

US EPA ARCHIVE DOCUMENT

MEMORANDUM

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

FROM: Peter G. Swenson, Chief
NPDES Programs Branch

Sally Swanson, Chief
Water Enforcement & Compliance Branch

TO: Timothy C. Henry
Acting Director, Water Division

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

Protocol for Responding to Issues Related to Permitting

- Allegation 1:** Illinois has failed to exercise control over activities required to be regulated, including a failure to issue permits for CAFOs.
- Allegation 2:** The IEPA has not conducted comprehensive inspections to determine which CAFOs need permits.
- Allegation 3:** The IEPA is not issuing individual or General Permit coverage to known dischargers and, as a result, is not requiring regular inspections to determine compliance with NPDES program requirements, and therefore cannot conduct compliance inspections at large CAFOs.
- Allegation 4:** Illinois fails to comply with public participation requirements.
- Response:** We will review Illinois' NPDES permit application forms, permit

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

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

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

Schedule:

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

Protocol for Responding to Issues Related to Compliance Monitoring and Enforcement¹

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

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

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

EPA staff will determine:

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

123.63 (a)(3)]

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

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

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

Protocol for Responding to Issues Related to Memorandum of Agreement

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

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

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

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

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

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

Response:

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

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

Schedule:

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

