

*Initial Results of an Informal Investigation of the*  
**National Pollutant Discharge Elimination System Program**  
**for Concentrated Animal Feeding Operations**  
**in the State of Illinois**

Region 5  
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## I. Executive Summary

In March 2008, the Illinois Citizens for Clean Air & Water (Illinois Citizens) submitted a petition for withdrawal of Illinois' authorized National Pollutant Discharge Elimination System (NPDES) program. In February 2009, Illinois Citizens, joined by the Environmental Integrity Project (EIP), supplemented its petition to provide the U.S. Environmental Protection Agency with additional information. The Illinois Citizens claim that the Illinois Environmental Protection Agency (Illinois EPA) has failed to fully implement the program for concentrated animal feeding operations (CAFOs). The Illinois Citizens' claim Illinois EPA has failed to:

- identify CAFOs subject to regulation;
- issue permits to CAFOs;
- inspect to determine whether or not facilities are CAFOs subject to NPDES requirements and are in compliance with those requirements;
- exercise its enforcement authorities to ensure compliance by CAFOs with NPDES requirements;
- provide for public participation in the permitting and enforcement process; and
- meet its commitments to EPA under the terms of the original program authorization in 1977 and ongoing work planning agreements.

The petitioners also expressed concern that Illinois EPA needs to revise its permitting process to comply with EPA's revised NPDES regulations and effluent limitations guidelines for CAFOs. While the petition and EPA's review focuses on Illinois' alleged failure to fully implement the CAFO portion of its program, any action to withdraw the State's program would affect the entire program.

EPA conducted an informal investigation of the petitioners' allegations<sup>1</sup>. The investigation consisted of visits at Illinois EPA's Headquarters and Field Offices, and a meeting with citizens to hear their concerns regarding specific CAFOs. The reviewers also met with a representative of the Illinois Attorney General's Office. EPA conducted these activities from December 2008 to September 2009.

Based on its investigation, EPA Region 5 finds that the Illinois EPA NPDES program for CAFOs does not meet minimum thresholds for an adequate program. This report discusses EPA's initial findings for the various program areas, and the actions Illinois EPA must take to comply with Clean Water Act requirements for authorized state NPDES programs. In particular, Illinois EPA must:

- issue NPDES permits to CAFOs that are required to be permitted under NPDES regulations,
- develop and maintain a comprehensive inventory of CAFOs and evaluate their regulatory status,

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<sup>1</sup> Where this report references "results" or "our review", those terms refer to the initial results of the informal investigation conducted under 40 CFR 123.64(b)(1).

- revise its inspection process for livestock and poultry facilities to enable the Agency to determine and track whether inspected facilities are CAFOs required to have NPDES permits, and whether they are in compliance with NPDES requirements,
- develop standard operating procedures and properly investigate, track, and respond to citizen complaints reporting potential violations of NPDES requirements,
- take timely and appropriate enforcement to address noncompliance by CAFOs,
- require that, where a facility has discharged or is designed, constructed, operated or maintained such that it will discharge, Illinois EPA's enforcement response must also address the CAFO's failure to apply for an NPDES permit,
- ensure that sufficient resources are maintained to issue or deny permits, as well as for inspections and enforcement of NPDES requirements for CAFOs, and
- establish technical standards for nutrient management by Large CAFOs and finalize revisions to 35 Illinois Administrative Code, Subtitle E, as necessary to be consistent with the federal CAFO rules as soon as possible, but not later than December 2010.

## **II. Introduction**

This report describes the results of an informal investigation of the NPDES program that the Illinois EPA administers to protect or restore water quality from pollutants generated by CAFOs. The EPA, Region 5, conducted the investigation in response to a petition filed by Illinois Citizens for Clean Air and Water (Illinois Citizens) on March 27, 2008. The Illinois Citizens claim that Illinois EPA has failed to fully implement the NPDES program for CAFOs. On February 20, 2009, Illinois Citizens, joined by the Environmental Integrity Project (EIP), submitted a supplement to the petition to provide EPA with additional information obtained subsequent to the filing of the original petition. EPA approved the Illinois EPA to administer the NPDES program in the State of Illinois on October 23, 1977. The purpose of this review is to develop the record on which to either deny the petition, or recommend that the EPA Administrator review the Illinois EPA's NPDES program and consider commencing proceedings to withdraw the program.

Section 301 of the Federal Water Pollution Control Act (Clean Water Act) prohibits the discharge of pollutants from point sources into waters of the United States unless the discharge is in compliance with an NPDES permit. Section 502 of the Act defines the term "discharge" to mean, among other things, any addition of any pollutant or combination of pollutants from a point source to waters of the United States. It defines "point source" to include CAFOs from which pollutants are or may be discharged. It defines the term "pollutant" to include agricultural waste. Under federal regulations, an owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated or maintained such that a discharge will occur (40 CFR §122.23(d)(1) (see 73 Federal Register 70480, November 20, 2008)). Once an application is complete, the federal regulation at 40 CFR §124.6 requires the Agency or approved state, as the case may be, to tentatively decide whether to prepare a draft permit.

The Clean Water Act, § 402(c)(2), requires states with approved NPDES programs, including Illinois EPA, to administer their programs in accordance with § 402 of the Act and the regulations EPA established under § 304(i)(2) of the Act at all times. These regulations appear

at 40 CFR Part 123. They require approved states to prohibit the discharge of pollutants from point sources unless the discharge is in compliance with an NPDES permit. They also establish requirements regarding: (1) the submission of NPDES permit applications to, and processing of NPDES permit applications by, approved states (see 40 CFR §123.25), (2) state programs for evaluating compliance by point sources (see 40 CFR §123.26), and (3) state enforcement authority (see 40 CFR §123.27).

The Clean Water Act, § 402(c)(3), requires the EPA Administrator to withdraw an approved state NPDES program if, after public hearing, she determines that the state is not administering the program in accordance with applicable requirements, and the state fails to take corrective action. Criteria for withdrawal appear at 40 CFR § 123.63. They include, but are not limited to, the following:

- (1) Where the state's legal authority no longer meets the requirements of Part 123, including:
  - (i) Failure of the state to promulgate or enact new authorities when necessary; or
  - (ii) Action by a state legislature or court striking down or limiting state authorities.
- (2) Where the operation of the state program fails to comply with the requirements of 40 CFR Part 123, including:
  - (i) Failure to exercise control over activities required to be regulated under Part 123, including failure to issue permits;
  - (ii) Repeated issuance of permits which do not conform to the requirements of Part 123; or
  - (iii) Failure to comply with the public participation requirements of Part 123.
- (3) Where the state's enforcement program fails to comply with the requirements of Part 123, including:
  - (i) Failure to act on violations of permits or other program requirements;
  - (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or
  - (iii) Failure to inspect and monitor activities subject to regulation.
- (4) Where the state program fails to comply with the terms of the Memorandum of Agreement required under §123.24.

While the petition and EPA's review were focused on Illinois EPA's implementation of the NPDES program for CAFOs, any action to withdraw Illinois' program would affect the entire program, not just the element pertaining to CAFOs. For point sources other than CAFOs, Illinois EPA has issued 1713 individual NPDES permits, and many more authorizations to discharge under general NPDES permits.

### III. Petitioners' Allegations

Following is an overview of the allegations provided in Illinois Citizens' March 27, 2008, petition, and the February 20, 2009 supplement, submitted by Illinois Citizens and EIP.

- Illinois EPA has failed to issue permits to facilities that require them.
- Illinois EPA has failed to make a comprehensive survey of livestock facilities in Illinois to determine which ones are subject to CWA NPDES requirements.
- Illinois EPA does not have a standard in place for review of the siting and design of new and expanding facilities to determine if they require NPDES permits.
- Illinois fails to inspect and monitor activities subject to regulation.
- Illinois EPA has not conducted comprehensive inspections to determine which CAFOs need NPDES permits.
- Illinois EPA is not requiring regular inspections at Large CAFOs to determine compliance with NPDES program requirements.
- Illinois EPA fails to adequately respond to citizen complaints regarding CAFOs with proposed or actual discharges.
- Illinois CAFOs are not being assessed adequate penalties for violations.
- Illinois EPA fails to comply with public participation requirements.
- Illinois EPA has failed to comply with the terms of the Memorandum of Agreement required under 40 CFR §123.24, and Environmental Performance Partnership Agreements between Illinois EPA and EPA.
- Illinois EPA failed to make available to the public a copy of each NPDES permit application in response to citizen requests, as required under Section 402(j) of the CWA.
- Illinois will need to revise its permitting process to comply with the NPDES regulations and effluent limitations guidelines for CAFOs, consistent with the Second Circuit Court of Appeals decision in *Waterkeeper Alliance et al v. EPA*.

## **IV. Methods**

EPA Region 5 developed a protocol (Appendix C) to guide the review of the allegations. The protocol consisted of:

### Interviews

- Illinois EPA staff and managers at Field Offices and Headquarters
- Illinois Attorney General's Office staffperson

### Illinois CAFO File Reviews

- Permit applications
- Compliance inspection reports
- Complaint investigations
- Enforcement actions

### Document Reviews

- National Pollutant Discharge Elimination System, Memorandum of Agreement between the Illinois EPA and the EPA Region 5, October 23, 1977
- Illinois Performance Partnership Agreements, 2000-2009
- Illinois EPA 2004 Enforcement Management System

### Meetings

- Members of Illinois Citizens regarding Illinois EPA's response to complaints

**Permit Application Review:** The review team reviewed 16 permit application files at two field offices, the Rockford Field Office and the Peoria Field Office. Reviews focused on the circumstances leading up to applications for permit coverage, and Illinois EPA's review and processing of applications.

**Compliance Monitoring and Enforcement Review:** EPA adapted templates from EPA's State Review Framework (SRF) to evaluate the compliance and enforcement aspects of Illinois EPA's NPDES program for CAFOs. The SRF is a tool that EPA uses to evaluate state performance in the NPDES compliance and enforcement program in a nationally consistent manner. The Framework provides a means to evaluate elements essential to the operation of an effective state program. These elements include: data completeness, timeliness, and quality; inspection coverage and quality; identification of violations; enforcement actions (appropriateness and timeliness); and the calculation, assessment, and collection of penalties.

EPA Region 5 randomly selected files that represent a stratified sample of facility sizes, and a variety of animal types. The random file selection was supplemented by the selection of additional files representing those facilities most likely to require permits: Large CAFOs and Medium CAFOs that have discharged in the past. Documents within the files could be classified into four major categories: complaints, inspections, pre-enforcement actions, and enforcement actions. Fourteen to twenty-three case files were reviewed at each of four Field Offices (Rockford, Peoria, Champaign and Marion/Collinsville).

## V. Results

The results of EPA Region 5's investigation consist of:

- A summary of the Illinois NPDES program for CAFOs, as it is contemplated in state law, administrative rules, and written policies and procedures.
- Our findings as to the manner in which the Illinois NPDES program for CAFOs is actually being implemented. The discussion addresses whether Illinois EPA meets the minimum requirements for state programs set forth in 40 CFR Part 123, and addresses each major program area.

### A. State law, administrative rules, and written policies and procedures.

*Permit process:* Illinois EPA's general authority to enforce environmental laws and administer a permitting program is provided by the Illinois Environmental Protection Act, 415 ILCS 5/1 (the Act), at Title III and X. The State of Illinois implements its regulatory scheme by way of the Illinois Pollution Control Board, which establishes NPDES permitting requirements for various classes of sources, and adopts substantive effluent limits and water quality standards under 35 Illinois Administrative Code (IAC) Subtitle C (Water Pollution) and Subtitle E (Agriculture Related Pollution). See 35 IAC Sections 304 and 502.

In particular, the Act authorizes the Board to issue regulations that "assure that no contaminants are discharged into the waters ... without being given the degree of treatment or control necessary to prevent pollution," including, among other requirements, water quality standards, effluent standards, standards for the issuance of permits, and inspection and monitoring requirements. Illinois Environmental Protection Act 415 ILCS 5/1, Sections 11 and 13. The Act directs the Board to adopt requirements, standards, and procedures which will enable the State to implement and participate in the NPDES program.

Regulations adopted by the Board prohibit the discharge of pollutants to waters of the State without an NPDES permit, and require compliance by permittees with effluent limitations and standards as established in permits. 35 IAC Sections 304 and 309. Section 309 establishes permit application requirements, including for animal waste facilities. Existing discharges are required to apply as of the effective date of the regulations, and new livestock facilities that are required to obtain a permit must apply no later than 180 days in advance of the date on which the facility is to commence operation minus the number of days of available storage time for installed manure storage structures. 35 IAC 309.103 and 502.205.

35 IAC Section 501 establishes specific requirements for livestock management facilities and livestock waste-handling facilities. Such facilities are required to comply with provisions of the Act and Board regulations, and with the CWA application requirements and feedlot effluent guidelines. The section requires specified persons operating livestock management facilities or livestock waste-handling facilities to apply for NPDES permits, although the threshold numbers

and types of animals that meet the State's criteria for operations required to apply for permit coverage are not fully consistent with current federal requirements. This section also continues to include the exemption from permitting for operations that only discharge in the event of a 25-year, 24-hour storm event. 35 IAC Section 502.102. EPA removed this exclusion from the federal regulations in 2003.

The Memorandum of Agreement (MOA) between Illinois EPA and EPA regarding Illinois EPA's administration of the NPDES program commits Illinois EPA to expeditious processing and issuance of all required NPDES permits, and to provide ongoing, timely and adequate review of permits. The MOA also commits Illinois EPA to comprehensively evaluate and assess compliance with effluent limitations and other permit conditions, and to maintain a vigorous enforcement program to take timely and appropriate enforcement action in every case where in the State's opinion such action is warranted<sup>2</sup>.

As of the time of this report, the Pollution Control Board had not revised the State's NPDES regulations to incorporate either the 2003 or 2008 revisions to the federal CAFO rule. Federal regulations require approved states to revise their programs within one year after EPA revises the relevant federal regulations. The regulations provide two years if a state statutory change is required.

On October 20, 2009, Illinois EPA reissued a general permit for CAFOs. CAFO owners and operators required to have a permit under 35 Illinois Administrative Code 502, Subpart A or 40 CFR §122.23 are eligible for coverage under the permit.

*Compliance/Enforcement:* The Bureau of Water and its associated Field Offices evaluate compliance by point sources; work with Illinois EPA's Division of Legal Counsel to issue informal enforcement actions; and prepare referrals to the Illinois Attorney General's Office for enforcement in state court or before the Illinois Pollution Control Board.

Illinois EPA has defined the processes it will use to enforce the Act and regulations in its 2004 Enforcement Management System (EMS) document<sup>3</sup>. Illinois EPA's Bureau of Water- Field Operations Section (FOS) evaluates compliance and engages in enforcement activities. This work is done by personnel at both the Headquarters and Field Offices. The Headquarters Office is largely responsible for policy decisions, guidelines, regulatory interpretations, and formal enforcement actions, while the field offices conduct compliance assurance activities, informal enforcement actions, and provide support for some formal enforcement actions.

*Compliance Monitoring and Evaluation:* Compliance with the Act and the environmental regulations implemented by the Illinois EPA is primarily monitored through either field investigations or record reviews. FOS identify violations at CAFOs through inspections.

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<sup>2</sup> As discussed in section V.B.5, annual commitments are further detailed in a two-year environmental Performance Partnership Agreement, or EnPPA. The EnPPA sets forth the joint environmental priorities and mutual interests, the desirable environmental outcomes, the performance expectations for the participating programs, and the oversight arrangements between the parties.

<sup>3</sup> During the 2009 SRF review, EPA reviewers were told that the EMS was no longer operable as guidance for compliance and enforcement staff at Illinois EPA.

Inspections may be performed as a part of a program to routinely monitor compliance or in response to complaints received. In addition, follow-up compliance monitoring of enforcement orders or Compliance Commitment Agreements (CCAs) may involve both field investigations and record reviews.

Once violations have been identified, decisions are made by the Bureau of Water, Springfield, as to whether or not to take compliance/enforcement follow-up actions. The types of actions that may be taken are described in the “Enforcement Response Guidance” provided in the 2004 EMS document.

The EMS does not contemplate specific procedures for the conduct of compliance assurance activities. Illinois EPA does not provide inspectors any standard operating procedures for the inspection of CAFO facilities, or any checklists by which to evaluate facility compliance.

*Enforcement Procedures:* The 2004 Illinois EMS provides media-specific guidance on enforcement responses for wastewater violations. Table 2 of the EMS, labeled *Wastewater Compliance Enforcement Response Guidance*, provides specific recommendations for addressing various noncompliance issues. Based on the circumstances of the noncompliance, a range of response is provided. The first wastewater noncompliance type described in Table 2 is “Permit violations” including “Discharge without NPDES permit.” The Permit Violation section differentiates two circumstances: 1) Unintentional; first violation without documented environmental impact; and 2) Intentional; one or more times with or without documented environmental impact. In the latter case, the suggested range of response includes a Violation Notice, or formal enforcement such as civil or criminal referrals. A range of responses for Livestock Waste Management Violations are also described in the EMS document.

The following is a description of enforcement procedures contemplated within the State’s EMS:

*Informal Warning Letters* – Section 31 of the Act, as described below, requires that certain actions be taken when violations of the Act are found. However, an informal warning letter called the Noncompliance Advisory can be used, if appropriate, in lieu of the procedures under Section 31 of the Act. It is available for violations of lesser significance. If the Noncompliance Advisory results in a return to compliance in a set amount of time, the compliance is documented and no further action is taken. If compliance does not occur in a timely manner, the procedures under Section 31 are then followed.

- *Pre-Enforcement Procedures* – Section 31(a)(1) of the Act requires that Illinois EPA issue a Violation Notice within 180 days of becoming aware of a violation. Section 31(a)(2) provides that the alleged violator must respond within 45 days of receipt of the Violation Notice with rebuttal information, a proposed Compliance Commitment Agreement, and a meeting request if desired. If the alleged violator does not respond, Illinois EPA does not have further procedural obligations under Section 31. For instances where the alleged violator responds, the Illinois EPA can accept, modify or reject the Compliance Commitment Agreement depending on its contents, but a return to

compliance must happen in a timely manner<sup>4</sup>. For alleged violations that remain unresolved after following the procedures set out in Section 31(a), or where the alleged violator does not respond, the Illinois EPA may refer the matter to the Attorney General for further enforcement pursuant to Section 31(b) and Section 42 (Penalties). If the decision is to reject the Compliance Commitment Agreement, or if a failure to comply with the Compliance Commitment Agreement is discovered, a decision will be made to refer or defer formal enforcement, or take no enforcement action at all.

- *Section 43 Immediate Enforcement Referral Procedures* – In cases of substantial danger to the environment or to public health, Illinois EPA can immediately refer cases to the Attorney General under Section 43 of the Act without first completing the Section 31(a) procedures. In these circumstances, the Attorney General can institute a civil action for an immediate injunction to halt the dangerous activity. The State court may issue a temporary injunction and schedule a hearing on the matter within three days of that order. The usual eventual outcome in these instances is a final judicial order for compliance. According to the Illinois Attorney General's Office, section 43 immediate enforcement cases comprise approximately 75% of CAFO enforcement cases sent to the Attorney General.
- *Section 31(b) and 42(b) Traditional Enforcement Referral Procedures* – If formal enforcement is chosen to resolve a violation, Illinois EPA may refer the matter to the Illinois Attorney General's Office with a recommendation for resolution. When this decision is made, Illinois EPA's Division of Legal Counsel must send a Notice of Intent to Pursue Legal Action letter to the alleged violator under Section 31(b). The Notice of Intent to Pursue Legal Action affords the party another opportunity to confer. If the matter is referred, the Attorney General's Office sends a separate notice letter to the respondent. The case is then pursued by the Attorney General's Office through one of two routes: 1) before the Illinois circuit court, which can issue an order (for penalties and/or injunctive relief) that is independently enforceable if violated, or 2) before the Illinois Pollution Control Board, which can issue an order (including penalties, but not injunctive relief, except for a requirement to seek permit coverage) that is not independently enforceable if violated. The Attorney General's Office must represent Illinois EPA in all matters before either legal tribunal. If a Pollution Control Board order is violated, the Attorney General's Office may litigate the matter before the state circuit court. Illinois citizens have no known statutory right of intervention in these enforcement actions. Illinois EPA does not have authority to issue administrative orders, to assess penalties, or to require submittal of information.
- *Criminal Referrals* – Cases that are believed to involve criminal activity will be processed by criminal staff within Illinois EPA. Illinois EPA may refer a criminal case to

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<sup>4</sup> Accepted CCAs will result in a return to compliance (or promise to cease and desist when a return to compliance is not possible for a past violation) within one year of the date of the CCA. CCAs with longer compliance plans shall only be accepted with the approval of the applicable bureau chief and the Chief Legal Counsel and shall include the following elements: compliance plan with enough specificity to show that the plan is achievable; specific completion date; interim milestone dates for significant steps.

the Attorney General, the Illinois State Police, or to the State's Attorney in the county where the violation occurred.

Public Access to Information: Federal regulations under the CWA provide that information provided in state NPDES application forms may not be claimed confidential. 40 CFR §122.7 (b) and (c).

The Illinois Freedom of Information Act (IFOIA) provides that "Each public body shall make available to any person for inspection or copying all public records, except as provided in Section 7." Section 7 lists the exemptions to requests for information. There is no exemption for NPDES permit applications. §§ 3 (a) and 7 of the IFOIA, 5 ILCS 140/3 and 7.

The Illinois Environmental Protection Act provides that all records of Illinois EPA shall be open to reasonable public inspection and copying with limited exceptions. §7 of the Illinois Environmental Protection Act, 415 ILCS 5/7. Under 35 IAC 309.185, Illinois EPA is required to assure public access to information pursuant to section 7(b) of the Illinois Environmental Protection Act.

B. The Illinois NPDES program for CAFOs as implemented

***1. Permitting Program***

***Allegation: Illinois EPA has failed to Issue Permits to CAFOs that Require Them.***

Program Requirements: Under 40 CFR 123.25, state NPDES programs must (1) have a law or administrative rule that requires all CAFOs that discharge or propose to discharge to apply for an NPDES permit and (2) must administer their programs in accordance with the permit application requirement. Under 40 CFR 123.63(a)(2)(i), the failure to issue permits is a criterion for withdrawal of a state NPDES program.

Illinois EPA provided a list of CAFO individual and general permits as of the time of the review (Attachment A). The list includes 12 facilities that have been covered by NPDES permits. Of the 12 CAFOs that have had permit coverage at one time or another, only two, Mulberry Pork Producers and Heller Brothers, were listed as being covered by a permit at the time of EPA's review (the April 2004 general permit, which expired in April 2009). Neither of these operations had submitted a renewal application at the time of EPA's review; Illinois EPA informed Heller Brothers in January 2009 that it was not required to have an NPDES permit.

Illinois EPA also provided the Review Team a spreadsheet of CAFOs which it believes are required to obtain an NPDES permit (Attachment B). The spreadsheet indicates when applications were submitted, and their current status. As of April 2009, Illinois EPA was tracking 76 facilities which it believes are required to obtain an NPDES permit. Sixty-four of those have submitted permit applications. All of the applications were originally submitted to the Agency's headquarters in Springfield. They have subsequently been sent to personnel in the appropriate Field Office for review and processing. Many of the

applications remained in the Headquarters office for years (as far back as 1997 in some cases) before being forwarded to the appropriate Field Office in mid 2008. All applications submitted to the Agency since mid 2008 were forwarded to the appropriate regional office upon receipt.

Files reviewed in the Field Offices indicated that applications had been submitted to Illinois EPA between four and ten years prior to EPA's review. These timeframes were evident even in cases where the need for a permit was mandated by a court order or originated with a discharge event documented by Illinois EPA<sup>5</sup>.

As of August 2009, FieldOffice staff had determined that eight of the facilities which Illinois EPA had identified as needing permits were ready to be permitted. Illinois EPA reissued its general permit for CAFOs in October 2009<sup>6</sup>.

In some facility files reviewed, Illinois EPA had issued three to four notices of incomplete applications. In some cases, Illinois EPA provided its initial notice regarding an incomplete application shortly after submittal of the original application. Where Illinois EPA has sent multiple notices, the language used to specify the consequences of failing to submit the required information varies, and the letters do not compel submittal of a complete application. Nor did the review team find any enforcement actions to compel complete applications.

Illinois EPA provided a list of 45 facilities that applied for NPDES permits, some as long as 10 years ago (Attachment D). The list indicates that these facilities do not need NPDES permits, many because of "no discharges." Seven of the facilities were either out of business, or were never built. For one of the files reviewed from this list, the facility had a documented discharge from a lagoon subsequent to Illinois EPA's determination that it did not need a permit<sup>7</sup>. In general, where a facility applies for an NPDES permit, that action indicates the need for a permit, and Illinois EPA is obligated to either issue or deny a permit after reviewing the application and providing for public comment.

During the 2004-2008 period, between 36 and 59 percent of the facilities evaluated in Illinois EPA's Livestock Facility Investigation Annual Reports had at least one regulatory violation, many related to discharges of manure, litter or process wastewater. However, only a small percentage of Illinois' estimated 500 Large CAFOs have applied for permits on their own volition. Other states in EPA Region 5 have addressed potential gaps between permitted CAFOs and those lacking the regulatory control afforded by

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<sup>5</sup> See Attachment C for a case study showing that a permit had not been issued ten years after application submittal, even where the CAFO was mandated by court order to apply for an NPDES permit following a discharge event documented by Illinois EPA.

<sup>6</sup> Any Illinois CAFO required to apply for an NPDES permit may seek coverage under this general permit. CAFOs may alternatively seek coverage or be required by Illinois EPA to seek coverage under an alternative general permit (if issued), or an individual permit.

<sup>7</sup> See Attachment C for a case study showing a CAFO with a discharge from its lagoon subsequent to Illinois EPA's determination that it did not discharge, and therefore did not need an NPDES permit.

permit coverage by establishing unambiguous requirements for CAFOs to apply for permits.

**Based on the above, EPA Region 5 finds the following:**

- a) With limited exceptions, Illinois EPA has not issued NPDES permits to CAFOs that have applied for them.**
- b) In some cases, Illinois EPA has sent applicants multiple notices of incomplete applications. The notices do not compel submittal of a complete application. Consequences for failing to submit the required information were not found by the Review Team.**
- c) Illinois EPA has determined that another group of 45 facilities that applied for NPDES permits, some as long as 10 years ago, do not need permits. Where a facility applies for a permit, Illinois EPA is obligated to either issue or deny a permit after reviewing the application and providing for public comment.**
- d) A significant percentage of the facilities evaluated in Illinois EPA's Livestock Facility Investigation Annual Reports had at least one regulatory violation, many related to discharges of manure, litter or process wastewater. Only a small percentage of Illinois' estimated 500 Large CAFOs have applied for permits on their own volition.**

## ***2) Compliance Evaluation/Inspection Program***

### ***a) Surveys to Identify Facilities Subject to NPDES Regulation***

#### ***Allegations:***

- Illinois EPA has failed to make a comprehensive survey of livestock facilities to identify which ones are subject to CWA requirements.***
- Illinois EPA does not have a standard in place for review of siting and design of new and expanding facilities to determine if they require NPDES permits.***

Program Requirements: Under 40 CFR 123.26(b)(1), a state must have a program which is capable of making comprehensive surveys of all facilities and activities subject to the Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements.

Past discussions between EPA and Illinois EPA addressed the need for Illinois EPA, with assistance as appropriate from EPA, to develop a comprehensive inventory of CAFOs in Illinois. Such an inventory would provide a basis for Illinois EPA to define the universe of CAFOs potentially needing to obtain NPDES permit coverage.

As part of its NPDES program oversight process, EPA annually conducts a "Joint Evaluation" with NPDES-authorized states to assess program performance. In its

response to EPA comments on the 2008 Joint Evaluation, and in discussions with Illinois EPA managers as part of this review, Illinois EPA cited numerous problems with establishing a statewide inventory. Barriers to creating an inventory include the time and resource demands of aggregating data from Agency and other sources, and the State's perception that such data is of limited utility.

While Illinois EPA has not developed a statewide inventory, all of the Field Offices maintain and provided lists of known or possible CAFOs. Data in field offices are expressed as animal units, not animal numbers as provided in the federal regulations. The lists vary in the level of detail. For example, the list from the Rockford Field Office consisted of only the facilities names and addresses. Rockford staff expressed a lack of confidence that the list was comprehensive enough to identify those facilities needing permits. In contrast, the Peoria and Collinsville/Marion Field Offices actively maintain their lists, which include information regarding the type of animal, animal units onsite, and the type of waste storage systems. These regions use the lists for inspection scheduling and tracking, and add facilities as they become known.

Through informal means, most Illinois EPA regional offices have been able to obtain information from the Illinois Department of Agriculture (IDA) regarding registrations of new sites, including the implementation of setback provisions, and/or manure management plan (MMP) registrations, from their counterparts at IDA regional offices. The Livestock Management Facilities Act (LMFA) (510 ILCS 77/1 et seq.) and associated rules (8 Illinois Administrative Code Part 900) give the IDA primary authority over the design, construction, and operation of livestock management and livestock waste-handling facilities in the State. The Act also establishes procedures and criteria for the siting of facilities. Compliance with the LMFA requires operators to submit a Notice of Intent to Construct for new facilities and to register livestock waste lagoons. The LMFA also states that facilities with 300 or more animal units must be supervised by a certified livestock manager; facilities with over 1000 animal units must certify their livestock waste management plans.

Illinois EPA does not have formal agreements in place allowing the Agency to receive facility information from IDA. A Notice of Intent to Construct (NOITC) application must be filed with IDA for new and/or expansions of livestock facilities. Though the NOITCs are posted on IDA's website, the NOITC filing is only the initial step in the LMFA approval process. According to IDA's LMFA website, once a facility is deemed compliant with all applicable provisions of the Act, including but not limited to the NOITC filing requirements, construction plan provisions, public informational meeting requirements (if applicable), various construction-related certifications, and any specific manure management planning requirements, the overall project is approved and the facility may begin operation. No mention is made in public information regarding the LMFA of the potential need for the facility to apply for an NPDES permit.

In part because Illinois EPA does not have a formal mechanism by which it can regularly receive information regarding new or proposed CAFOs from IDA, it does not have a comprehensive list of facilities with NOITCs approved by IDA. Illinois EPA staff indicated that it can be difficult to know whether a proposed facility has been constructed and when the facility may go into operation.

EPA provided Illinois EPA with a list of CAFOs that have received IDA approval of NOITCs from IDA since 2003. Illinois Citizens had obtained the list from IDA as a result of a FOIA request. Staff from the Field Offices were interested in comparing the list with their lists of CAFOs, and indicated that regular updates of that list would be useful.

Field Office staff also indicated that they may learn of facilities from the Illinois Emergency Management Agency (IEMA) as a result of a manure spill. Inspectors frequently respond to spill incidents occurring within their region, and will respond to incidents outside their boundaries as needed to maintain coverage.

While Illinois EPA does not have a formal inventory of CAFOs, the Agency does have data sources that may serve as a foundation for inventory development. Currently, the Agency has four databases that serve differing needs: 1) the CAFO tracker is maintained to track permit issuance status; 2) the complaints and inspection database is managed and populated by field office inspectors; 3) the Violation Notice, or “VN” tracking system follows the issuance of informal enforcement actions; and 4) the Division of Legal Counsel (DLC) maintains a list of enforcement actions. The complaints and inspection database is the most comprehensive of these lists, as it reflects most facilities for which the Field Operations Section has had contact. Five of the Illinois EPA’s seven field offices maintain current data in this database<sup>8</sup>. This database could serve as the Agency’s primary data source for the development of a comprehensive inventory. The complaints and inspection database is also appropriate as the foundation for Illinois EPA’s CAFO inventory since it is maintained by Illinois EPA inspectors as they inspect/survey facilities over time.

**Based on the above, EPA Region 5 finds that Illinois EPA does not currently have a statewide comprehensive survey of CAFOs which may be subject to NPDES permit requirements. However, all of the field offices maintain lists of known or possible CAFOs. These lists vary in the level of detail and specificity provided with respect to NPDES requirements.**

**Illinois EPA does not have a formal agreement with IDA to provide plans for new and expanded livestock facilities submitted to IDA. Lacking complete access to these plans, Illinois EPA is unable to review plans for new and expanded facilities to identify livestock operations as CAFOs that are subject to permit application requirements.**

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<sup>8</sup> As of the time of the review, Field Offices 1 and 2 had not entered any data into the central database since 2007.

***b) Inspection coverage***

***Allegations:***

- ***Illinois EPA has not conducted comprehensive inspections to determine which CAFOs need NPDES permits.***
- ***Illinois fails to inspect and monitor activities subject to regulation.***
- ***Illinois EPA is not requiring regular inspections to determine compliance with NPDES program requirements at Large CAFOs.***

Program Requirements: Under 40 CFR 123.26(b), state programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. 40 CFR 123.26(b)(2) states that programs shall have a program for periodic inspections of the facilities and activities subject to regulation.

Under 40 CFR 123.63(a)(3)(iii), failure to inspect and monitor activities subject to regulation is a criterion for withdrawal of a state NPDES program.

To assess whether Illinois EPA is meeting its program requirements with respect to inspections, EPA evaluated 1) the adequacy of the procedures employed by inspectors in determining whether or not CAFO facilities were in compliance with NPDES requirements, and 2) whether or not the Illinois EPA has met its obligations for periodic inspection of facilities potentially subject to regulation.

As specified in EPA's NPDES Compliance Inspection Manual (July 2004), the primary role of a CAFO inspector is to gather information to evaluate compliance with NPDES CAFO permit conditions. Inspectors also identify facilities subject to regulation through compliance monitoring of unpermitted animal feeding operations (AFOs). Facilities should be inspected to determine whether they meet the definition of a CAFO and whether the facility discharges or proposes to discharge and should have an NPDES permit. The CAFO inspector plays an important role in enforcement case development and support, as well as permit development.

In order to provide an objective assessment of Illinois EPA's inspection of livestock facilities, EPA Region 5 randomly selected files that represent a stratified sample of facility sizes, and a variety of animal types. The random file selection was supplemented by the selection of additional files representing those facilities most likely to require permits: Large CAFOs and Medium CAFOs who have discharged in the past. A checklist was used to determine the degree to which inspection reports properly document observations, and whether reports provide sufficient information to lead to an accurate compliance determination (see Appendix D: Inspection and Enforcement Review Protocol).

EPA Region 5 reviewers' observations regarding inspection program performance are detailed below. Where Illinois EPA lacks written guidance, such as a policy

regarding the timeliness of inspection report completion, EPA policy was used as the standard for comparison. The quantitative metrics developed from the file reviews are indicators of performance based on available information.

**Table 1: Evaluation of Illinois EPA Inspection Program Implementation**

File Review Parameter	Value	Initial Findings and Conclusions	Assessment
# of inspection case files reviewed.	72	A ten-year time period, from 1999-2009, was reviewed to assess the history of inspections and facility compliance with NPDES requirements. In many cases, more than one inspection report was reviewed in a case file; nonetheless, the count was 1 (file) for purposes of the inspection metrics.	
% of inspection reports reviewed that are complete.	48%	Major deficiencies observed in the completion of inspection reports included a substantive lack of detail about the facility, including the number and type of livestock; incomplete descriptions of the areas of the facility examined; and little narrative explanation in the inspection report.	Significant area of concern. Complete inspection reports are critical to making accurate NPDES compliance determinations.
% of case files reviewed that provide sufficient documentation to lead to an accurate compliance determination.	68%	49 out of 72 inspection case files reviewed had one or more inspection reports that provided sufficient information to lead to an accurate compliance determination. Illinois EPA also performs a large number of informal inspections that would be classified as reconnaissance inspections, usually conducted in response to complaints. Very few of these inspections are as comprehensive as needed to determine compliance with NPDES requirements.	Significant area of concern. The 23 case files with insufficient documentation frequently lacked evidence such as lab reports and photographs needed to make a compliance determination.
% of inspection reports reviewed that are timely.	68%	Among Illinois EPA staff interviewed during the review, there was a general consensus that reports should be produced within 30 days of the inspection. Reports from four of the five Field Offices reviewed did not distinguish between the inspection date and the report date, making determination of timeliness difficult. Reviewers frequently determined timeliness based on other documents within the case files. 67.6% of the case files reviewed contained timely inspection reports. 25% of the files contained insufficient documentation to determine how timely inspection reports were.	Area of concern. Due in part to a lack of Standard Operating Procedures for CAFO inspections and inspection reports, it was difficult to determine how timely inspection reports were. Inspection reports need to differentiate between inspection date and report date.

The deficiencies noted in the collection and documentation of inspection data by Illinois EPA’s inspectors significantly impair Illinois EPA’s ability to make accurate NPDES compliance determinations. Basic information is often missing from inspection reports, such as the location of the facility, the number and type of livestock maintained onsite, the areas of the facility inspected, and whether or not the facility had permit coverage or had applied for a permit. The absence of such data renders the report incomplete, and does not enable the reader to determine whether or not a facility is an AFO or a CAFO.

Thirty-two percent of inspection reports were also found to be lacking sufficient detail to allow an accurate determination of compliance. As recommended in Chapter 16 of the NPDES Compliance Inspection Manual, an inspection report should include an inspection checklist, any documentation copied during the inspection, an explanation of findings, and supporting documentation such as photographs. Many of Illinois EPA's inspection reports were lacking any narrative communicating the inspector's observations, or any photographs and/or sampling data documenting the findings of the inspection. Narrative findings should include observations regarding whether or not the facilities had a release or discharge of manure and/or wastewater. These deficiencies limit Illinois EPA's ability to accurately make compliance determinations.

Illinois EPA is also limiting its ability to identify facilities needing NPDES permits, and to monitor the return to compliance by facilities subject to pre-enforcement or enforcement actions, because it is not consistently monitoring CAFO facilities on a routine, planned basis. Illinois EPA staff indicated that planned inspections, including follow-up at facilities known to have been in noncompliance, may not be completed due to the demands of responding to large numbers of complaints. The primary reason for inspections of CAFOs, as stated by Illinois EPA inspectors, was complaints received and follow-up after such complaints. Although Illinois' goal is to inspect each CAFO at least once every five years, Field Office staff estimated that inspections in response to complaints make up about 75 percent of livestock inspections conducted. For the 2004-2008 period, the Peoria Office received well over 200 complaints of all types each year. On average, thirty-seven percent (91 facilities) of these complaints were livestock-related, requiring further investigation by field personnel. Facilities subject to complaint may also be AFOs not subject to permitting requirements, as indicated by staff at the Springfield Office, which inspected approximately 50 non-CAFO livestock facilities in 2007 and 2008.

Review of case files showed that some facilities under informal enforcement through a Violation Notice with a Compliance Commitment Agreement were not monitored for time periods as long as five to ten years. As a result, many of these facilities were in ongoing noncompliance. The Review Team observed that the lack of permit coverage for these CAFOs likely contributes to ongoing noncompliance, as well as to the number of complaints to which inspectors must respond. Regulatory conditions are not in place that could prevent some problems from developing and/or continuing. As a result, the nature of most completed inspections is not to determine compliance or noncompliance with NPDES program requirements but to respond to citizen complaints.

Prior to 2009, there appears to have been no central coordination in the planning of CAFO inspections despite ongoing commitments to perform inspections. In 2008, Illinois EPA committed in its EnPPA to implement the National Compliance Monitoring Strategy (CMS) in Fiscal Year 2009. This national strategy calls for states to inspect all Large CAFOs within five years, and regularly thereafter, to determine whether the facility discharges or proposes to discharge. The CMS also

calls upon states to inspect medium AFOs one time to determine whether they are Medium CAFOs, and are therefore required to apply for an NPDES permit. After the initial assessment, for facilities that are not medium CAFOs, states should inspect and designate those facilities as needed based on citizen complaints or other information that indicates whether they are significant contributors of pollutants. The CMS calls for similar efforts regarding small facilities. Several of the Field Offices have been attempting to inspect CAFO facilities on a routine five-year basis, with limited success. Routine inspection efforts by all Field Offices are frequently limited by workload issues, including the review of NPDES permit applications. In 2009, the first year Illinois EPA was to adopt the CMS, the Illinois EPA Field Operations Section issued a spreadsheet to the Regional Field Offices listing a limited number of CAFOs requiring inspection and monitoring. For Fiscal Year 2009, Illinois EPA did not meet the CMS goals set forth in the EnPPA.

**Based on the above, EPA finds that Illinois EPA has serious deficiencies in its program for determining compliance or noncompliance with applicable program requirements. Illinois EPA does not have inspection and surveillance procedures sufficient to determine compliance or noncompliance with applicable program requirements.**

**EPA also finds that Illinois EPA has not been conducting periodic inspections of CAFOs that may be subject to NPDES regulation. Illinois EPA has not met its EnPPA commitments to implement the National Compliance Monitoring Strategy, including the goal to inspect CAFOs on a routine five-year basis.**

*c) Response to Citizen Complaints*

*Allegation: Illinois EPA fails to adequately respond to citizen complaints regarding CAFOs with proposed or actual discharges.*

Program Requirements: Under 40 CFR 123.26, state programs shall have procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

Under 123.27(d), authorized states shall provide for public participation in the enforcement process by providing either authority which allows intervention as of right in any civil or administrative action by any citizen having an interest which is or may be adversely affected, or assure that the state agency or enforcement authority will, among other requirements, investigate and provide written responses to all citizens complaints submitted pursuant to the procedures in 123.26(b)(4).

Illinois EPA field office inspectors respond to numerous citizen complaints regarding a range of issues, including spills, unauthorized discharges, and odor. Though the inspectors will try to meet the needs of the complainant through a telephone call, a site visit is frequently required. A considerable amount of time is spent by Field

Operations Section inspectors responding to and investigating odor complaints. The investigations are to determine whether violations of air pollution-related nuisance provisions have occurred under the Illinois Environmental Protection Act. These complaints are recorded on a “Livestock Odor Complaint and Log Form” to facilitate the gathering of data from complainants. Odor complaint investigations are a specific subset of inspections. While the implementation of statutes other than the Clean Water Act is beyond the purview of this review, this observation is of significance due to its impact on the workload of the Bureau of Water field inspectors.

Tracking complaints received, and the response to these complaints, has proven challenging for the Illinois EPA. Illinois EPA has a statewide database of livestock and/or CAFO complaints, which usually includes the follow up actions taken. This database is not consistently maintained by all Regional Field Offices, however. Data compiled includes the nature and source of the complaint, and the resulting action by the field office, but does not indicate if follow-up is conducted with the complainant.

**While Illinois EPA inspectors respond to numerous citizen complaints regarding a variety of issues at livestock facilities, it is not clear whether Illinois EPA consistently provides a written response to the complainant. Illinois EPA does not have procedures developed to ensure proper consideration of information submitted by the public regarding such potential violations. Such procedures, accompanied by appropriate staffing, would allow Illinois EPA to provide appropriate responses to citizens’ complaints.**

### 3) Enforcement Programs

*Allegation: Illinois CAFOs are not being assessed adequate penalties for violations.*

Program Requirements: Under 40 CFR 123.27, “Requirements for enforcement authority,” states administering NPDES programs must have available remedies for violations of State program requirements. These remedies must include a mechanism to stop any unauthorized activity which is endangering or causing damage to public health or the environment, and the ability to seek or assess specified civil or criminal penalties for violation of state program requirements.

Further, 40 CFR 123.63(a)(3) states the following are criteria for withdrawal of a state program: Where the State’s enforcement program fails to comply with the requirements of this part, including: (i) Failure to act on violations of permits or other program requirements; (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed.

***a) Enforcement Activities***

Addressing the Petitioners' allegations regarding the assessment of penalties first requires evaluation of whether or not Illinois properly exercises enforcement authority to stop activities that may be in violation of NPDES program requirements. Where noncompliance has been discovered, enforcement action is needed. The goal of enforcement is to provide a rapid resolution to environmental hazards, and to achieve a return to compliance by noncompliant facilities.

Section 31 of the Illinois Environmental Protection Act describes the procedures, timelines, and management controls associated with pre-enforcement and enforcement referral activities in response to findings of noncompliance. As discussed in EPA's 1989 National Enforcement Management System (EPA EMS) policy, guidance on the appropriate enforcement action for specific types of violations should be defined in an Enforcement Management System (EMS) document. Although Illinois EPA indicated during the 2009 State Review that it is not currently employing the 2004 Illinois EMS, the practices described in the document are reflective of current practice with respect to CAFOs.

Determination of the levels of follow-up action for specific violations is made by personnel at the Bureau of Water, with legal consultation as needed. EPA allows that informal pre-enforcement activities may be appropriate in response to inspection findings of noncompliance where violations are minor in nature. Informal pre-enforcement actions such as Noncompliance Advisory letters should only be used where conditions permit a prompt return to compliance with all applicable statutory provisions and regulations. Where pre-enforcement actions have not succeeded in achieving compliance, and/or the nature of the violation is more serious, formal enforcement is generally more appropriate. Formal enforcement, as defined in the EPA EMS, requires specific actions to achieve compliance to be completed on a finite schedule. Formal enforcement actions should also contain consequences for noncompliance that are enforceable independent of the original violation, and subject the facility to adverse legal consequences for noncompliance. Formal enforcement may include the assessment of civil and/or criminal penalties.

Illinois EPA's informal enforcement process begins with the issuance of a Noncompliance Advisory or a Violation Notice. The Illinois EMS allows up to 60 days to issue a Noncompliance Advisory from the date a violation is identified and 165 days to issue a Violation Notice. The enforcement referral process allows 90 days from the date an enforcement decision is made to the date a referral package is due to management.

CAFO enforcement program elements examined included appropriateness and timeliness of enforcement actions, and calculation, assessment and collection of penalties. Fourteen to twenty-three complete case files were reviewed at each Field Office visited. Overall, 90 pre-enforcement and enforcement action files were reviewed.

### **Pre-Enforcement/ Enforcement Actions**

The pre-enforcement/enforcement action category includes five types of actions: Noncompliance Advisories; Violation Notices with Compliance Commitment Agreement approvals; Notices of Intent to Pursue Legal Action; Section 43 Immediate Enforcement Referrals; and Consent Decrees. Actions taken by the Illinois Attorney General's Office, or the Illinois Pollution Control Board, were reviewed solely in the context of their relationship to the effectiveness of Illinois EPA enforcement.

EPA reviewers examined whether or not Illinois EPA's enforcement responses returned, or were likely to return, facilities to compliance with the CAFO regulations applicable at the time of the enforcement response<sup>9</sup>. Determining whether or not a given enforcement action returned, or will return, a facility to compliance often involved looking beyond actual discharges to evaluate other factors such as substantial failure to implement best management practices; failure to meet major milestones required in a permit or a judicial or administrative order, or failure to submit timely reports as required. Whether or not an action by Illinois EPA would return the facility to compliance in the future was, in part, also determined by whether or not the pre-enforcement/enforcement action included an enforceable schedule for implementation of appropriate injunctive relief, and whether or not a facility that required a permit was ordered to apply for one.

The reviewers also examined whether or not the enforcement response was appropriate to the violation, and whether or not the responses were taken in a timely manner. The EPA EMS encourages all CWA violations be reviewed and considered for appropriate follow-up enforcement action. Important considerations include the type, duration, frequency, and outcome of any violation or deficiency. If violations persist without resolution, the NPDES authority should initiate formal enforcement action with an appropriate penalty, particularly if the facility has failed to correct violations that were noted during the compliance evaluation or fails to comply with conditions related to an informal action.

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<sup>9</sup> e.g., per the 2000-2004 EnPPAs, Illinois EPA committed to the following: "for CAFOs with 1000 or more animal units, the Agency will enforce the duty to apply for an NPDES permit...For CAFOs with more than 300 but less than 1,000 animal units that are subject to enforcement...the Agency's enforcement will result in either (1) a change in the design or operation of the facility, or both, such that the facility no longer is a CAFO point source or (2) the submission of an application for a NPDES permit".

**Table 2: Evaluation of Illinois EPA Enforcement Program Implementation**

File Review Parameter	Value	Initial Findings and Conclusions	Assessment
# of enforcement case files reviewed <sup>10</sup>	56	A total of 90 pre-enforcement/enforcement actions in 56 case files were reviewed.	The majority of the enforcement responses were informal. The number and type of action issued is detailed below.  NCA: 36 VN with CCA: 32 NIPLA: 13 Section 43 Referral: 2 Consent Order: 7
% of enforcement responses that have returned or will return a source in noncompliance to compliance.	46%	26 of the 56 case files had enforcement responses that, in the past ten years, have returned or will return a facility in noncompliance to compliance with basic provisions of the CWA. A determination of whether or not a facility has returned, or is likely to return, to compliance could not be made for 4 facilities (7%).  <ul style="list-style-type: none"> <li>• 17 of 36 NCAs (47%) did not/will not return the subject facilities to compliance.</li> <li>• 20 of 32 VNs (62.5%) did not/will not return the subject facilities to compliance</li> </ul>	Significant area of concern. Over fifty percent of the actions were NCAs or VNs which have failed or were likely to fail to bring the subject facility into compliance.
% of enforcement responses reviewed that are appropriate to the violations.	54%	The majority of the enforcement responses reviewed were appropriate to the violation when reviewed against the procedures required by Section 31 of IL's environmental law. However, only 27 of 50 (54%) of these responses would be considered appropriate, according to national policy for addressing the violations apparent in the case histories.	Significant area of concern. Based on factors such as the severity of the discharge, the recalcitrance of the facility, and the environmental damage caused, many cases should have been elevated to a Violation Notice or formal enforcement earlier.
% of enforcement responses reviewed that are taken in a timely manner.	34%	17 of 50 enforcement responses were taken in a timely manner. 16 of 53 were not taken in a timely manner. For an additional 17 files, the timeliness of the enforcement actions could not be determined.	Significant area of concern. The timeliness of enforcement response to violations can be improved by establishing and following further guidance on appropriate and effective enforcement through an Enforcement Management System

<sup>10</sup> As described on p. 18, Illinois EPA has not routinely gathered information on the size and type of livestock maintained on CAFO/AFO facilities inspected. A similar deficiency was noted when reviewing enforcement actions taken; the review team could not adequately differentiate whether actions taken were against AFOs or CAFOs.

When it identifies violations, the Illinois EPA will often issue an informal enforcement action in the form of a Noncompliance Advisory. Per the Illinois EMS, if a Noncompliance Advisory is issued, the return to compliance must be achieved within 150 days of the violation date. These advisory letters, however, appear to be of varying effectiveness for returning a facility to compliance. As indicated in Table 2, 47% of the facilities reviewed returned to compliance after receipt of a Noncompliance Advisory<sup>11</sup>.

Illinois EPA may employ a Violation Notice for an escalation of enforcement. A Violation Notice with Compliance Commitment Agreement must be recommended by the Field Office to a management decision-making group at the Bureau of Water in Springfield. Facilities receiving a Violation Notice must respond within 45 days identifying facility-specific activities and timeframes by which they will resolve violations. The informal enforcement process is concluded with a Compliance Commitment Agreement acceptance or rejection letter. If the Compliance Commitment Agreement is accepted by the facility and Illinois EPA, the facility is determined to be in compliance during the duration of the Agreement. Rejected Compliance Commitment Agreements are one basis upon which the Agency may seek a formal action in the form of a referral to the Office of the Attorney General, the State's Attorney, or EPA.

In over 50% of the cases reviewed, the original response by Illinois EPA was insufficient to resolve the violations and bring the facility back into compliance. Attachment C provides examples where Illinois EPA enforcement responses did not return facilities to compliance. Some, but not all, of these cases of continuing noncompliance, including rejected Compliance Commitment Agreements, were referred for formal action. As stated in EPA guidance documents, when one or more noncompliance conditions occur at a single site, the enforcement response should be weighted toward the strongest response option, in light of previous responses taken at the facility. Larger or more sophisticated facilities may warrant stronger enforcement responses.

The authority to enforce against violations is maintained by a management group in the Bureau of Water. This group will consider action – either a Violation Notice or a “no action” decision – in the event that the Noncompliance Advisory is not successful in obtaining compliance, or when the violations are serious enough to warrant a stronger response. If this management group makes a “no action” decision despite continuing noncompliance, the Illinois EMS specifies this decision must be adequately documented to the file. Clear documentation of these decisions was not readily apparent in all case files. It is also unclear to what extent “no action” recommendations by this group are communicated to Field Offices and inspectors.

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<sup>11</sup> The Illinois EMS states that if a facility returns to compliance, “it can be documented (*e.g.*, reinspection or report from violator) to the appropriate file and no further enforcement taken.” As stated in Section V. B. 2. b. above, follow-up inspections may not be conducted. In such cases, a determination of return to compliance cannot be made.

When a Violation Notice with Compliance Commitment Agreement is authorized by the management group, a Compliance Commitment Agreement received from the facility is one determinant of the response by Illinois EPA. If the decision is to reject the Compliance Commitment Agreement, or if a failure to comply with an accepted Compliance Commitment Agreement is discovered, it is Illinois EPA's policy that a recommendation on the matter be presented to the "Enforcement Decision Group", a higher level management group authorized to make enforcement decisions for the Bureau of Water. This group may decide to: 1) to refer the case for formal enforcement; 2) defer enforcement; or 3) not pursue enforcement. Anecdotal evidence from Illinois EPA managers and staff has indicated that resource issues frequently have a large influence on the decision whether or not to escalate enforcement, independent of proof of noncompliance.

In Table 2 of the Illinois EMS, labeled *Wastewater Compliance Enforcement Response Guidance*, the recommended responses for CAFO facilities are inconsistent with those recommended for permit violations and wastewater noncompliance issues regarding other point source dischargers. For wastewater compliance issues in general, a Violation Notice or a referral for formal enforcement is the suggested response for "Discharge without NPDES permit," where the discharge is intentional and/or has occurred one or more times without a documented environmental impact. For livestock facilities, however, a Violation Notice or formal enforcement is only suggested where a livestock waste discharge has a documented environmental impact, or there is evidence of negligence or intent. Although Illinois EPA has indicated it is not currently employing the 2004 EMS, the practices described in the document are reflective of current practice with respect to CAFOs. By applying a standard of documented environmental harm, Illinois has not consistently escalated enforcement against CAFOs with chronic problems consistent with the general EMS responses for "discharge without a permit."

While Illinois strives to meet the timeframes in its EMS for enforcement action, a Violation Notice with a Compliance Commitment Agreement may not return facilities to compliance within a reasonable timeframe. EPA policy requires that a facility that has been found to be in serious or chronic noncompliance be corrected or that a formal enforcement action be initiated within a specified period of time. Illinois EPA's EMS should provide the criteria by which staff can make this determination, either generally or with respect to livestock facilities, and the case files should contain the documentation of that decision. Illinois EPA should also track the timeframes in which facilities achieve compliance<sup>12</sup>.

EPA recognizes that Illinois EPA's lack of independent formal administrative enforcement authority, such that the Agency must pursue formal action from the

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<sup>12</sup> During the 10-year period examined, only 20 of the 32 facilities reviewed that were under Violation Notices with Compliance Commitment Agreements were determined by reviewers to have returned to compliance. Reviewers were unable to determine the time these facilities took to return to compliance based on information provided in case files.

Illinois Pollution Control Board through referral to the Attorney General's Office, lessens the number of options available.

**Based on the above, EPA finds that Illinois EPA frequently fails to act in a timely and/or appropriate way in response to violations of NPDES program requirements applicable to CAFOs. Half of the pre-enforcement/enforcement actions examined for livestock operations did not result in the facility returning to compliance, or did not appear likely to return a facility to compliance in the future.**

**According to its EMS, Illinois EPA's escalation of enforcement for CAFO violations is not consistent with responses Illinois EPA would pursue regarding noncompliance by other types of point source dischargers. In addition, the EMS does not include a requirement for a CAFO to apply for an NPDES permit where it has discharged or is designed, constructed, operated or maintained such that it will discharge.**

*b) Assessment of penalties for violations*

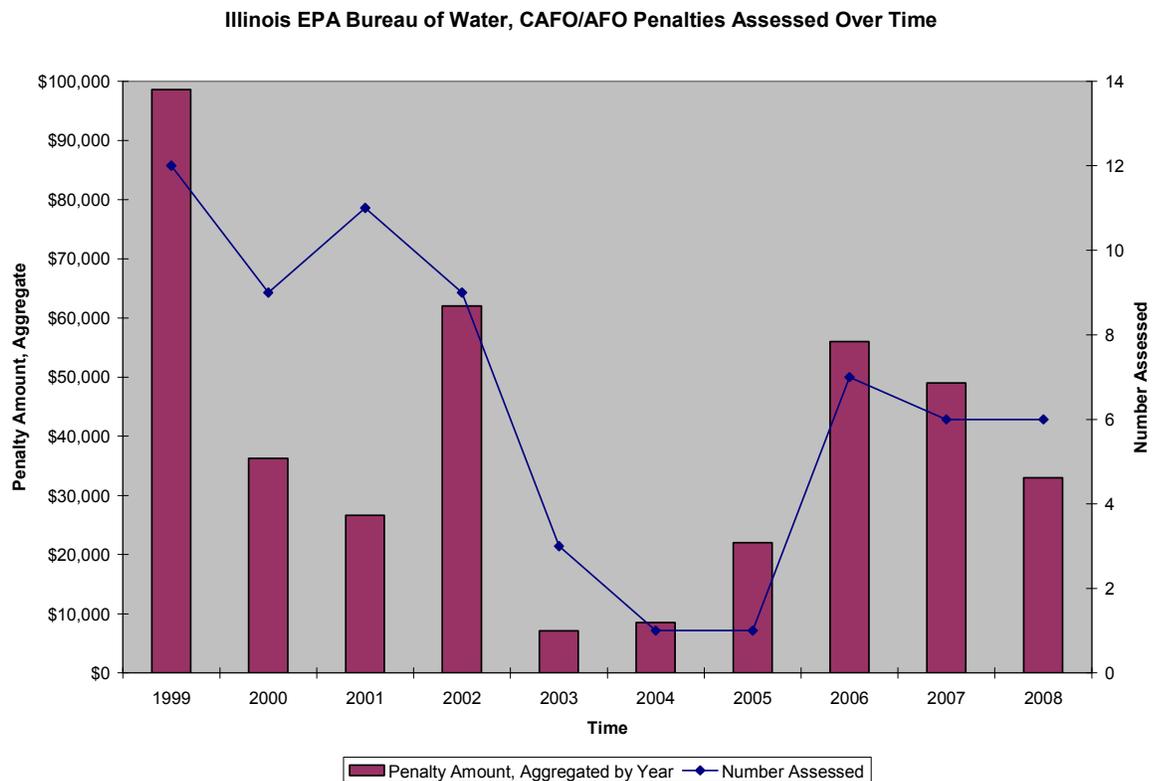
As discussed in the previous section, effective formal enforcement requires specific actions to achieve compliance to be completed on a finite schedule. These actions should also contain consequences for noncompliance that are enforceable independent of the enforcement for the original violation, and subject the facility to adverse legal consequences for noncompliance. Formal enforcement may include the assessment of civil and/or criminal penalties.

Illinois EPA is limited in its options for formal enforcement. The Violation Notice with Compliance Commitment Agreement has been employed by Illinois EPA in the absence of independent administrative order authority. EPA analysis has shown, however, that 62.5% of the Violation Notices reviewed did not, or will not, return the facility to compliance. Many of these facilities exhibited serious or chronic noncompliance. Any CAFO exhibiting significant noncompliance should be considered for formal enforcement. With respect to CAFOs, examples of serious noncompliance include the following:

- any significant unauthorized discharge
- no Nutrient Management Plan (NMP) when one is required
- multiple discharges without an NPDES permit (and the failure to apply for an NPDES permit, when one is required)
- multiple violations of permit requirements
- multiple deficiencies in complying with the permit and the NMP, such as failure to maintain adequate storage capacity and containment
- failure to meet the major milestones required in an administrative or judicial order or in a permit by 90 days or more
- failure to submit an annual report or other required report

Of the files EPA reviewed, fourteen large facilities with unauthorized discharges and/or fish kills were issued Noncompliance Advisories and/or Violation Notices during the review period, 1999-2009. In EPA's assessment, these pre-enforcement/enforcement actions did not, or will not, return the facilities to compliance. The Noncompliance Advisories or Violation Notices issued to nine of these 14 large facilities included language recommending the facility apply for NPDES permits<sup>13</sup>. Five of these facilities subsequently submitted applications. These five facilities submitted permit applications between 2001 and 2007. In the intervening time period between submittal of an application for an NPDES permit and the current time, these facilities continued to violate the CWA act, as determined by further inspections by Illinois EPA or EPA. None of the fourteen large facilities had received a permit by the end of calendar year 2009, nor had they been determined to be in compliance via inspection. Nevertheless, the enforcement files on these cases were often considered closed by the Bureau of Water<sup>14</sup>. The majority of these cases were not referred to the Illinois Attorney General or other authority for formal enforcement seeking penalties, despite persistent serious or chronic noncompliance.

**Figure 1. CAFO/AFO Penalties Assessed Over Time**



<sup>13</sup> See Attachment C for case studies showing examples where Illinois EPA enforcement activities did not return the facility to compliance, and where CAFOs were not required to apply for an NPDES permit as part of an enforcement action for long-standing water quality issues.

<sup>14</sup> Information on the closure of case files was not consistently available in the files provided to the review team.

National policies on the assessment of civil penalties state several goals; the primary goal is to promote a swift resolution of environmental problems. Review of a ten-year history of 56 Illinois EPA case files has revealed numerous facilities with chronic significant noncompliance issues. The number of penalties assessed by the Illinois Attorney General on behalf of the Illinois EPA has varied over time. The dollar amount assessed has also varied. EPA cannot quantify the number of penalties that should have been assessed. However, based on the failure of many facilities to come into compliance, more facilities should have been assessed penalties than were.

National policies also state that a penalty should, at a minimum, recover the economic benefit to the facility of noncompliance; that penalties should be large enough to deter noncompliance; and that there should be a logical basis for the calculation of penalties for all types of violations.

Of the 90 formal enforcement actions found in a random sampling of Illinois EPA case files of livestock facilities, 14 actions included penalties. Documentation of penalty calculations, penalty demands, and penalties received is maintained by the Illinois EPA's Division of Legal Counsel in Springfield. In order to effectively assess penalties, Illinois EPA needs an EMS that clearly delineates policies and procedures for the calculation of penalties in accordance with recommended guidelines.

**Based on this review, EPA finds that Illinois EPA did not refer a sufficient number of CAFO cases for formal enforcement to the Illinois Attorney General or other authorities, in light of the number of CAFOs in chronic or serious noncompliance.**

**Due to the lack of a current Illinois EPA EMS that establishes policies and procedures for the documentation and calculation of penalties, EPA was unable to evaluate whether the penalties assessed were adequate.**

#### **4) Responses to information requests.**

*Allegation: Citizens have been denied reasonable access to permitting documents.*

Program Requirements: The information in NPDES permit applications may not be claimed confidential (40 CFR §§122.7(b) and (c) and 123.25).

According to Illinois Citizens, citizens submitted under the Illinois Freedom of Information Act (FOIA) a request for information to Illinois EPA on September 12, 2007, seeking, among other documents, all pending CAFO NPDES permit applications. On September 24, 2007, Illinois EPA's FOIA Coordinator for the Bureau of Water responded by sending the requestor, among other items, a list of NPDES permit applications received for CAFOs, and stated that "Since this request has many records to review and screen" the above referenced documents/files will be made available after they have been screened for your inspection at the Illinois EPA." (Attachment F) The letter went on to say that only five files will be made available

per visit for inspection and copying ... at the Illinois EPA headquarters” in Springfield, Illinois. The letter also said that another request for information must be sent. An appointment was made by the requestor for October 12, 2007, with Illinois EPA in Springfield to review Illinois EPA files.

The petition states that at the October 12, 2007 appointment, an Illinois EPA FOIA Officer verbally denied the requestor access to the pending NPDES permit applications. According to the petition, the Officer stated that because the applications had not been approved by the Agency, they were not subject to the FOIA. The Petitioner alleges that since Illinois EPA did not provide access to pending NPDES permit applications, the Agency violated Section 1342(j) of the CWA.

EPA discussed with Illinois EPA the allegation that Illinois EPA did not provide copies of NPDES permit applications in response to a FOIA request. Also discussed was the specific allegation that when the requestors arrived at Illinois EPA Headquarters, the requestors were denied the right to look at the applications, since the applications had not been approved by Illinois EPA, and the alleged requirement that requestors needed to come to the Agency’s headquarters office to review the documents.

According to Illinois EPA, it is Agency policy to provide pending NPDES permit applications to requestors. Due to the large number of files requested in the September 12, 2007 request, Illinois EPA asked the requestor to pick five files to come in and see, and then make a subsequent visit to see more files. According to Illinois EPA, the requestor came to Illinois EPA Headquarters office on October 12, 2007, and was given the five files that the requestor had identified, including five Division files. Illinois EPA believes that there is no reason they would not have provided pending NPDES permit applications that were in the five files identified by the requestor. Illinois EPA indicated it has provided pending NPDES permit applications to other requestors, and the requested applications did not fall under the confidential business information exemption.

According to Illinois EPA, the only time requestors are asked to come in and see documents is if the volume of the requested materials is over 400 pages. If a response to a request is over 400 pages, a requestor is required to come in or reduce the request.

Illinois EPA’s representative stated that the agency does not have a written FOIA policy, but follows the Illinois FOIA. Illinois EPA also needs to screen the files before releasing them. For example, if the NPDES permit application is not issued and the application file contains Illinois EPA review notes, the Illinois EPA considers the documents in the file draft documents, and would not release them until the notes are separated from the applications.

In 2008, the Bureau of Water received 4767 requests and Illinois EPA received 26,908 requests for information. The Illinois EPA Bureau of Water has two people assigned to processing FOIA requests.

**Based on the above, EPA Region 5 finds that it is currently Illinois EPA's unwritten policy to provide copies of pending NPDES permit applications to FOIA requestors. According to the information provided, Illinois EPA's practices for responding to information requests are consistent with the expectations for the authorized state program.**

#### **5) Compliance with the Memorandum of Agreement and Performance Partnership Agreements.**

*Allegation: Illinois EPA has failed to comply with the terms of the Memorandum of Agreement required under 40 CFR 123.24, and Environmental Performance Partnership agreements between Illinois EPA and U.S. EPA.*

Program Requirements: 40 CFR 123.63(a)(4) states that a state's failure to comply with the terms of the Memorandum of Agreement required under 40 CFR 123.24 is a criterion for withdrawal of a state program."

As pointed out in Illinois Citizen's petition, the 1977 Memorandum of Agreement between EPA and Illinois EPA regarding Illinois' NPDES program commits the State to expeditiously process and issue all required NPDES permits and provide ongoing, timely and adequate review of permits. The MOA also commits Illinois EPA to comprehensively evaluate and assess compliance with effluent limitations and other permit conditions, and to maintain a vigorous enforcement program to take timely and appropriate enforcement action in every case where in the state's opinion such action is warranted.

The MOA commits Illinois EPA to delineate an annual State Program Plan, which is enacted through a Performance Partnership Agreement (PPA, or "the agreement"). The agreement between EPA Region 5 and Illinois EPA sets forth the mutual understandings reached regarding the state/federal relationship, the desirable environmental outcomes, the performance expectations for the participating programs, and the oversight arrangements between the parties.

The agreements entered into between the agencies since 2005 required Illinois EPA to review all CAFO permit applications and act upon those applications. In its latest Performance Partnership Agreement with EPA, Illinois EPA committed to NPDES permit coverage for at least 10 CAFOs by June 30, 2009. Illinois EPA did not meet this commitment.

Previous Performance Partnership Agreements between EPA and Illinois EPA have also addressed the need for Illinois EPA, with assistance as appropriate from EPA, to develop a comprehensive inventory of CAFOs in Illinois. As discussed in section

V.B.2, Illinois EPA has not developed a statewide inventory, although Field Offices have developed lists which vary in the degree of completeness and detail.

For the period subject to review, the agreements have memorialized commitments by Illinois EPA to inspect and enforce against CAFOs. For the time period from 2000-2004, the agreement includes an ongoing commitment from Illinois EPA to review and update, if necessary, the State's EMS, assuring that all components are consistent with EPA policy and regulations. The current EMS was completed by Illinois EPA in 2004. The following year, the agreement contained modified language regarding EMS documents: "Take appropriate compliance and enforcement actions in accordance with the Illinois EPA's Enforcement Management System and Section 31 of the Illinois Environmental Protection Act for violations of NPDES, Stormwater, SSO/CSO, CAFO and other violations of environmental regulations." Subsequent agreements contained the same language. Statements by Illinois EPA personnel during the 2009 State Review Framework indicated that the Illinois EMS was not currently being employed. The absence of an effective EMS is inconsistent with the agreement Illinois EPA has with EPA.

The 2000 PPA committed Illinois EPA to submit to EPA an inspection strategy at the start of the fiscal year identifying overall goals and priorities, including an approach for targeting CAFOs. The inspection plan was also to identify facilities to be inspected. In FY2002, the PPA stated that Illinois EPA will "continue to develop the AFO inventory. In developing the inventory, the IEPA will compile data from existing sources based on field inspections, enforcement activities and permitting." At that time, Illinois EPA also committed to provide the results of this initial phase of the inventory process to EPA for review. Following EPA review, additional data and a schedule for any outstanding activities necessary to complete the inventory of CAFOs was to be arranged by mutual agreement between Illinois EPA and EPA. Illinois EPA also committed to performing "targeted inspections ... to identify facilities larger than 1000 animal units or otherwise subject to NPDES requirements. Consistent with available resources, the Agency will work toward a goal of inspecting all CAFOs before October 2003." These commitments were not met. Starting in 2003, subsequent PPA commitments cited resource constraints as a factor in whether or not the Illinois EPA would meet its commitments. In FY 2004, for example, the PPA included the statement that Illinois EPA..." will continue to initiate inspections consistent with available resources, working toward a goal of inspecting 20 percent of the known universe....." Illinois has not met the most basic requirements of the PPA with respect to inspection of CAFOs; EPA has not received an inspection plan identifying priorities and targeted facilities since 2006.

In 2008, Illinois EPA committed to implement the National Compliance Monitoring Strategy (CMS) requiring inspection of all Large CAFOs within five years, and regularly thereafter, to determine whether the facility discharges or proposes to discharge. The CMS also set goals for inspection of medium and small facilities to determine whether they are subject to regulation. Illinois EPA has not developed and implemented an inspection plan that meets the requirements of the CMS Strategy.

**Based on the above, and as discussed in previous sections of this report, Illinois EPA has not met its Memorandum of Agreement or Performance Partnership Agreement requirements with respect to CAFOs.**

**Illinois EPA needs to fulfill its long-standing PPA commitment to compile an inventory of CAFO facilities, as well as its commitments to issue permits to facilities that discharge or propose to discharge, to provide an annual inspection strategy to EPA for approval, and to maintain an EMS consistent with current regulatory policy. Although Illinois EPA committed to implement the National CMS for CAFO inspections, the Agency is unable to quantify its performance under the CMS goals until it has identified Illinois' universe of CAFO/AFOs.**

#### **6) Illinois EPA Organization and Resources.**

Illinois EPA has indicated that the Bureau of Water has seven FTEs working on CAFO permitting and inspections. These FTEs are primarily field staff that inspect CAFOs as part of their duties. As indicated above, Illinois EPA forwarded all permit applications it had previously received (19) to the Field Offices for review beginning in mid-2008. At the time of EPA's review, regional office staff knowledgeable about CAFOs had reviewed some of these applications, including review of nutrient management plans and identification of deficiencies in applications. Through these means, eight applications had been identified by regional office staff as being complete and ready to be permitted.

The review of CAFO permit applications is a collateral duty for Illinois EPA inspectors, and has meant an increase in desk work, decreasing the amount of time they can spend on inspecting CAFOs and responding to complaints. Many of these inspectors also have additional, non-CAFO-related inspection duties; as such, Illinois EPA does not appear to have seven full FTEs devoted to NPDES CAFO activities. In several regions, regional managers have taken on inspector duties in other areas of the NPDES program in an attempt to allow the CAFO inspectors to address this increased workload. No increase in resources for the regional offices is planned, despite their expanded role. Regional office managers and staff indicated they would be unable to maintain both the current level of inspection coverage and the increased permit-related responsibilities.

In order for CAFO inspectors to meet their responsibilities, they are required to know and abide by applicable regulations, policies, and procedures; legal requirements concerning inspections; procedures for effective inspection and evidence collection; accepted health and safety practices; and quality assurance standards. They must also be familiar with the permit requirements for the facilities they are inspecting. While this review did not examine the full scope of general job-related training requirements, CAFO-specific training was discussed with inspectors and managers. Technical training on NPDES CAFO requirements appears to consist primarily of on-the-job training. No written standard operating procedures for CAFO inspections are in use at Illinois EPA.

**Based on the above, EPA finds that Illinois EPA field office inspectors are being relied upon for both permitting and inspection activities, along with their other duties. Illinois needs to take measures to ensure that adequate resources are maintained for review of permit applications, as well as for compliance monitoring and enforcement at CAFOs.**

#### **7) Legal authority**

EPA did not assess Illinois EPA's legal authority as part of its review of ICCAW's petition. However, in a December 22, 2008, letter from Tinka Hyde, Director, Water Division, EPA Region 5 to Marcia Willhite, Chief, Bureau of Water, Illinois EPA, EPA asked that Illinois EPA take steps necessary to establish technical standards for nutrient management, and to ensure that the CAFO rules were amended in 2009 as necessary to be consistent with the federal CAFO rules. Illinois EPA indicated that the Illinois Pollution Control Board is responsible for adopting administrative rules for the Illinois NPDES program, and that final state livestock rules are expected to be completed by December 2010.

Under the State Review Framework, EPA reviewed Illinois EPA's general compliance monitoring and enforcement processes, including the Illinois Environmental Protection Act and the relationship between Illinois EPA, the Illinois Attorney General's Office, and the Illinois Pollution Control Board for purposes of implementing the NPDES program. The EPA State Review Framework team and the Petition review team both observed that Illinois EPA's lack of administrative order authority impacts the timeliness and effectiveness of enforcement against violations (see section V.B.3.a., Enforcement Activities).

**Illinois EPA has not updated its NPDES program for CAFOs to be consistent with the federal CAFO regulations as revised. In particular its rules and technical standards for nutrient management need revision.**

**EPA's review indicates that Illinois' enforcement efforts were not timely and appropriate. EPA believes that timeliness and effectiveness of enforcement efforts could be improved if Illinois EPA had independent administrative enforcement authority.**

### **VI. Initial Findings and Required Actions**

As stated above, EPA Region 5 finds that the Illinois EPA NPDES program for CAFOs does not meet minimum thresholds for an adequate program. Following is a summary of the findings in response to the petitioners' allegations, and the required actions Illinois EPA must take to comply with the requirements for state programs set forth in 40 CFR Part 123. This section also includes several recommendations for Illinois EPA to improve the effectiveness of its CAFO program.

## 1. Permitting Program

### Findings:

*Illinois EPA has not issued NPDES permits to CAFOs that have applied for them.* While the Agency has identified 76 facilities as needing NPDES permits, and 64 have submitted applications, only five are currently covered by permits. Many of the applications were submitted several years ago. Permits have not been issued even in cases where the need for a permit application was triggered by a court order or discharge event documented by Illinois EPA. As of October 2009, there were eight facilities identified by Field Office staff as having complete permit applications. On October 20, 2009, Illinois EPA reissued its CAFO general permit.

In some cases, Illinois EPA sent applicants multiple notices of incomplete applications. The notices do not compel submittal of a complete application. Consequences for failing to submit the required information were not found by the Review Team.

Illinois EPA has determined that another group of 45 facilities that applied for NPDES permits, some as long as 10 years ago, do not need permits. Where a facility applies for a permit, Illinois EPA is obligated to either issue or deny a permit after conducting its review of the application and providing for public comment.

Only a small percentage of Illinois' estimated 500 Large CAFOs have applied for permits on their own volition.

### Required actions:

Illinois EPA must issue NPDES permits to CAFOs that discharge or are designed, constructed, operated, or maintained such that a discharge will occur. Permits must be issued within a timeframe to be negotiated with EPA.

- Permit issuance may be phased in, beginning with the 76 facilities the State has identified as needing permits. Permits for additional CAFOs identified through the survey that Illinois EPA has committed to conduct, and other means may be issued in subsequent phases.
- The State must either issue or deny permits to the 45 facilities that had submitted applications, but which Illinois EPA subsequently determined did not need permits. Where a facility applied for a permit and is no longer in operation or did not commence operation, Illinois EPA should confirm the status with the applicant and close the application file.
- Illinois EPA needs to establish a consistent, escalating process for responding to submittal of incomplete permit applications. Escalated responses should include inspections and enforcement as appropriate.

**Recommendation:**

In order to establish and convey clear water quality expectations for CAFO operations, the State should consider establishing an unambiguous requirement for CAFOs to apply for a permit.

To enable Illinois EPA to obtain complete permit applications, and to obtain information whether CAFOs that have not begun operations propose to discharge, the State should consider providing Illinois EPA either information collection and/or enforcement authority to compel submittal of complete information.

**2. Compliance Evaluation/Inspection Program****Finding:**

*A. Illinois EPA does not maintain a program capable of making a comprehensive survey of CAFOs subject to NPDES permit requirements. Several of the Agency's Field Offices maintain a list that, with modifications to align data to NPDES requirements, could serve as a baseline for such a survey.*

Illinois EPA does not have a formal agreement with IDA to review plans for new and expanded livestock facilities submitted to IDA. Illinois EPA review of plans for new and expanded facilities would facilitate Illinois EPA's ability to identify livestock operations as CAFOs that need permits.

**Required actions:**

To determine which facilities are CAFOs requiring NPDES permits, Illinois EPA must conduct and maintain a comprehensive survey of livestock facilities. The inventory developed should be entered and maintained in EPA's Integrated Compliance Information System.

**Recommendation:**

To identify new or expanded livestock operations as CAFOs that are subject to permit application requirements, Illinois EPA should establish procedures, in coordination with IDA and other state agencies as appropriate, to review plans for new and expanded livestock facilities.

**Finding:**

*B. Illinois EPA has not conducted comprehensive inspections to determine whether unpermitted CAFOs need NPDES permits, or whether permitted CAFOs are in compliance with NPDES requirements. Illinois EPA has serious deficiencies in its ability to inspect and monitor activities subject to regulation. A majority of inspections conducted at livestock facilities are not comprehensive, and do not document whether or not a facility is in compliance with NPDES requirements or needs an NPDES permit. Illinois EPA does not have inspection and surveillance procedures sufficient to determine compliance or noncompliance with applicable program requirements.*

Illinois EPA has failed to conduct routine, periodic inspections of CAFOs that may be subject to NPDES regulation. Illinois EPA has not met the commitments described in its Environmental Performance Partnership Agreement to implement the National Compliance Monitoring Strategy of 2008, including the goal to inspect CAFOs on a routine five-year basis.

**Required actions:**

Illinois EPA must revise its inspection process for livestock facilities so that it can determine and track whether inspected facilities are CAFOs required to have NPDES permits, and whether they are in compliance with NPDES requirements. In particular, Illinois EPA needs to develop and implement:

- A standard operating procedure (SOP) for CAFO inspections to aid in assessing whether or not a facility is a CAFO, is discharging, and whether it is subject to NPDES permit application requirements.
- A standard operating procedure for inspection reports.
- An inspection checklist that aligns to the requirements of Illinois EPA’s CAFO general permit, to ensure that data necessary for a compliance determination is gathered.

Illinois EPA must track the routine inspection and monitoring of facilities that may be subject to regulation using a comprehensive inventory of facilities. In accordance with its EnPPA, and the requirements of the National Compliance Monitoring Strategy (CMS) incorporated therein, Illinois EPA must develop and execute an inspection plan to accomplish the inspection goals stated in the CMS.

**Recommendation:**

Illinois EPA should enter all CAFO inspections into EPA’s Integrated Compliance Information System, and work with EPA to ensure that inspections and evaluations for CAFOs are classified and recorded consistent with national definitions.

**Finding:**

*C. It is unclear whether Illinois EPA consistently responds adequately to complaints.* While Illinois EPA inspectors do respond to numerous citizen complaints regarding a variety of issues about livestock facilities, it is not clear that they consistently provide a timely response to the complainant. Illinois EPA needs to develop procedures to ensure proper consideration of information submitted by the public regarding potential violations of NPDES program requirements. Such procedures, accompanied by appropriate staff resources, would allow the Illinois EPA to appropriately respond to citizens’ complaints.

**Required action:**

Illinois EPA shall investigate and provide written responses to citizen complaints reporting potential violations of NPDES requirements, including for CAFOs. To ensure that Illinois EPA responds to complaints as appropriate, the Agency should establish written procedures for responding to complaints regarding livestock facilities, including procedures for responding to complainants as appropriate and establish a procedure for conducting compliance inspections during investigation of citizens' complaints.

**3. Enforcement Program****Findings:**

*A. Illinois EPA is not taking timely and appropriate enforcement in response to NPDES violations by CAFOs.* Illinois EPA's use of its two primary informal pre-enforcement tools, Noncompliance Advisories and Violation Notices with Compliance Commitment Agreements, do not consistently return facilities to compliance. The Agency's EMS as it applies to CAFOs is inadequate, as it does not result in escalated enforcement action consistent with actions that would be taken for other facilities, including the assessment of penalties. Illinois does not follow existing national compliance and enforcement policy and guidance. The State's application of a standard of environmental harm to CAFOs for the determination of whether or not to proceed with formal enforcement is inconsistent with CWA policy. In addition, enforcement actions do not consistently include requirements for CAFOs that have discharged to apply for NPDES permit coverage.

**Required actions:**

Illinois EPA must take timely and effective enforcement to address noncompliance by CAFOs. To do so, Illinois EPA should revise its Enforcement Management System guidance for CAFOs, including a timeframe for making enforcement decisions, and must fully implement the EMS upon approval by EPA. The guidance should specify that, where a facility has discharged or is designed, constructed, operated or maintained such that it will discharge, the enforcement action must also address the CAFO's failure to apply for an NPDES permit. Illinois EPA's escalation of enforcement for CAFO violations, as implemented through its EMS, needs to be consistent with the responses Illinois EPA would pursue regarding noncompliance by other types of point source dischargers. Where a facility is in significant noncompliance, enforcement should take the form of a referral to the Illinois Attorney General's Office for enforcement in circuit court or by the Illinois Pollution Control Board.

**Recommended action:**

Illinois EPA should seek the authority to issue administrative orders, including the authority to seek administrative penalties, without having to pursue administrative action from the Illinois Pollution Control Board through referral to the Attorney General's Office. Until such time as this authority is obtained, Illinois EPA needs to seek ways to increase the likelihood that Compliance Commitment Agreements will bring facilities into compliance with NPDES

requirements in a timely manner. Illinois EPA should bring formal enforcement against facilities that fail to comply with informal enforcement responses.

**Findings:**

B. *Illinois EPA is not assessing adequate penalties against CAFOs.* Based on this review, EPA finds that Illinois EPA has referred an insufficient number of CAFO cases for formal enforcement to the Illinois Attorney General or other authorities, in light of the number of CAFOs in chronic or serious noncompliance. The number of cases referred for which penalties were assessed does not appear to be sufficient to serve as deterrence to noncompliance.

**Required actions:**

Illinois EPA must revise its Enforcement Management System guidance for CAFOs to ensure escalation of enforcement occurs in a manner consistent with the violations identified, and in accordance with the EPA EMS guidelines.

**Recommendation:**

Illinois EPA should update its EMS to include additional instructions on calculation and documentation of penalties, as well as a commitment to assess penalties using those calculations. This recommendation was included in the 2007 Illinois SRF report, which was to have been completed by December 31, 2007.

**4. Response to citizen requests for information**

**Finding:**

*Illinois EPA's unwritten policy is to provide copies of pending NPDES permit applications for CAFOs to citizens that request them.* The Agency's practices for responding to information requests are consistent with the expectations for the authorized state program.

**Required action:**

None.

**Recommendation:**

Illinois EPA should develop a written policy describing how it will address citizen requests for NPDES permit applications, including for CAFOs.

## **5. Compliance with the Memorandum of Agreement and Performance Partnership Agreements between Illinois EPA and EPA**

### **Finding:**

*Illinois EPA has not met its Memorandum of Agreement or Performance Partnership Agreement requirements with respect to CAFOs. In addition to not meeting numerous requirements stated in the MOA and the PPAs, Illinois EPA has not met the requirements of the National Compliance Monitoring Strategy, as adopted in FY2009.*

### **Required action:**

As discussed above, Illinois EPA must fulfill its long-standing PPA commitment to compile an inventory of CAFO facilities, as well as its commitments to issue permits to facilities that need them, to provide an annual inspection plan to EPA, and to maintain an EMS consistent with current regulatory policy. Illinois EPA must develop a comprehensive plan, including timeframes, for completing these tasks. Illinois EPA must also meet its targets under the National CMS for CAFO inspections, or adopt a state-specific strategy with realistic performance goals satisfactory to EPA Region 5.

## **6. Organization and resources.**

### **Finding:**

*Illinois EPA field office inspectors are being relied upon for both permitting and inspection activities, along with their other duties.*

### **Required action:**

Illinois EPA must prepare a workload assessment to determine the number of full-time equivalents (FTEs) needed to effectively implement the NPDES program for CAFOs. The assessment must include, but should not necessarily be limited to, FTEs needed for characterizing which livestock operations are CAFOs needing NPDES permits, permit issuance, compliance and enforcement activities, responding to citizen complaints, and information management. Plans for addressing any shortfalls between needed and available FTEs must also be addressed in the assessment including existing or potential worksharing arrangements with other state agencies, utilization of contract or temporary employees, and permanent or temporary reassignment of existing Illinois EPA employees. Illinois EPA must also develop a long-term plan for obtaining and training future CAFO inspectors. Illinois EPA must allocate staff to CAFO permitting, compliance evaluation, and enforcement as required to implement an effective program.

## **7. Legal Authority**

### **Finding:**

*A. Illinois has not updated its NPDES program for CAFOs, in particular its rules and technical standards for nutrient management, consistent with the federal CAFO regulations as revised.*

### **Required action:**

Illinois must revise its rules and nutrient management standards as necessary to be consistent with the federal CAFO rules as soon as possible, but not later than December 2010.

ILLINOIS CITIZENS FOR CLEAN AIR & WATER

March 27, 2008

*Via email and certified mail*

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**PETITION FOR WITHDRAWAL OF THE  
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM  
DELEGATION FROM THE STATE OF ILLINOIS**

Illinois Citizens for Clean Air & Water (ICCAW)<sup>1</sup> respectfully petition the U.S. Environmental Protection Agency (EPA) to initiate formal proceedings to withdraw the National Pollutant Discharge Elimination System (NPDES) permit program from the State of Illinois. This Petition is made because the Illinois Environmental Protection Agency (IEPA) has failed to fully implement the NPDES program for Concentrated Animal Feeding Operations (CAFOs).

**BACKGROUND**

Since the IEPA received authority to implement and enforce the Federal Clean Water Act (CWA) NPDES permit program in 1977,<sup>2</sup> its program has failed to keep stride with rapid changes in Illinois' livestock industry. The industry has steadily moved from small, widespread, family farms to large, investor owned, industrialized operations. According to the United States Department of Agriculture's 2002 Census of Agriculture, Illinois is now ranked as having the

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<sup>1</sup> ICCAW is a state-wide coalition of individuals and community groups concerned with the environmental, human health, and quality of life impacts of large-scale, industrialized livestock production facilities. The organization has over 70 members from various counties throughout the State. The majority of its members are family farmers and rural residents that live near large-scale livestock facilities and have been adversely impacted by the problems they create.

<sup>2</sup> National Pollutant Discharge Elimination System Memorandum of Agreement between the Illinois Environmental Protection Agency and the United States Environmental Protection Agency Region V (May 12, 1977).

fourth largest concentration of large-scale hog confinements in the United States.<sup>3</sup> As of 2005, nearly 80 percent of the 4.5 million hogs produced annually in Illinois came from large-scale operations.<sup>4</sup>

According to the EPA's 2002 National Water Quality Inventory, agricultural operations such as Animal Feeding Operations (AFOs) are among the leading sources of water pollution in the United States.<sup>5</sup> According to the IEPA's 2004 Water Quality Report, over 85 percent of the total public lake acreage in Illinois is impaired.<sup>6</sup> Agriculture is identified as one of the leading causes.<sup>7</sup> Agriculture is also responsible for 73 percent of Illinois' river and stream impairment.<sup>8</sup> This is nearly double the percentage of pollution from municipal point sources and almost three times more than from urban runoff.<sup>9</sup> Further, although the percentage of fish kills in Illinois due to industrial point sources has declined in the last 30 years (and now represents only 10 percent of total fish kills); fish kills attributable to agriculture have steadily increased.<sup>10</sup> Since 1997, 22 fish kills attributable to manure related pollution have been documented.<sup>11</sup> Consequently, the IEPA's failure to fully implement the NPDES program for CAFOs is of particular concern.

Despite these figures, the State is failing to require NPDES permits of CAFOs that discharge into waters of the State. Unlike the other Region 5 States, the IEPA has not even determined which CAFOs do, in fact, discharge and therefore require NPDES permits. Further, the Agency has not issued coverage to facilities that have submitted NPDES permit applications, and all of the NPDES permits issued by the Agency to date are presently expired.<sup>12</sup> As a result, not one facility in the State has an active NPDES permit.<sup>13</sup> Because unpermitted facilities are not subject to regular reporting and inspection requirements, the Agency cannot adequately determine which

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<sup>3</sup> United States Department of Agriculture National Agricultural Statistics Service, The Census of Agriculture 2002 Census Publication, available at: <http://www.agcensus.usda.gov/Publications/2002/index.asp>; see also Food & Water Watch, Turning Farms into Factories: How the Concentration of Animal Agriculture Threatens Human Health, the Environment, and Rural Communities, Companion Map (July 2007), available at: <http://www.foodandwaterwatch.org>.

<sup>4</sup> Illinois Environmental Council Education Fund, Illinois Environmental Briefing Book 2005-2006 (2006), at 20-21, available at: [http://www.ilenviro.org/publications/files/2005\\_briefingbook.pdf](http://www.ilenviro.org/publications/files/2005_briefingbook.pdf).

<sup>5</sup> EPA, National Water Quality Inventory: Report to Congress, 2002 Reporting Cycle, available at: <http://www.epa.gov/305b/2002report/>.

<sup>6</sup> Illinois EPA, Illinois Water Quality Section 305(b) Report, Appendix D (2004), at 2, available at: <http://www.epa.state.il.us/water/water-quality/305b/305b-2004.pdf>.

<sup>7</sup> Id. at 4.

<sup>8</sup> Green Media Toolshed, Scorecard: Pollution Locator, Leading Sources of Water Quality Impairment (January 2008), available at: <http://www.scorecard.org/env-releases/water/cwa-sources>.

<sup>9</sup> Id.

<sup>10</sup> Clean Water Network, Spilling Swill: A Survey of Factory Farm Water Pollution in 1999 (December 1999), at 14; see also Izaak Walton League, Fish Kill Advisory Network: Pollution Events by Known General Source (June 2004), available at: [http://66.155.8.209/graphics/fishkill/ag\\_evnts\\_vsoters.pdf](http://66.155.8.209/graphics/fishkill/ag_evnts_vsoters.pdf).

<sup>11</sup> Izaak Walton League, Fish Kill Advisory Network Online Database (visited March 13, 2008), available at: [http://66.155.8.209/fishkill/fk\\_search.asp](http://66.155.8.209/fishkill/fk_search.asp).

<sup>12</sup> Documents obtained from the IEPA via the Freedom of Information Act, February 2008; see also Diamond, Danielle, Illinois Failure to Regulate Concentrated Animal Feeding Operations in Accordance with the Federal Clean Water Act, 11 Drake Journal of Agricultural Law 2, 185-224 (Summer 2006), at 210 (citing a communication with Bruce Yurdin, IEPA Permits Division, March 11, 2005).

<sup>13</sup> Id.

CAFOs are operating in accordance with the NPDES program. As such, the NPDES program is not being properly implemented since Large CAFOs are virtually unregulated.

Although citizens have attempted to spur the IEPA into action, the Agency has resisted making any meaningful progress to regulate large industrial CAFOs under the NPDES program.<sup>14</sup> Because the IEPA is not requiring facilities that discharge to have NPDES permits, is not actively assessing which CAFOs discharge and need NPDES permits, is not issuing coverage to CAFOs which apply for permits, is not conducting compliance inspections to determine if CAFOs are complying with NPDES permit requirements, and is not therefore enforcing NPDES permit requirements, EPA should initiate proceedings to withdraw the NPDES program authority from the State.

According to 40 C.F.R. ' 123.63, the Administrator may withdraw program approval when a State program no longer complies with NPDES requirements, and the State fails to take corrective action. As outlined below, Illinois' failures warrant withdrawal of the State's NPDES program delegation.

## **PETITIONER'S ARGUMENT**

### **ILLINOIS' FAILURE TO MEET ITS NPDES OBLIGATIONS REGARDING CAFOs JUSTIFIES WITHDRAWAL OF ITS NPDES DELEGATION**

40 C.F.R. ' 123.63 sets forth the criteria for State program withdrawal as follows:

40 C.F.R. ' 123.63 (a)

- (1) Where the State's legal authority no longer meets the requirements of this part, including:
  - (i) Failure of the State to promulgate or enact new authorities when necessary; or
  - (ii) Action by a State legislature or court striking down or limiting State authorities.
- (2) Where the operation of the State program fails to comply with the requirements of this part, including:
  - (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

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<sup>14</sup> For example, in an April 9, 2007 meeting between concerned citizens and the IEPA, the IEPA declined citizen requests to develop an inventory of Illinois CAFOs and require NPDES permits of known dischargers.

- (ii) Repeated issuance of permits which do not conform to the requirements of this part; or
  - (iii) Failure to comply with the public participation requirements of this part.
- (3) Where the State's enforcement program fails to comply with the requirements of this part, including:
- (i) Failure to act on violations of permits or other program requirements;
  - (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or
  - (iii) Failure to inspect and monitor activities subject to regulation.
- (4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under ' 123.24 (or, in the case of a sewage sludge management program, ' 501.14 of this chapter).
- (5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.
- (6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132 into individual permits.

Illinois meets the applicable criteria for withdrawal of authority to administer the NPDES program based on its failure to meet its regulatory obligations under ' 123.63 (a)(2), (3) and (4) listed above. Additional concerns relating to the conduct of the State of Illinois regarding the regulation of CAFOs are also included in the conclusion of this Petition.

#### I. ILLINOIS' NPDES PROGRAM OPERATION FAILS TO COMPLY WITH FEDERAL REQUIREMENTS.

Pursuant to ' 123.63(a)(2), a State's program qualifies for withdrawal when: i) the State fails to exercise control over activities required to be regulated, including failure to issue permits; ii) the State repeatedly issues permits which do not conform to federal requirements, and iii) the State fails to comply with public participation requirements. This petition satisfies the second criterion

for State program withdrawal because the State has failed to exercise control over activities to be regulated, including failure to issue permits under ' 123.63(a)(2)(i) and the State fails to conform to the CWA's public participation requirements under ' 123.63(a)(2)(iii).

A. Illinois fails to exercise control over activities required to be regulated, including failure to issue permits.

This Petition satisfies the second criterion for State program withdrawal pursuant to ' 123.63(a)(2)(i) because the IEPA is not exercising control over activities required to be regulated. This is because: i) the Agency has not conducted comprehensive inspections to determine which large industrial CAFOs discharge and therefore need permits; ii) the Agency is not issuing coverage under their General NPDES permit or individual permits; and iii) the Agency is not issuing permits to known dischargers. Since it is not issuing NPDES permits, it can not do inspections to determine whether NPDES permit requirements are being met. As a result, the State is failing to meet its legal obligation to protect waters of the State from CAFO related water pollution.

i) *The IEPA has not conducted comprehensive inspections to determine which CAFOs need permits.*

The CWA requires all point source dischargers to obtain and comply with an NPDES permit.<sup>15</sup> It prohibits the "discharge of a pollutant" by "any person" from any "point source" into waters of the United States except when authorized by a permit issued under the NPDES program.<sup>16</sup> The CWA specifically defines the term "point source" to include CAFOs.<sup>17</sup> Despite this clear mandate, Illinois has failed to issue permits to CAFOs that discharge into waters of the United States.

As of October 2001, there were an estimated 35,000 livestock facilities operating in Illinois.<sup>18</sup> It is unknown exactly how many of these meet the defining criteria of a CAFO under the NPDES program. To date, the State has not made a comprehensive survey of Illinois Animal Feeding Operations (AFOs) to determine which ones are point source dischargers. The IEPA only has an inventory of 30 percent of the estimated 500 Large CAFOs in the State<sup>19</sup> and conversations with EPA Region 5 officials have revealed that neither they, nor IEPA staff, have knowledge of the

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<sup>15</sup> 33 U.S.C. § 1342(a).

<sup>16</sup> Id. §§ 1311(a), 1342.

<sup>17</sup> Id. § 1362(14). To be considered a CAFO, a facility must first be defined as an Animal Feeding Operation (AFO). 40 C.F.R. § 122.23(b) (2). An AFO means a lot or facility where the following conditions are met: "1) animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period, and 2) crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility." Id. § 122.23(b) (1). An AFO may be considered a CAFO depending on its size and/or whether or not it discharges. Id. § 122.23(b) (3).

<sup>18</sup> Environmental Law Institute, State Regulation of Animal Feeding Operations: Seven State Summaries (2003), at 23, available at: <<http://www.elistore.org/Data/products/d13-02a.pdf>>.

<sup>19</sup> EPA, Permitting for Environmental Results, NPDES Profile: Illinois (2004) at 11, available at: <[http://www.epa.gov/npdes/pubs/illinois/\\_final\\_profile.pdf](http://www.epa.gov/npdes/pubs/illinois/_final_profile.pdf)>.

actual whereabouts of the majority of AFOs in Illinois.<sup>20</sup> Without knowing where the facilities are located, the Agency cannot identify and inspect facilities to determine which ones discharge and therefore are subject to NPDES regulations. As such, the Agency is not exercising control over activities required to be regulated.

- ii) *The IEPA is not issuing coverage under Illinois' General NPDES Permit or individual permits.*

In addition to the IEPA's failure to determine which facilities are subject to NPDES regulations, the Agency has failed to issue CAFO NPDES permits. Since 1977 the IEPA has only issued approximately 40 NPDES permits to CAFOs, all of which are presently expired.<sup>21</sup> Although some of the previously permitted facilities have been required to have permits because they either caused significant environmental harm as a result of large manure spills or they were cited for repeat violations, the Agency appears to have failed to renew their permits, reissue these permits, or grant coverage under the General Permit for CAFOs.<sup>22</sup> If these facilities are still operating, they are now doing so without being subject to NPDES permit monitoring and reporting requirements. Further, although the IEPA issued a revised General Permit in 2004,<sup>23</sup> not one facility has been issued coverage under it.<sup>24</sup> This is despite the fact that a number of facilities submitted permit applications.<sup>25</sup> Hence, as of this date, not one CAFO in Illinois has an active IEPA issued NPDES permit.

- iii) *The IEPA is not issuing individual or General Permit coverage to known dischargers and, as a result, not requiring regular inspections to determine compliance with NPDES program requirements and therefore can not conduct compliance inspections at large industrial CAFOs.*

Beyond not issuing NPDES permits, the Agency has failed to require permits of known dischargers. According to the IEPA's 2001 Annual Livestock Investigation Report, 52 percent of the 240 livestock facilities surveyed by the Agency had one or more regulatory violations.<sup>26</sup> Of the facilities contacted/visited, the following sources of water pollution were documented:

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<sup>20</sup> See Diamond supra note 12, at 190-191 (citing a communication with Steve Jann and Arnie Leder, Region 5 United States Environmental Protection Agency, January 5, 2006).

<sup>21</sup> Documents obtained from the IEPA via the Freedom of Information Act (February 2008); see also Environmental Law Institute, supra note 18, at 23; Diamond, supra note 12, at 210 (citing a communication with Bruce Yurdin, IEPA Permits Division, March 11, 2005); .

<sup>22</sup> Documents obtained from the IEPA via the Freedom of Information Act (February 2008).

<sup>23</sup> IEPA, NPDES Permit No. ILA01 (2004).

<sup>24</sup> Documents obtained from the IEPA via the Freedom of Information Act (February 2008).

<sup>25</sup> Email message from Bruce Yurdin, IEPA Permits Division (October 30, 2007).

<sup>26</sup> IEPA Bureau of Water, Illinois EPA Livestock Program, 2001 Livestock Facility Investigation Annual Report (2001), at 4, available at: <<http://www.epa.state.il.us/water/cafo/reports/2001-livestock-annual.pdf>>.

feedlots (63), pit discharges (8), lagoon overflows (16), intentional discharge/dumping (7), tile connections (2), manure stacks (13), field application (18), equipment failure (3) and other identified sources (22).<sup>27</sup> Although specific water pollution statistics are not available in the report, the identification of the actual sources of water pollution is indicative of the fact that that Illinois' CAFOs do discharge and that the CWA's goal of zero discharge has not been met. In fact, IEPA reports show that, on average, over 50 percent of the facilities that were either contacted or visited by the Agency from 1999 to 2005 had one or more regulatory violations.<sup>28</sup> A number of these facilities were found to be in violation for not having required NPDES permits and at least 23 facilities had discharges that resulted in documented fish kills. It is unknown exactly how many facilities had repeat violations; however, a two million gallon manure spill at a 1,200 head dairy in 1999 marked the fourth pollution violation by the same facility.<sup>29</sup>

When these facilities discharged, they were required to apply for NPDES permits as a matter of law. Despite this, the IEPA failed to issue any permits. As a result, these facilities are not subject to regular NPDES compliance inspection, monitoring, and reporting requirements. Further, they are not subject to the types of operation, maintenance and management requirements as they would be if they had effective NPDES permits. As such, the IEPA cannot adequately assess or ensure these facilities are operating in compliance with NPDES permit requirements.

The IEPA has improperly stated its intent to wait until EPA finalizes its 2003 CAFO Rule revisions in response to the Second Circuit's *Waterkeeper* decision before requiring CAFO dischargers to have NPDES permits.<sup>30</sup> Illinois is the only State in Region 5 that has not identified large industrial CAFOs that discharge and therefore require NPDES permits.<sup>31</sup> The CWA definitively prohibits all point source discharges unless the discharge is in compliance with an NPDES permit.<sup>32</sup> It should be noted that, although the *Waterkeeper* decision vacated the requirement in the EPA CAFO Rule that required CAFOs with the "potential to discharge" seek permit coverage,<sup>33</sup> the requirement that CAFOs with actual discharges seek NPDES coverage has never been questioned. The IEPA, however, has consistently failed to issue and maintain viable permits for CAFOs that have documented discharges.

Further, although the *Waterkeeper* decision invalidated the duty to apply requirement for "potential discharges," there remains in the NPDES regulations the duty to apply provision for point sources that "propose to discharge."<sup>34</sup> This duty applies to all point sources, including

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<sup>27</sup> Id. at 6.

<sup>28</sup> See IEPA Bureau of Water, Illinois EPA Livestock Program, Livestock Facility Investigation Annual Reports (1999-2005), available at: <http://www.epa.state.il.us/water/cafo/reports/index.html>.

<sup>29</sup> Clean Water Network, *Spills & Kills: Manure Pollution and America's Livestock Feedlots* (2000), at 20.

<sup>30</sup> Statement made by IEPA officials at an April 9, 2007 meeting with concerned citizens.

<sup>31</sup> See Diamond, *supra* note 12, at 213-219.

<sup>32</sup> 33 U.S.C. §§ 1311(a), 1342.

<sup>33</sup> *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005).

<sup>34</sup> 40 C.F.R. § 122.21(a).

CAFOs. The EPA’s 2006 proposed NPDES CAFO Rule revisions, which responded to the *Waterkeeper* decision, identified circumstances in which a CAFO may “propose to discharge.”<sup>35</sup> These circumstances include: when production areas and containment structures are not designed, operated, and maintained to contain the discharge from a 25 year, 24 hour storm event, when a CAFO is located in close proximity to waters, and when a CAFO has had a discharge in the past and has not corrected the factors that caused the discharge to occur.<sup>36</sup>

It is unknown exactly how many facilities in Illinois “propose to discharge.” However, it may be inferred from the IEPA’s Annual Livestock Facility Investigation Reports noted above, that a significant number of CAFOs could fall under this category. A large percentage of facilities have had one or more regulatory violations, and a number of them were identified as sources of water pollution. If a facility is not designed, operated, or maintained to prevent discharges it may be defined as “proposing to discharge.” Facilities that “propose to discharge” have a duty to apply for NPDES permits and the IEPA has a duty ensure they comply with permit requirements.

In summary, Illinois has failed assess how many CAFOs in Illinois are required to have NPDES permits, failed to issue permit coverage to CAFOs applying for NPDES permits, and failed to issue permits to those identified as requiring permits. Because unpermitted facilities are not subject to regular reporting and inspection requirements, the Agency can not adequately determine which CAFOs, if any, are operating in compliance with the NPDES program. As such, the State can not adequately exercise control over activities required to be regulated. Illinois’ CAFO NPDES program operation thus fails to comply with federal requirements, satisfying the second criterion for withdrawal of its delegated authority under ‘ 123.63(a)(2)(i).

B. Illinois fails to comply with public participation requirements.

This Petition also satisfies the second criterion for State program withdrawal because Illinois’ CAFO NPDES program operation fails to comply with the CWA’s public participation requirements under ‘ 123.63(a)(2)(iii).

The CWA definitively states that “public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.”<sup>37</sup> The Act further provides that there be an “opportunity for public

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<sup>35</sup> EPA, Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to *Waterkeeper* Decision, 71 Fed. Reg. 37,749, 37,784 (proposed June 30, 2006) (to be codified at 40 C.F.R. pts. 122 and 412).

<sup>36</sup> Id.

<sup>37</sup> 33 U.S.C. § 1251(e).

hearing” before any NPDES permit issues,<sup>38</sup> and that a “copy of each permit application and each permit issued under this section shall be available to the public,”<sup>39</sup> and that “any citizen” may bring a civil suit for violations of the Act.<sup>40</sup>

Because Illinois fails to issue and maintain viable NPDES permits for CAFOs it, by default, does not provide the public an opportunity to participate in the regulatory process. NPDES permits are critical to the CWA because they define discharger obligations and effluent limitation standards and, in the case of CAFOs, various management practices necessary to insure that discharges of manure and other pathogens to waters of the United States and the State of Illinois are minimized. Because the IEPA is not requiring facilities to apply for, or issuing viable permits, the public is being deprived of essential NPDES program implementation and enforcement data. By refusing to regulate CAFOs, the IEPA is denying the public reasonable access to information which should be made available under the provisions of the CWA.

Further, the CWA mandates that a “copy of each permit application...shall be available to the public.”<sup>41</sup> Presently, the IEPA has a policy where the public has access to permitting information via the Freedom of Information Act (FOIA). On September 12, 2007 concerned citizens submitted a FOIA request to the IEPA seeking, among other documents, all pending CAFO NPDES permit applications. The IEPA responded to the request in a letter dated September 24, 2007. The letter provided a list of permit applicants and stated that the records would be made available to the requestor for inspection and/or copying at the IEPA headquarters by appointment. At the appointment, the IEPA FOIA Officer verbally denied the requestor access to the pending permit applications. The Officer stated that because the applications had not been approved by the Agency, they were not subject to the FOIA.

As noted, the CWA mandates that a “copy of each permit application...shall be available to the public.”<sup>42</sup> Because the FOIA Officer verbally denied the requestor access to the pending permit applications, the IEPA violated this requirement. This account demonstrates that citizens have been denied reasonable access to permitting documents.

Because Illinois is not regulating CAFOs which discharge, it denies the public an opportunity to participate in the regulatory process. Furthermore, the State has denied citizens reasonable access to permit applications. The State is thus failing to “provide for, encourage, and assist the public” in participating in the NPDES CAFO program as required by the CWA. Because Illinois’ CAFO program violates the public participation requirements of the CWA, the State’s program operation meets the second criterion for withdrawal as set forth in ‘ 123.63(a)(2)(iii).

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38 Id. § 1342(a)-(b).

39 Id. § 1342(j).

40 Id. § 1365(a).

41 Id. § 1342(j).

42 Id.

In summary, this Petition satisfies the second criterion for State program withdrawal pursuant to ' 123.63(a)(2) because the State of Illinois is failing to exercise control over activities required to be regulated and is failing to comply with the CWA's public participation requirements.

## II. ILLINOIS' ENFORCEMENT PROGRAM FAILS TO COMPLY WITH FEDERAL REQUIREMENTS.

Pursuant to ' 123.63 (a)(3) a State program qualifies for withdrawal when its enforcement program fails to comply with federal requirements. Circumstances justifying withdrawal under this part include: i) failure to act on violations of permits or other program requirements; ii) failure to seek adequate enforcement penalties or to collect administrative fines when imposed, and iii) failure to inspect and monitor activities subject to regulation. This Petition satisfies the third criterion for State program withdrawal because the State has failed to monitor and inspect activities subject to regulation under ' 123.63(a)(3)(iii).

### A. Illinois fails to inspect and monitor activities subject to regulation.

This Petition satisfies the third criterion for State program withdrawal because the IEPA fails to monitor and inspect activities subject to regulation under ' 123.63(a)(3)(iii).

A strong regulatory presence establishes a deterrent, which is a cornerstone of effective NPDES program implementation. To ensure regulations are abided by, authorized States must have and use means of monitoring and inspecting CAFOs for compliance. Accordingly, States are required to have "inspection and surveillance procedures to determine compliance or noncompliance with applicable NPDES permit requirements."<sup>43</sup> Specifically, federal law requires Illinois to maintain a program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority, and "a program for periodic inspections of the facilities and activities subject to regulation."<sup>44</sup> Illinois fails to comply with these requirements because the IEPA has not made a comprehensive survey of all AFOs to determine which ones are CAFOs which discharge and are therefore subject to regulation. As a result, the Agency has failed to inspect and monitor CAFOs subject to NPDES requirements. Further, by not issuing required permits the Agency by default is not monitoring and inspecting activities subject to regulation.

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<sup>43</sup> 40 C.F.R. § 123.26(b)(1).

<sup>44</sup> Id. § 123.26(b)(2).

The IEPA has not properly assessed all CAFOs in Illinois. The IEPA only has about four staff members conducting inspections of the estimated 35,000 livestock facilities in the State.<sup>45</sup> The IEPA does not know where the majority of these facilities are located, nor do they know which ones are polluting. Illinois has inventory information for only about 30 percent of the estimated 500 Large CAFOs in the State.<sup>46</sup> Conversations with EPA Region 5 officials have revealed that neither they, nor IEPA staff, have knowledge of the actual whereabouts of the majority of the facilities located throughout Illinois.<sup>47</sup> Inspections of non-permitted facilities are typically conducted in response to complaints.<sup>48</sup> Without knowing the location of the vast majority of livestock facilities in Illinois, the IEPA's surveillance procedures can not determine which facilities need to be regulated, let alone their compliance with the CWA. Accordingly, it is impossible for the Agency to adequately monitor and inspect facilities subject to NPDES requirements.

Illinois' enforcement program also fails to comply with the CWA because the IEPA is not issuing required permits, which by default means the Agency is not monitoring and inspecting activities subject to regulation.

Because the IEPA is unaware of the location of the vast majority of livestock operations in Illinois, the Agency is unable to assess which facilities are subject to regulation. Further, by not issuing required permits, the Agency is by default not adequately monitoring and inspecting facilities in accordance with NPDES requirements. Based on this, Illinois' enforcement program meets the third criterion for withdrawal under ' 123.63 (a)(3)(iii).

In summary, this Petition satisfies the third criterion for State program withdrawal pursuant to ' 123.63(a)(3) because the State of Illinois fails to inspect and monitor activities subject to regulation.

### III. ILLINOIS' NPDES PROGRAM FAILS TO COMPLY WITH THE TERMS OF THE MEMORANDUM OF AGREEMENT REQUIRED UNDER ' 123.24.

Pursuant to ' 123.63 (a)(4) a State's NPDES program qualifies for withdrawal when it fails to comply with the terms of the Memorandum of Agreement required under ' 123.24. Illinois' NPDES program for CAFOs meets this criterion for withdrawal because the State has failed to comply with the Memorandum of Agreement between the IEPA and EPA Region 5.<sup>49</sup>

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<sup>45</sup> See Diamond, supra note 12, at 208 (The IEPA affirmed this finding in a meeting with concerned citizens on April 9, 2007).

<sup>46</sup> EPA, IL NPDES Profile, supra note 19, at 11.

<sup>47</sup> See Diamond supra note 12, at 190-191 (citing a communication with Steve Jann and Arnie Leder, Region 5 United States Environmental Protection Agency, January 5, 2006).

<sup>48</sup> Clean Water Network, supra note 29, at 20

<sup>49</sup> National Pollutant Discharge Elimination System Memorandum of Agreement between the Illinois Environmental Protection Agency and the United States Environmental Protection Agency Region V (May 12, 1977).

Pursuant to the Memorandum of Agreement, the State is required to “[e]xpediently process and issue all required NPDES permits and provide ongoing, timely and adequate review of permits.” Further, the corresponding Performance Partnership Agreements from 2005/2006 and 2006/2007 required the IEPA to review all CAFO permit applications and act upon those applications.<sup>50</sup> IEPA has failed to abide by these agreements.

According to a list of CAFO NPDES permit applicants included in the IEPA’s response to the September 12, 2007 FOIA request, at least 16 facilities have submitted permit applications.<sup>51</sup> Because the IEPA failed to provide the requestor with these applications, it is unknown exactly when these permit applications were submitted and which ones have been acted upon. However, according to the documents received, four facilities that applied for permits from October 27, 2004 thru August 8, 2005 did not receive notice that their applications were determined to be incomplete submissions until April 16, 2007.<sup>52</sup> On average, it took the Agency between two and three years to begin to process these applications. It is unknown how many of the submitted applications are for facilities that discharge and/or propose to discharge. Hence, it is unknown how many facilities are presently operating and discharging without required permits. However, to date not one CAFO has active permit coverage. Thus, it is clear that the IEPA has failed to expediently process and issue permits as required under the Memorandum of Agreement. The Agency has also failed to meet its obligations under its corresponding Performance Partnership Agreements by failing to review and act upon all CAFO permit applications.

Because the IEPA has failed to expediently process and issue permits as required under the Memorandum of Agreement, and has failed to review and act upon all CAFO permit applications as required under the corresponding Performance Partnership Agreements, Illinois’ NPDES program meets the fourth criterion for withdrawal under ‘ 123.63 (a)(4).

In summary, this Petition satisfies the fourth criterion for State program withdrawal pursuant to ‘ 123.63(a)(4) because Illinois’ CAFO NPDES program fails to comply with the terms of the Memorandum of Agreement required under ‘ 123.24.

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<sup>50</sup> IEPA, FY 2006/2007 Performance Partnership Agreement Between Illinois EPA and Region 5, USEPA, at 55, available at: <<http://www.epa.state.il.us/ppa/ppa-fy2006.pdf>> (visited January 25, 2008); IEPA, FY 2005/2006 Performance Partnership Agreement Between Illinois EPA and Region 5, USEPA, at 68, available at: <<http://www.epa.state.il.us/ppa/ppa-fy2005.pdf>> (visited January 25, 2008).

<sup>51</sup> Documents obtained from the IEPA via the Freedom of Information Act (September 2007).

<sup>52</sup> Documents obtained from the IEPA via the Freedom of Information Act (February 2007).

## CONCLUSION

For the forgoing reasons, Illinois Citizens for Clean Air and Water request that EPA take immediate action to notify the State of Illinois of its ongoing violations of the CWA, and request that EPA withdraw its approval of Illinois' NPDES program and take other actions as are necessary and appropriate.

## ADDITIONAL CONCERNS

### ILLINOIS WILL NEED TO REVISE ITS CAFO NPDES PERMITTING SCHEME TO COMPLY WITH THE CWA.

Illinois will need to revise its CAFO NPDES permitting scheme to comply with the CWA. The terms of nutrient management plans must be made part of Illinois' General Permit for CAFOs, as well as any individual permits. Nutrient management plans must also be made available to the public.

The CWA unequivocally provides that all applicable effluent limitations must be included in each NPDES permit.<sup>53</sup> The *Waterkeeper* decision held that the terms of nutrient management plans constitute effluent limitations and thus, by failing to require that the terms of the nutrient management plans to be included in NPDES permits, the EPA CAFO Rule violated the CWA.<sup>54</sup> At present, Illinois' General Permit is not in compliance with the CWA because the nutrient management plan is not incorporated into its terms. Although the permit requires a nutrient management plan as a condition for application,<sup>55</sup> the nutrient management plan is not incorporated into the permit itself. The terms of nutrient management plans must be made part of the General Permit, as well as any individual permit, in order to be consistent with the requirements of the CWA.

Further, the CWA definitively states that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any state under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.”<sup>56</sup> The Act further provides that there be an “opportunity for public hearing” before any NPDES permit issues,<sup>57</sup> and that a “copy of each permit application and each permit issued under this section shall be available to the public,”<sup>58</sup> and that “any citizen” may bring a civil suit for violations of the Act.<sup>59</sup>

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53 33 U.S.C. §§ 1311(a)-(b), 1342(a).

54 *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005).

55 IEPA, NPDES Permit No. ILA01, Special Condition 5(e)(iv) (2004).

56 33 U.S.C. § 1251(e).

57 *Id.* § 1342(a)-(b).

58 *Id.* § 1342(j).

59 *Id.* § 1365(a).

Illinois' permitting scheme provides no assurance that the public will have a meaningful role in the implementation of the CWA because it not only fails to incorporate the terms of nutrient management plans into actual permits, but it fails to provide the public with any other means of access to them. The General Permit merely requires that a copy of the CAFOs site-specific nutrient management plan be included with the facility's best management practices plan, which is to be maintained on site for the term of the permit and for a period of five years after its expiration.<sup>60</sup> The permit does not require that copies of the nutrient management plans be made available to the public. In order for the public participation requirements to be in compliance with the CWA, Illinois will have to include the terms of nutrient management plans in NPDES permits and allow the public to assist in the development, revision, and enforcement of such effluent limitations.<sup>61</sup>

Respectfully submitted,

Illinois Citizens for Clean Air & Water

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<sup>60</sup> IEPA, NPDES Permit No. ILA0, Special Condition 5(e) (2004).

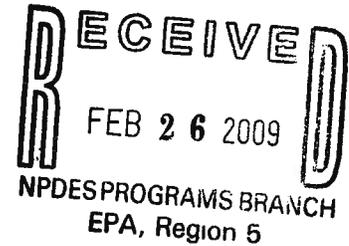
<sup>61</sup> 33 U.S.C. § 1251(e).

**ILLINOIS CITIZENS FOR CLEAN AIR AND WATER/  
ENVIRONMENTAL INTEGRITY PROJECT**

February 20, 2009

*Via certified mail and email*

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**RE: Supplement to the Petition to Withdraw the Illinois NPDES Program**

Dear Director Hyde:

This letter is intended to supplement evidence for the Illinois Citizens for Clean Air & Water (ICCAW)/Environmental Integrity Project (EIP) Petition for Withdrawal of the National Pollutant Discharge Elimination System (NPDES) Program Delegation from the State of Illinois, which was filed on March 27, 2008. We appreciate the opportunity to provide the U.S. EPA with this additional information which has come to our attention subsequent to filing the original Petition.

We direct your attention to ongoing official neglect by the State of Illinois to adequately administer the Federal Clean Water Act's (CWA) NPDES program for Concentrated Animal Feeding Operations (CAFOs). This official neglect is evidenced by continued water pollution and fish-kills caused by unregulated discharges from CAFOs.

For example, this past April, the Dennis Anderson Swine Farm in Bureau County illegally discharged 750,000 gallons of waste into the Bureau Creek, killing untold numbers of fish. Additionally, CAFO discharges have caused at least three separate fish-kills in Henderson County alone in the past year. *See* Bergin, Nick, Burlington Iowa Hawkeye (September 1, 2008), *available at*: <<http://www.thehawkeye.com>>. In August, a discharge from SF Ventures, LLC, a newly constructed 10,000-head hog facility, resulted in a fish-kill and the contamination of the Deep Run Creek, a tributary to the Mississippi.

In addition to continued pollution events, there are concerns that the State of Illinois is allowing the operation of many new and expanding CAFOs that do not meet CWA NPDES standards. For example, a number of newly constructed facilities are suspected to have the same design as the facility that caused the fish-kill in the Deep Run Creek. At least three additional facilities under SF Ventures LLC ownership have been identified as having the same "obvious design flaw" in their manure holding ponds. *See* Illinois Attorney General, Press Release (October 3, 2008), *available at*: <<http://www.illinoisattorneygeneral.gov>>. This has raised concerns that their manure ponds could soon fail in a similar manner. There may also be a number of additional new facilities of the same design now in operation in Henderson County under different ownership. These facilities propose to discharge because they lack sufficient containment to comply with CWA and NPDES program requirements.

Once a CAFO has a discharge, or a proposed discharge, it is required to have an NPDES permit as a matter of law. *See* 33 U.S.C. §§ 1311(a), 1342(a), *see also* 40 C.F.R. § 122.21(a). This is an obligation under the CWA's existing 30+ year old requirements, as well as under revised NPDES standards for CAFOs. *Id.*, *see also* 73 Fed. Reg. 70418 at 70480 (November 20, 2008) (to be codified at 40 C.F.R. § 122.23 (d) (1)). Despite this clear mandate, it is suspected that none of the above described CAFOs are operating with required NPDES permits. This includes CAFOs that discharge, as well as those with inadequate designs that propose to discharge.

We assert that continued pollution events are the direct result of the Illinois Environmental Protection Agency's (IEPA) failure to exercise proper NPDES regulatory oversight over CAFOs. This problem has been exacerbated by the IEPA's ongoing neglect to adequately respond to citizen concerns. The Agency has historically neglected to address CAFOs which can discharge, waiting instead until they do discharge and cause a fish-kill or other pollution incident. The Agency also fails to adequately respond to citizen complaints regarding discharging facilities. Specific instances of these are discussed below.

### **The IEPA's Failure to Exercise Proper Regulatory Oversight over CAFOs**

The IEPA continues to neglect its responsibilities under the CWA by not exercising proper regulatory oversight over CAFOs. Even since the filing of the ICCAW/EIP Petition on March 27, 2008, the Agency has failed to make a comprehensive survey of livestock facilities in Illinois to determine which ones are subject to CWA NPDES requirements. In fact, there appears to be no standard in place whereby the IEPA reviews the siting and design of new and expanding facilities to determine if they require NPDES permits. The Agency has also failed to issue permits to those facilities that require them. As a result, virtually all existing and new CAFOs in Illinois are unregulated. This problem has been exacerbated by the Agency's continued neglect to adequately respond to citizen complaints and concerns. The result has been continued illegal discharges and increased water pollution from CAFOs.

#### Failure by the IEPA to Adequately Respond to Citizen Concerns

The IEPA has continually failed to adequately respond to citizen concerns. This is evidenced by: 1) the Agency's neglect to meaningfully evaluate "proposed discharges" from CAFOs in response to citizen requests, and 2) the Agency's neglect in adequately responding to citizen complaints regarding "discharging" facilities.

#### *Neglect to Meaningfully Evaluate "Proposed Discharges" in Response to Citizen Requests*

The IEPA has neglected to meaningfully evaluate "proposed discharges" from CAFOs in response to citizen requests. The proposed Traditions South Dairy of Jo Daviess County is a case in point. As noted by Helping Others Maintain Environmental Standards (HOMES) in their letter submitted to EPA on November 11, 2008, the Illinois Department of Agriculture (IDOA) approved construction plans for the 5,000+ head dairy facility despite serious

concerns over the risks it posed to surface and related ground water. Sam Panno, a senior geochemist and groundwater geology expert with the Illinois State Geological Survey, as well as many other experts, warned of the risks posed by the facility. Of significant concern is: 1) the location of 40+ acres of clay lined earthen waste holding ponds (with an anticipated leakage rate of 400 to 600 gallons per acre per day when half full) atop a spring fed creek leading to waters of the United States, and 2) the location of the facility in a sensitive karst aquifer with a direct hydrological connection to adjacent surface waters.

Although Illinois law provides certain environmental safeguards for the siting of large-scale livestock facilities in such locations, the IDOA approved plans for the facility, which failed to meet these standards:

- In violation of 35 Ill. Adm. Code 501.402 (a), the proposed facility contains a stream within its boundaries;
- In violation of 35 Ill. Adm. Code 506.312 (a), the facility is not designed to prevent seepage into groundwater, and
- In violation of 35 Ill. Adm. Code 506.312 (b), the facility is not designed to utilize a rigid material such as concrete or steel.

While the IDOA failed to consider these apparent violations in issuing the construction permit for the facility, the IEPA has the responsibility “to *prevent* (emphasis added) pollution caused by failure to plan the construction, location and operation of [livestock operations] with regard to proper environmental safeguards.” Ill. Admin. Code tit. 35 § 501.102(e) (1991). Despite this responsibility, the IEPA has failed to adequately respond to, and appropriately deal with, concerns relating to the water pollution risks posed by the facility.

For example, HOMES member, Ken Turner, submitted a series of requests to the IEPA asking that the facility be required to apply for an NPDES permit on April 30, 2008, May 11, 2008, and June 14, 2008. *See* Exhibit A, parts 1-3 (attached). The IEPA denied his initial request on May 5, 2008, stating that the Agency was awaiting clarity on the federal level as to which CAFOs should be required to have NPDES permits in response to the Second Circuit’s decision in *Waterkeeper Alliance, Inc., v. EPA*, 399 F.3d 486 (2d Cir. 2005). *See* Exhibit B (attached). It was further stated that the Agency was focusing its resources on discharging facilities discovered mainly through complaint investigations. *Id.*

The IEPA’s position that it must await clarity on the federal level holds little weight. Applicable 30+ year old permitting requirements, which require dischargers and “proposed” dischargers to apply for NPDES permits, have never been called into question, and have remained in effect. *See* 40 C.F.R. § 122.21(a). Furthermore, the *Waterkeeper* Court pointed out that there is “ample reason to consider imposing a mandatory duty to apply upon Large CAFOs...to effectively regulate water pollution...given that they are important contributors and that they have, historically at least, improperly tried to circumvent the permitting process.” *Waterkeeper*, at footnote 22.

Regardless of the IEPA's reasoning for denying the requests, it appears that the IEPA's determination to not require an NPDES permit was made absent any meaningful evaluation of the plans for the proposed facility. According to an IEPA response to a Freedom of Information Act (FOIA) request, submitted by HOMES member, Bern Colleran, on August 1, 2008, the Agency had no records or documents whatsoever on file relating to the Traditions South proposal. *See* Exhibit C, parts 1-5 (attached).

Assuming that the IEPA wasn't improperly withholding information from the public in violation of the FOIA, the absence of any records, documents, or correspondence relating to the facility, indicates that the determination *not* to require Traditions South to apply for an NPDES permit was a decision made without even a basic factual investigation of the proposal.

The IEPA's determination not to require an NPDES permit application from Traditions South should be considered in light of the U.S. EPA's newly issued 2008 CAFO Rule enacted in response to the *Waterkeeper* decision. *See* 73 Fed. Reg. 70418 at 70480 (November 20, 2008) (to be codified at 40 C.F.R. § 122.23 (d)(1)). The Rule provides additional clarification as to when a CAFO "proposes to discharge" and should be required to apply for an NPDES permit. This includes when a CAFO is not "designed" or "constructed" for zero discharge. *Id.*, at 70480-01.

In applying this standard, the IEPA should be evaluating construction and design plans for CAFOs to evaluate whether or not they should be required to apply for NPDES permits. Thus, there appears to be little justification for the IEPA's failure to review the proposed construction site and design plans for Traditions South in response to citizen concerns.

This account demonstrates Illinois' failure to exercise proper regulatory oversight over CAFOs under the NPDES program, which has been exacerbated by the IEPA's failure to adequately respond to citizen concerns. Although the IEPA should be evaluating proposed new and expanding facilities to determine if they require NPDES permits, the Agency has refused to do this in at least one case without even a basic factual investigation of the facility.

It is unreasonable for the IEPA to ignore concerns by the public and to wait until catastrophic damage occurs before evaluating the necessity of a discharge permit. By only pursuing enforcement actions for "discharging" facilities, the IEPA is doing nothing to "prevent" water pollution, the stated purpose of both Illinois' federally approved NPDES implementing regulations and the CWA. Further, by not requiring NPDES permit applications from "proposed dischargers," the public has limited access to important permit information such as nutrient management plans to ensure the CWA's effluent limitation guidelines are met.

*Neglect to Adequately Respond to  
Citizen Complaints Regarding "Discharging" Facilities*

The IEPA's failure to adequately respond to citizen concerns is also evidenced by the Agency's neglect to appropriately respond to citizen complaints regarding "discharging"

facilities. Although the IEPA has stated that it is “focusing its resources on discharging CAFOs discovered mainly through complaint investigations” (*See Exhibit B*), this does not appear to be the case.

If the IEPA is “focusing” its resources on discharging CAFOs discovered through complaints, it might be assumed that this focus would include routine follow-up investigations of facilities in response to such complaints. The following accounts suggest that this is not occurring.

Take for example the previously mentioned SF Ventures, LLC discharge into the Deep Run Creek that caused the fish-kill in August of 2008. According to reports from citizens, an anonymous complaint about the facility was actually filed ten days prior to the fish-kill. Although this complaint alerted the IEPA to the problems at the facility well in advance, an investigation of the facility was not conducted by the IEPA until after the fish-kill occurred. This kind of retroactive action is unacceptable. Had the IEPA adequately responded to the initial complaint ten days prior, the fish-kill may have been avoided.

Another example is the IEPA’s response to a complaint that was filed on September 15, 2008 by Schuyler County citizens. The complaint warned of suspected discharges into the Sugar Creek from a 6,000 to 8,000-head farrow to finish hog CAFO. The complaint provided compelling evidence that run-off from dead hog carcasses located in the facility’s production area was discharging into the Sugar Creek. *See Exhibit D* (attached). (The Sugar Creek is located just west of the facility and approximately 1000 feet down-slope from the production area where the carcasses were located.)

The IEPA’s response to this complaint, involved reviewing “the dead animal handling procedures that the facility utilizes with a facility representative.” *See Id.*, Exhibit D. By “reviewing” these procedures with a facility representative, the IEPA was apparently able to make a determination that a follow-up investigation was unnecessary. According to the individual that filed the complaint, there was no further investigation of the facility or enforcement action taken.

Although the IEPA has claimed that it is “focusing its resources on discharging facilities discovered mainly through complaints” (*see Exhibit B*), the Agency does not appear to be conducting timely complaint investigations on a routine basis. So long as the IEPA continues to implement its CWA regulations for CAFOs in an “after-the-fact” manner by only stepping in after discharges occur, widespread pollution problems from CAFOs will persist. The August 2008 discharge from the Henderson County CAFO demonstrates this.

### **Conclusion**

ICCAW and EIP maintain that Illinois is not administering and enforcing the CWA effectively, and that the action sought by the Petition for Withdrawal of the State of Illinois’ NPDES Program Delegation is justified. The IEPA continues to fail to exercise proper NPDES regulatory oversight over CAFOs. This problem has been exacerbated by the Agency’s ongoing neglect to adequately respond to citizen concerns. (*The attached Exhibits provide specific examples of this.*) So long as these inadequate regulatory policies remain,

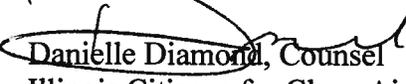
CAFO pollution problems in Illinois will persist.

It is unreasonable for the IEPA to wait until the State completely revises its CWA regulations in response to the *Waterkeeper* decision before regulating CAFOs with NPDES permit requirements. These requirements have been in place, and have remained unchanged, for 30+ years. Further, regardless of the rule changes in the 2008 CAFO Rule, the IEPA's position can't be that the CWA doesn't apply unless citizens can show repeated discharges from the same facility. This position is untenable because it places everyone in the position of having to wait until groundwater, rivers, and streams are irreparably damaged before permit requirements kick in. This is essentially "closing the barn door after the manure is already out."

The facilities identified herein should be required to have permits that comply with NPDES requirements. If the State of Illinois will not see to this, the U.S. EPA should take enforcement action and require permit applications and compliance.

Thank you for your consideration.

Respectfully,

  
Danielle Diamond, Counsel

Illinois Citizens for Clean Air & Water  
181 Illinois Street  
Crystal Lake, IL 60014  
ddiamond@icaw.org  
815-403-0278

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202-263-4442

Encl.

Cc: *via email*

Matthew Gluckman, USEPA Region 5  
Eric Schaeffer, Executive Director EIP  
Dr. Kendall Thu, Representative ICCAW  
Karen Hudson, Representative ICCAW  
Douglas P. Scott, IEPA Director  
Marcia Willhite, IEPA Bureau of Water Chief

**ICCAW/EIP PETITION SUPPLEMENT  
LIST OF EXHIBITS**

**Exhibit**

- A** Series of requests to the IEPA asking that the Traditions South facility be required to apply for an NPDES permit
- Part 1 – Letter to Douglas P. Scott, Director of IEPA from Ken Turner, H.O.M.E.S., April 30, 2008
- Part 2 – Letter to Douglas P. Scott, Director of IEPA from Ken Turner, H.O.M.E.S., May 11, 2008
- Part 3 – Letter to Douglas P. Scott, Director of IEPA from Ken Turner, H.O.M.E.S., June 14, 2008
- B** Response Letter from IEPA Director Douglas P. Scott to Ken Turner regarding the Traditions South NPDES permit request, May 9, 2008
- C** FOIA request submitted to IEPA by Mr. Bern Colleran, H.O.M.E.S., regarding the Traditions South facility and IEPA responses
- Part 1 – FOIA request, submitted to IEPA by Bern Colleran, H.O.M.E.S., August 1, 2008
- Part 2 – IEPA response from Janet Christer, FOIA Coordinator, Records Unit, Bureau of Water, August 6, 2008
- Part 3 – IEPA response from Michael J. McCabe, Freedom of Information, Division of Legal Counsel, August 19, 2008
- Part 4 – IEPA response from Ed Bakowski, Manager Permit Section-Acting, Division of Air Pollution Control, August 4, 2008
- Part 5 – IEPA response from Carolyn Wright, Office of Emergency Response, FOIA Coordinator, August 4, 2008
- D** Email complaint filed by Schuler County citizens regarding suspected production area discharges from Large CAFO into the Sugar Creek, September 15, 2008, and IEPA response, September 16, 2008



To: douglas.scott@illinois.gov, dan.heacock@illinois.gov, al.keller@illinois.gov  
From: Kenneth Turner/D211  
Date: 04/30/2008 09:25AM  
cc: gluckman.matthew@epa.gov, berman.michail@epa.gov, jmcbride@atg.state.il.us,  
lmadigan@atg.state.il.us, kturner@d211.org  
Subject: NPDES Permit application required, megadairy

Director, IEPA

Douglas Scott,  
The attached letter was sent to members of your department, April 21, 2008, requesting that an NPDES permit application be requested from the Traditions Dairies, North and South Facilities, proposed for Jo Daviess County. The attached letter demonstrates clearly that such a permit is required for the proposed facility. It is my most sincere hope that you will use the authority of your office to facilitate an urgent request to those responsible at these facilities.

I urge you to send a registered letter reminding AJ Bos (owner) and Terry Feldmann (project engineer) that they are required to submit an application for an NPDES permit 180 days prior to commencing operations. Their addresses are below:

A.J. Bos  
10600 Rycroft Way , Bakersfield , CA 93311

Terry Feldmann, Project engineer,  
Maurer Stutz, Inc  
7615 N. Harker Drive , Peoria , IL 61615

I hope you will see the need to require application for an NPDES permit immediately. Please let me know if there is any further information that you require. I thank you for your urgent attention and effort in this required task of the IEPA.

Sincerely,  
Ken Turner  
415 Park  
Warren , IL

*(see letter on next page)*

## Illinois Environmental Protection Agency

Dear IEPA,

As a clear and certain part of your duty to “safeguard environmental quality” thereby “protecting health, welfare, property, and the quality of life” in Illinois (IEPA Mission Statement), I ask that you require the application for an NPDES permit from the Traditions Dairies LLC, North and South Facilities; the large CAFO’s proposed for Jo Daviess County in Northwestern Illinois. As you may know, this proposed megadairy will be the largest of its kind in Illinois. Certainly that fact alone warrants caution on the part of those who would permit this facility in Illinois. But beyond that, there are three compelling reasons for requiring the application for an NPDES permit.

First, IEPA requires all new large CAFO’s to apply for an NPDES permit. “If you are a completely new CAFO, you must apply for a NPDES permit 180 days prior to operating. Example: You open new facilities on a new site.” (IEPA regulations) Testimony given at the public hearing in Warren on January 10, 2008 clearly stated that both facilities were going to exceed the amount required to qualify for the EPA designation as “large CAFO”. The Clean Water Act requires this permitting process. As the IEPA is the local body that bears this authority, the IEPA is required to act. Thus the IEPA shall require the application for an NPDES permit from the proposed facility.

Secondly, any facility that proposes to discharge to waters of the US is required to apply for an NPDES permit. Both facilities are in the watershed of the Apple River, as the Wolf Creek which leads to the Apple River is present in both sites, furthermore, the proposed North facility will position its waste lagoons on top of Wolf Creek. Wolf Creek meets the definition of “waters of the US”, as these include “All other waters such as intrastate lakes, rivers, streams (including intermittent streams), ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including and such waters: 1) which are or could be used by interstate or foreign travelers for recreational or other purposes...” The Apple River Canyon State Park will be affected by any waste discharged to Wolf Creek. Apple River Canyon State Park has tens of thousands of visitors per year. Many of those are out-of-state visitors who use the park for fishing, etc. Some might claim that there will be no discharge. That is a false claim, and the people who make it should be chastised either for their ignorance, or for their willful efforts to hide the truth. In “Do Earthen Structures Leak?”, Manure Matters, 1998 by Dennis Schulte of the UNL Department of Biological Systems Engineering, Schulte states, “the simple answer is yes.” and goes on to discuss the how, the why, the etc. of the leaks. In “Field Performance of Compacted Clay Liners” by Craig H. Benson, 1999, the author shows that all of the 85 waste lagoons studied leak and he compares their field performance with the design expectations. It was expected that they would leak. The unexpected part was that only 74% of the 85 met the performance standard designed for the lagoons. In “Seepage Losses From Animal Waste Lagoons: A Summary of a Four-Year Investigation in Kansas” by J. M. Ham in 2002, the author studies 20 lagoons and measures the rate at which they leak. It is not surprising to the author that they leak. They all leak. Furthermore, the average leak from the cattle feedlots surveyed is 385 kg/Ha/yr. That is the same as 155.804 kg/acre/yr, or for each of the two proposed facilities, more than 11,678 pounds of waste per year. Certainly, this qualifies as a

discharge! Each of these studies is done on the same type of manure storage lagoon that has been proposed for the megadairies in Jo Daviess County. These storage facilities are actually designed to discharge. These facilities propose to discharge to waters of the US. Again, the IEPA must require these facilities to apply for an NPDES permit.

Finally, if a facility should “threaten to cause pollution” the facility must apply for an NPDES permit, again, quoting the statute,

“No person shall: (a) Cause or threaten or allow the discharge of any contaminants into the environment ...so as to cause or tend to cause water pollution in Illinois...(f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein...without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act.” (A CAFO is defined as a point source discharge.)

As so many of these large CAFO’s have spills, leaks, and other mishaps; this proposed CAFO is a threat to cause pollution. There was a spill at Stone Ridge Dairy in 2004, the only other large dairy CAFO in the state. There was a spill at the Country Aire Farms Dairy in Wisconsin in 2008. Documented problems in Oregon go back for years, including the fine imposed in 1999 by the EPA. The spill in Walkersville, Maryland in 2008 contaminated the municipal drinking water for months. The EPA has records of many, many of these episodes, all over the country. No one expected or anticipated these spills. But when they occur with so great a frequency, it is time to anticipate their consequences. These facilities threaten to cause discharge of contaminants into the environment. They are required to apply for an NPDES permit.

Each of these three cases requires the proposed projects to apply for an NPDES permit. When you consider that the State Geologist has stated that the proposed site is located on “Karst” and “It is the aquifer that is key. Groundwater flowing through a karst aquifer can travel miles per hour, whereas, groundwater flowing through a sand and gravel aquifer may travel feet per year. In a karst aquifer, surface-borne pollutants (e.g., a spill or seepage of animal waste) can contaminate wells miles away from the source in a matter of hours.”, you must conclude that not requiring an NPDES permit would be an omission with grave consequences.

In summary, the proposed facilities are new, large CAFO’s, and are therefore required to apply for an NPDES permit. They propose to discharge to waters of the US, and are therefore required to apply for an NPDES permit. They threaten to cause water pollution in Illinois and are therefore required to apply for an NPDES permit. As the State of Illinois NPDES permitting arm of the United States Environmental Protection Agency, it is your job, but as the arm of government that will ensure the protection of the environment and the safety of its citizens, it is an obligation you must pursue with vigor. It is a mandate given to your place in the government for the benefit of us today, and our children tomorrow. After all, “Each of us has the responsibility to protect the environment- not just for our quality of life today, but for the generations to come.” Douglas P Scott, Director IEPA. You must require an application for an NPDES permit from the proposed Traditions Dairies facilities, North and South.

I anticipate hearing from you immediately on the status of requiring these applications. It is a matter of utmost urgency and critical in its implications for the environment and the citizens of Illinois.

Sincerely,  
Ken Turner  
Warren, IL  
H: 815-745-9013  
W: 847-755-4816



To: doug.scott@illinois.gov, lisa.bonnett@illinois.gov, karen.a.cox@illinois.gov  
From: Kenneth Turner/D211  
Date: 05/11/2008 07:57PM  
cc: gluckman.matthew@epa.gov, berman.michael@epa.gov, jmcbride@atg.state.il.us  
Subject: proposed megadairy, Jo Daviess

Mr. Scott,  
Please find an attached letter that documents my continuing concerns with the proposed megadairy.

Thank you for your continuing efforts,  
Sincerely,  
Ken Turner  
Warren, IL

*(see letter on next page)*

Douglas P. Scott  
Director  
Illinois Environmental Protection Agency

May 11, 2008

Dear Mr. Scott,

Thank you so much for your letter of May 9, in response to my e-mail of April 30. I certainly appreciate your efforts to bring further resolution to the required NPDES permit application from Traditions Dairies LLC, a facility proposed for Jo Daviess County and that is currently being reviewed by the Illinois Department of Agriculture for compliance with design/construction requirements of the Livestock Management Facilities Act (LMFA).

Thanks to your efforts, I see that although the facility is designed to contaminate the groundwater, that by itself is no reason to require an application for the NPDES permit. Apparently, pollution and/or contamination of the surface water, waters of the United States, would require an NPDES permit; whereas pollution and/or contamination of groundwater has no such requirement. To re-state what you wrote, groundwater contamination will become a matter for the Illinois EPA's enforcement program after it occurs. No need or requirement for an NPDES permit before that contamination occurs. (Please remember that the USDA Natural Resources Conservation Services standard for this kind of lagoon allows a seepage rate of more than 0.25 inches/day. This translates to 6,800 gallons/acre/day, or for the total area of the proposed site, **462,400** gallons/day! This is NOT "zero discharge".) You stated in your letter, "Any failure of the lagoon system and release into groundwater would become a matter for Illinois EPA's enforcement program." Failure...? The 462,400 gallons/day will not be a failure-it is allowed by the standard of the USDA. The lagoons are permitted this rate of contamination of the groundwater. According to your statements, then, you are saying that no compliance with an NPDES permit application is required because they are releasing up to 462,400 gallons/day into the groundwater, not "waters of the United States". It seems to me that the statement in 415 ILCS 5/39 (b), "the agency may issue an NPDES permit... within the jurisdiction of the state, or into any well" applies. It would be hard to convince people that the IEPA were doing its job if they were unable to prevent a specific point source pollution of a well from occurring. Also, 415 ILCS 5/11 (c), states, "The provisions of this act... pursuant to an NPDES program shall not be construed to limit, affect, impair, or diminish the authority... of the agency... to regulate and control pollution of any kind." There is comfort in those words. The cool, calm, and collected comfort that the IEPA has the authority, even the obligation, to control this pollution of the wells and ground water in the area of the proposed megadairy. I am certain you did not mean to state that the agency was powerless to request an application from the project. Surely you did not mean that the agency must wait for the pollution to happen. Such convoluted reasoning would be incredible and possibly illegal. I find it extremely difficult to believe that this kind of certain contamination can only be stopped after it happens. I would think a "Protection" agency would have some means to actually protect the citizens and environment from this pollution before it occurred, that is why the NPDES permitting regulations were written.

Still, if the NPDES permit is only required if the CAFO is discharging or proposing to discharge to "waters of the United States", then the NPDES permit is still required. This part of the act still

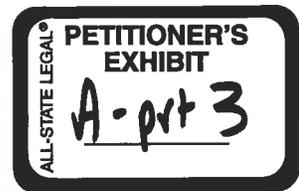
stands. As I stated in my previous letter, the Wolf Creek, which leads to the Apple River is present in both sites. Furthermore, the proposed North facility will position its waste lagoons on top of Wolf Creek. Wolf Creek leads to Apple River. Apple River is the central feature of Apple River Canyon State Park with many, many visitors, hikers, campers, and fishermen from this state and others. Wolf Creek is a "waters of the United States". Furthermore, there is a permanent spring in the site that feeds groundwater from the site directly into the creek. I believe this is what is considered a "significant nexus" to waters of the United States. The seepage, leakage, spillage into groundwater will contaminate the wells, the spring, and the Wolf Creek. The Traditions Dairies proposes to discharge to them. Not all of the seepage, run-off, etc. is going into groundwater. Some of the South facility contamination and much of the North facility is going to the surface water, the "waters of the United States". The Traditions Dairies LLC proposes to discharge to waters of the United States. I think that is very clear. It is unsettling that this very clear point was not even mentioned in your letter of May 9, 2008. If Traditions Dairies proposes to discharge to waters of the United States, they are required to submit an application for an NPDES permit.

Furthermore, if a facility should "threaten to cause pollution", the facility must apply for an NPDES permit. Again, "No person shall: (a) Cause or threaten or allow the discharge of any contaminant into the environment... so as to cause or tend to cause water pollution in Illinois...(f) Cause threaten or allow the discharge of any contaminant into the waters of the State, as defined herein... without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act" (A CAFO is defined as a point source discharge.) Allow me to describe the threat. Any state that has a history with these facilities will provide ample description- I have chosen Iowa. Between 1992 and 2004 there were more than 450 manure spills from CAFO's. 2/3 of those reached surface waters of the state, killing over 2.6 million fish. IDNR estimated that the volume of manure released from just 23 of the total documented spills exceeded a staggering 4.4 million gallons. Mr. Scott, the threat to cause pollution is real and documented. This is the kind of documentation that will hold in a court of law. The Traditions Dairies project is a threat to cause pollution and must apply for an NPDES permit.

As an aside, I am glad that the IEPA worked closely with the IDOA as they established the design standards for these structures in the LMFA and suggested protective construction requirements for lagoons placed in areas known to contain karst. Yes, the IDOA has the statutory responsibility to assure that the proposed design and construction meet these requirements. What a pity the IDOA is choosing to ignore these standards. But this is all the more reason for the IEPA to play a more active role than that currently chosen.

Traditions Dairies proposes to discharge to waters of the United States and threatens to cause water pollution in Illinois. They are required by law to apply for an NPDES permit. You are the director of the Illinois Environmental Protection Agency, and it is your responsibility to require this application. I hope you will immediately require the application of an NPDES permit for the proposed megadairies. Your dereliction of this duty will have the most severe of consequences.

Very truly yours,  
Ken Turner  
Warren, IL



To: doug.scott@illinois.gov, al.keller@illinois.gov  
From: Kenneth Turner/D211  
Date: 06/14/2008 01:37PM  
cc: gluckman.matthew@epa.gov, berman.michael@epa.gov, lmadigan@atg.state.il.us,  
jmcbride@atg.state.il.us  
Subject: mega dairy woes and NPDES

Dear Director Doug Scott,

I have still had no response to my request for further clarification on why an NPDES permit had not been required from the Traditions Dairies group in Jo Daviess County (May 11). If you were waiting for the Department of Agriculture to grant them permission, that happened on May 30. It is time to require application for the NPDES permit. They propose to discharge to "waters of the United States".

Please read the attached letter and act as swiftly as possible. I await your response.

Thanks for your time and efforts!  
Ken Turner

*(see letter on next page)*

Douglas P. Scott  
Director  
Illinois Environmental Protection Agency

Dear Mr. Scott,

Thank you so much for your letter of May 9, in response to my e-mail of April 30. I certainly appreciate your efforts to bring further resolution to the required NPDES permit application from Traditions Dairies LLC, a facility proposed for Jo Daviess County and that is currently being reviewed by the Illinois Department of Agriculture for compliance with design/construction requirements of the Livestock Management Facilities Act (LMFA). I still have not heard your response to my letter of May 11.

Apparently a facility that will contaminate the groundwater, is no reason to require an application for the NPDES permit. Pollution and/or contamination of the surface water, waters of the United States, would require an NPDES permit; whereas pollution and/or contamination of groundwater has no such requirement. (Please remember that the USDA Natural Resources Conservation Services standard for this kind of lagoon allows a seepage rate of more than 0.25 inches/day. This translates to 6,800 gallons/acre/day, or for the total area of the proposed site, **462,400** gallons/day! This is NOT "zero discharge".) I know that, "Any failure of the lagoon system and release into groundwater would become a matter for Illinois EPA's enforcement program." Failure...? The 462,400 gallons/day will not be a failure- it is allowed by the standard of the USDA. The lagoons are permitted this rate of contamination of the groundwater. They may only leak 1,000 – 1,300 gallons/acre/day. According to an engineer I have correspondence with, that would be a typical seepage rate for the type of pond plan that has been submitted. I can easily enough give you my sources for any of the information I have written. According to your statements, then, you are saying that no compliance with an NPDES permit application is required because they are releasing up to 462,400 gallons/day into the groundwater, not "waters of the United States". It seems to me that the statement in 415 ILCS 5/39 (b), "the agency may issue an NPDES permit... within the jurisdiction of the state, or into any well" applies. The nearby community of Nora is on well and septic. There are several wells there that are less than 100 feet deep. These will certainly be compromised. It would be hard to convince people that the IEPA were doing its job if they were unable to prevent a specific point source pollution of a well from occurring. Also, 415 ILCS 5/11 (c), states, "The provisions of this act... pursuant to an NPDES program shall not be construed to limit, affect, impair, or diminish the authority... of the agency... to regulate and control pollution of any kind." There is comfort in those words. The cool, calm, and collected comfort that the IEPA has the authority, even the obligation, to control this pollution of the wells and ground water in the area of the proposed megadairy. I am certain you did not mean to state that the agency was powerless to request an application from the project. Surely you did not mean that the agency must wait for the pollution to happen?!

Still, if the NPDES permit is only required if the CAFO is discharging or proposing to discharge to "**waters of the United States**", then the NPDES permit is still required. This part of the act still stands. As I stated in my previous letter, the Wolf Creek, which leads to the Apple River is

present in both sites. Wolf Creek leads to Apple River. Apple River is the central feature of Apple River Canyon State Park with many, many visitors, hikers, campers, and fishermen from this state and others. Wolf Creek is a “waters of the United States”. Furthermore, there is a permanent spring in the site that feeds groundwater from the site directly into the creek. I believe this is what is considered a “**significant nexus**” to waters of the United States. The seepage, leakage, spillage into groundwater will contaminate the wells, the spring, and the Wolf Creek. The Traditions Dairies proposes to discharge to them. Not all of the seepage, run-off, etc. is going into groundwater. Some of the South facility contamination is going to the surface water, the “**waters of the United States**”. The Traditions Dairies LLC proposes to discharge to waters of the United States. I think that is very clear. If Traditions Dairies proposes to discharge to waters of the United States, they are required to submit an application for an NPDES permit.

Furthermore, if a facility should “threaten to cause pollution”, the facility must apply for an NPDES permit. Again, “No person shall: (a) Cause or threaten or allow the discharge of any contaminant into the environment... so as to cause or tend to cause water pollution in Illinois...(f) Cause threaten or allow the discharge of any contaminant into the waters of the State, as defined herein... without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act” (A CAFO is defined as a point source discharge.) Allow me to describe the threat. Any state that has a history with these facilities will provide ample description- I have chosen Iowa. Between 1992 and 2004 there were more than 450 manure spills from CAFO’s. 2/3 of those reached surface waters of the state, killing over 2.6 million fish. IDNR estimated that the volume of manure released from just 23 of the total documented spills exceeded a staggering 4.4 million gallons. Mr. Scott, the threat to cause pollution is real and documented. This is the kind of documentation that will hold in a court of law. The Traditions Dairies project is a threat to cause pollution and must apply for an NPDES permit.

As an aside, I am glad that the IEPA worked closely with the IDOA as they established the design standards for these structures in the LMFA and suggested protective construction requirements for lagoons placed in areas known to contain karst. Yes, the IDOA has the statutory responsibility to assure that the proposed design and construction meet these requirements. What a pity the IDOA is choosing to ignore these standards. But this is all the more reason for the IEPA to play a more active role than that currently chosen.

Traditions Dairies proposes to pollute wells, discharge to waters of the United States, and threatens to cause water pollution in Illinois. They are required by law to apply for an NPDES permit. You are the director of the Illinois Environmental Protection Agency, and it is your responsibility to require this application. I hope you will immediately require the application of an NPDES permit for the proposed megadairies.

I require a response to this message of utmost importance.

Very truly yours,  
Ken Turner  
Warren, IL  
815-745-9013



## ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 - (217) 782-2829  
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 - (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR      DOUGLAS P. SCOTT, DIRECTOR



May 9, 2008

Mr. Ken Turner  
Warren, IL

Dear Mr. Turner:

This responds to the e-mail you sent on April 30, 2008 that urges Illinois EPA to seek an NPDES permit application from Traditions Dairies LLC, a facility that is proposed for Jo Daviess County and that is currently being reviewed by the Illinois Department of Agriculture for compliance with design/construction requirements of the Livestock Management Facilities Act (LMFA).

The issue of which CAFOs must be permitted under NPDES in Illinois is not as clear as your letter suggests. While it is true that 35 Ill. Adm. Code Section 502.103 requires that operations that have a certain number of animals must obtain an NPDES permit, Section 501.102 does not require a permit when the facility discharges only as a result of a 25-year, 24-hour storm event. Illinois EPA is also bound by Section 12(f) of the Illinois Environmental Protection Act. This section states, in part: "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." USEPA promulgated a CAFO rule in 2003 that required NPDES permits for large CAFOs. In 2004, a federal appeals court struck down this requirement, stating that USEPA could not require an NPDES permit for a large CAFO unless the CAFO was discharging or proposed to discharge. Since federal rules pursuant to the Clean Water Act (the new name for the Federal Water Pollution Control Act) do not require an NPDES permit for a facility simply because of the number of animals confined, Illinois may not require an NPDES permit for Traditions Dairies solely based on the number of animals it plans to confine.

Similarly, Illinois EPA may not require an NPDES permit if the sole discharge is to groundwater. You stated your belief that the proposed lagoons would leak to groundwater both because "lagoons always leak" and because of the karst geology in the area. However, since "waters of the United States" presently do not include groundwater, Illinois EPA again faces the statutory restriction against issuing an NPDES permit that would not be required by the Clean Water Act.

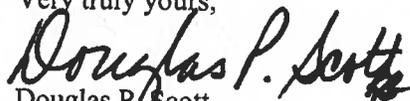
Illinois EPA certainly understands the risks to groundwater that can be posed by manure storage lagoons that are improperly designed or located. This is why we worked very closely with the Illinois Department of Agriculture (IDOA) as they established the design

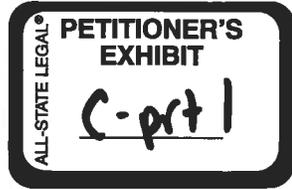
standards for these structures in the LMFA and suggested protective construction requirements for lagoons placed in areas known to contain karst. IDOA has the statutory responsibility to assure that the proposed design and construction meet these requirements. Although you request that the Illinois EPA require a permit for the facility because lagoons leak and the lagoon is proposed for construction in a karst area, this is not a permitting issue. Any failure of the lagoon system and release into groundwater would become a matter for Illinois EPA's enforcement program.

USEPA is in the process of developing a new CAFO rule that is consistent with the court decision. While Illinois EPA awaits clarity at the federal level about which CAFOs are required to be permitted under NPDES, we are focusing our resources on addressing discharging CAFOs that are discovered mainly through complaint investigations. We are using our enforcement program to eliminate the discharge and/or require the CAFO to apply for an NPDES permit.

I appreciate your help in focusing the attention of Illinois EPA on a potential water pollution source. If the facility receives approval from IDOA and is constructed, we stand ready to assure that it is operated in compliance with the Illinois Environmental Protection Act.

Very truly yours,

  
Douglas P. Scott  
Director



# Verification of FOIA Submittal

FOIA Request submitted by: Mr. Bern Colleran  
Automated reply sent to: stagecoachtrail@sbcglobal.net

Subject: FOIA Request - Bern Colleran 8/1/2008 4:23:53 PM - 8/1/2008-506403

If you provided a valid return email address, the summary of your request will be sent. For additional questions, please feel free to use the contact information below:

- Bureau of Air - Marilyn Clardy - 217/782-2113 - 217/524-5023(FAX)
- Bureau of Land - Jan Ogden - 217/557-2482 - 217/782-9290(FAX)
- Bureau of Water - Janet Christer 217/782-8482 - 217/782-9891(FAX)
- Office of Emergency Response - Carolyn Wright - 217/558-1677 - 217/782-1431(FAX)
- Division of Legal Counsel - Michael McCabe - 217/782-5544 - 217/782-9807(FAX)

Thank you.  
To submit another FOIA request, click the "New Request" button below.

[New Request](#)

*Please do not refresh your browser or navigate backwards during the form request process. To cancel and begin a new application, use the cancel button below.*

I. Requester Information (completed) 8/1/2008-50

II. Facility/Location/Subject Matter (if no bureau, incident, permit, or USEPA ID is known, at a minimum, please include the street address in addition to the city)

Identification Number

Name

Address

City/Township

County

Or

Subject Matter

III. Routing of the Request Check only the areas below from which you want information (must select at least 1).

- |   |   |   |   |   |
|---|---|---|---|---|
| <input checked="" type="checkbox"/> (BOA)     | <input checked="" type="checkbox"/> (BOL) | <input checked="" type="checkbox"/> (BOW)       | <input checked="" type="checkbox"/> (DLC/Other) | <input checked="" type="checkbox"/> (OER) |
| Bureau of Air<br>Air Quality Data<br>Asbestos | Bureau of Land<br>U.S.T.<br>Groundwater   | Bureau of Water<br>Drinking Water<br>Wastewater | Division of Legal<br>Counsel<br>Enforcement     | Office of<br>Emergency<br>Response        |

Any documents pertaining to or generated in the matter of the application or status of the application, or correspondence between or within State of Illinois departments or agencies on any aspect relating to the application made by A. J. Bos of Bakersfield, CA, for permits or clearances or permissions in his attempt to operate factory farm facilities known as Traditions Dairies near the town of Nora, Illinois. This should include documents of any type described below generated in the above matter. These documents include but should not be confined to the following:

- Applications, including any IEPA notations on the paperwork or other internal communication pertaining to it;
- Mail correspondence sent by and received by IEPA to and from any party or representative involved in the case;
- E-mail correspondence, also in both directions, between the applicant or his representatives and any official of the Ill. EPA or any other state official, as forwarded by other state official to Ill. EPA;
- Memorandums and notes regarding phone conversations on the case generated by EPA personnel or other state officials
- Transcripts, or notes if no transcript is made, of all meetings between the Applicant and/or his representatives and employees of Illinois EPA or parties engaged by Illinois EPA in any capacity in connection with this case.

## FOIA Request Form

Please do not refresh your browser or navigate backwards during the form request process.

To cancel and begin a new application, use the cancel button below.

Continue to complete section IV (Information Requested), then click the Submit Request button (when enabled).

I. Applicant Information *(completed)*

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II. Facility Information *(completed)*

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III. Routing Information *(completed)*

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IV. Information Requested

Click on each enabled button (below) to enter/edit specific information you would like. The Submit button will be enabled once you've entered data from the area (Bureau/Division/Office) requested.

Updated 4:07:30  
PM

Updated 4:15:45  
PM

Updated 4:17:52  
PM

Updated 4:19:17 PM

Updated 4:19:50  
PM



# ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 - (217) 782-2829

JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 - (312) 814-6026

8/6/2008

ROD R. BLAGOJEVICH, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR  
Phone: 217/782-8482

Fax: 217/782-9891

Email: [foia@illinois.gov](mailto:foia@illinois.gov)

Bern Colleran  
H.O.M.E.S.  
2704 N. St. Louis Av  
Chicago, IL 60647

ALL-STATE LEGAL  
PETITIONER'S  
EXHIBIT  
**C-prt 2**

RE: Request regarding information concerning property(s) in IL: **2008-2935**  
**Traditions Dairy/AJ Bos/Maurer-Stutz Engineering, Nora, IL**

Dear Bern Colleran:

The FOIA Sector, Bureau of Water, has processed your FOIA request **2008-2935** dated 8/1/2008 for public records pursuant to the Freedom of Information Act ("FOIA") (5 ILCS 140/1 et. Seq.). The Bureau of Water, Water Pollution Control Division has no information regarding the subject of your request, as referenced above.

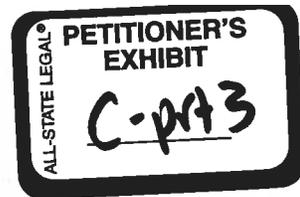
For the DMR Data, go to: <http://www.epa.gov/echo/>. At this screen pick Related Links from the list on the left hand side. On the next screen, pick the EPA Envirofacts Warehouse. In the middle of the screen under advanced capabilities, pick queries and pick PCS from the drop down box. At the query form, you must enter the information needed for the site.

The Bureau of Water, Division of Public Water Supplies' file's are structured around community water systems and would not have information regarding the referenced property(s) in your request. If you wish to receive any well data relative to particular community water supplies or facilities proximate to the site(s) in question the Bureau of Water respectfully requests that you resubmit this request with additional details. Specifically, the Division of Public Water Supplies will need the exact location of the site in question including a map of the site, at an appropriate scale, and the legal description of the property down to the 1/4, 1/4, 1/4 of the Section. Furthermore, the Division of Public Water Supplies needs to know the size or extent of the area of concern (e.g., "x" distance from the site in question).

Please contact me at the above referenced number, if you require further assistance.

Sincerely,  
*Janet Christer*

Janet Christer  
FOIA Coordinator, Records Unit  
Bureau of Water  
cc: File



217/782-5544

August 19, 2008

Bern Colleran  
H.O.M.E.S.  
2704 N. St. Louis Av  
Chicago, IL. 60647

RE: Freedom of Information Act Request  
Traditions Dairy and or A.J. Bos and or Maurer-Stutz Engineering  
Nora Township

Dear Mr. Colleran:

This letter is in response to your Freedom of Information Act ("FOIA") request, to the Illinois Environmental Protection Agency ("Illinois EPA"), for information pertaining to the above location, address, individual, facility, or entity.

Please be advised no records were located in the Division of Legal Counsel files responsive to your information request. Thank you for your patience in this matter.

Should you have any questions, please do not hesitate to call me at 217/782-5544.

Sincerely,

*Michael J. McCabe*

Michael J. McCabe  
Freedom of Information  
Division of Legal Counsel  
Illinois Environmental Protection Agency

Cc: file



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19506, SPRINGFIELD, ILLINOIS 62794-9506 - (217) 782-2113

ROD R. BLAGOJEVICH, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

ALL-STATE LEGAL®  
PETITIONER'S  
EXHIBIT  
C-PT-4

(217) 782-2113

Monday, August 04, 2008

H.O.M.E.S.

Attn: Bern Colleran

2704 N. St. Louis Ave

Chicago, IL 60647-

Re: FOIA Request Received 8/1/2008

Dear Mr. Colleran:

The IEPA Bureau of Air does not have any files or permits for the facility(s) listed below.

Traditions Dairy/A.J. Bros./Maurer-Stutz Engineering  
Nora, IL

If you have any questions, please feel free to contact the FOIA Coordinator at the number indicated above.

Sincerely,

Ed Bakowski  
Manager, Permit Section - Acting  
Division of Air Pollution Control



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. Box 19276, SPRINGFIELD, ILLINOIS 62794-9276 - (217) 782-3399  
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 - (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR    DOUGLAS P. SCOTT, DIRECTOR

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PETITIONER'S  
EXHIBIT  
C-prt 5

8/4/2008

Bern Colleran  
H.O.M.E.S.  
2704 N St Louis Ave  
Chicago, IL 60647

Re: FREEDOM OF INFORMATION ACT (FOIA) REQUEST - OER # 0019601  
NO INFORMATION FOUND

This letter is in response to your request for public records pursuant to the Freedom of Information Act ("FOIA") (5 ILCS 140/1 et.seq.) processed by the Office of Emergency Response.

Your request was received: 8/1/2008.

You requested information about: Traditions Dairy/ AJ Bos/ Maurer-Stutz Engineering- Nora Twp, Jo Daviess County (Jan 1 2007 - present).

A search of our file index databases identified that there are no public records contained therein which match the parameters of your request.

Please contact me at 217/558-1677 for further assistance.

Sincerely,

*Carolyn Wright*

Carolyn Wright  
FOIA Coordinator  
Office of Emergency Response



From: Ginder, David

To: Karen

Sent: Tuesday, September 16, 2008 10:51 AM

Subject: RE: PICTURES OF HILLTOP CONFINEMENT...

Mrs. Hopkins,

I have viewed the digital photographs that you forwarded. I reviewed the dead animal handling procedures that the facility utilizes with a facility representative and have determined that the dead animal handling procedures are acceptable and meet the requirements of the Illinois Dead Animal Disposal Act.

The submitted photographs do not show livestock waste or leachate/runoff from a dead animal building, from a dead animal composting structure, from a livestock feed storage area or from a livestock bedding storage area reaching waters of the State but rather show slightly turbid surface runoff from the facility which one would expect from such a facility as well as numerous other types of facilities and properties including residential properties after a 4.5" precipitation event. The photograph of Sugar Creek shows turbid water that one would expect in rural Illinois after such a precipitation event. One can also determine from the photograph of Sugar Creek that properties in the entire watershed tributary to Sugar Creek at the location where the photograph was taken, not just Hilltop Farm, contribute to the turbidity observed in Sugar Creek.

Please contact the Agency with any future concerns that you have when observing the livestock waste, dead animal, livestock feed and livestock bedding material handling and storage practices at Hilltop Farm.

David P. Ginder  
Environmental Protection Engineer  
Field Operations Section  
Division of Water Pollution Control

As of 1/1/08 my email address is: [David.Ginder@illinois.gov](mailto:David.Ginder@illinois.gov)

As of 4/7/08 my contact information is:

Illinois EPA  
Springfield Field Office Staff, MC #10  
1021 North Grand Avenue East, P.O. Box 19276  
Springfield, Illinois 62794-9276  
Phone: 217/557-8761

---

**From:** Karen [<mailto:jk4ranch@frontiernet.net>]

**Sent:** Monday, September 15, 2008 3:54 PM

**To:** Ginder, David

**Subject:** PICTURES OF HILLTOP CONFINEMENT...

WE TOOK A DRIVE OVER TO THE HILLTOP HOG CONFINEMENT YESTERDAY 9/14/08 SINCE THE RAINS HAS BEEN SO BAD AND THIS IS WHAT WE FOUND...



DEAD HOGS OUTSIDE HILLTOP CONFINEMENT DOOR OAKLAND TWP SCHUYLER CO



CULVERT NEXT TO THE HILLTOP ENTRANCE RAIN RUN OFF DRAINING INTO DITCH



WATER RUNNING OUT OF THE HILLTOP CONFINEMENT DRIVEWAY NEXT TO CULVERT  
RUNNING DOWN THE ROAD TO SUGARCREEK IN ABOVE PICTURE



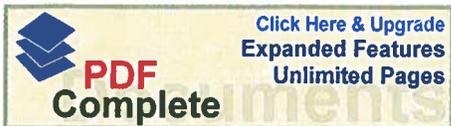
DONNIE WARD TAKING WATER SAMPLE FROM RUN OFF AT DRIVEWAY OF HILLTOP CONFINEMENT



GRAY WATER IN DITCH AT SAME SITE AS ABOVE



SUGARCREEK OUT BELOW HILLTOP CONFINEMENT AT HOPKINS FARM [JK4 RANCH] GAUGE SHOWS 4 1/2" OF RAIN



KAREN & JIM HOPKINS  
JK4 RANCH  
RUSHVILLE,IL  
<http://www.avg.com>

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No virus found in this incoming message.

Checked by AVG - <http://www.avg.com>

Version: 8.0.169 / Virus Database: 270.6.21/1674 - Release Date: 9/16/2008 8:15 AM

**MEMORANDUM**

**SUBJECT:** Protocol for Reviewing the Illinois Citizens for Clean Air & Water's Petition to Withdraw the Illinois NPDES Program

**FROM:** Peter G. Swenson, Chief  
NPDES Programs Branch

Sally Swanson, Chief  
Water Enforcement & Compliance Branch

**TO:** Timothy C. Henry  
Acting Director, Water Division

We are writing to recommend that you sign the following protocol for reviewing the Illinois Citizens for Clean Air & Water's (Illinois Citizens) petition to withdraw the Illinois NPDES program. Illinois Citizens submitted its petition on March 27, 2008, because the group claims the Illinois Environmental Protection Agency (IEPA) has failed to fully implement the NPDES program for Concentrated Animal Feeding Operations (CAFOs). Both IEPA and the petitioners had an opportunity to review the draft protocol. The final protocol has been revised to incorporate comments provided by the petitioners. If you agree to sign the protocol, we recommend that you send copies to Marcia Willhite at IEPA, and Danielle Diamond, representative for Illinois Citizens. The review process will begin following finalization of the protocol, and will determine whether action to withdraw the program should be initiated.

**Protocol for Responding to Issues Related to Permitting**

**Allegation 1:** Illinois has failed to exercise control over activities required to be regulated, including a failure to issue permits for CAFOs.

**Allegation 2:** The IEPA has not conducted comprehensive inspections to determine which CAFOs need permits.

**Allegation 3:** The IEPA is not issuing individual or General Permit coverage to known dischargers and, as a result, is not requiring regular inspections to determine compliance with NPDES program requirements, and therefore cannot conduct compliance inspections at large CAFOs.

**Allegation 4:** Illinois fails to comply with public participation requirements.

**Response:** We will review Illinois' NPDES permit application forms, permit

application procedures, and records generated in response to the receipt of applications from CAFOs. The forms and procedures will be reviewed to evaluate whether they: (1) provide for the submission of applications under rules the State has adopted pursuant to 40 CFR 123.25(a)(4) and (9), and 122.21, and (2) include the information required by the same Illinois rules. Records generated in response to the receipt of applications will be reviewed to evaluate IEPA's procedures for decision-making. [40 CFR 123.25(a)].

We will review IEPA files, including selected inspection files, enforcement case files and public comments/complaints to determine whether the evidence supports the allegations above, in particular whether there are CAFOs subject to NPDES requirements that have not been permitted by IEPA.

We will review IEPA's requirements and procedures for responding to requests from the public for information regarding NPDES permit applications and permits, and records regarding IEPA's responses to such requests [§ 402(j) of the CWA, 40 CFR 122.7(c)].

**Schedule:**

In Fall 2008, we expect to visit the IEPA office in Springfield, and as appropriate IEPA District Offices to review IEPA permit application forms, procedures, and files. Prior to the visit, we will send a letter to IEPA explaining the purpose of and schedule for the visit, asking that the information be made available, and arranging for copying as necessary. For each session, there will be an entrance interview with State managers and staff (participation by IEPA personnel is at the State's discretion) and an exit interview during which preliminary findings will be outlined. In addition to the file reviews, the audit team will pose questions to IEPA staff involved in responding to inquiries from potential permit applicants or reviewing permit applications. Matt Gluckman will be the team leader.

**Protocol for Responding to Issues Related to Compliance Monitoring and Enforcement<sup>1</sup>**

**Allegation 1:** The IEPA has not conducted comprehensive inspections to determine which CAFOs need permits.

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<sup>1</sup> EPA maintains independent enforcement authority under the Clean Water Act. Comparable State authority is a prerequisite to receiving, and an ongoing requirement for the continued operation of, an approved State NPDES program.

- Allegation 2: The IEPA is not issuing individual or General Permit coverage to known dischargers and, as a result, is not requiring regular inspections to determine compliance with NPDES program requirements, and therefore cannot conduct compliance inspections at large CAFOs.
- Allegation 3: Illinois fails to inspect and monitor activities subject to regulation.
- Allegation 4: IEPA fails to adequately respond to citizen complaints.
- Allegation 5: Illinois CAFOs are not being assessed adequate penalties for violations
- Response: The review of IEPA's Compliance Monitoring and Inspection of CAFOs will consist of three elements: file reviews at State Headquarters, Regional offices and/or the Attorney General's office; interviews with State staff, and/or Illinois citizens; and written information requests to the State. IEPA files, including selected inspection files, case files and public comments/complaints, will be reviewed to determine whether the evidence supports the allegations above. Documents such as IEPA's Annual Livestock Facility Investigation Reports, Enforcement Management System plan, and annual work plans shall be reviewed. In addition, we may collect information through the inspection of suspected CAFOs or the issuance of information collection orders to suspected CAFOs under the Clean Water Act, Section 308, as necessary.

EPA staff will determine:

- (1) Whether the program is capable of making comprehensive surveys of all CAFO facilities subject to regulation under NPDES requirements. We will review IEPA's files, protocols and procedures to determine its process for identifying AFOs that are CAFOs subject to NPDES requirements. As part of this review, we will look at IEPA's use of data from other sources, which could be used to identify such facilities [40 CFR 123.26 (b) (1)],
- (2) The cause for inspections the IEPA has conducted at animal feeding operations [40 CFR 123.26(b)],
- (3) Whether, during the course of an inspection, IEPA determines whether the facility subject to the inspection is a CAFO, has discharged or proposes to discharge, and has met or failed to meet NPDES permit application requirements [40 CFR 123.26(b)],
- (4) Whether the IEPA has sought adequate enforcement penalties [40 CFR

## 123.63 (a)(3)]

(5) Whether IEPA receives, properly considers, investigates, and provides written responses to information provided by the public about violations by CAFOs [40 CFR 123.26(b)(4) and 40 CFR 123.27(d)(2)(i)], and

(6) Consistency of IEPA's action with its Enforcement Management System and EPA's Enforcement Response Guide [40 CFR 123.26(b) and 123.63(a)(3)].

**Schedule:** In FY 2009, we expect to visit the IEPA office in Springfield, and as appropriate District Offices, to review copies of inspection and other relevant reports. Prior to the visit, we will send a letter to IEPA explaining the purpose of and schedule for the visit, asking that the information be made available, and arranging for copying as necessary. For each session, there will be an entrance interview with State managers and staff (participation by IEPA personnel is at the State's discretion) and an exit interview during which preliminary findings will be outlined. In addition to the file reviews, the audit team will pose questions to IEPA staff involved in responding to complaints about potential violations from CAFOs. Barbara VanTil will be the team leader.

Protocol for Responding to Issues Related to Memorandum of Agreement

**Allegation 1:** The IEPA has failed to expeditiously process and issue permits as required under the Memorandum of Agreement.

**Allegation 2:** The Agency has also failed to meet its obligations under its corresponding Performance Partnership Agreements by failing to review and act upon all CAFO permit applications.

**Response:** We will review the EPA/IEPA MOA, recent Partnership Agreements, and IEPA's procedures and files to determine if commitments in these agreements are being followed with respect to NPDES permits for CAFOs.

Protocol for Responding to Additional Concerns Raised regarding IEPA's CAFO Permitting Process

**Allegation:** The petitioners raised the additional concern that Illinois will need to revise its CAFO permitting process to comply with the Clean Water Act, consistent with the Court's decision in *Waterkeeper Alliance, Inc. v. EPA*,

399 F.3d 486, 502 (2d Cir. 2005). In particular, the petition states that the terms of nutrient management plans must be made part of Illinois' General Permit for CAFOs, as well as any individual permits. In addition, nutrient management plans must also be made available to the public.

Response:

EPA's evaluation will assess IEPA's NPDES program for consistency with requirements in current federal regulations. Any deficiencies identified in the State's legal authority or procedures will be included in the record of our review, and taken into account in making our determinations with respect to the petition.

EPA is in the process of finalizing revisions to the federal CAFO regulations to respond to the Court's decision. Once the final revisions to the federal regulations are promulgated, Illinois will need to reevaluate its NPDES regulations and procedures, and make revisions as necessary to be consistent with federal requirements. Consistent with 40 CFR 123.62, regulatory revisions are expected to be made within one year from the date of promulgation of the federal rule, and any statutory changes are expected to be made within two years of promulgation. EPA will review and either approve or disapprove any such revisions upon submittal by the state.

Schedule:

If the final *Waterkeeper* rule is promulgated during the review of Illinois' NPDES program, we will seek a schedule from the State for making revisions to its NPDES program for CAFOs, consistent with 40 CFR 123.62.



**Appendix D**

**Inspection and Enforcement Review Protocol for CAFOs**

**Adapted from the**

***State Review Framework CWA Plain Language File Review Metrics Guide  
Final: October 10, 2008***

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## **1. Purpose of the Guide**

The purpose of the SRF Plain Language Guide (the “Guide”) is to provide guidance for review of the file metrics for the CWA/NPDES, enforcement and compliance program, under the State Review Framework. The Guide will help EPA reviewers to conduct the reviews in an efficient, effective and consistent manner. The Guide provides specific guidance on evaluating each of the metrics, including detailed reference to applicable agency policy, guidance or regulation. The Guide contains sufficient information to ensure that reviewers apply consistent interpretation of data derived from the data and file reviews, and consistently evaluate those data against applicable goals. The Guide has been adapted for use in the review of Illinois EPA’s inspection and enforcement programs for Concentrated Animal Feeding Operations (CAFOs).

## **2. Review Process**

The Region will select the files for review based on facilities previously inspected by EPA Region 5, and based on data provided to them by the Illinois EPA. It is suggested that reviewers conduct the review using the following steps:

- Start with the list of files selected for review during the on-site visits.
- Use the SRF CWA Plain Language Guide, as adapted, as a reference for additional explanation of the File Review Metrics.
- During the on-site review, discuss issues arising from the files with the state in order to understand those issues.
- Use the File Review Summary Form to array the data and to calculate the value for each metric.
- Use the File Review Analysis Form to display the File Review Metrics and to write out the initial findings.
- Initial findings should be developed subsequent to the completion of all on-site visits.

The reviewers should use the tools (i.e., File Review Checklist, and the File Review Analysis Form) that were developed to assist in documenting and retaining information obtained through the file review. The Summary Form may be modified by the reviewers to suit their needs. The only requirement is that the information obtained during the on-site file review be retained in an organized fashion as part of the review record.

## **3. Review Considerations**

In conducting a review of a state (Illinois EPA), there are several general concepts or principles to be aware of and consider. The following is a brief discussion of several of these concepts.

### **3.1 Both State and Federal Guidance are important**

While most of the goals against which a state will be evaluated are specified at the national levels, it is important to review a state against their own guidance as well. This is necessary for a variety of reasons. First, the national goal may be expressed as a range of acceptable responses, and the state may have developed guidance that more narrowly limits these responses. Additionally, the national guidance may require only that a state establish a standard (for example, current guidance for the NPDES program requires that a state establish a time frame for completing an inspection report) but not actually provide the standard. In such cases, the reviewer will need to ensure that the state has developed the required standard, and use that standard to evaluate state performance. Finally, the State may have developed an enforcement management system in consultation with EPA which may have become, due to evolution of national guidance, out of date or inaccurate. In such cases, the reviewer should make appropriate recommendations for revision of the state guidance.

### **3.2 There is a difference between areas of discussion and recommendations**

Reviewers must be careful to ensure that the results of a single file review do not unduly influence overall findings and recommendations. Where deficiencies are observed, reviewers should consider both the magnitude of the deficiency, and the frequency with which it was observed, when developing findings and recommendations. This is important in order to ensure that recommendations for improvement are proposed for only where needed. Other findings may not warrant recommendations but should nonetheless be discussed with the state and noted in the final report. For example, if the state has established a 45 day deadline for completing inspection reports, and a small number are completed after that timeframe, this should be noted to the state who may want to monitor this issue, but for the purposes of the SRF, the percent of late reports is too small to warrant a recommendation

### **3.3 State specific issues may be considered when conducting the file review**

There may be a variety of issues that affect a state's work. These issues may include: 1) resources, e.g., hiring freezes or funding to operate the program; 2) legal limitations, e.g., a lack of administrative penalty authority; and 3) retention of knowledgeable staff. If patterns appear in the data related to such issues that appear to affect state performance under any given metric the Region should identify and discuss them with the state. However, these issues would not need to be discussed in the report findings unless they appear to contribute to deficiencies identified through the review. Additionally, if there is a pattern of a state performing particularly well, the Region may wish to further investigate it to see if it may be a "good practice" that should be encouraged to be adopted by other states where possible.

### 3. Sources

The following sources are referenced in the metrics discussion which follows.

1. *The Enforcement Management System, National Pollutant Discharge Elimination System (Clean Water Act)*, 1989
2. Memo “Clarification of NPDES EMS Guidance on Timely and Appropriate Response to Significant Noncompliance Violations” from Mark Pollins, Director Water Enforcement and Betsy Smidinger, Acting Director Enforcement Planning, Targeting , May29, 2008
3. *Policy Framework for State/EPA Agreements*, August 1986, as revised
4. *Permit Compliance System (PCS) Policy Statement*, August 31, 1985, as amended in 2000.
5. Memo “ICIS Addendum to the Appendix of the 1985 PCS Policy Statement” from Michael M Stahl, Director, Office of Compliance and James A Hanlon, Director, Office of Wastewater Management, December 7, 2007
6. Memo “Final Single Event Violation Data Entry Guide for the Permit Compliance System (PCS) from David A. Hindin, Director, Enforcement Targeting and Data Division, May 22, 2006.
7. *Guidance for Preparation of Quarterly and Semi-Annual Noncompliance Reports (Per Section 123.45, Code of Federal Regulations, Title 40)* March .13, 1986 (this document is also included as an attachment to Source 1)
8. *Interim Clean Water Act Settlement Penalty Policy*, March 1, 1995.
9. Memo, “Clean Water Act National Pollutant Discharge Compliance Monitoring Strategy for the Core Program and Wet Weather Sources” from Granta Y. Nakayama, Assistant Administrator, October 17, 2007.
10. Memo “Clarification of NPDES Guidance on Timely and Appropriate Response to Significant Noncompliance (SNC) Violations, from Mark Pollins, Director, Water Enforcement Division, July 17, 2007.
11. Memo “The Office of Enforcement and Compliance Assurance’s Agency Response to the Evaluation Report: *Better Enforcement Oversight Needed for Major Facilities with Water Discharge Permits in Long-term Significant Noncompliance* (Report No. 2007-P-00023) from Granta Y Nakayama, Assistant Administrator, Aug 14, 2007.
12. Memo “Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements”, from Steven A. Herman, Assistant Administrator, June 23, 1993 (this document contains an amendment to source 3)
13. *PCS Quality Assurance Guidance Manual*, August 28, 1992
14. The Code of Federal Regulations including 40\_CFR 123.26(e)(1), 40\_CFR 123.26(e)(2), 40\_CFR 123.26(e)(5), and 40\_CFR 123.45(c).

## **5. Information needed to complete the analysis of the metrics**

In addition to the sources identified above, the reviewers will need the following documents prior to commencing the review of the metrics.

1. A pull of the data metrics for the program for the year under review. Note that as most CAFO facilities in Illinois are minor facilities that may or may not be permitted, data may not be available in OTIS.
3. Relevant state policy, guidance and regulation.
4. Environmental Performance Partnership Agreements, or related grant agreement documents, for the period under review (Oct. 1999-Oct. 2009).
5. Information on inspection coverage for CAFOs.
6. Access to relevant state databases. Increasingly, states are creating electronic records, rather than paper records. Where this is the case for files selected for review, arrangements should be made with the state, to have temporary access to the electronic databases. It may be helpful to have arranged for state personnel to be available at the time of the file review, to assist with operating this database, or locating relevant records
7. In certain cases, penalty calculations and penalty procedures have not been made available to reviewers. Reviewers should clarify before arriving for the file review, that these items will be made available (to the extent that they exist). Where the state declines to provide these items, this should be escalated immediately, and resolved prior to the file review. The basis for requesting this information is found in the appendix to Source 12. Page 2 of the appendix sets forth the expectation that state penalty procedures will be made available to US EPA and the expectation that case records be made available to USEPA is found on page 8 of the attachment. Recordkeeping is defined to include “documentation of the penalty sought”.

## **6. Analysis of the Metrics**

Several metrics used routinely in the SRF are not applicable to this review, as most CAFO facilities in Illinois are minor facilities that may or may not be permitted; inspection and enforcement data for Illinois CAFOs may not be reflected in OTIS; and the required data for review may not be available from Illinois EPA. Metrics used are discussed below. For consistency with SRF review guidance, metrics used have retained the numbering used in the SRF CWA Plain Language Guide of October 2008.

**Element 4 – Completion of Commitments.** Degree to which all enforcement and compliance commitments in relevant agreements (i.e., EnPPAs, CMS plans, authorization agreements, etc.) are met and any products or projects are completed.

Review of this metric will be a function of three factors: 1) the review period, 2) the EnPPAs for the review period, and 3) the status of the state’s compliance monitoring strategy (this is an inspection strategy developed by the state and consistent with the Federal Compliance Monitoring Strategy). (See source 9.)

In addition, the reviewers will have to rely on data from the state in reviewing state performance against the applicable CMS as CAFOs do not have fully populated inspection data in OTIS. The state and region will need to define the sources of information to be used for evaluating state compliance prior to conducting the review when feasible, or during the review as necessary.

Reviewers should evaluate CAFO compliance and enforcement related commitments in the state work plan, and the progress the state has made in meeting them. Recommendations should be included as appropriate. This should include commitments/work products in the EnPPAs, state specific CMS plans in accordance with the federal CMS policy, MOAs, MOUs, or other relevant agreements. The CAFO enforcement and compliance commitments should be identified. The purpose of this metric is to determine whether the state agency successfully completed all enforcement and compliance commitments in relevant agreements for the period under review.

Results should be analyzed and discussed in the region's report. Commitments that are not achieved, and have a direct effect on the enforcement and compliance program will be discussed in the region's report.

**Element 5 – Inspection Coverage.** Degree to which state completed the universe of planned inspections/compliance evaluations (addressing core requirements and federal, state and regional priorities).

Element 5 will be discussed in narrative fashion in the resulting review report.

**Element 6 – Quality of Inspection or Compliance Evaluation Reports.** Degrees to which inspection or compliance evaluation reports properly document observations, are completed in a timely manner, and include accurate description of observations.

**File Review Metric 6a – Inspection reports reviewed.**

**Description of Metric –** Number of inspection reports reviewed.

This metric establishes the universe to be used in calculating the percentages in 6b. It is likely to be a larger number than the number of inspection files reviewed. This is because, in the course of reviewing an enforcement action file, it may be necessary to review a precursor inspection. The reviews of those additional inspections should be included in the evaluation, even when they may have occurred prior to the review year.

**File Review Metric 6b – Inspection reports reviewed that are complete.**

**Description of Metric –** Percent of inspection reports reviewed that are complete.

The Inspection Report Review Guide (Appendix 4) should be completed for each inspection reviewed, and the results summarized. If a state has established additional

requirements for the content of inspection reports, these should be added to the Inspection Report Review Guide. Where all components listed in the Inspection Report Review Guide are present (including those that stem from state requirements) the report is complete. Reviewers should calculate the percent of the number of inspections calculated in metric 6a that are complete. If certain of the attributes listed in the review guide are routinely missing, these should be specifically mentioned. It may be helpful in discussions with the state if reviewers calculate the percent of the reports reviewed for which such individual attributes are missing, as well as the overall percent of reports that are complete.

**File Review Metric 6c** - Inspection reports reviewed that provide sufficient documentation to determine compliance at the facility.

**Description of Metric** – Percent of inspection reports reviewed that provide sufficient documentation to lead to an accurate compliance determination. This information is extracted from the inspection report review guide. Where inspection reports are determined to be complete by using the review guide, the report should provide sufficient information to document compliance at the facility. If a report is not complete, but the information reviewed through Parts II and III of the review guide are determined to be complete, sufficient documentation is present to determine compliance, and these reports, though lacking in certain required information, may provide sufficient information to determine compliance. For any potential noncompliance, the inspection report should include information that links permit requirements and/or a regulatory requirements to the observations made by the inspector, and provide the documentation (such as a report or record, a sample, a photograph, or a statement by facility personnel) supporting the observations. The documentation should allow the reviewer to determine whether there is sufficient information to lead to an accurate compliance determination. Reviewers should calculate the percent of reports identified in metric 6a that provide sufficient information to determine compliance. Where any inspection reports reviewed do not provide sufficient documentation to determine compliance, this finding should be discussed with the state. The discussion should address the types of information needed in the reports, and a plan for documenting the information that will be added to future inspection reports. It is important to review this finding with the state at the time the file review is being conducted in order that additional illustrative inspection reports can be reviewed, if necessary.

**File Review Metric 6d** – Inspection reports completed within the prescribed time frame.

**Description of Metric** – Percent of inspection reports reviewed that are timely.

There is no national standard for timeliness of CWA inspection report completion, so the criteria for timeliness contained in the state EMS should be used. Where the state EMS does not contain a timeframe, the reviewers should use a threshold of thirty days for timeliness evaluations (this is the timeframe that EPA has recommended for its own reports) and consider making a recommendation that the State supplement the EMS to establish a timeframe, particularly if the average time to complete reports is more than 30

days. In most cases, the EMS deadlines for completing the reports contain caveats, recognizing that there may be valid reasons for not issuing a report, or for issuing the report beyond the established deadline. In these instances, where a report has not been written, or has been completed after the prescribed deadline, the reviewers should consider the particular circumstances that resulted in the delay, and discuss them in the report. If reports that are not completed within the state's prescribed timeframe meet the exceptions provided in state guidance they should nonetheless be considered timely.

In addition to simply recording the percent of reports that were timely, reviewers may also find that discussions with the state are enhanced if mean, average and maximum timeframes are computed. This is helpful because, for example, finding that fifty percent of the reports were late but the average length of time to complete reports was less than the time allotted in state guidance should result in a different recommendation than a finding that fifty percent of the reports were late, and the average length of time to complete them exceeded the allotted time by two weeks. One issue that has arisen is how to factor in results for reports that are undated. While there is no right answer to this question, in order to ensure consistent interpretation of findings, the following guidance should be used. Where a report is undated, but the report has been sent to the permittee, or others, it is appropriate to use the date on the cover letter to evaluate the timeliness of the report. Where the report is undated and there is no other documentation that might give evidence to the date by which the report was completed, this should be noted, the report should not be considered timely, and that report should be counted in the denominator, but not the numerator, in calculating the percentage of reports that are timely.

While it will be useful for the state to be provided the findings under this metric, recommendations resulting from the findings should be considered carefully given that there is not a prescribed timeframe provided in national guidance. As noted above, if based upon the file reviews, the timeframe for report completion averages more than 30 days, and the state has not developed its own definition of timeliness, it may be appropriate to recommend that the state do so.

**Element 9 – Enforcement Actions Promote Return to Compliance.** Degree to which state enforcement actions include required corrective action (i.e., injunctive relief or other complying actions) that will return facilities to compliance in a specific time frame.

**File Review Metric 9a** – Enforcement responses reviewed.

**Description of Metric** – Number of formal/informal enforcement responses reviewed.

This metric establishes the universe to be used in calculating the percentages in 9b and 9c. NOTE: This number is not necessarily the same as the number of enforcement files reviewed. This is because, in the course of reviewing an inspection file, it may be necessary to review a subsequent enforcement action. The reviews of those additional enforcement actions should be included in the evaluation, even where they occur after the year under review.

**File Review Metric 9b** – Responses that have returned or will return a source in serious and/or chronic noncompliance to compliance.

**Description of Metric** – Percent of enforcement responses that have returned or will return a source to compliance.

Source 1 states that serious and/or chronic violations should be responded to in a timely and appropriate manner. The responses should reflect the nature and severity of the violation and, unless there is supportable justification, the response must be a formal action or a return to compliance by the permittee. In the rare circumstance when formal enforcement action is not taken, there should be a written record that clearly justifies why the alternative action (*e.g.*, informal enforcement action or permit modification) was more appropriate. This record might take the form of a “violation summary.” (Source 1 Chapter III, Attachment B, p.2 and Source 2, May 29, 2008 Supplemental Memorandum) A formal enforcement action is defined (Source 1 Chapter 2, Page 24) as one which includes injunctive relief. Consequently, the expectation in EPA’s national guidance is that ongoing serious and/or chronic violations that remain unaddressed will be subject to an enforcement action which contains requirements that will return the facility to compliance, if the facility has not already returned to compliance.

**File Review Metric 9c** – Responses that have returned or will return sources with non-serious and/or chronic violations to compliance.

**Description of Metric** – Percent of enforcement responses that have returned or will returned a source with non- serious and/or chronic violations to compliance.

Information Source 1 suggests a range of enforcement responses that may be appropriate for certain categories of violations, and suggests that states should develop similar guidance. Not all of these actions contain injunctive relief, yet they may be effective in returning a facility to compliance. The action taken should be reviewed to determine if it has returned a facility to compliance, or contains a schedule to return the facility to compliance.

**Element 10 – Timely and Appropriate Action.** Degree to which a state takes timely and appropriate enforcement actions in accordance with policy relating to specific media.

**File Review Metric 10b** - Enforcement responses reviewed that address serious and/or chronic noncompliance in a timely manner.

**Description of Metric** – Percent of reviewed enforcement responses to address serious and/or chronic noncompliance that are taken in a timely manner.

This file review metric is used to assess the accuracy of data metric 10a. Relevant dates in the file (*e.g.*, date of enforcement action(s), date violations were determined) should be reviewed.

**File Review Metric 10c** – Enforcement actions reviewed that are appropriate to the violations.

**Description of Metric** – Percent of enforcement responses reviewed that address noncompliance are appropriate to the violations.

All serious and/or chronic violations should be responded to in a timely and appropriate manner. The responses should reflect the nature and severity of the violation and, unless there is supportable justification, the response must be a formal action or a return to compliance by the permittee. In the circumstance when formal enforcement action is not taken, there should be a written record that clearly justifies why the alternative action (e.g., informal enforcement action or permit modification was more appropriate). This record might take the form of a “violation summary.” (Source 1 Chapter III, Attachment B, p.2 and Source 2, May 2008 Supplemental Memorandum) The term “formal enforcement action” is defined in Source 1, Enforcement Response Guide, p. 11 and Chapter 2 page 24. Care must be taken to use the criteria in Chapter 2, page 24, rather than the name of a state action, to determine whether or not the action is a formal action. For example, a State NOV may contain all the necessary attributes of a formal action, whereas this is not the case for Federal NOVs. Similarly, a federal penalty order does not contain injunctive relief and therefore is not a formal enforcement action under the agency definition cited above. However, states often are able to issue penalty orders that include injunctive relief. If these orders meet the other criteria specified in the definition of formal enforcement action, then these state penalty orders would be considered formal enforcement actions. Where a state administrative action is not found to be a formal enforcement action, it is often because it does not meet the criterion of being independently enforceable.

Reviewers should determine for all enforcement files involving serious and/or chronic noncompliance at CAFO facilities, whether or not the guidance discussed above has been met. To the extent that the guidance has not been met, and there is no supporting documentation in the file to justify the exception, a recommendation should be made to adhere to the guidance.

**File Review Metric 10d** – Enforcement responses reviewed that appropriately address non- serious and/or chronic violations.

**Description of Metric** – Percent of enforcement responses reviewed that appropriately address non- serious and/or chronic violations.

This metric pertains to violations at minor permittees. The range of acceptable enforcement responses can be found in Chapter II of Source 1. If the state has established similar guidance in an EMS developed in consultation with the Region, the state guidance should be used to evaluate this metric. Each enforcement response that is not related to serious and/or chronic should be evaluated against the relevant guidance.

Particular attention should be paid to repeat or multiple violations of the same nature, as often there is an elevated response that is identified as appropriate in these cases.

Reviewers should calculate the percent of times that enforcement responses are not consistent with the applicable guidance. Where this percent is significant (considering both the size of the percentage, as well as the degree to which the individual responses vary from the recommended response) an appropriate recommendation should be made.

**File Review Metric 10e** – Enforcement responses that address non-serious and/or chronic violations in a timely manner.

**Description of Metric** – Percent of enforcement responses for non-serious and/or chronic violations where a response was taken in a timely manner.

Source 1 (Chapter 2, Appendix B, page 3) states that due to a variety of factors, no specific timeliness criteria have been established for this category of noncompliance. Source 1 (Chapter 2, Page 18) further indicates, however that states should develop appropriate timeframes for response to “obvious noncompliance”. Where a state has developed such timeframes, the timeliness of enforcement actions should be evaluated against the state standards, and recorded in the findings. Where the state has not established such standards, a recommendation to do so should be made.

**Element 11 – Penalty Calculation Method.** Degree to which state documents in its files that initial penalty calculation includes both gravity and economic benefit calculations, appropriately using the BEN model or other method that produces results consistent with national policy.

**File Review Metric 11a** – Penalty calculations reviewed that consider and include where appropriate gravity and economic benefit.

**Description of Metric** – Percentage of penalty calculations that consider and include where appropriate gravity and economic benefit.

This metric evaluates the extent to which the state considers economic benefit and gravity in cases where penalties are proposed. EPA’s Supplement to the Policy Framework for State/EPA Enforcement agreements (Source 12) voices an expectation that states recoup at least the economic benefit a violator gained through noncompliance (page 5).

It is EPA policy not to settle for less than the amount of economic benefit of noncompliance, where it is possible to calculate it, unless (1) the benefit component is a *de minimis* amount, (2) a violator demonstrates an inability to pay, (3) there is a compelling public concern, or (4) there are litigation-related reasons for such settlement. State enforcement agencies should calculate and assess the economic benefit of noncompliance in negotiations and litigation except under these circumstances. Where state statutory authority would not specifically authorize recovery of economic benefit,

EPA still expects states to make a reasonable effort to calculate economic benefit and to attempt to recover this amount in negotiations and litigation using the states own criteria.

States are encouraged to use EPA's BEN model, but are not required to do so, as long as the model that they use a consistent alternative model. States are also expected to consider "an additional amount reflecting the seriousness of the violation" and this is referred to as the "gravity component" of the penalty. Finally, Source 12 indicates (page 8) that State and local agencies should include documentation of the penalty sought, including the calculation of economic benefit, where appropriate.

In evaluating whether or not economic benefit was considered, reviewers should determine if documentation exists to show that economic benefit was calculated. If such documentation does not exist, reviewers should determine if documentation exists showing that one of the four exceptions applies. Either of these situations indicates that economic benefit was considered.

Reviewers should record the percent of files that show that economic benefit was considered, the percent that document that gravity considered and the percent that document both were considered. Where the file reviews reveal that these factors have not been considered or that consideration has not been documented a recommendation to document that these factors have been considered should be included.

**File Review Metric 12b** – Penalties collected.

**Description of Metric** – Percent of enforcement actions with penalties that document collection of penalty.

The universe of files reviewed is those files for which penalties have been assessed, and the due date for the payment has passed. Files should be reviewed for documentation that a penalty has been paid. Where a settlement allows for a series of payments, documentation should be provided for all dates that have passed. It may be that the state has an electronic system for documenting payments made; if so, this system should be reviewed. Under Source 12, development of written penalty policies and procedures by states is strongly encouraged. A system for maintaining accurate recordkeeping is a recommended component of these policies. Where the state has no system for documenting payment and such documentation is frequently lacking in the files, a recommendation for establishing a written procedure for doing so should be made.

## **Appendix D-1 List of Acronyms**

**Note:** This is not a complete list of acronyms used in this document. It includes only those acronyms that are not frequently used in the Agency lexicon, or which have multiple meanings in the Agency lexicon.

<b>CMS</b>	Compliance Monitoring Strategy. When the reference is to the National CMS, the reference is to Source 9, above.
<b>EMS</b>	Enforcement Management System. In this document, EMS ALWAYS means Enforcement Management System. Elsewhere in the Agency, the acronym is used in reference to an Environmental Management System; however that term is not used in this document.
<b>EnPPA</b>	Environmental Performance Partnership Agreement.
<b>FFY</b>	Federal Fiscal Year (October 1 through September 30)
<b>SRF</b>	State Review Framework. In this document, SRF ALWAYS refers to the State Review Framework. If reference is made to the State Revolving Fund, that term is spelled out.

**Appendix D-2  
Clean Water Act  
File Review Checklist  
Illinois CAFO Review**

**Instructions:** This checklist is divided into three parts. The first part, containing general background information, is to be completed for all file reviews. The second part is to be completed for inspection files, and the third part for enforcement files. In certain cases, where the inspection file leads to an enforcement action, or where an enforcement action is based in whole or in part on an inspection, all parts of the checklist should be completed. To assist in evaluating Parts II, A. and II, B., an inspection report checklist has been prepared. This checklist is attached and should be completed for each inspection report reviewed. Finally, a companion document, the "Plain English Guide to the CWA Metrics" provides additional information on the purpose, meaning and relevant policy and guidance for each of the metrics, and should be consulted if questions arise in completing this file review checklist.

**Part I Background Information**

- A. State Agency Being Reviewed: Illinois**
- B. Date of the Review:**
- C. Location of the Review:**
- D. Names of State Participants:**
- E. File Reviewer:**
- F. Facility Name:**
- G. NPDES Permit Number (if applicable):**
- H. Permittee Location:  
(street address if available, and  
City where discharge occurs. If State  
has district or regional offices, that  
information should also be included)**

**I File Selection Criteria: Check each item that is selected to analyze in the facility file:**

Representative District Office _____ Permitted CAFO?: Yes _____ No _____ Facility Size: Large _____ Medium _____ Small _____ Facility Type: Feedlot _____ Dairy _____ Swine _____ Poultry _____ Other _____	Inspection: Initial _____ Follow-up _____ Permit/Compliance Schedule Violations _____ Enforcement Response: NCA _____ VN _____ CCA required _____ Penalty _____
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**Part II Inspection File Review**

**A. Is the inspection report complete? (Metric 6b)** (The CWA Inspection Checklist should be used to document this finding. An inspection is complete if all elements identified in the checklist are present).

Yes \_\_\_\_\_ No \_\_\_\_\_

**Comments:**

**B. Does the inspection report provide sufficient information so that subsequent reviewers are able to determine the compliance status of the facility? (Metric 6c)** (Generally if all components of the checklist are present, the report would provide sufficient documentation to make this finding. Where the report is not complete, it may still be possible to determine the compliance status, if at least sections IV,V and VI of the checklist are present)

Yes \_\_\_\_\_ No \_\_\_\_\_

**Comments:**

**C. 1) How long did it take to complete the inspection report? 2) Was the inspection report completed on time? (Metric 6d)** (There is no national standard for timeliness, so the criteria for timeliness contained in the state EMS should be used. Where the state EMS does not contain a timeframe, the reviewers should use a threshold of thirty days for timeliness evaluations. Reviewers should record the length of time that it took to complete the report, so that mean, average and maximum timeframes can be computed).

Number of days \_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_

**Comments:**

**Was the Inspection report transmitted to the facility?**

Yes \_\_\_\_\_ No \_\_\_\_\_

**D. Did the inspection report lead to a compliance determination?**

**(Metric 7e)** Reviewer should look for evidence that a compliance determination was made and the report was signed by management or senior enforcement officers. (The state EMS will generally describe the review process and identify the personnel who are responsible for making this determination)

Yes \_\_\_\_\_ No \_\_\_\_\_

**Comments:**

**Was a discharge documented?**

Yes \_\_\_\_\_ No \_\_\_\_\_

### **Part III Enforcement File Review**

**A. Has or will the enforcement response for a violation returned the facility to compliance? (Metric 9b)** The action should be reviewed to determine if it has returned a facility to compliance, or contains a schedule to return the facility to compliance. If either of these circumstances exists, the answer is yes.

Yes \_\_\_\_\_ No \_\_\_\_\_

**Comments:**

**Did the enforcement response direct the facility to apply for a NPDES permit?**

Yes \_\_\_\_\_ No \_\_\_\_\_

**B. Were the violations addressed in a timely manner? (Metric 10b)** The relevant national guidance provides that violations must be responded to in a timely and appropriate manner. The responses should reflect the nature and severity of the violation and, unless there is supportable justification, the response must be a formal action or a return to compliance by the permittee.. In the rare circumstance when formal enforcement action is not taken, there should be a written record that clearly

justifies why the alternative action (e.g., informal enforcement action or permit modification was more appropriate. This record might take the form of a "violation summary." The action should be reviewed to determine if this timeline was met. Particular attention should be paid to repeat or multiple violations of the same nature, as there often is an elevated response that is identified as appropriate in these cases.

Yes \_\_\_\_\_ No \_\_\_\_\_

**Comments:**

- C. **Were enforcement actions appropriate? (Metric 10c)** The relevant national guidance indicates that violations must be responded to in a timely and appropriate manner. The responses should reflect the nature and severity of the violation and, unless there is supportable justification, the response must be a formal action or a return to compliance by the permittee.. In the rare circumstance when formal enforcement action is not taken, there should be a written record that clearly justifies why the alternative action (e.g., informal enforcement action or permit modification was more appropriate. This record might take the form of a "violation summary." The action should be reviewed to determine if it was appropriate -- i.e., a formal action or written justification to support an alternative action.

Yes \_\_\_\_\_ No \_\_\_\_\_

**Comments:**

**Appendix D-3**  
**CWA Inspection Report Evaluation Guide**  
**CWA NPDES Inspection Report Completeness Checklist**

Check  
 One if  
 report is  
 complete

**Instructions:**  
 Use this checklist to assess whether the inspection report is both complete and contains sufficient information to make an accurate determination of the conditions at a facility. Use the comment fields to elaborate on the observations in the inspection report.

Ye  
 s

No

**I. General Information**

**I.a. Inspection date(s) and Time of Inspection**

(Check “yes” only if both pieces of information are present in the inspection report. If “no” indicate missing information in the comment field below.)

**I.b. Type and purpose for the inspection.**

(The type of inspection should be included using the list of codes on the NPDES Compliance Inspection Form 3560-3 or similar state list (or nomenclature). The purpose could be a compliance inspection, a follow-up inspection, a state or national priority, etc.)

**I.c. Facility Information**

(Facility name, address, and telephone number. Check “yes” only if all pieces of information are present in the inspection report. If “no” indicate missing information in the comment field below.)

**I.d. NPDES, SPDES ID, or Other ID Number**

**I.e. Inspection participants**

(Are all major inspection participants identified in the report, including, as appropriate, federal, state, local inspectors, other agency representatives, facility representatives and consultants?)

**I.f. Comments:**

**II. Facility Information**

**II.a. Facility description and areas evaluated**

(Does the report provide general information on the type of facility (i.e., number of animals/size, type of animals, etc.), and other pertinent information such as size in acres, normal hours and days of operation, and/or number of employees?)

**II.b. Description of NPDES regulated activities pertinent to the inspection**

(Does the report describe NPDES permit(s) status (e.g., unpermitted, active, expired, under appeal, etc.); NPDES regulated activity on-site including a description of the facility operations that generate waste and discharge to navigable waters? Check “yes” only if all pieces of information are present in the inspection report. If “no” indicate missing information in the comment field below.)

NOTE: If detailed facility-specific information describing the NPDES regulated activities pertinent to the inspection being reviewed are contained in earlier inspection reports contained in the facility file, those may be cross-referenced and considered when evaluating inspection report completeness under this item, and should be noted (including

the date of the inspection report being cross referenced) in the comment field below.)

- II.c. Regulated areas evaluated during inspection**  
(Does the report identify the areas evaluated during the inspection, for example, pertinent records/reports, effluent/receiving waters, flow measurement, self-monitoring program, compliance schedules, permit conditions, facility site review, operations and maintenance, manure handling/disposal, storm water,)  
**II.d. Comments:**

### **III. Inspector Observations and Documentary Support of Observations**

- III.a. Narrative Description of Field Activities Conducted (and Sampling, if appropriate)**  
(Does the narrative describe all field activities and any sampling conducted?)
- III.b. Permit Requirement (or Regulatory Citation, if appropriate)**  
(Does the report specify the appropriate information on permit requirement(s) relevant to the inspection? If there is no permit, if available, does the report provide the relevant state or federal regulatory citation(s)?)
- III.c. Observation(s) made regarding permit requirements (or regulatory citation, if appropriate)**  
(Does the report provide specific observation(s) pertinent to the permit requirement(s) (or state or federal regulatory citation(s))?)
- III.d. Information to support the observation(s) that are made**  
(Does the report provide factual information supporting an observation in one or more of the following four categories: 1) sample(s), 2) photo(s) and a photo log (if taken and needed), 3) record(s) or report(s), or 4) statement(s) by the facility representative(s)?)
- III.e. Inspection checklists**  
(Complete this question if a checklist(s) was used pursuant to state inspection policy. If yes, specify the checklist(s) used.)
- III.f. Corrective actions**  
(Does the report provide factual information on any actions taken by facility during the inspection to address areas of concern or deficiencies (potential violations), if applicable.)
- III.g. Report date and signatures**  
(Is the inspection report signed and dated by the responsible agency representative(s)?)
- III.h. Comments:**

### **IV. Inspection Report Sufficiency**

- IV.a. Overall Assessment of Inspection Report Sufficiency**  
(Is the information contained in the inspection report (and supporting documentation) sufficient to make a compliance determination? If "no" the reviewer should describe in the comment field below the reasons for the assessment that it is not sufficient.)
- IV.b. Comments:**



Attachment D- ILLINOIS EPA LIST OF CAFOS REQUIRED TO OBTAIN NPDES PERMIT

PROVIDED BY IEPA 4/14/09  
PERMIT REQUIRED

Applicant	NPDES #	County	Region Assigned	CAFO Type	Application Received	PRIORITY	Application Sent to FOS	9/12/08: FOS ACTION NEEDED	FOS ACTION TAKEN	ACTION NEEDED 3/31/09
Allen Barry Livestock	IL0067229	Ogle	Rockford	Cattle	4/2/2001		7/15/2008	Complete review of application/NMP by 9/15/08	no NMP in file - notice of incomplete submission sent 7/25/08. Granted extension to file NMP until 11/29/08. 12/17/08 consultants delivered NMP on 12/18/08 - under review. 2/3/09 FOS completed review of NMP - all document.	Refer to Region 5
Andrews Swine Farm	IL0072842	Henry	Peoria	Swine	3/2/1998		9/19/2008	Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.	1/17/08 Review letter sent. 12/17/08 needs 30-60 day extension to develop site water. Add emergency plans 2/3/09 add notice sent to applicant on 10/19/08. Response letter received 1/17/09 requesting extension to 4/1/09. FOS spoke w/ consultant on 3/25/09. Consultant will submit additional info. Letter submitted 3/30/09 - under review.	FOS to review 3/30/09 letter
Arlington Int'l Racecourse	IL0063487	Cook	Rockford	Horse Farm	3/27/2001		9/19/2008	Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.	1/30/08 LH has not been there yet. 12/17/08 not reviewed at 03296.	FOS to inspect initiate review. initiate review.
	ILA010045	Clay	Marion	Swine	2/27/2009		3/31/2009			
	ILA010046	Clay	Marion	Swine	2/27/2009		3/31/2009			
	ILA010047	Clay	Marion	Swine	2/27/2009		3/31/2009			
	IL0072613	Henderson	Peoria	Cattle Feedlot	10/22/1997		9/19/2008	Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.		Issue permit
Cain Cattle Farm	ILA010021	Montgomery	Springfield	Cattle	12/16/2008		1/7/2009		9/2/08 VN sent which req'd permit application - 1/30/09 permit may not be necessary - field visit needed to verify after facility makes changes permitted to in VN response. 2/3/09 UPDATE FOS has not reviewed the application. Will need to conduct a site visit to determine if the facility still needs a permit as they have installed some improvements/alterd management practices.	FOS to inspect. BJY discussed with JH on 3/31/09 - open concrete tank. Need to make decision on pmt.
Christensen Farms - Newman	ILA010011	Douglas	Champaign	Swine	8/20/2005		7/15/2008	Complete review of application/NMP by 9/15/08	6/10/08 Review letter sent. 3/8/09 processed to approve permit application.	
Cold Springs Farm	IL0078395	Jo Daviess	Rockford	Cattle Feedlot	1/4/2007		7/15/2008	Complete review of application/NMP by 9/15/08	1/16/08 LH has reviewed permit applic. Did a site visit on 10/23/08. Waiting for the OAMP completion from Mader. Note: 12/17/08 in review. waiting for NMP. 2/3/09 FOS reviewing for NMP. 3/2/08 FOS reviewed NMP.	FOS to review NMP.
Cosley Animal Farm-Wheaton	IL0070248	DuPage	Rockford	Animal Farm	10/27/1985		9/19/2008	Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.	12/17/08 LH to see DPRO staff to see if site is still an existing site. Under review as 12/9/08. 11/17/08 need to advise DLO of CD violation for not submitting complete application. 1/3/09 FOS reports the they require file for inspection-NMP incomplete.	DPRO to inspect. Await outcome of current CD Violation actions. FOS will issue review letter on current documents.
Douglas Farm	ILA010019	Bureau	Rockford	Swine	9/23/2006		10/8/2008	Complete review of application by 12/08/08		
	ILA010003	Henderson	Peoria	Swine	10/25/2004		7/15/2008	Complete review of application/NMP by 9/15/08	12/17/08 FOS visited site on 11/12/08. Plans to be submitted during 11/12/08. Reinspection/allow inspection required to the owner's site that the NPDES permit was necessary and the supporting plans needed to be submitted. Following the inspection, talked to Terry Feldmann P.E. Mader & Sons, Inc. and explained that the permit was necessary. At that time explained that the supporting plans needed to be submitted. In his December 2008 Mr. Feldmann submitted a FOD project to RD for all inspection reports in 2007 & 2008. Copies of inspection reports were submitted to RD on 1/14/09 in response to the request. Since the FOD report, copying has been submitted by the facility on 30 behalf of the facility. 3/2/08 UPDATE: On September 19, 2008, the Agency sent the facility a 2nd notice of incomplete submission letter. Next, a telephone call was received from Terry Feldmann, P.E. Mader & Sons, Inc. The consultant had concerns as to the applicability of the permit. Therefore, a Response/Letter Inspection was conducted on November 10, 2008. No major changes were observed during the visit. However, based upon the facility's waste management system to Lewis Creek and the potential for the system to overflow, the facility representative was told to the end of	Issue Permit
Gene Bank of N. America	ILA010012	Perry	Marion	Cattle	8/11/2008		7/25/2008	Complete review of application/NMP by 9/15/08		Refer to Region 5



Marchhart - Obrien South Ridge	ILA010033	Pike	Springfield	Swine	2/27/2009	HIGH	3/31/2009		Initiate review.
Marchhart - Roll Oak Farms	ILA010049	Clinton	Marion	Swine	2/27/2009		3/31/2009		Initiate review.
Marchhart - Schwartzkopf	ILA010052	Washington	Marion	Swine	2/27/2009		3/31/2009		Initiate review.
Marchhart - White North	ILA010050	Fayette	Marion	Swine	2/27/2009		3/31/2009		Initiate review.
Marchhart - White South	ILA010051	Fayette	Marion	Swine	2/27/2009		3/31/2009		Initiate review.
Midwest Poultry Service LP - Loda	IL0076961	Iroquois	Champaign	Poultry	8/20/2003	HIGH	7/15/2008	Complete review of application/NMP by 9/15/08	FOS to review response.
Mondt Dairy Farm	IL0078522	Clinton	Marion	Dairy	7/13/2007	HIGH	7/15/2008	Complete review of application/NMP by 9/15/08	Refer to Region 5
Norman Feedlot - Oregon	ILA010016	Ogle	Rockford	Cattle Feedlot	7/6/2006	HIGH	7/15/2008	Complete review of application/NMP by 9/15/08	Issue permit
North Fork Pork - Carthage	IL0077399	Hancock	Peoria	Swine	6/28/2004	HIGH	7/25/2008	Complete review of application/NMP by 9/15/08 Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.	FOS to call consultant. FOS to inspect and make decision on the need for a permit.
Perkinson Porkville	IL0061611	Iroquois	Champaign	Swine		HIGH			
Pinnacle Genetics LLC	ILA010002	Hancock	Peoria	Swine	6/28/2004	HIGH	7/25/2008	Complete review of application/NMP by 9/15/08	FOS to call consultant.
Pork Chop Ridge	IL0062529	Woodford	Peoria	Swine		HIGH		Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.	FOS to review application.
Randy Edmund Farm	IL0077178	Henry	Peoria	Swine/Cattle	1/15/2004	HIGH	7/15/2008	Complete review of application/NMP by 9/15/08	Issue permit
Roll Oak Farms	ILA010048	Wayne	Marion	Swine	3/9/2009		3/31/2009		Initiate review.

10/31/08 review letter. 12/17/08 need at end of 2008 to submit plans. 3/30/09 FOS has response review in process.

9/15/2008 review letter. 12/17/08 not responding--FOS to check with Region 5 about AO. On 1/19/09, FOS received a call from Mr. Mondt. He indicated that the construction of the waste containment system was completed. FOS inquired about removal of the open dumped items on the property that were cited in the VN. He indicated that they have not been removed. FOS explained that all apparent violations had to be corrected. FOS also asked about submittal of the NPDES Permit supportive plans. He recommended that FOS talk to his engineering consultant. Therefore, FOS called Chris West, P.E., Frank & West Environmental Engineers, Inc. FOS explained that the Agency had reviewed the facility's NPDES permit application and a letter had been sent to the facility listing the deficient items. He was unaware of the review letter. FOS explained that the items noted in the letter needed to be submitted to Agency for review. Therefore, Mr. West submitted a FOIA request for the Mondt file. Since the FOIA request, nothing has been submitted by the facility or on behalf of the facility. 3/31/09 UPDATE On March 27, 2008, an inspection of the facility was conducted by U.S. EPA, Region 5. Following the inspection, an Order for 11/8/08 LH needs to do a site visit. Have reviewed permit applic. 12/17/08 can issue perm. 2/3/09 FOS visited in 12/08 and will again in 2/09.

10/1/2008 review letter. 12/17/08 TH reviewing plans. 3/31/09 FOS to call consultant and request additional info.

12/17/08 need field visit. 3/30/09 Facility to be inspected late spring/early summer 2009.

10/1/2008 review letter. 12/17/08 reviewing plans. 3/31/09 FOS to call consultant and request additional info.

12/17/08 FOS to prepare review letter. 12/19/08 EA contacted Blunier and sent another copy of the 12/17/07 letter. He will respond within 60 days. 3/31/09 FOS spoke w/ Blunier on 12/31/08. He submitted letter requesting extension on 1/14/09. FOS spoke w/ Blunier on 2/23/09 and sent fax. He submitted permit application on 3/17/09. Review needed.

EA spoke with Randy Edmund's attorney last week (11/27/08) or the week before. He faxed a brief letter following the phone call and intends to submit a complete response to the NPDES Review letter in the next few days. 10/1/2008 review letter. 12/17/08 FOS to check on status of response. 3/31/09 issue Permits (3/3/09).

Under Review  
Issue Permit (?)

## **Attachment C- Case Studies of Illinois EPA CAFO Permitting Compliance and Enforcement Activities**

The following case studies summarize the Review Team's observations from selected file reviews, and are representative of the files reviewed. These observations provide the bases for many of the findings in the report.

### **Jerry Grauf Farm/JK Pork**

This swine facility had originally submitted an NPDES permit application in 1997. The following year Illinois EPA replied to JK Pork with a notice of incomplete submission of application. The notice was followed by a Consent Order entered in the Hancock County Circuit Court in 1999. The Consent Order required the facility to cease discharges from its onsite lagoon, and to apply for a NPDES permit. The facility also agreed to a penalty, and to two Supplemental Environmental Projects, at that time. In 2002, the enforcement case file was closed.

A CAFO facility inspection was conducted by the Peoria Field Office in January 2007 as follow-up to the 1999 Consent Order, in order to determine whether or not the facility required an NPDES permit.

This permit application remained in the Illinois EPA central office until 2008, when it was sent to the Peoria Regional Office. In late 2008, the Peoria Office informed the Illinois EPA Bureau of Water that the permit could be issued based on the information provided in 1999<sup>1</sup>.

**Case-specific Findings:** The CAFO was mandated by court order to apply for an NPDES permit following a discharge event documented by Illinois EPA. A permit had not been issued in the ten years following application.

### **Bradford Pig Palace/Cowser Feedlot**

This swine operation, under the name "Bradford Pig Palace," had an individual NPDES permit from 1994-99. An Illinois EPA inspection report documented that the operation had been the source of a large spill that occurred in March 1997. A Section 43 Injunction was issued by the State Attorney General's office in response to the spill. Cowser Feedlot leased the facilities from Bradford Pig Palace in March 1999. A reconnaissance inspection was conducted in April 2002; the Illinois EPA inspector noted that no complaints had been received at that point in time since operation of the facility had changed. The facility submitted a permit application in 2003. Illinois EPA conducted another inspection in 2005. At the time of the inspection, the operation was reportedly expanding from 1200 to 2300 sows. The report from the 2005 inspection indicated that the operation would be a CAFO as a result of the expansion, but did not confirm it would be a Large or Medium CAFO upon expansion, and did not discuss the CAFO's permit

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<sup>1</sup> Illinois EPA's 2008 inspection determined that while no hogs were onsite at the time of the inspection, three waste lagoons remained at the facility. Illinois EPA reaffirmed the need for the facility to be permitted.

application. The report indicated that no apparent compliance issues were noted. As a result of the inspection, Illinois EPA included the facility on its list of CAFOs that did not need a permit (See Attachment D).

In March 2007, the operation reported a 1000 gallon spill to the Illinois Emergency Management Agency (IEMA). According to the IEMA report, about 1000 gallons of liquid hog waste was spilled due to a rodent hole in the berm surrounding the lagoon. Without a permit, this discharge was not a violation of a permit condition (i.e. inspection and maintenance of storage structures). If such conditions had been complied with, the discharge may have been prevented.

***Case-specific Findings:*** The CAFO had a discharge from its lagoon subsequent to Illinois EPA's determination that it did not need an NPDES permit. The operation was included on Illinois EPA's list of CAFOs that did not need permits, despite it having submitted an application.

### **Byington Farm/Judd Farm**

The Byington Farm, a large cattle operation in Kane County, Illinois, was associated with a fish kill in 1998 under a prior owner. At that time, regional office staff requested that Illinois EPA's Bureau of Water issue a Violation Notice, and a Court Order was filed by the Illinois Attorney General's office. The facility was subsequently vacant for several years. The facility resumed operation as Judd Farm. As of 2007, the facility had 1300 feeder cattle. In September 2007, Illinois EPA's Rockford Regional Office again recommended that the Bureau of Water issue a Violation Notice to the facility, indicating that the water quality issues in the 1998 inspection had not been addressed.

A Violation Notice was issued in December 2007. The Notice required the facility to cease discharges; develop a manure management plan; channel excess storm water to a subsurface tile; and properly dispose of mortalities. In February 2008, Illinois EPA accepted Judd Farm's Compliance Commitment Agreement. Neither the Violation Notice nor the Compliance Commitment Agreement compelled the facility to apply for a NPDES permit.

***Case-specific Findings:*** Illinois EPA's enforcement action did not address the CAFO's failure to apply for an NPDES permit. The lack of effective enforcement against a known discharger contributed to long-standing water quality issues.

### **Christensen Family Farms-Newman**

This swine facility was previously the subject of complaint and investigation in 1995 while operating as Heartland Pork. In April 2002, a new complaint was made about the facility, then operating as Christensen Family Farms-Newman. An inspection was conducted on April 29, 2002 in response to an anonymous complaint of discharge of manure to a stream.

Basic facility information, including the address of the facility, and the number and type of animals located therein, were not provided in the inspection report. No description of the general operational parameters of the facility was provided. A storage structure was examined, but other parts of the facility do not appear to have been inspected. No evidence was noted of any discharge at the time of the inspection.

Land application of manure was implicated in the spill, though no application was occurring at the time of the inspection. The facility had reportedly told the inspector that they would notify Illinois EPA when land application was to resume, although no further record of follow-up was provided in the case file. No enforcement action was taken in response to this inspection.

According to the case file, additional anonymous complaints about the facility were submitted to Illinois EPA in December 2004, and in April 2005. None of the three complaints were recorded in any centralized database; the information was only available in the Field Office files.

The facility applied for an NPDES permit in June 2005, but requested to withdraw its application in March 2009. Illinois EPA had not made a final decision on this request at the time of EPA's review.

***Case-specific Findings:*** Christensen Family Farms was inspected in response to a 2002 citizen complaint. The inspection performed was inadequate to determine whether or not the facility required an NPDES permit, and no specific NPDES requirements were included in the report. Subsequent complaints were received regarding the facility, but no informal enforcement or subsequent inspections appear to have resulted from any of these complaints. It is unclear whether or not Illinois EPA recommended the facility apply for a permit.

### **Diekemper Dairy**

Diekemper Farm, a large dairy feed lot, has been the subject of various odor and land application-related complaints. The history of complaints goes back as far as 2001, when a discharge complaint was made. While Illinois EPA reportedly conducted an inspection in response to the discharge, the field inspection report was missing from the records reviewed. In September 2003, there was an odor complaint about the facility, followed by an Illinois EPA inspection. A letter regarding manure management practices was sent to the facility. A week following this incident, another manure management complaint was issued, again soliciting a response from Illinois EPA in the form of a manure management practice sheet. In October 2003, Illinois EPA conducted another inspection following a miscellaneous complaint. In November of the same year, a Noncompliance Advisory letter was sent to Diekemper.

In February of 2004, Illinois EPA sent a Violation Notice to the facility, citing eight violations. The Violation Notice required the facility to submit a Compliance Commitment Agreement. Illinois EPA provided four recommendations to bring the facility back into compliance. The Compliance Commitment Agreement submitted by the facility was rejected in April 2004 as insufficient. The rejection letter recommended the facility to apply for a permit, as the facility was continuing to discharge.

In October 2004, Illinois EPA issued a Notice of Intent to Pursue Legal Action to the facility. A meeting was held with the facility in an attempt to resolve the violations. While the outcome of the meeting is unclear, based on documentation within the case file, it is apparent that the case did not proceed.

The facility was the subject of a complaint in December 2005, regarding a winter land application of manure. Inspectors sent another manure management practice sheet to the facility. This process was repeated in June 2006. In May 2006, another discharge complaint was made to Illinois EPA. During the inspection following this complaint, the inspector observed no improvements to the operating procedures of the facility. A construction project required by Illinois EPA had not yet begun, and a need for further monitoring was noted. Illinois EPA conducted another inspection in October 2006, following a complaint of the facility. The inspection included samples taken directly upstream and downstream of the facility. Inspection results were well-documented with appropriate regulatory citations and recommendations to bring the facility back into compliance. Another Violation Notice with a Compliance Commitment Agreement was issued to Diekemper the same month. Soon thereafter, the facility was vacated due to bankruptcy and the file on the facility was closed by Illinois EPA.

***Case-specific Findings:*** Inspectors responded to repeated, ongoing complaints with a series of inspections. Inspection findings were adequately documented. Water quality impacts were evident. Illinois EPA made several attempts to escalate informal enforcement against the facility, but did not proceed to formal enforcement despite the fact that there were repeat violations and clear water quality impacts. Through an informal enforcement mechanism, the Illinois EPA did recommend the facility apply for a permit, but there was no consequence to the facility's failure to do so. A formal administrative and/or judicial action with penalty should have been pursued against the Diekemper facility.

### **McChesney Cattle & Swine Farm**

The McChesney Cattle and Swine farm is a large swine facility which has been operating and discharging without an NPDES permit. Between 1997 and 2001, inspectors visited the McChesney Farm three times. Several citizen complaints were lodged during that timeframe. At the time of a 1999 inspection, a discharge from the facility was documented, and a stream containing manure was found to be running through the feedlot. Sampling by the Field Office showed the stream contained high levels of nutrients. The water body to which the stream emptied was determined by an aquatic biologist to be chronically impaired with significant harm posed to fish populations. The Illinois EPA regional office subsequently referred the case for enforcement through a Violation Notice. The Violation Notice identified that the facility was discharging without a NPDES permit, but did not include notice of the requirement to apply for an NPDES permit. Citizen complaints continued from 2002-2007 while enforcement actions taken by Illinois EPA began informally. Enforcement steadily progressed from the issuance of a Noncompliance Advisory to a Violation Notice, to a Notice of Intent to Pursue Legal Action. A Consent Order was subsequently issued in 2004. The Consent Order required the facility to take specific steps to come into compliance, but it was not clear based on information available in the

case file when the corrective actions required under the terms of the Consent Order were completed. Illinois EPA's latest inspection of this facility was in 2007. The report for this inspection was lacking the date and time of inspection, and did not indicate whether or not the facility needed an NPDES permit. The facility continues to operate without an NPDES permit, and was not on Illinois EPA's list of CAFOs either needing or not needing NPDES permits.

***Case-specific Findings:*** Illinois EPA made several attempts to escalate informal enforcement against the facility, but did not proceed to formal enforcement despite the fact that there were repeat violations and clear water quality impacts. A Violation Notice with Compliance Commitment Agreement issued to the facility did not result in compliance. Enforcement should have been escalated earlier, based on proven environmental impacts. Citizen complaints may have been avoided with effective escalated enforcement. The five-year cycle of inspections employed by Illinois EPA does not allow the state agency to determine whether prompt corrective actions have been taken to address prior violations. The enforcement actions did not address the failure to apply for a permit or seek an order to require a permit application, despite a history of discharges, and discharge-related enforcement actions.

Attachment D- Illinois EPA List: No Permit Required

NPR  
4/14/09

Applicant	NPDES #	County	Region Assigned	CAFO Type	Application Received	NMP Received	Appl & NMP sent to FOS	Review Letter	Response	FOS Review Completed	Notes:
Amos Brubaker Section 30 Farm	IL0074859	Jefferson		Swine	7/23/2003						09/06/08 - No Permit necessary - large confinement operation, no discharges
Benesh Anthony Farm	IL0077160	Ogle		Cattle	12/15/2003						05/21/08 No permit. Will be incorporated into the AG's order. NPR letter sent 1/9/09.
Bradford Pig Palace	IL0064319	Bureau		Swine	6/9/2003						Bradford Pig Palace has changed ownership to Cowser Farm and Feedlot. Is a swine confinement w/ no discharges and thus, no permit needed.
Bradshaw		Clark									8/21/08 It had been suggested that this facility look into getting a NPDES Permit after an application discharge and fish kill. However, the facility is a medium in size and it is not realistic that a permit be required and was not required as part of the fish kill stipulated agreement.
Carlyle Farms LLC, Mulkeytown	IL0076787	Franklin		Swine	4/22/2003						09/06/08 - No Permit necessary - large confinement operation, no discharges
Chalmers Livestock John H	IL0038072	Menard		Cattle Feedlot	9/9/1999						No Permit Necessary - 8/9/05 inspection - no swine at the facility, a few cattle and sheep on pasture - 4 existing lagoons had adequate freeboard at the time of the inspection - 9/16/05 letter from Springfield Region to facility advising to properly maintain lagoon berms, repair/rebuild freeboard markers, maintain adequate freeboard in the lagoons, monitor lagoon levels and land apply as necessary to prevent discharge - Lagoons need to be properly closed - Follow up through enforcement if future discharges are observed
Darrell Sheffley Farm	IL0077313	Stephenson		Swine	4/23/2004						06/21/08 Lg. CAFO; confinement; no problems; no permit. NPR letter sent 1/9/09.
F & M Hogs - Sumner	IL0076872	Lawrence		Swine	6/18/2003						09/09/08 - No Permit necessary - large confinement operation
Four Star Pig Inc.	IL0061221	Calhoun		Swine	6/12/2003						No Permit Necessary. Permit already terminated. 8/1/07 inspection. Except for a few months in 1995 no swine production at the facility since before 1988. Trying to achieve lagoon closure through enforcement. NCA sent to the facility owner 12/21/07.
Germantown Egg Co.	IL0067270	Clinton		Egg	3/24/2003						01/18/08 Germantown Egg Company was inspected July 24, 2008 and no discharges were observed. The farm is a dry litter facility. They submitted the NPDES permit application only because of construction requirements in the original CAFO rule. Moved to No Permit Req'd.
Germantown Egg Co.	IL0067270	Clinton	Marion	Egg	3/24/2003						
Heiser Brothers	ILG010002	JoDavless	Rockford	Dairy	30-Jun-00						NPDES Permit No. ILA010003. 12/17/08 NPR letter sent 1/9/09.
Hempen Hog/Cattle Farm	IL0076821	Clinton	Marion	Swine	6/17/2003		7/15/2008				9/1/08 FOS inspected and verified no discharges. FOS will send letter stating No Permit Required. 9/15/08 Hempen Hog/Cattle Farm (formerly listed on the tracker as Carlyle Farms LLC - Maschhoff Pork) is under review but needs an updated inspection to determine if corrective action has been taken by the facility. The inspection will be conducted this week.
Hempen Hog/Cattle Farm	IL0076821	Clinton	Marion	Swine	6/17/2003		7/15/2008				
Hintzche/Barnes-Sheridan	IL0064921	La Salle		Swine	4/12/2001						09/21/08 Confinement; no discharges; no permit
Hobbs Fish Farm	IL0073237	Hardin		Fish Farm	7/8/1998						09/09/08 - No permit necessary
Illinois Cattle Feeders	IL003594	Woodford		Cattle	1-Jul-93						No permit needed. Facility abandoned, demolished, no longer exists.
James McCune - site 1 - Sheffid	IL0077011	Bureau		Swine	9/25/2003						09/21/08 Confinement; no discharges; no permit. No permit required letter sent 1/9/09.
James McCune - Site 2 Mineral	ILA010003	Bureau		Swine	3/3/2005						09/21/08 Lg. confinement, no discharges; no permit. NPR letter sent 1/9/09.
Jat, LLC	ILA010005	Whiteside		Swine/Cattle	3/7/2005						09/21/08 Lg. confinement, no discharges; no permit
Johnson-Pate Pork	ILA010005	DeKalb	Rockford	Swine	11/5/2004		9/19/2008				NPDES Permit No. IL 0072613. 12/17/08 NPR letter sent 1/9/09.
John Rodgers	IL0077127	Richland		Swine	12/2/2003						09/09/08 - No Permit necessary - large confinement operation, underfloor deep pit operation
Lewis Hilltop Hog Farm - Louisville	IL0076881	Clay		Swine	6/18/2003						09/09/08 - No Permit necessary - large confinement operation, underfloor deep pit operation. No problems since new owner took over operation.
Lincolnland Farms	IL0067059							10/22/2007			08/21/08 Lg. confinement, no discharges; no permit

NO ANIMALS

FACILITY OUT OF BUSINESS

Loepker Dairy Farm - Bartleso	IL0072214	Clinton		Dairy	3/5/2002				09/06/08 - No permit is necessary, facility went out of business.
Lyndell Eshback - #1	IL0077194	Wayne		Swine	1/28/2004				09/06/08 - No permit necessary, no problems in recent years
Meier Pork	IL0077143	Washington		Swine	12/5/2003				09/06/08 - No Permit necessary - large confinement operation, no discharges
Oink Inc. - Morrison	IL0077216	Whiteside		Swine	2/5/2004				08/21/08 Lg confinement, no discharges, no permit
Clary Farms	IL0077429	Mercer		Swine	8/3/2004				No permit needed. Odor/land application incident. No discharge observed.
Paul Goldstein Hog Farm	IL0061395	Effingham		Swine	8/5/1998				8/21/08 This facility has been closed for several years and on last view of the area in 2007 was not noted as having any livestock buildings.
Pine Ridge Pork Ranch	IL0063550	Tazewell		Swine	7/7/1988				No permit needed. Facility abandoned, demolished, no longer exists.
Rahermann Pork Farms	IL0078953	Clinton		Swine	8/1/2003				09/06/08 - No Permit necessary - large confinement operation, no discharges
RLH Farms - Louisville	ILA010014	Clay		Swine	1/19/2008				09/06/08 - No permit necessary.
Rodney Ranius Hog Farm	IL0073202	Schuyler		Swine	30-Jun-98				No Permit Necessary - 1/9/02, 11/15/00 and 6/9/00 inspections - no swine observed at the facility and a realtor's for sale sign was observed at the facility - the existing lagoon had adequate freeboard at the time of the inspections - Lagoon needs to be properly closed - Follow up through enforcement if future discharges are observed
Rolling H Farms - Tampico	IL0078970	Whiteside		Swine	8/25/2003				08/21/08 Never built; no permit
Timberline Pork Farm	ILA010001	Montgomery		Swine	8/20/2004				No Permit Necessary - 10/29/07 inspection verified that the proposed facility has not been constructed - LMFA construction approval period for the facility has lapsed - no plans to pursue construction of the proposed facility
Trimmerman Ronald Barn #1	IL0077291	Clinton		Swine	4/1/2004				09/06/08 - No Permit necessary - large confinement operation, no discharges
Tracy Kiley	ILA010010	Clay		Swine	3/10/2005				09/06/08 - No Permit necessary - large confinement operation, no discharges
Waste Management & Design-Manle	IL0063748	Fulton		Swine	9/12/2002				longer exists.
Westam Creek Farms LLC	IL0077208	Hancock		Swine	1/29/2004				No permit needed. Total confinement. No known discharge. Formerly Andres Johnson Farm.
Byington			Rockford						Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.
									12/17/08 need to make visit. 2/3/09 FCS to make spring visit for compliance confirmation.
									Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.
									12/17/08 NPR.
Nice Valley Beef - Home Base Farm	ILA010017	Whiteside	Rockford	Cattle	4/21/2008	HIGH		7/15/2008	Complete review
Nice Valley Beef - Jordan Farm	ILA010018	Whiteside	Rockford	Cattle	4/21/2008	HIGH		7/15/2008	Complete review
									Conduct inspection as necessary. Re-establish contact, verify permit required for site and notify owner to apply as necessary.
Twenty First Century Pork Inc.	IL0070394	Effingham	Champaign	Swine	2/17/1994	HIGH			Facility was inspected on 9/10/2008, No Permit Needed. 12/17/08 NPR.

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TOTAL-45