

# ILLINOIS' FAILURE TO REGULATE CONCENTRATED ANIMAL FEEDING OPERATIONS IN ACCORDANCE WITH THE FEDERAL CLEAN WATER ACT<sup>1</sup>

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## II. PREFATORY NOTE

It must be emphasized that none of the criticisms in this report are directed at any of the Illinois Environmental Protection Agency (“IEPA”) staff or officials. There is no doubt that the quality of Illinois water has become increasingly better over the past years – undoubtedly due to the tireless and dedicated efforts of the IEPA. However, due to the rapid increase in corporate farming more effective measures are required at a more rapid pace.

Although every effort has been made to ensure the accuracy of the information in this report, the overwhelming complexity of environmental law and

the current state taking place in both the state and federal Clean Water Act ("CWA") regulations has made it impossible to explore in depth many of the issues affecting the agricultural sector in Illinois at this time. Furthermore, the resources available for this study were limited. For these reasons the following information is only intended to provide a general overview of the current state of Illinois' NPDES permitting scheme and should not be used as a substitute for individual legal or professional guidance.

### III. SUMMARY

This report analyzes the current state of the IEPA's regulation of water pollution from livestock operations.

According to the United States Environmental Protection Agency's ("EPA") national water quality inventory, 70% of our nation's river impairment and 49% of our country's lake impairment are caused by agriculture.<sup>3</sup> Livestock operations, otherwise known as Animal Feeding Operations ("AFOs"), are reported by twenty-two states to constitute approximately 20% of the total agricultural contribution to water quality impairment in the United States.<sup>4</sup> These problems are acutely magnified in the corn-belt states of the upper Mississippi River Valley as the epicenter of industrial agriculture and increasingly large-scale AFO production. State water quality reports in Illinois clearly indicate concern over the AFOs and water quality. Nearly 85% of the total public lake acreage in Illinois is impaired.<sup>5</sup> Agriculture is known to be the leading cause of such impairment.

Until recently, water pollution from AFOs was not a focus of the EPA's clean water efforts. Rather, agricultural and AFOs have been considered "non-point" pollution sources and accorded lesser priority compared to "point-sources." However, the recent transformation of livestock and poultry production from small, widespread, family farms to large, investor owned, Concentrated Animal Feeding Operations ("CAFOs") has caused the EPA to rethink past policies. In recognizing the necessity to strengthen regulatory programs for CAFOs, the EPA revised the Federal CWA's National Pollutant Discharge Elimination

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3. EPA, NATIONAL WATER QUALITY INVENTORY: 1996 REPORT TO CONGRESS 15, 19 (1997), available at [http://www.epa.gov/owow/305b/96report/sec\\_one.pdf](http://www.epa.gov/owow/305b/96report/sec_one.pdf).

4. EPA, ENVIRONMENTAL IMPACTS OF ANIMAL FEEDING OPERATIONS 3 (1998), available at <http://www.epa.gov/waterscience/guide/feedlots/envimpct.pdf#search=%22ENVIRONMENTAL%20IMPACTS%20OF%20ANIMAL%20FEEDING%20OPERATIONS%22>.

5. IEPA, ILLINOIS WATER QUALITY SECTION 305(B) REPORT, APPENDIX D at 2 (2004), available at <http://www.epa.state.il.us/water/water-quality/305b/305b-2004.pdf>.

System (“NPDES”) permitting requirements for CAFOS (hereinafter EPA CAFO Rule).<sup>6</sup>

Unfortunately, the actions taken by the EPA have had little effect on Illinois’ implementation and enforcement of the program to date. “As of October 2001, of the nearly 35,000 AFOs in Illinois, the IEPA ha[d] issued slightly over forty NPDES permits.”<sup>7</sup> Many of the operations were not required to have permits based upon the defining criteria; however, an investigation from IEPA indicated that 52% of the livestock facilities contacted or visited had one or more regulatory violations.<sup>8</sup> Of the facilities contacted, the following sources of water pollution were documented: 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>9</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 the CWA’s standard of zero discharge has not been met.

Given recent legislative interest in Illinois to bolster livestock production, care must be taken to encourage the most appropriate type. According to data presented as background to the new EPA CAFO Rule, “Large CAFOs must transport 60% of their nitrogen and 70% of their phosphorus off-site.”<sup>10</sup> In addition, “small and medium AFOs are more likely than large CAFOs to have a sufficient land base for utilizing manure nutrients at rates consistent with appropriate agricultural utilization of nutrients.”<sup>11</sup> Since manure from CAFOs is considered one of the leading causes of Illinois’ remaining water quality problems, any legislative effort to encourage livestock production should direct efforts toward smaller or mid-size operations which are generally better for rural economics and more conducive to a cleaner environment. Moreover, the IEPA has failed to implement and enforce the CWA to protect Illinois waters which does not bode well for increasing the numbers of large-scale CAFOs in Illinois.

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6. 40 C.F.R. §§ 9, 122-23, 412 (2003).

7. ENVIRONMENTAL LAW INSTITUTE, STATE REGULATION OF ANIMAL FEEDING OPERATIONS, SEVEN STATE SUMMARIES 23 (2003), available at <http://www.elistore.org/Data/products/d13-02a.pdf> [hereinafter ELI SUMMARIES]; see also CLEAN WATER NETWORK, SPILLS & KILLS: MANURE POLLUTION AND AMERICA’S LIVESTOCK FEEDLOTS 19 (2000) [hereinafter CLEAN WATER NETWORK REPORT].

8. IEPA BUREAU OF WATER, 2001 IEPA LIVESTOCK PROGRAM, LIVESTOCK FACILITY INVESTIGATION ANNUAL REPORT 4 (2001), available at <http://www.epa.state.il.us/water/cafo/reports/2001-livestock-annual.pdf> [hereinafter IEPA 2001 LIVESTOCK REPORT].

9. *Id.* at 6.

10. National Pollution Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 60 Fed. Reg. 7176-01, 7180 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122-123, 412).

11. *Id.* at 7208.

### A. Findings

1. IEPA has failed to properly implement the NPDES permitting program. Although Illinois was granted the authority to implement the EPA NPDES permitting scheme in 1977, it has gone largely unenforced. Of the nearly 35,000 livestock operations in Illinois, only forty NPDES permits have ever been issued – many of which are now expired. The IEPA has an inventory of only 30% of the CAFOs now operating in Illinois.<sup>12</sup> From 2000 to 2002, the State completed only 154 inspections of the known 500 Large CAFOs.<sup>13</sup>

2. IEPA has not issued any permits to CAFOs under the revised EPA NPDES permit program. Pursuant to the new regulations, Illinois developed a revised general permit in order to bring CAFOs in compliance with federal law. Under the new regulations at least 3,200 CAFOs are estimated to need coverage.<sup>14</sup> Unfortunately, despite the fact that IEPA general permit became effective in May of 2004, not a single CAFO has been issued coverage.

3. IEPA will need to revise its permit program to comply with federal law. IEPA's NPDES permitting program is in substantial compliance with federal law; however, a recent federal court decision interpreting the revised EPA CAFO regulations will require Illinois to revise its permit scheme. Specifically, the holding requires nutrient management plans to be made part of the state's general and individual permits in order to ensure public access to site specific effluent limitations as well as to ensure the public's right to assist in the development, revision, and enforcement of the NPDES program. Illinois will need to revise its permit scheme so that each CAFO submitting a Notice of Intent ("NOI") for NPDES coverage is required to include a site-specific nutrient management plan with their application. All such application materials must be reviewed by the agency and the public before issuance of coverage under the permit.

4. Illinois needs to reassess its statutory guidelines for prosecuting CWA violations. Due to the regulatory framework, the IEPA must go through an elaborate negotiation process before referring a case to the Attorney General

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12. EPA, PERMITTING FOR ENVIRONMENTAL RESULTS, NPDES PROFILE: ILLINOIS 11 (2004), available at [http://www.epa.gov/npdes/pubs/illinois\\_final\\_profile.pdf](http://www.epa.gov/npdes/pubs/illinois_final_profile.pdf) [hereinafter IEPA NPDES Profile].

13. *Id.*

14. Communication with Bruce Yurdin, IEPA, Permits Division (Mar. 11, 2005). This number may reduce in light of the *Waterkeeper Alliance* ruling, as the Court determined that only dischargers-in-fact had a duty to apply – not potential dischargers; see *infra* note 31.

for prosecution.<sup>15</sup> Very few cases are ultimately prosecuted because of this process. If a case is finally referred to the Attorney General's office, the fines assessed are commonly too low to provide incentive to not break the law. Often the actual penalties and the cost of litigation end up being less expensive than bringing the operation into compliance from the beginning. In effect, it is more economical for CAFOs to break the law than it is to follow it.

5. IEPA's policy of facility self-monitoring provides incentives for CAFOs to operate in noncompliance. As of October 2001, out of approximately 35,000 total AFOs, IEPA had only issued forty NPDES permits. However, an investigation from IEPA indicated that 52% of the livestock facilities contacted or visited had one or more regulatory violations.<sup>16</sup> Because the present permit scheme is generally administered through self-monitoring – meaning it is the permit holder's responsibility to collect samples and to submit annual reports – the system provides incentives for permit holders to monitor inaccurately or at times when there is less likelihood that a permit violation will be found.<sup>17</sup> Without oversight by the IEPA, many discharges go without being noticed until it is too late.

6. IEPA has been unable to properly assess all CAFOs in Illinois. As of now, the IEPA only has about four staff members conducting inspections of the estimated 35,000 livestock facilities in the state.<sup>18</sup> It is unknown how many of these facilities are polluting. It is most likely that there are many CAFOs operating without required permits. Most inspections of non-permitted facilities are only conducted in response to complaints.<sup>19</sup> Records obtained from the IEPA in 1998 indicated that "15 out of 22 randomly inspected lagoons in western Illinois were illegally discharging wastewater into streams."<sup>20</sup> A 2001 report indicated that at least twenty facilities were in violation of the CWA for not having NPDES permits.<sup>21</sup> Despite these figures, Illinois has inventory information for only about 30% of the estimated 500 Large CAFOs in the state<sup>22</sup> and conversations with EPA Region 5 officials have revealed that neither they, nor IEPA staff,

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15. ENVIRONMENTAL LAW & POLICY CENTER, ILLINOIS WATER QUALITY AND THE CLEAN WATER ACT 10 (2003), available at <http://www.elpc.org/documents/ILWaterQuality.pdf> [hereinafter ELPC 2003 REPORT].

16. IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 4.

17. ELPC 2003 REPORT, *supra* note 14, at 7.

18. ENVIRONMENTAL LAW INSTITUTE, LOCATING LIVESTOCK: HOW WATER POLLUTION CONTROL EFFORTS CAN USE INFORMATION FROM STATE REGULATORY PROGRAMS 72 (1999), available at [http://www.elistore.org/reports\\_detail.asp?ID=487](http://www.elistore.org/reports_detail.asp?ID=487). [hereinafter ELI 1999 REPORT]; see also CLEAN WATER NETWORK 2000 REPORT, *supra* note 6, at 19.

19. CLEAN WATER NETWORK 2000 REPORT, *supra* note 6, at 20.

20. *Id.*

21. IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 4.

22. IEPA NPDES PROFILE, *supra* note 11, at 11.

have knowledge of the actual whereabouts of the majority of the facilities located throughout Illinois.<sup>23</sup>

7. IEPA lacks sufficient resources to perform the necessary inspections and enforcement activities needed to ensure proper implementation of the NPDES program. In March of 2003, IEPA identified over \$27 million in funding needed to administer the NPDES program, compared to the \$13.5 million in current resources.<sup>24</sup> "IEPA reports 26% of individual permittees are operating on expired permits, and there is a backlog of 1,000 permit renewal and modification applications."<sup>25</sup> These numbers are problematic considering the fact that the new CAFO regulations will require more permits, meaningful review of individual permittees' nutrient management plans and more facility inspections.

8. Illinois is creating a safe haven for Midwest polluters. The state is failing to meet its responsibilities under the CWA, especially in comparison to other states in the region. While Illinois is still using outdated NPDES CAFO regulations from 1978, all of the other states in the region are either in the final stages of enacting revised regulations or have already completely revised their NPDES programs to comply with federal law. Whereas all of the other states in the region are actively issuing permits under their revised CAFO permit schemes, the IEPA has not issued any NPDES CAFO permits since before the 2003 revisions to the federal rules. Beyond this, a majority of the states in the region have implemented more stringent NPDES CAFO rules than the federal guidelines require. Between Illinois' failure to implement and enforce the revised NPDES CAFO program and the existence of more stringent NPDES regulations in neighboring states, the state is likely becoming a safe haven for polluters.

### B. Recommendations<sup>26</sup>

#### 1. Enact a State-wide Moratorium on the Construction of New CAFOs and on the Expansion of Existing CAFOs.

Illinois should enact a state-wide moratorium on the building of new CAFOs and the expansion of existing facilities.<sup>27</sup> A moratorium is necessary in

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23. Communication with Steve Jann and Arnie Leder, Region 5 EPA (Jan. 5, 2006).

24. ELPC 2003 REPORT, *supra* note 14, at 13.

25. *Id.*

26. See ENVIRONMENTAL INTEGRITY PROJECT, THREATENING IOWA'S FUTURE: IOWA'S FAILURE TO IMPLEMENT AND ENFORCE THE CLEAN WATER ACT FOR LIVESTOCK OPERATIONS 35-43 (2004) [hereinafter EIP 2004 REPORT]. A majority of the recommendations offered in this paper are based on the EIP's recommendations for Iowa. Iowa and Illinois are experiencing very similar challenges to CAFO regulation. The pivotal and indispensable work of EIP greatly contributed to the research presented in this report.

27. *Id.* at 35.

Illinois given the number of facilities and the lack of resources available to regulate them. The construction of new facilities and the expansion of any existing facilities should be halted until the IEPA has had an opportunity to inventory and inspect all CAFOs in Illinois. Until all existing facilities have been properly assessed and brought into compliance, no new operations should be allowed.

### 2. *Actively Enforce the CWA*

Enforcement is one of the only ways to provide an effective incentive to comply with the law.<sup>28</sup> At present, IEPA does not have the resources or man power to enforce state or federal laws. IEPA needs to collect application fees and higher penalties for violations and use such funds to conduct random inspections of all existing CAFOs and subsequently prosecute those facilities they find in noncompliance.

### 3. *Increase Public Access to Permitting and Enforcement Data*

Public access is vital to the NPDES permitting and enforcement process. Public access is imperative because it allows people to participate in making “informed decisions regarding environmental issues affect[ing] their communities.”<sup>29</sup> Beyond allowing people to participate in the decision-making process, the public’s direct access to compliance and permitting information provides incentives for regulated entities to comply with the law.<sup>30</sup> In order to guarantee the public’s rightful involvement in the decision-making process, IEPA must post all application materials for general permits on its website – including nutrient management plans and information regarding offsite transferees. Presently, the IEPA has a policy where the public has access via the Freedom of Information Act (“FOIA”). This process is laborious and time consuming and has been found to be an ineffective means in granting public access to information. Not only it is the IEPA’s responsibility to grant reasonable access to such information, but it is mandated by the CWA that such public participation be provided for, encouraged, and assisted by the Administrator of the State.<sup>31</sup>

Given the recent holding in the Waterkeeper Alliance case,<sup>32</sup> it is the state’s responsibility to require the terms of nutrient management plans to be included in the actual permits. Furthermore, the permitting authority must make such information available to the public to fulfill the CWA’s public participation requirements.<sup>33</sup> Although some effort has been made by the IEPA to give the public notice of its intention to issue coverage under the general permit by post-

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28. *Id.* at 41.

29. *Id.* at 42.

30. *Id.*

31. Clean Water Act, 33 U.S.C. §1251(e) (2003).

32. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005).

33. *Id.*

ing such notice on its website, it should also post all application materials on the website so that each permit application is subject to public scrutiny.

#### 4. *Citizens Should Utilize Citizen Suit Provisions*

As it has been demonstrated, the IEPA does not have the resources to enforce the NPDES program. Congress has given power to citizens to enforce the CWA in federal court under its citizen suit provisions.<sup>34</sup> The federal courts may award citizens the same relief as any governmental action taken against CAFOs. The courts may issue injunctions to stop noncompliance and grant civil penalties of up to \$32,500.00 per day, as well as attorney's fees. Given the enforcement and prosecution record of the IEPA in Illinois, it appears at this time that citizen suits may be the most effective way to bring many CAFOs into compliance, as well as to deter any future violations.

#### 5. *Create a Coalition to Help Facilitate Citizen Suits and Assist in Providing Legal Awareness*

Due to the imperative role of citizen suits in the enforcement of CAFO regulations, it is necessary to focus and strengthen citizen capacity and motivation to participate in the regulatory process. A citizens' group or coalition should be developed in order to provide public education, community organizing, issue advocacy and to assist the public in gaining access to legal rights and remedies against the negative environmental impacts generated from unregulated industrialized farming. Other possible functions may include warning people of possible community health issues, providing updates on current regulatory and legislative actions and directing citizens to appropriate legal representation. Providing a bridge between citizens and the regulatory process would improve the enforcement of the NPDES programs and overall awareness of the issues currently confronting rural communities.

#### 6. *Increase IEPA's Penalty Authority*

Penalties play a critical role in the regulatory process in that they deter future violations.<sup>35</sup> Penalties should be high enough so that they are not absorbed as the "cost of doing business." Presently, penalties in Illinois appear to encourage CAFOs to break the law instead of bringing their facilities into compliance as it is more economical to risk prosecution than to comply with regulatory standards. IEPA should also resist reducing already low penalties in the negotiation process and assess higher damages for fish kills. "The penalties should include the value of the lost fish as well as investigation costs and the value of the lost services to the public."<sup>36</sup>

#### 7. *Pass Legislation Granting Administrative Authority to the IEPA*

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34. 33 U.S.C. § 1365 (2003).

35. EIP 2004 REPORT, *supra* note 25, at 41.

36. *Id.*

Under Illinois' current regulatory scheme, the IEPA does not have the administrative authority to impose corrective actions or penalties for NPDES violations. Many other states have granted their environmental agencies the statutory right to bring facilities into compliance by issuing administrative orders and collecting administrative penalties.<sup>37</sup> In order to ensure compliance in Illinois, the IEPA must go through an elaborate negotiation process with violators before referring cases to the Attorney General's office for prosecution. It has been found that this process is highly ineffective in deterring future violations as an overwhelming majority of violations are never fully prosecuted.<sup>38</sup> To remedy this situation, legislation should be enacted granting the IEPA administrative authority to impose corrective actions and collect administrative penalties for NPDES violations. The state must seek administrative order authority from the General Assembly and the citizens of Illinois should support this effort.

#### 8. *Increase Funding for CAFO Regulation*

IEPA has been unable to properly implement and enforce NPDES CAFO regulations to date. Thus, it is not difficult to draw the conclusion that it will be unable to meet its responsibilities under the new CAFO regulations without a significant increase in funding. IEPA should seek additional resources through all available mechanisms in both the state and federal arena. Furthermore, the IEPA should charge application fees to cover the costs it faces under the new regulations, as well as increase its penalties for violations.

#### 9. *IEPA Should Issue Watershed Based General Permits*

Ideally, the IEPA should issue individual permits for each and every CAFO. However, given the number of facilities in Illinois and the time and resources it takes to issue individual permits, the most efficient way for Illinois to implement an effective NPDES program is to develop watershed based general permits in addition to issuing individual permits.<sup>39</sup> Watershed based permits target geographic areas encompassing particular watershed boundaries. Topographic factors and watershed-specific water quality standards are easier to address in watershed based permits. Because single statewide permits do not target specific area water quality concerns, they are somewhat ineffective in protecting already impaired watersheds.<sup>40</sup> By developing watershed based general permits it

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37. See, e.g., IND. CODE §§ 13-20-4(b)(2)(B), 13-30-3-11 (2005); MINN. STAT. § 116.072(1), (4) (2004); OHIO REV. CODE ANN. §§ 903.16, 903.17 (West 2005).

38. According to the IEPA's 2001 livestock facility investigation records, of the sixty noncompliance advisory letters sent by the agency, only seven were referred to the Attorney General's office for prosecution. See IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 17.

39. EIP 2004 REPORT, *supra* note 25, at 36-37.

40. *Id.* at 37.

will be easier to provide additional protection to designated high quality and impaired waters.

*10. Extend Liability to Corporations that Own Livestock*

There is a present trend in livestock production where large producers or processors owning livestock enter into contracts with smaller producers or facility owners to raise the animals to market weight.<sup>41</sup> Currently, Illinois' laws are written in such a fashion that only owners or operators of the facilities are responsible for the proper disposal of livestock waste. As a result, large corporations are somewhat shielded from liability and have limited incentive to ensure their contractors are properly handling waste. In such situations, requiring livestock owners to be co-permittees would make the proper disposal of animal waste the joint responsibility of all entities under the permit.<sup>42</sup>

*11. Require all CAFOs to Apply for NPDES Permits or Demonstrate They Have No Potential to Discharge*

Although the Second Circuit found that the EPA exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate they have no potential to discharge, states have the authority to enact such measures. It is the states' responsibility to preserve the integrity of its own water resources. As such, states may institute measures as stringent, or more stringent, than the federal requirements. Due to insufficient resources and the current regulatory framework, the IEPA is unable to adequately ensure against CWA violations. Requiring CAFOs to apply for permits or demonstrate they have no potential to pollute would relieve much of the monitoring burden presently shouldered by the IEPA and would force those facilities with the actual potential to pollute into compliance before violations occur.

*12. Look to Other States That Have Effective NPDES Programs for Guidance in Enacting Revised Regulations*

Because the IEPA has been unable to properly implement the CAFO NPDES program under Illinois' current regulatory framework, the agency should look for guidance from other states that have been successful in regulating the livestock industry. It appears Minnesota has been the most successful state in the region in implementing its permitting program. The state has registered approximately 29,000 facilities through its delegated county program and has issued NPDES permit coverage to nearly 1,000 facilities.<sup>43</sup> Given the fact Illinois

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41. *Id.*

42. *Id.*

43. MINNESOTA POLLUTION CONTROL AGENCY, LIVESTOCK AND THE ENVIRONMENT

FEEDLOT PROGRAM OVERVIEW 2 (2004), available at <http://www.pca.state.mn.us/publications/wq-f1-01.pdf#search=%22MINNESOTA%20POLLUTION%20CONTROL%20AGENCY%2C%>

does not have an inventory of the estimated 35,000 facilities now operating in the state, a county delegated program may be the only way the IEPA will be able to assess and adequately deal with all of the facilities likely requiring NPDES permits. Illinois should consider implementing a delegated county program such as Minnesota's if, and when, it revises its CAFO rules.

#### IV. INTRODUCTION

Until now, Illinois' NPDES permit program has failed to adequately regulate harmful pollutant discharges from industrialized farming complexes into waters of the state. The system has gone largely unenforced and has failed to provide incentives for CAFOs to comply with current regulations. Self-monitoring, small penalties, and lack of consistent on-site inspections have all contributed to the failure of the permitting program.

Due to recent changes in the federal regulatory scheme, Illinois has a new opportunity to enforce CWA measures to protect its waster from CAFO pollutants. However, existing challenges to the newly enacted EPA NPDES regulations in the Second Circuit has undoubtedly affected Illinois' enactment of its revised permit program. Several aspects of the federal regulations were vacated and remanded, and thus uncertainty about the law remains. Because of these recent developments, the following study is intended to provide a brief overview of the federal regulations and the anticipated changes to those regulations in light of the Second Circuit decision. Additionally, an analysis of the present permitting and enforcement scheme in Illinois is provided and compared to other states within the Midwestern region. The report concludes with recommendations for future water protection action.

#### V. THE FEDERAL NPDES REGULATORY PROGRAM

The CWA is intrinsic in the federal effort to protect the environment. It is "designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>44</sup> The CWA is the principal legislative source of the EPA's authority—and responsibility—to abate and control water pollution.<sup>45</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

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20LIVESTOCK%20AND%20THE%20ENVIRONMENT%20FEEDLOT%20PROGRAM%20OV  
ERVIEW%22 [hereinafter MPCA OVERVIEW].

44. No Spray Coalition, Inc. v. City of New York, 351 F.3d 602, 604 (2d Cir. 2003).

45. 33 U.S.C. §§ 1311(a), 1342, 1362 (2003).

the NPDES program.<sup>46</sup> This essentially means that the EPA primarily advances the CWA's objectives, which includes not only reducing water pollution, but also eliminating it.<sup>47</sup> NPDES permits, while authorizing some water pollution, place significant restrictions on the quality and character of such pollution.

NPDES permits are issued either by the EPA itself or the states in a federally approved permitting system.<sup>48</sup> Regardless of the issuer, every NPDES permit is statutorily required to set forth, at the very least, "effluent limitations," which are "restriction[s] . . . on [the] quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters."<sup>49</sup> In general, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters.

The CWA specifically defines the term "point source" to include CAFOs.<sup>50</sup> To be considered a CAFO, a facility must first be defined as an AFO.<sup>51</sup> An AFO means a lot of 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."<sup>52</sup>

In 1974 and 1976, the EPA promulgated regulations that established Effluent Limitation Guidelines ("ELGs") and NPDES permitting regulations for CAFOs. These regulations defined AFOs as CAFOs if they confined more than 1,000 animal units.<sup>53</sup> Smaller AFOs confining less than 1,000 animal units were also considered CAFOs if they discharged pollutants through a man-made device or if pollutants were discharged to waters running through the facility or otherwise can in contact with the confined animals.<sup>54</sup> However, AFOs were not considered CAFOs if they discharged in a 25-year, 24-hour storm event.<sup>55</sup> Under the regulations, the EPA could also designate an AFO as a CAFO if it was determined that the AFO was a "significant contributor of pollutants."<sup>56</sup>

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46. *Id.* §§ 1311(a), 1342.
  47. *Id.* § 1251(a)(1).
  48. *Id.* § 1342.
  49. *Id.* § 1362(11).
  50. *Id.* § 1362(14).
  51. 40 C.F.R. § 122.23(b)(2) (2003).
  52. *Id.* § 122.23(b)(1).
  53. *Id.* § 122.23(b)(3).
  54. *Id.* § 122.23(c)(2).
  55. *Id.* § 122.23(b)(3).
  56. *Id.* § 122.23(c).

In 2003 the EPA revised the twenty-five year old requirements.<sup>57</sup> In general, the revised EPA CAFO Rule maintains many of the basic features and the overall makeup of the 1976 NPDES rules with some important exceptions. First, the term “animal unity” is no longer used. Instead, the actual number of animals is used in order to define an AFO as a CAFO. Second, unless it can be proven that there is “no potential to discharge,” all facilities are required to apply for permits regardless of whether or not they discharge in a 25-year, 24-hour storm event.<sup>58</sup> Third, large poultry operations are covered, regardless of the type of waste disposal system used or whether the litter is managed in wet or dry form.<sup>59</sup> Finally, all CAFOs covered by an NPDES permit are required to develop and implement nutrient management plans. Nutrient management plans are intended to identify the practices necessary to implement ELGs and any other requirements in the permit, including the requirements to land apply manure, litter, and process wastewater consistent with site specific nutrient management practices that ensure appropriate utilization of the nutrients.<sup>60</sup>

The EPA CAFO Rule allows the permitting authority to determine the most appropriate type of permit coverage for CAFOs.<sup>61</sup> The permitting authority may determine whether a CAFO should be covered under an individual permit or under a general permit. Individual permits are specifically tailored for individual facilities,<sup>62</sup> while general permits are issued to cover multiple facilities with similar characteristics.<sup>63</sup> The EPA recognized the fact that most CAFOs would be covered under the general permits; however, certain circumstances were recognized that would necessitate the issuance of individual permits (e.g. exceptionally large facilities, facilities with a history of noncompliance, or facilities applying for approval to use alternative performance standards).<sup>64</sup>

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57. National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176-01 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122-23, 412).

58. *Id.* at 7182.

59. *Id.*

60. *Id.*

61. *Id.* at 7232.

62. 33 U.S.C. § 1342 (2003).

63. 40 C.F.R. § 122.28 (2003).

64. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7233 (Feb. 12, 2003).

### A. Challenges to the EPA CAFO Rule

The EPA CAFO Rule was recently challenged by the Waterkeeper Alliance and other environmental groups in the Second Circuit.<sup>65</sup> The holding will result in some substantial changes to the Rule as presently written. First, the Court vacated the provisions of the rule that:

(1) allow[ed] the permitting authorities to issue permits without reviewing the terms of the nutrient management plans; (2) allow[ed] permitting authorities to issue permits that do not include the terms of the nutrient management plans and that do not provide for adequate public participation; and (3) required CAFOs to apply for NPDES permits or otherwise demonstrate that they have no potential to discharge.<sup>66</sup>

Aspects of the EPA CAFO Rule that were remanded to the EPA for further clarification and analysis include:

(1) to definitely select a [best conventional pollutant control technology] (BCT) standard for pathogen reduction; and (2) to clarify-via a process that adequately involves the public - the statutory and evidentiary basis for allowing Subpart D CAFOs to comply with the new source performance standard by either: (a) designing, constructing, operating, and maintaining production areas that could contain all manure, litter, and process wastewater including the runoff and direct precipitation from a 100-year, 24-hour rainfall event; or (b) complying with alternative performance standards that allow production area discharges, so long as such discharges are accompanied by an equivalent or greater reduction in the quantity of pollutants released to other media.<sup>67</sup>

Additionally, the EPA was directed to clarify the statutory and evidentiary basis for failing to promulgate water quality based effluent limitations for discharges other than agricultural storm water discharges, as that term is defined in the federal regulation.<sup>68</sup> The EPA was also directed to clarify "whether states may develop water quality based effluent limitations on their own."<sup>69</sup> The CAFO Rule was upheld in all other respects.

Although the holding obviously has positive aspects, there are two significant downfalls. First, it has given certain states an invalid justification to wait until EPA clarifies and revises the Rule before fully implementing their own revised NPDES programs.<sup>70</sup> Second, it was determined that the EPA exceeded its

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

66. *Id.* at 524.

67. *Id.*

68. 40 C.F.R. § 122.23(e) (2003).

69. *Waterkeeper Alliance*, 399 F.3d at 524.

70. Communication with Albert Ettinger, Senior Attorney, Illinois Environmental Law & Policy Center (Mar. 3, 2005).

statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate they have no potential to discharge. It was held the CWA was not intended to regulate potential discharges, but rather only dischargers in-fact.<sup>71</sup> This limits the regulatory authority of the EPA in that only those point sources that actually discharge into waters of the United States will be required to apply for a permit. This eliminates potential discharges from having to demonstrate they have no potential to pollute and correspondingly reduces the EPA's regulatory oversight of such facilities.

The full effect of the Waterkeeper holding is yet to be seen. Nonetheless, it has undoubtedly had an effect on the implementation of the CWA. For example, in response to the ruling, the EPA revised its NPDES compliance dates by which newly defined CAFOs were required to seek a permit coverage and by which all CAFOs were required to have nutrient management plans developed and implemented. The dates have been extended until July 31, 2007, which is more than a year later than originally intended.<sup>72</sup>

## VI. IS ILLINOIS' NPDES PERMIT SCHEME CONSISTENT WITH FEDERAL LAW?

### A. Overview of the Illinois Permit Scheme

The governmental bodies involved in implementing and enforcing the requirements of the CAFO NPDES program include the IEPA Bureau of Water, the Illinois Pollution Control Board ("IPCB") and the Illinois Attorney General. The IEPA is responsible for the administration, monitoring, and enforcement of the state's NPDES permit program for CAFOs and has the responsibility of issuing NPDES permits and monitoring permittees by conducting on-site inspections and reviewing discharge monitoring reports.<sup>73</sup> The IPCB develops water quality standards (generally based on recommendations from the IEPA), hears CAFO permit appeals, and grants variances from NPDES permit requirements.<sup>74</sup> The Attorney General prosecutes violations of the CWA.<sup>75</sup> Typically, the Attorney General waits for referrals from the IEPA before bringing a case.<sup>76</sup> Citizens may

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71. *Waterkeeper Alliance*, 399 F.3d at 505.

72. See Revised Compliance Date for National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations, 71 Fed. Reg. 6978 (Feb. 10, 2006) (extending the date from Dec. 31, 2006).

73. ILL. ADMIN. CODE tit. 35, §309.146 (2005).

74. *Id.* § 501.101.

75. The IEPA does not have the authority to bring its own causes of action for CWA violations in court or in front of the IPCB. *People ex rel. Scott v. Briceland*, 359 N.E.2d 149 (Ill. 1976).

76. Illinois Environmental Protection Act, 415 ILL. COMP. STAT. 5/31 (2005).

also bring suits against CWA violators pursuant to both state and federal regulations.<sup>77</sup> Notice, complaint, and hearing requirements and procedures are essentially the same for both Attorney General and citizen suits.

It should be noted that the Illinois Department of Agriculture ("IDOA") administers and enforces the Livestock Management Facilities Act ("LMFA").<sup>78</sup> The LMFA establishes requirements for the design, construction, and operation of livestock management and livestock waste-handling facilities and sets forth the criteria for the training and certification of livestock facility operators. The LMFA also sets standards for the development and implementation of waste management plans.<sup>79</sup> This has caused great confusion for many in terms of trying to determine what CAFO regulations prevail. Recently, the IEPA and IDOA initiated efforts to combine their regulatory programs by developing a workbook of forms and instructions intended to assist livestock industry producers in complying with the requirements between the agencies.

### B. *Inconsistencies with Federal Law*

In general, Illinois' CAFO NPDES permit program is in compliance with the EPA CAFO Rule. However, in light of *Waterkeeper Alliance*, there are two glaring inconsistencies between the CWA and Illinois' permitting scheme. First, the nutrient management plan is not incorporated into the General Permit and is not subject to review and approval by the IEPA. Second, the public notice requirements for nutrient management plans are inadequate in that they are shielded from public scrutiny and comment.

#### 1. *Nutrient Management Plans*

The CWA unequivocally provides that all applicable effluent limitations must be included in each NPDES permit.<sup>80</sup> It was held in *Waterkeeper Alliance* that terms of nutrient management plans constitute effluent limitations and thus, by failing to require the terms of the nutrient management plans to be included in NPDES permits, the EPA CAFO Rule violated the CWA.<sup>81</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

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77. 33 U.S.C. §1365(b) (2003); 415 ILL. COMP. STAT. 5/31(d) (2005).

78. Illinois Livestock Management Facilities Act, 510 ILL. COMP. STAT. 77/1 to 77/999 (1996).

79. *Id.* at 77/10.40.

80. 33 U.S.C. §§ 1311(a)-(b), 1342(a) (2003).

81. *Waterkeeper Alliance*, 399 F.3d at 502.

nutrient management plans as a condition for application,<sup>82</sup> the nutrient management plan is not incorporated into the permit itself. The terms of the nutrient management plan 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.

It should be further noted that the Illinois NPDES permit scheme is in violation of the CWA in that it does not require proper review and approval of nutrient management plans prior to permit issuance. Although the EPA CAFO Rule does not specifically require permitting authorities to review nutrient management plans before issuing permits, Waterkeeper Alliance held that the absence of such a requirement is in violation of the CWA. It was stated that by failing to provide for permitting authority review, the EPA CAFO Rule “does not adequately prevent Large CAFOs from misinterpreting or misrepresenting their specific situation and adopting improper or inappropriate waste management rates.”<sup>83</sup> Accordingly, in order to be in compliance with the CWA, Illinois will have to amend its permitting scheme so that each and every nutrient management plan is subject to review and approval by the permitting authority prior to receiving coverage under either an individual or general permit.<sup>84</sup>

## 2. Public Comment

Illinois' present permitting scheme violates the CWA's public participation requirements in that it shields nutrient management plans from public scrutiny and comment. 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>85</sup> The Act further provides that there be an “opportunity for public hearing” before any NPDES permit issues,<sup>86</sup> and that a “copy of each permit application and each permit issued under this section shall be available to the public,”<sup>87</sup> and that “any citizen” may bring a civil suit for violations of the Act.<sup>88</sup>

The Illinois permitting scheme provides no assurance that the public will have a meaningful role in the implementation of the CWA because it not only

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82. IEPA, *NPDES Permit No. ILA01, Special Condition 5(e)(iv)* (2004), available at [http://www.age.uiuc.edu/clmt/rules\\_npdes-permit.pdf#search=%22IEPA%2C%20NPDES%20Permit%20No.%20ILA01%22](http://www.age.uiuc.edu/clmt/rules_npdes-permit.pdf#search=%22IEPA%2C%20NPDES%20Permit%20No.%20ILA01%22).

83. *Waterkeeper Alliance*, 399 F.3d at 502.

84. *Id.*

85. 33 U.S.C. §1251(e) (2003).

86. *Id.* § 1342(a)-(b).

87. *Id.* § 1342(j).

88. *Id.* § 1365(a).

fails to incorporate the terms of nutrient management plans into the 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 (BMP) plan. The BMP plan is to be maintained on site for the term of the permit and for a period of five years after its expiration.<sup>89</sup> However, the permit does not similarly 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>90</sup> The public must also be able to call hearings and meaningfully comment on the permits before they issue.<sup>91</sup> Having access to the nutrient management plans provides the public with the information that is necessary to bring citizens suits – an integral component in enforcement of the CWA.<sup>92</sup>

#### VII. DOES THE ILLINOIS PERMIT SCHEME FOR CAFOs PREVENT CWA VIOLATIONS?

IEPA's current NPDES program appears to be ineffective in preventing CWA violations. Under the present scheme, Illinois requires NPDES permits for AFOs it defines as "Very Large Operators" or "Large Operators," as well as on the case-by-case basis. AFOs are defined as

a lot or facility where animals have been, are or will be stabled or confined or fed or maintained for a total of forty-five days or more within any twelve month period, and corps, vegetation, forage growth, or post-harvest residues that are grown in place are not sustained in the normal growing season over any portion of the lot facility.<sup>93</sup>

Very Large Operators are confined AFOs with more than 1,000 animal units.<sup>94</sup> Large Operators are confined AFOs with at least 300 animal units that

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89. IEPA, *NPDES Permit No. ILA01*, *supra* note 80, at 5(e).

90. 33 U.S.C. § 1251(e) (2003).

91. *Id.* § 1342 (a), (b)(3).

92. Due to the high strain placed upon state and federal agencies because of underfunding and under-staffing, citizen involvement creates an additional security measure in both identifying and enforcing violations. Furthermore, citizens may file suit against the permitting authority for not properly implementing and enforcing the law.

93. ILL. ADMIN. CODE tit. 35, § 501.225 (2005).

94. *Id.* § 502.103.

either discharge pollutants into “navigable water through a manmade ditch, flushing system or other similar manmade device” or discharge pollutants into “navigable waters which originate outside of and pass over, across, through or otherwise come into direct contact with the animals confined in the operation.”<sup>95</sup>

Even if an AFO does not fit the above definitions, IEPA may require an AFO to obtain an NPDES permit if (after an on-site inspection) an operation is determined to pose a threat to state waters.<sup>96</sup> These types of designations are determined on a case-by-case basis. However, IEPA may not require an AFO with less than 300 animal units to obtain an NPDES permit unless they either discharge pollutants into navigable waters “through a manmade ditch, flushing system or other similar manmade device” or discharge pollutants into “navigable waters which originate outside of and pass over, across, through or otherwise come into direct contact with the animals confined in the operation.”<sup>97</sup> In addition, no AFO is required to obtain an NPDES permit if it only discharges in the event of the 25-year, 24-hour storm event.<sup>98</sup>

As of October 2001, out of the nearly 35,000 AFOs in Illinois, the IEPA had only issued approximately forty NPDES permits.<sup>99</sup> Many of the operations were not required to have permits based upon the defining criteria; however, an investigation from IEPA indicated that 52% of the livestock facilities contacted or visited had one or more regulatory violations.<sup>100</sup> Of the facilities contacted, the following sources of water pollution were documented: 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>101</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 the CWA’s standard of zero discharge has not been met.

One of the overriding problems with the permit scheme is that permits are generally enforced through self-monitoring. Under the current regulations, it is the permit holder’s responsibility to collect samples and submit annual reports. Although there are some checks on self-reporting such as facility inspections, the system “provides incentives for permit holders to monitor inaccurately or at times when there is less likelihood that a permit violation will be found.”<sup>102</sup>

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95. *Id.* § 502.104.

96. *Id.* § 502.106(a).

97. *Id.* § 502.106(b).

98. *Id.* § 502.102.

99. ELI SUMMARIES, *supra* note 6, at 23.

100. IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 4.

101. *Id.* at 6.

102. ELPC 2003 REPORT, *supra* note 14, at 7.

Without oversight by the IEPA in the monitoring process, many discharges go unnoticed until it is too late (i.e., fish kills and other obvious damage).

### VIII. HOW DOES THE ILLINOIS EPA ENFORCE ITS CWA LAWS AGAINST CAFOS?

#### A. Enforcement Program Overview

Generally speaking, the primary way NPDES permits are enforced is by the IEPA referring cases to the Illinois Attorney General. The Attorney General then brings actions for penalties before the IPCB. Typically, the IEPA institutes enforcement proceedings only after being made aware of alleged violations – usually after receiving complaints. Within 180 days of becoming aware of a violation, the IEPA will issue a written notice informing the facility of the alleged violation.<sup>103</sup> The violator has forty-five days to file a written response to the notice. If the complaint is valid, the response should include a proposed compliance agreement.<sup>104</sup> The agency will issue a written notice of acceptance or rejection of the proposed compliance agreement in its reply. If the violator abides by the compliance agreement, the agency is precluded from referring the violation to the Attorney General's office.<sup>105</sup>

This cumbersome process most often results in an agreement between the IEPA and the violator, which precludes Attorney General prosecution of significant violations. There is a danger of promoting these agreements over prosecution and proper punishment. By avoiding prosecution and punishment, violators are unlikely to gain the necessary principles these punishments are meant to impose.<sup>106</sup> According to the IEPA's 2001 livestock investigation records, of the sixty noncompliance advisory letters sent by the agency, only seven were referred to the Attorney General's office.<sup>107</sup> The actual number of resulting referrals to the Attorney General indicates that an overwhelming majority of violations are never fully prosecuted. There is no doubt that many operations do not

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103. 415 ILL. COMP. STAT. 5/31(a)(1) (2005).

104. *Id.* at 5/31(a)(2).

105. *Id.* at 5/31(a)(10).

106. The widely accepted need for punishment in our society is generally placed into the categories of: retribution, where the penalty is imposed as a mere punishment for doing the act; rehabilitation, in order to teach a lesson with hopes that the violator may again re-enter society as a serving member; specific deterrence, discouraging the violator from acting in the same manner for fear of prosecution; and general deterrence, discouraging the rest of society from doing that act for fear of prosecution. By allowing violations to go unpunished there is no societal pressure imposed upon facilities to comply with existing regulations.

107. IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 17.

comply with the law until after they receive substantiated complaints. It could also be reasonably suspected that the current enforcement procedures have little deterrent effect on violators as there is no real obligation to follow the law until entering into a compliance agreement with IEPA.

Although informal compliance tools such as notices of violations may be useful for minor, first time violations, such measures are inadequate for serious and repeated offenses. This is because they are unenforceable and do not impose corrective actions or penalties.<sup>108</sup> Most other states have granted their environmental agencies administrative authority to bring facilities into compliance by issuing enforceable administrative orders and collecting administrative penalties.<sup>109</sup> Under Illinois' present regulatory scheme, the IEPA does not have the power to take such actions for NPDES violations and must rely on the good faith of facility operators to comply with negotiated agreements.

CWA enforcement actions may also be brought by the Attorney General or District Attorneys.<sup>110</sup> Under the CWA, citizens may commence a civil action on their own behalf against any person (including governmental entities) for violating the Act.<sup>111</sup> However, no citizen action may be brought "if the Administrator or the State has commenced and is diligently prosecuting a civil or criminal action."<sup>112</sup> This restriction has been problematic in the past in precluding the public from participating in enforcement. According to a recent report from the Environmental Law & Policy Center

[i]t was routine practice for the Attorney General's office under the last Attorney General to file an enforcement action before the IPCB on the 59<sup>th</sup> day after the filing of the citizen suit 60-day notice letter to prevent the citizen group from enforcing the law. The only apparent purpose in this practice was to protect the violator.<sup>113</sup>

Apparently, by taking such actions to the IPCB rather than federal court, violators are typically assessed lower fines, as penalties in federal court for CWA violations are typically much higher.

In terms of the effectiveness of the present enforcement system in deterring future violations, the actual fines imposed on NPDES violators are equally as inconsequential as the number of enforcement actions actually brought. Un-

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108. See 415 ILL. COMP. STAT. 5/31(a)(1)(A) (2005). The IEPA has the authority to issue administrative citations, which impose fines for minor offenses. However, this authority is limited to violations relating to improper land pollution and refuse disposal (i.e. littering); see *id.* at 5/31.1.

109. See, e.g., IND. CODE §§ 13-30-3-4(b)(2)(B), 13-30-3-11 (2005); MINN. STAT. §§ 116.072 (1), (4) (2004); OHIO REV. CODE ANN. §§ 903.16, 903.17 (West 2003).

110. 415 ILL. COMP. STAT. 5/42 (2005).

111. 33 U.S.C. § 1365(a) (2003).

112. *Id.* § 1365(b).

113. ELPC 2003 REPORT, *supra* note 14, at 49.

der the Illinois Environmental Protection Act, a violator may be liable for a civil penalty not to exceed \$50,000.00 for the violation and an additional civil penalty not to exceed \$10,000.00 for each day the violation continues.<sup>114</sup> However, a number of factors are taken into consideration in assessing the amount of fines to be imposed. Such factors include the duration and gravity of the violation, the due diligence on the part of the violator in attempting to comply with the requirements of the Act, previous violations, and the economic benefits accrued by the violator because of the delay in compliance.<sup>115</sup>

Under the CWA, penalties must be high enough to recover any economic gain derived from the violator by not complying with the law. Otherwise, there is a risk that the fines may be considered merely the "cost of doing business." If fines can be absorbed into the "cost of doing business" some operations may risk not following the law. Often, these operations tend to have an economic advantage over their competitors who actually invest in taking measures to comply with the law. The economic gains analysis must also be applied in assessing fines under Illinois law as well; however, the IPCB has not consistently applied such measures. In fact, it has been noted that when the economic benefit analysis is actually applied in assessing fines in Illinois, the IPCB "often uses a purportedly minimal economic benefit from a permit violation as a factor for determining [such] penalties."<sup>116</sup>

### B. *Fines and Penalties for Violations*

Information regarding the actual penalty amounts collected from CAFOs for NPDES violations is unavailable; however, the total amount collected in NPDES enforcement actions for 2003 amounted to \$381,357.00.<sup>117</sup> This number includes fines for all NPDES violations – not CAFOs alone. The amount collected is alarmingly low if one takes into account the fact that the NPDES permitting scheme applies to all point sources. Most, if not all, industrial activities require NPDES permits. CAFOs are but a fraction of the overall industry regulated under the NPDES program.

In addition to collecting actual fines for violations, the IPCB may also assess damages for fish kills. However, the fines assessed for fish kills in Illinois likely have little financial impact on most violators. In 2001, five counties with documented fish kills resulted in a total assessed value of \$4,675,14.00.<sup>118</sup>

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114. 415 ILL. COMP. STAT. 5/42(a) (2003).

115. *Id.* at 5/42(h).

116. ELPC 2003 REPORT, *supra* note 14, at 49.

117. ELPC NPDES PROFILE, *supra* note 11, at 15.

118. IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 13.

Fish kills in Henderson and Woodfield counties had a \$0.00 assessed value.<sup>119</sup> Fish kills in Iroquois, Peoria, and Wayne counties had assessed values ranging between \$1,291.46.00 and \$2,073.47.00.<sup>120</sup> Information regarding the actual fines imposed for these fish kills was unavailable, but the assessed values nonetheless demonstrate the need for higher, more stringent requirements in terms of evaluating such damages.

In summary, the present enforcement scheme is ineffective. Due to the regulatory framework, the IEPA must go through an elaborate negotiation process before referring a case to the Attorney General for prosecution. Very few cases are ultimately prosecuted because of this process. If a case is finally referred to the Attorney General's office, the fines assessed are commonly too low to provide an incentive against breaking the law. Often, the actual penalties and the cost of litigation end up being less expensive than bringing the operation into compliance from the beginning. In effect, it is more economical for CAFOs to break the law than it is to follow the law.

### C. CAFO Inspection Activities

Under the present NPDES regulations most CAFOs are not required to obtain a permit if they claim to have no discharge. As of now, the IEPA only has about four staff members conducting inspections of the suspected 35,000 livestock facilities in the state.<sup>121</sup> The proper assessment of these facilities in having no potential to pollute is likely not accurate as most inspections are conducted only in response to complaints.<sup>122</sup> Records obtained from the IEPA in 1998 indicated that "15 out of 22 randomly inspected lagoons in western Illinois were illegally discharging wastewater into streams."<sup>123</sup> More recent data from a 2001 IEPA report reveals that 52% of the facilities either contacted or visited had one or more regulatory violations.<sup>124</sup> These findings indicate it is possible that over half of the 35,000 facilities in the state are polluting without regulatory supervision.

As of 2004, Illinois had inventory information for about 30% of the estimated 500 Large CAFOs in the state.<sup>125</sup> From 2000 to 2002, the IEPA com-

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119. *Id.*

120. *Id.*

121. ELI 1999 REPORT, *supra* note 17, at 72; *see also* CLEAN WATER NETWORK 2000 REPORT, *supra* note 6, at 19.

122. CLEAN WATER NETWORK 2000 REPORT, *supra* note 6, at 20.

123. *Id.* at 19-20 (citing to 1998 FOIA information compiled by Illinois Stewardship Alliance).

124. IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 4.

125. IEPA NPDES PROFILE, *supra* note 11, at 11.

pleted periodic inspections of only 154 Large CAFOS and currently has a goal of conducting on-site inspections of Large CAFOs once every five years.<sup>126</sup> With the combination of self-monitoring and the actual percentage of random IEPA inspections being conducted, the permit scheme is not adequately ensuring against CWA violations.

## IX. HAS THE IEPA BEEN ABLE TO PROPERLY IMPLEMENT THE NPDES PROGRAM?

### A. *Where Are We Now?*

Illinois has failed to implement its NPDES CAFO program in accordance with federal law. According to the EPA CAFO Rule, all states were required to have their revised programs in place as of July 2005.<sup>127</sup> Illinois has not met this requirement. The state's NPDES CAFO regulations are modeled after federal rules dating back to 1978 and there appears to be no effort by the state to revise the program at this time.

Aside from failing to revise its CAFO regulations, Illinois has failed to issue permits in accordance with the CWA. According to the EPA CAFO Rule, Illinois had until April of 2006 to ensure all CAFOs were covered under the new permit scheme.<sup>128</sup> IEPA estimates indicate there are approximately 3,200 facilities that may need permits under current federal regulations.<sup>129</sup> Although the EPA extended the compliance dates for certain CAFOs in response to the Second Circuit holding,<sup>130</sup> all other CAFOs are required to have current permits. As of today, no new permits have been issued in Illinois and all of the permits issued

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126. *Id.*

127. 40 C.F.R. § 123.62(e) (2003).

128. *Id.* § 123.62(e).

129. Communication with Bruce Yurdin, IEPA, Permits Division (Mar. 11, 2005). (This number may reduce in light of the *Waterkeeper Alliance* ruling, as to the Court determined that only dischargers-in-fact had a duty to apply – not potential dischargers.)

130. *See* Revised Compliance Date for National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations, 71 Fed. Reg. 6978 (Feb. 10, 2006) (CAFOs falling in these categories are those facilities that were not defined as CAFOs prior to the enactment of the EPA CAFO Rule and those facilities that were in existence as of the date of the revised rules that would now qualify as CAFOs due to expansion. It should be noted that CAFOs located in states that have not revised their rules to reflect the EPA's recent date extensions are not permitted the same extensions, as states may choose to require CAFOs to obtain NPDES permits in advance of the dates set forth by the EPA pursuant to the authority granted to them under Section 501 of the CWA to adopt regulations more stringent than federal law.)

prior to the EPA CAFO Rule are suspected as being expired.<sup>131</sup> Further, Illinois has inventory information for only about 30% of the estimated 500 Large CAFOs in the state and conversations with EPA Region 5 officials have revealed that neither they, nor IEPA staff, know the actual whereabouts of the majority of the facilities operating throughout Illinois.<sup>132</sup>

*B. IEPA Does Not Have the Requisite Funding or Manpower to Properly Administer the NPDES Program*

Much of the enforcement and monitoring problems in Illinois derive from lack of funding and understaffing. It is clear that IEPA lacks sufficient resources to perform the necessary inspections and enforcement activities needed to ensure proper implementation of the NPDES program. A recent report noted that an IEPA "Gap Analysis" in 2000 indicated "the agency needed more than twice as much funding for CWA implementation than was available at the time."<sup>133</sup> "In March of 2003, IEPA identified over \$27 million in funding needed to administer the NPDES program, compared to the \$13.5 million in current resources."<sup>134</sup> "IEPA reports 26% of individual permittees are operating on expired permits, and there is a backlog of 1,000 permit renewal and modification applications."<sup>135</sup> These numbers are problematic considering the fact that the new CAFO regulations will require more permits, meaningful review of individual permittees' nutrient management plans, as well as more facility inspections.

*1. The IEPA Needs to Assess Application Fees*

Historically, one of the main reasons the [IEPA] Bureau of Water was under funded and heavily dependent on federal funds was that, until legislation was passed in Spring 2003 providing for NPDES fees, Illinois was one of only eleven states (and only Midwest state) that failed to charge fees for reviewing and issuing water permits and monitoring permitted sources...Industrial and municipal wastewater dischargers have long been required to pay for the costs related to the issuance of NPDES permits in most states. In some cases, revenues collected [from permittees] more than pays for the costs in administering [NPDES programs]...<sup>136</sup>

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131. Communication with Bruce Yurdin, IEPA, Permits Division (Mar. 11, 2005).

132. Communication with Steve Jann and Arnie Leder, Region 5 EPA (Jan. 5, 2006); see also IEPA LIVESTOCK NPDES PROFILE, *supra* note 11, at 11.

133. ELPC 2003 REPORT, *supra* note 14, at 13.

134. *Id.*

135. *Id.*

136. *Id.*

Presently, the IEPA has no application fees assessed to CAFO operations.<sup>137</sup> The failure of IEPA to charge such fees should be reconsidered as such fees are an "equitable source of revenue for permitting, monitoring and enforcement activities because they are paid by the entities that generate pollution."<sup>138</sup> Fees should be assessed for NPDES applications. Any excess funds should be used towards expanding and developing better monitoring and enforcement measures for CAFOs.

### C. Loopholes

Beyond the IEPA's deficiencies in funding and the resulting under staffing, there are a few areas in the actual permit scheme that need revision in order to prevent water pollution from CAFOs. Although the General Permit is substantially in line with federal regulations,<sup>139</sup> neither the federal guidelines nor the general permit are especially rigorous. One of the largest loopholes involves the non-regulation of off-site manure disposal. Although the permit provides for required record keeping of off-site transfers, once the manure leaves the site it is unregulated under the NPDES program.

Large CAFOs are the primary source of excess nutrients – the main source of water pollution. They typically have smaller land bases to distribute waste over, requiring them to transport their manure off-site. Traditionally, farmers used excess manure as fertilizer and distributed it over their crops during the growing season. Conventional farms typically had larger land bases, which reduced the risk of applying too much manure at a given time on a given area. Concentrated levels of nutrients can have significant negative impacts on the environment, so having a larger land base reduces the risk of misapplication of manure. Corporate livestock producers do not practice traditional farming and do not grow crops or utilize other conventional farming methods. Thus, there is no demand for larger land holdings. This results in shipping manure off-site for disposal. Without these transfers being covered under the permit, many of the Large CAFOs are shielded from the responsibility of ensuring proper disposal or application of the nutrients they generate.

Another significant loophole in Illinois' regulatory scheme involves IEPA's policy of self-monitoring. As mentioned previously, IEPA has a current policy of inspecting Large CAFOs once every five years. This leaves each facil-

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137. Communication with Bruce Yurdin, IEPA, Permits Division (Mar. 11, 2005).

138. ELPC 2003 REPORT, *supra* note 14, at 13.

139. This is not taking into consideration new developments resulting from *Waterkeeper*, *supra* note 31 (i.e., nutrient management plans incorporated into the general permit and public comment and participation).

ity with years of unmonitored activity. Because it is left to the owner or operator to report any discharges, it is highly likely that, without constant checks from the regulatory authority, many of the facilities discharge either without knowing or without proper reporting. Furthermore, it is left to the operators to prepare and submit annual reports. This allows too much flexibility in the timing and frequency of required inspections. Because of this flexibility, the testing done by owners and operators can be performed at opportune times when there is less likelihood of detectable violations.

In designing the CAFO Rule, the EPA intended to maximize the flexibility for states to implement appropriate and effective programs to protect water quality and public health.<sup>140</sup> In order to properly hold Large CAFOs accountable and to monitor the application of the nutrients they produce, Illinois should require off-site transferees to be co-applicants on the general permit. Additionally, IEPA should conduct random inspections of all CAFOs in Illinois on a regular basis, as well as perform independent testing of ground and surface waters in the vicinity of each randomly inspected facility.

#### X. HOW DOES ILLINOIS COMPARE TO OTHER STATES IN EPA REGION 5?

##### A. *Overview of EPA Regional Oversight of State Implemented NPDES Programs*

The EPA has the authority and responsibility to delegate the CWA NPDES program. Within this authority, the agency may authorize approved states to administer the program if it retains oversight authority over them.<sup>141</sup> There are ten regional EPA offices responsible for the execution of EPA programs in their respective states and territories. The Administrator of each regional office reports directly to the Administrator at EPA Headquarters in Washington D.C. The EPA Region 5 office is located in Chicago and oversees programs in Illinois, Indiana, Ohio, Michigan, Minnesota, and Wisconsin. The following is a brief review of the NPDES CAFO programs showing that Illinois is far behind other states within the region in implementing and enforcing the CWA's NPDES program for CAFOs.

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140. Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7231 (Feb. 12, 2003).

141. 33 U.S.C. §§ 402 (b)(5), (d)(1) (2003).

## B. EPA Region 5 State NPDES CAFO Programs

### 1. Indiana

The Indiana Department of Environmental Management (“IDEM”) administers the state’s NPDES CAFO program. While Indiana has had the authority to administer the NPDES program since 1975, up until recently the state had not issued any NPDES permits to CAFOs. Historically, the IDEM administered its Confined Feeding Program (“CFP”) approval system in lieu of issuing NPDES permits.<sup>142</sup>

Indiana’s CFP approval program requires all CAFOs with as few as 300 animals to have written approval from the IDEM in order to construct, operate, or close.<sup>143</sup> The program sets standards for facility sites and design as well as nutrient management practices. Although the program is more stringent than the federal guidelines in certain respects (i.e. facilities confining as few as 300 animals must be approved), it has been argued as not fully meeting the requirements for NPDES permitting under federal law and being inadequate in ensuring against CWA violations.<sup>144</sup>

As of 2002, the IDEM had not issued any CAFO NPDES permits.<sup>145</sup> IDEM’s failure to issue permits eventually led citizens to bring suit in the United States District Court for the Southern District of Indiana in *Save the Valley, Inc. v. EPA*.<sup>146</sup> The plaintiffs alleged that the EPA had actual knowledge the state had failed to adopt and enforce adequate laws for CAFOs in accordance with the CWA and sought injunctive relief to compel the EPA to: 1) reassume enforcement of the state’s NPDES program and 2) to initiate proceedings to withdraw approval of the state’s program.<sup>147</sup> The Court declined to compel the EPA to withdraw approval of the NPDES program. However, it was found that Indiana had failed to properly administer the program in accordance with the CWA, so the Court moved to compel the state to “act forthwith to bring its program into compliance.”<sup>148</sup> The state responded to the ruling by revising its NPDES CAFO program and issuing a new general permit for CAFOs through an emergency rulemaking process in May of 2003.

Since *Save the Valley, Inc.*, the state has been active in implementing its CAFO NPDES program. As of May 2006, the state had issued permit coverage

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142. See IND. CODE § 13-18-10 (2005), 327 IND. ADMIN. CODE 16 (2005).

143. 327 IND. ADMIN. CODE 16-2-5, 16-4-1 (2005).

144. See *Save the Valley, Inc. v. EPA*, 223 F. Supp. 2d 997, 1012-15 (S.D. Ind. 2002).

145. *Id.* at 1012-13.

146. *Id.* at 999-1000.

147. *Save the Valley*, 223 F. Supp. at 999.

148. *Id.* at 1013.

to 207 facilities under its general permit and issued individual permit coverage to five facilities.<sup>149</sup> In 2004, the state revised its CAFO rules to incorporate the revised federal standards set forth in the EPA CAFO Rule.<sup>150</sup>

## 2. Michigan

Michigan has had the authority to administer the CWA NPDES program since 1973.<sup>151</sup> Until 1997, the Michigan Water Resources Commission was in charge of permitting. In 1997, the EPA approved a reorganization of Michigan agencies whereby the authority to administer the program was transferred to the Michigan Department of Environmental Quality ("MDEQ").<sup>152</sup> Until recently, Michigan had only voluntary environmental programs for livestock producers such as the Right to Farm Act and its corresponding Generally Accepted Agricultural and Management Practices ("GAAMPs").<sup>153</sup> According to a 2000 report, Michigan refused to implement an NPDES program for CAFOs based on the claim it had a zero discharge policy for waters of the state.<sup>154</sup>

It was not until significant pressure by citizens and Region 5 EPA that Michigan bought its NPDES CAFO program into compliance with the CWA. In 1999, the Sierra Club filed a petition with the EPA requesting the agency to withdraw approval of the state's permitting program.<sup>155</sup> The petition set in motion an EPA investigation of the state's regulations and permitting activities. The EPA has not withdrawn the state's authority to administer the program. However, the petition led to a negotiation process between the state and Region 5 EPA. This process resulted in a commitment by the MDEQ to properly enforce the CAFO NPDES program.<sup>156</sup>

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149. Indiana Water Pollution Control Board, *Effect of Recent Rulemakings*, Rule Title: CAFO (NPDES) (#01-51) (2006), available at <http://www.in.gov/idem/rules/packets/water/may/recentrulemakings2006.pdf>.

150. See 327 IND. ADMIN. CODE 5, 15, 16 (2005).

151. National Association of State Departments of Agriculture Research Foundations, *State Environmental Laws Affecting Michigan Agriculture* (2000), available at <http://www.nasdaq.org/nasdaq/nasdaq/Foundation/state/Michigan.pdf>. (It should be noted that at the time Michigan's program was approved, there were no specific requirements for regulating CAFOs).

152. EPA, REGION 5 INTERIM REPORT: RESULTS OF AN INFORMAL INVESTIGATION OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATIONS SYSTEM PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS IN THE STATE OF MICHIGAN I (2000) [hereinafter EPA INTERIM REPORT: MICHIGAN].

153. MICH. COMP. LAWS ANN. § 286.471-474 (WEST 1999)

154. EPA INTERIM REPORT: MICHIGAN, *supra* note 151, at 1.

155. See 40 C.F.R. § 123.63 (2003).

156. Communication with Steve Jann, Region 5 EPA (Jan. 5, 2006).

Michigan revised its CAFO permitting regulations in April of 2005 to comply with the EPA CAFO Rule.<sup>157</sup> Despite the Second Circuit ruling, Michigan still requires all CAFOs to apply for permits or demonstrate they have no potential to discharge.<sup>158</sup> The permit program covers both direct and indirect discharges to surface and groundwater as well as the storage of substances which “may” affect the quality of waters in the state.<sup>159</sup> As of June 2006, the MDEQ had issued approximately forty-two NPDES permits under the revised permit scheme and had an additional sixteen permit applications pending.<sup>160</sup> The state has also issued approximately 100 permits under its Michigan Agriculture Environmental Assurance Program (“MAEAP”) alternative permitting approach for CAFOs (also known as the Environmental Council of the States (ECOS Project)), which incorporates both state and federal NPDES permitting requirements.<sup>161</sup>

### 3. Minnesota

The Minnesota Pollution Control Agency (“MPCA”) is authorized to administer the state’s NPDES program. Minnesota’s NPDES program for CAFOs is incorporated into the state’s Feedlot Program.<sup>162</sup> The Feedlot Program sets standards for design and construction of all animal feedlots with at least fifty animal units. It also regulates the collection, transportation storage, processing, and disposal of livestock manure.<sup>163</sup> Under the Program, counties may assume responsibility to issue certain permits for feedlots up to 1,000 animal units. The MPCA issues all permits to facilities with 1,000 or more animal units and facilities in non-delegated counties.<sup>164</sup>

In an effort to assess and reduce the environmental impacts of livestock operations throughout the state, Minnesota revised its Feedlot Program in October of 2000. The revisions required the MPCA to register all facilities in the state with fifty or more animal units. It also requires NPDES permits of all operations with 1,000 animal units or more, as well as smaller facilities that dis-

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157. See MICH. ADMIN. CODE, r. 323.2196(2)(c), (4) (2006).

158. *Id.* at 323.2196(1).

159. *Id.* at 323.2102 (n), 323.2196(2)(c), (4).

160. Communication with Ronda Wuycheck, MDEQ Water Bureau (June 13, 2006).

161. *Id.*; see also MDEQ & EPA, REGULATORY INNOVATIONS PROPOSAL ALTERNATIVE PERMITTING APPROACH FOR CONCENTRATED ANIMAL FEEDING OPERATIONS PROJECT – 2003 ANNUAL REPORT 2 (2004), available at [http://www.deq.state.mi.us/documents/deq-water-npdes-CAFO\\_2003\\_Report.pdf](http://www.deq.state.mi.us/documents/deq-water-npdes-CAFO_2003_Report.pdf).

162. See MINN. ADMIN. CODE 7020 (2005).

163. *Id.* at 7020.0405.

164. EPA, STATE COMPENDIUM: PROGRAMS AND REGULATORY ACTIVITIES RELATED TO ANIMAL FEEDING OPERATIONS 141 (2002), available at <http://www.epa.gov/npdes/pubs/state-com.pdf> [hereinafter EPA 2002 STATE COMPENDIUM].

charge or otherwise pose a threat to state waters.<sup>165</sup> With the assistance of delegated counties, the MPCA registered approximately 29,000 feedlots by January 2002.<sup>166</sup> In 2001, the MPCA issued a General NPDES Permit, requiring all facilities with over 1,000 animal units to seek coverage.<sup>167</sup> By October of 2004, 560 facilities had been issued coverage under the permit.

When the EPA issued its revised CAFO Rule in 2003, the state estimated at least 250 more facilities would need coverage. Due to the recent revisions to the Feedlot Program, the state elected not to revise its CAFO rules again. Rather, it revised its general permit scheme to incorporate the changes in the federal regulations.<sup>168</sup> The state's revised permit scheme took effect in 2004. As of November 2005, the state had issued coverage to approximately 990 facilities.<sup>169</sup>

#### 4. Ohio

At present, the Ohio Environmental Protection Agency ("OEPA") and the Ohio Department of Agriculture ("ODA") administer the state's environmental regulations for livestock facilities. In 2000, Ohio elected to transfer most of its regulating and permitting authority for livestock operations to the ODA by enacting Senate Bill 141. However, the ODA is still in the process of petitioning the EPA for approval to administer the state's CAFO NPDES program. Until the EPA approves the ODA's program, the OEPA will retain its responsibility in regulating the CAFOs under the CWA.<sup>170</sup> As of today, the OEPA administers the NPDES program for CAFOs and the ODA administers construction and operating permits for CAFOs.<sup>171</sup>

Under Ohio's current NPDES permitting program, there are two types of permits a livestock facility may be required to have.<sup>172</sup> The first is an NPDES wastewater permit, which may be issued either individually or generally. The second is an NPDES construction storm water permit, which is required to prevent discharges resulting from the disturbance of one or more acres of land through the facility construction process. It should be noted that this permit

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165. *Id.* at 143.

166. MPCA, 2002 FEEDLOT PROGRAM: REPORT TO THE LEGISLATURE 3 (2003), available at <http://www.pca.state.mn.us/publications/reports/lr-feedlot-02.pdf>.

167. MPCA, GENERAL LIVESTOCK PRODUCTION PERMIT 2 (2001), available at <http://www.pca.state.mn.us/publications/feedlot-generalnpdespermit.pdf>.

168. *Id.* at 1.

169. MPCA OVERVIEW, *supra* note 41, at 2.

170. See OHIO REV. CODE. ANN. § 903.08(A)(2) (West 2005).

171. See, e.g., *id.* §§ 903.02, 903.03, 903.08, 6111.

172. See *id.* § 6111.02.1.

scheme traditionally applied to all different types of industry and it was not until recently that Ohio designed a permit program specifically for CAFOs.

In 1997, the Sierra Club and several other public interest groups petitioned the EPA to withdraw Ohio's authority to administer the state's NPDES program (along with a number of other state implemented federal environmental initiatives).<sup>173</sup> Although the EPA ultimately denied the petition, it was found that Ohio's NPDES program for CAFOs was lacking. Through the process of evaluating the state's program, the EPA received a commitment from OEPA to develop and properly enforce its CAFO permitting scheme.<sup>174</sup> By the end of 2003, the OEPA had begun regular inspections of large facilities and had issued its first EPA approved NPDES CAFO permit.<sup>175</sup>

In anticipating the EPA's approval of the transfer of CAFO NPDES authority, the ODA enacted its own NPDES rules for CAFOs in March of 2001. In November of 2003, those rules were revised to conform to the EPA CAFO Rule. The revised rules require all CAFOs to apply for NPDES permit coverage unless it is determined that they have no potential to discharge and are notified as such by the regulatory authority.<sup>176</sup> As of today, over twelve facilities have received coverage under the state's revised general permit and twenty-two facilities have been issued individual permits.<sup>177</sup>

### 5. Wisconsin

The Wisconsin Department of Natural Resources ("WDNR") is responsible for implementing the Wisconsin Pollutant Discharge System ("WPDES"). The WPDES program is largely patterned after the federal NPDES program. However, unlike the federal program, it applies to municipal, industrial, and animal waste facilities that discharge into both surface and ground waters of the state.

In the 1980s, Wisconsin enacted administrative rule NR 243 in order to directly address state-wide water quality impacts from CAFOs.<sup>178</sup> Under NR 243, all animal feeding operations having 1,000 or more animal units must apply

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173. EPA, *U.S. EPA Denies Petition to Withdraw Ohio Environmental Programs* (2005), available at <http://www.epa.gov/Region5/orc/enfactions/enfactions2003/state-oh.htm>.

174. EPA, REVIEW OF OHIO EPA'S PROGRAMS: EXCERPTS FROM THE FINAL REPORT (2003), available at <http://www.epa.state.oh.us/dir/USEPAReportSummary.html>.

175. *Id.*

176. OHIO REV. CODE ANN. § 903.08(B)(1) (West 2005).

177. Communication with Melinda Harris, OEPA, Division of Surface Water (June 15, 2006); see also OEPA, NPDES CAFO PERMITS ISSUED IN OHIO (2006), available at [http://www.epa.state.oh.us/dsw/cafo/permit\\_lists.html#General](http://www.epa.state.oh.us/dsw/cafo/permit_lists.html#General).

178. WISC. ADMIN. CODE [NR] § 243.01 (2006).

for permit coverage under a general or individual permit. Smaller operations may be required to have permits if they have discharged in the past and have failed to respond to a Notice of Discharge. All facilities with WPDES permits are required to have WDNR approved nutrient management plans in place. They must also have construction and facility modification plans approved for their waste control systems. The Department of Agriculture, Trade, and Consumer Protection ("DATC"), as well as county offices assist the WDNR with enforcement and inspection activities as well as with quality assurance of nutrient management plans and waste control systems. Like the other states in Region 5, Wisconsin's permitting program has a broader scope and is more stringent than federal law. For example, all CAFOs that land apply manure, process wastewater, or store manure or wastewater in a below or at-grade storage facility are assumed to discharge into ground and/or surface water and are therefore required to apply for WPDES permits.

To date, Wisconsin has only issued individual permits for CAFOs. As of 2002, Wisconsin had issued approximately 100 individual permits to facilities with over 1,000 animal units.<sup>179</sup> Once the EPA CAFO Rule took effect, all individual WPDES permits issued thereafter were designed to meet the revised federal standards in as much as the state's regulatory structure would allow.<sup>180</sup> As of June 2006, Wisconsin had issued individual permit coverage to 148 facilities throughout the state. Further, the WDNR has taken the Waterkeeper decision into account as part of its revision procedures and is currently moving forward with its rulemaking process. The WDNR's proposed revisions to NR 243 were adopted by the Natural Resources Board on May 24, 2006 and are now being considered by the Wisconsin Legislature for their finalization.

### C. Illinois Is Behind

In reviewing other Region 5 state programs, it becomes even more apparent that Illinois is failing to meet its responsibilities under the CWA. The state is severely behind schedule in revising its permit program compared to all of the other states in the region. While Illinois is still using outdated CAFO regulations from 1978, all of the other states have either completely revised their NPDES programs to comply with the EPA CAFO Rule or are in the final stages of enacting their revised regulations. Further, whereas all of the other states in the region are actively issuing permits under their revised CAFO permit schemes, the IEPA has not issued any NPDES CAFO permits since before the EPA CAFO

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179. EPA 2002 STATE COMPENDIUM, *supra* note 163, at 303.

180. Communication with Kristi Minahan, WDNR, Bureau of Watershed Management (June 15, 2006).

Rule was enacted and all of the permits issued prior to the Rule are suspected as being expired. Beyond this, all of the other states in Region 5 either require all CAFOs to either apply for permits or have permits to operate and have implemented more stringent NPDES rules than the federal guidelines require.

Between Illinois' failure to enforce the CWA's CAFO program and the existence of more stringent NPDES regulations in neighboring states, the state is likely to become a safe haven for large-scale polluters if it has not yet achieved this status. It should be noted that other states in the region, namely Indiana and Michigan, have escaped this fate due to the involvement of citizens and public interest organizations in the regulatory process. Region 5 EPA officials have expressed that citizens in Illinois have not been involved with the EPA or the state in enforcing the CWA to the same degree as citizens in other states within the region.<sup>181</sup> Yet given Illinois' failure to implement the EPA CAFO Rule and to enforce NPDES CAFO permits, it appears Illinois citizens have strong standing to petition the EPA to withdraw approval of Illinois' permitting program or seek other measure to avoid further water pollution from CAFOs.

#### XI. RECOMMENDATIONS<sup>182</sup>

In enacting the CWA, the federal government left much responsibility to the states to implement its intended purpose. Illinois has been given the responsibility to implement the CWA's NPDES program and the state must set standards as stringent, or more stringent, as the federal requirements. In an effort to ensure the federal goal of zero discharge from CAFOs is met, Illinois should take additional measures above and beyond the minimum requirements imposed by federal law. Although Illinois' present permit scheme is substantially in line with the federal requirements, this should not be seen as an opportunity to accept minimal standards. Thanks to the Illinois Constitution, citizens of the state are among the only ones in the country who have an explicit right to live in a "healthful environment."<sup>183</sup> With this in mind, the IEPA and the citizens of Illinois should recognize that there is no other option than to take every measure possible in ensuring this constitutional mandate. The following recommendations serve such a purpose:

1. *Enact a State-wide Moratorium on the Construction of New CAFOs and on the Expansion of Existing CAFOs.*

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181. Communication with Steven Jann and Arnie Leder, Region 5 EPA (Jan. 5, 2006).

182. See EIP 2004 REPORT, *supra* note 25, at 35-43.

183. IL. CONST. art. 11 §2 (amended 1972).

Illinois should enact a state-wide moratorium on the building of new CAFOs and the expansion of existing facilities.<sup>184</sup> A moratorium is necessary in Illinois given the number of facilities and the lack of resources available to regulate them. The construction of new facilities and the expansion of any existing facilities should be halted until the IEPA has had an opportunity to inventory and inspect all CAFOs in Illinois. Until all existing facilities have been properly assessed and brought into compliance, no new operations should be allowed.

### 2. *Actively Enforce the CWA*

Enforcement is one of the only ways to provide an effective incentive to comply with the law.<sup>185</sup> At present, IEPA does not have the resources or man power to enforce state or federal laws. IEPA needs to collect application fees and higher penalties for violations and use such funds to conduct random inspections of all existing CAFOs and subsequently prosecute those facilities they find in noncompliance.

### 3. *Increase Public Access to Permitting and Enforcement Data*

Public access is vital to the NPDES permitting and enforcement process. Public access is imperative because it allows people to participate in making "informed decisions regarding environmental issues affect[ing] their communities."<sup>186</sup> Beyond allowing people to participate in the decision-making process, the public's direct access to compliance and permitting information provides incentives for regulated entities to comply with the law.<sup>187</sup> In order to guarantee the public's rightful involvement in the decision-making process, IEPA must post all application materials for general permits on its website – including nutrient management plans and information regarding offsite transferees. Presently, the IEPA has a policy where the public has access via the FOIA. This process is laborious and time consuming and has been found to be an ineffective means in granting public access to information. Not only it is the IEPA's responsibility to grant reasonable access to such information, but it is mandated by the CWA that such public participation be provided for, encouraged, and assisted by the Administrator of the State.<sup>188</sup>

Given the recent holding in the Waterkeeper Alliance case,<sup>189</sup> it is the state's responsibility to require the terms of nutrient management plans to be included in the actual permits. Furthermore, the permitting authority must make such information available to the public to fulfill the CWA's public participation

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184. EIP 2004 REPORT, *supra* note 25, at 35.

185. *Id.* at 41.

186. *Id.* at 42.

187. *Id.*

188. 33 U.S.C. §1251(e) (2003).

189. *Waterkeeper Alliance, Inc.*, 399 F.3d at 504.

requirements.<sup>190</sup> Although some effort has been made by the IEPA to give the public notice of its intention to issue coverage under the general permit by posting such notice on its website, it should also post all application materials on the website so that each permit application is subject to public scrutiny.

#### 4. *Citizens Should Utilize Citizen Suit Provisions*

As it has been demonstrated, the IEPA does not have the resources to enforce the NPDES program. Congress has given power to citizens to enforce the CWA in federal court under its citizen suit provisions.<sup>191</sup> The federal courts may award citizens the same relief as any governmental action taken against CAFOs. The courts may issue injunctions to stop noncompliance and grant civil penalties of up to \$32,500.00 per day, as well as attorney's fees. Given the enforcement and prosecution record of the IEPA in Illinois, it appears at this time that citizen suits may be the most effective way to bring many CAFOs into compliance, as well as to deter any future violations.

#### 5. *Create a Coalition to Help Facilitate Citizen Suits and Assist in Providing Legal Awareness.*

Due to the imperative role of citizen suits in the enforcement of CAFO regulations, it is necessary to focus and strengthen citizen capacity and motivation to participate in the regulatory process. A citizens' group or coalition should be developed in order to provide public education, community organizing, issue advocacy and to assist the public in gaining access to legal rights and remedies against the negative environmental impacts generated from unregulated industrialized farming. Other possible functions may include warning people of possible community health issues, providing updates on current regulatory and legislative actions and directing citizens to appropriate legal representation. Providing a bridge between citizens and the regulatory process would improve the enforcement of the NPDES programs and overall awareness of the issues currently confronting rural communities.

#### 6. *Increase IEPA's Penalty Authority*

Penalties play a critical role in the regulatory process in that they deter future violations.<sup>192</sup> Penalties should be high enough so that they are not absorbed as the "cost of doing business." Presently, penalties in Illinois appear to encourage CAFOs to break the law instead of bringing their facilities into compliance as it is more economical to risk prosecution than to comply with regulatory standards. IEPA should also resist reducing already low penalties in the negotiation process and assess higher damages for fish kills. "The penalties

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190. *Id.*

191. 33 U.S.C. § 1365 (2003).

192. EIP 2004 REPORT, *supra* note 25, at 41.

should include the value of the lost fish as well as investigation costs and the value of the lost services to the public."<sup>193</sup>

7. *Pass Legislation Granting Administrative Authority to the IEPA*

Under Illinois' current regulatory scheme, the IEPA does not have the administrative authority to impose corrective actions or penalties for NPDES violations. Many other states have granted their environmental agencies the statutory right to bring facilities into compliance by issuing administrative orders and collecting administrative penalties.<sup>194</sup> In order to ensure compliance in Illinois, the IEPA must go through an elaborate negotiation process with violators before referring cases to the Attorney General's office for prosecution. It has been found that this process is highly ineffective in deterring future violations as an overwhelming majority of violations are never fully prosecuted.<sup>195</sup> To remedy this situation, legislation should be enacted granting the IEPA administrative authority to impose corrective actions and collect administrative penalties for NPDES violations. The state must seek administrative order authority from the General Assembly and the citizens of Illinois should support this effort.

8. *Increase Funding for CAFO Regulation*

IEPA has been unable to properly implement and enforce NPDES CAFO regulations to date. Thus, it is not difficult to draw the conclusion that it will be unable to meet its responsibilities under the new CAFO regulations without a significant increase in funding. IEPA should seek additional resources through all available mechanisms in both the state and federal arena. Furthermore, the IEPA should charge application fees to cover the costs it faces under the new regulations, as well as increase its penalties for violations.

9. *IEPA Should Issue Watershed Based General Permits*

Ideally, the IEPA should issue individual permits for each and every CAFO. However, given the number of facilities in Illinois and the time and resources it takes to issue individual permits, the most efficient way for Illinois to implement an effective NPDES program is to develop watershed based general permits in addition to issuing individual permits.<sup>196</sup> Watershed based permits target geographic areas encompassing particular watershed boundaries. Topographic factors and watershed-specific water quality standards are easier to address in watershed based permits. Because single statewide permits do not target

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193. *Id.*

194. *See, e.g.*, IND. CODE §§ 13-20-4(b)(2)(B), 13-30-3-11 (2005); MINN. STAT. § 116.072(1), (4) (2004); OHIO REV. CODE ANN. §§ 903.16, 903.17 (West 2005).

195. According to the IEPA's 2001 livestock facility investigation records, of the sixty noncompliance advisory letters sent by the agency, only seven were referred to the Attorney General's office for prosecution. *See* IEPA 2001 LIVESTOCK REPORT, *supra* note 7, at 17.

196. EIP 2004 REPORT, *supra* note 25, at 36-37.

specific area water quality concerns, they are somewhat ineffective in protecting already impaired watersheds.<sup>197</sup> By developing watershed based general permits it will be easier to provide additional protection to designated high quality and impaired waters.

*10. Extend Liability to Corporations that Own Livestock*

There is a present trend in livestock production where large producers or processors owning livestock enter into contracts with smaller producers or facility owners to raise the animals to market weight.<sup>198</sup> Currently, Illinois' laws are written in such a fashion that only owners or operators of the facilities are responsible for the proper disposal of livestock waste. As a result, large corporations are somewhat shielded from liability and have limited incentive to ensure their contractors are properly handling waste. In such situations, requiring livestock owners to be co-permittees would make the proper disposal of animal waste the joint responsibility of all entities under the permit.<sup>199</sup>

*11. Require all CAFOs to Apply for NPDES Permits or Demonstrate They Have No Potential to Discharge*

Although the Second Circuit found that the EPA exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate they have no potential to discharge, states have the authority to enact such measures. It is the states' responsibility to preserve the integrity of its own water resources. As such, states may institute measures as stringent, or more stringent, than the federal requirements. Due to insufficient resources and the current regulatory framework, the IEPA is unable to adequately ensure against CWA violations. Requiring CAFOs to apply for permits or demonstrate they have no potential to pollute would relieve much of the monitoring burden presently shouldered by the IEPA and would force those facilities with the actual potential to pollute into compliance before violations occur.

*12. Look to Other States That Have Effective NPDES Programs for Guidance in Enacting Revised Regulations*

Because the IEPA has been unable to properly implement the CAFO NPDES program under Illinois' current regulatory framework, the agency should look for guidance from other states that have been successful in regulating the livestock industry. It appears Minnesota has been the most successful state in the region in implementing its permitting program. The state has registered approximately 29,000 facilities through its delegated county program and has issued NPDES permit coverage to nearly 1,000 facilities.<sup>200</sup> Given the fact Illinois

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197. *Id.* at 37.

198. *Id.*

199. *Id.*

200. MPCA OVERVIEW, *supra* note 42, at 2.

does not have an inventory of the estimated 35,000 facilities now operating in the state, a county delegated program may be the only way the IEPA will be able to assess and adequately deal with all of the facilities likely requiring NPDES permits. Illinois should consider implementing a delegated county program such as Minnesota's if, and when, it revises its CAFO rules.