

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
CONCENTRATED ANIMAL FEEDING) R2012-023(A)
OPERATIONS (CAFOS): PROPOSED)
AMENDMENTS TO 35 ILL. ADM. CODE)
501, 502, AND 504)

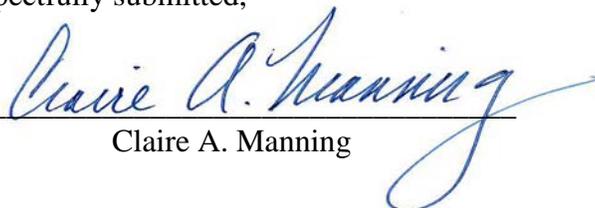
NOTICE OF ELECTRONIC FILING

TO: *SEE ATTACHED SERVICE LIST*

PLEASE TAKE NOTICE that on February 3, 2015, on behalf of the ILLINOIS PORK PRODUCERS ASSOCIATION, ILLINOIS FARM BUREAU, ILLINOIS BEEF ASSOCIATION, and ILLINOIS MILK PRODUCERS' ASSOCIATION ("AGRICULTURAL COALITION"), I have filed the following PUBLIC COMMENT, copies of which are also herewith sent to the attached service list.

Dated: February 3, 2015

Respectfully submitted,

By: 
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CERTIFICATE OF SERVICE

I, Claire A. Manning, the undersigned, hereby certifies that copies of AGRICULTURAL COALITION'S FIRST NOTICE PUBLIC COMMENT was served on the following persons by enclosing the same in envelopes properly addressed with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mail Box in Springfield, Illinois, on the 3rd day of February, 2015.

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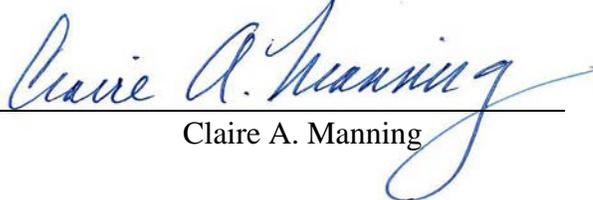
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AGRICULTURAL COALITION’S PUBLIC COMMENT

NOW COMES the AGRICULTURAL COALITION (“Coalition”), comprised of the ILLINOIS PORK PRODUCERS ASSOCIATION, the ILLINOIS FARM BUREAU, the ILLINOIS BEEF ASSOCIATION, and the ILLINOIS MILK PRODUCERS’ ASSOCIATION, by and through its counsel, BROWN, HAY & STEPHENS, LLP, and respectfully presents to the Illinois Pollution Control Board (“Board”) the following Public Comment.

I. BACKGROUND

On July 15, 2014, a Certificate of No Objection (“Certification”) was issued by the Illinois Joint Committee on Administrative Rules (“JCAR”) concerning the Board’s proposed amendments to 35 Ill. Adm. Code Parts 501, 502, and 504 of the agriculture-related pollution regulations (“CAFO rules”). The Certification followed: formal JCAR comments to the Board, R12-23, PC# 3047, July 3, 2014; a Board Order addressing JCAR’s comments, *In The Matter Of: Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504*, PCB R12-23 (July 10, 2014); and JCAR consideration of the proposed rules on July 15, 2014, pursuant to its authority under the Administrative Review Act, 5 ILCS 100/1-1 *et seq.*

On August 7, 2014, the Board issued its Final Opinion and Order adopting the CAFO rules. *In The Matter Of: Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504*, PCB R12-23 (Aug. 7, 2014). The Final Opinion and Order removed provisions of the CAFO rules that were of concern to JCAR. *Id.* The promulgated rules became final upon publication in the Illinois Register. *See* 38 Ill. Reg. 17661, 17687, 17754 (Aug. 22, 2014). One provision removed by the Board prior to final promulgation was Section 501.505, which would have required mandatory reporting of certain information by facilities not required to secure a National Pollutant Discharge Elimination System (“NPDES”) permit. The Board directed the opening of this Sub-Docket (R12-23(A)) to allow for further consideration of proposed Section 501.505 in its August 7, 2014 Final Opinion and Order. The Coalition objected to proposed Section 501.505 throughout the Docket R12-23 rulemaking. *See* R12-23PC, Pre-filed Testimony of Jim Kaitschuk for the Coalition (June 19, 2012); Coalition’s Questions for IEPA (July 17, 2012); Coalition’s Motion Proposing Changes to IEPA Proposed Rules (Sept. 25, 2012); PC# 19, 28, 3030, and 3040.

Specifically, the Coalition asserted, and continues to assert, that proposed Section 501.505 is neither federally required nor authorized by existing state law; thus, the provision is outside the limited scope of the Board’s authority in this rulemaking. *Id.* Moreover, the Illinois Environmental Protection Agency (“IEPA”) has consistently maintained that the information required from unpermitted CAFOs in proposed Section 501.505 is not necessary to meet its obligations under the Clean Water Act (“CWA”). *Id.* Finally, the Coalition asserts that proposed Section 501.505 is unduly burdensome to Illinois farmers. *Id.* In addition to this Public Comment, the Coalition asks the Board to consider all its previously filed comments, which are restated and reincorporated herein with respect to proposed Section 501.505.

In this R12-23(A) Sub-Docket, the Board directed IEPA to address certain matters related to the proposed amendments to Section 501.505. Specifically, the Board ordered IEPA to provide a response that included the CAFO information compiled and maintained by IEPA (“CAFO Database”). IEPA filed its Response to the Board’s Questions (“Response”) on December 3, 2014. Response, p. 1 (Dec. 3, 2014). The Response included most of the information requested by the Board.¹ *Id.* The Board has directed any participant wishing to comment on IEPA’s Response, or to otherwise address the issues raised by JCAR, to file public comments with the Board. The Coalition submits this Public Comment to address those issues.

II. THE BOARD’S PROPOSED REPORTING RULE (SECTION 501.505) IS UNNECESSARY AND BURDENSOME

The Board’s proposed reporting rule in Section 501.505 would require unpermitted CAFOs to provide a variety of information to IEPA. *In The Matter Of: Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504*, PCB R12-23, p. 275-276 (November 7, 2013). Specifically, proposed Section 501.505 would require CAFOs that are not required to be permitted to nonetheless report:

- a. Name, address, and telephone number of owners and operators;
- b. Livestock facility location information, including facility street address, latitude, and longitude;
- c. Location of the facility according to township, county, section, and quarter;
- d. Identification of each animal type stabled or confined at the facility and the maximum number of each type of animal;
- e. Identification of animal holding areas including pastures, confinement barns, and open lots;
- f. Waste and wastewater storage information; and
- g. The date the information was submitted to the IEPA. *Id.*

¹As a result of the Coalition’s filing of an Application for Non-Disclosure pursuant to Section 130.406 of the Board’s procedural rules, 35 Ill. Adm. Code 130.406, certain information IEPA maintains was redacted in its Response. Coalition’s Application for Non-Disclosure, p. 10 (Dec. 1, 2014); Response, p. 6. The Board reviewed the information submitted by IEPA in its Response to Board Questions and dismissed the Coalition’s Application for Non-Disclosure as moot. Board Order, R12-23(A), p. 2 (Dec. 18, 2014).

IEPA, the regulatory entity responsible for NPDES permitting and oversight in Illinois, has acknowledged that it does not believe mandatory reporting of unpermitted CAFOs is necessary or within the scope of its statutory authority. IEPA's Memorandum of Law Regarding Authority for An Illinois CAFO Registration Requirement, R12-23, pp. 5-6 (October 9, 2012) ("IEPA Memo of Law"). In Docket R12-23, IEPA did not support the mandatory reporting requirement contained in proposed Section 501.505 and maintained that it was unnecessary, "unproductive," and "burdensome." *See* Transcript of August 21, 2012, Hearing in Docket R12-23 ("Transcript"), p. 112; *see also* IEPA's Post-Hearing Comments in Docket R12-23, p. 14 (January 16, 2013). Instead, IEPA has consistently asserted that the information it has "is more than adequate to run this program" and that it will continue to compile such information, as explained in its Response. Transcript, p. 112; Response, pp. 2-5.

In the December 3, 2014 Response, IEPA again explained that the information sought by proposed Section 501.505 is currently collected for inclusion in the CAFO Database. Response, pp. 7-8. IEPA utilizes multiple sources to compile the information. The sources of information include Illinois Department of Public Health ("IDPH") dairy operations records, and Illinois Department of Agriculture ("IDOA") facility data collected pursuant to the Livestock Management Facilities Act ("LMFA"). Response, pp. 2-4. IDPH dairy operations records include 12 database fields compiled through field inspections conducted by IDPH's Office of Health Protection, Food, Drugs, and Dairy Division. *Id.* at 2. IDOA facility data includes 29 database fields for construction information, 11 database fields for Notice of Construction Completeness information, and 8 database fields for Final Notice of Construction Completeness information, which create the IDOA Access Database that holds 39 separate fields for facility information. *Id.* at 3-4.

In addition to the large amount of data received from IDPH and IDOA, the CAFO Database includes information from other sources including:

- a. Citizen Complaints and/or Inquiries;
- b. Facility Contacts;
- c. DWPC/FOS Inspection Reports;
- d. DWPC/NPDES Permit files (CAFO Applications and Stormwater NOIs);
- e. DWPC/Surface Water Section Stream Surveys; and
- f. Illinois Emergency Management Agency and National Response Center Incident Reports. *Id.* at 4-5.

IEPA has implemented a process to maintain and regularly update the CAFO Database to meet its obligations under the Illinois Program Work Plan 2014-2016 Agreement with the United States Environmental Protection Agency (“USEPA”). Response, pp. 9-11 and Exhibit H. This process has proven to be an effective mechanism for gathering data, as the CAFO Database listed 1,338 facilities in Illinois as of the date of the Response. Response, p. 5. Accordingly, JCAR was correct to conclude “that Section 501.505 is now redundant.” Comments of JCAR, R12-23, P.C. # 3047, p. 2 (June 26, 2014). The process utilized by IEPA is sufficient, and the mandated reporting rule proposed in Section 501.505 is unnecessary.

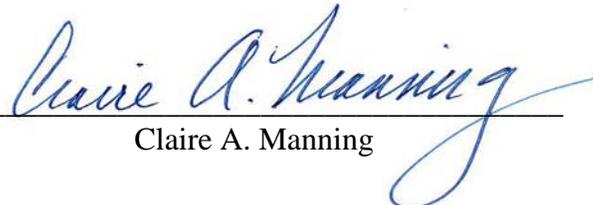
Based upon the Board’s actions in this Docket, R12-23(A), the Board appears to have interpreted JCAR’s admonition related to proceeding forward with the reporting requirements in proposed Section 501.505 as a directive to ascertain and review the information IEPA possesses in its CAFO Database, and determine if the proposed rule was necessary. Assuming the Board’s interpretation of JCAR’s direction is accurate, the information provided in IEPA’s Response clearly shows that JCAR was correct that the information sought in proposed Section 501.505 is redundant of the information contained in the CAFO Database and therefore unnecessary. As such, implementation of proposed Section 501.505 is unnecessary.

Proposed Section 501.505 is an unnecessary burden for Illinois farmers. Pursuant to CWA, NPDES permits are only required if a CAFO is discharging. *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 751 (5th Cir. 2011). Permits are not required based upon a *potential* to discharge. *Id.* While implementing the federal CAFO program, USEPA itself declined to require the very type of reporting the Board sets forth in proposed Section 501.505. See R12-23(A), Coalition's Application for Non-Disclosure, pp. 8-10 (Dec. 1, 2014). It is not the state's responsibility, nor should it be the state's goal, to require private businesses, outside the scope of required permitting, to report information the state does not need to meet its obligations. Accordingly, the mandatory reporting provisions of proposed Section 501.505 create an undue and unnecessary burden on Illinois farmers.

III. CONCLUSION

IEPA currently collects data from a number of sources to compile the CAFO Database. The information in the CAFO Database is sufficient to satisfy the state's obligations under federal law, and is consistent with USEPA's implementation of CWA. Proposed Section 501.505 is an unnecessary and burdensome mandatory reporting requirement that IEPA does not need to meet federal obligations, which will necessitate reporting by farmers that are not required to obtain an NPDES permit. The Coalition appreciates the opportunity to comment and urges the Board to decline adoption of proposed Section 501.505. The Coalition also appreciates the time and effort of the Board and its staff, as well as IEPA, on this rulemaking.

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