

ILLINOIS POLLUTION CONTROL BOARD
March 20, 1997

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

DISSENTING OPINION (by R.C. Flemal):

I dissent from the majority's opinion and order delivered today. I do agree with many of their decisions. I was, in fact, the author of large parts of the document that today becomes the core of the majority's opinion and order. The portions I agree with are those that support adoption of the Department of Agriculture's proposal, with the various slight modifications that work toward perfecting the Department of Agriculture's proposal.

I dissent nevertheless because today the majority adds new provisions to the proposal that are (a) adopted in violation of the Administrative Procedure Act and (b) have unwarranted impacts on the livestock industry in Illinois.

Administrative Procedure Act

The APA requires that an administrative agency "shall give at least 45 days' notice of its intended action to the general public" (5 ILCS 100/5-40(b)). Today the majority adopts a number of major new provisions for which it has never given this notice. This includes three new sections that have never received public notice (Sections 506.105, 506.106, and 506.703), plus major new provisions folded into previously existing sections (e.g., the definition of "populated area" at Section 506.103, the outdoor activity provisions at 506.702(c), the innovative designs provisions at 506.702(f), and the setback waiver requirements at 506.702(g)).

I understand that the purpose of the APA notice requirement is to allow the general public and the affected administrative agencies to be alerted to, and to comment on, regulations that will affect them. Here, the opportunity has not been had. I, as a decisionmaker, likewise have been deprived of the perspective that would have ordinarily come from being able to hear and weigh perspectives of affected persons.

Objectionable New Provisions

The new provisions that I object to are substantive. They collectively impose a burden on the livestock industry that is not contemplated in the LMFAAct, and to which the livestock industry itself has had no opportunity to respond. This burden is imposed on all facets of the livestock industry, including the dairy, beef, sheep, and horse industries.

There are two new major provisions of this type. The first is a significant expansion of the setback areas for new or modified livestock waste facilities, the effect of which is to prohibit¹ new or modified livestock facilities from locating in large parts of the State. The second is a new requirement that all new or modified livestock facilities, located anywhere in the State, must give notice of their intent to construct to both the Department of Agriculture and to their neighbors, and must in addition obtain approval of the Department of Agriculture before construction can begin.

Expansion of Setbacks

The LMFAct provides for setbacks of livestock management and waste handling facilities from neighboring populated areas². (See 510 ILCS 77/35.) By today's action the majority expands the area of the State included in these setbacks by expanding the definition of populated area to include "land managed for recreational or conservation purposes"³. The majority then further expands the area of the State included in setbacks by declaring that setbacks from all populated areas involving outdoor activity be measured from the property line of the lands.

"Land managed for recreational or conservation purposes" includes a broad range of lands of private, local, county, state, and federal ownership. It includes forest preserve lands, state and federal recreation areas, hunting areas, wildlife areas, woodlands, and trails used by bicycles, snowmobiles, and horses. Pursuant to today's majority decision, new or modified livestock facilities of even small size (as low as 50 animal units⁴) would be prohibited from

¹ The majority has contended that it is not correct to characterize the setbacks as "prohibitions" because it is possible for a livestock operator to obtain waivers from his neighbors and accordingly site within the setbacks. I do not accept this argument because new sitings are indeed prohibited unless the waiver is obtained, and I believe that waivers would be so difficult to obtain as to be an empty option in most cases.

² "Populated area" comes into play in the LMFAct in the calculation of setbacks. In particular, new or modified small livestock management facilities (50 to 1,000 animal units) are prohibited from being constructed within 1/2 mile of a populated area (510 ILCS 77/(c)); new or modified livestock management facilities in the 1,000 to 7,000 animal unit range are prohibited from being constructed at distances graduated up to one mile (*Id.*); and new or modified livestock management facilities greater in size than 7,000 animal units are prohibited from being constructed within a distance of one mile from a populated area. (*Id.*)

³ The majority actually expands the definition of populated area by including a whole range of facilities and structures within the definition, but "land managed for recreational or conservation purposes" causes the most objectionable inflation of the setbacks.

⁴ 50 animal units equates to 25 horses, 36 dairy cows, 50 feeder cattle, 125 swine (weight 55 lbs or greater), or 500 sheep, lambs, and goats; if more than one species is kept, the allowable numbers of other species are decreased accordingly.

locating within one-half mile⁵ from any such land, with the only qualification being that at least 50 people a week frequent the land during some ill-defined time “when reductions in attendance do not occur”. The 50 people need not congregate at any one spot within the total property area or at any one time within the week. I believe that this is a very small threshold that would be met in all but the very small and isolated recreation/conservation properties.

A few examples of the consequences of the manipulation of the definition of populated area are illustrative.

The seven counties that occupy the southern rim of the State are distinguished by small, largely rural populations and large amounts of federal and state lands managed for recreational or conservation purposes. In Pope County, for example, 42% of the county is owned by the U.S. Forest Service; much of the rest of the county is within one-half mile of some part of this federal land. (PC 66.) With today’s majority action, much of the private agricultural land in Pope County would be off-limits for livestock development under the guise that the 42% that is federal land constitutes a populated area. This is uniquely ironic, because Pope County has the lowest population in any county in the State⁶ and depends on agriculture for a significant part of the local economy.

In general, today’s expansion of the setbacks falls hardest on the low population, rural counties where agriculture forms the basis of the economy, because it is also within these counties that recreational and conservation lands are congregated.

In my home county, DeKalb County, there is a wholly rural bicycle trail on an abandoned railroad bed. By today’s action the majority would carve a one- to two-mile wide swath along the length of this trail from which new or modified livestock facilities would be prohibited. To my mind it is incongruous at best -- absurd at worst -- that livestock agriculture should be excluded in a band along the bicycle trail under the guise that the bicycle trail is a populated area.

On larger scales, the majority’s decision would carve a one- to two-mile wide setback paralleling the 75 miles of snowmobile trails of the Hennepin Canal Parkway State Park through Bureau, Henry, and Whiteside Counties, along the 55 miles of the Illinois-Michigan Canal State Trail through Will, Grundy, and LaSalle Counties, and along the 27 miles of the Rock Island Trail in Peoria and Stark Counties.

The Illinois Department of Natural Resources manages a number of large properties for hunting. Each of these would, pursuant to the majority’s decision, have a one-half to one mile setback around it, again under the guise that each is a populated area. So also would there be a setback around each of the large reservoirs in the State (Rend Lake, Carlyle Lake, Clinton Lake, Lake Shelbyville, etc.), measured not even from the water’s edge, but from the

⁵ Larger facilities would be prohibited from locating within distances up to one mile.

⁶ Pope County’s population in the 1990 U.S. Census was 4,373.

boundary of any land managed along with the lakes (whether or not the public ever visits the land).

Pursuant to the majority's decision, horsemen would be prohibited from building a stable or feeding station for 25 horses within one-half mile of land managed for recreational or conservation purposes, even if one of the recreational uses of the land is horseback riding!

New or modified dairy operations would be prohibited from locating within one-half mile of Mississippi Palisades State Park in Carroll County or one-half mile from Apple River Canyon State Park or the Upper Mississippi Wildlife Refuge in Joe Daviess County, to name just a few. New or modified cattle feed lots would be prohibited from locating within one-half mile or more from the Rice Lake Conservation area in Fulton County, from Sangchris Lake in Christian County, and from Lowden Miller State Forest or Castle Rock State Park in Ogle County, to name just a few more.

In the final analysis, the underlying premise that drives the majority's expansion of the setbacks is that all livestock agriculture produces odors that are inherently offensive, and that accordingly livestock agriculture must be excluded from areas adjacent to wherever the public might be. It is a premise, however, that is simply wrong and that must be rejected.

Initial Determination of Setbacks

Today's majority decision grafts on to the Department of Agriculture's proposal a requirement that any person desiring to construct a new or modified livestock management or waste handling facility obtain clearance from the Department of Agriculture prior to construction. (See Section 506.703.) The person is also required to notify all neighboring land owners of the intent to construct.

I do believe that the purpose underlying these provisions is admirable: to establish a base date upon which a particular setback is in effect. The flaw is in the execution. It is simply regulatory overkill to require these procedures of all new livestock sitings. I appreciated the Department of Agriculture's suggestion that it would be willing to shoulder the burden of making setback determinations when asked, but believe there is no reason or desire on the part of any participant to require it universally.

Miscellaneous Objections

The majority today adds paperwork and engineer/geologist certification requirements to all of the waiver provisions provided by the LMFAct. This is done without information in the record regarding the cost of these added requirements. It also unnecessarily constrains the decisionmaking flexibility given to the Department of Agriculture under the LMFAct.

I object further to the general tone that pervades the opinion and the rule that the Department of Agriculture is not capable of exercising sound professional judgment in a regulatory capacity.

For these reasons, I dissent.

Ronald C. Flemal
Board Member

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board