

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
CONCENTRATED ANIMAL FEEDING) R-2012-023
OPERATIONS (CAFOS): PROPOSED)
AMENDMENTS TO 35 ILL. ADM. CODE)
501, 502 AND 504)

NOTICE OF ELECTRONIC FILING

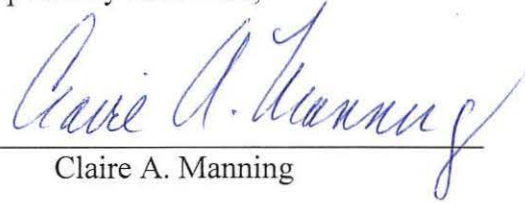
TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have electronically filed on January 16, 2013, with the Illinois Pollution Control Board, the AGRICULTURAL COALITION'S PRE-FIRST NOTICE PUBLIC COMMENT, copies of which are also herewith sent to the attached service list.

Dated: January 16, 2013

Respectfully submitted,

By:



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PROOF OF SERVICE

I, Claire A. Manning, certify that I have served the AGRICULTURAL COALITION'S PRE-FIRST NOTICE PUBLIC COMMENT, by U.S. Mail, first class postage prepaid, on January 16, 2013 to the following:

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AGRICULTURAL COALITION’S PRE-FIRST NOTICE PUBLIC COMMENT

Now comes the Agricultural Coalition (“Coalition”), comprised of the ILLINOIS PORK PRODUCERS ASSOCIATION, THE ILLINOIS FARM BUREAU, THE ILLINOIS BEEF ASSOCIATION AND THE ILLINOIS MILK PRODUCERS ASSOCIATION, by and through its counsel, BROWN, HAY & STEPHENS, LLP, and respectfully presents to the Illinois Pollution Control Board (“Board”) the following post-hearing Pre-First Notice Public Comment.

First, the Coalition acknowledges and appreciates the time spent by the Board, including its members and staff, on this rulemaking. In particular, the Coalition appreciates that the Board scheduled and held five public hearings throughout the State, because those hearings allowed a portion of the Coalition’s composite membership to provide public comment. Those public comments are summarized in Attachment A.

Second, the Coalition would oppose any Board action which adopts regulations that are (a) not required by the federal rules from which these rules are drawn; or (b) are inconsistent with the current provisions of the Livestock Management Facilities Act (LMFA), 510 ILCS 77/1 et. seq. The Coalition takes this position having had substantial involvement in the regulatory development of CAFO rules, at both the State and federal levels. Moreover, the LMFA is not subject to modification in this proceeding, directly or indirectly. It is a substantial piece of

legislation that has been in place since 1996, which cannot be amended by the Board or other State (or federal) agency without appropriate legislation.

I. LIVESTOCK WASTE REGULATION IN ILLINOIS: BACKGROUND

The Board is not revisiting the issue of Concentrated Animal Feedlot Operations (“CAFO”) regulations for the first time in this rulemaking. Rather, there is a significant regulatory history concerning the operation of livestock management facilities in Illinois. First, at the initiation of the Illinois Environmental Protection Agency (“IEPA”), the Board created and then amended Subtitle E, particularly to address implementation of the federal Clean Water Act (“CWA”) as it applied to agriculture at that time. See *In the Matter of Livestock Waste Regulations*, R72-9, November 14, 1974, and *In the Matter of Amendments to the Agriculture Related Pollution Regulations of the Illinois Pollution Control Board*, R76-15, September 21, 1978. Thus, Subtitle E has always been drawn from the CWA.

Some two decades later, given the changes in the livestock industry, the Illinois legislature determined that more specificity in the regulation of livestock waste was required, at a State level. Accordingly, the LMFA was passed. P.A. 89-456 eff. May 21, 1996. The LMFA set forth “a participative rulemaking process to provide the State, the agricultural community, environmental associations, and interested citizens, a public forum for the development of standards and rules.” *In the Matter of Livestock Waste Regulations*, 35 Ill. Adm. Code 506, R97-15, December 5, 1996, at p. 1.

Pursuant to hearings throughout the State, and a voluminous record, the Board developed regulations pursuant to the LMFA, at 35 Ill. Adm. Code Part 506. These rules governed siting and construction standards, as well as operation and management requirements. They also provided for training of livestock managers, as well as research and proper disposal and

application of livestock waste. See *In the Matter of Livestock Waste Regulations: 35 Ill. Adm. Code 506*, R97-15(A), May 15, 1997.

The LMFA was subsequently amended, in 1998, 1999, and 2007. The amendments addressed issues such as additional construction requirements (e.g., as secondary containment and increased protections in environmentally sensitive areas such as karst areas), more specific land application requirements (including specific phosphorous standards), public information requirements, and procedures related to notice of intent to construct and IDOA design and construction approval. See P.A. 90-565, eff. Jan. 2, 1988; and P.A. 91-110, eff. July 13, 1999.

Subsequent to hearings, the Board amended its Part 506 regulations. Some aspects of the Board's original LMFA regulations were repealed, such as those implemented by IDOA since, by then, the relevant regulatory provisions had been adopted by IDOA in its own rules, at 8 Ill. Adm. Code Part 900. See *In the Matter of Amendments to Livestock Waste Regulations: 35 Ill. Adm. Code 506*, R01-28, November 1, 2001. For the Board's information, a comprehensive summary of the LMFA and IDOA's implementation of it can be found on its website at <http://www.agr.state.il.us/Environment/LMFA/index.html>.

II. CONTEXT OF THIS RULEMAKING

Importantly, in this rulemaking the IEPA's proposal seeks to amend the Board's rules that are derivative of the CWA, at Parts 501, 502 and 503, for the primary purpose of reconciling those rules with the recently amended federal CAFO rules.¹ This is appropriate and, as we

¹ The EPA Administrator first signed the final NPDES regulations and ELG for CAFOs on December 15, 2002, and the 2003 CAFO Final Rule was published in the Federal Register on February 12, 2003. In 2005, the U.S. Court of Appeals for the Second Circuit decided Waterkeeper Alliance et al. v. EPA, 399 F.3d 486 (2d Cir. 2005). A series of public meetings and proposed amendments and changes to the federal CAFO Rule ensued, and in 2008 a new Final Rule was adopted. In 2011, the U.S. Court of Appeals for the Fifth Circuit decided National Pork Producers Council et al. v. EPA, 635 F.3d 738 (5th Cir. 2011) regarding litigation over EPA's 2008 amendments to Clean Water Act (CWA) permit regulations for concentrated animal feeding operations (CAFOs). In its decision, the court vacated EPA's requirement that CAFOs that propose to discharge apply for NPDES Permits. EPA followed with a new proposed rule that adopted the Fifth Circuit's direction. This proposed rule originally contained a requirement that

stated repeatedly at hearing, the Coalition is totally supportive of the IEPA's attempts to reconcile the State's rules in a manner consistent with the newly adopted federal rules and existing State law.

However, the Coalition rejects any attempt by other participants in this rulemaking to go beyond those rules, in any manner which would (by Board promulgated regulation) effectively amend the carefully crafted legislative provisions of the LMFA. No such amendment is necessary to incorporate the new federal CAFO rules into State (Board) regulatory language, as the IEPA in its proposal, and Statement of Reasons, recognizes.

III. ENVIRONMENTAL GROUPS' PROPOSED AMENDMENTS

For the above reasons, the Board must reject the Environmental Groups' attempted changes to the IEPA's regulatory proposal – summarized below. Additionally, these changes are not supported by the record, and must be rejected by the Board for that reason as well.

A. Location-based (Siting) Amendments – Suggested Changes to Proposed Section 501.402 (h) and (i)

In the above-referenced sections, the Environmental Groups propose to limit the location of any new livestock management facility or new livestock waste-handling facility as it relates to surface waters and drinking water supply wells. This proposal is outside the scope of this proceeding and is not merited by any record evidence. As stated above, and in the IEPA Statement of Reasons, the proposal before the Board is to incorporate the new federal CAFO rules into State regulations.

CAFOs register by submitting certain information to EPA (76 FR 65431); however, the registration requirement was withdrawn in 2012. The public comment period on the latest proposed rule has been extended to March 1, 2013. See http://www.epa.gov/npdes/regulations/cafo_final_rule2008_comp.pdf for an EPA document that consolidates the current federal CAFO regulatory requirements included in the 2012 CAFO Rule Revision to remove the 5th Circuit Court's vacated elements, and the 2008 and 2003 Final CAFO Rules into a single document.

Location prohibitions are not a part of that federal rule, nor should they be part of these State regulations. IEPA has proposed no substantive changes to Section 501.402 (except to update a statutory citation). This Section has been in effect since 1978, and has only been amended once, in 1991. Since that time, the legislature has provided for siting criteria in a different context: via the LMFA.

The Board should decline any invitation to legislate location standards for CAFOs in this rulemaking.

B. Prohibition on the Application of Livestock Waste in Karst Areas- Suggested Changes to Proposed Sections 501.301 and 502.620

Here, the Environmental Groups again propose restrictions on the land application of livestock waste that are not required under the federal rule and that are in many instances antithetical to the existing State legislation and regulations governing this subject.

In particular, the Environmental Groups spent much time on the record, through the testimony of Sam Panno and Donald Keefer, attempting to justify what appears to be a requested prohibition of the construction of CAFOs, and the application of livestock wastes, in any karst areas and in any areas where macropores are present. See, in particular, proposed Section 502.620 (m) (“Liquid livestock waste shall not be applied to land with subsurface drainage when macropores are present.”) and proposed Section 501.301 (“Macropore [is] [A]ny pore that allows free drainage to the depth of the subsurface drain.”). In essence, these proposed sections would subject any producer or farmer who is applying livestock waste to *any field with a macropore* (which, by Mr. Keefer’s own testimony, can be a .08 millimeter crack in the ground) to enforcement. See testimony of Donald Keefer, Elizabeth Hearing, November 14, 2012, Trans. at pp. 158-59.

As David Trainor, a registered engineer and geologist, licensed in multiple states, testified:

Implementation of Mr. Panno's recommendations would result in the virtual elimination of land spreading areas in essentially much of the Driftless Area that encompasses southwest Wisconsin, southeast Minnesota, northeast Iowa and northwest Illinois. Existing CAFOs have operated for many years in these areas with few adverse consequences.

At the request of the Coalition, Mr. Trainor reviewed the IEPA's proposed rule and concluded that it is consistent with what has been developed in other states, and that it "would be protective of any groundwater resources or other sensitive areas as they are depicted in the rule." See testimony of David Trainor, Elizabeth Hearing, November 14, 2012, Trans. at p. 119.

This rulemaking is not the first time Mr. Trainor and Mr. Panno faced off in legal proceedings related to the location of CAFOs in karst areas of the State. Mr. Panno was hired by a group of citizens ("Helping Others Maintain Environmental Standards" or "HOMES") who attempted to stop the construction of a proposed dairy CAFO in Jo Daviess County. After a lengthy trial, where Mr. Panno testified for Plaintiffs and Mr. Trainor for Defendants, the court refused to issue the injunction, finding that Defendant's expert evidence should be accorded greater weight and that the testimony offered by Mr. Panno and others was "vague and lacked clarity as to the specific types, concentrations, or mechanisms of release of alleged contaminants" and that the "likelihood of contaminant exposure to Plaintiffs, their properties, or the public was left largely to inference." See *HOMES v. A.J. Bos Tradition Investments, LLC*, Case No. 2008 CH 42, December 15, 2009.²

² Although the proposed dairy operation survived the attempted injunction, prior to the receipt of any animals the Office of Attorney General charged the owner with a violation of the Act as a result of stormwater having mixed with standing livestock feed. The Complaint, filed with the Board as PCB 11-68, was later settled, without admission, for a \$1,000 penalty. The out-of-state developer has since dropped his plans to construct a dairy CAFO in Illinois.

Here, the court determined that any prohibition on the location of a large CAFO in a sensitive karst area requires more than just conjecture; it requires a site specific investigation as well as construction, design and/or operational adjustments to ensure environmental protection. It is just these types of site specific parameters that the LMFA and associated regulations have been developed to address, in the context of siting, design, setbacks and land application. See also 8 Ill. Adm. Code 900.602, concerning location standards in karst areas.

The testimony provided by Mr. Panno and Mr. Keefer adds nothing positive, from either an environmental or economic perspective, to the current regulatory structure and does nothing to inform the Board concerning the IEPA's proposed regulations. Moreover, the testimony is not relevant to the task at hand: incorporating the new federal CAFO rules into existing State law and regulations.

C. Further Proposed Prohibitions and Restrictions

The Environmental Groups also seek:

- to prohibit the application of livestock waste within 500 feet of biologically significant streams, outstanding resource waters and designated surface drinking water supplies (See proposed changes to IEPA proposal at Section 502.645);
- to prohibit temporary manure stacks in certain areas (See proposed changes to IEPA proposal at Section 502.645 (f)); and
- to dictate specific requirements for private agreements between the producer and those farmers and other landowners who land apply manure (See proposed changes to IEPA proposal at Sections 501.404 (b)(3)-(4); 502.201 (a); 502.320; 502.325; 502.505; 502.510; 502.610(k)).

These proposals are made without sufficient foundation or rationale and without regard to existing State law and practice. They are not contemplated by the federal rules; thus they are

outside the nature of this rulemaking. Moreover, the LMFA already contains specific legislated set back requirements related to the application of livestock waste, applicable to anyone who land applies livestock waste, which the IEPA was careful to incorporate into its proposed rules. See 510 ILCS 77/20 and 8 Ill. Adm. Code Section 900.803. Under the current structure, at Section 900.803 (o) – (s), any CAFO which has at least 1000 animal units³ must develop a livestock waste management plan which contains, among other items:

o) A provision that livestock waste applied within 1/4 mile of any residence not part of the facility shall be injected or incorporated on the day of application. However, livestock management facilities and livestock waste handling facilities that have irrigation systems in operation prior to May 21, 1996, or existing facilities applying waste on frozen ground, are not subject to the provisions of this subsection (o) [510 ILCS 77/20(f)(5)];

p) A provision that livestock waste may not be applied within 200 feet of surface water unless the water is upgrade or there is adequate diking and waste will not be applied within 150 feet of potable water supply wells [510 ILCS 77/20(f)(6)];

q) A provision that livestock waste may not be applied in a 10-year flood plain unless the injection or incorporation method of application is used [510 ILCS 77/20(f)(7)];

r) A provision that livestock waste may not be applied in waterways. [510 ILCS 77/20(f)(8)] For the purposes of this Part, a grassed area serving as a waterway may receive livestock waste through an irrigation system if there is no runoff, the distance from applied livestock waste to surface water is greater than 200 feet, the distance from applied livestock waste to potable water supply wells is greater than 150 feet; the distance from applied livestock waste to a non-potable well, an abandoned or plugged well, a drainage well, or an injection well is greater than 100 feet; and precipitation is not expected within 24 hours;

s) A provision that if waste is spread on frozen or snow-covered land, the application will be limited to land areas on which:

1) land slopes are 5% or less; or

2) adequate erosion control practices exist [510 ILCS 77/20(f)(9)];

The above constitutes only a portion of the regulatory requirements applicable to Nutrient Management Plans (“NMPs”) under the LMFA⁴. The NMPs are typically given to whoever

³ As the LMFA uses “animal unit” terminology, and the federal rules now measure by individual animal, the Coalition provides the Board with IDOA’s conversion chart. See Attachment B.

⁴ These plans are variously referred to as Waste Management Plans (WMPs) (under the LMFA) and Nutrient Management Plans (NMPs) (under these proposed rules) and Comprehensive Nutrient Plans (CNMPs) (by NRCS). The Coalition here refers to all such plans as NMPs.

applies livestock waste from the facility, as it is understood that inappropriate application of livestock waste can subject both the producer and the land applicator to enforcement.

In addition to the various requirements pursuant to the LMFA, producers often seek guidance from the University of Illinois Extension Office and from the USDA Natural Resources and Conservation Service (NRCS) in the preparation of NMPs. NRCS estimates that it has provided assistance in the development of over 800 NMPs in Illinois since 2002. See Attachment C (Communication between Jim Kaitschuk, Executive Director, Illinois Pork Producers Association, and Ivan Dozier, Assistant State Conservationist-Programs, NRCS).

The best evidence of how livestock waste is applied in Illinois was presented through the testimony of Dr. Ted Funk, a member of the faculty of the Department of Agricultural and Biological Engineering at the University of Illinois, as well as an Extension Specialist in Agricultural Engineering. Dr. Funk testified to the requirements set forth in the LMFA, as well as those promulgated by NRCS. The latter oversight is generally sought by producers, especially when they seek financial assistance in developing NMPs. As Dr. Funk testified, any plan developed with NRCS input would recognize NRCS requirements, as well as any relevant State requirements.⁵ See Testimony of Dr. Ted Funk, Urbana Hearing, October 23, 2012, Trans. at pp. 97-98.

The IEPA's proposal, based upon significant pre-filing meetings with all stakeholders, is respectful of the existing paradigm, while incorporating all newly required federally mandated provisions. If the Environmental Groups believe that further livestock waste application restrictions are necessary, beyond those set forth in existing State law or required by the

⁵ The NRCS relationship to CAFOs in Illinois is explained on the following page of the United States Department of Agriculture website: http://www.il.nrcs.usda.gov/news/publications/factsheets/FS_eqip-confliv.html

underlying federal rule that is the subject of this proceeding, the Board, in the context of this rulemaking, is not the proper forum to achieve such new restrictions.

Further, the Environmental Groups have presented no real or compelling evidence that would lead the Board to conclude that stricter regulations are needed in Illinois beyond those provided federally.

In fact, the Environmental Groups' primary basis for seeking stricter regulations is conjecture based upon allegations of violations in the nature of unpermitted discharges. For example, Dr. Stacey James' testimony and attachments were replete with enforcement actions, many still pending, that have been filed against livestock management facilities, alleging discharges, but from various causes, at various times, against various operators.

As a quasi-adjudicatory and quasi-legislative body, the Board should refrain from drawing any conclusions as to regulatory necessity on the basis of enforcement priority or pendency. Thus, the Board must, in fairness, ignore any imputation of wrongdoing (or corresponding regulatory need) on the basis of pending complaints, especially those which have led to no adjudicatory findings or conclusions whatsoever. This is especially true here since the nature of a discharge, under the CWA, is not conceptually or legally clear. See *Rapanos v. U.S.*, 547 U.S. 715, June 19, 2005.

Moreover, the Board must not impute guilt where a matter has been settled without admission of violation, especially since the nature of whether a prohibited "discharge" actually occurred is not clear. See Attachment 2 to Stacey James Pre-Filed Testimony, which is the Stipulation and Proposal for Settlement in *People v. Professional Swine Management, et. al.*, PCB 10 -84. The purposes for which Dr. James offers this attachment are spurious, as the Order itself is based upon a settlement which reads, in relevant part:

Respondent represents that it has entered into this Stipulation for the purpose of settling and compromising disputed claims without having to incur the expense of contested litigation. By entering into this Stipulation and complying with its terms, the Respondent does not affirmatively admit the allegations of violation within the Complaint and referenced within Section I.B. herein, and this Stipulation shall not be interpreted as including such admission. See PCB No. 10-84, *Stipulation and Proposal for Settlement with North Fork Pork, LLC* at p. 3, January 27, 2011.

Likewise, over the objection of the IEPA and the Coalition, on the first day of hearing in this proceeding, the Environmental Groups offered into evidence Exhibit 17, a newspaper article entitled "Illinois AG Asked to Take Action." The article concerns an alleged fish kill in July of 2012 suspected to be caused by swine manure in Iroquois County. Although both the IEPA and the Ag Coalition vehemently objected, the Environmental Group argued that "(T)he story of a fish kill should be something that the Board should consider because of the relationship between discharges from a livestock operation that may be subject to this rule and the impact that it has had on the local area where the spill occurred." See Remarks of Jessica Dexter, Counsel for Environmental Groups, Springfield Hearing, August 21, 2012, Trans. at p 97. The Board accepted the document into the record.

The Board is not a forum for promulgating State law and policy on the basis of such flimsy evidence. Accepting it into the record is one thing; giving it any weight is something else. As the Coalition pointed out at hearing, serious questions exist related to the source and cause of the purported fish kill – including extreme drought conditions. Indeed, at the time of hearing, the matter was still under investigation. Now, more than one-half year later, *no charges whatsoever* have been filed against anyone in conjunction with the reported fish kill.

Quite simply, there are no legitimate conclusions that can be made by the Board on the basis of any of these allegations. Thus, the Environment Groups' exhibits cannot be taken as legitimate record "evidence".

D. Registration and Reporting Requirements

On the basis of the above allegations, as well as other unconvincing exhibits, such as a Memorandum of Understanding between the USEPA and IEPA (to which the Environmental Groups subscribe a different interpretation than does the IEPA), the Environmental Groups argue that more stringent registration and reporting requirements are required, beyond those sought by the implementing agency, the IEPA. See the Environmental Groups proposed changes to IEPA's proposed Section 501.505.

The Coalition agrees with the IEPA that these provisions are not necessary to effectively regulate CAFOs and that, absent legislation, they have no authority to implement (and the Board has no authority to promulgate) the registration requirements sought by the Environmental Groups.⁶ Moreover, as the IEPA explained at hearing and in its Statement of Reasons, the USEPA itself determined to abandon a proposed registration rule for CAFOs.

Further, the Environmental Groups are wrong to assert the claim that no public information is available as to CAFOs. Indeed, the LMFA sets forth a process whereby a Notice of Construction is provided to IDOA whenever a new livestock management facility (or CAFO) will be constructed. Those notices are then posted on the IDOA's website and can be found at <http://www.agr.state.il.us/Environment/LMFA/noitclist.php>. Also, any CAFO required to be permitted by discharging becomes part of the public record. There is, quite simply, no need to require reporting and registration of CAFOs that are designed and operated in a manner where no discharges occur.

In sum, the Environmental Groups have presented no competent or sufficient evidence as to why the IEPA's proposed rules, drawn from the federal rules and set forth upon a backdrop of

⁶ A recent example of a registration program under the Illinois Environmental Protection Act developed through legislative enactment is the ROSS (Registration of Smaller Sources) program, administered by IEPA Bureau of Air. See Public Act 97-95, July 2011.

an existing State regulatory structure, are insufficiently protective. Rather, they seek to develop stricter State regulation on the wrongful premise that, because there is significant enforcement activity, there must be shortcomings in the current regulatory structure. There is no merit to any such proposition however – since enforcement does not connote a poor underlying legal structure; instead, it provides a necessary deterrent (or, depending on your perspective, a valuable incentive to follow the law).

When Kamini Jaiswal, a noted criminal lawyer, was recently asked what legal changes are necessary to curb the incidence of rape, she responded: “Law is not the deterrent. It is the enforcement of the law that is the deterrent.” Thus, the Board should not draw any conclusions related to need for additional regulations on the basis of increased enforcement. Instead, the Board should here heed some wisdom from Winston Churchill: “If you have ten thousand regulations you destroy all respect for the law.”

IV. AGRICULTURAL COALITION PROPOSED CHANGES

In large part, the Coalition supports the IEPA proposal. On September 25, 2012, the Coalition raised specific concerns, which we here reiterate and ask that the Board modify the proposal accordingly, prior to promulgation at First Notice.

A. Applicable Waters – Section 501.325

The IEPA proposes the deletion of the current definition in the Board rules related to applicable waters which, as stated above, was developed in the 1970s on the basis of the CWA. Since that time, the parts being here amended have been linked to the CWA and its NPDES program.

In its proposal, the IEPA proposes to repeal the Board’s current definition of Navigable Waters, found at Section 501.325. The IEPA proposes no substitute definition, although it has stated throughout the hearing, and in its Statement of Reasons, that these proposed rules are

intended to mirror the federal CAFO program and apply only to “waters of the United States”. See Trans. of Springfield Hearing, August 21, 2012, at p. 75. Yet, the applicable corresponding language in the CWA has not changed. Thus, the Coalition believes it inappropriate (and confusing) for the Board to repeal this long-existing language.

Meanwhile, the Environmental Groups propose that the Board modify the waters language, throughout the proposed rule, to delete the federal language entirely and instead insert “waters of the State”. The Coalition wholeheartedly objects to any such change, as the very purpose of this rulemaking is to incorporate a federal program into State law. The entire focus of this rulemaking is, and should be, the incorporation of the federal NPDES permit program into State law, as it relates to CAFOs. The Act sets forth the legislative parameter which underlies this rulemaking: “No permit shall be required under this subsection and under Section 39(b) of this Act for any discharge for which a permit is not required under the [federal CWA], as now or hereafter amended, and regulations pursuant thereto.” See 415 ILCS 5/12(f). As waters of the State has a much broader connotation than legislatively prescribed in relation to the NPDES program, and would include virtually all ponded water on a person’s land, the Coalition would vehemently object to the Board’s adoption of any such language.

Here, the Coalition only seeks clarification - since elimination by repeal presents confusion. We made two suggestions: retain the current language, or provide a simple reference similar to the following:

501.325 Waters of the United States. All waters of the United States as defined in the Federal Clean Water Act.

Either approach will work.

B. Frozen Ground/Application of Manure – Proposed Sections 501.252; 502.630(c)

As the Coalition reads the IEPA's current proposed language, it has concerns that someone land applying manure would be subject to arbitrary enforcement. This is because the Coalition considers the proposed language too prescriptive. As stated at hearing, the Coalition recognizes that land application during winter months is not ideal and should be, if possible, avoided (or done by injection, not spreading). However, where necessary, the key is whether the conditions allow for proper absorption. Some flexibility on the part of the land applicator is required to make the proper call. The Coalition's issue here is that the proposed language does not allow for such flexibility – and is not based upon any scientific or technical review or assessment of conditions in Illinois, as was clear from the testimony at hearing. The proposed language is, in the Coalitions' perspective, arbitrary. On this point, the Coalition suggests the Board review the testimony of Dr. Funk, which the Coalition believes supports the change requested by the Coalition – which request we here reiterate.

C. Definition of Livestock Waste – Proposed Section 501.295

The Coalition's point here was a simple one: it raised concerns with some of the proposed language, as drafted, particularly with the inclusion of the phraseology "contaminated soils." The IEPA then posed the question as to whether the Coalition would consider soil material from a lagoon berm that has broken and entered a water of the United States to be covered by the language "other materials polluted by livestock" and we responded in the affirmative. Accordingly, the IEPA appeared poised to agree to the removal of the objectionable language from the proposed section. The Coalition here reiterates its position that the language it proposed in substitution is more palatable and less subject to misinterpretation.

D. Required Permit Coverage

As the IEPA admits in testimony (p. 45-46) and in its Statement of Reasons (p. 15), the courts have clearly concluded that the CWA does not authorize the relevant regulating agency, here IEPA through delegation, to require a non-discharging facility to obtain an NPDES permit, whatever its size or CAFO classification. See *National Pork Producers Council, American Farm Bureau Federation, et. al v. United States Environmental Protection Agency*, 635 F. 3d 738 (5th Cir., 2011) which reads:

there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of CAFOs that discharge. Any attempt to do otherwise exceeds the EPA's statutory authority. Accordingly, we conclude that the EPA's requirement that CAFOs that "propose" to discharge apply for an NPDES permit is *ultra vires* and cannot be upheld.

635 F. 3d at 751. See also *Waterkeeper Alliance, et. al. v. United States Environmental Protection Agency*, 399 F. 3d 486 (2nd Cir., 2011) which reads:

in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

399 F. 3d at 505.

On the basis of the above, the Coalition expressed two concerns with the proposed rules. First, it sought clarification that a non-discharging CAFO was not required to obtain an NPDES permit and, second, it raised serious legal concerns with the IEPA's proposed "Case-by-case Designation" rule proposal at Section 502.106.

As to the first concern, the Coalition believes that the issue has been sufficiently aired in the public record and the IEPA has sufficiently clarified that no NPDES CAFO permit is

required for a facility that is not operating as a CAFO and that does not have a discharge of livestock waste. However, the Coalition would seriously object to the deletion of IEPA's proposed Section 502.101 (b)(1) and (2), as requested by the Environmental Groups, since that language provides the very clarification on this point that the USEPA provided in its preamble to the federal rules (Section 502(b)(1)) and, as well, reflects State law (Section 502(b)(2)).

As to the Coalition's second concern, however, we continue to believe that the IEPA's proposed Section 502.106 is inconsistent with federal case law and the carefully crafted environmental decision-making scheme underlying the Illinois Environmental Protection Act ("Act"), which requires that final decisions of the IEPA are appealable to the Board and, thereafter, to the appellate courts. As this particular issue is a legal one, an evidentiary record is not helpful to its resolution. Accordingly, we here fully reiterate, and again provide, the following legal argument, as presented in our earlier filing.

The corresponding federal rule (to proposed Section 502.106) is found at 40 CFR 122.23(c)(3). It pre-existed the *Waterkeepers* and *National Pork* decisions and therefore must be read in the context of those decisions. The gist of the federal rule is to allow for the designation of certain small facilities (animal feeding lots or "AFOs") as CAFOs given certain conditions, including discharge. The 2008 CAFO Rule (73 FR 70418 (November 20, 2008)) discusses Section 122.23(c) at page 70421 where it seems to assume important procedural steps in making the designation. Those are first an actual onsite inspection and, thereafter, a *finding* that the facility "is a significant contributor of pollutants to waters of the United States." Simply put, that latter clause means an actual discharger and, moreover, an actual finding of such. It seems that making such a finding would be the end procedural point of what should be a somewhat formal document pathway for forcing a facility into the permit regulated universe when it otherwise

would be permit exempt. The IEPA's modifications of 40 CFR 122.23(c)(3) would turn this State rule into an unbridled procedural mechanism for IEPA to make (unappealable) findings that a specific facility *must* obtain a permit.

As such, proposed Section 502.106 is inconsistent with environmental and administrative decision-making in the State of Illinois and must be stricken or modified. The Coalition is concerned with IEPA's position that a producer who disagrees with the IEPA's designation would have no right to appeal that designation to the Board but instead must accept (without review) the IEPA's finding and seek a permit. States the IEPA: only after the permit *is granted* may review (as to the necessity for the permit) be had. Such position is antithetical to the Act, the Board's procedural rules (35 Ill. Adm. Code 105, Subpart B, Appeal of Agency Permit Decisions and Other Final Decisions of the Agency) and the Administrative Review Law (735 ILCS 5/3-101 *et seq.*).

The Coalition is further concerned that IEPA's position will directly conflict with the outcome of the recent decision of the United States Supreme Court in *Sackett v. EPA*, 132 S.Ct. 1367 (2012). In that case, the Sacketts faced almost exactly the same situation that a "designated" producer would face under the IEPA's proposed Rule—*i.e.*, apply for a permit that it denies it needs or face enforcement penalties. The United States Supreme Court unanimously decided that due process requires that review be allowed for final agency action pursuant to the CWA. A "finding" by the IEPA pursuant to proposed Section 502.106 constitutes such final action, as it leaves the producer with only one real choice: apply for the permit that the producer contests the facility needs. The IEPA position that appeal to the Board would be allowed *subsequent* to the permit process is nonsensical, as the IEPA permit applicability decision has, for all intents and purposes, become a *fait accompli*.

The Act was carefully crafted to provide a system of checks and balances, with the IEPA being the agency responsible for the administration of environmental laws and programs, including the CWA permitting program, and the Board the agency responsible for promulgation of substantive regulations relevant to those programs and, importantly, for the adoption and *interpretation* of rules and requirements related to those programs. The courts have clearly drawn a distinction between the agencies' respective authorities in the permitting context. See *Illinois Power Company v. Illinois Pollution Control Board and Illinois EPA*, 100 Ill. App. 3d 528 (3rd Dist., 1981):

In the context of petitioner's appeal, it is important to distinguish between the roles the Board and Agency assume in the resolution of permit issuance and disputes arising therefrom. The Board is a creature of the legislature (Ill.Rev.Stat.1979, ch. 1111/2, par. 1005). As such, it undertakes both quasi-legislative and quasi-judicial functions. In the former capacity, it drafts procedural rules and may adopt substantive regulations pursuant to its rule making authority, as long as such are consistent with the purposes of the Act. In its adjudicative role, the Board has the authority to conduct hearings concerning violations of the Act, its regulations, or the denial of a permit. In the latter instance it is the Board's principal function to interpret regulations defining the requirements of the permit system. [Landfill, Inc. v. Pollution Control Board \(1978\), 74 Ill.2d 541, 557, 25 Ill.Dec. 602, 387 N.E.2d 258.](#)

Although the courts have historically dealt with the checks and balances imbedded in the State's permitting system upon appeal of a permit denial, the "finding" of permit applicability sought by the IEPA in its proposed Section 502.106 is certainly cognizable as a matter subject to appeal to the Board. In crafting the responsibilities of the IEPA, the General Assembly stated:

The Agency shall appear before the Board in any hearing upon a petition for variance, the denial of a permit, or the validity or *effect of a rule or regulation of the Board*, and *shall have the authority to appear before the Board in any hearing under the Act.* 415 ILCS 5/4(f) *Emphasis Added.*

Meanwhile, in crafting the authority of the Board, the General Assembly declared:

The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; *upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act*; upon petitions to remove seals under Section 34 of this Act; *and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule.* 415 ILCS 5/5(d) *Emphasis Added.*

Clear from the above cited statutory authority provisions is the framework for appeal to the Board of any final decision of the IEPA and, thereafter, appeal to the appellate courts pursuant to Section 41 of the Act. 415 ILCS 5/41. For the above-stated reasons, the Coalition requests that the Board modify proposed Section 502.106, specifically to provide for Board review of an IEPA finding of permit applicability, consistent with the Illinois statutory framework.

E. Unpermitted Large CAFOs and the Agricultural Stormwater Exemption

The Coalition now turns to its final, and most important, concern. The Coalition disagrees that, in order to achieve the agricultural stormwater exemption set forth in the corresponding federal rules, a non-discharging large CAFO has to comply with the NMP as prescribed in proposed Section 502.

An animal feeding operation (“AFO”) is a large CAFO if it meets the definition of AFO and also confines 700 dairy cows, 1,000 cattle, 2,500 swine weighing 55 pounds or more or 10,000 swine weighing 55 pounds or less. Unless a large CAFO is discharging, an NPDES permit is not required. As the definition of livestock waste excludes agricultural stormwater, a key component of the proposed rules is how agricultural stormwater is appropriately defined. This is important primarily in the context of land application since a producer who land applies

in accordance with good management practices is not discharging, so that a rain event on fields where manure has been appropriately applied would not trigger an NPDES permit.

Under federal law, land application of manure can constitute a discharge unless it is an agricultural stormwater discharge. See 33 USC 1362(14). The new federal regulations provide, at 40 CFR 122.23(e), that where manure, litter or process wastewater are “applied in accordance with the site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in Section 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.”

Thus, any NMP that meets the federal parameters above should allow for the agricultural stormwater exemption in any precipitation event. The relevant federal parameters, set forth in 40 CFR 122.42(e)(1)(vi)-(ix), are as follows:

(1) Requirement to implement a NMP. Any permit issued to a CAFO must include a requirement to implement a NMP that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The NMP must, to the extent applicable:

* * *

(vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

Current Illinois law (the LMFA and corresponding regulations) requires every producer who has 1000 animal units or more to have an NMP. 510 ILCS 77/20(c) (i.e., in the context of swine: 2,500 animals over 55 pounds; dairy: 714; and cattle: 1000). These numbers are virtually identical to the numeric threshold for a large CAFO under the federal rules. The LMFA plan must meet the provisions of the LMFA regulations, at 8 Ill. Adm. Code Part 900, Subpart H.

Each of the above federal parameters, and more, are covered in the above-referenced LMFA Subpart H rules. The Board should refer to the testimony of Dr. Funk, at the Urbana hearing, for a fuller understanding of how the application of manure is currently regulated in Illinois. Additionally, in many instances, this application is also subject to an entirely different set of federal requirements: those promulgated by NRCS and necessitated in order to receive Environmental Quality Incentive Program ("EQIP") money to develop NMPs. As Mr. Dozier explained to Jim Kaitschuk, NRCS has assisted with 800 NMPs in Illinois since 2002. Given the IEPA's testimony that there are about 500 large CAFOs in Illinois, that is a very high percentage and likely includes some small and medium CAFOs.

The Coalition submits that the IEPA's current position on the applicability of the agricultural stormwater exemption does not square with federal or State law, and is not necessary to fully implement the federal CAFO rules in Illinois. Instead, the Coalition requests that the Board recognize the sufficiency of the current LMFA program, as it relates to the application of livestock waste, so that any large CAFO who has in place a waste management plan pursuant to 8 Ill. Adm. Code 900, Subpart H is recognized as being able to assert the federally designated stormwater exemption. To do otherwise, in the Coalition's opinion, is to require an additional

set of regulatory requirements – not necessitated by the federal rule and without any further environmental benefit than that already provided for in State law.

Moreover, as the Coalition has previously pointed out, some of the IEPA's proposed provisions that relate to land application are inconsistent with existing provisions of the LMFA regulations and must be modified accordingly. See, for example, the LMFA's phosphorous provisions, found at 510 ILCS 77/20(f)(1)-(10) and 8 Ill. Adm. Code 900.803. In accordance with the above, the Coalition again proposes the following revision:

Section 502.102 Land Application Discharges and Agricultural Stormwater

b) Where livestock waste has been land applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the livestock waste and in compliance with Section 502.510 for permitted CAFOs ~~and Section 502.510(b)~~ or 510 ILCS 77/20(f) and 8 Ill. Adm. Code 900.803 for unpermitted Large CAFOs, a precipitation-related discharge of livestock waste from land application areas of an unpermitted large CAFO or a permitted CAFO, is an agricultural stormwater discharge.

c) Unpermitted Large CAFOs must maintain the documentation related to the contents of the Waste Management Plan specified in 510 ILCS 77/20(f) and 8 Ill. Adm. Code Part 900, Subpart H ~~35 Ill. Adm Code 502.5 10(b)(15)~~ either on site or at a nearby office or otherwise make such documentation readily available to the Agency upon request.

Section 502.500 Purpose, Scope and Applicability

a) The requirements in this Subpart apply to CAFOs required to obtain an NPDES permit. ~~Unpermitted Large CAFOs, claiming an agricultural stormwater exemption consistent with Section 502.102, are subject to the requirements in Section 502.510(b).~~

Section 502.600 Applicability

This Subpart provides livestock waste discharge limitations and technical standards for permitted CAFOs. Permitted CAFOs must achieve the livestock waste discharge limitations and technical standards in this Subpart as of the date of permit coverage. ~~Unpermitted Large CAFOs claiming an agricultural stormwater exemption consistent with Section 502.102 are also subject to portions of this Subpart.~~ This Subpart does not apply to CAFOs that stable or confine Horses, Sheep or Ducks. Horses or Sheep CAFOs are subject to applicable production area livestock waste discharge limitations and technical standards found in Section 502.720. CAFOs that confine Ducks in either a Dry Lot or Wet Lot are subject to applicable production area livestock waste discharge

limitations and technical standards found in Section 502.730.6. CAFOs that confine Ducks in either a Dry Lot or Wet Lot are subject to applicable production area livestock waste discharge limitations and technical standards found in Section 502.730.6.

V. ECONOMICS

For a full understanding of the impact of the livestock industry to the Illinois economy, the Board need only review the Public Comment #11 filed by Dr. Peter Goldsmith, an economist who is a professor at the University of Illinois and who is well regarded as the leading expert on the subject. The Coalition presented this comment in order for the Board to appreciate that, in Illinois, agriculture and livestock are key to this State's prosperity: past, present and future. Additionally, many legislators and members of the farm community provided oral comments at the Board's hearings concerning the link between Illinois agriculture and the Illinois economy. See Attachment A.

The recent public comment filed by Dr. John E. Ikert does nothing to devalue the facts contained in Dr. Goldsmith's report and the points made by the various Illinois commenters at hearing. Dr. John E. Ikerd, a professor at the University of Missouri, did not provide comment related to any specific research concerning Illinois' economy and agriculture's role therein – as compared to Dr. Goldsmith's. Rather, Dr. Ikerd's comment focused on the economic calculations that had been done by the USEPA, in promulgating the federal rules. The Coalition does not dispute such calculations. However, those calculations presume adherence to the federal rules so, where the IEPA proposal (or Environmental Groups suggested changes) exceed those federal requirements, the federal economic calculations cannot be used as justification. Indeed, the Coalition submits that the federal economic calculations should serve as further reason for the Board *not* to adopt any provisions that are not required federally, particularly those sought by the Environmental Groups.

VI. CONCLUSION

The Coalition appreciates the opportunity to participate in this proceeding and looks forward to the Board's attentive review of these comments.

Respectfully submitted,

BROWN, HAY & STEPHENS, LLP

A handwritten signature in black ink that reads "Claire A. Manning". The signature is written in a cursive style with a large, looping 'M' at the end.

By: Claire A. Manning

Dated: January 16, 2013

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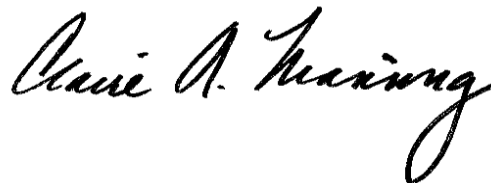
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ATTACHMENT A

**Public Commentary Made at Public Hearings in the Matter of:
Concentrated Animal Feeding Operations (CAFOs): Proposed
Amendments to 35 ILL. Adm. Code Parts 501, 502, and 504**

**Hearing, Tuesday 21 August, 2012, Illinois Environmental Protection Agency,
Springfield, Illinois (Sangamon County)**

Illinois State Senator Sam McCann, of the 49th State Senate District, stated that the proposed IEPA changes were the result of several years of discussion and hard work, and that the agricultural organizations are in large part supportive of the result that is before the Board. He stated that we need to “work together to ensure that governmental rules are economically and technically feasible.” He stated his opinion that livestock farmers are committed to being good stewards of the land, air and water; their goal is provide financially today for their family’s well-being, while safeguarding the environment for coming generations. He cited the long and successful history of the agricultural industry in working with regulatory officials while implementing best practices to ensure natural resources are protected.

Senator McCann thanked the IEPA and stated that, whether from the legislative branch or executive branch, persons in government should never lose sight of the fact that they work for the people. He recognized that agriculture has long been a driver of our state’s and nation’s economic successes. Its impact has never been more important than it is today: “in a state economy that is lethargic at best, agriculture has continued to shine.” He mentioned that livestock production in Illinois directly creates 3.5 billion dollars of economic activity and employees 25,000 people. Indirect economic impacts amount to \$27 billion: grain farmers, feed mills, meat processors, dairy processors and other associated businesses. He thanked those who participated in negotiating the rule proposal and pointed out that we all win when we work together, and respect each other’s viewpoints – as he claims the industry and the regulators have done with these proposed changes.

Dereke Dunkirk, President of the Illinois Pork Producers Association and owner and manager of a diversified crop farm with a 4500 contract wean-to-finish swine operation in Morrisonville (Christian County) provided the Board with comments on the stance of farmers concerning regulatory changes of CAFO rules. He emphasized the commitment of farmers to protecting natural resources and supporting research programs that help to capture, treat and recycle nutrients found in manure at farms.

Mr. Dunkirk stated that the agricultural associations are interested in clarifying the NPDES permit program with the aim of bringing common sense to the permit requirements and improving environmental performance. Mr. Dunkirk mentioned the need to ensure that CAFO rules are easily understood so that compliance is achieved. He wanted to make sure the Board’s rules are economically reasonable and technically sensible and feasible. Mr. Dunkirk stressed the point that the NPDES permit does not allow

farmers to discharge or otherwise pollute; he appreciated that the rule proposal does not require permitting for accidental discharges when the CAFOs is otherwise designed and operated so as not to discharge. He also emphasized the importance of ensuring the Illinois rule is in accordance with the federal rule and the Livestock Management Facilities Act.

Dale Hadden, a grain and livestock farmer in Jacksonville (Morgan County) and a member of the Illinois Farm Bureau Board, began by mentioning the dedication of farmers to preserving the natural resources, sustaining their resources and bettering their management practices. He discussed the economic impact of livestock in Illinois: the generation of 3.5 billion dollars in direct economic activity and the employment of over 25,000 Illinois citizens. Additionally, livestock farmers help other farm-related businesses in Illinois to thrive leading to over \$27 billion, 5 per cent, of the state's revenue. Mr. Hadden commented that in order to maintain a vibrant agriculture industry in Illinois, the regulations that govern the industry must be economically reasonable and technically sensible and feasible. He also stressed that Illinois regulations must mirror the federal CAFO rule to provide clarity for farmers on rules to which they must adhere. Mr. Hadden also stated that any promulgated rule needs to respect the existing Livestock Facilities Act (LMFA). Mr. Hadden concluded that all farmers, no matter the size of the farm or number of animals, must limit environmental impact and serve to produce for the better of their community,

Jim Braun, a native of Iowa City, and former Commissioner on the Iowa Environmental Protection Commission gave his comment to the Board on the matter of CAFOs. He stated that he is in Illinois working to build a local food system for economic development, job creation, rural/urban revitalization, public health and emergency preparedness reasons. He cited a growing need for locally produced Illinois meat, dairy and poultry. He provided his history with CAFOs, both in the regulatory development context as a Commissioner, and as a large producer of swine in Iowa. He provided the biblical reference: "The law is not made for the righteous but for the lawless and the disobedient." He welcomed enforcement of the environmental laws as to CAFOs and called for a balance between the rights of neighbors and those who want to begin livestock, poultry and dairy production in the State of Illinois...without burdensome regulations. He state that a "balance must be found in order to stop this trench war and peaceably expand livestock poultry and dairy across the State of Illinois.

Paul Rice, a self-described "common farmer" has "a handful of cows" west of Springfield (Sangamon County). Mr. Rice mentioned the current economic climate, and stressed the importance of standards that will keep farmers in Illinois. Mr. Rice expressed his fear that too much regulation or legislation will scare farmers away to other states. He mentioned that there are "a lot of rules on the books if we just enforce what we have." He said that too many farmers are already facing relocation on account of the economic difficulties and he cited the need for standards that would be equivalent to the federal standards.

Hearing, Tuesday, 16 October 2012, St. Clair County Courthouse, Belleville, Illinois (St. Clair County)

Darryl Brinkmann, a grain and livestock farmer from Carlyle, Illinois (Clinton County) farms about 1,800 acres of corn, soybeans and wheat with his brother. In the past he had a farrow to finish swine operation but now the extent of his livestock operation is a small cow/calf herd that he started with his daughter for a 4-H project. Mr. Brinkmann serves on the Board of Directors of the Illinois Farm Bureau Board, and as its representative on the Prairie Farms Board.

Mr. Brinkmann mentioned farmers' commitment to environmental responsibility, specifically to best management practices and sustainability which, to him, means: "being able to continue to farm and leave my land in a better condition than I did in the past, and also to produce more from that land with less inputs." He discussed his concern for his neighbors and that, as a livestock farmer, he tries to do responsible things such as incorporate manure as soon as possible and spread away from anybody's house. He mentioned the connection between grain farming and livestock farming and that both need regulations that make sense and are economically reasonable. He expressed concerns that regulations that don't make common sense or are too expensive will drive people away from agriculture, and that's not what society needs right now. He mentioned that agriculture as an economic driver in Illinois, contributing \$25 billion, or about 5% of the Illinois economy. He asked the Board to be sure that the regulations mirror the federal policy and respect the LMFA – which he believes has been good for agriculture and has helped farmers be more responsible and sustainable.

Hearing, Tuesday, 23 October 2012, Brookens Administrative Center, Urbana, Illinois (Champaign County)

Illinois State Senator Mike Frerichs, of the 52nd district of Illinois, and sponsor of the bill being referenced in conjunction with CAFO regulation in Illinois, provided commentary to the Board concerning the legislative background on Public Act 097-0962 (NPDES Permit Fees for CAFOs) which he explained resulted from longtime negotiations between the Environmental Groups and the Agricultural Groups. Sen. Frerichs talked about the importance of the environment and agriculture in his district, which is a large rural area where farming is very important and where farmers of all kinds work hard to provide safe food and implement sound environmental practices.

Senator Frerichs talked about agriculture playing a leading role in Illinois' economy, directly creating 3.5 billion in economic activity in Illinois. He stated that we need to continue to keep the industry vibrant, while also maintaining safe drinking water. He urged the Board to ensure the rules are consistent with the LMFA, a "law prescribed at the General Assembly through three different revisions of the Act that govern construction and pollution prevention standards for livestock farms in Illinois." He called for clarity in the rule so that farmers will be able to properly adhere to the regulations and improve environmental performance. He commended the IEPA for working with the stakeholders on both sides of the issue. He emphasized that a commonsense approach is required because there is so much at stake for our environment and for our industry.

Chris Hausman, a fourth-generation farmer from Pesotum, Illinois (Champaign County) with his family operates a cash grain farm and farms approximately 1,500 acres (corn and soybeans). He is hoping one of his three sons will be a fifth-generation Illinois farmer. Hausman has served on the Board of Directors of the Illinois Farm Bureau for six years. He cites the Farm Bureau's mission: to improve the economic well-being of agriculture and to enrich the quality of farm family life. He also serves on the Illini FS Operating Board, a member-owned cooperative that supplies fuel, feed, herbicides and other supplies. The proposed rules are important to him as a grain farmer since livestock production is the single largest consumer of grain. He discusses the integrated nature of agriculture: Livestock farmers in Illinois need feed, veterinarian services and other supplies – resulting in \$27 billion of Illinois economic activity.

Hausman also discusses how responsible environmental management is important to him and explains how he has installed filter strips next to drainage ditches, and that he is a certified private applicator, careful to use products only as directed and only as needed. He also uses variable-rate technology with yield maps, which provide him with prescriptive fertilizer application rates. As a farmer, he tries to be “the best steward that I can be.” As for livestock production, he recognizes that food needs to be produced in a sustainable way and he believes livestock production does that since manure from animals is used to fertilize crops which are then fed to the animals. He emphasizes that there is nothing new to this cycle, citing his great grandfather as a prime example: He set the path and we continue down that path of important stewardship for the environment. His point: without his stewardship there would be no farm today. As to the proposed rules, Hausman requested that they align with the LMFA and mirror the federal rules and he hopes that the result is a rule that is clear without unnecessary duplication.

Hearing, Tuesday, 30 October 2012, DeKalb Municipal Building, DeKalb, Illinois (DeKalb County)

Illinois State Representative Robert W. Pritchard, of the 70th Legislative District (comments read into the record by Jeff Sheehan) and fifth generation farmer, opened with the fact that DeKalb County is a leading producer of hogs and cattle in the state. He recognized cooperation and efforts of those involved to reach the proposed rule. Rep. Pritchard said “it is critical that regulations be reasonable, fair and clear so that livestock producers can comply with the intent of the law while continuing to use best practices and make an economic living.” He stressed the importance of consistency between the proposed rules and the Federal CAFO rules, and noted that the proposed rules are a step toward environmental protection with due consideration of the economic circumstances of the state’s farmers.

Philip Nelson, fourth generation farmer from Seneca, Illinois (LaSalle County) and former president of the Illinois Farm Bureau, discussed the importance of manure as a source of fertilizer for his farm, and the measures that he takes to ensure that the manure is managed properly. He worked to reduce erosion and protect water quality through conservation practices on his own farm, and spoke about the prevalence of these responsible practices by farmers throughout Illinois. Mr. Nelson discussed the importance of regulations that do not duplicate, and are consistent with, the Livestock Management Facilities Act and the federal Clean Water Act for the sake of practicality as well as protection of resources. Mr. Nelson discussed the essential role that livestock and livestock farmers play in the Illinois economy and the corresponding need for economically feasible regulations.

Douglas Block, fifth generation dairy farmer from Pearl City, Illinois (Stephenson County) and part owner (with his brother) of Hunter Haven Farms, spoke about the importance of being a good neighbor as the area surrounding his farm has grown. He offers tours of his facility and encourages the community to visit the farm. Mr. Block spoke about his efforts in appropriately applying manure in a manner that is protective of the environment. To that end and to comply with regulations, he has commissioned a comprehensive nutrient management plan that is continuously updated to reflect the best practices. Mr. Block spoke firsthand about his farm’s connection to the local economy, as well as to the state’s economy, and the need to keep regulations sensible from a cost standpoint to maintain this balance.

Bill Deutsch, livestock farmer from Sycamore, Illinois (DeKalb County), spoke about the importance of environmental responsibility on his farm and the zero discharge standard held at his facility. He noted that

manure was once considered a nuisance but is now a commodity that can help replenish nutrients lost in the soil around his farm. Mr. Deutsch also noted his hope that the Board would bear in mind the financial burdens of additional regulation beyond what is already required.

Hearing, Wednesday, 14 November 2012, Highland Community College, Elizabeth, Illinois (Jo Daviess County)

Illinois State Senator Tim Bivins, of the 45th District of Illinois, discussed how a rule that is clear and consistent with the LMFA will “help eliminate unnecessary duplication of regulations for farmers that would only add to the cost of compliance without providing additional protections for our natural resources.”

Illinois State Representative Jim Sacia, of the 89th Legislative District, offered public comments regarding the significance of the Livestock Management Facilities Act, as well as the direct impact (to the tune of \$109 billion) of the livestock community on the economy of the State of Illinois. He stated that his primary concern was “the ongoing costs to livestock producers” at stake in this rulemaking.

Ronald Lawfer, of Stockton, Illinois (Jo Daviess County), a former Illinois State legislator, noted that “farmers understood the need to preserve the quality of the water long before any regulations were born since the passing of the Clean Water Act.” He also noted that many farmers in his community have exited the livestock production industry because of the increasing costs of upgrading their facilities to comply with regulations, and requested that the Board’s rule be economically sensible.

Doug Schneider, fifth generation farm owner (with wife Trish), pointed out that his family drinks the same water as his cows. He referred to his comprehensive nutrient management plan as “a living document, one that is constantly being reviewed, updated, and improved” with the help of a hired consultant. He contrasted the use of manure on his farm for fertilizer with the use of commercial fertilizer, which is often manufactured thousands of miles from Jo Daviess County. He stressed the need for the regulations to be science-based and rooted in common sense in order to keep Illinois farms in a competitive position with other states.

Ronald Lee Lawfer, fifth generation farmer from Kent, Illinois (Stephenson County) and President of the Jo Daviess County Farm Bureau, first noted that farmers know the importance of preserving environmental resources, in part because of their desire to pass the land on to future generations. “It isn’t fair,” he said, “to a producer to make all the effort to be in compliance with one governmental agency only to be out of compliance with another.” Thus, Mr. Lawfer said he hopes for rules that are consistent across the involved agencies. He also emphasized the consideration of farmers’ financial situations in passing new rules, because “it serves no purpose to have rules and regulations on paper if there are no producers left to regulate.” He invited hearing attendees to drive through the countryside to observe firsthand the efforts of the producers in Jo Daviess County.

Brian Duncan, third generation farmer in Polo, Illinois (Ogle County), echoed the comments of Ronald Lee Lawfer. He raises hogs and expressed his wish to continue with his family in animal agriculture for generations to come. According to Mr. Duncan:

No one here wants dirty water, dirty air, but those of us who farm need a regulatory environment that we know how to navigate. It needs to be consistent . . . You can lay layers of regulation upon layers of registration, and if they don't benefit the environment, all they do is serve as layers of discouragement. . . . [W]hat we are asking you is as you put these rules together, keep our family in mind. We want to stay here, and we want to be part of agriculture, specifically animal agriculture, for generations to come.

CONVERSION TABLE FOR ANIMAL UNITS					
	Conversion Factor	50 A.U.	300 A.U.	1,000 A.U.	7,000 A.U.
swine over 55 lbs.	0.4	125	750	2,500	17,500
swine under 55 lbs.	0.03	1,667	10,000	33,334	233,334
dairy	1.4	35	214	714	5,000
young dairy stock	0.6	84	500	1,667	11,667
cattle	1.0	50	300	1,000	7,000
sheep, lambs, goats	0.1	500	3,000	10,000	70,000
horses	2.0	25	150	500	3,500
turkeys	0.02	2,500	15,000	50,000	350,000
laying hens or broilers*	0.01	5,000	30,000	100,000	700,000
laying hens or broilers**	0.03	1,667	10,000	33,334	233,334
ducks	0.02	2,500	15,000	50,000	350,000

From Illinois Department of Agriculture Website, at
<http://www.agr.state.il.us/Environment/LMFA/index.html>

Copied January 14, 2013

Jennifer L. Powers

From: Jennifer L. Powers
Sent: Wednesday, January 16, 2013 2:15 PM
To: Jennifer L. Powers
Subject: RE: CNMPS

From: Dozier, Ivan - NRCS, Champaign, IL [mailto:Ivan.Dozier@il.usda.gov]
Sent: Monday, January 14, 2013 10:44 AM
To: Jim Kaitschuk
Subject: RE: CNMPS

All species. Our contracting system doesn't differentiate type of livestock.

From: Jim Kaitschuk [mailto:jim@ilpork.com]
Sent: Monday, January 14, 2013 10:36 AM
To: Dozier, Ivan - NRCS, Champaign, IL
Subject: RE: CNMPS

Thanks Ivan. Is that for all species or pork specific?

From: Dozier, Ivan - NRCS, Champaign, IL [mailto:Ivan.Dozier@il.usda.gov]
Sent: Monday, January 14, 2013 10:23 AM
To: Jim Kaitschuk
Subject: RE: CNMPS

Hi Jim,

We've approved approximately 800 EQIP contracts for CNMPs since 2002.

Ivan

From: Jim Kaitschuk [mailto:jim@ilpork.com]
Sent: Friday, January 11, 2013 1:22 PM
To: Dozier, Ivan - NRCS, Champaign, IL
Cc: Tim Maiers
Subject: CNMPS

Good afternoon Ivan-

I hope all is well with you.

The various livestock groups have been working with the IEPA and Pollution Control Board this past fall and winter in the discussion and development of the new Illinois CAFO regulations. As part of that conversation one of the board members asked at a hearing "How many CNMPS have been approved by NRCS over the last 10 years?"

Is that a number that you could get your hands on?

Electronic Filing - Received, Clerk's Office : 01/16/2013 P.C. #19

Sorry for the short timeframe, but if at all possible we would need that information by Tuesday of next week.

Thanks again and please don't hesitate to contact me if I can be of any assistance.

Jim

Jim Kaitschuk

Executive Director

Illinois Pork Producers Association

6411 S. 6th St. Rd.

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