BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

P.C. #17

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board ILLINOIS EPA'S POST HEARING COMMENTS, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____
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DATED: January 15, 2013

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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ILLINOIS EPA'S POST HEARING COMMENTS

NOW COMES the Illinois Environmental Protection Agency, (Illinois EPA or Agency) by and through its counsel, and hereby submits its Post Hearing Comments as directed by the Hearing Officer Order entered on November 30, 2012 in the above captioned rulemaking.

Procedural Background

On March 1, 2012, the Illinois EPA filed its proposal to amend Subtitle E, Agricultural Related Water Pollution, Parts 501, 502 and 504. The Agency seeks to update the Concentrated Animal Feeding Operation (CAFO) rules to ensure consistency with the federal National Pollutant Discharge Elimination System (NPDES) CAFO rules, and to develop state technical standards mandated but not prescribed by the federal rule. On March 15, 2012, the Illinois Pollution Control Board (Board) accepted the Illinois EPA's proposal for hearing.

The first hearing in this matter was held on August 21, 2012 in Springfield, Illinois. The Illinois EPA presented three witnesses who pre-filed testimony: Sanjay Sofat, Dan Heacock and Bruce Yurdin. Two other chief participants in this rulemaking were present at the first hearing: the Illinois Agricultural Coalition and the Environmental Groups. The Agricultural Coalition pre-filed the testimony of Jim Kaitschuk. After the first hearing, the Agricultural Coalition filed a motion proposing changes to the Illinois EPA's proposed rules.

The second hearing was held on October 16, 2012, in Belleville, Illinois. No participant pre-filed testimony. The Board directed questions to the Agricultural Coalition and the Illinois EPA regarding the Coalition's counter proposal. The Agricultural Coalition answered the Board's questions during the third hearing, held on October 23, 2012, in Urbana, Illinois. The Agency filed written responses to the Board's questions on November 8, 2012.

Ted Funk pre-filed testimony on his own behalf for the hearing in Urbana, Illinois. After the third hearing, the Environmental Groups filed a counter proposal. The fourth hearing in this matter was held on October 30, 2012 in DeKalb, Illinois. Three witnesses pre-filed testimony on behalf of the Environmental Groups: Dr. Stacy James, Dr. Kendall Thu and Arnold Leder. Samuel Panno pre-filed testimony on his own behalf. The fifth and final hearing was held in Elizabeth, Illinois on November 14, 2012. Stacy James, on behalf of the Environmental Groups pre-filed additional testimony. David Trainor pre-filed testimony on behalf of the Agricultural Coalition, and Donald Keefer pre-filed testimony on his own behalf.

At the close of hearings in this matter, the Hearing Officer set a January 16, 2013 deadline for post hearing comments, and a January 30, 2013 deadline for responses.

Agricultural Coalition's Proposal

A. Applicable Waters:

In its counter proposal, the Agricultural Coalition requests the Board keep the definition of "navigable waters" in section 501.325, which the Agency proposes to repeal. Alternatively, the Coalition proposes to change the definition of "navigable waters" to "waters of the United States," defined as follows: "All waters of the United States as defined in the Federal Clean Water Act."

The Agency now wishes to reiterate its objection to both the Agricultural Coalition's suggestions. In Illinois EPA's Prefiled Answers to Board Questions Posed at the Second Hearing, the Agency states that it seeks to repeal the "navigable waters" definition because when this definition was promulgated, it was modeled after a federal definition which has subsequently been repealed. (Prefiled Answers (Nov. 8, 2012) p. 2.) The federal CAFO rule amendments no longer use the term navigable waters, and instead use the term "waters of the United States."

During the course of these proceedings, the Illinois EPA articulated its belief that defining "waters of the United States" is problematic. In its Prefiled Answers, the Agency stated that it believed that a definition was not necessary because the term is defined by the federal rules in 40 C.F.R. §122.2. (Prefiled Answers (August14, 2012) Attachment 1, p. 9.) The Agency noted in its answer that the federal definition does not include subsequent case law or guidance further defining the term. Because the federal definition does not stand alone, the Illinois EPA felt it was premature to define the term in the Board's regulations. Further, in the Illinois EPA's response to Board's Questions Posed at the Second Hearing, the Agency noted that the Agricultural Coalition's definition of "waters of the United States" was unnecessary because it would not clarify how the federal definition will be construed in conjunction with case law and guidance, and possibly might lead to further confusion. (Prefiled Answers (Nov. 8, 2012) p. 3.)

In contrast to the proposal by the Agricultural Coalition, the Environmental Groups have submitted proposed regulatory language to the Board that would change the phrase "waters of the United States" in the Agency proposal to "waters of the State." Since the Environmental Groups have not submitted testimony on the intended meaning of the term and have indicated they will address the issue in legal briefs as part of their post-hearing comments, it is difficult to be certain of the intended meaning of the proposed change. (Dekalb Hr'g Tr. 259-260.) While

the language could simply be interpreted to mean all waters of the United States located within the territorial boundaries of the State of Illinois, it seems more likely the terminology is intended to include all "waters" within the State of Illinois that meet the definition of "waters" found in the Environmental Protection Act at 415 ILCS 5/3.550 and the Board's regulations at 35 Ill. Adm. Code 301.440. Because the provisions of the current and proposed Part 502 are NPDES permitting regulations, the Board's exercise of rulemaking authority should be consistent with section 12(f) of the Environmental Protection Act which limits the State's authority to issue NPDES permits to sources required to obtain permits under the Clean Water Act and federal case law interpreting that statute. 415 ILCS 5/12(f).

B. Frozen Ground

The Agricultural Coalition requests that the Board define frozen ground as soil that is impenetrable due to frozen soil moisture but does not include soil that is only frozen to a depth of 2 inches or less. Originally, the Agency proposed frozen ground to include soil that is frozen anywhere between the first half inch to eight inches of soil. The Agricultural Coalition justifies decreasing the universe of "frozen ground" to exclude all ground that is only frozen to a depth of two inches because it claims that winter application is "sometimes necessary," and that the soil frozen between 1/2 inch and 2 inches is only minimally frozen. (Coalition Mot. 3.)

In its Prefiled Answers of the Illinois Environmental Protection Agency, the Agency articulated its position that winter application of livestock waste can adversely affect both surface water and groundwater, but these risks can be reduced through injection and incorporation of the waste into the soil. (Prefiled Answers (August14, 2012), Attachment 4 p. 6.) When the soil is frozen between the first 1/2 inch and 2 inches, injection and incorporation are possible. (Urbana Hr'g Tr. 20, 61.) Therefore, the Agency believes prohibiting surface

application of waste on fields frozen between the first 1/2 inch and 2 inches, unless the requirements of proposed section 502.630(a) are met, is not overly restrictive or burdensome because the livestock waste can still be land applied via the injection and incorporation methods. Moreover, prohibiting surface land application on these same fields unless the requirements of proposed section 502.630(a) are met will be protective of both the surface water and groundwater because surface application results in a greater potential for runoff. (Yurdin Test. 5.)

The Agricultural Coalition's definition of frozen ground excluding ground that is only frozen within the first 2 inches of soil creates a gap in the Agency's objective to encourage injection or incorporation during the winter months. This proposed change will result in a larger number of instances when surface land application is permissible during winter under high risk conditions because injection or incorporation would not be required.

The expert testimony presented during the hearings supports the Agency's conclusions: When asked about surface land application on ground where the soil was frozen to a depth of a first half inch, Ted Funk testified that the waste generally does not infiltrate into the soil. (Urbana Hr'g Tr. 23, 61.) He further testified that when the ground is frozen at just the surface, the better management practice would be to incorporate or inject the livestock waste than to surface apply the waste. *Id.* Dr. James testified that winter land application is "one of the most risky practices," and waste can leave the field when surface applied and be a significant contributor of nutrient and pathogens to surface waters. (James Test. 11 (Oct. 16, 2012).) Arnold Leder testified that "when waste is applied to frozen ground, the soil cannot effectively absorb it. And when the waste is not absorbed into the soil, most of the nutrient value will be lost because the waste will leave the field during precipitation events and snowmelt. . . . [T]he risk of land-

applied waste entering surface waters increases when waste is surface-applied to frozen, ice-covered and snow-covered ground." (Leder Test. 3.) According to the Leder's testimony, "[a]pplication by incorporation or injection is less environmentally risky because the waste is not just sitting on top of the ground, unprotected from the elements." *Id.* at 4.

The Illinois EPA believes that frozen ground should be defined as proposed in its initial filing—including ground frozen anywhere in the first 1/2 inch to 8 inches of soil.

C. Definition of livestock waste

The Agricultural Coalition proposes that the Agency's definition of "livestock waste" be modified to not include "sludge and contaminated soils from storage structures" as an example of livestock waste. The Agency does not have an objection to removing the language as the Agricultural Coalition proposes so long as sludge and soils removed from an earthen lagoon are considered to be livestock waste. While testifying on behalf of the Agricultural Coalition, Claire Manning stated that sludge and soils removed from an earthen lagoon would be considered livestock waste. (Urbana Hr'g Tr. 143.) It appears that the Agency and Agricultural Coalition agree.

D. Nondischarging CAFOs

In its motion to the Board, the Agricultural Coalition asks the Board to adopt a new section 502.107, which provides "No NPDES permit shall be required for any facility which is not discharging or has not yet received livestock waste." Claire Manning testified that the new section which the Agricultural Coalition proposes is "just another way of saying" the same thing as the Agency's proposed section 502.101(b). (Urbana Hr'g Tr. 150.) The Agency believes that the Agricultural Coalition's proposed new section is unnecessary, would create confusion and could discourage new CAFOs that will have a discharge from obtaining a permit before

commencing operation, as required by proposed section 502.101(e). (Prefiled Answers (Nov. 8, 2012) p. 5.) The Agency believes the Board should deny the Agricultural Coalition's motion to add new section 502.107.

E. Appeal from Case by Case Designations.

Both in its written motion and its testimony before the Board, the Agricultural Coalition claims that the Agency's proposal for CAFO designation found in proposed section 502.106 is inconsistent with the federal rule. However, the factors for designation under the Agency's proposed section 502.106 and the federal rule are identical. See 35 Ill. Adm. Code 502.106; 40 C.F.R. 122.23(c)(1).

The federal designation provisions do not contain a specific requirement that designated CAFOs must obtain a permit; however, the existing Board rule in section 502.106 does require designated CAFOs to obtain a permit. Subsection (a) of existing section 502.106 states that the Agency may require an animal feeding operation (AFO) to obtain a permit by designating the AFO as a CAFO. Additionally, subsection (d) provides that the newly designated CAFO must apply for a permit within 90 days of designation. While these requirements are not explicitly found in section 122.23(c) of the federal rule, they are still federal requirements. Section 122.23(e) provides that discharges from CAFOs that are not agricultural stormwater discharges are subject to NDPES permit requirements. AFOs that are designated under the identical Board and federal criteria necessarily have a discharge because both must be a significant contributor of pollutants to waters of the United States. See 40 C.F.R. 122.23(c).

This Board rule has differed in this limited and non-substantive aspect from the federal CAFO rule since its promulgation in 1978. See 41 Fed. Reg. 11460 (March 18, 1976); 2 Ill. Reg. 44 (October 30, 1979). The Board decided to word the designation provision differently from

the federal rule when it initially promulgated this section and, in the 32 years since its promulgation, the Agency has not had cause to seek its modification.

The Agricultural Coalition claims that the Agency's designation of an AFO should be immediately appealable to the Board. The Illinois EPA maintains that the designation of an AFO as a CAFO is not a final decision, but is the first step of a permitting process. After designation, the Agency will require the CAFO to fix problems that resulted in the CAFO being a significant contributor of pollutants to waters of the United States. If unable to fix these problems, the CAFO must obtain a permit (Springfield Hr'g Tr. 47.) After permit issuance, the CAFO would then be able to appeal the permit and the designation. Witnesses from both the Agency and the Agricultural Coalition agree that a CAFO designation is not a final decision. Ms. Manning agreed that after an Agency has designated a CAFO, but during the permitting process, it is possible for the Agency to determine that the facility corrected its discharge and no longer needs a permit. (Urbana Hr'g Tr. 155.)

The Agency has a statutory duty to administer the NPDES permit program. Designation of AFOs as CAFOs falls under this duty. Whether the designation was proper is a question for the Board or the courts in an enforcement or permit appeal context. The Agency maintains that section 502.106 is consistent with the federal rule, and environmental and administrative decision making in the State of Illinois. The Agency believes the Board should deny the Agricultural Coalition's request that section 502.106 be stricken or modified.

F. Unpermitted Large CAFOs and Nutrient Management Plans (NMPs)

Finally, the Agricultural Coalition moves the Board to change the scope of the agricultural stormwater exemption. Under the Agency's proposed section 502.102, a CAFO must demonstrate compliance with the requirements of proposed section 502.510(b) to claim this

exemption. Contrary to the Agricultural Coalition's assertion, section 502.510(b) does not require unpermitted large CAFOs to develop a NMP. (Prefiled Answers (Aug.14, 2012) Attachment 2 p. 7.) The Agricultural Coalition claims that the Agency's rule is duplicative of and inconsistent with the Livestock Management Facilities Act (LMFA) and associated regulations, and therefore, the Board should amend section 502.102 to allow unpermitted large CAFOs to claim the agricultural stormwater exemption if the CAFO complies with section 20(f) of the LMFA and section 900.803 of the associated LMFA regulations. Furthermore, the Agricultural Coalition proposes to limit the scope of Subpart E and Subpart F to permitted CAFOs. Finally, the Coalition proposes that unpermitted large CAFOs be required to keep the records specified in the LMFA's regulations.

Illinois EPA believes that the scope of facilities subject to the LMFA is different than the scope of large CAFOs under the Clean Water Act. There are certain types of large CAFOs that have less than 1,000 animal units. For example, a mature dairy cow operation with 700 cows only has 980 animal units, and a facility with 10,000 swine under 55 pounds would have only 300 animal units (Urbana Hr'g Tr. 113-17.) Under the LMFA, livestock facilities with less than 1,000 animal units shall not be required to prepare and maintain a waste management plan. 510 ILCS 77/20(a). The changes proposed by the Agricultural Coalition would directly conflict with the LMFA because some facilities with less than 1,000 animal units would be required to develop a waste management plan to claim that discharges from land application areas are agricultural stormwater. The Agency's proposal on the other hand does not require unpermitted large CAFOs to follow any particular plan, so long as the CAFO can demonstrate the practices in proposed section 502.510(b)[1] have been complied with.

[1] These practices include applying livestock waste at an appropriate rate, having adequate land area to apply the livestock waste, having adequate storage, having proper mortality management, diverting clean water, preventing

It is also worth noting that simply developing a plan is not sufficient to claim the agricultural stormwater exemption under the federal rule and the rule proposed by the Agency. Unpermitted large CAFOs must demonstrate that they employ the appropriate "*practices*" regardless of what is stated or not stated in a plan. Under the Agricultural Coalition's proposal, an unpermitted large CAFO must develop a waste management plan that complies with section 20(f) of the LMFA and section 900.803 of the Department of Agriculture's regulations. Neither of these sections requires a livestock facility to comply with the terms of its plan, or carry out the practices described therein. Instead, section 20(a) of the LMFA provides that a livestock facility must comply with the handling, storing and disposing requirements set forth in the rules adopted pursuant to the Illinois Environmental Protection Act concerning agriculture related pollution, which include Parts 501and 502. Making the change as proposed by the Agricultural Coalition without adopting additional language requiring compliance with the plans developed under the LMFA would create a loophole in Illinois law.

The Agency believes that the requirements in section 502.510(b) are consistent with federal agricultural stormwater exemption requirements. During the hearings in this proceeding, the testimony of Dr. Ted Funk and Dr. Stacy James explored the differences between the requirements in section 502.510(b) and the LMFA. These differences include the following:

1) The LMFA lacks the winter requirements found in proposed section 502.630 of Agency's proposal.

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contact of animals with waters of the United States, handling chemicals and chemical disposal properly, implementing site specific conservation practices, applying appropriate protocols for testing livestock waste and soil, applying appropriate land application protocols which ensure agricultural utilization of the nutrients in the livestock waste, following setbacks set forth in Part 502, developing and implementing a winter application plan meeting the requirements in section 502.630, inspecting and monitoring subsurface drainage systems, developing a spill prevention and control plan, maintaining records, and emergency storage provisions.

2) The Agency's proposal contains a setback of 100 feet from conduits to surface waters unless there is 35 foot vegetative buffer; the LMFA has no similar requirement.

3) The Agency's proposal requires more frequent soil sampling than the LMFA, and requires the waste to be analyzed annually. The LMFA allows operators to determine the nutrient value of livestock waste by using table values.

4) The Agency's proposal requires the operator to monitor, inspect, manage and repair subsurface drains. The LMFA does not have this requirement.

5) The Agency's proposal requires a spill control and prevention plan. The LMFA does not have this requirement.

6) The Agency's proposal requires the operator to develop waste management strategies when conditions prevent land application or other methods of waste disposal. The LMFA does not.

7) The Agency's proposal requires that the CAFO have adequate storage of livestock waste; the LMFA does not have a similar requirement.

8) The LMFA lacks the mortality management requirements, which are required under the Agency's proposal.

9) The LMFA does not require clean water be diverted from the production area as is required by proposed section 502.510(b)(5).

10) The Agency's proposal requires the CAFO to prevent direct contact of livestock in the production area from waters of the United States, and the LMFA does not.

11) To claim the agricultural stormwater exemption under the Agricultural Coalition's proposal, the CAFO must demonstrate compliance with 20(f) and 900.803. Neither of these sections have a record keeping requirement. Therefore, it is plausible that a CAFO could claim

the agricultural stormwater exemption without keeping records of its practices. If a CAFO failed to keep the required records, the exemption would not be foreclosed, but the CAFO would be in violation of the independent record keeping requirement. Under the Agency's proposal, a CAFO must keep records demonstrating its compliance with section 502.510(b). This is not an independent record keeping requirement, and if a CAFO fails to keep the required records, the CAFO will not be able to claim a discharge from the land application is an agricultural stormwater discharge. The Agency's proposed record keeping requirement in connection with the agricultural stormwater exemption is consistent with the federal rule, while the Agricultural Coalition's proposal is not. See 40 C.F.R. 122.23(e), 122.42(e)(1)(ix). Additionally, the independent record keeping requirement under the LMFA is different from the record keeping requirement in 502.510(b)(15). (Compare 8 Ill. Adm. Code 900.809 with Agency proposed section 502.510(b)(14)).

The Agency believes that the Agricultural Coalition's proposed changes would be inconsistent with federal agricultural stormwater exemption requirements and would not be sufficiently protective of water quality. Therefore, the Agency believes the Board should deny the Agricultural Coalition's requested changes to sections 502.102, 502.500, 502.600.

Environmental Groups' Proposal

A. Registration Requirement

Pursuant to authority under section 308 of the Clean Water Act, U.S. EPA proposed a rulemaking that would have required submittal of information from certain CAFOs. See 76 Fed. Reg. 65431 (Oct. 21, 2011). U.S. EPA withdrew this proposed rule on July 20, 2012. See 77 Fed. Reg. 42679 (July 20, 2012). Section 502.505 of the Agency's proposal entitled "Requirements for Certain CAFOs to Submit Information" would require CAFOs subject to such

a federal requirement, should U.S. EPA adopt one in the future, to submit the same information to Illinois EPA that is required to be submitted to U.S. EPA.

In the regulatory language proposal submitted by the Environmental Groups, the Agency's proposal is stricken in its entirety and is replaced by a new CAFO registration program. Testimony on the need for a comprehensive CAFO inventory was submitted by Arnold Leder. (Leder Test. 6-8.) Testimony in support of the CAFO registration program was submitted by Dr. Kendall Thu. (Thu Test. 4-6.)

In response to information requests made of the Agency at the August 21, 2012 hearing in Springfield, the Agency submitted a legal memorandum to the Board on October 9, 2012 addressing the authority of the Agency or the Board to adopt a registration program for large CAFOs. The Agency's conclusion in that memorandum is that there are significant questions as to whether the Board has sufficient legislative authority to adopt such a program. In addition, Bruce Yurdin and Sanjay Sofat presented testimony about the Agency's efforts in the development of a comprehensive CAFO inventory which would make this controversial and possibly illegal proposal unnecessary. (Springfield Hr'g Tr. 110 – 113.)

The topic of a CAFO inventory and CAFO registration was addressed at the Dekalb and Elizabeth hearings. Witnesses for the Environmental Groups expressed the concern that it is important to know where all the CAFOs in the state are located. However, the Agency believes the proposal put before the Board by the Environmental Groups goes well beyond the collection of information necessary to develop an inventory of CAFOs. Requiring the submittal of information on waste storage and containment, volume of waste generated, methods of disposal, details on disposal locations, nutrient management plans, contractual agreements with parties

who accept waste, and information on record-keeping practices is well beyond the type of information expected to be generated from a comprehensive inventory.

Dr. Thu testified that "Because the USEPA withdrew its proposed CAFO Reporting Rule, the regulatory proposal now before the Board clearly fails to meet commitments made by the Illinois EPA to avoid dedelegation of the state's NPDES program." (Thu Test. 6.) Illinois EPA disagrees with Dr. Thu that the Agency has in any way failed to meet its obligations to U.S. EPA to maintain delegation of the NPDES program. The Agency has not been given any indication from U.S. EPA that it has failed to meet any requirements of the February 24, 2011 Program Work Plan that was submitted as Attachment 7 to Dr. Thu's testimony. In addition, the requirements of that work plan were folded into the FY12-13 Performance Partnership Agreement entered into between U.S. EPA and Illinois EPA every two years for the administration of delegated programs. The language regarding rulemaking proposals that Dr. Thu is relying on in his testimony was not included in the current Performance Partnership Agreement or the revisions to the CAFO Program Work Plan.

For these reasons, the Agency does not support the registration language proposed by the Environmental Groups. The comprehensive inventory being developed by the Agency and U.S. EPA will serve the stated purposes of the proposal without obligating the Agency to receive, review, store and track a large volume of information that is unnecessary to implement the NPDES program or enforce the Environmental Protection Act.

B. Livestock Waste Transfers

Under the Illinois EPA's proposal, a CAFO must have adequate land application area for the livestock waste produced by the CAFO, and this land must be included in the NMP (See Agency proposal section 502.510(b)(2); SOR p. 78; TSD p. 15; Pre-filed Answers (Aug. 14,

2012) Attachment 5 p. 8.) The CAFO must own, rent, or have the land available through a consent agreement. (Springfield Hr'g Tr. 171-73, 175-76.) When a CAFO land applies to land it does not own or rent, but has access to via consent agreement, the Agency does not consider this to be a "third party" or "off-site" transfer of waste. (Springfield Hr'g Tr. 173-175.) The land application rules contained in Subtitle E apply to the land application by the CAFO on land that it has access to via consent agreement. *Id.* at 173-72.

The Agency believes requiring each CAFO to own, rent, lease or control (via consent agreement) enough land to spread all the livestock waste generated at the CAFO at an agronomic rate is an important element in protecting the State's waters. If CAFOs were not required to own, rent, lease or control enough land area to spread its waste, a CAFO would be forced to rely on third party's willingness to accept its waste. When a third party refuses to accept the waste, the CAFO may unintentionally discharge while storing or handling this waste. If, however, the CAFO controlled all the land it needed to land apply all the waste it generates, and this land was required to be included in the NMP, the CAFO could independently ensure that the waste it generates is properly land applied. The Illinois EPA believes this latter approach is more protective of surface waters because it requires the NMP to be comprehensive.

The Illinois EPA does not believe transfers to third parties (where the CAFO is not doing the land application, or where land application is done by the CAFO, but it is on fields without a consent agreement and not included in the NMP) should be considered in determining whether a CAFO is properly managing its waste; therefore these third party transfers should not be included in the NMP. (Prefiled Answers (Aug. 14 2012) Attachment 5 p. 7.) While these transfers should not be a part of the NMP, the Agency recognizes that these transfers do occur because the nutrient value of livestock waste is a commodity. (Springfield Hr'g Tr. 174.) While

a CAFO cannot rely on these third party transfers of waste in its nutrient management planning, the Agency's proposed rule does not prohibit this type of transfer. When these "third party" transfers occur, the CAFO must document the quantity of livestock waste transferred. (See Agency proposed 502.325(b)(3); Springfield Hr'g Tr. 172.) The CAFO must also give the third party the nutrient analysis of the waste, and retain records of the recipient's name, address, and the amount of waste transferred. (See Agency proposed rule 502.610(k).) These requirements are derived from the federal CAFO rule. 40 C.F.R. §122.42(e)(3)(2012).

The Environmental Groups believed that the Agency's regulations on this point are not clear, and submitted a counter proposal. (Springfield Hr'g Tr. 176.) Under the counter proposal, the Environmental Groups propose allowing CAFOs to include land not under its control in the NMP. Under their proposal, section 502.510(b)(2) provides that the NMP must specify and demonstrate "adequate land application area for livestock waste application, including land owned or controlled by a person other than the CAFO owner or operator." The Agency believes this counter proposal is less protective of surface waters than the Agency's proposal because CAFOs are permitted to rely on third parties over which they have no control in their planning of proper waste management. Under the Environmental Groups' proposal, a CAFO could own, lease, rent or control no land, but have an agreement that a third party would accept all the CAFO's waste. This CAFO would comply with the Environmental Groups' proposed section 502.510(b), and have an adequate NMP. Under the Agency's proposal, the CAFO must own, rent, lease or have control over enough land to spread all the waste it generates. The Agency believes its proposal requires CAFOs to develop long term land use plans, and prevents CAFOs from completely relying on a third party's ability or willingness to accept the CAFO's waste.

Additionally, the Environmental Groups propose in section 502.610(k) that all waste transfers be accompanied by a signed contract, where the individual is informed of "his or her responsibility to comply with state land application rules and manage the waste to minimize the discharge of pollutants to waters of the State." (See Environmental Group's counter proposal, section 502.610(k)(2)(E).) The Agency finds this provision ambiguous because it is not clear where this "responsibility" arises. The Agency is unaware of any land application rules that apply to facilities that are not livestock management facilities or livestock waste handling facilities. Part 502 only applies to CAFOs, and the land application rules in Subpart F likewise only apply to CAFOs. The Agency does not believe that the provisions of section 502.610(k) clearly create this "responsibility." The ambiguity of proposed section 502.610(k)(2) leaves the Agency wondering if the Environmental Groups intended for the CAFO and the third party to include as a term of the contract an agreement that the third party will follow the requirements of subpart F. If this "responsibility" is only a term of a contract, the Illinois EPA will have no means to enforce compliance.

Illinois EPA believes it will be difficult for the regulated community to comply with this section because third parties do not have an independent obligation to follow the land application rules in subpart F, and the rule as drafted by the Environmental Groups does not specifically require compliance with subpart F as a term of the contract. For these reasons, the Agency does not support the Environmental Groups' proposed changes to sections 502.510(b)(2), 502.610(k), 502.505(h), 502.325(3), 502.320(l) and 502.201(12).

The Environmental Groups have proposed an additional language change that seems directed at third parties. In section 502.201 of the Agency's proposal, the Environmental Groups propose a new subsection (a)(2) adding an additional information submittal requirement for

permit applications of: "If a contract operation, the name and address of the integrator." The Agency is not clear on the meaning or intent of this additional informational requirement for permit applicants. If the Board decides to accept this proposed change, it would be necessary to include additional clarification or definition of terms.

C. Unpermitted Large

The Environmental Groups propose increasing the scope of the technical standards articulated in subpart F of Part 502 and the Nutrient Management Plan provisions in subpart E of Part 502 to all unpermitted large CAFOs. To accomplish this, the Environmental Groups propose changing the agricultural stormwater exemption in proposed section 502.102. Under the Agency's proposal, an unpermitted large CAFO must land apply livestock waste in accordance with "*site specific nutrient management practices* that ensure appropriate agricultural utilization of the nutrients of the livestock waste," and in accordance with section 502.510(b) (emphasis added). The Environmental Groups propose changing "site specific nutrient management practices" to "section 502.615 through 502.645." The Environmental Groups' proposal also states that unpermitted large CAFOs must develop a NMP.

The Agency does not agree with the proposed changes presented by the Environmental Groups. When asked why the Agency did not require all unpermitted large CAFOs to follow the requirements in sections 502.615 to 502.645, the Agency responded with the testimony of Sanjay Sofat:

> I think the Agency's proposal wanted to keep the flexibility that the federal rule has. We did not want to take away the technology or other developments that could happen in the future and therefore bind them to the requirements that we do have for the permitted rule. So it was more flexibility; give them room.
>
> Again, 510(b) needs to be complied with. How you comply, all that is being left on unpermitted large CAFOs to decide. They know their site. They could be involved in groups, with the universities, that they're looking into technologies, and we do not want

> to, just like the federal rule talks about, we did not want to limit that flexibility so that they can effectively and efficiently comply with the ag storm water exemption requirement.

(Springfield Hr'g Tr. 155.) The Agency believes that the Environmental Groups' proposal for unpermitted large CAFOs is too prescriptive and fails to give these non-discharging facilities flexibility that is provided by the federal CAFO rule:

> "Because the technical standards established by the Director represent the permitting authority's judgment as to practices that ensure appropriate agricultural utilization of nutrients. . . they provide a sound basis for determining and documenting that a precipitation-related discharge from land application area will meet the [agricultural stormwater exemption] requirements . . . If a facility chose to take a different approach and follow other standards, the facility would need to demonstrate not only that its practices accorded with such alternative standards, but also that the standards provided a reliable, technically valid basis for meeting the terms of the [agricultural stormwater exemption requirements]. . . The EPA recognizes that there may be other standards that are developed besides those established by the Director that may also provide guidance to producers regarding appropriate agronomic nutrient management practices and the development of rates of application. Under this rule, owners and operators of unpermitted CAFOs are not precluded from relying on such standards."

73 Fed. Reg. 70435 (November 8, 2008). The Agency requests that the Board forgo the changes proposed by the Environmental Groups to ensure that the Board's rule retains this flexibility.

D. Winter Application

The Environmental Groups propose modifying the Illinois EPA proposed winter land application regulations in section 502.630. Under the Agency's proposal, surface land application on frozen, snow covered or ice covered land is prohibited, unless the following six conditions are met: (1) no practical alternative measures are available; (2) the waste cannot be injected or incorporated; (3) the owner has taken steps to provide 120 days of available storage by December 1; (4) even though the owner has taken steps to provide enough storage for winter conditions, the owner does not have 120 days of available storage on December 1; (5) the owner

has notified the Agency in writing that it does not have 120 days of storage as of December 1; and (6) a discharge is likely to occur.

The Environmental Groups propose modifying the Agency's proposal by adding that surface land application on frozen, snow covered or ice covered ground is prohibited unless the Agency grants permission. The Illinois EPA would be required to evaluate the six criteria explained above, and if the owner has complied with all six criteria grant permission to the owner to surface land apply during winter conditions.

The Agency does not believe the permission provision is necessary, and in some cases may be harmful. Given the site specific nature of land application, the Agency may not be able to grant permission over the telephone or within a single business day because Agency personnel may need to make a site visit to determine whether or not practical alternatives exist, that the livestock waste cannot be injected or incorporated, or that a discharge is likely to occur. It is possible that the CAFO may not have time to wait for Agency approval if a discharge is truly likely to occur. In this situation, the CAFO could land apply to avoid a discharge from the production area; however, such land application would be in violation of the rules proposed by the Environmental Groups. In a second alternative in this situation, a CAFO could wait for Agency approval, and in the meantime watch its storage structure overflow; in this alternative, an unpermitted CAFO will most likely be discharging without a permit, and a permitted CAFO will most likely be discharging in violation of the permit. The Environmental Groups' proposal removes needed flexibility for CAFOs and places CAFOs in emergency conditions in a no-win situation.

The Agency also opposes the Environmental Groups' proposed changes to section 502.630 because the Illinois EPA does not want Agency permission to be used as a "shield" in

enforcement actions for causing water pollution. It is possible that the Agency could approve winter application that causes water pollution, a violation of 12(a) of the Environmental Protection Act. If the Board were to adopt the Environmental Groups' proposal, the Agency would not intend to grant a shield when it granted permission to surface apply to frozen, snow covered or ice covered fields.

E. Macropore

The Environmental Groups propose defining "macropore" in section 501.301 as "any pore that allows free drainage to the depth of the subsurface drain." Furthermore, they propose adding a new subsection (m) to section 502.620 which would prohibit liquid livestock waste from being land applied on fields containing macropores.

The Agency believes this provision is unnecessary and overly burdensome for the agricultural community to implement. According to the Environmental Groups' technical witness, surface land application would be permissible on the fields with macropores and subsurface drains if the fields were tilled prior to application or if the waste was incorporated. (James Test. 6-7.) The Environmental Groups' proposal in section 502.620, however, does not reflect the exception articulated by Dr. James. Moreover, it is not clear from the record before the Board whether tilling prior to land applying would reduce the likelihood that the livestock waste would reach the subsurface drains. Donald Keefer testified that tillage may have positive benefits, but that results are inconsistent. (Elizabeth Hr'g Tr. 178.) Samuel Panno testified that, in his opinion, tillage and incorporation does not destroy macropores, and that tillage may actually increase the risk of livestock waste reaching subsurface drains because the soil is broken up and more permeable. (DeKalb Hr'g Tr. 76, 124.)

Even if the exceptions articulated by Dr. James were incorporated into the Environmental Groups' proposal, the Agency believes that the proposed rule is too restrictive. Don Keefer testified that macropores are generally 0.08 millimeters in diameter, and are present on every field in Illinois (Keefer Test. 2; Elizabeth Hr'g Tr. 158, 163, 171-173.) It is not clear whether these macropores would be visible to an observer walking across the field. (DeKalb Hr'g Tr. 122.) While the depth of macorpores can extend 15 feet or more, one cannot necessarily tell how deep each pore extends without conducting a field study. (Keefer Test. 2; DeKalb Hr'g Tr. 120, 123; Elizabeth Hr'g Tr. 171.) According to Dr. James' prefiled testimony, 30% of the Illinois farmland has subsurface drainage. (James Test. 6.) Therefore, given the difficulty in determining the depth of macropores, and the testimony that all fields have them, the Environmental Groups' proposal effectively eliminates 30% of the fields to which liquid livestock waste can be land applied.

The Agency believes that its current land application prohibitions found in Subpart F of the Agency's proposed regulations are sufficiently protective and the macropore prohibition proposed by the Environmental Groups is not necessary. In his testimony at the Elizabeth hearing, Don Keefer agreed, stating that a prohibition on land application on fields with subsurface drains was not necessary. (Elizabeth Hr'g Tr. 176.) Instead, restricting livestock waste application rates, and applying other best management practices would be sufficiently protective. *Id.* In particular, the Agency's proposal contains a 100 foot setback from open subsurface drainage intakes in proposed section 502.645, protocols governing land application and protocols describing how to determine livestock waste application rates in proposed section 502.620 and 502.625, and requirements of proposed section 502.615 that require individual field assessments.

The Agency does not believe the Board should make the Environmental Groups' proposed changes to sections 501.301 and 502.620(m) regarding macropores.

F. Set Backs

The Environmental Groups' counter proposal contains new setback provisions for livestock waste management facilities from surface waters, drinking water supplies, and potable water wells, and for land application from biologically significant streams, outstanding source water and designated drinking water intakes.

They propose two new subsections in section 501.403:

(h) No new livestock management facility or new livestock waste handling facility shall locate within 750 feet of surface water or a quarter-mile from designated surface water drinking supplies.

(i) No new livestock management facility or new livestock waste-handling facility shall locate within 1000 feet of community water supply wells or 400 feet from other potable water supply wells.

The Agency has identified a few issues with these proposed changes. First, Part 501 currently defines new livestock management facility as any facility built or modified after 1978. According to Dr. James' testimony at the DeKalb hearing, the Environmental Groups did not intend for these setbacks to apply to facilities that are existing at the time the regulations are promulgated. (DeKalb Hr'g Tr. 236-37.) However, if the Board chooses to adopt these setbacks, the Board would have to sufficiently distinguish facilities built after 1978 from those facilities built after promulgation of these rules because the term new facility is used throughout existing section 501.403.

Second, the Agency believes the LMFA governs the siting of livestock waste management facilities. Under the LMFA, one who wishes to build a new livestock management facility must file a notice of intent to construct with the Illinois Department of Agriculture

(IDOA) for "determination of setbacks in compliance with setback distances." 510 ILCS 77/11 (West 2010). For small facilities without a lagoon, construction can begin after IDOA reviews the documents and grants approval to the project. *Id.* For larger facilities, the county board where the facility is proposed to be located is contacted and given the opportunity to request an informational meeting with IDOA. 510 ILCS 77/12. The county board is required to submit an advisory recommendation to the IDOA regarding the siting criteria. *Id.* Construction cannot begin until after the IDOA reviewed and replied to the county board's recommendation, indicating if the facility will be in compliance with the LMFA, including all setback and siting criteria. *Id.* The Illinois Pollution Control Board and the Illinois EPA do not play a role in the siting and construction of these facilities.

The Agency believes rules setting forth the required setbacks for facilities belong in the LMFA or Title 8 of the Illinois Administrative Code, Part 900, Livestock Management Facility Regulations. Before the IDOA will allow a new facility to be built, it must determine that siting and setback provisions of the LMFA have been complied with. The Agency acknowledges that the LMFA is silent on the setback distance for facilities from surface waters, drinking water supplies or wells. The IDOA's LMFA rules also do not contain these setbacks. Since the proposed setbacks are not in the LMFA, the IDOA can allow new facilities to be constructed that are closer to surface waters, wells and drinking water supplies than specified in the Environmental Groups' proposed subsections (h) and (i) because the IDOA can allow construction to proceed after it determines that it is "more likely than not" that the provisions of the LMFA have been met. 510 ILCS77/12.1(a).

Additionally, the Agency would like to note that the Illinois Groundwater Protection Act, P.A. 85-863 which amended the Environmental Protection Act, established minimum and

maximum setback distances from community and potable water supply wells. Under section 14.2 of the Act, no potential secondary source (which would include any unit at a facility utilized for handling livestock waste) can be located within 200 feet of a potable water supply well, or 400 feet if the well derives water from an unconfined shallow fractured or highly permeable bedrock formation or from an unconsolidated and unconfined sand and gravel formation. 415 ILCS 5/14.2. The Agency believes the General Assembly is the proper forum for increasing these setback provisions as proposed by the Environmental Groups.

The Environmental Groups also propose a land application setback in section 502.645(f): "Livestock waste shall not be land applied within 500 feet of biologically significant streams, outstanding resource waters and designated surface drinking water supplies." The Agency believes the process of designating surface drinking water supplies in proposed sections 502.645(f) and 501.403(h) is unclear. Additionally, the rules proposed by the Environmental Groups do not specify what a biologically significant stream is or how it is determined. The Agency does not believe the testimony and evidence presented at the hearing is sufficient to remove the doubts surrounding these terms.

G. Temporary Manure Stacks

The Agency, in its proposal, made changes to the temporary manure stack provisions in section 501.404. The Agency's proposed changes would require a cover and pad be used when needed to prevent runoff and leachate from entering surface water and groundwater. The Environmental Groups' proposed changes to this section would require a cover and a pad unless certain setback provisions were met. A cover and pad would be required when the temporary manure stack is less than 750 feet from surface water, 1000 feet from community water supply wells, 400 feet from other potable water wells, and 400 feet from karst features. Additionally, a

cover and pad would be required when the minimum depth to the seasonal high water table is less than or equal to 2 feet or where there is less than 20 inches of unconsolidated material over bedrock.

The Agency believes that its proposal allows more flexibility, while being equally protective. During the DeKalb hearing, Dr. Stacey James testified it was possible that a cover and pad would be necessary to prevent runoff and leachate from a manure stack located beyond the prescribed setback to surface water distance (750 feet). (DeKalb Hr'g Tr. 242.) The Agency believes that site specific criteria, such as the slope of the land or whether any conservation buffers exist between the manure stack and the surface water, must be considered before determining if a pad and cover is necessary. Under the Environmental Groups' proposal, a cover and pad would always be required when the manure stack is less than 750 feet from surface water, even when runoff and leachate would not reach surface water in the cover and pad's absence. Conversely, under the counter proposal, a cover and pad or other control device would not be required for manure stacks located more than 750 feet from surface water, even if the cover and pad or other control device would be necessary to prevent runoff and leachate from reaching surface waters.

As noted above in the Agency's discussion of setbacks, the Environmental Protection Act contains statutorily established minimum and maximum setback distances from community water supply wells. The Agency believes that the General Assembly is the proper forum for a discussion about increasing these setback provisions.

Finally, the Environmental Groups propose prohibiting manure stacks without a pad and cover if the manure stack is located within 400 feet of "karst features." The Environmental Groups do not propose a definition of "karst features." During the hearings in this matter, two

experts disagreed as to what a suitable definition of karst would include. Samuel Panno testified that karst means carbonate bedrock showing karst features such as sinkholes or enlarged crevices or joints, and that this definition of karst is consistent with the LMFA. (DeKalb Hr'g Tr. 92.) Donald Keefer testified that karst is not localized, but refers to "the processes that have happened on rock formation, which is a thickness of deposits usually across many miles." (Elizabeth Hr'g Tr.179.) According to Mr. Keefer, karst cannot be "characterized from site specific characterization capabilities," but instead is an area-wide or regional determination *Id.* at180-81. The Illinois EPA believes that the Environmental Groups' proposal adds unnecessary confusion to the proposed rule because it does not define "karst" or "karst features."

The Agency believes its proposed amendments to section 501.404 are more protective and clear than the revisions suggested by the Environmental Groups, and therefore, the Agency does not believe that the Board should make the Environmental Groups' proposed changes.

Other Comments

A. Funk's Proposal

In his prefiled testimony for the Urbana hearing Dr. Ted Funk recommended that the Board delete two subsections of section 502.630 as proposed by the Agency. Dr. Funk testified that he believed subsections 502.630(c)(4) and (5) were arbitrary and burdensome to implement. (Funk Test p. 2.) Section 502.630 as proposed by the Agency provides:

> c) Availability of Individual Fields for Winter Application
>
> If livestock waste is to be surface applied on frozen ground, ice covered land or snow covered land, the land application may only be conducted on land that meets the following requirements:
>
> . . . .
>
> 4) Application may only occur on sites that have field specific soil erosion loss less than the erosion factor T as determined using Revised Universal

Soil Loss Equation 2, and have a median Bray P1 or Mechlich 3 soil level of phosphorus equal to or less than 300 pounds per acre;

5) Surface Application may only occur after application of three times the otherwise applicable setbacks from Sections 502.615 and 502.645 if the slope of the field is between 2 percent and 5 percent. This setback requirement does not include the ¼ mile distance from residences contained in Section 502.645(a); and

With regard to section 502.630(c)(5), Dr. Funk was asked by the Board why he felt additional setbacks for winter application were overly burdensome. He testified that "I think to come up with. . . one or two more sets of setbacks for different weather conditions makes it very confusing to an operator. . . " (Urbana Hrg'g Tr. 35.) When the Board asked if he had an alternative recommendation, Dr. Funk stated that "I think it just is a better overall process using a site-specific, field-by-field assessment rather than to just come up with a blanket setback number from surface water." *Id.* at 36. Dr. Funk also admitted that slope and distance to surface waters are two of the most significant factors that determine whether manure applied in winter will reach surface waters. *Id.* at 86. When the Board staff asked whether the proposal should be changed to simply prohibit land application in winter on slopes over a certain percent Dr. Funk again reiterated his recommendation for a site-specific approach. *Id.* at 88-89. When asked if this site-specific approach should be incorporated into the regulations, Dr. Funk could not provide a recommendation for alternative regulatory language to replace the Agency's proposal. *Id.* at 89-90.

With regard to section 502.630(c)(4), Dr. Funk again testified that he found the Agency's language too prescriptive, but he also admitted that the factors in this subsection – RUSLE 2 and soil phosphorus levels – could in some circumstances affect the impact of winter land application of livestock waste on surface waters. *Id.* at 64 -65. Dr. Funk did not provide an alternative, less-prescriptive set of suggestions that would provide a comparable level of protection from the risks

of winter application. While the Agency shares Dr. Funk's concerns that the final regulations provide as much flexibility as possible, Dr. Funk has not persuaded the Agency that there is a less prescriptive but equally protective alternative to these requirements. For these reasons, the Agency recommends that the Board reject Dr. Funk's suggestion that subsections 502.630(c)(4) and (5) be eliminated from the Board's first notice proposal.

Dr. Funk also recommended that the Board add three additional references to Section 502.625(b) for calculating manure production volumes. One of those sources, "Manure Characteristics", MWPS-18 Section 1, Second Edition (2004), is already incorporated by reference in Section 501.200 of the Agency's proposal and the Agency does not object to referencing this source in Section 502.625(b) as well. The Agency has also reviewed the NRSC Agricultural Waste Management Field Handbook Chapter 4, Agricultural Waste Characteristics. If the Board chooses to include this additional source to proposed Section 502.625(b) the Agency would find that acceptable also. The addition of the ASABE d384.2 MAR2005 (R2010) Manure Production and Characteristics is also acceptable to the Agency.

B. Panno's Proposal

Samuel Panno, from the Illinois State Geological Survey, prefiled testimony for the DeKalb hearing, wherein he states that "any portion of Illinois underlain by carbonate bedrock and with less than 50 feet of overburden may qualify as karst terrain. (Panno Test. 6 (October 16, 2012).) In his testimony, Panno makes the following proposals to the Board: (1) prohibit land application of livestock waste on a karst area when there is not 50 feet of unconsolidated material overlying the bedrock (Panno Test. 5 (October 24, 2012)); and (2) prohibit medium and large CAFOs in karst areas of the state where there is not a minimum of 50 feet of unconsolidated materials over bed rock. (Panno Test. 7 (October 24, 2012).) Figure 1, submitted as a part of

Panno's testimony, shows as dark grey areas those parts of Illinois underlain by kart terrain/aquifers and with less than 50 feet of overburden. (Panno Test. 5 (October 24, 2012).) Panno estimates that approximately 9% of Illinois has karst features at or near the surface. *Id.* at 4.

The Illinois EPA does not believe the Board should make the changes Panno suggests for three reasons: (1) As articulated above, the Illinois EPA believes the experts have provided conflicting testimony on how to define "karst" or "karst terrain"; (2) requiring 50 feet of overburden over karst terrain is too restrictive; and (3) the LMFA governs the siting of facilities and the proper place for an amendment prohibiting CAFOs construction and operation over karst is the LMFA. Under the Agency's proposal, livestock waste must be applied at a rate that ensures appropriate agricultural utilization of the nutrients in the waste. The Agency believes that when applying at the appropriate rate, 50 feet of overburden is not necessary to prevent groundwater contamination. If the Board were to adopt Panno's proposal, the Agency estimates that nearly all fields in Jo Davies, Pike, Calhoun, Monroe and Hardin counties would be unsuitable for land application. (See Panno Test. 4 (October 16, 2012).) A portion of the fields in Hancock, Adams, Brown, Schuler, Scott, Green, Jersey, St. Clair, Randolph, Jackson, Union, Pulaski, Johnson, Massac and Pope counties would also be unsuitable for land applications. CAFOs would also not be permitted to locate in these same areas. As explained above (surpa 23-24), changes to the regulations governing siting belong in the LMFA or regulations promulgated pursuant thereto.

The Illinois EPA believes Panno's proposal lacks a clear definition and could result in severe restriction on CAFO location and land application; therefore, the Agency proposes the Board not follow Panno's recommendations.

WHEREFORE, The Illinois EPA respectfully submits these comments, and requests the Board to proceed expeditiously to First Notice.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
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DATED: January 15, 2013

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CERTIFICATE OF SERVICE

Joanne M. Olson, Assistant Counsel for the Illinois EPA, herein certifies that she has served a copy of the foregoing NOTICE OF FILING and ILLINOIS EPA'S POST HEARING COMMENTS 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 January 15, 2013.

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