

**ORIGINAL**

BEFORE THE  
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

CONCENTRATED ANIMAL FEEDING )  
OPERATIONS (CAFOs): PROPOSED ) DOCKET R12-23  
AMENDMENTS TO 35 ILLINOIS )  
ADMINISTRATIVE CODE )  
PARTS 501, 502 AND 504 )

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STATE OF ILLINOIS  
Pollution Control Board

Hearing held, pursuant to notice, on Tuesday, October  
16, 2012, at 10:00 a.m., at the St. Clair County  
Courthouse, 10 Public Square, Belleville, Illinois.

Before duly appointed Hearing Officer:  
MR. TIM FOX

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1 ILLINOIS POLLUTION CONTROL BOARD MEMBERS:

MR. TOM HOLBROOK, Chairman

2 DR. DEANNA GLOSSER

3 ILLINOIS POLLUTION CONTROL BOARD TECHNICAL UNIT:

4 MR. ANAND RAO

5 In behalf of Illinois Environmental Protection  
Agency:

MS. DEBORAH J. WILLIAMS

6 MS. JOANNE OLSON and

MR. DANIEL L. HEACOCK

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9  
10 In behalf of the Agricultural Coalition:

MS. STEPHANIE HAMMER and MR. JIM KAITSCHAK

11  
12 In behalf of Environmental Groups:

MS. KIM KNOWLES

Staff Attorney

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14 Champaign, Illinois 61820

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1 HEARING OFFICER: Good morning and  
2 welcome to this Illinois Pollution Control Board  
3 Hearing. My name is Tim Fox, and I'm the hearing  
4 officer for this proceeding entitled In The Matter of  
5 Concentrated Animal Feeding Operations (CAFOs)  
6 Proposed Amendments to 35 Illinois Administrative  
7 Code 501, 502, and 504. The Board Docket number for  
8 this rule-making is R12-23.

9 Also present today from the Board are,  
10 at my immediate left, Board Chairman Tom Holbrook,  
11 who is the lead Board member for this proceeding.  
12 And at his left, Board member Dr. Deanna Glosser. I  
13 also, of course, want to emphasize that at my right  
14 is from the Board's technical unit, Anand Rao.

15 The Environmental Protection Agency  
16 initiated this docket by filing a rule-making  
17 proposal on March 1, 2012. And then in an order  
18 dated March 15 of 2012, the Board accepted that  
19 proposal for hearing. The first hearing, of course,  
20 took place on August 21, 2012, in Springfield. A  
21 hearing officer order had set October 2, 2012, as the  
22 deadline to pre-file testimony for this second  
23 hearing today. I do want to note for the record that  
24 no participant has pre-filed testimony for this

1 hearing today.

2           However, we do have some other filings,  
3 and I want to address those in turn. First of all,  
4 on September 17, 2012, the Agency filed a motion to  
5 correct the transcript of the first hearing. And  
6 that listed 13 specific corrections to the 203-page  
7 transcript. The Board has not received any response  
8 to this motion. Does any participant wish to be  
9 heard on the motion to correct the first transcript?

10           (There was no response.)

11           HEARING OFFICER: Neither seeing nor  
12 hearing any, and after having reviewed the substance  
13 of that motion, the Agency's September 17 motion to  
14 correct the transcript is granted, and I will direct  
15 the Board's clerk to make that clear in the Board's  
16 docketing information, so that the corrections are  
17 clear to the participants in this proceeding.

18           Secondly, I want to note that on  
19 September 25 of 2012, the Agricultural Coalition  
20 filed a motion proposing amendments to the Agency's  
21 original March 1 rule-making proposal. That motion  
22 is directed to the Board in its entirety, and  
23 requests that the Board make changes in proceedings  
24 to first notice, which is a step that it will not be

1 taking until some later date. And consequently,  
2 there will be no action on that motion by the  
3 Agricultural Coalition today.

4 Third, I do want to stress that on  
5 October 9, 2012, the Agency filed post-hearing  
6 comments in response to questions that had been  
7 raised at the first hearing. I want to acknowledge  
8 that the Board did receive those and did place those  
9 into the record of its proceeding, and those are  
10 available through the clerk's office on-line, and I  
11 wanted to acknowledge the Agency's prompt response to  
12 that and their helpfulness in completing the record.

13 Fourth, also on October 9, 2012, the  
14 Environmental Groups -- and Ms. Knowles, you're  
15 representing them once again, I'm certain -- filed a  
16 motion requesting that the Hearing Officer extend the  
17 time to respond to the Agricultural Coalition's  
18 motion that had proposed amendments. Because the  
19 deadline to respond to that has not yet run, I did  
20 want to see if any of the participants wished, on the  
21 record, to respond to that motion here during the  
22 hearing today. Ms. Williams, I see you nodding, and  
23 I'll let you respond to that.

24 MS. WILLIAMS: Good morning. My name

1 is Deborah Williams on behalf of the Illinois  
2 Environmental Protection Agency. The Agency would  
3 like to ask the Agricultural Groups if they intend to  
4 present a witness to be questioned about aspects of  
5 their proposal at any of the hearings that are coming  
6 up, or if the proposal will just stand on its own.

7 HEARING OFFICER: Mr. Kaitschak, if we  
8 may turn to you to respond to that.

9 MS. HAMMER: My name is Stephanie  
10 Hammer, and I'm here on behalf of the Agricultural  
11 Coalition. And once we receive the questions, we'll  
12 be better able to answer whether we will be  
13 presenting witnesses to respond to them. At this  
14 time, we're uncertain as to whether we'll have  
15 witnesses.

16 MS. WILLIAMS: Okay. Well, with  
17 regards specifically to the Environmental Group's  
18 motion, they request that further action on the  
19 motion be suspended until after the record is  
20 closed. In general, I think the Agency is in support  
21 of that request. It would seem appropriate that  
22 comments, post-hearing comments addressing the motion  
23 be taken.

24 In addition, I think the Agency's

1 position on how we would respond will depend on  
2 whether there are witnesses where we can flesh out  
3 the intent and the meaning behind some of the  
4 proposals. I will be hard for us, in the absence of  
5 testimony on the proposal, to provide further  
6 testimony or answer questions or provide detailed  
7 responses to a proposal which there's been no  
8 testimony on. So we're going to, I guess, reserve  
9 for how, depending on what questions the Board has  
10 and what testimony the Agricultural Groups present,  
11 reserve for later our position on that.

12 HEARING OFFICER: Very good. And the  
13 response deadline, of course, has not run based on  
14 the filing date, and we can address that if you wish,  
15 Ms. Williams, before we adjourn today. Mr.  
16 Kaitschak, I saw you indicating that you wished to  
17 respond, as well.

18 MR. KAITSCHAK: Jim Kaitschak on behalf  
19 of the Ag Coalition Groups. I guess specifically to  
20 some of the issues raised by the Agency specifically  
21 on this is that part of our issue will be in  
22 determining how to answer the questions and who will  
23 testify in response to some of the questions that  
24 will be asked. So if we can get a flavor for what

1 those questions will be, then we can better determine  
2 who to have available.

3 HEARING OFFICER: Very good. Let's  
4 reserve ruling on that -- I'm sorry.

5 MS. HAMMER: I'd like to add one thing.  
6 I'd also just like to point out that some of the  
7 issues that were raised in our filing are legal  
8 issues. And to the extent that there's legal  
9 argument going between the parties, we won't need to  
10 be presenting any witnesses. We won't be presenting  
11 any lay witnesses to make legal argument. So to that  
12 extent, there won't be any witnesses on the legal  
13 arguments.

14 MS. WILLIAMS: But if the -- I mean, I  
15 don't -- I think, Mr. Kaitschak, I appreciate your  
16 attempt to be helpful, but he's sort of putting the  
17 proceedings backwards from how we've done things  
18 here. In general we've put testimony in the record  
19 and then the questions on the testimony. If the  
20 Hearing Officer wants to set a deadline for pre-filed  
21 questions and then the groups decide who to present  
22 as witnesses to answer them, we can consider that, as  
23 well. But I don't think it's really fair to say we  
24 should put our questions on the record and then you



1 can decide when you want to bring in witnesses to  
2 answer them.

3 MR. KAITSCHAK: Well, I guess --

4 MS. WILLIAMS: But Stephanie's point is  
5 well taken, as well. To the extent there are legal  
6 issues, we would expect that to be resolved in  
7 arguments and post-hearing comments after the  
8 hearings are closed.

9 HEARING OFFICER: Mr. Kaitschak, you  
10 had indicated you had something to say?

11 MR. KAITSCHAK: I can appreciate what  
12 Counsel is saying, but by the same token, our issues  
13 have been identified in our draft. So as such, if  
14 the Agency has questions specific to that draft, if  
15 they can be identified, it's --

16 MS. WILLIAMS: Would you like to try to  
17 answer them today? I'm prepared to ask them of you  
18 if you're ready to be the witness today.

19 MR. KAITSCHAK: It depends on the  
20 question, ma'am.

21 HEARING OFFICER: Very good. I'd like  
22 to reserve ruling on the motion to extend the  
23 deadline which was filed by the Environmental  
24 Coalition. And as I'd indicated in discussing

1 procedure before the hearing, the Board itself, on  
2 behalf of its members, has questions on the motion to  
3 amend the proposal, some of which are directed either  
4 to the Agency or to the Coalition or to both for  
5 their responses to those.

6 So perhaps after those are read into  
7 the record, clarified to the extent that the  
8 participants wish them to be clarified, we can  
9 address some of the issues that you've just discussed  
10 in responding to the Environmental Coalition's motion  
11 to extend that deadline. But Ms. Knowles, for the  
12 time being, that motion's response deadline has not  
13 run, and again, I will, at least for the moment, not  
14 be ruling on that request for an extension of the  
15 deadline. Anything further on that issue before I go  
16 on?

17 MS. KNOWLES: I'm just not clear. What  
18 is the response deadline for the motion?

19 HEARING OFFICER: A motion requesting  
20 action on the part of the Board or its hearing  
21 officer triggers a 14-day response deadline, which  
22 typically is only abbreviated in the case of  
23 prejudice or undue delay. And in this case, the  
24 filing triggered a 14-day period, which will expire,

1 I believe, next Tuesday. So there is still an  
2 opportunity for participants to respond to the  
3 request that you've filed.

4 Moving on then, we did have a fifth  
5 entry into the docket that I wanted to refer to.  
6 Also on October 9, 2012, the Board received pre-filed  
7 testimony for the hearing scheduled on the 23rd in  
8 Urbana from Dr. Ted Funk. I want only to note that  
9 that is in the record. It's accessible through the  
10 Board's clerk's office on-line, and I don't intend to  
11 address his testimony today, as he is expected to be  
12 available for cross examination and questioning at  
13 the hearing that's taking place next Tuesday, the  
14 23rd.

15 Although, as I had noted, the Board did  
16 not receive pre-filed testimony for this hearing, I  
17 do want to note for the record that there's a sheet  
18 inside the door, at which any person who had not  
19 pre-filed testimony could indicate that they wished  
20 to testify here today. Just before the hearing  
21 began, there was no name on it. So we will have no  
22 witnesses here today on the basis of either pre-filed  
23 testimony or appearing today with that testimony.

24 The Board, as I mentioned to the

1 participants, does have questions based upon the  
2 Agricultural Coalition's motion to amend the Agency's  
3 proposal. I'd like to turn to those in just a  
4 moment, so that they can be, as I said, made part of  
5 the record and be clarified as necessary by the  
6 persons to whom they are directed.

7 And then finally, after those  
8 questions, any persons -- Mr. Brinkman, you had  
9 signed in, indicating that you wished to comment.  
10 You and any others who appear will be able to do so,  
11 and we'll have you step up to the front and deliver  
12 that.

13 Just generally, of course, I want to  
14 note that this proceeding is governed by the Board's  
15 procedural rules. Under Section 104.426 of those  
16 rules, all information that is relevant and that is  
17 not repetitious or privileged will be admitted into  
18 the record. I do want to note that any questions  
19 that the Board poses today are intended solely to  
20 develop a clear and complete record and are not  
21 intended to indicate any prejudgment or decision on  
22 the proposal today.

23 I would ask, for the benefit of our  
24 court reporter, I think we'll have very little

1 difficulty making one another heard here, but if you  
2 could avoid talking at the same time as another  
3 person, we'll have the clearest possible transcript,  
4 and I know that she will appreciate your help.

5 Do we have any other issues to take up  
6 before the Board raises the questions that it has for  
7 the participants here today?

8 (There was no response.)

9 HEARING OFFICER: Neither seeing nor  
10 hearing any, let me begin those. I want to begin  
11 with the first question, of course. The Agricultural  
12 Coalition had proposed a new definition for the term  
13 "waters of the United States" to replace the  
14 definition of the term "navigable waters," which the  
15 Agency's proposal had sought to repeal.

16 First of all -- and this is directed  
17 chiefly at the Agency, Ms. Williams -- the  
18 definitions under Part 501 apply to Parts 501 through  
19 504, and the term "navigable waters," it does appear,  
20 is used in Section 503.101(b). And the Board would  
21 like the Agency specifically to clarify whether the  
22 definition of navigable waters should be retained in  
23 existing Section 501.325, and if not, whether Section  
24 503.101(b) should be opened and amended to replace

1 the term "navigable waters" with the definition of  
2 the term "waters of the United States." That was a  
3 lengthy question, Ms. Williams. Did I make that  
4 clear?

5 MS. WILLIAMS: Yes.

6 HEARING OFFICER: Very good. I also  
7 would like the Agency to comment on whether the  
8 definition that had been proposed in the Agricultural  
9 Coalition's motion is acceptable to the Agency, and  
10 if not, whether it would be possible to propose an  
11 alternative definition of that term that would  
12 reflect the Agency's intent in its proposal. The  
13 second question, Ms. Williams, whenever you're ready.

14 MS. WILLIAMS: Oh, I'm ready. And  
15 she'll get them. The court reporter will get them  
16 better than I will in my notes anyway, but go ahead.

17 HEARING OFFICER: But I didn't want to  
18 move on if you wished to clarify what I had asked in  
19 the first question.

20 MS. WILLIAMS: No, I think I  
21 understand. It's very clear.

22 HEARING OFFICER: Very good. Secondly,  
23 in Section 501.252, the Agricultural Coalition had  
24 requested that the Board use Iowa criteria for land

1 application to frozen ground rather than the  
2 Wisconsin criteria that the Agency had relied upon in  
3 drafting its proposal. And the Agricultural  
4 Coalition's motion, I believe, emphasizes that there  
5 are perhaps more similarities between Iowa and  
6 Illinois than there are between Illinois and  
7 Wisconsin. I think that's a fair summary of the  
8 position that they had expressed.

9 What the Board would request is that  
10 the Agency comment on whether the definition of  
11 frozen ground that was proposed in the Agricultural  
12 Coalition's motion is acceptable to the Agency. And  
13 I do have a follow-up to that.

14 MS. WILLIAMS: Go ahead.

15 HEARING OFFICER: And I want both,  
16 frankly the Agency and the Ag Coalition to respond to  
17 this specific question. The Agency's technical  
18 support document filed with its original proposal at  
19 page 39 states a primary concern with the land  
20 application to frozen ground, i.e. the risk of runoff  
21 of livestock waste into surface waters. I think  
22 that's a fair statement of the general intent behind  
23 that.

24 What the Board would like the

1 participants to explain is whether that risk or  
2 potential for livestock waste runoff is significantly  
3 different between ground that is frozen to a depth of  
4 one-half inch below the surface and ground that is  
5 frozen to a depth of two inches below the surface,  
6 and whether there has been any research or other data  
7 that could explain the different risks of that runoff  
8 from those two different scenarios.

9 MS. WILLIAMS: Okay. Do you want me to  
10 hold -- I mean, I think this might be a good point.  
11 Is that the end of that particular series of  
12 questions?

13 HEARING OFFICER: Yes, that's the end  
14 of question No. 2.

15 MS. WILLIAMS: I think this would be a  
16 good point for me to explain the Agency's issue with  
17 the request that we respond in Urbana. You know, I  
18 don't think it's appropriate to ask the Agency to  
19 provide a response to this definition where no  
20 testimony has been presented to support it, no  
21 opportunity to ask these types of questions of the  
22 proponent of this counterproposal.

23 If no testimony is presented, we  
24 certainly can address in our comments, or at a



1 subsequent hearing, we would be happy then to come  
2 back and respond after we've had a chance to ask  
3 questions or hear answers to the Board's questions.  
4 But that's my primary objection to agreeing to  
5 present new witnesses for these questions in Urbana.  
6 I don't know if that causes a problem for you, but I  
7 really want my concerns to be highlighted on the  
8 record.

9 HEARING OFFICER: So noted, Ms.  
10 Williams.

11 MS. WILLIAMS: Okay.

12 HEARING OFFICER: And I think that your  
13 position is clear, and I think it's understood. All  
14 right. Are we prepared to move on to the third of  
15 five questions?

16 The Agricultural Coalition had sought  
17 to change the Agency's definition of the term  
18 "livestock waste" at Section 501.295, specifically  
19 by deleting the phrase: "including but not limited  
20 to sludge and contaminated soils from storage  
21 structures."

22 And I'd like both the Agency and the  
23 Agricultural Coalition to respond effectively to the  
24 same question from a different perspective. The

1 Agency's intent, first of all, in including those  
2 elements in the definition of the term, and as  
3 specifically as they can be, the Agricultural  
4 Coalition's intent in striking those elements from  
5 the term.

6 And also, I would appreciate if the  
7 Agency would respond to whether the change as  
8 proposed by the Agricultural Coalition is acceptable  
9 to the Agency. Any clarification or follow-up I can  
10 offer?

11 MS. WILLIAMS: No, thank you.

12 HEARING OFFICER: Mr. Kaitschak?

13 MR. KAITSCHAK: Yes, Mr. Fox. It's  
14 simply in this particular instance, our intention was  
15 to mirror the federal regulation and incorporate --

16 HEARING OFFICER: If you want to  
17 testify about that, Mr. Kaitschak, we'd want to swear  
18 you in. Would you like to be sworn in to respond to  
19 that in the hearing today on the record?

20 MR. KAITSCHAK: That's fine.

21 HEARING OFFICER: Very good.

22 (Mr. Jim Kaitschak was sworn in.)

23 HEARING OFFICER: Mr. Kaitschak, thank  
24 you for letting me interrupt you. You were prepared,

1 I think, to respond to the Board's question.

2 MR. KAITSCHAK: Yes. Just simply, our  
3 intention here was to mimic the federal regulation as  
4 it was discussed and testimony at the initial hearing  
5 that the Agency's intention was primarily to let the  
6 federal regulation apply here to the state. The  
7 effort here is to simply carry over and lift the  
8 federal definition to the state regulations, as well,  
9 which we're adding in the last sentence with regard  
10 to stormwater. That's all it's intended to do and  
11 provide that level of clarity, which I believe, if I  
12 recall correctly, that Mr. Sofat indicated in his  
13 testimony was to do precisely what the federal  
14 regulation was. So that's the intention.

15 HEARING OFFICER: Very good. Thanks,  
16 Mr. Kaitschak.

17 MS. WILLIAMS: Can I ask a follow-up  
18 question?

19 HEARING OFFICER: Please go ahead, Ms.  
20 Williams.

21 JIM KAITSCHAK,  
22 having been first duly sworn under oath, was examined  
23 and testified as follows:

24 EXAMINATION CONDUCTED BY MS. WILLIAMS:

1 Q. Mr. Kaitschak, do you know, one way or  
2 another, whether the basis for this reference may  
3 have come from the LMFA?

4 A. I think the basis for the vast majority  
5 of our changes came from the LMFA, so yes.

6 Q. So my question was whether the  
7 terminology in the Agency's proposal was intended to  
8 reference requirements from the LMFA?

9 A. I can't speak for the Agency.

10 Q. Okay. So you believe that your  
11 proposal would be more consistent with the LMFA?

12 A. I believe our proposal is more  
13 consistent with the federal regulations as trying to  
14 mimic the federal change and the CAFO rights that we  
15 have and lift it here to Illinois.

16 Q. What about LMFA?

17 A. And the Clean Water Act. I can address  
18 that later.

19 MS. WILLIAMS: Okay.

20 HEARING OFFICER: Any further  
21 questions, Ms. Williams? Any follow-up?

22 MS. WILLIAMS: No. I'm sorry. That's  
23 all I have.

24 HEARING OFFICER: Great.

1 MS. WILLIAMS: Wait. Oh, I'm sorry. I  
2 have one other question I should ask.

3 HEARING OFFICER: Please go ahead.

4 MS. WILLIAMS:

5 Q. The terminology "livestock waste," the  
6 definition that we were talking about in this  
7 proposal is the definition of the term "livestock  
8 waste"; is that correct?

9 A. (Nodding head.)

10 Q. Can you tell the Board --

11 HEARING OFFICER: I'm sorry, Mr.  
12 Kaitschak. If you can answer orally, thanks very  
13 much.

14 A. Yes. Sorry.

15 Q. Can you just tell the Board whether the  
16 federal rule uses the term "livestock waste"?

17 MR. KAITSCHAK: Let me get back to you  
18 on that. I mean, we're getting into additional  
19 questions here, Mr. Fox, that I prefer to have  
20 additional background information before I respond.

21 HEARING OFFICER: We do have three  
22 hearings on the schedule, and we can address that,  
23 including the issues that you would raise, Ms.  
24 Williams.

1 MS. WILLIAMS: I think that's fair, but  
2 I think we should maybe get some confirmation about  
3 whether they will have witnesses at those hearings to  
4 answer questions. If this is my only chance to ask,  
5 that's the reason I'm asking. So it's not been made  
6 clear to me that I will have another chance.

7 HEARING OFFICER: I think that makes  
8 the most sense. And I appreciate your point. I'm  
9 not unclear, Ms. Williams. Why don't we go through,  
10 there are two more questions that the Board has, and  
11 perhaps it will be most helpful to get all of those  
12 into the record and clarified to the extent that we  
13 can, and then we can take up some of the procedural  
14 issues. But did I see a --

15 MS. HAMMER: I just wanted to state for  
16 the record that we will have legal counsel prepared  
17 to address the legal arguments that are -- we're  
18 getting into some legal argument here, and we'll have  
19 counsel prepared, and we'll do legal briefing as to  
20 legal arguments.

21 HEARING OFFICER: Very good, very  
22 good. Thank you. Why don't we turn to the fourth  
23 question, if you're prepared for those.

24 MS. WILLIAMS: Oh, absolutely.

1 HEARING OFFICER: Great. Did you need  
2 a moment, Ms. Williams?

3 MS. WILLIAMS: No. I'm fine.

4 HEARING OFFICER: Okay. I note that  
5 the Agricultural Coalition has proposed the addition  
6 of a new Section 502.107 to address non-discharging  
7 CAFOs. And that proposed new section in the motion  
8 sets forth that an NPDES permit is not required for a  
9 facility which is not discharging or has not received  
10 livestock.

11 First of all, and this is directed  
12 chiefly to the Agency, if the Agency would respond  
13 whether that proposed new section that appears in the  
14 Agricultural Coalition's motion reflects the Agency's  
15 intent to require NPDES permits for CAFOs that  
16 discharge into the waters of the United States.

17 MS. WILLIAMS: Can you repeat that?

18 HEARING OFFICER: Yes, absolutely so.  
19 If the Agency would respond whether the proposed new  
20 Section 502.107 in the Agricultural Coalition's  
21 motion reflects the Agency's intent to require NPDES  
22 permits for CAFOs that discharge pollutants into  
23 waters of the United States.

24 MS. WILLIAMS: So the Board is asking

1 the agency to interpret the Agricultural Group's  
2 proposal and whether it meets our intent in our  
3 proposal?

4 HEARING OFFICER: Correct.

5 MS. WILLIAMS: Okay.

6 MR. RAO: Basically whether it's  
7 acceptable to you.

8 MS. WILLIAMS: Okay. That I  
9 understand.

10 HEARING OFFICER: The practical voice  
11 has spoken more clearly than mine. And then  
12 secondly, to clarify whether an NPDES permit is  
13 required only if a discharge is ongoing, and if so,  
14 how intermittent discharges would be addressed under  
15 a section such as that proposed by the Agricultural  
16 Coalition.

17 MS. OLSON: Can you repeat that?

18 HEARING OFFICER: Yes. Clarify whether  
19 an NPDES permit is required only if the discharge is  
20 ongoing, and if so, explain how intermittent  
21 discharges would be addressed under the proposed  
22 Section 502.107 that is offered in the Agricultural  
23 Coalition's motion.

24 MS. HAMMER: I'm not sure if it's



1 clear. I just wanted to set forth that the proposed  
2 language is -- I think that we're on the same page  
3 here on the part that we're dealing with, but the  
4 proposed languages pertain to CAFOs that are not yet  
5 constructed and don't have animals. So to that  
6 extent, we're not dealing with animal involvement.  
7 So there's no CAFOs essentially is the point that  
8 we're setting forth with that part of the definition,  
9 so I just wanted to be clear about that.

10 MS. WILLIAMS: You mean for the whole  
11 section or just for the last phrase?

12 MS. OLSON: Would it be helpful to read  
13 what they propose into the record?

14 HEARING OFFICER: Ms. Olson, I think  
15 that sounds like a good idea, and I have a copy of  
16 the motion here. And Mr. Kaitschak, I'm sure you'll  
17 correct me if I'm mistaken, but page No. 6 of the  
18 Agricultural Coalition's motion requested the  
19 addition of a new Section 502.107, providing in its  
20 entirety that "No NPDES CAFO permit shall be required  
21 for any facility which is not discharging or has not  
22 yet received livestock."

23 MR. KAITSCHAK: (Nodding head.)

24 MS. WILLIAMS: Okay. So Ms. Hammer,

1 would you agree that part of that definition does  
2 also, or part of that proposal also refers to  
3 facilities with animals; correct?

4 HEARING OFFICER: Mr. Kaitschak has  
5 been sworn. Are you the appropriate witness to  
6 respond to that question?

7 MS. HAMMER: I think this is getting  
8 back into the questions that we'd like to take back  
9 and consult or at least see in writing or deal with  
10 after we come together and discuss, in order to put  
11 forth a clear answer.

12 MS. WILLIAMS: And I will just say  
13 again on the record, the Agency is not prepared to  
14 present additional testimony or respond to the  
15 Board's questions on these issues until we have a  
16 chance to flesh out the meaning from the Agricultural  
17 Groups of what it is they would like the Board to  
18 consider. Then we would be more than happy to  
19 respond at that point.

20 HEARING OFFICER: So noted, Ms.  
21 Williams. And then the Board has one fifth and final  
22 question. And I'll use Mr. Rao's terminology, I  
23 think, to clarify. Please comment on whether the  
24 Agricultural Coalition's proposed changes to the

1 nutrient management plan requirements for unpermitted  
2 large CAFOs is acceptable to the Agency.

3 And in this regard, if the Agency would  
4 comment on whether the nutrient management plan  
5 requirements that are applicable to unpermitted large  
6 CAFOs are identical, the extent to which they are  
7 identical to those under the Livestock Management  
8 Facilities Act Regulations at Part 8, Illinois  
9 Administrative Code 900.

10 MS. WILLIAMS: Thank you. I got that.  
11 One thing I can say about this on the record at this  
12 time, also, is that I have reviewed quickly Mr.  
13 Funk's testimony for Urbana, and I think he does get  
14 into this topic a little bit, and I think he will  
15 actually be a very helpful technical witness for us  
16 to ask him some questions that will help the Agency  
17 come to a position which we don't at this time  
18 necessarily have on the proposal. So hopefully after  
19 Urbana, we can go back and consider the Board's  
20 question at that time, if that's acceptable to you.

21 HEARING OFFICER: That actually comes  
22 to the end of the Board's questions. So our intent  
23 was to get those into the record, get the scope of  
24 them established for you. And having exhausted

1 those, I hope that we have done so.

2 I had posted sheets on which  
3 individuals could indicate that they wished either to  
4 testify here today or offer a comment. I do notice  
5 that we've had some people arrive after the hearing  
6 began this morning. I mention those only so that if  
7 you did arrive after the hearing began, you knew that  
8 those were there and could indicate that you wished  
9 either to testify or offer a comment.

10 MS. WILLIAMS: Mr. Hearing Officer,  
11 these folks are some of our field staff, if you'd  
12 like them to introduce themselves to the Board.

13 HEARING OFFICER: I think that would be  
14 fine, Ms. Williams. Let's have them do that.

15 MR. BRIAN RODELY: I'm Brian Rodely.  
16 I'm with Illinois EPA, Marion Regional Office.

17 MS. WILLIAMS: Can you spell your name,  
18 Brian, for the court reporter.

19 MR. BRIAN RODELY: Brian, B-R-I-A-N,  
20 last name R-O-D-E-L-Y.

21 MR. JOE STITELY: I'm Joe Stitely, and  
22 I'm with Illinois EPA out of our Marion Regional  
23 Office. Last name is spelled S-T-I-T-E-L-Y.

24 MR. BRUCE RODELY: I'm Bruce Rodely out

1 of Marion Regional Office, and we are brothers. Last  
2 name is spelled R-O-D-E-L-Y.

3 HEARING OFFICER: Okay. Ms. Williams,  
4 thanks for introducing them. Gentlemen, it looks as  
5 if you are not interested in testifying or offering a  
6 comment today, but we're monitoring our course here.  
7 Seeing that that's the case, we can move on in just a  
8 moment.

9 Mr. Rao has reminded me that I had  
10 overlooked one question, and I apologize for  
11 reopening that for a sixth, Ms. Williams. I don't  
12 get better at remembering things, I'm afraid. One of  
13 the issues that the motion to amend the Agency's  
14 proposal had raised was the possibility of the appeal  
15 of an Agency determination that a facility is a  
16 CAFO.

17 And I wanted to ask the Agency to  
18 respond to that, particularly with regard to this  
19 hypothetical. If the designation is not appealable  
20 and triggers, in effect, an obligation to -- or I  
21 shouldn't say obligation; please strike that --  
22 triggers a desire to apply for a permit, a CAFO NPDES  
23 permit to avoid enforcement for failure to have one  
24 that the Agency believes is necessary. And if that

1 permit is issued exactly as it is applied for, does  
2 that mean, under Section 40 of the Act, which allows  
3 for appeal of a denial or a grant with conditions,  
4 that that issuance of a permit is essentially  
5 unappealable?

6 MS. OLSON: Do you mean unappealable?

7 HEARING OFFICER: I beg your pardon?

8 MS. OLSON: I'm sorry. I didn't hear  
9 you. Did you say unappealable?

10 HEARING OFFICER: Unappealable, yes,  
11 whether the appeal rights under Section 40 would not  
12 apply to a permit that was granted precisely as it  
13 was applied for.

14 MS. WILLIAMS: Can you just walk  
15 through the fact pieces of your hypothetical?

16 HEARING OFFICER: Yes. I realize that  
17 I was not perfectly clear. The Agency issues a  
18 determination that a facility is a CAFO, and that in  
19 order to avoid an enforcement case based upon failure  
20 to have a permit that the Agency believes is  
21 required, a facility applies for a permit and  
22 receives it just as it is requested or applied for.

23 And if that occurs, acknowledging that  
24 that's a hypothetical, are they left without appeal

1 rights under Section 40 that addresses the denial or  
2 the grant of a permit with conditions? And forgive  
3 me for adding No. 6. I apologize that I moved on a  
4 little too quickly.

5 MS. WILLIAMS: That's okay. Thank  
6 you.

7 HEARING OFFICER: That exhausts the  
8 Board's questions. Do the participants want a moment  
9 or two? I notice that they're communicating amongst  
10 themselves a bit.

11 MS. WILLIAMS: I'm sorry. Do we want  
12 more time?

13 HEARING OFFICER: Ms. Williams, I  
14 notice that the Ag Coalition and the Agency were  
15 speaking with themselves. If you'd like to take a  
16 break or just hold for a moment, we can let you do  
17 that before we move on.

18 MS. WILLIAMS: Can we go off the record  
19 just for a couple of minutes?

20 HEARING OFFICER: Yes, if we can go off  
21 the record. Thanks very much.

22 (A break was taken.)

23 HEARING OFFICER: The Agricultural  
24 Coalition has indicated that in response to the

1 Board's sixth question relating to designation of  
2 CAFOs, that you had some follow-up. Am I correct on  
3 that?

4 MS. HAMMER: Yes. I just have one area  
5 of clarification, that we thought it might be going  
6 down a road that we were not sending everyone down  
7 with this proposal. We're not addressing a question  
8 of whether something is a CAFO or is not a CAFO. The  
9 question regarding the appeal rights would be once a  
10 CAFO must apply for a permit, not the designation in  
11 the first place whether it's a CAFO.

12 MS. WILLIAMS: So you're not asking for  
13 appeal rights for the designation process, or you  
14 are?

15 HEARING OFFICER: Mr. Kaitschak, did  
16 you want to --

17 MR. KAITSCHAK: Just because, based on  
18 the rules as they've been laid out to this point,  
19 just because something is a CAFO does not necessarily  
20 mean it has to have a permit.

21 MS. WILLIAMS: Okay.

22 MR. KAITSCHAK: So our issue is  
23 specifically related to clarifying that those farms  
24 that would need to have a permit and an appeal



1 process that would be corresponding to those, once  
2 they're designated to have a permit requested.  
3 That's specifically what the issue's trying to  
4 address.

5 MS. WILLIAMS: So are you -- can I ask  
6 a clarifying question?

7 HEARING OFFICER: Please go ahead, Ms.  
8 Williams.

9 MS. WILLIAMS: I'm not sure I -- I'm  
10 just really not sure I'm understanding, so let me  
11 just -- this is purely for my benefit and hopefully  
12 the Board's. Are you saying that the concern is that  
13 once a CAFO is designated, that the Agency not then  
14 require them to get a permit? That it's okay to be  
15 designated without appeal rights, but if we say  
16 you're designated and then you must apply for a  
17 permit, that you're looking for appeal rights at that  
18 point?

19 MR. KAITSCHAK: The question that we  
20 raise is specifically related to whether or not a  
21 farm needs to have a permit. And if you are saying  
22 that they need to have a permit, what's their appeal  
23 rights according to that requirement that you're  
24 addressing to them?

1 MS. WILLIAMS: So it's not the  
2 designation itself that you're concerned about; it's  
3 appealing?

4 MR. KAITSCHAK: It's whether or not  
5 they need to have a permit.

6 MS. WILLIAMS: Thank you.

7 HEARING OFFICER: Ms. Williams, any  
8 further clarification?

9 MS. WILLIAMS: One thing I will just  
10 say again related to the issue of the Agency's  
11 ability to respond to the Board's questions. This,  
12 of all the issues raised in the motion, I think is  
13 one that we're going to need to consult with USEPA  
14 about their feelings on the language. So it probably  
15 will take us longer to get back on this issue than  
16 some of the others. But we certainly will get back  
17 with a position as soon as we're able to.

18 HEARING OFFICER: So noted, Ms.  
19 Williams. Thank you. Anything further on the part  
20 of the Agricultural Coalition? Very well. As we had  
21 spoken about procedures in going off the record, Mr.  
22 Brinkman, we've come to a point at which we can take  
23 your comment into the record. We've got a podium  
24 here and a microphone, which will help broadcast your

1 voice. And if the court reporter's ready, we can  
2 have you begin, sir.

3 MR. GERALD BRINKMAN: Okay. Thank you  
4 very much. I appreciate the Pollution Control Board  
5 giving me the opportunity to speak here. Obviously,  
6 everything that's been told before is way outside my  
7 league. My name is Gerald Brinkman. I'm a farmer  
8 from Carlyle, Illinois. I farm about 1,800 acres of  
9 corn, soybeans, and wheat with my brother. In the  
10 past, my farming operations had a feed lot that  
11 finished out hogs, a farrow to finish operation. At  
12 one time, we had sheep, and my dad even had chickens  
13 when I was real little.

14 Right now the extent of my livestock  
15 operation is a small cow/calf herd that I started a  
16 couple of years ago with my daughter for a 4-H and  
17 FFA project, which means that once again I'm  
18 interested in issues like this.

19 I serve on the Illinois Farm Bureau  
20 Board of Directors. I have for the last eight  
21 years. Farm Bureau is the largest farm organization  
22 in the state, with about 80,000 members. I also  
23 represent their interest on the Prairie Farms Board  
24 of Directors. Farmers have a commitment to

1 environmental responsibility. We've done this  
2 forever.

3           Years ago, we started doing a lot of  
4 things on our own to earn checkoff activities and  
5 research at college, as we're learning new and better  
6 ways to do this. Best management practices, soil and  
7 water conservation, and a new word that's come out in  
8 recent years called sustainability. I realize that  
9 means different things to different people, but to  
10 me, it means being able to continue to farm and leave  
11 my land in a better condition than I did in the past,  
12 and also to produce more from that land with less  
13 inputs. And I think that's very important.

14           As a livestock farmer, I know I'm a  
15 member of the community, and I've got to be a good  
16 neighbor to everybody else. If they don't like the  
17 odor or if my livestock gets out, that's going to  
18 cause problems, so I certainly try to take care of  
19 that. But I think I've got a pretty strong track  
20 record on doing that. When I haul manure, I try to  
21 do responsible things, spread away from anybody's  
22 house and do it, incorporate it as soon as possible.  
23 I realize that we're held to a zero discharge  
24 situation, and I certainly understand the reason for

1 that.

2 Grain farming and livestock farming go  
3 together. We raise feed for ourselves. We also sell  
4 corn and hay and stuff to other farmers, too. And we  
5 need regulations that make sense and that are  
6 economically reasonable. My daughter and I, we've  
7 got eight cow breeding females. That's not very  
8 much. We can't spend a whole lot of money trying to  
9 put in some big expensive system, because we just  
10 don't have the numbers. And everybody seems to like  
11 to see small farmers. Well, those small farmers have  
12 to be able to do something that makes sense and that  
13 we can understand.

14 I also represent Prairie Farms Dairy,  
15 and there's a lot of dairy farmers in this state that  
16 are what I would consider small farmers. They milk  
17 50 to 100 cows twice a day every day. And if  
18 something, if new regulations come in that are too  
19 expensive or don't make common sense, you know, a lot  
20 of times the first thing you think about is maybe I  
21 just need to get out of this. And I don't think  
22 that's what we as society want. We need those  
23 people, and we need what they produce.

24 Livestock is a significant economic

1 driver in Illinois, about 5 percent of our economy  
2 and about \$27 billion. It provides income for grain  
3 farmers and business for grain farmers, ethanol and  
4 biodiesel plants, feed mills, meat processors, dairy  
5 processors, and related businesses.

6 I would like to hope that the Board  
7 could have a rule regarding NPDES permits for CAFOs  
8 that would mirror the federal policy and respect the  
9 Livestock Management Facility Act standards. That  
10 was something that I can remember being part of that  
11 was implemented, and I think it's been good for  
12 agriculture, and it's helped us be more responsible  
13 and sustainable in the way we produce.

14 So in closing, I would hope that the  
15 rule could be reasonable, economically feasible, and  
16 parallel the federal policy, something that's  
17 cost-effective and something that makes common  
18 sense. Thank you very much.

19 HEARING OFFICER: Mr. Brinkman, thank  
20 you for your comment, which is appreciated, and of  
21 course, is now in our record today. I do again see  
22 the sign-in sheets for both witnesses and commenters,  
23 and I see no additional names, nor has anyone else  
24 appeared. So for the record, I think we have wrapped

1 up all of the comments with Mr. Brinkman's, and  
2 again, we thank him for that.

3 I think we have come to the point where  
4 we would most profitably go off the record to talk  
5 about procedural issues pertaining to the next couple  
6 of hearings. Was there anything that the  
7 participants wanted to take care of on the record  
8 before we do that?

9 (There was no response.)

10 HEARING OFFICER: Not seeing any  
11 indication that they do, why don't we go off the  
12 record then for a moment or two.

13 (Discussion held off the record.)

14 HEARING OFFICER: The participants did  
15 go off the record to discuss procedural issues  
16 briefly, specifically with regard to the upcoming  
17 schedule of hearings and the order of proceedings at  
18 them. The Board is appreciative that Mr. Kaitschak,  
19 on behalf of the Agricultural Coalition, will make  
20 available at the scheduled hearing next week, the  
21 23rd in Urbana, a witness or witnesses, as they see  
22 fit, to respond to questions raised by their motion  
23 to amend the Agency's proposal.

24 And I know the Board appreciates your

1 help in developing a clear and complete record for  
2 decision on that motion language, and that decision  
3 is, of course, requested before the Board goes to  
4 first notice after the conclusion of the hearings.

5 Ms. Williams, on behalf of the Agency,  
6 had indicated that to the extent they have a response  
7 to the testimony in support of that motion, that the  
8 Agency's witnesses would be available at the now  
9 scheduled hearing in November in Jo Daviess County to  
10 offer their testimony in response to it.

11 And Ms. Knowles, as well, had indicated  
12 that the Environmental Coalition is today filing for  
13 the hearing in DeKalb on October 30 testimony in  
14 support of its witnesses and its own proposal to  
15 amend the Agency's original rule-making proposal.

16 And I again appreciate the information  
17 that you shared and your flexibility in doing so. As  
18 I stressed, I think that will help all of the  
19 participants and the Board make the best use of the  
20 time available at the five hearings that we have  
21 scheduled. Do we have any questions about that  
22 before we move on to a quick housekeeping issue?

23 (There was no response.)

24 HEARING OFFICER: Great. I do want to



1 note that under Section 27(b) of the Environmental  
2 Protection Act, the Board must request that the  
3 Department of Commerce and Economic Opportunity, or  
4 DCEO, conduct an economic study of proposed rules  
5 before the Board adopts rules. The Board then must  
6 either make that economic impact study or the  
7 department's explanation for not conducting one  
8 available to the public at least 20 days before the  
9 hearing.

10 In a letter of March 2012, the Board's  
11 chairman, Tom Holbrook, requested the DCEO conduct an  
12 economic study of this Agency rule-making proposal.  
13 The Board specifically requested a response, but to  
14 date, has not received one. Is there anyone who  
15 would like to testify regarding the Board's request  
16 for a study and DCEO's lack of response to date?

17 (There was no response.)

18 HEARING OFFICER: Neither seeing nor  
19 hearing any, I do want to note that no additional  
20 persons have appeared and that we have exhausted the  
21 comments that participants sought to offer.

22 The third hearing in this docket will  
23 take place exactly as scheduled, on Tuesday, October  
24 23, in Urbana. And the clerk's office on-line

1 includes the hearing officer order that set that. It  
2 includes the building name, address, and I believe  
3 even parking information. The deadline to pre-file  
4 testimony for that hearing passed on October 9, and  
5 as I noted for the record earlier in this hearing,  
6 the Board has received timely pre-filed testimony by  
7 Dr. Ted Funk of the University Extension Service.

8 The fourth hearing will take place  
9 again as scheduled, on Tuesday, October 30, in  
10 DeKalb, and the deadline to pre-file testimony for  
11 that is today, October 16. Those filings with the  
12 Board, whether paper or electronic, must also be  
13 served on the hearing officer and participants on the  
14 service list. And you can please check with the  
15 Board's clerk to ensure that you have the most  
16 current version of that list. Are there any  
17 questions about procedural aspects of the  
18 rule-making?

19 (There was no response.)

20 HEARING OFFICER: Neither seeing nor  
21 hearing any, is there any reason not to adjourn at  
22 this point?

23 (There was no response.)

24 HEARING OFFICER: I'm clearly not

1 seeing nor hearing any reason not to adjourn. Let me  
2 thank all of those of you who have participated and  
3 helped the Board develop a clear record for this and  
4 for your comments, as well. We are adjourned, and I  
5 suspect that we will see many, if not all of you, one  
6 week from today in Urbana. Thanks very much.

7 (The proceedings concluded at  
8 11:05 a.m.)

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1 STATE OF ILLINOIS )

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3 COUNTY OF JACKSON )

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6 I, Sharon Valerius, a Freelance Court  
7 Reporter for the State of Illinois, do hereby certify  
8 that I reported in machine shorthand the hearing  
9 before the Illinois Pollution Control Board held on  
10 October 16, 2012, at 10:00 a.m., at the St. Clair  
11 County Courthouse, 10 Public Square, Belleville,  
12 Illinois; that I thereafter caused the foregoing to  
13 be transcribed into computer-aided transcription,  
14 which I hereby certify to be a true and accurate  
15 transcript of the same.

16  
17 Dated this 22nd day of October, 2012.

18  
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21  
22 \_\_\_\_\_  
23 FREELANCE COURT REPORTER  
24

<p style="text-align: center;"><b>A</b></p> <p><b>abbreviated</b> 10:22</p> <p><b>ability</b> 34:11</p> <p><b>able</b> 6:12 12:10 34:17 36:10 37:12</p> <p><b>about</b> 6:4 18:17 20:16 21:6 22:2 25:9 27:11 34:2 34:14,21 35:8,22 37:20 38:1,2 39:5 40:21 42:17</p> <p><b>absence</b> 7:4</p> <p><b>absolutely</b> 22:24 23:18</p> <p><b>acceptable</b> 14:9 15:12 18:8 24:7 27:2,20</p> <p><b>accepted</b> 3:18</p> <p><b>accessible</b> 11:9</p> <p><b>according</b> 33:23</p> <p><b>accurate</b> 44:14</p> <p><b>acknowledge</b> 5:7 5:11</p> <p><b>acknowledging</b> 30:23</p> <p><b>acres</b> 35:8</p> <p><b>Act</b> 20:17 27:8 30:2 38:9 41:2</p> <p><b>action</b> 5:2 6:18 10:20</p> <p><b>activities</b> 36:4</p> <p><b>actually</b> 27:15,21</p> <p><b>add</b> 8:5</p> <p><b>adding</b> 19:9 31:3</p> <p><b>addition</b> 6:24 23:5 25:19</p> <p><b>additional</b> 21:18,20 26:14 38:23 41:19</p> <p><b>address</b> 4:3 7:14 10:9 11:11 16:24 20:17 21:22 22:17 23:6 33:4 42:2</p> <p><b>addressed</b> 24:14,21</p> 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