

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

STATE OF ILLINOIS  
Pollution Control Board

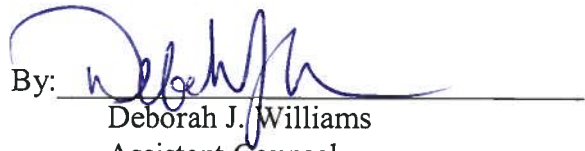
**NOTICE OF FILING**

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board ILLINOIS EPA'S PRE-FILED ANSWERS TO BOARD QUESTIONS POSED AT SECOND HEARING, a copy of which is herewith served upon you.

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Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:   
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DATED: November 7, 2012

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**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

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**ILLINOIS EPA'S PRE-FILED ANSWERS TO BOARD QUESTIONS  
POSED AT SECOND HEARING**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by and through its counsel, and pursuant to requests of the Hearing Officer in this proceeding at the October 16, 2012 hearing, hereby submits its responses to the questions posed by the Board in the above captioned rule making. In support thereof, the following statements are made:

1. On September 25, 2012, the Agricultural Coalition (consisting of the Illinois Pork Producers Association, the Illinois Beef Association, the Illinois Milk Producers Association and the Illinois Farm Bureau) filed a motion with the Board to amend the Agency's rulemaking proposal in the above-captioned rulemaking proceeding.

2. At the October 16, 2012 hearing held in Belleville, Illinois on the Agency's proposal, the Board posed several questions to the Agency and the Agricultural Coalition regarding the Agricultural Coalition's motion.

3. The Agricultural Coalition provided some limited responses to the Board's questions at the October 16<sup>th</sup> hearing and agreed to present a witness or witnesses at the October 23, 2012 hearing in Urbana to address the remaining questions.

4. At the Urbana hearing, the Agricultural Coalition presented one witness, Claire Manning of the law firm Brown, Hay & Stevens, to complete the responses to the Board's questions. In her testimony, Ms. Manning also indicated that the Agricultural Coalition was relying on the testimony of Dr. Ted Funk, of the University of Illinois Extension Service, for the technical responses to the Board's questions. October 23, 2012 Hearing Transcript at pp. 138-140. Dr. Funk had pre-filed testimony in advance of the October 23<sup>rd</sup> hearing and graciously made himself available for extensive cross-examination by the parties and the Board on that date.

5. The Agency agreed to respond to the Board's questions at the November 11, 2012 hearing in Elizabeth, Illinois in this proceeding. The hearing officer questions and Agency responses are included as paragraphs (A) through (I) below.

A) The definitions under Part 501 apply to Parts 501 through 504, and the term "navigable waters," is used in Section 503.101(b). The Board asked the Agency to clarify whether the definition of navigable waters should be retained in existing Section 501.325, and if not, whether Section 503.101(b) should be opened and amended to replace the term 'navigable waters' with 'waters of the United States.'" October 16, 2012 Hearing Transcript at p. 13.

**The definition of navigable waters in Section 501.325 specifically references the definition of the term found in 40 C.F.R. §125.1 (p). That federal regulation has been repealed by USEPA. The Agency does not believe it is acceptable to continue to reference this outdated, repealed federal definition for any purpose. While the Agency would not directly object to the Board's suggestion of replacing the term "navigable waters" in Part 503 with the term "waters of the United States," we are concerned that opening up Part 503 may raise additional questions and concerns that would delay the outcome of the rulemaking. Part 503 has not been updated since 1978 and potentially has other provisions that are out of date which have not been considered or evaluated.**

B) The Agency was asked to comment on whether the definition of "waters of the United States" proposed in the Agricultural Coalition's motion is acceptable to the

Agency, and if not, whether it would be possible to propose an alternative definition of that term that would reflect the Agency's intent in its proposal. October 16, 2012 Hearing Transcript at p. 14.

**As Illinois EPA indicated in response to the Board's pre-filed question 26, the Agency did not believe that it was necessary for these regulations to define the term "waters of the United States." That term was defined by USEPA in 40 C.F.R. §122.2, but the current federal definition does not reflect subsequent federal court cases, including U.S. Supreme Court precedent. USEPA has been developing guidance on the definition of waters of the United States and is also evaluating whether to propose a regulation clarifying the definition of the term. Illinois EPA believes it would be premature to attempt to define the term "waters of the United States" while these efforts by USEPA are ongoing. The imprecise definition proposed by the Agricultural Coalition does not add further clarity to the proposal and therefore is unnecessary and could cause confusion.**

C) The Board requested that the Agency comment on whether the definition of "frozen ground" that was proposed in the Agricultural Coalition's motion is acceptable to the Agency. October 16, 2012 Hearing Transcript at p. 15.

**In evaluating the definition of the term "frozen ground" in the Agency's proposal, it is important to keep in mind how the term is used in the substantive regulation. Contrary to statements made in the Motion by the Agricultural Coalition, the Agency's proposal does not prohibit surface application when the ground is frozen. Motion at p. 3. Rather, the proposal places significant restrictions and limitations on the practice to ensure that it is avoided and that the risks are minimized.**

**As explained in Dr. Funk's testimony, it is expected that when the ground is frozen to a depth of the first two inches or less injection and in many cases incorporation of manure are still practicable. October 23, 2012 hearing transcript at pp. 20 and 61. One of the goals of the Agency's proposal is to encourage and provide incentives to conduct injection or incorporation, rather than surface application without incorporation, whenever possible. Changing the definition of "frozen ground" would seem to eliminate the incentive in the Agency's proposal to use injection or incorporation when the ground conditions still allow for these practices and would instead encourage surface application in high risk conditions. The Agency would not support the Agricultural Coalition's proposal if it would have that result.**

D) Is the risk or potential for livestock waste runoff significantly different between ground that is frozen to a depth of one-half inch below the surface and ground that is frozen to a depth of two inches below the surface? Is there any research or other data that could explain the different risks of that runoff from those two different scenarios? October 16, 2012 Hearing Transcript at p. 16.

**While the Agency is not aware of data that precisely looks at the issue of frozen ground to a degree that would allow a distinction between ½ inch and 2 inches, it seems that Dr. Funk’s testimony was still quite helpful on this issue. October 23, 2012 hearing transcript at pp. 32-33, 59-61. The difference between the two scenarios is not primarily whether more waste could infiltrate the soil and therefore there would be less runoff. The distinction is how likely the chance is for a thaw where the soil beneath the frozen layer would be dry so as to allow infiltration. Id at p. 60. The proposed language from the Agricultural Coalition would not provide clarity to distinguish between a situation where the ground is frozen ½ inch today and tomorrow it will thaw or a situation where the ground is frozen ½ inch today and a cold snap is expected tomorrow that will result in ground frozen deeper in the subsequent days. The proposed language also does not provide clarity regarding when the soil beneath the surface layer would be dry. It would be very difficult to develop language to address the variety of scenarios that could occur and therefore it is not sufficiently protective of water quality to accept the producer’s definition without addressing these varying weather and soil moisture conditions.**

E) What is the Agency’s intent in including the phrase “including but not limited to sludge and contaminated soils from storage structures” to the definition of livestock waste? October 16, 2012 Hearing Transcript at pp. 17-18. Is the change proposed by the Agricultural Coalition acceptable to the Agency? October 16, 2012 Hearing Transcript at p. 18.

**In Pre-Filed questions, the Agency was asked about this language by the Agricultural Coalition and the Agency’s response to Question 16(b) was as follows: “The phrase ‘sludge and contaminated soils from storage structures’ in the proposal does not expand the current definition of livestock waste under Subtitle E but clarifies its meaning by providing a non-exhaustive list of examples of the meaning of the phrase ‘other materials polluted by livestock’ in the existing definition. The phrase ‘contaminated soils from storage structures’ generally refers to soils in earthen lagoons which may be removed**

**from the lagoon along with the manure, litter and process wastewater and should be disposed of in the same manner as other livestock waste.”**

**At the October 23, 2012 hearing, Ms. Manning was asked whether sludge and soils removed from an earthen lagoon at a CAFO and land applied would be considered livestock waste. October 23, 2012 hearing transcript at p. 143. Since the Agricultural Coalition agrees with the Agency that the intended materials are clearly considered to be livestock waste (i.e. other materials polluted by livestock), then the clarification proposed by the Agency would not be necessary and the Agency would not object to its removal.**

F) The Hearing Officer asked the Agency to clarify whether the new Section 502.107 proposed by the Agricultural Coalition reflects the Agency’s intent to require NPDES permits for CAFOs that discharge pollutants into waters of the United States. The Agency was also asked whether the proposed Section 502.107 was acceptable to the Agency. October 16, 2012 Hearing Transcript at pp. 23-24.

**The language proposed by the Agricultural Coalition for a New Section 502.107 is “No NPDES CAFO permit shall be required for any facility which is not discharging or has not yet received livestock.” Even after the testimony of Mr. Kaitschak on October 16, 2012 and the testimony of Ms. Manning on October 23, 2012, the Agency is not entirely clear on the intent and meaning of the proposal. See, October 16, 2012 transcript at pp. 24-26 and October 23, 2012 transcript at pp. 144-152.**

**When asked how this proposal differs from language in the Agency’s Section 502.101(b), a satisfactory answer was not received that would convince the Agency that this language is necessary and not duplicative. October 23, 2012 hearing transcript at pp. 150 - 151. In addition, it seems that this proposal could create confusion and discourage new CAFOs, that do plan to discharge, from complying with Section 502.101(e) that provides “The owner or operator of a new CAFO that will discharge must apply for NPDES permit coverage at least 180 days prior to the time that the CAFO commences operation.” Without a better understanding of the potential implications of including this language, the Agency cannot agree that it would be acceptable.**

G) Is an NPDES permit required only if the discharge is ongoing? If so, explain how intermittent discharges would be addressed under section 502.107. October 16, 2012 Hearing Transcript at p. 24.

**An NPDES permit certainly would be required for intermittent discharges to “waters of the United States.” Illinois EPA is not clear on how such discharges would be handled under the Agricultural Coalition’s proposed Section 502.107. October 23, 2012 hearing transcript at pp. 145-146.**

H) Illinois EPA was asked to comment on whether the Agricultural Coalition’s proposed changes to the nutrient management plan requirements for unpermitted large CAFOs is acceptable to the Agency. The Hearing Officer also asked the Agency to comment on whether the nutrient management plan requirements that are applicable to unpermitted large CAFOs are identical to those under the Livestock Facilities Management Act Regulations at Part 8, Illinois Administrative Code 900. October 16, 2012 Hearing Transcript at pp. 26-27.

**The changes proposed to the cross-references in Sections 502.102(b) and (c), 502.500 and 502.600 are not acceptable to the Agency.**

**As was explored in detail at the October 23, 2012 hearings, there are numerous differences between the Agency’s proposal and the requirements for Waste Management Plans developed under the LMFA. October 23, 2012 hearing transcript at pp. 25-32, 114-119 and 131-137. Some of the issues that were identified include the fact that the Agency does not require a formal nutrient management plan, but requires that unpermitted Large CAFOs follow the practices identified in 502.510(b). While some unpermitted Large CAFOs have developed WMPs, others may not have been required to do so and the Board rules should not create a conflict with the LMFA by requiring plans specified by that program that would not actually be required by that program. Id. at pp. 114-118. The Agency has testified that it is certainly possible that a WMP could be developed in such a way that it would document all the practices required by Section 502.510(b) and if it did so it would be an acceptable means of qualifying for the agricultural stormwater exemption.**

**Based on the evidence in the Record, the Agency cannot agree that changes proposed by the Agricultural Coalition would be consistent with federal requirements for receiving an agricultural stormwater exemption, that they would be sufficiently protective of water quality, or that they would include the appropriate universe of facilities.**

I) The Hearing Officer asked the Agency to respond to a hypothetical fact pattern related to the possibility of an appeal of an Agency designation of a facility as a CAFO. If the designation is not appealable, it may hypothetically trigger the desire to apply for a CAFO

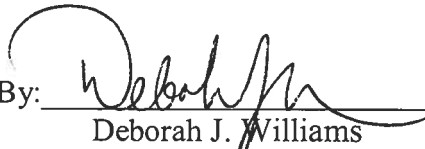
NPDES permit to avoid enforcement for failure to have a permit that the Agency believes is necessary. If that permit is issued exactly as it is applied for, does that mean, under Section 40 of the Act, which allows for appeal of a denial or a grant with conditions, that the issuance of a permit is essentially unappealable? October 16, 2012 Hearing Transcript at pp. 29-30.

**Ms. Manning testified at the Urbana hearing that she believed the permit and the Agency's designation decision would clearly be appealable under the fact pattern presented. October 23, 2012 hearing transcript at p. 155. Illinois EPA agrees with this conclusion. While the Agency recognizes the legal issue raised by the Board and the possibility that a court may hold differently, the Agency's position is that as long as the facility has made its contention that it should not be designated as a CAFO or that an NPDES permit should not be required as part of the permit record, the applicant can raise this issue in a permit appeal to the Board after the permit is issued.**

WHEREFORE, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY respectfully submits the foregoing responses.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:   
Deborah J. Williams  
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DATED: November 7, 2012

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**CERTIFICATE OF SERVICE**

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STATE OF ILLINOIS  
Pollution Control Board

Joanne M. Olson, Assistant Counsel for the Illinois EPA, herein certifies that she has served a true copy of the foregoing NOTICE OF FILING and ILLINOIS EPA'S PRE-FILED ANSWERS TO BOARD QUESTIONS POSED AT SECOND HEARING, upon persons listed on the Service List by mailing, unless otherwise noted on the Service List, a true copy thereof in an envelope duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on November 7, 2012.

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