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 G. T. Girard):

I agree with large portions of the majority opinion, especially those sections that closely follow the emergency rules adopted by the Board, those additional sections flowing from the rules proposed by the Department of Agriculture, and other provisions clearly supported by the record developed in this proceeding. However, I dissent from the majority opinion and order because critical portions of the document are not authorized by the Livestock Management Facilities Act (LMFAct) or supported by the evidence in this proceeding. In addition, the majority did not exercise their authority under the LMFAct to craft rules which "make distinctions for the type and size of livestock management and livestock management handling facilities and operations" (510 ILCS 77/55(c)) and, as a consequence, large portions of the livestock industry in Illinois will be over-regulated without addressing the crux of the problem.

Definition of Populated Area

I disagree with the majority definition of populated area, and the consequences that flow from the definition in terms of how setbacks are measured. The majority definition of populated area is not authorized by the LMFAct, is not supported by the record, introduces more ambiguity, is not economically reasonable, and does not address those aspects of the livestock industry that are creating problems. In addition, the majority opinion that setback waivers can be obtained from persons other than owners of residences is contrary to the clear language of the LMFAct. Finally, the record in this proceeding does not provide evidence to support a finding that the definition is economically reasonable.

The definition of populated area is a key concept in this rulemaking because it is used to determine setbacks from livestock management or livestock waste facilities. In the LMFAct, setbacks apply to all new livestock facilities with more than 50 animal units (510 ILCS 77/35 (c)(2)). Setback distances are determined by measuring "from the nearest corner of the residence or place of common assembly to the nearest corner of the earthen waste lagoon or livestock management facility, whichever is closer." (510 ILCS 77/35(c)(1).) For example, for a livestock facility with greater than 50, but less than 1000 animal units, the minimum setback is one-half mile from the nearest populated area. (510 ILCS 77/35 (c)(3).)

Section 10 of the LMFAct states that "[i]n this Act words and phrases have meanings set forth in the following Section, unless the context clearly requires otherwise."

(510 ILCS 77/10). The majority opinion circumvents the General Assembly's intent by using a strained analysis of the imbedded phrase "common place of assembly" to fashion a meaning for populated area that is not supported by the language of the LMFAct or the context in which the phrase is used. This contradicts the legislative instruction that the definitions in the LMFAct are explicitly set forth unless the context clearly requires otherwise.

I agree that the definition of populated area proposed by the Department of Agriculture should have been adopted by the Board. However, the majority exceeded their authority under the LMFAct by including "land managed for recreational or conservation purposes" (Section 506.103) in the definition of populated area. The Department of Agriculture's definition of populated area reduces the ambiguity of the phrase "common place of assembly" within the context of the LMFAct. On the other hand, the majority's definition circumvents the legislative intent by adopting the proposal advanced by the Illinois Department of Natural Resources (IDNR) to have setbacks ultimately measured from the legal property lines of land managed for recreational or conservation purposes. The majority's definition of populated area also introduces major new ambiguities which is contrary to their stated goal of reducing ambiguity.

The IDNR proposal was based on the two concerns; that odor pollution from large livestock facilities would negatively impact visitors' outdoor experience and that leakage or overflow of waste lagoons potentially threatened the natural resources of state managed lands. (Tr. 1 at 143). While these are valid concerns, they do not justify going beyond the specific language and context of the LMFAct to fashion a definition of populated area which unnecessarily burdens thousands of Illinois landowners.

A clear reading of the statutory definition of populated area in the context of the LMFAct indicates that the General Assembly did not intend to measure setbacks to lands "managed for recreational or conservation purposes" unless there was a facility which served as a "common place of assembly." The majority goes far beyond the intent of the LMFAct by finding that setbacks should be measured to the legal property line when the common place of assembly is primarily an outdoor activity. (Section 506.702(c)(2).) The LMFAct clearly states that setbacks are measured from the nearest corner of the residence or common place of assembly to the nearest corner of the livestock management facility or waste lagoon. (510 ILCS 77/35(c)(1).) The majority argument that measuring to property lines is a way to reduce ambiguity is not supported by the clear context of the LMFAct: setbacks to residences and common places of assembly are to be measured corner to corner, not to adjacent real property lines.

The record in this proceeding does not provide information for the majority to determine the true impact of expanding setbacks by changing the definition of populated area and by measuring setbacks from the property lines of lands managed for recreational or conservation purposes. IDNR testified that their properties comprise less than 1.2 percent of Illinois land area. (Tr. 1 at 148.) However, there is no testimony or other evidence about how much land area is included when the definition of populated areas is changed to include all lands managed for recreational or conservation purposes. There is

not even a definition of these new terms in the majority opinion. Without this definition, and a classification of such lands in Illinois, the majority cannot make a finding that the new regulation is economically reasonable because the majority does not know the extent of such lands in Illinois. Thousands of Illinois landowners could be unreasonably burdened by the necessity of dedicating one-half mile strips on their property contiguous to recreational and conservation lands as setbacks when establishing new livestock facilities or expanding beyond 50 animal units.

Setback Waivers

The majority argues that the potential impacts of new setback exclusions would be minimized because livestock producers would get waivers from adjacent landowners, including owners of recreational and conservation lands. Their argument ignores the specific language of the LMFAct, and is not consistent with the underlying purpose of setbacks. Their argument fails because the LMFAct states that "[a] setback may be decreased when waivers are obtained from owners of residences that are occupied and located in the setback area." (510 ILCS 77/35(a).) The LMFAct clearly does not provide that owners of common places of assembly may grant setback waivers.

Restricting setback waivers to owners of residences is in keeping with the public policy and intent of the LMFAct which provides setbacks to lessen odors from livestock operations. (Tr. 1 at 102.) Since the purpose of setbacks from common places of assembly is also to lessen the odors from livestock facilities before they reach surrounding persons, why should the owner of a common place of assembly be able to waive the statutory rights to a setback for persons who might assemble at their establishment? Therefore, the argument that livestock operators who want to expand beyond 50 animal units would not be burdened by the half-mile setback from all recreational and conservation lands because setback waivers are available is without statutory authority and is not consistent with the purpose of setbacks.

Setback Notification

Section 506.703 of the rules requires that all livestock owners notify the Department of Agriculture and neighboring property owners in the setback area if they intend to build a new livestock facility for more than 50 animal units. I agree that this Section would be appropriate if it was voluntary, as requested by the Farm Group (PC 60 at 6). But to require such notification for all livestock owners with greater than 50 animal units, irregardless of animal type is over-regulation. There is no evidence in the record that there is a compelling public interest to require all livestock owners to go through this notification process. The record only supports a finding that this notification requirement should be required of new, large hog facilities. The rationale for this finding is explained in the following paragraphs.

Distinctions By Type and Size of Operation

The majority failed to take advantage of its clear authority under the LMFAct to adopt rules that "make distinctions for the type and size of livestock management and livestock management handling facilities and operations." (510 ILCS 77/55(c). In this proceeding the Board was told by many citizens including farmers, who live close to hog operations, that hog odor negatively impacts their enjoyment of life and property. Many others testified that they are concerned about new hog facilities being planned or constructed near their homes or communities. The legislative debate before enactment of the LMFAct also demonstrated that the primary impetus for the LMFAct's sponsors was the potential environmental impact of large hog facilities.

The major environmental concerns about large hog operations are potential contamination of ground or surface water, and odor. I agree with the additional safeguards against ground or surface water contamination contained in the majority's rules. However, until the Board distinguishes hog operations from other livestock operations in terms of odor, the Board will over-regulate large segments of the livestock industry in Illinois, without addressing the specific potential problems created by new large hog operations. The record in this proceeding, including the testimony of citizens and experts, demonstrates that hog odor is in a different class from other livestock odor, and should be regulated separately.

Opening Docket B

The majority opinion opens a Docket B in this proceeding to receive a proposal from the Department of Agriculture on financial assurance rules. The majority should have also placed the new sections not previously seen by the public into Docket B, and entertained proposals to make regulatory distinctions based on number and type of animal. For example, several new sections place specific administrative requirements on the Department of Agriculture. These rules would be better supported with additional testimony from the Department of Agriculture.

For these reasons, I respectfully dissent.

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G. Tanner Girard

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