

ILLINOIS POLLUTION CONTROL BOARD
July 17, 2012

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STATE OF ILLINOIS
Pollution Control Board

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)

HEARING OFFICER ORDER

On March 1, 2012, the Illinois Environmental Protection Agency (Agency) filed a rulemaking proposal to amend Parts 501, 502, and 504 of the Board's agriculture related water pollution regulations. *See* 35 Ill. Adm. Code 501, 502, 504. In an order dated May 5, 2012, the Board accepted the Agency's proposal for hearing. In an order dated March 22, 2012, the hearing officer scheduled hearings in this proceeding, including a first hearing beginning on Tuesday, August 21, 2012, in Springfield. Among other matters, that hearing officer order set a deadline of June 19, 2012, to pre-file testimony for the first hearing. In order to expedite the first hearing and make it more efficient, the order also set a deadline to pre-file written questions based on that pre-filed testimony on or before July 17, 2012, and to pre-file written answers to those pre-filed questions on or before August 14, 2012.

On June 18, 2012, the Agency pre-filed the testimony of Mr. Bruce Yurdin, Mr. Sanjay Sofat, and Mr. Dan Heacock. On Jun 19, 2012, the board received pre-filed testimony by Mr. Jim Kaitschuk on behalf of the Illinois Pork Producers Association and the Illinois Agricultural Coalition, which includes the Illinois Beef Association, the Illinois Milk Producers' Association, and the Illinois Farm Bureau.

The Board and its staff have reviewed the testimony pre-filed in this docket and posed the questions attached to this order as Attachment A. The Board directs the participants to which those questions are posed to address them in pre-filed answers for filing on or before the previously-established deadline of August 14, 2012. The Board may raise follow-up questions in the course of the first hearing.

IT IS SO ORDERED.



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ATTACHMENT A to HEARING OFFICER ORDER OF JULY 17, 2012**Statement of Reasons (Section II: Facts in Support):**

1. This section cites a document entitled “An Urgent Call to Action -- Report of the State-EPA Nutrient Innovations Task Group” (August 2009) that is not attached to the Statement of Reasons or listed as a Reference in the Agency’s Technical Support Document. With its written response to questions, would the Agency submit a copy of this document into the record of this rulemaking?
2. This section also cites a draft water quality report and Section 303(d) list that also are not attached to the Statement of Reasons or listed as a Reference in the Agency’s Technical Support Document. With its written response to questions, would the Agency submit a copy of this document into the record of this rulemaking?

Technical Support Document:

3. In addressing this proposed amendment, the TSD appears to cite USEPA’s NPDES Permit Writer’s Guidance Manual from 2003. That manual is listed in the TSD as a “Reference” and in Attachment O as a document used to develop the proposal, but it is not now included in the Board’s record. Can the Agency submit a copy of the document to the Board so it can be included in the record?

Yurdin Pre-Filed Testimony:

4. On page 2 of your pre-filed testimony, you note that the Agency does not issue permits for the design and construction of CAFOs. Does the Agency have any role in the design and construction of waste handling facilities at CAFOs?
5. On pages 6-7 of your pre-filed testimony, you indicate that unpermitted Large CAFOs are required to comply with NMP criteria in Section 502.510(b) because of their potential to produce more livestock waste, land apply more manure more frequently and have the greatest need to properly manage nutrient levels when they apply livestock waste. Please comment on whether the unpermitted medium CAFOs that stable or confine a number of animals close to the threshold specified in Section 502.104 pose similar concerns as large CAFOs. If so, comment on whether the Agency considered requiring unpermitted medium CAFOs also to comply with the NMP criteria.
6. On page 7 of your pre-filed testimony, you refer to excluding large unpermitted CAFOs from Section 502.405(a). Can you clarify that reference, which is not part of the existing rules or the Agency’s proposal?
7. On page 8 of your pre-filed testimony, you note that one of the changes concerning CAFO designation updates the term “navigable waters” to “waters of the United States”. Please explain the implications, if any, of this change..

Sofat Pre-Filed Testimony

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8. On page 3 of your pre-filed testimony, you state that Subpart G sets forth the NSPS for large dairy cow and cattle CAFOs and Subpart H specifies NSPS for new large swine, poultry and veal CAFOs. Please clarify whether new and existing dairy cow, cattle and veal calves CAFOs not covered under Subparts G and H are subject to the waste discharge limitations and technical standards of Subpart F pursuant to Section 502.600.

9. On page 4 of your pre-field testimony, you state that the Agency chose to develop one set of technical standards that were protective of surface waters, regardless of the size of the livestock facility. Please explain the rationale for not extending the proposed technical standards to unpermitted facilities, particularly unpermitted medium and small CAFOs which may have the same impact as the permitted facilities.

10. On page 6 of your pre-file testimony, you note that, “[i]n the absence of a phosphorus-index (“P-Index”) like those used by other states to quantify nutrient potential, the Agency’s proposal in Section 502.615 depends on several site-specific physical factors and conservation practices to address the issue of nutrient transport from a field to waters of the U.S.” Please identify “other states” that rely on a P-Index. In addition, please explain why a P-Index is not available for Illinois fields. Also, please comment on whether proposed site-specific procedures provide a better estimate of nutrient transport potential than the P-Index.

11. On page 7 of your pre-filed testimony, you state that other neighboring states also do not prohibit land application of livestock waste on frozen, ice-covered or snow-covered ground. Please comment on whether any Midwestern states prohibit winter application of livestock waste.

12. On page 7 of your pre-filed testimony, you note that the Agency’s proposal to allow winter application under emergency situations is based on the consideration of factors that minimize the risks posed by such application. Please comment on whether a CAFO needs to keep records of winter application, other than the weather forecast information under subsections 502.630(b)(3-5), to show compliance with the winter application plan requirements at Section 502.630(b) and (c).

Section 501.200(a) Incorporations by Reference:

13. The proposed incorporation of Bulletin 811 - or Attachment W to the Agency’s original proposal - notes a revision on January 15 without referring to a year. Since it appears that the revision occurred in 2011, would it clarify the incorporation to include a reference to that year?

Section 501.238 Concentrated Animal Feeding Operation (CAFO):

14. The federal definition of CAFO at 40 C.F.R. § 122.23(b)(2) includes language consistent with the Agency’s proposed definition, but the federal definition also includes language providing that “[t]wo or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.”

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However, language similar to this is now included as subsection (b) of the definition of “AFO” at Section 501.225. Does the Agency have any comment on this difference between its proposal and the federal definitions?

Section 501.244 Erosion Factor T:

15. The proposed definition and the Technical Support Document at page 61 both refer to U.S. Department of Agriculture soil surveys, which list Erosion Factor T for soil types. Would the Agency comment on whether this survey should be incorporated by reference in Section 501.200?

Section 501.390 25-Year, 24-Hour Precipitation Event:

Section 501.395 100-Year, 24-Hour Precipitation Event:

16. The proposed definitions refer to a National Oceanic and Atmospheric Administration Precipitation Frequency Atlas and the Web address at which it can be found. Would the Agency comment on whether this survey should be incorporated by reference in Section 501.200?

Section 501.505 Requirements for Certain CAFOs to Submit Information:

17. Can the Agency report on whether USEPA took action on its proposal by July 2012 as expected? If so, would the Agency describe the reporting option chosen by USEPA? If not, can the Agency provide any update on the federal rulemaking that “co-proposed” two options for obtaining information from CAFOs? 76 Fed. Reg. 65431 (Oct. 21, 2011) (Att. G).

18. At page 1 of the TSD and page 11 of Mr. Sofat’s pre-field testimony, the Agency refers to this proposed section as a “place-holder.” In the event that the timing of USEPA action allows it, does the Agency intend to address the federal rulemaking in, for example, a motion to amend its proposal or in post-hearing comments?

Section 502.101 NPDES Permits:

19. On page 40 of the Statement of Reasons, the Agency states that the “proposal does not require CAF’s that propose to discharge to obtain NPDES permit.” Please clarify whether the rules require permits only for CAFOs with actual ongoing discharge.

20. Please clarify whether the NPDES permit requirements apply to CAFOs that discharges regardless of their size, *i.e.* large, medium or small.

21. Subsection (b)(1) allows an owner or operator to not seek an NPDES permit for a past discharge “if the conditions that gave rise to the discharge have been corrected and the CAFO modified its design, construction, operation or maintenance in such a way as to prevent discharges from occurring in the future.” Please clarify whether the owner or operator must submit any documentation to show that issues concerning past discharges have been resolved in accordance with subsection (b)(1). Also, please comment on whether a permitted CAFO seeking

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not to renew its under subsection (d) must provide any documentation to the Agency to show that the CAFO will not discharge after the expiration of its permit.

22. Subsection (b)(2) cites Section 12(f) of the Environmental Protection Act and provides that “[n]o permit shall be required under this Part for any discharge for which a permit is not required under the CWA, and regulations pursuant thereto.” Please clarify whether this provision applies to only discharges to waters that are not waters of the United States, as noted at page 41 of the Statement of Reasons. If not, please provide examples of other situations where a discharge from a CAFO would not require an NPDES permit under the CWA.

23. Subsection (c) requires an owner or operator of a CAFO that discharges to apply either of an individual NPDES permit or a general permit. Please explain the differences between the two types of permits.

Section 502.102 Land Application Discharges & Agricultural Stormwater:

24. Subsection (d) requires a CAFO to review nutrient management practices annually and update the nutrient management plan whenever there is change in the nutrient management practices. Please comment on whether this provision would be more appropriately placed under the NMP provisions of Subpart E. Also comment on whether the findings of the annual review should be included in the annual report under proposed Section 502.325.

Section 502.104 Medium CAFO:

25. According to the proposed definition, a CAFO is defined as a Medium CAFO if it has the specified number of animals stabled or confined and discharges pollutants into waters of the United States in accordance with subsections (b) or (c). Please comment on whether discharge of pollutants described in subsections (b) and (c) is different from the discharge of livestock waste to waters of the United States under Section 502.102(a).

26. Please comment on whether the rules need to define “waters of the United State.”

Section 502.106 Case-by-Case Designation Requiring NPDES Permits:

27. Please explain under what circumstances an AFO would be designated as a “Medium CAFO” under Section 502.106.

28. Please comment on whether an Agency determination under this section is appealable to the Board.

Section 502.202 Permit Application Submission:

29. Please clarify whether submission of “[a]ll permit applications” refers to application of General NPDES and Individual NPDES permits. Also, please clarify how the Agency will designate the address for submission of the permit application.

ATTACHMENT A to HEARING OFFICER ORDER OF JULY 17, 2012**Section 502.310 CAFOs Seeking Coverage Under NPDES General Permits:**

30. Please clarify whether CAFOs seeking individual NPDES permits must comply only with the requirements of Section 502.201 and Part 309.

31. Also, please clarify whether CAFOs seeking NPDES General Permits must meet the requirements of Section 502.310 in addition all of the requirements of Part 309 or only those provisions of Part 309 for which there are cross references in Section 502.310.

Section 502.320 Recordkeeping Requirements:

32. Please clarify whether unpermitted large CAFOs are subject to recordkeeping and annual reporting requirements. If not, please explain the rationale for not requiring such facilities to comply with some type of recordkeeping and reporting requirements.

Section 502.500 Purpose, Scope and Applicability:

33. Subsection (a) provides that Unpermitted Large CAFOs claiming an agricultural stormwater exemption are subject to requirements of Section 502.510(b). Please explain why the Nutrient Management Plan requirements under Section 502.500(b) and Section 502.505 are not appropriate for large unpermitted CAFOs.

34. Also, please clarify whether the NMP developed by an Unpermitted Large CAFO pursuant to Section 502.510(b) must be submitted to the Agency. If not, should the CAFO owner or operator maintain the plan on site and make the plan available to the Agency upon request?

Section 502.505 Nutrient Management Plan Information:

35. Subsection (d) requires that the NMP include the name of the person who developed the NMP and whether the NMP was developed or approved by a certified nutrient management planner. Please provide details regarding entities that issue this certification and the certification requirements.

36. The Agency proposed in subsection (g) that an NMP include aerial photos or map indicating features including "common places of assembly." Could the Agency be more specific about the kinds of places included in that term?

37. The Agency's proposal refers to "land application areas not owned or rented." Would it clarify this subsection to refer to land application areas not owned or rented by the owner or operator of the CAFO?"

Section 502.510 Nutrient Management Plan Requirements:

38. Subsection (b)(1) requires the NMP to demonstrate that the livestock waste application rates not exceed the single year crop nitrogen and single year or multi-year phosphorus

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requirements for realistic crop yield goals in the rotation. Please clarify whether the procedures of Subpart F must be followed to make the nutrient application rate demonstration. If so, please clarify whether the procedures of Subpart F should apply to Unpermitted Large CAFOs.

Section 502.520 Changes to the Nutrient Management Plan:

39. Please clarify whether the requirements of this section are applicable only to permitted CAFOs. If so, please comment on whether Unpermitted Large CAFOs with NMPs are subject to requirements regarding changes to any of the demonstrations and specifications listed in Section 502.510(b).

Section 502.600 Applicability:

40. This Section sets forth that unpermitted Large CAFOs claiming an agricultural exemption consistent with Section 502.102 are also subject to portions of Subpart F. Please identify the provisions of Subparts F, G, and H applicable to unpermitted Large CAFOs.

Section 502.605 Livestock Waste Discharge Limitations for the Production Area for Permitted CAFOs:

41. Under subsection (c), please clarify whether a CAFO must request alternative performance standards as a part of the initial NPDES permit application under Subpart E or such a request can be made during operation the facility after a permit has been issued by the Agency.

42. Also, please clarify the basis on which the Agency can either grant or deny a request for alternate performance standard, and whether an Agency denial is appealable to the Board.

Section 502.610 Additional Measures for CAFO Production Areas:

43. The recordkeeping requirement at Section 502.320(c) requires the maintenance of records documenting the visual inspections performed pursuant to Section 502.610(c). Please comment on whether it would be appropriate to add to Section 502.610(c) language requiring documentation of the visual inspections.

44. Subsection (g) requires dead livestock to be disposed of only in facilities used solely for disposal of dead livestock. At page 48 of the Technical Support Document, the Agency notes that flows from these facilities could be managed in accordance with the Illinois Dead Animal Disposal Act (225 ILCS 610/17). Please comment on whether subsection (g) should be amended to require disposal of dead livestock and flows from facilities used solely for disposal of dead livestock to be managed in accordance with the Dead Animal Disposal Act.

Section 502.615 Nutrient transport Potential:

45. Please clarify whether “[s]oil test phosphorus” at subsection (a)(5) refers to available soil phosphorus content. If it does not, please explain what that factor means.

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46. Subsection (c)(2) refers to soil phosphorus test methods Bray P1 and Mechlich 3. Please clarify whether these methods are included in one or more of the documents incorporated by reference in Section 501.200. If so, please identify the specific documents. Also would it be acceptable to the Agency to add a cross reference in subsection (c)(1) to Section 501.200, which contains the documents incorporated by reference?

47. Subsection (c)(3) provides that, for nitrogen-based application of livestock waste, soil loss must be less than the erosion factor T calculated using the Revised Universal Soil Loss Equation 2, which is found at a Purdue University website. Please comment on whether it would be appropriate to include the soil loss equation in the rule instead of a link to a website, which may be changed in future.

48. The undesignated paragraph after subsection (c)(4)(B) allows a CAFO to demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by the 150-foot setback. Please clarify whether the "150-foot setback" demonstration addresses the 50-foot vegetative buffer required under subsection (c)(4)(A). Also, would it be acceptable to the Agency if this undesignated paragraph after subsection (c)(4)(B) is designated as subsection (c)(4)(C)?

49. Subsection (c)(5) sets forth that setback requirements of subsection (c)(4) will not apply if conduits on the field are greater than 400 feet from surface waters. Please clarify whether the CAFO would be subject to setback requirements of Section 502.645, including Section 502.645(b)(2).

Section 502.620 Protocols to Land Apply Livestock Waste:

50. Subsection (f) provides in part that "[i]njection or incorporation within 24 hours shall be used when land slope is greater than 5%. . . ." Please clarify whether the 24-hour period refers to the "24 hours preceding a forecast" of precipitation specified in subsection (d). If so, should the rule language under subsection (f) include a cross reference to subsection (d)?

51. At subsections (j) and (k), the Agency has proposed "common sense conservative approach" of allowing application of livestock waste at only 50 percent of the agronomic nitrogen rate near bedrock and the water table to protect groundwater. TSD at 34-35. Please comment on whether additional limitations, including prohibiting livestock waste application, may be necessary for soils with high infiltration rates.

Section 502.625 Determination of Livestock Waste Application Rates:

52. Subsection (f) requires the calculation of nitrogen credits for nitrogen-producing crops grown the previous year, for other sources of nitrogen applied for the growing season, and mineralized organic nitrogen in livestock waste. Please explain how nitrogen credits calculated pursuant to subsection (f) will be accounted for in determining the livestock waste application rates.

ATTACHMENT A to HEARING OFFICER ORDER OF JULY 17, 2012**Section 502.630 Protocols to Land Apply Livestock Waste During Winter:**

53. Please comment on whether the calculation of storage volume under subsection (a)(2) must include a safety factor of safety to minimize the risk that the volume of waste and other materials requiring storage exceeds the 120-day storage capacity.

54. Subsection (b)(2) sets forth “No discharge may occur during land application of livestock waste.” Please clarify whether this provision prohibits any discharges to the waters of the United States.

55. In subsection (a)(2)(C)(i), the Web address of the State Water Survey source for determining normal precipitation isn’t the same address as that listed in the Statement of Reasons at page 74, footnote 62. Both sites appear to include normal amounts of precipitation for Illinois locations. Would the Agency clarify which of these two Web addresses it intends to list in the proposed rule or whether it intends to list both?

56. Subsection (b)(6) refers to an obligation to monitor specific fields when the ambient temperature is great then 32° F. Can the Agency clarify how it intends for an owner or operator to determine that temperature?

57. Subsection (c)(4) allows application of livestock waste if the “median” Bray P1 or Mechlich 3 soil level phosphorus is equal to or less than 300 pounds per acre. Please explain the rationale for using the median phosphorus level. when the Agency has not relied on median level in provisions including Sections 502.615(c)(2) and (d)(3).

Section 502.645 Land Application Setback Requirements:

58. Subsection (b)(1) allows livestock waste to be land applied within 200 feet of surface water if there is adequate diking. The Agency states at page 55 of the TSD that “diking is adequate if it prevents runoff from the land application from entering surface water that are within 200 feet of the land application area.” TSD at 55. Please comment on whether it would be acceptable to the Agency if the definition of “adequate diking” in the TSD is included in the rule language for purposes of clarity.

Section 502.710 NSPS for Dairy Cows and Cattle Other Than Veal Calves:

59. Subsection (a) provides that NSPS applies to “[a]ny CAFO with ‘capacity’ to stable or confine 700 or more mature dairy cows whether milked or dry or 1,000 or more cattle other than mature dairy cows or veal calves. . . .” The Board notes that the proposed rules do not define Large, Medium and Small CAFOs in terms of capacity. Please clarify whether the requirements of this Section apply to CAFOs with “capacity” to stable or confine the specified number of animals or actually stables or confine the specified number of animals.

60. Please explain the rationale for not requiring new CAFOs with 1,000 or more veal calves to comply with the NSPS, while existing CAFOs with veal calves may be subject to discharge limitations under Subpart F.

ATTACHMENT A to HEARING OFFICER ORDER OF JULY 17, 2012**Section 502.720 Horse and Sheep CAFOs: BPT, BAT and NSPS:**

61. Subsections (a) and (b) set forth BPT and BAT for existing large horse and sheep CAFOs. Please explain whether existing horse and sheep CAFOs have choice between the proposed BPT and BAT. If so, are there any criteria for selecting the appropriate standard, or does the owner or operator of the CAFO chose the applicable effluent limitation?

62. Please clarify whether it would be acceptable to the Agency if the term “maintained” is added under subsection (a)(2) to read “a facility designed, constructed, operated and maintained to contain all process generated wastewaters. . . .”

63. Please clarify whether the NSPS for new horse and sheep under subsection (c) is limited to the application of BAT.

Section 502.800 Applicability:

64. Under subsection (c), please clarify whether it would be acceptable to the Agency to replace the phrase “[t]hese limitations and requirements” with “[t]he limitations and requirements of this Subpart.”

Section 502.810 Production Area Requirements:

65. This Section prohibits any discharge of livestock waste pollutants to waters of the United States from the production area unless the CAFO complies with alternative livestock waste discharge limitations. Please clarify whether the Agency will require CAFOs seeking to comply with alternative limitations to demonstrate “no discharge” under Section 502.830(a). If so, please describe the elements of such a demonstration. If not, please explain how the Agency will ascertain that a CAFO is not discharging livestock waste to waters of the United States.