ILLINOIS POLLUTION CONTROL BOARD
March 20, 1997

IN THE MATTER OF:	)	
	)	
LIVESTOCK WASTE REGULATIONS	)	R97-15 (A) & (B)
35 ILL. ADM. CODE 506	)	(Rulemaking - Land)

DISSENTING OPINION (by J. Theodore Meyer):

By today's action, the majority missed its opportunity to completely address the threats to human health and the environment presented by the new development in Illinois' livestock industry, the large hog confinement facility. I agree that the Livestock Management Facilities Act (LMFAct) is an important first step toward maintaining an economically viable livestock industry while protecting against the great impacts to human health and the environment presented by larger concentrations of animals at a livestock management facility. However, I believe the Board is charged with the responsibility of taking an important second step: examining the evidence from the five hearings held in this matter, as well as the 79 public comments received, and determining what parts of the LMFAct are acceptable as proposed, and what parts need clarification and modification.

In creating the LMFAct, the General Assembly did not have the opportunity to hear the wealth of information that the Board heard during this rulemaking. As such, it could not possibly have anticipated every situation, consequence or practical result of the LMFAct. The Board has this ability, and therefore should use the information gathered during this proceeding to improve the LMFAct. Thus, although the majority broadly construed the LMFAct in some areas,[1] it declined to do so in terms of preventing odor problems and requiring waste management operations that will treat odor.

The General Assembly recognized that the livestock management facility owner or operator would have to comply with the requirements for handling, storing, and disposing of livestock waste as set forth in the Illinois Environmental Protection Act (Act) (P.A.89-456 §20(a)), and further recognized that the operators shall practice odor control methods identified in the rules adopted pursuant to the Act during the course of manure removal and field application (P.A. 89-456 §25). Therefore, the Board had the authority in this rulemaking to address the topics of odor prevention and odor treatment options.

After reviewing the record in this matter, I am convinced that large concentrations of animals, especially swine, pose a serious threat to human health because of the large amount of odor produced at these confinement facilities. Evidence presented at hearing shows that swine odor has a negative effect on human health. (Exhibits 8, 69, 70, 75, and 77, Public Comment

[1] The majority opinion modified the definition of "populated area" and "common place of assembly" (Section 506.103), made the property line the place of measurement of setback distances for common places of assembly that are outdoor activities (506.702(c)(2)(A)), and expanded the requirements for alternatives, modifications and waivers (New Section 506.105).

15.) Therefore, these rules should prescribe methods of odor prevention for the larger confinement facilities. The only way to prevent odor is to treat it at the source—the waste handling facility and the animal confinement facility.

The LMFAct attempted to address the odor problem with required setback distances. Setbacks are not a treatment for odor problems; they are merely a dilution tactic, and the evidence does not convince me that setback distances will adequately dilute odor from lagoons and confinement facilities to avoid interference with another person's use and enjoyment of their property. (Public Comment 16: reports of hog odors traveling four to 15 miles from a hog confinement facility.) This is especially true for lagoons serving the larger hog confinement facilities. Neither setback distances nor any type of controls exist that will satisfactorily dilute or eliminate the amount of odor, gases, and airborne particulate matter produced by a lagoon that size, or the number of flies it would attract. I am not convinced that the preventative measures of pre-filling with water, continual feeding, shelter belts, masking agents or setbacks provide enough odor control for lagoons this size. In addition, these rules fail to address that, in Illinois, anaerobic lagoons produce serious amounts of odor in the spring. To properly address odor, the owner or operator of a large confinement facility must implement a waste management tool that will treat the waste under the particular environmental conditions found in Illinois.

Of the technology available to treat livestock odor, the two types of odor prevention treatments that would be particularly suited for facilities in Illinois are composting and the anaerobic digester process. Composting is an aerobic process which requires oxygen to function. The chemical processes involved in composting also process odor created from animal waste. If properly maintained with regular agitation, a compost is an inexpensive way to control odor because every facility has a tractor or other machine to power the agitator. Composting, therefore, is a way to treat odor and prevent its creation, rather than a way to dilute odor.

Anaerobic digesters control odor, collect methane for use or sale and prevent contributions to the greenhouse effect from these facilities. (Exhibit 69.) Anaerobic digesters are more capitol intensive than lagoons, but the expense is a small percentage of the total investment of these large confinement facilities. In addition, there are two federal grant programs available to offer farmers financial assistance in constructing treatment facilities: the USEPA's AgSTAR Program and EQIP—the Environmental Quality Incentive Program of the federal farm. (Tr5. at 57-60.)

As a final comment, it is important to point out that the setback provisions in these rules are probably invalid for two reasons. First, in measuring setback distances, the rules as written allow an owner or operator of a livestock facility to use another person's property as part of the setback distance. If a person's land is being used as part of a setback, that land suddenly becomes restricted in terms of available uses due to offensive odor. Therefore, use of another person's land in a setback measurement is probably a taking of property without adequate compensation.

Second, the rules distinguish between farm residence and non-farm residence in the setback provisions. Although this distinction is found in the Board's Agriculture Related Pollution regulations as well as the LMFAct, I believe the distinction probably violates the Equal Protection Clause of the Fourteenth Amendment, and Article I, Section 2 of the Illinois Constitution. Neither the General Assembly nor the Department of Agriculture explained why a farm residence is treated differently from a non-farm residence when both groups are similarly situated in terms of a need for protection from livestock waste odors, gases and particulate matter.

Arguably, the right to use and enjoy one's property free from a public nuisance like livestock waste odor is a fundamental right. Under the Equal Protection Clause, an infringement upon that right can only be upheld if the State can show that it has a compelling government interest in abridging the fundamental right, and that it used the least restrictive means to do so. (Pyler v. Doe, 457 U.S. 202 (1982, Boddie v. Connecticut, 401 U.S. 371, Shapiro, Commissioner of Welfare of Connecticut v. Thompson, 394 U.S. 618 (1969).) I do not believe the General Assembly or the Department of Agriculture can show a compelling government interest for treating differently those persons who are similarly situated. Therefore, the terms "farm residence" and "non-farm residence" should be eliminated in §506.702(c)(3), and be replaced by the term "occupied residence".

For these reasons, I respectfully dissent.

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J. Theodore Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the _____ day of _____, 1997.

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Dorothy M. Gunn, Clerk
Illinois Pollution Control Board