for Calendar Years 2014-2016. First Resp. at 2, Att. H. The work plan requires IEPA to develop, update, and submit to USEPA its inventory of CAFOs. First Resp. Att. H at 4 (¶¶10, 11). IEPA must maintain an inventory of “all confirmed Large and permitted CAFO sites” and submit that inventory to USEPA twice each year. *Id.* (¶10). Specifically, the work plan requires

[IEPA] will update and submit to USEPA its Large CAFO inventory by August 31 and February 28 each year. By these same dates, [IEPA] will ensure that the updated inventory is available to all [IEPA] staff and the public in an easily accessible format. The inventory will include all confirmed Large and permitted CAFO sites identified by [IEPA] based on information in permit applications, citizen tips and complaints, USEPA, [IDOA], and [IDPH]. First Resp. Att. H at 4 (¶10).

IEPA states that, on November 24, 2014, it submitted an updated CAFO inventory to USEPA. First Resp. at 2, citing Att. I. This CAFO inventory appears to list 266 facilities and identifies facility name, city, county, permit number, animal type, and facility size. First Resp.

Att. I. In response to Board questions, on May 28, 2015, IEPA provided an updated list to the Board that listed 277 facilities. Sec. Resp. Ex. 1.

The work plan also requires IEPA to have a plan to maintain the inventory. First Resp. Att. H at 4 (¶11). Specifically, the work plan requires

By October 31, 2014, [IEPA] will submit a plan to maintain the inventory. The plan will specify how [IEPA] will maintain the inventory including a process of confirming sizes and whether discharges are occurring at unpermitted large and medium livestock facilities and documenting the determinations. The plan will also include the process to get updates from [IDOA] and [IDPH]. Within 60 days of receipt of USEPA's review of [IEPA's] plan, [IEPA] will submit a final plan. First Resp. Att. H at 4 (¶11).

Pursuant to this requirement, IEPA submitted to USEPA: (i) IEPA's inspection strategy dated August 2014 (First Resp. Att. J); (ii) IEPA's operating procedure for updating the inventory dated October 2014 (First Resp. Att. K); (iii) a summary of information IEPA receives from IDOA and IDPH dated October 2014 (First Resp. Att. L); and (iv) IEPA's operating procedure for reviewing information provided by those departments dated November 2014 (First Resp. Att. M). First Resp. at 2.

The work plan provides that IEPA will submit a final plan for maintaining the inventory within 60 days after USEPA reviews the plan. First Resp. Att. H at 4 (¶11). As of May 28, 2015, IEPA had not received USEPA's review of this work plan. Sec. Resp. at 1. IEPA states that it will file its final plan to maintain the CAFO inventory with the Board at the same time it files the final plan with USEPA. *Id.*

IEPA, IDOA, IDPH Data Collection

On November 21, 1997, IEPA and IDOA entered into an interagency agreement to share information on livestock facilities. First Resp. at 2, Att. N. Weekly, IDOA submits to IEPA notices of intent to construct (First Resp. Att. O), initial notices of construction plan completeness (First Resp. Att. P), final notices of construction plan completion (First Resp. Att. Q), and acknowledgements of setback compliance (First Resp. Att. R). IEPA inputs information from these documents in a database.

IEPA receives information from IDPH on dairy operations. First Resp. at 4. Twice per year, IDPH sends IEPA a spreadsheet containing a list of operating dairies. First Resp. at 4, Att. T. The information in the spreadsheet, which includes twelve information fields, is obtained through routine field inspections. *Id.* IEPA inputs information from these documents in a database.

In addition to these routine sources of information from IDOA and IDPH, IEPA states that information for the CAFO database will also be collected from the following sources: citizen complaints, facility contacts, inspection reports, permit files, stream surveys, and emergency incident reports. First Resp. at 5. IEPA has developed an inspection checklist to collect

information for the CAFO database. First Resp. Att. U. IEPA notes that it receives numerous citizen complaints on CAFOs. Sec. Resp. at 11. For example, IEPA received over 200 complaints in 2011. *Id.*

CAFO Inventory

IEPA created the CAFO inventory by first compiling a CAFO database. First Resp. at 5. IEPA combined its historical data with data from IDOA and IDPH. *Id.* IEPA reviewed the data and removed duplicate facilities and facilities known not to be in operation. *Id.* IEPA explains that it adds facilities to the CAFO database “after an Agency inspection of a livestock facility.” First Resp. at 5. As of December 2014, the CAFO database had 1,338 facilities. *Id.* Of these, 266 facilities are CAFOs and the sizes of the facilities are as follows: 254 Large CAFOs, 10 Medium CAFOs, and 2 Small CAFOs. *Id.* The remaining facilities in the CAFO database are not CAFOs. *Id.*

IEPA then generates the CAFO inventory from the CAFO database. As of December 2014, the CAFO inventory included the above-identified 266 facilities. This is the inventory IEPA submits to USEPA on August 31 and February 28 each year. First Resp. at 6. The CAFO inventory is maintained in a database with the following fields: IEPA identification, facility name, NPDES permit number, issue date, expiration date, facility size (Large, Medium, or Small), animal type, and county. *Id.*

In response to Board questions, IEPA also provided a copy of the updated Large CAFO inventory that was due to be submitted to USEPA by February 28, 2015. Sec. Resp. at 1, Sec. Resp. Ex. 1. The updated inventory contains eleven Large CAFOs that did not appear in the earlier version.

IEPA contends that its inventory “closely reflects the actual number of Large CAFOs in Illinois.” Sec. Resp. at 9. IEPA also states that, “[n]ow that [IEPA] has developed and fine-tuned its sophisticated method of maintaining the CAFO Inventory, it does not believe the Environmental Groups’ methodology or a registration program through a Board regulation is necessary.” *Id.*

Public Comments

After the Board’s August 7, 2014 order, the Board received fourteen comments in this subdocket. Several commenters addressed CAFO Amendments. Many of the commenters provided general comments on environmental impacts from CAFOs and regulation of CAFOs. Comments relating specifically to this subdocket concerning the proposed requirement for unpermitted Large CAFOs to submit identifying information to IEPA are summarized below.

Natural Resources Conservation Service (PC 3050)

PC 3050 is a copy of comments provided to JCAR after second notice of the rules adopted in CAFO Amendments by the Illinois office of the Natural Resources Conservation Service of the United States Department of Agriculture. These comments relate to other sections

of the rules adopted in CAFO Amendments and not the information requirement specifically addressed in this subdocket.

Environmental Groups (PC 3051)

After second notice publication of the rules adopted in CAFO Amendments, the Environmental Groups submitted comments to JCAR supporting the rulemaking and describing the outreach by IEPA and opportunities for public input in the development of the rules. PC 3051 is a copy of those comments.

Agricultural Coalition (PC 3052)

After second notice publication of the rules adopted in CAFO Amendments, the Agricultural Coalition submitted comments to JCAR. As to the information requirement, the Coalition opposed the requirement and asked JCAR to prohibit the Board from adopting the rule. PC 3052. The Coalition listed the following reasons: (1) the Board does not have authority to adopt the information requirement; (2) federal law does not require the rule; (3) Illinois law does not require the rule; (4) IEPA does not want or need the rule; (5) the rule is a “fishing expedition” requested by Environmental Groups; and (6) the rule is unduly burdensome for Illinois farmers. *Id.* at 1.

Raminder Kumar (PC 3053)

Raminder Kumar asks the Board to preserve a requirement that unpermitted CAFOs provide IEPA with information identifying the operator, location, number and type of livestock, types of animal holding areas, and types and capacity of waste storage structures. PC 3053.

Bern Colleran (PC 3054)

Bern Colleran states that IEPA “needs to create a comprehensive inventory of CAFOs so they will have the ability to regulate them and evaluate which ones should have permits.” PC 3054. Further, this inventory should be created “without wasting valuable taxpayer dollars” by requiring CAFOs “to report information to [IEPA] through a reporting program.” *Id.* A reporting requirement “is a common sense approach and there is no justifiable reason why CAFOs should not have to submit basic information about their operations to regulators.” *Id.*

Edward L. Michael (PC 3055)

Edward L. Michael comments that there is a need for Illinois “to adopt CAFO information reporting requirements that fill existing gaps in the array of specific items of information IEPA now receives.” PC 3055. IEPA needs this information to complete and update the inventory of CAFOs in the state. *Id.* Requiring CAFOs to report to IEPA “is the only economically viable way to collect the timely and complete information needed to assure proper management of the massive amount of animal waste produced by these facilities.” *Id.*

Cindy Sinclair (PC 3056)

Cindy Sinclair submitted a comment to the Board requesting a reporting requirement for CAFOs. PC 3056. Ms. Sinclair provides five reasons including that IEPA does not know where many CAFOs are located and IEPA needs a comprehensive inventory to be able to regulate CAFOs and evaluate which CAFOs need permits. *Id.*

George Sinclair (PC 3057)

George Sinclair submitted a comment to the Board requesting a requirement that all CAFOs register with IEPA. PC 3057. Mr. Sinclair provides three reasons including that CAFOs “are known polluters of the air and water” and IEPA “only gets involved after the damage is done.” *Id.*

Susan Turner (PC 3058)

Susan Turner comments that “the only CAFOs that are being regulated by the IEPA’s permitting program are the ones who have damaged the environment with their pollution.” PC 3058. Ms. Turner asserts that “IEPA has an inadequate record of unpermitted CAFOs.” *Id.* To rectify this, Ms. Turner urges a comprehensive inventory and reporting program to allow IEPA to do its job. *Id.*

Agricultural Coalition (PC 3059)

The Agricultural Coalition argues that requiring unpermitted Large CAFOs to submit identifying information to IEPA is unnecessary and unduly burdensome. PC 3059 at 4. The Coalition “urges the Board to decline adoption of proposed Section 501.505.” *Id.* at 6.

The Agricultural Coalition notes that IEPA is the regulatory entity responsible for NPDES permitting in Illinois. PC 3059 at 4. The Coalition claims that IEPA “does not believe mandatory reporting of unpermitted CAFOs is necessary or within the scope of its statutory authority.” *Id.* The Coalition summarizes IEPA’s recent data collection efforts as described in IEPA’s responses to Board questions. *Id.* Based on this information recently provided to the Board in this subdocket, the Coalition concludes that IEPA’s data collection process is sufficient and “the mandated reporting rule proposed in Section 501.505 is unnecessary.” *Id.* at 5.

The Agricultural Coalition further asserts that NPDES permits are only required by the federal Clean Water Act if a CAFO is discharging. PC 3059 at 6, citing National Pork Producers Council v. USEPA, 635 F.3d 738, 751 (5th Cir. 2011). The Coalition argues that facilities not required to obtain an NPDES permit likewise should not be required “to report information the state does not need to meet its obligations.” *Id.* at 6.

Environmental Groups¹ (PC 3060)

¹ The Board notes that PC 3060 in this subdocket was filed by Prairie Rivers Network, Illinois Citizens for Clean Air and Water, and the Environmental Law and Policy Center but did not include Natural Resources Defense Council.

The Environmental Groups urge the Board to adopt proposed Section 501.505. PC 3060 at 28. The Groups note that Illinois is required to maintain a comprehensive survey of CAFOs and argues that Illinois is failing to do so. *Id.* According to the Groups, IEPA's current process fails to identify CAFOs and is inefficient. *Id.* The Groups also ask to make the CAFO inventory accessible to the public through a website rather than through a Freedom of Information Act request. *Id.* at 21-22.

The Environmental Groups argue that IEPA's process for identifying CAFOs is inadequate for several reasons. First, IEPA's process misses Large CAFOs. The Groups assert that IEPA's list of 254 Large CAFOs submitted to the Board in December 2014 is not comprehensive. PC 3060 at 5. The Groups assert that there could be 516 Large CAFOs based on IDOA data or as many as 560 Large CAFOs based on data from Illinois Citizens for Clean Air and Water (ICCAW). *Id.*

As for IDOA data, the Environmental Groups explain that IDOA tracks the number of animal units at a facility while IEPA tracks the number of animals. *Id.* at 6. The Groups argue that a Large CAFO as defined in 35 Ill. Adm. Code 502.103 corresponds to a facility with at least 1,000 animal units tracked by IDOA. *Id.* The Groups also note that the IDOA database is compiled using notices of intent to construct submitted after 1996. *Id.* at 7. Using IDOA information, the Groups claim that there could be 516 Large CAFOs. *Id.* at 6.

The Environmental Groups describe an investigation conducted by ICCAW to count the number of Large CAFOs. PC 3060 at 7-8. ICCAW selected seventeen Illinois counties to study. ICCAW collected data from IDOA through Freedom of Information Act requests and from the Illinois Secretary of State and United States Department of Agriculture websites. *Id.* at 8, fn 15. ICCAW used mapping tools and satellite images to locate facilities and estimate building sizes. *Id.* In the seventeen selected counties, IEPA identified 109 Large CAFOs, but ICCAW identified 188 Large CAFOs. *Id.* at 9. ICCAW then extrapolated these findings to estimate that at least 306 Large CAFOs are missing from the IEPA inventory state-wide. *Id.* at 9, fn. 17. The Environmental Groups identify specific facilities they allege are missing from IEPA's inventory. *Id.* at 10-17.

Second, the Environmental Groups argue that IEPA's process is inadequate because IEPA's inventory of Large CAFOs lacks key information. PC 3060 at 18. Specifically, the Groups comment on IEPA's Attachment W which is IEPA's "Proposed 501.505 fields within the CAFO database." The Groups assert that this attachment does not contain certain fields and not all the fields are populated. *Id.*

Third, the Environmental Groups argue that the work plan agreed to by IEPA and USEPA will not result in a comprehensive survey of Illinois CAFOs. PC 3060 at 19. The Groups argue that the work plan is a short-term strategy. *Id.* IEPA will need to update the inventory beyond 2016 and "codification of a reporting requirement would make certain that the inventory will be completed and maintained." *Id.* at 19-20.

Fourth, the Environmental Groups contend that relying on existing data from other agencies will not identify all Large CAFOs. PC 3060 at 20. IDOA’s database lacks information from CAFOs constructed prior to 1996. *Id.* Further, IDPH data only covers dairies and lacks information such as the maximum number of animals, holding areas or types, and capacity of waste containment structures. *Id.* at 20-21.

Fifth, the Environmental Groups note that IEPA adds facilities to the CAFO database after an IEPA inspection and as staffing and priorities allow. PC 3060 at 21. The Groups argue that this approach is inadequate to create a comprehensive inventory. *Id.*

In further support of adopting Section 501.505, the Environmental Groups argue that requiring Large CAFOs to submit basic information to IEPA is more efficient than the information-gathering process currently used by IEPA. PC 3060 at 5. The Groups explain

Yet IEPA continues to pursue an approach that demands an even greater outlay of Agency resources in order to comply with the law. To complete a comprehensive inventory of Illinois CAFOs, it could take hours of investigation by multiple IEPA staff members to gather the necessary data for an individual facility. . . . To complete the comprehensive inventory that is required, IEPA would have to repeat this process hundreds of times. By contrast, responsible CAFO owners and operators should be able to comply with the basic reporting requirement proposed in Section 501.505 in a matter of minutes. *Id.*

Joan Wallace (PC 3061)

Joan Wallace filed a comment requesting that the Board adopt a reporting program for CAFOs “to submit basic information about their operations to regulators.” PC 3061. Ms. Wallace contends that IEPA needs a comprehensive inventory of CAFOs in order to regulate them and evaluate which CAFOs are required to obtain permits. *Id.* Requiring CAFOs to report information to IEPA through a reporting program would be “the only way to do this without wasting valuable taxpayer dollars.” *Id.*

Matthew Alschuler (PC 3062)

Matthew Alschuler, President of Helping Others Maintain Environmental Standards, filed a comment urging the Board “to require a reporting program for all CAFOs in Illinois.” PC 3062. Mr. Alschuler claimed that IEPA does not have a comprehensive list of Large CAFOs and without such a list IEPA cannot ensure that the facilities are complying with environmental law. *Id.*

League of Women Voters of Illinois (PC 3063)

The League of Women Voters of Illinois (League) argued that the Board’s proposed Section 501.505 improved IEPA’s proposal but claimed that it “is still insufficient for compiling a more complete and current inventory.” PC 3063 at 2. The League stated that subsection (a)(1) requires submission of information by “Large CAFOs not covered by an NPDES permit, but

there is no obligation to update this information.” *Id.* The League recommended that subsection (a)(1) “include a requirement to update information supplied by unpermitted Large CAFOs every four years.” *Id.* at 3.

The League added that subsection (a)(2) exempts Medium CAFOs “unless they propose to increase their animal population.” PC 3063 at 2 (emphasis in original). The League proposed revising subsection (a)(2) to require that CAFOs with the same or fewer animals as the number in Section 502.103 must submit specified information within 90 days of the effective date of the regulations and update it every four years. *Id.* at 3.

The League concludes that these requirements would improve the IEPA’s “ability to identify possible sources of nuisance odors and better respond to citizen complaints.” PC 3063 at 3.

BOARD DISCUSSION

Section 5(b) of the Environmental Protection Act (Act) provides the Board with rulemaking authority to “determine, define, and implement the environmental control standards applicable in the State of Illinois.” 415 ILCS 5/5(b) (2014). Further, the Board “may adopt rules and regulations in accordance with Title VII of this Act.” *Id.*; see 415 ILCS 5/26-29 (2014). Section 27(a), part of Title VII of the Act, provides that the “Board may adopt substantive regulations as described in this Act. . . . The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act.” 415 ILCS 5/27(a) (2014).

As to water pollution specifically, Section 13(a) of the Act provides that the Board “may adopt regulations to promote the purposes and provisions of this Title.” 415 ILCS 5/13(a) (2014). Section 13(a) also provides a non-exhaustive list of standards, requirements, and procedures the Board is authorized to prescribe. 415 ILCS 5/13(a) (2014). A CAFO reporting or registration program is not one of the topics expressly enumerated in Section 13(a).

Section 11(b) of the Act provides that a purpose of the Act’s water pollution provisions is “to authorize, empower, and direct the Board to adopt such regulations and the Agency to adopt such procedures as will enable the State to secure federal approval to issue NPDES permits pursuant to the [Clean Water Act].” 415 ILCS 5/11(b) (2014). The Act further directs that these provisions “shall not be construed to limit, affect, impair, or diminish the authority, duties and responsibilities of the Board, Agency . . . to regulate and control pollution.” 415 ILCS 5/11(c) (2014).

Section 13(b) of the Act specifically enables the Board to adopt rules needed to implement the NPDES program. 415 ILCS 5/13(b) (2014). Section 13(b) of the Act provides:

Notwithstanding other provisions of this Act and for purposes of implementing an NPDES program, the Board shall adopt: (1) Requirements, standards, and procedures which, together with other regulations adopted pursuant to this Section 13, are necessary or appropriate to enable the State of Illinois to

implement and participate in the National Pollutant Discharge Elimination System (NPDES) pursuant to the [Clean Water Act]. All regulations adopted by the Board governing the NPDES program shall be consistent with the applicable provisions of such federal Act and regulations pursuant thereto, and otherwise shall be consistent with all other provisions of this Act . . .” *Id.*

The Illinois Appellate Court has had opportunities to interpret this language in the context of challenges to NPDES rules adopted by the Board. That court has explained “[i]t is clear that section 13(b)(1) of the Illinois Act, which requires the Board to promulgate regulations ‘necessary or appropriate’ for Federal approval and regulations which are ‘consistent’ with the [Clean Water Act], does not limit the Board’s rule-making power to that necessary to obtain Federal approval of Illinois’ NPDES permit program.” U.S. Steel Corp. v. PCB, 52 Ill. App. 3d 1, 4-5, 367 N.E. 2d 327 (2nd Dist. 1977), citing Peabody Coal Co. v. PCB, 36 Ill. App. 3d 5, 15-16, 344 N.E.2d 279, 285 (5th Dist. 1976). The court continued, “Such a limited interpretation of the Illinois Act would unduly hinder the Board from achieving the true goal of the NPDES permit system, which is the limitation of the discharge of point source pollutants into navigable waters.” *Id.*; *see also* Illinois Power Co. v. PCB, 112 Ill. App. 3d 457, 461, 445 N.E.2d 820, 823 (5th Dist. 1983) (“Under this section all regulations adopted were to be consistent with federal law and otherwise consistent with the Illinois act”).

Federal NPDES regulations require that Illinois must have a program “capable of making comprehensive surveys of all facilities and activities subject to [IEPA’s] authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements.” 40 C.F.R. § 123.26(b)(1). Thus, information is needed for IEPA to identify which CAFOs are required to obtain NPDES permits. The Board proposed Section 501.505 to collect basic information needed to comply with 40 C.F.R. § 123.26(b)(1).

In CAFO Amendments, IEPA testified that it was developing such a comprehensive CAFO survey or inventory. CAFO Amendments, R12-23, slip op. at 183 (Nov. 7, 2013). IEPA explained that it was developing a CAFO inventory from an IDPH database of more than 800 dairy operations and 1400 permits issued by IDOA. *Id.* IEPA estimated, based on data from IDOA, that there were approximately 350 to 400 Large CAFOs in Illinois. *Id.* at 184. IEPA represented that it issued approximately 35 NPDES permits to CAFOs. *Id.* The Board analyzed the record and noted data gaps in available information from IEPA, IDOA, and IDPH needed for a comprehensive survey. For example, IDOA’s data collected under the Livestock Management Facilities Act (LMFA) dated only to 1996, and IDPH’s data covered only dairy operations. *Id.* at 183, 184. The comments submitted in the initial rulemaking did not contest the Board’s analysis of 40 C.F.R. § 123.26(b)(1). Nor did the comments point to the record for any support that IEPA’s database approach was sufficient or that the Board overlooked any data in its analysis of data gaps. Furthermore, IEPA did not comment on the Board’s proposed Section 501.505 after first notice publication or submission of a second-notice proposal to JCAR.

On September 5, 2014, after the Board opened this subdocket, IEPA entered into a work plan with USEPA requiring IEPA to develop, update, and submit to USEPA its inventory of CAFOs. First Resp. Att. H at 4 (¶¶10, 11). Under the work plan, IEPA must maintain an inventory of “all confirmed Large and permitted CAFO sites” and submit that inventory to

USEPA twice each year. First Resp. Att. H at 4 (¶10). IEPA submitted a CAFO inventory to USEPA on November 24, 2014. First Resp. at 2. In response to Board questions, IEPA also provided a copy of the updated Large CAFO inventory that was due to be submitted to USEPA by February 28, 2015. Sec. Resp. at 1, Sec. Resp. Ex. 1.

The work plan also requires IEPA to have a plan to maintain the CAFO inventory. First Resp. Att. H at 4 (¶11). Based on this requirement, IEPA submitted to USEPA: (i) IEPA's inspection strategy dated August 2014 (First Resp. Att. J); (ii) IEPA's operating procedure for updating the inventory dated October 2014 (First Resp. Att. K); (iii) a summary of information IEPA receives from IDOA and IDPH dated October 2014 (First Resp. Att. L); and (iv) IEPA's operating procedure for reviewing information provided by those departments dated November 2014 (First Resp. Att. M). First Resp. at 2. As of May 28, 2015, IEPA had not received USEPA's review of this work plan. Sec. Resp. at 1. IEPA states that it will file its final plan to maintain the CAFO inventory with the Board at the same time it files the final plan with USEPA. *Id.* IEPA is not required to file its final plan with the Board because the Board today takes final action in this docket.

IEPA has now set up routine procedures to receive information from IDOA on livestock facilities and IDPH on dairies. First Resp. at 2-5, First Resp. Att. J-M. In addition, IEPA will obtain information for the CAFO inventory from citizen complaints, facility contacts, inspection reports, permit files, stream surveys, and emergency incident reports. First Resp. at 5.

As of December 2014, IEPA's CAFO database had 1,338 facilities. First Resp. at 5. 266 of these facilities are CAFOs distributed as follows: 254 Large CAFOs, 10 Medium CAFOs, and 2 Small CAFOs. *Id.* The remaining facilities in the CAFO database are not CAFOs. *Id.* The CAFO inventory provided to the Board in December 2014 lists these 266 CAFOs. The inventory due to be submitted to USEPA on February 28, 2015 contains eleven CAFOs that were not included in the original list, for a total of 277 CAFOs. Sec. Resp. Ex. 1.

The Environmental Groups argue that IEPA's December 2014 list of 254 Large CAFOs is not comprehensive. PC 3060 at 5. The Groups assert that there could be 516 Large CAFOs based on IDOA data or as many as 560 Large CAFOs based on ICCAW's analysis. *Id.*

IEPA does not concur with the methodology used by the Environmental Groups for five reasons. Sec. Resp. at 1. First, IEPA contends that under the Board's Subtitle E regulations, Large CAFOs are based on the number, size, and type of a specific animal species being confined, not on the total animal units. *Id.* at 3. Additionally, in the case of chickens and ducks, the type of manure handling system also impacts the number of animals needed to be considered a Large CAFO. *Id.* IEPA states that the data relied on by the Environmental Groups does not account for the number, size and type of animals within a given species and the type of manure handling system utilized at the facility. *Id.*

Second, IEPA disagrees with the Environmental Groups that there are 550 Large CAFO facilities in Illinois. Sec. Resp. at 5. IEPA notes that LMFA data indicates there have instead been 550 approvals, which includes approvals for the replacement of old structures taken out of service and for the expansion of structures at existing locations. *Id.*

Third, IEPA states that the information relied on by the Environmental Groups is based on the design capacity that the livestock waste handling facility will serve, whereas the definition of a Large CAFO under Subtitle E is based on the number of animals actually being confined. Sec. Resp. at 6.

Fourth, IEPA states that a facility identified in the LMFA may now be inactive and would therefore not meet the definition of a Large CAFO under Subtitle E. Sec. Resp. at 6.

Fifth, IEPA contends that livestock waste management facilities or livestock management facilities may be considered a single facility under Subtitle E, but multiple facilities under the LMFA. Sec. Resp. at 7. IEPA notes that, under Subtitle E, Section 501.225 provides that two or more animal feeding operations under common ownership are deemed to be a single animal feeding operation if they are adjacent to each other, or if they utilize a common area or system for the disposal of wastes. *Id.*, citing 35 Ill. Adm. Code 501.225(b).

Additionally, IEPA contends that satellite imagery “cannot be used to definitively determine whether the mere existence of such a facility meets the definition of a Large CAFO under Subtitle E.” Sec. Resp. at 7. This is because the number of animals being confined cannot be determined by satellite imagery, nor can it be determined whether the facility is active. *Id.* at 8.

The Environmental Groups argue that IEPA’s inventory of Large CAFOs lacks key information. PC 3060 at 18. Specifically, the Groups assert that IEPA’s First Response Attachment W does not contain certain fields and not all the fields are populated. *Id.* Attachment W is IEPA’s “Proposed 501.505 fields within the CAFO database.” However, elsewhere in its response to Board questions, IEPA explained that its CAFO database has over 100 fields of information. IEPA identified the sources of how each field is populated and which fields are not currently populated. First Resp. at 6, First Resp. Att. V. IEPA explains that Attachment W is a report from the CAFO database for those fields contained in proposed Section 501.505. *Id.* Further, as detailed above, IEPA has developed a plan for updating and maintaining the CAFO database.

The Environmental Groups argue that the short-term work plan agreed to by IEPA and USEPA will not result in a comprehensive survey of Illinois CAFOs. PC 3060 at 19. Beyond 2016, IEPA will need to update the CAFO inventory. *Id.* While the work plan currently is in effect through 2016, 40 C.F.R. § 123.26(b)(1) requires IEPA, beyond 2016, to continue to maintain a comprehensive survey of CAFO facilities so that IEPA can identify facilities subject to regulation.

The Environmental Groups argue that relying on existing data from other agencies will not identify all Large CAFOs. PC 3060 at 20. IEPA is developing its CAFO inventory from an IDPH database and LMFA database, however the IDPH database only covers dairy operations, and the LMFA information dates only to 1996. The Environmental Groups also argue that IEPA’s limitation in adding facilities to the CAFO database as staffing and priorities allow is inadequate. *Id.* at 21. The Groups argue that requiring Large CAFOs to submit basic

information to IEPA is more efficient than the information-gathering process currently used by IEPA. PC 3060 at 5. In response to the Groups, IEPA contends that its CAFO inventory process more accurately reflects the true number of Large CAFOs in Illinois than the Environmental Groups methodology because,

in addition to LMFA data and aerial imagery, the Agency considers citizen complaints and/or [inquiries], facility contacts, inspection reports, NPDES permit application files (CAFO applications and Stormwater [Notices of Intent]), [IDPH] information, surface water section stream surveys, and Illinois Emergency Management Agency and Response Center Incident reports. Sec. Resp. at 8-9.

IEPA also states that it has multiple avenues to collect information about pre-1996 Large CAFOs. Sec. Resp. at 10. This includes: institutional knowledge resulting from regulating CAFOs since the 1970s; records of IEPA inspections of animal feeding operations since 1972; a historic database used by IEPA along with inspection and livestock summaries when first formulating the current CAFO inventory; IDPH information on pre-1996 dairy facilities that are currently active; LMFA construction approval information for older facilities that expand or replace older structures; and citizen complaints on CAFOs. *Id.* at 10-11.

IEPA is required to “adopt such procedures as are necessary to carry out its duties” in issuing permits. 415 ILCS 5/39(a) (2014). More specifically, IEPA shall adopt filing requirements and procedures that are, in part, “necessary and appropriate for the issuance of NPDES permits.” 415 ILCS 5/39(b) (2014). IEPA has described in detail in its responses to Board questions and the twenty four documents attached to those responses the process it is using to conduct a comprehensive survey of CAFOs in Illinois. IEPA does not believe proposed Section 501.505 is necessary or appropriate for carrying out its duties under the NPDES program. Rather, IEPA has developed a process that it contends “is much more efficient and accurate” than the proposed Section 501.505. Sec. Resp. at 9.

The Board finds that IEPA’s process for developing a CAFO database and using that database to generate a CAFO inventory to submit to USEPA twice per year renders proposed Section 501.505 unnecessary at this time. The Board finds that IEPA’s efforts to develop a CAFO database and inventory are sufficient to make a comprehensive survey under the federal rules. *See* 40 C.F.R. § 123.26(b)(1). The Board does not, therefore, believe it is now necessary to implement a requirement that duplicates IEPA’s procedures. *See* 415 ILCS 5/39(b) (2014).

USEPA has entered into an agreement with IEPA setting forth IEPA’s process. Further, there is no current USEPA regulation expressly requiring unpermitted CAFOs to submit information to USEPA or delegated states such as Illinois. *See* 77 Fed. Reg. 42679 (July 20, 2012) (withdrawing CAFO reporting rule). USEPA decided that instead of collecting CAFO information by rule, USEPA will collect CAFO information using existing sources of information. *Id.* USEPA explained “it is more appropriate to obtain CAFO information by working with federal, state, and local partners instead of requiring CAFO information to be submitted pursuant to a rule.” *Id.* IEPA’s process of obtaining information from IDOA and IDPH reflects USEPA’s recognition that “many CAFOs have provided their information to some governmental entity.” 77 Fed. Reg. 42679, 42682 (July 20, 2012). Like the USEPA, the Board

finds it reasonable for IEPA “to work with its federal, state, and local partners to obtain existing information rather than asking CAFOs to re-submit information that they have already submitted to another governmental entity.” *Id.*

CONCLUSION

The Board finds that its previously proposed 35 Ill. Adm. Code 501.505 is not warranted at this time. The Board therefore declines to propose the amendment for first notice and closes the docket.

IT IS SO ORDERED.

Board Chairman D. Glosser concurs.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2014); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 18, 2015, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board