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ILLINOIS CITIZENS FOR CLEAN AIR & WATER

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Via email and certified mail

Administrator Stephen Johnson
johnson.stephen@epa.gov
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1011A
Washington, DC 20460

Regional Administrator Mary A. Gade
gade.mary@epa.gov
U.S. Environmental Protection Agency
77 W. Jackson Boulevard
Mail Code: R-19J
Chicago, IL 60604

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

⁷ Id. at 4.

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

⁹ Id.

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

¹¹ Izaak Walton League, Fish Kill Advisory Network Online Database (visited March 13, 2008), available at: http://66.155.8.209/fishkill/fk_search.asp.

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

¹³ Id.

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

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

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

PETITIONER'S ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As of October 2001, there were an estimated 35,000 livestock facilities operating in Illinois.¹⁸ It is unknown exactly how many of these meet the defining criteria of a CAFO under the NPDES program. To date, the State has not made a comprehensive survey of Illinois Animal Feeding Operations (AFOs) to determine which ones are point source dischargers. The IEPA only has an inventory of 30 percent of the estimated 500 Large CAFOs in the State¹⁹ and conversations with EPA Region 5 officials have revealed that neither they, nor IEPA staff, have knowledge of the

¹⁵ 33 U.S.C. § 1342(a).

¹⁶ Id. §§ 1311(a), 1342.

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

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

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

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

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

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

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

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

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

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

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

23 IEPA, NPDES Permit No. ILA01 (2004).

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

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

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

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

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

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

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

²⁷ Id. at 6.

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

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

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

³¹ See Diamond, *supra* note 12, at 213-219.

³² 33 U.S.C. §§ 1311(a), 1342.

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

³⁴ 40 C.F.R. § 122.21(a).

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

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

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

B. Illinois fails to comply with public participation requirements.

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

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

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

³⁶ Id.

³⁷ 33 U.S.C. § 1251(e).

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

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

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

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

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

38 Id. § 1342(a)-(b).

39 Id. § 1342(j).

40 Id. § 1365(a).

41 Id. § 1342(j).

42 Id.

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

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

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

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

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

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

⁴³ 40 C.F.R. § 123.26(b)(1).

⁴⁴ Id. § 123.26(b)(2).

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

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

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

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

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

Pursuant to ' 123.63 (a)(4) a State's NPDES program qualifies for withdrawal when it fails to comply with the terms of the Memorandum of Agreement required under ' 123.24. Illinois' NPDES program for CAFOs meets this criterion for withdrawal because the State has failed to comply with the Memorandum of Agreement between the IEPA and EPA Region 5.⁴⁹

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

⁴⁶ EPA, IL NPDES Profile, supra note 19, at 11.

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

⁴⁸ Clean Water Network, supra note 29, at 20

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

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

According to a list of CAFO NPDES permit applicants included in the IEPA’s response to the September 12, 2007 FOIA request, at least 16 facilities have submitted permit applications.⁵¹ Because the IEPA failed to provide the requestor with these applications, it is unknown exactly when these permit applications were submitted and which ones have been acted upon. However, according to the documents received, four facilities that applied for permits from October 27, 2004 thru August 8, 2005 did not receive notice that their applications were determined to be incomplete submissions until April 16, 2007.⁵² On average, it took the Agency between two and three years to begin to process these applications. It is unknown how many of the submitted applications are for facilities that discharge and/or propose to discharge. Hence, it is unknown how many facilities are presently operating and discharging without required permits. However, to date not one CAFO has active permit coverage. Thus, it is clear that the IEPA has failed to expeditionously process and issue permits as required under the Memorandum of Agreement. The Agency has also failed to meet its obligations under its corresponding Performance Partnership Agreements by failing to review and act upon all CAFO permit applications.

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

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

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

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

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

CONCLUSION

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

ADDITIONAL CONCERNS

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

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

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

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

⁵³ 33 U.S.C. §§ 1311(a)-(b), 1342(a).

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

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

⁵⁶ 33 U.S.C. § 1251(e).

⁵⁷ Id. § 1342(a)-(b).

⁵⁸ Id. § 1342(j).

⁵⁹ Id. § 1365(a).

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

Respectfully submitted,

Illinois Citizens for Clean Air & Water

Kendall M. Thu, Ph.D., Representative
609 Parkside Drive
Sycamore, IL 60178
kleppesumn@aol.com
815-895-6319

Danielle J. Diamond, J.D., Representative
181 Illinois Street
Crystal Lake, IL 60014
daniellejdiamond@aol.com
815-245-4660

Cc: Douglas P. Scott, IEPA Director
doug.scott@illinois.gov

⁶⁰ IEPA, NPDES Permit No. ILA0, Special Condition 5(e) (2004).

⁶¹ 33 U.S.C. § 1251(e).