

Illinois EPA Response to USEPA, Region 5's September 2010
*“Initial Results of an Informal Investigation of the National Pollutant
Discharge Elimination System Program for Concentrated Animal
Feeding Operations in the State of Illinois”*

November 1, 2010

This document contains the Illinois Environmental Protection Agency (Illinois EPA or Agency) responses to the findings, required actions and recommendations made by Region 5 of the United States Environmental Protection Agency (USEPA-Region 5 or Region 5) in *“Initial Results of an Informal Investigation of the National Pollutant Discharge Elimination System Program for Concentrated Animal Feeding Operations in the State of Illinois.”* The Initial Results Report reflects a review of Illinois EPA's Concentrated Animal Feeding Operation (CAFO) program activities and statistics for the period of December 2008 to September 2009. The responses below provide evidence of progress in administering the CAFO program, as well as our commitments for continued improvements in CAFO permitting, inspection and enforcement programs.

Permitting

As of November 1, 2010, the Illinois EPA has issued 14 NPDES permits for CAFOs, and two additional CAFO permit applications are on public notice.

The Initial Report reflected 76 CAFO applications filed with the Agency. At the time Region 5 queried the Illinois EPA's files, there were approximately 40 newer applications, most of which were incomplete, plus an additional 45 older applications that the Agency had determined to be from facilities that were no longer in service or did not require permits.

- Current Applications

To compel additional information from applicants who had failed to submit complete applications, Illinois EPA has requested that Region 5 issue Administrative Orders (AO) under Sections 308 and 309 of the Clean Water Act (CWA). This process began in July 2010. In addition, the Agency is using Violations Notices to compel applicants to respond with complete applications.

Illinois EPA has made significant progress on the 40 incomplete applications. Under the FY10-11 Performance Partnership Agreement (the PPA is an agreement that contains work items for all Agency programs to be performed as part of the grant agreement between Illinois EPA and USEPA); Illinois EPA has until September 30, 2011 to complete the review and issuance of these 40 applications. Of those 40 applications:

- Nine have been referred to Region 5 for issuance of administrative orders seeking necessary documents to complete those applications.
- Two have been issued Violation Notices (VNs) for the same reason.
- 18 are under review (several of those applications were received within the last 60 days),
- Two are now on public notice.
- Nine have completed for public notice and are in the process of being issued permits.

Illinois EPA expects to receive six new applications in December 2010 and 13 more in March 2011, all from a single livestock producer. Illinois EPA intends to address these 19 new applications with existing staff, completing each review within 60 days of receipt.

Illinois EPA will seek an amendment to the EPAct in the next legislative session for administrative order authority to enforce against facilities that fail to apply or fail to submit complete applications. Until administrative order authority is enacted, the Illinois EPA must continue to rely on the EPAct's Section 31 process for enforcement purposes and on referrals to Region 5 for issuance of administrative orders, as appropriate.

Currently, Illinois EPA is following the schedule outlined in the FY 2010—2011 PPA. Illinois EPA is willing to adjust the time frame for permit issuance in consultation with Region 5.

The Illinois EPA will use criteria established in USEPA's CAFO guidance in determining whether an NPDES permit is required. CAFOs that meet these criteria will be required to seek a permit from Illinois EPA.

In order to increase the number of permits issued and the efficiency with which permit applications will be reviewed, Illinois EPA will seek approval to hire three new permit staff. As is currently the practice, USEPA and Illinois EPA will hold conferences calls at frequent intervals to review the status of CAFO applications.

The Initial Report recommends that Illinois EPA consider establishing an unambiguous requirement for CAFOs to apply for a permit. Currently, Illinois EPA is constrained by Section 11 of the EPAct to issue an NPDES permit for only those circumstances for which USEPA would issue an NPDES permit. Since there is no "duty to apply" for all CAFOs in the federal 2008 CAFO rule and Illinois has no separate state program, the Illinois EPA has no statutory authority to require all CAFOs to apply for a CAFO permit. However, Illinois EPA will attempt to amend the EPAct to add such a requirement.

- Old Applications

Illinois EPA has investigated and identified the 45 old applications as facilities that are no longer in existence or in need of a permit. Of those 45, we have inspected approximately 40 between 2007 and 2009, finding that nine no longer needed permits and were subsequently issued letters to that effect, five were abandoned or did not exist and two were never built.

The Initial Results report requires Illinois EPA to either issue or deny permit for these 45 applications. Illinois EPA does not believe responding to these applications with a permit denial for a facility that does not now exist or that does not need a permit is appropriate and is consistent with Section 39(a) of the Illinois Environmental Protection Act (EPAct or Act). Under this section, the Agency cannot issue or deny a permit if such permit is not required by the EPAct or the Illinois Pollution Control Board regulations.

Illinois EPA cannot lawfully deny permits unless the application in some fashion violates a provision of the EPAct or the Illinois Pollution Control Board regulations (see 415 ILCS 5/1 *et seq.*). To confirm our initial findings, Illinois EPA is committing to re-investigate these 45 facilities. Illinois EPA will by August 1, 2011: 1) provide documentation of those facilities that no longer exist, 2) attempt to re-contact existing facilities that do not propose to discharge and advise them that withdrawing their application is an option, and 3), in those cases in which Region 5 argues that permits might be required under the 2008 CAFO rule, advise owners to obtain an NPDES permit, including filing a complete application within a specified period of time of Illinois EPA's notification.

Compliance Evaluation/Inspection Program

- Inventory

The Illinois EPA will meet the commitment in the FY 2010—2011 PPA to complete the final CAFO inventory within 12 to 18 months of finalizing the pilot.

In the interim, by May 1, 2011, Illinois EPA will develop an interim list of CAFOs using currently available resources, such as the current permit application list, the list of facilities for which complaints were received, IDOA approved facilities and IDPH approved/inspected sites. From this interim list, the Agency will develop a prioritized inspection strategy.

In order to have a complete, uniform inventory, Illinois EPA has contracted with Western Illinois University (WIU) to provide a seven (7) county pilot survey that can be updated as necessary. The inventory now in development by WIU will provide readily updateable, Geographic Information System (GIS)-based documents (e.g., maps and photos) of each site. This GIS-based methodology will use shape files from IDOA livestock facilities' and Illinois Department of Public Health (IDPH) dairy facilities' data. The initial pilot of the GIS-based inventory will be ready for field verification by January 31, 2011. Illinois EPA will seek assistance from Region 5 in the funding and review of the statewide inventory.

Further, Illinois EPA will propose a revision in the state livestock regulations (a draft of which will be sent to Region 5 by December 1, 2010) so that livestock producers are required to file basic information with the Illinois EPA. The proposed revisions to Subtitle E will allow Illinois EPA to populate a statewide inventory, which then can be used for prioritization of inspections and permitting decisions.

- Inspection SOPs

Illinois EPA is committed to developing standard operating procedures (SOPs) for inspections and reports. However, the Agency believes the underlying problems associated with CAFO inspections (i.e., lack of resources and an adequate, centralized inventory) have little to do with the lack of SOPs for inspections and report drafting. The Agency's CAFO inspections are rigorous and complete. The Initial Results report assumes that all Illinois EPA inspections were conducted for purposes of determining NPDES compliance. Many inspections conducted by the Agency staff were for more targeted reasons, often based on citizen complaints regarding specific incidents or were in response to emergencies at livestock facilities. Because of the specific scope of these inspections, they should not be compared to routine monitoring and compliance inspections at permitted facilities.

By August 1, 2011, Illinois EPA will develop and train staff in the use of SOPs for CAFO inspections. The SOP will be provided to Region 5.

By August 1, 2011, Illinois EPA will develop and train staff in the use of an inspection checklist that aligns with the requirements of the CAFO general permit. The checklist will be provided to Region 5.

In the past, only NPDES permitted facilities were loaded into ICIS. Illinois EPA has the capability to load past and future CAFO inspections, whether permitted or not. By May 1, 2011, Illinois EPA will enter all CAFO inspections into ICIS.

- Citizen's Complaints

The Initial Results report found that "it is not clear that they [Illinois EPA] consistently provide a timely response to the complainant." A further review of the Illinois EPA's complaint logs and, more importantly, follow up discussions with the staff who investigate these complaints would have addressed the matter. While no log is kept of the follow up and written response is not always given, staff do follow up with the complainants via phone and email. As each investigation is subject to its own complexity and timeframe, the staff follows up with the complainants when the investigation has been concluded.

By February 1, 2011, Illinois EPA will establish a process for providing written responses when requested by complainants to describe actions taken by the Illinois EPA in response to that complaint.

By February 1, 2011, Illinois EPA will establish appropriate procedures for responding to complainants.

Enforcement Program

- Enforcement Response Guide

Illinois EPA must take timely and effective enforcement and therefore must revise its Enforcement Management System (EMS), specifically, the Bureau of Water's Enforcement Response Guide, to include a time frame for making enforcement decisions.

In order to address these concerns, by January 1, 2011, the Illinois EPA will modify our Enforcement Response Guidance (ERG) to assure that escalation of CAFO enforcement is consistent with enforcement responses for other, similar NPDES violations. In addition, the ERG will require that where a CAFO has a discharge or is designed, constructed, operated and maintained to have a discharge, a permit will be required. This modified ERG will assure that all CAFO violations are evaluated against set criteria so that consistent, timely and appropriate enforcement actions are taken. This ERG will include a requirement that all CAFOs which had a discharge or are designed, constructed, maintained or operated to have a discharge, will be required to apply for and obtain an NPDES permit.

The Illinois EPA must adhere to the statutory deadline requirements of Section 31 of the Act as described below. However, the Illinois EPA anticipates referring more cases to USEPA

for prosecution. In addition, Illinois EPA will seek administrative order authority that will include penalties. Should the Illinois EPA be successful in obtaining this authority, much more timely enforcement actions will be achieved.

Section 31 of the EPAct sets the basic framework for environmental compliance assurance/enforcement in Illinois. Illinois EPA in pursuing enforcement cases must adhere to the Section 31 process as outlined below.

Within 180 days of the Agency becoming aware of a violation of the Act, a regulation or a permit, it issues a VN informing the person of the facts related to the alleged violation. The person has the opportunity to meet with the Illinois EPA and explain the violation. The person may also submit a written proposed Compliance Commitment Agreement (CCA) which sets forth time lines for returning to compliance with the EPAct and correcting any environmental harm. The individual may also meet with the Illinois EPA compliance and inspection staff. No penalties are sought at this stage and environmental compliance is expected to be promptly achieved.

If the Illinois EPA determines that the CCA is inadequate (e.g., the alleged violation is not sufficiently addressed or a civil penalty is needed) or that the environmental harm is significant, the Illinois EPA may reject the CCA and proceed to formal enforcement by issuing a Notice of Intent to Pursue Legal Action (NIPLA) letter to the person. The person is given another opportunity to meet with the Illinois EPA personnel and discuss in detail mechanisms for resolving the violation short of referral to the Attorney General's Office (AGO) or the appropriate State's Attorney's Office (SAO). Several matters are resolved at this stage.

If the person does not reach resolution after the NIPLA meeting, the matter is referred to the Attorney General's office or the SAO for litigation, penalties, and an enforceable order. The only exception in this procedure is set forth in Section 43 of the EPAct. Specifically, if there is a substantial danger to the environment or public health, an immediate referral of the matter to the AGO or SAO is allowed without need of a VN or NIPLA.

In addition, the Initial Report requires the Illinois EPA to maintain a Compliance Monitoring Strategy (CMS) consistent with current regulatory policy. By November 1, 2011, the Illinois EPA will develop a state-specific CMS for Region 5's approval.

- Penalties

In addressing CAFO violations in 2008 and 2009, Illinois EPA sent 54 Noncompliance Advisories (NCAs), issued 39 VNs, issued 10 NIPLAs and referred 23 cases to the Attorney General.

The Initial Results report cites (page 27) that "62.5% of the Violation Notices reviewed did not, or will not, return the facility to compliance." VNs alone—without implementation of an acceptable CCA or further action via a NIPLA or referral to the Attorney General or SAO—are not expected to resolve all violations. Illinois EPA must follow enforcement procedures as outlined above.

Currently, Illinois EPA considers a CCA completed and resolved when information is obtained and the agreed upon actions have been taken. A “completed” CCA means that the alleged violation has been satisfactorily resolved pursuant to the Act. However, USEPA does not recognize this current procedure as formal enforcement action resolving the violations. Illinois EPA will require a signed certification be submitted from the VN recipient certifying that all CCA milestones have been completed and that the facility has returned to compliance. This additional documentation will be placed in the paper files. In cases when the CCA is accepted, Illinois EPA will conduct follow-up inspections on a portion of these facilities to ensure that compliance has actually been achieved. The failure of a facility to be in compliance with the CCA will result in immediate escalated enforcement, and providing false information to Illinois EPA (e.g., a fraudulent certification) is now a felony offense.

USEPA has concerns that the penalty amount recovered is not achieving deterrence and that an insufficient number of agricultural pollution matters are being referred, and that the penalty amount recovered is too low. Illinois EPA does not have authority to impose and collect penalties; it makes a penalty recommendation to the prosecuting authority. As the Illinois EPA does not assess penalties, it will continue to urge the prosecuting authority to assess penalties which will obtain deterrence.

Illinois EPA will revise the ERG as necessary to ensure that penalty recommendations to the Illinois Attorney General are appropriate and consistent, but in general, will continue to follow the USEPA guidance and State law factors on penalty calculation. In addition, the Illinois EPA will continue to maintain documentation of its calculations and worksheets.

- Response to Citizen Requests for Information

The Illinois EPA currently administers the Illinois Freedom of Information Act (FOIA) under rules adopted on April 15, 2002 and more recently amended in response to changes made to the FOIA. The rules may be found in 2 Ill Adm Code, Subtitle E, Parts 1825 and 1828 (see attachment). These rules establish the procedures by which the Illinois EPA responds to public requests for its documents. In addition, the Illinois EPA uses an internal Document Screening Manual (March 2005) (see attachment) that addresses the issues of exemptions from FOIA, document screening processes and procedures. Illinois EPA believes these rules and the Manual adequately address the question of how and when Illinois EPA provides documents, including NPDES applications, to the public.

Since the Illinois EPA has existing and up-to-date FOIA rules and procedures, we propose to take no further actions in this matter.

Compliance with the Performance Partnership Agreement

Since the signing of the FY 2010--2011 PPA in November 2009, Illinois EPA has made significant progress in issuing permits, completing review of applications and acquiring additional information for incomplete applications through Illinois EPA/Region 5 cooperative efforts, and through inspections to determine if facilities existed and needed CAFO permits. For further details, please refer to the Agency’s response to 1.

The Illinois EPA believes that it has been closely following the milestones outlined in the PPA. Illinois EPA is 1) requiring nutrient management plans (NMPs) (including stormwater and emergency management plans and controls), 2) posting the notices of applications and intent to issue coverage under the CAFO general permit, and 3) Illinois EPA will share the complete draft of the CAFO rule with Region 5 by December 1, 2010.

Organization and resources

In 2008 and 2009, Illinois EPA inspectors surveyed a total of 312 livestock facilities of which 118 facilities were contacted for the first time. The total number of on-site visits conducted during 2008 and 2009 was 542 (this includes multiple visits to the same sites). The inspections included livestock facilities that housed beef, dairy, swine, poultry, sheep and horses. These inspections covered livestock facilities that had animal units less than 50 and as many as 5000. For more details on the livestock inspection program for the last decade, please refer to the Illinois EPA Livestock Facility Investigation Annual Reports at <http://www.epa.state.il.us/water/cafo/reports/index.html>.

The Illinois EPA currently uses approximately five full time employees (FTEs) for the CAFO program. These FTEs are responsible for the inspections and CAFO permit applications. They are also responsible for responding to citizen complaints involving CAFOs. While these FTEs spend most of their time on the CAFO program, they also are responsible for other NPDES related inspections and responding to non-CAFO complaints.

In the interim, all CAFO staff will be responsible for reviewing permit applications, conducting CAFO inspections and responding to citizen complaints. The interim list (as described in 2(A) above) will be used by the CAFO staff prior to the actual development of a GIS-based inventory. New inspections will be used to populate the list and inventory.

By May 1, 2011 Illinois EPA will prepare a workload assessment consistent that will address the use of the interim list and the GIS-based inventory for purposes of inspection and permitting prioritization. As new FTEs are added, both new and current staff will be required to attend training via available resources through the internet (web-based USEPA training) and through classroom type training sessions with Region 5 staff. Illinois EPA will also use USEPA contractual assistance in setting up necessary training.

Legal authority

The Illinois EPA has been working with a stakeholder group (CAFO Workgroup) to revise Illinois CAFO rules to ensure consistency with the 2008 federal CAFO rule. The Illinois EPA first met with various stakeholders in December 2009. The CAFO Workgroup is comprised of representatives from the several livestock sectors, citizens and environmental interest groups, National Resources Conservation Service (NRCS), the University of Illinois-Cooperative Extension Service and the IDOA. The objective of forming the CAFO Workgroup was to seek complete and thorough input of stakeholders on key issues early in the rule development process.

Illinois EPA sent out a complete initial draft on October 15, 2010, to the CAFO workgroup for review and comment. The CAFO Workgroup has been asked to provide comments by

November 10, 2010. After reviewing comments from these stakeholders, by December 1, 2010 the Illinois EPA will send a revised draft of Illinois' CAFO rules to Region 5 for its review. On October 15, 2010 Illinois EPA sent a draft of the Subtitle E revisions to the CAFO Workgroup for their review and comment. The Illinois EPA believes that the draft revisions to Subtitle E ensure that Illinois CAFO rules are consistent with the federal 2008 rule. The CAFO Workgroup's comments are due to Illinois EPA by November 10, 2010. Illinois EPA will revise the draft rule, if necessary, prior to sending the revised rule to Region 5 by December 1, 2010. Following any comments and revisions by Region 5's review, Illinois EPA will submit the Subtitle E revisions to the Illinois Pollution Control Board for consideration and adoption.