

US EPA ARCHIVE DOCUMENT

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

Region 5
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604

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I. Executive Summary

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

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

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

EPA conducted an informal investigation of the petitioners' allegations¹. The investigation consisted of visits at Illinois EPA's Headquarters and Field Offices, and a meeting with citizens to hear their concerns regarding specific CAFOs. The reviewers also met with a representative of the Illinois Attorney General's Office. EPA conducted these activities from December 2008 to September 2009.

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

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

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

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

II. Introduction

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

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

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

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

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

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

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

III. Petitioners' Allegations

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

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

IV. Methods

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

Interviews

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

Illinois CAFO File Reviews

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

Document Reviews

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

Meetings

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

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

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

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

V. Results

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

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

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

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

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

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

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

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

The Memorandum of Agreement (MOA) between Illinois EPA and EPA regarding Illinois EPA's administration of the NPDES program commits Illinois EPA to expeditious processing and issuance of all required NPDES permits, and to provide ongoing, timely and adequate review of permits. The MOA also commits Illinois EPA to comprehensively evaluate and assess compliance with effluent limitations and other permit conditions, and to maintain a vigorous enforcement program to take timely and appropriate enforcement action in every case where in the State's opinion such action is warranted².

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

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

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

Illinois EPA has defined the processes it will use to enforce the Act and regulations in its 2004 Enforcement Management System (EMS) document³. Illinois EPA's Bureau of Water- Field Operations Section (FOS) evaluates compliance and engages in enforcement activities. This work is done by personnel at both the Headquarters and Field Offices. The Headquarters Office is largely responsible for policy decisions, guidelines, regulatory interpretations, and formal enforcement actions, while the field offices conduct compliance assurance activities, informal enforcement actions, and provide support for some formal enforcement actions.

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

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

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

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

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

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

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

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

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

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

compliance must happen in a timely manner⁴. For alleged violations that remain unresolved after following the procedures set out in Section 31(a), or where the alleged violator does not respond, the Illinois EPA may refer the matter to the Attorney General for further enforcement pursuant to Section 31(b) and Section 42 (Penalties). If the decision is to reject the Compliance Commitment Agreement, or if a failure to comply with the Compliance Commitment Agreement is discovered, a decision will be made to refer or defer formal enforcement, or take no enforcement action at all.

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

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

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

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

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

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

B. The Illinois NPDES program for CAFOs as implemented

1. Permitting Program

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

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

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

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

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

Files reviewed in the Field Offices indicated that applications had been submitted to Illinois EPA between four and ten years prior to EPA's review. These timeframes were evident even in cases where the need for a permit was mandated by a court order or originated with a discharge event documented by Illinois EPA⁵.

As of August 2009, FieldOffice staff had determined that eight of the facilities which Illinois EPA had identified as needing permits were ready to be permitted. Illinois EPA reissued its general permit for CAFOs in October 2009⁶.

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

Illinois EPA provided a list of 45 facilities that applied for NPDES permits, some as long as 10 years ago (Attachment D). The list indicates that these facilities do not need NPDES permits, many because of "no discharges." Seven of the facilities were either out of business, or were never built. For one of the files reviewed from this list, the facility had a documented discharge from a lagoon subsequent to Illinois EPA's determination that it did not need a permit⁷. In general, where a facility applies for an NPDES permit, that action indicates the need for a permit, and Illinois EPA is obligated to either issue or deny a permit after reviewing the application and providing for public comment.

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

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

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

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

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

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

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

2) *Compliance Evaluation/Inspection Program*

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

Allegations:

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

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

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

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

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

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

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

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

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

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

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

While Illinois EPA does not have a formal inventory of CAFOs, the Agency does have data sources that may serve as a foundation for inventory development. Currently, the Agency has four databases that serve differing needs: 1) the CAFO tracker is maintained to track permit issuance status; 2) the complaints and inspection database is managed and populated by field office inspectors; 3) the Violation Notice, or “VN” tracking system follows the issuance of informal enforcement actions; and 4) the Division of Legal Counsel (DLC) maintains a list of enforcement actions. The complaints and inspection database is the most comprehensive of these lists, as it reflects most facilities for which the Field Operations Section has had contact. Five of the Illinois EPA’s seven field offices maintain current data in this database⁸. This database could serve as the Agency’s primary data source for the development of a comprehensive inventory. The complaints and inspection database is also appropriate as the foundation for Illinois EPA’s CAFO inventory since it is maintained by Illinois EPA inspectors as they inspect/survey facilities over time.

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

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

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

b) *Inspection coverage*

Allegations:

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

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

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

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

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

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

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

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

Table 1: Evaluation of Illinois EPA Inspection Program Implementation

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

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

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

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

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

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

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

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

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

c) Response to Citizen Complaints

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

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

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

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

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

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

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

3) Enforcement Programs

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

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

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

a) Enforcement Activities

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

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

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

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

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

Pre-Enforcement/ Enforcement Actions

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

EPA reviewers examined whether or not Illinois EPA's enforcement responses returned, or were likely to return, facilities to compliance with the CAFO regulations applicable at the time of the enforcement response⁹. Determining whether or not a given enforcement action returned, or will return, a facility to compliance often involved looking beyond actual discharges to evaluate other factors such as substantial failure to implement best management practices; failure to meet major milestones required in a permit or a judicial or administrative order, or failure to submit timely reports as required. Whether or not an action by Illinois EPA would return the facility to compliance in the future was, in part, also determined by whether or not the pre-enforcement/enforcement action included an enforceable schedule for implementation of appropriate injunctive relief, and whether or not a facility that required a permit was ordered to apply for one.

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

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

Table 2: Evaluation of Illinois EPA Enforcement Program Implementation

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

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

When it identifies violations, the Illinois EPA will often issue an informal enforcement action in the form of a Noncompliance Advisory. Per the Illinois EMS, if a Noncompliance Advisory is issued, the return to compliance must be achieved within 150 days of the violation date. These advisory letters, however, appear to be of varying effectiveness for returning a facility to compliance. As indicated in Table 2, 47% of the facilities reviewed returned to compliance after receipt of a Noncompliance Advisory¹¹.

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

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

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

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

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

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

While Illinois strives to meet the timeframes in its EMS for enforcement action, a Violation Notice with a Compliance Commitment Agreement may not return facilities to compliance within a reasonable timeframe. EPA policy requires that a facility that has been found to be in serious or chronic noncompliance be corrected or that a formal enforcement action be initiated within a specified period of time. Illinois EPA's EMS should provide the criteria by which staff can make this determination, either generally or with respect to livestock facilities, and the case files should contain the documentation of that decision. Illinois EPA should also track the timeframes in which facilities achieve compliance¹².

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

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

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

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

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

b) Assessment of penalties for violations

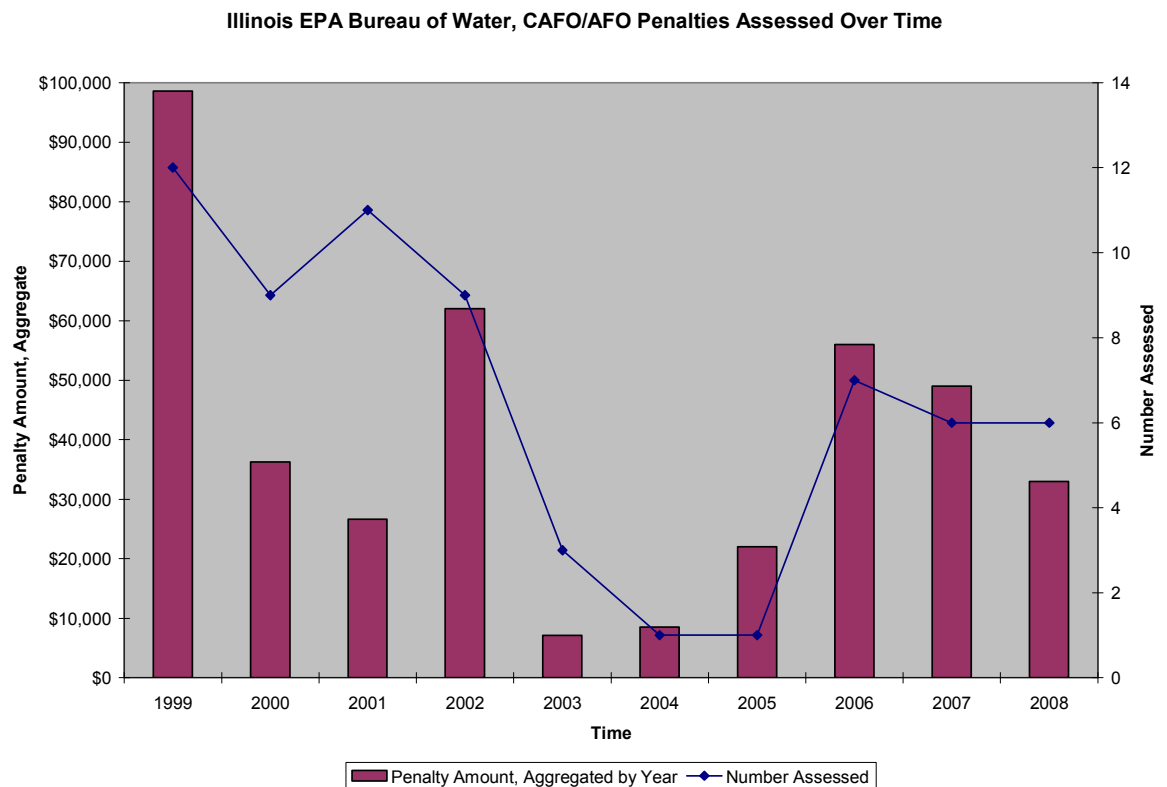
As discussed in the previous section, effective formal enforcement requires specific actions to achieve compliance to be completed on a finite schedule. These actions should also contain consequences for noncompliance that are enforceable independent of the enforcement for the original violation, and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

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

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

Of the files EPA reviewed, fourteen large facilities with unauthorized discharges and/or fish kills were issued Noncompliance Advisories and/or Violation Notices during the review period, 1999-2009. In EPA’s assessment, these pre-enforcement/enforcement actions did not, or will not, return the facilities to compliance. The Noncompliance Advisories or Violation Notices issued to nine of these 14 large facilities included language recommending the facility apply for NPDES permits¹³. Five of these facilities subsequently submitted applications. These five facilities submitted permit applications between 2001 and 2007. In the intervening time period between submittal of an application for an NPDES permit and the current time, these facilities continued to violate the CWA act, as determined by further inspections by Illinois EPA or EPA. None of the fourteen large facilities had received a permit by the end of calendar year 2009, nor had they been determined to be in compliance via inspection. Nevertheless, the enforcement files on these cases were often considered closed by the Bureau of Water¹⁴. The majority of these cases were not referred to the Illinois Attorney General or other authority for formal enforcement seeking penalties, despite persistent serious or chronic noncompliance.

Figure 1. CAFO/AFO Penalties Assessed Over Time



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

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

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

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

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

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

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

4) Responses to information requests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6) Illinois EPA Organization and Resources.

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

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

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

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

7) Legal authority

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

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

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

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

VI. Initial Findings and Required Actions

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

1. Permitting Program

Findings:

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

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

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

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

Required actions:

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

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

Recommendation:

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

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

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

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

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

Required actions:

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

Recommendation:

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

Finding:

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

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

Required actions:

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

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

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

Recommendation:

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

Finding:

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

Required action:

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

3. Enforcement Program**Findings:**

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

Required actions:

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

Recommended action:

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

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

Findings:

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

Required actions:

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

Recommendation:

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

4. Response to citizen requests for information

Finding:

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

Required action:

None.

Recommendation:

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

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

Finding:

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

Required action:

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

6. Organization and resources.

Finding:

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

Required action:

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

7. Legal Authority

Finding:

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

Required action:

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