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 30, 2013, with the Illinois Pollution Control Board, the AGRICULTURAL COALITION'S PRE-FIRST NOTICE POST-HEARING RESPONSIVE COMMENT, copies of which are also herewith sent to the attached service list.

Dated: January 30, 2013

Respectfully submitted,

By: _____
Claire A. Manning

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
Registration No. 3124724
William D. Ingersoll
Registration No. 6186363
Stephanie M. Hammer
Registration No. 6302800
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AGRICULTURAL COALITION'S PRE-FIRST NOTICE

POST-HEARING RESPONSIVE 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 Pre-First Notice Post-Hearing Responsive Public Comment, as allowed by Hearing Officer Order in this proceeding.

I. GENERAL RESPONSE

As indicated in the Coalition's Pre-First Notice Public Comment, the Coalition wishes to express its support for the proposed Rule submitted by the Illinois Environmental Protection Agency ("IEPA"). This proposal reflects the many hours of stakeholder time spent collaborating and working toward development of a Rule that is effective and practicable. To meet these goals, the proposed Rule must be clear and understandable for those who are tasked with compliance, and it must comport with and adequately respect the Livestock Management Facilities Act ("LMFA") and other State programs.

The proposed Rule is rooted in the Federal Clean Water Act ("CWA") NPDES requirements. The corresponding Federal Rule arising from the same statute has been shaped over many years through multiple rulemaking proceedings and appellate court intervention. It has been the subject of thousands of pages of federal records, including an exhaustive economic analysis. Although the Public Comment of Dr. John E. Ikerd, Public Comment 16, filed by the Environmental Groups, recognizes the painstaking federal economic analysis that forms the basis of the Federal Rule, the Environmental Groups proposed "improvements" to the Rule go well beyond its federal roots and are more prescriptive, and economically onerous, than the Federal Rule that provides the basis for the federal economic analysis.

Instead of looking to other States, as the Environmental Groups urge, federal precedent and Illinois law must guide the Board as to the proper context for our State's Rule. The State regulatory parts are, and have been, drawn from the CWA since their creation. Because of this background, and Section 12(f) of the Illinois Environmental Protection Act, 15 ILCS 5/12(f), the State cannot require an NPDES Permit where one would not be required federally. The Coalition urges the Board to avoid attempting to "improve" the Federal Rule as suggested by the Environmental Groups and detailed below.

Among the relevant federal cases is *National Pork Producers v. United States EPA*, 635 F.3d 738 (5th Cir. 2011). The Environmental Groups attempt to discredit this case as having come from a separate jurisdiction than applicable in Illinois. However, as the IEPA and USEPA have recognized, this federal precedent applies to virtually all areas of the country where agriculture is an important national asset, as the case was transferred to the Fifth Circuit from the Judicial Panel on Multi-District Litigation, and it was composed of appeals from six different circuits, including the Seventh – thus clearly covering the State of Illinois.

That a non-discharging CAFO cannot be required to seek coverage under an NPDES permit is thus an established principle of law. While the Environmental Groups suggest that several States have felt free to ignore this federal backdrop, Illinois is not in a position to do so.

First, each State has its own history and statutory and regulatory requirements, and it would be wrong for the Board to draw any inference as to appropriateness in Illinois on the basis of another State's application of this legal point in its jurisdiction. For example, in the Environmental Group's Final Comments, the Group cites from the Ohio General NPDES CAFO permit. See PC#20, footnote 158. Yet, information the Illinois Farm Bureau has received from the Ohio Environmental Protection Agency ("OEPA") establishes that Ohio's CAFO General Permit expired on January 31, 2010 and it is no longer utilized. Rather, OEPA reports that it only issues individual CAFO NPDES permits at this time. See correspondence between Bill Bodine, Associate Director of State Legislation, Illinois Farm Bureau and Jon Bernstein, P.E., Compliance Assistance & CAFO Unit, Division of Surface Water, Ohio Environmental Protection Agency, dated January 30, 2013. Attachment A.

Second, on this point (applicability of NPDES permits in Illinois), Illinois law is quite clear, leaving no ambiguity:

> 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 Water Pollution Control Act, as now or hereafter amended, and regulations pursuant thereto.

415 ILCS 5/12(f).

II. RESPONSE TO IEPA COMMENTS

The Coalition supports and appreciates the efforts undertaken by IEPA in its Public Comment of January 16, 2013 and in its work throughout these proceedings. IEPA has

demonstrated an understanding of the needs of the livestock industry and has worked cooperatively with the Coalition and other industry stakeholders.

It is clear to the Coalition that IEPA understands and has been dedicated to the State and Federal contexts of this rulemaking; it is incumbent upon the Board to do the same. The only substantive commentary the Coalition wishes to provide in response to IEPA's January 16, 2013 Public Comment is in regard to appeals from case-by-case designations by IEPA as found in Section 502.106 of the proposed Rule. While the section appears to track the Federal Rule, the Coalition believes that it is not consistent with the Federal Rule; rather, in some very key ways it goes beyond the Rule and, in doing so, fails to recognize the uniqueness of the Illinois environmental regulatory decision-making scheme.

As a preliminary matter, the Federal Rule is not identical to the proposed Rule. The Federal Rule simply allows the "appropriate" State agency to designate that an entity is a CAFO. Here, the proposed Rule *will allow the IEPA to require permitting* – even if an entity disagrees that a permit is required. Here, the IEPA's provision requiring permitting-upon-designation reaches well beyond the Federal Rule.

Moreover, the IEPA has failed to consider important issues related to the requirement's practical implementation. The IEPA has not offered any comprehensive picture of how its proposed designation system would function, and has left several questions unanswered: Who would initiate the designation process? Would there be an investigatory record? How would designation connect with enforcement?

Most troubling, however, is the unanswered question of how a producer can challenge a determination that there has been a discharge that requires NPDES permitting. It appears that the only options for appeal exist after the producer has actually applied for a permit, which requires

significant consultant expenditures and undercuts precedent, Due Process, and the purposes of the Federal Rule. The enforceability of the designation is itself unclear; if it is an enforceable decision, then it is a final decision subject to appeal to the Board.

In addition, Illinois courts have held that IEPA permit administration, and Board review of permit decisions, constitute an "administrative continuum" in which a final decision is not rendered until the Board has made its final decision. See *IEPA v. PCB and Waste Management, Inc.*, 138 Ill. App. 3d 550, 551 (1985); *affirmed* 503 N.E. 2d 343 (1986). The Board should not sanction a rule which allows the IEPA to make permit decisions outside the scope of Board review, as the Act, as historically interpreted by case law, does not countenance unilateral agency decision making in the area of permitting.

As to the application of manure during winter conditions, while the Coalition believes that the IEPA's specific proposal is arbitrary and overly prescriptive in terms of the minimal degree of frozen soil required, it notes that IEPA has generally understood that land application of manure to frozen ground is not a common occurrence in Illinois, as land application is increasingly done by underground injection and most producers prefer not to land apply in winter months. Moreover, the Coalition appreciates the IEPA's hesitancy in requiring pre-approval prior to winter application, as such approach is not practical and might pose additional and unnecessary risks to the environment.[1]

Finally and most importantly, the Agricultural Coalition believes the IEPA proposal goes too far as it relates to requirements that must be met prior to justifying an "agricultural stormwater exemption" as it fails to to consider the adequacy of the land application regulatory structure of the LMFA for this purpose.

[1] DeKalb Hearing, October 30, 2012, Trans. at pp. 182-85

III. RESPONSE TO ENVIRONMENTAL GROUPS' COMMENTS

The Environmental Groups point to a 1997 USDA Census of Agriculture and the testimony of Kendall Thu, to allege a surplus of manure generation beyond agricultural needs for Illinois land application. The Board should not accept any such assertion, since the survey upon which it is based is nearly two decades old and was intended to generally cover the entire country. Any applicability to these 2013 proceedings is, at best, tenuous and remote. Further, the Environmental Groups draw no evidence of causal connection between any alleged surplus and water pollution from livestock manure. Instead, the Board should bear in mind the testimony and comments made by those who understand Illinois agriculture: Livestock manure is a valuable commodity. When it is land applied to enhance crop production, as an essential and valuable nutrient, sustainability is achieved. The crops are naturally enriched – and fed to the livestock – who then produce more manure – allowing this natural cycle to continue.

Although the proposals submitted by the Environmental Groups may be well-intentioned, the Coalition must point out to the Board that they are substantially deficient in: (1) technical substance; and (2) the practicability and effectiveness drawn from IEPA's experience in regulating the livestock industry. As a result, the Environmental Groups have proposed changes and alternatives to IEPA's proposed Rule that run afoul of the Federal Rule and exceed both the Board's authority and the scope of this rulemaking. To the extent that the Board accepts changes to IEPA's proposed Rule at the urging of Environmental Groups, it would be doing so in a manner not supported by IEPA, the agency charged with the development and administration of the Rule itself. The individuals who testified for the Environmental Groups cannot match IEPA's

experience in regulatory drafting and day-to-day application and administration of the promulgated Rules and the Illinois livestock program.

The lack of regulatory experience and technical shortcomings of the Environmental Groups are reflected in their proposals regarding macropores and karst application. Although the Groups did elicit testimony on these subjects, the testimony itself does not support their proposals, even with changes to language they proposed in their January 16, 2013 filing. If the Board were to adopt the Environmental Groups' proposal in this regard, the additional restrictions would seriously limit livestock production in areas of the State where it has been, historically, a vital component of the State and local economies. Also, the Board should be mindful that the legislature has already dealt with the issue of karst areas, by the LMFA's requirement of site-specific due diligence prior to the allowance of any construction of livestock facilities in karst areas. See 510 ILCS 77/13 and 8 Ill. Adm. Code Part 900.

Any assertion that the Environmental Groups' proposed restrictions are economically reasonable has not been borne out by record evidence. Likewise, any conclusion that these restrictions are technically justified has not been borne out by record evidence. Instead, Board adoption would be based solely upon vague and overly generalized scientific principles, not on the type of direct technical evidence worthy of the Board, as envisioned by Section 27(a) of the Act. 415 ILCS 5/27(a).

In respect to land application of manure, the Environmental Groups do not appear to have recognized the ever increasing importance of manure as a natural fertilizer. The value of manure lies not just in its existence, but in its application in an agriculturally responsible way. Irresponsible application harms crops and in no way benefits those who apply beyond regulatory

prescription. Broader land application should be encouraged, as it addresses the generation of nutrients for the mutual benefit of producers and the environment.

Moreover, it is evident from other Board regulations that the IEPA's proposed rule is significantly more protective than the land application allowed by the Board for municipal sludge, which is not nearly as valuable a nutrient – and which in fact poses more potential risks. See 35 Ill. Adm. Code Part 391, a subpart of which states:

> a) The phosphorus content of the soil may govern loading rates for the sludge. It is recommended that the available phosphorus content in soils and total phosphorus in the sludge be analyzed every 2 years.
>
> b) After five years of sludge application the phosphorus level in the soil shall be monitored and sludge application shall cease if the plant available phosphorus content in the soil exceeds 400 pounds per acre for sandy soils or 800 pounds for non-sandy soils.

35 Ill. Admin. Code 391.412.

The Environmental Groups presented no data specific to Illinois that would suggest that the State's CAFOs are a larger contributor to water pollution in the form of phosphorus or nitrogen than any other source—specifically landowners who fertilize their lawns with chemicals or small businesses and municipalities who apply excess municipal sludge. It is important for the Board to realize in its decision-making that little if any of the Environmental Groups' information is Illinois-specific. Rather, it is information that is generally understood nationally – information that has been cited by the USEPA as a basis for its Federal Rule.

The Environmental Groups have not presented any instances of contamination of community water supply wells via agricultural application of manure; nor did they consider the positive progress made by the livestock industry in the last decade.[2] Likewise, the Environmental Groups have not presented any evidence that would technically support the

[2] See public comments of Illinois State Senator Mike Frerichs, Illinois State Senator Tim Bivins.

implementation of new setback regulations in these proceedings. Setbacks like those proposed by the Environmental Groups are typically legislatively prescribed, and are already a part of the LMFA. The Board would be hard pressed to find support for such any such measures on the record before it in this rulemaking.

Throughout these proceedings, the Environmental Groups have insisted on a reporting or registration requirement "to develop an adequate inventory of CAFOs in Illinois."[3] The Coalition is again compelled to respond that there is no statutory or other authority for such a requirement. Although the USEPA originally proposed such a requirement, it withdrew such proposal in large part on the objection of many participants, on the basis of lack of authority and justification.[4]

Given the withdrawal by the federal government itself, the Board would be hard pressed to accept the testimony of Kendall Thu (contradicted by the IEPA) that the IEPA risks its delegation status by failing to adopt such requirement.[5] In addition to the lack of authority, the IEPA testified to the economic and administrative burden that such registration requirement would have on the IEPA.

Finally, the Coalition urges the Board not to broaden Parts 501 and 502 beyond the intended federal NPDES program – as the Environmental Groups invite, especially with their proposed change in application of federal NPDES permitting for "waters of the State".

The Illinois legislature long ago determined that NPDES permitting will be required in Illinois only when it is required federally. As Sanjay Sofat clearly articulated at the Board's first hearing in Springfield, this rule is intended to implement NPDES permitting requirements in Illinois. It should not serve as the basis for establishing overly stringent requirements that would

[3] 1/16/13 Public Comment of Environmental Groups, p. 9
[4] http://cfpub.epa.gov/npdes/afo/aforule.cfm ("EPA is withdrawing a proposed rule that would have required information to be submitted to the Agency about concentrated animal feeding operations (CAFOs).").
[5] DeKalb Hearing, October 30, 2012, Trans. at pp. 166-70.

apply to virtually every water body in the State – regardless of its hydrologic connection ("nexus") to a federally protected water.

To address waters of the State is beyond the scope of this rulemaking and incompatible with the federal context into which any Rule promulgated by the Board in this proceeding must fit. If NPDES permitting is to be expanded in Illinois as regards CAFOs, any such expansion should be the province of the legislature – not the Board in this rulemaking.

Conclusion

The Coalition seriously refutes the various implications made by the Environmental Groups that CAFOs have been evading regulatory responsibility, as such responsibilities are also ever present through the more traditional agricultural regulatory entities: the State and Federal Departments of Agriculture. The Coalition simply requests that the Board adopt the IEPA's proposed Rule, with the few suggested changes it offers – including the deletion (or modification) of the Case- by- Case designation rule, in order to comport with Illinois law.

Dated: January 30, 2013

Respectfully submitted,

By: _____
Claire A. Manning

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
Registration No. 3124724
William D. Ingersoll
Registration No. 6186363
Stephanie M. Hammer
Registration No. 6302800
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com

Jennifer L. Powers

From: Jennifer L. Powers
Sent: Wednesday, January 30, 2013 3:03 PM
To: Jennifer L. Powers
Subject: FW: Ohio NPDES General Permit for CAFOs

From: Bernstein, Jon [mailto:jon.bernstein@epa.state.oh.us]
Sent: Wednesday, January 30, 2013 7:00 AM
To: Bodine, Bill
Subject: RE: Ohio NPDES General Permit for CAFOs

Hi Bill.

Yes, the CAFO General Permit expired on January 31, 2010. No, the General NPDES permit is no longer utilized. We only issue individual CAFO NPDES permits now.

Jon Bernstein, P.E.
PTI, Compliance Assistance, & CAFO Unit
Division of Surface Water
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, OH 43216-1049
(614) 728-2397

From: Bodine, Bill [mailto:BBodine@ilfb.org]
Sent: Thursday, January 24, 2013 2:46 PM
To: Bernstein, Jon
Subject: Ohio NPDES General Permit for CAFOs

Jon,

As the contact person for the Ohio EPA on Concentrated Animal Feeding Operations, I have a couple of questions regarding the Ohio General NPDES Permit for CAFOs? From my reading of the General NPDES Permit, it appears that the permit expired on Jan. 31, 2010. Is that correct?

If the General NPDES permit has expired, is it utilized in Ohio any longer? Thank you for the clarification and information. If you have any questions, please don't hesitate to call

Regards,
Bill Bodine
Assoc. Dir. of State Legislation
Illinois Farm Bureau
Phone: 309-557-3272
Mobile: 309-531-8799
Email: bodine@ilfb.org

PROOF OF SERVICE

I, Claire A. Manning, certify that I have served the AGRICULTURAL COALITION'S PRE-FIRST NOTICE POST-HEARING RESPONSEIVE COMMENT, by U.S. Mail, first class postage prepaid, on January 30, 2013 to the following:

Jane McBride
Matthew J. Dunn
Assistant Attorney General
500 South Second Street
Springfield, IL 62706

Deborah J. Williams, Assistant Counsel
Joanne M. Olson, Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19726
Springfield, IL 62704-9276

Alec M. Davis
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, IL 62701

Nancy Erickson
Illinois Farm Bureau
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Bart Bittner
Illinois Farm Bureau
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Paul Cope
Illinois Farm Bureau
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Jim Kaitschuk
Illinois Pork Producers
6411 S. Sixth Street
Frontage Road East
Springfield, IL 62707

Tim Maiers
Illinois Pork Producers
6411 S. Sixth Street
Frontage Road East
Springfield, IL 62707

Warren Goetsch
Shari L. West
Illinois Department of Agriculture
P.O. Box 19281
801 E. Sangamon Avenue
Springfield, IL 62794

Jessica Dexter
Environmental Law and Policy Center
35 E. Wacker Drive
Suite 1600
Chicago, IL 60601

Jack Darin
Sierra Club
70 E. Lake Street, Suite 1500
Chicago, IL 60601

Lindsay Record
Executive Director
Illinois Stewardship Alliance
401 W. Jackson Parkway
Springfield, IL 62704

Mitchell Cohen
Virginia Yang
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702

Stacy James
Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, IL 61820

Kim Knowles
Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, IL 61820

Albert Ettinger
53 W. Jackson, Suite 1664
Chicago, IL 60604

Marvin Traylor
Executive Director
Illinois Association of Wastewater Agencies
241 N. Fifth Street
Springfield, IL 62701

Ann Alexander
2 N. Riverside Plaza
Suite 2250
Chicago, IL 60606

Brett Roberts
Matt Roberts
US Department of Agriculture
2118 W. Park Court
Champaign, IL 61821

Ted Funk
Extension Specialist
University of Illinois Extension
332E Ag Eng Science Bldg.
1304 W. Pennsylvania Avenue
Urbana, IL 61801

Jim Fraley
Illinois Milk Producers Association
1701 N. Towanda Avenue
Bloomington, IL 61701

Laurie Ann Dougherty
Executive Director
Illinois Section of the American Water Works
545 S. Randall Road
St. Charles, IL 60174

Karen Hudson
Families Against Rural Messes Inc.
22514 W. Claybaugh Road
Elmwood, IL 61529

Ester Liberman
League of Women Voters of Jo Davies County
815 Clinton Street
Galena, IL 61036

Kendall Thu
Illinois Citizens for Clean Air and Water
609 Parkside Drive
Sycamore, IL 60178

Jeff Keiser
Director of Engineering
Illinois American Water Company
100 North Water Drive
Belleville, IL 62223

Danielle Diamond
Illinois Citizens for Clean Air and Water
3431 W. Elm Street
McHenry, IL 60050

Brian J. Sauder
Illinois Interfaith Power & Light Campaign
1001 South Wright Street, Room 7
Champaign, IL 61802

Reid Blossom
Executive Vice President
Illinois Beef Association
2060 West Iles Ave., Suite B
Springfield, IL 62704

By: Claire A. Manning

Claire A. Manning
Brown Hay & Stephens, LLP
205 S. Fifth Street, Suite 700
Springfield, Illinois 62701
(217) 544-8491

PROOF OF SERVICE

I, Claire A. Manning, certify that I have served the AGRICULTURAL COALITION'S PRE-FIRST NOTICE POST-HEARING RESPONSIVE COMMENT, by U.S. Mail, first class postage prepaid, on January 30, 2013 to the following:

Jane McBride
Matthew J. Dunn
Assistant Attorney General
500 South Second Street
Springfield, IL 62706

Deborah J. Williams, Assistant Counsel
Joanne M. Olson, Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19726
Springfield, IL 62704-9276

Alec M. Davis
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, IL 62701

Nancy Erickson
Illinois Farm Bureau
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Bart Bittner
Illinois Farm Bureau
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Paul Cope
Illinois Farm Bureau
1701 N. Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901

Jim Kaitschuk
Illinois Pork Producers
6411 S. Sixth Street
Frontage Road East
Springfield, IL 62707

Tim Maiers
Illinois Pork Producers
6411 S. Sixth Street
Frontage Road East
Springfield, IL 62707

Warren Goetsch
Shari L. West
Illinois Department of Agriculture
P.O. Box 19281
801 E. Sangamon Avenue
Springfield, IL 62794

Jessica Dexter
Environmental Law and Policy Center
35 E. Wacker Drive
Suite 1600
Chicago, IL 60601

Jack Darin
Sierra Club
70 E. Lake Street, Suite 1500
Chicago, IL 60601

Lindsay Record
Executive Director
Illinois Stewardship Alliance
401 W. Jackson Parkway
Springfield, IL 62704

Mitchell Cohen
Virginia Yang
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702

Stacy Jaines
Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, IL 61820

Kim Knowles
Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, IL 61820

Albert Ettinger
53 W. Jackson, Suite 1664
Chicago, IL 60604

Marvin Traylor
Executive Director
Illinois Association of Wastewater Agencies
241 N. Fifth Street
Springfield, IL 62701

Ann Alexander
2 N. Riverside Plaza
Suite 2250
Chicago, IL 60606

Brett Roberts
Matt Roberts
US Department of Agriculture
2118 W. Park Court
Champaign, IL 61821

Ted Funk
Extension Specialist
University of Illinois Extension
332E Ag Eng Science Bldg.
1304 W. Pennsylvania Avenue
Urbana, IL 61801

Jim Fraley
Illinois Milk Producers Association
1701 N. Towanda Avenue
Bloomington, IL 61701

Laurie Ann Dougherty
Executive Director
Illinois Section of the American Water Works
545 S. Randall Road
St. Charles, IL 60174

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22514 W. Claybaugh Road
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609 Parkside Drive
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100 North Water Drive
Belleville, IL 62223

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Illinois Citizens for Clean Air and Water
3431 W. Elm Street
McHenry, IL 60050

Brian J. Sauder
Illinois Interfaith Power & Light Campaign
1001 South Wright Street, Room 7
Champaign, IL 61802

Reid Blossom
Executive Vice President
Illinois Beef Association
2060 West Iles Ave., Suite B
Springfield, IL 62704

By: Claire A. Manning

Claire A. Manning
Brown Hay & Stephens, LLP
205 S. Fifth Street, Suite 700
Springfield, Illinois 62701
(217) 544-8491