

# **05hr\_CRule\_05-014\_AC-Ag\_pt04a**



Details:

(FORM UPDATED: 07/12/2010)

## **WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS**

### **2005-06**

(session year)

### **Assembly**

(Assembly, Senate or Joint)

### **Committee on ... Agriculture (AC-Ag)**

### **COMMITTEE NOTICES ...**

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**
- Record of Comm. Proceedings ... **RCP**

### **INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL**

- Appointments ... **Appt**
  - Clearinghouse Rules ... **CRule**
  - Hearing Records ... bills and resolutions
    - (**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)
    - (**sb** = Senate Bill)                            (**sr** = Senate Resolution)
  - Miscellaneous ... **Misc**
- (**ajr** = Assembly Joint Resolution)  
(**sjr** = Senate Joint Resolution)



## KEEPING THE COWS IN WISCONSIN™

December 8<sup>th</sup>, 2005

CR 05-014?

Assembly Agriculture Committee  
Senate Agriculture Committee

Re: Dairy Business Association of Wisconsin, Inc. – Comments on Proposed ATCP 51, Wis. Admin. Code (Final Draft September 15, 2005)

Set forth below and herein are the comments of the Dairy Business Association of Wisconsin, Inc. (“DBA”) concerning proposed Ch. ATCP 51, Wis. Admin. Code. DBA is a state-wide non-profit organization of dairy producers, vendors, allied industry partners and professionals collectively working to assure that dairy producers, large and small, remain an active, thriving part of Wisconsin’s economy, communities and food chain. The dairy industry is a \$20.6 billion annual business to Wisconsin and DBA’s mission is to promote the growth and success of all dairy farms in Wisconsin by fostering a positive business and political environment.

DBA appreciates the opportunity to provide the Senate and Assembly Agriculture committees its detailed review comments and appreciates the working relationship DBA has enjoyed with the Legislature. DBA thanks the Department of Agriculture, Trade and Consumer Protection and its staff for its hard work and efforts in developing the proposed rule. DBA remains committed to continuing to work with the Legislature, DATCP and other stakeholders to address the concerns and comments set forth below and herein. DBA remains committed to helping Wisconsin’s livestock industry grow and thrive.

DBA participated extensively in the legislative process resulting in the adoption of Wisconsin’s landmark Livestock Facility Siting Law contained in 93.90, Wis. Stats. Ed Larson, a founding member of DBA, served as a livestock member of the Department’s Advisory Committee on Siting of Livestock Facilities. DBA representatives participated actively in the development of proposed ATCP 51 and its members and representatives attended each and every public hearing DATCP held on the proposed rule in March offering oral comments. Most importantly, however, DBA undertook an effort to actually apply the proposed rule to many of its producer member operations, “field testing” the rule to determine its impacts, both positive and negative. DBA’s comments, therefore, are not only reflective of the opinion of its entire membership, but are perhaps the most informed comments about the *actual impacts* of the proposed rule on existing operations desiring to expand.

We explain this “as applied” approach inasmuch as DBA’s comments focus on the rule’s ability to meet several of the Legislature’s key directives. We remind the Legislature that the statute compels (See, 93.90(2)(b), Stats.) that this rule be:

Practical and workable;

Cost effective;

Objective;



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Based on available scientific information that has been subjected to peer review; and,

Designed to promote the growth and viability of animal agriculture in the state.

The rule must be tested against these legislative directives at every turn.

In addition to and in concert with the narrative comments offered below, we attach hereto livestock's mark up of the Hearing Draft ATCP 51 rule text providing further suggested changes to the rule along with livestock's letter to Secretary Nilsestuen dated September 7, 2005 from the Wisconsin Farm Bureau Federation, Dairy Business Association, Wisconsin Pork Association and the Wisconsin Cattlemen's Association which expressed their continuing concern with the current draft of Wis. Admin. Code ATCP 51, Livestock Facility Siting, as proposed by the Department of Agriculture, Trade and Consumer Protection.

### **COMPLETE GRANDFATHERING OF LIVESTOCK STRUCTURES THAT ARE NOT BEING EXPANDED**

Existing livestock structures are not grandfathered. The rule applies to and requires producers to incur costs regarding existing livestock structures that are not proposed to be expanded or modified as part of the expansion that is subject to the local approval. This was not the intent of the siting law. Local approvals to expand a farm do not involve an assessment of facilities that are not a subject of the local approval. The statute reads that the department "shall promulgate rules specifying standards for siting and expanding livestock facilities". Wis. Stat. § 93.90(2)(a). This applies to new or expanding structures, not existing structures not proposed to be modified or expanded. The rules' approach will impede growth not foster it.

By way of example, if a small dairy farmer wants to supplement his dairy income by constructing two turkey barns to raise turkeys triggering the siting law, the local approval is subject to the farmer assessing the status of his pre-existing manure lagoon for the dairy operation which is wholly unrelated to the purpose of the expansion or the requested local approval. This constitutes nothing other than a "regulatory reach" which is neither consistent with the sought after local approval nor consistent with the legislative intent upon passage of 2003 Wisconsin Act 235.

The rule should be amended to indicate that the new standards created by the ATCP 51 apply only to that portion of the livestock facility or structure that constitutes the expansion subject to the local approval. Importantly as well, if this change is not made, we are concerned about scenarios whereby certain existing facilities' status as legal non-conforming uses under zoning law will be jeopardized. See e.g. 51.01(12); 51.18(1) and (2); 51.20(2)).

The final rule should cross-reference the definition of "expansion" to Wis. Stat. § 93.90(3)(e) which allows 20% incremental expansion. See 51.01(13) and Wis. Stat. § 93.90(3)(e).



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### **MODIFY DEFINITION OF “AFFECTED NEIGHBOR”**

Newly created definition of “Affected neighbor” for purposes of the odor score calculation should be modified to reduce its applicability to 1,500 feet from the currently proposed ½ mile radius. See 51.01(2).

### **REVISION OF THE ANIMAL UNIT CALCULATION**

A concern of producers throughout this rulemaking process has been the application of the nutrient management provisions of NRCS 590 to facilities that previously have been able to receive cost sharing from other state and local regulations that can apply these standards. In addition, livestock groups have been continually concerned about the use of a mix animal unit calculation as a trigger for expansion. For instance, currently the DNR is proposing to change the mixed animal unit calculation which if adopted mandates farms with few animal units to comply with the odor standards. The rule should adopt the single Federal Animal Unit calculation that EPA requires whereby each species is counted individually.

### **IMPROVE DEFINITION OF “KARST FEATURE”**

“Karst feature” is poorly defined. Final rule should clarify that a “Karst feature” is one that in fact does provide a direct conduit to groundwater (not one that is “likely to”, but may not) to remove subjectivity from this determination. See 51.01(16).

### **IMPROVE DEFINITION OF “LIVESTOCK STRUCTURE”**

Feed storage facilities and milking parlors should not be included in the definition of “livestock structure” as they are not intended to confine livestock on any permanent basis. Moreover, feed storage structures vary widely and should not be covered by this rule. Temporary shelters and sunbreaks, not designed for the long-term confinement of livestock, should also not be defined as a “livestock structure” subject to this rule. See 51.01(19).

### **IMPROVE DEFINITION OF “OPERATOR”**

The final draft rule’s definition of “operator” is drafted too narrowly. The definition should be amended to include the person that either applies for or holds the local approval or who owns, manages, or controls the livestock facility and all legal entities owned, managed or controlled by such persons. See 51.01(28); See also, 51.01(2).

### **IMPROVE DEFINITION OF “PROPERTY LINE”**

The definition of “Property line” should not apply to “persons” that own, manage, control or meet the definition of “operator” (as suggested to be revised above) of the livestock facility. Specifically, the definition’s use of the phrase “different persons” should be replaced with the concept of “unrelated persons or entities” to recognize the use of business entities in the livestock industry (such as limited liability companies, family



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farm corporations and the like, each of which have a status as a unique person under law). In other words, even though a livestock operation and property may be owned by differing corporate entities, LLCs, LLPs, and the like, they nonetheless may be still be related for purposes of the application of a property line for the rule's setback purposes. See 51.01(33).

### IMPROVE DEFINITION OF “SUBSTANTIALLY ALTERED”

Final draft rule results in the new standards being applied to existing facilities that make “alterations” (minor/substantial) to the facility that are short of the statutorily-provided “trigger” of 20% expansions. Definition of “substantially altered” should be amended to clarify that it applies only to *expansions* of livestock structures or increases in animal units. The statute does not mention anything about developing state standards for the “alteration” or “material change” of a livestock structure. The Department’s rule should only apply to situations where a new livestock facility is being sited for the first time or where an existing livestock facility is being expanded by 20%. See 51.01(38).

### CLARIFICATION ON EXISTING WASTE STORAGE STRUCTURE

§ ATCP 51.12(2) must be clarified so that an existing waste storage structure that was located within the setback area prior to the effective date of the setback requirement, may be expanded away from the property line or public road to which the local setback applies, so as to avoid an ambiguity existing between 51.12(2) and 51.12(1)(d). This clarification should be drafted in 51.12(2)(b).

### REMOVE “REASONABLY SUBSTANTIATE”

The “reasonably substantiate” standard proposed in 51.16(1)(b) should be removed. This standard is contrary to both the legislative intent and underlying policy of the Livestock Facility Siting Law which was to create a certain level of standardization and certainty in the permitting process. This is particularly so when DATCP certified professionals prepare and certify the accuracy of the information provided. Local officials are not in a position to render this judgment and the language guts the legislative intent. Simply put, this a subjective standard and is ripe for mischief as applied in certain local contexts.

### STRIKE ALL PHRASES OF “CREDIBLE AND INTERNALLY CONSISTANT”

Relatedly, the rule’s requirement that information in the application be “credible and internally consistent” injects too much discretion and subjective opinion into the process and hence the phrase should be stricken wherever it appears. The language is problematic and the concept of who decides what is “credible” with respect to an application creates an unnecessary loophole given that the application worksheets require certification by the applicant and/or a credentialed professional. This certification is sufficient for presumptive truth in other programs and should be here as well. The application, based on the worksheets, should rise or fall of its own merits and the rule should not attempt to create a legal standard which could conflict with the standard the Legislature adopted in Wis. Stat. § 93.90 (4)(d), Stats.



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### **CLARIFY ACRES FOR PURPOSES OF NUTRIENT MANAGEMENT CALCULATION**

Section 51.16(1)(c) of the final rule should be clarified to make clear that the operator does not have to own all the acres for purposes of nutrient management calculation in order to qualify for the exemption. Specifically, the reference to “acres” in para. (c) should be followed by the words “either owned, leased or available pursuant to agreement”.

### **REDRAFT EXEMPTION FOR OPERATORS HOLDING WPDES PERMITS**

The exemption provided in 51.16(4), 51.18(7), and 51.20(10) for operators holding WPDES permits is helpful but must be redrafted. WPDES permits do not incorporate animal unit capacity limitations. Rather, WPDES permits are issued based upon design plans provided as part of the permit application and issuance process. WPDES permits do not contain any sort of animal unit “cap”.

### **REDUCE APPLICATION FEE FOR PRODUCERS**

The application fee a political subdivision is authorized to charge was doubled to \$1,000.

### **ODOR MANAGEMENT STANDARD**

- July 2004, WDNR adopts revisions to Ch. NR 445, Wis. Admin. Code (Wisconsin’s air toxics rule) and includes emissions of hazardous air contaminants associated with agricultural wastes in the rule.
- Rule provided a three-year exemption (i.e., July 2007) to applicability to agricultural operations.
- Exemption period granted in part due to ongoing rule development in the context of livestock siting (ATCP 51, Wis. Admin. Code) and the pendency of US EPA’s National Air Quality Agreement for Livestock Operations.
- Rule acknowledged a preference for the adoption of Best Management Practices (“BMPs”) as a means to control airborne emissions:

(c) The owner or operator of a source of emissions of hazardous air contaminants associated with agricultural waste shall be deemed in compliance with all requirements, limitations and conditions in this chapter provided best management practices, as approved by the department, for the handling of agriculture waste are implemented at the source.

**Note:** NR 445 was not developed with the purpose of regulating emissions of hazardous air contaminants associated with agricultural waste or byproducts. The department believes that using best management practices is the preferred approach to regulate and control emissions from these types of sources.



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Accordingly, the department intends to participate in the development of best management practices to regulate and control emissions from such sources within 36 months of July 1, 2004.

- **BMP preference is consistent with science which shows that control of emissions and airborne particulate matter has positive impact on odor control, such that the BMPs are coextensive (i.e., effective to respond to concerns of both odor and air emissions from livestock operations).**
  - \* **ATCP 51's proposed odor management standards, proposed in the context of the livestock siting rule, is an opportunity to develop the BMPs that will serve to fulfill the requirements of NR 445, as applied to agricultural waste.**
  - \* **Opportunity exists now to develop one set of standards and BMPs to address both issues: odor mitigation for purposes of livestock siting and air emission BMPs for purposes of NR 445.**
  - \* **Advantage to producers is one set of acceptable BMPs or control strategies; advantage to regulators is WDNR's ability to incorporate into NR 445 by reference the BMPs already developed in ATCP 51 without undertaking separate resource-consuming rulemaking.**

What is required:

1. **Expand the list of BMPs designed to be acceptable control strategies for emissions from livestock operations.**
2. **Redefine the odor management standards to be emission management standards addressing both the reduction of nuisance odor and the reduction of airborne emissions from livestock operations.**
3. **Seek WDNR concurrence in the coextensive approach so that producers will have one comprehensive list of flexible BMPs from which to choose.**

Very truly yours,

**DAIRY BUSINESS ASSOCIATION**

**Laurie Fischer, Executive Director**

cc (w/encl.): **DBA Board of Directors  
Representative David Ward  
Speaker John Gard**

\* DBA

September 7, 2005

**VIA HAND DELIVERY  
AND EMAIL TRANSMISSION**

Secretary Rod Nilsestuen  
Department of Agriculture, Trade and Consumer  
Protection  
P.O. Box 8911  
Madison, WI 53708-8911

RE: Proposed Livestock Facility Siting Administrative Rule, ATCP 51

Dear Secretary Nilsestuen:

We are writing on behalf of the Wisconsin Farm Bureau Federation, the Wisconsin Pork Association, the Wisconsin Cattlemen's Association and the Dairy Business Association, to express our continuing concern with the current draft of Wis. Admin. Code § ATCP 51, Livestock Facility Siting, as proposed by the Department of Agriculture, Trade and Consumer Protection (the Department).

As you know, each of these groups provided the Department with extensive written comments during the public comment period in April 2005, and numerous producer representatives provided oral comments to the Department at the March public hearings. On August 8, 2005 we received the Department's draft in response to those comments. On August 16, eight days later, all of the livestock groups met for several hours to review the revised draft. We realized that we still had numerous unresolved concerns. Therefore, our producer leaders met with you on August 19 to express our concerns about the rule's potential negative impact on the growth of Wisconsin's livestock industry. You instructed us to provide more detail. On Friday, September 2, we received the Department's final draft of ATCP 51. Since our meeting on the 19<sup>th</sup>, we have worked together to create specific recommendations that reflect our comments on the original rule.

One of our chief concerns with this rule has been the air quality issue associated with livestock siting. We learned last week, that the Department received a **\$646,945 Conservation Innovation Grant from the federal government to conduct "Wisconsin's Dairy and Livestock Air Emission/Odor Project."** We congratulate the Department on their leadership shown on making the application and receiving this grant. The Department now has the opportunity to study the criteria used to measure odor and air emissions on Wisconsin livestock operations. In light of this, we suggest an amendment to the air quality section of the rule that will provide producers with a flexible approach to comply with air quality requirements until your scientific research provides a more specific model that can be implemented in the rule.

Accordingly, we are providing you and your Board with very specific information regarding our concerns with the rule and our explanation for those concerns. This information includes this cover memo and a revised draft of ATCP 51. These documents



illustrate our chief concerns with the rule and our proposed changes to the rule that will address these concerns.

#### **A. Our Guiding Principles**

We were guided by the following basic principles, all of which were main themes from our written comments submitted in April, as we drafted changes to this rule:

- All new livestock structures must comply with all of the provisions in the rule;
- All expanding livestock structures must comply with all of the provisions of the rule *except* with regard to property line/roadway setbacks. In that case, an expanding livestock structure, including a manure storage structure, may expand back from, or parallel to, their existing footprint; and
- All existing livestock structures that *are not being expanded* will not be affected by this rule. They are truly grandfathered and protected from additional regulation or modification unless they are being expanded.

In many respects, the Department's latest draft of ATCP 51 is consistent with these basic principles. However, as described in detail below, in several key respects, it is not.

#### **B. Key Changes Made to the Department's August 30<sup>th</sup> Draft of ATCP 51**

##### **1. Protection from Excessive Setback Requirements for All Expanding Livestock Structures**

First, we amended section 51.12 of the draft to ensure that all new or expanded livestock structures, including manure storage structures, will be subject to the same maximum setback distances.

In your most recent rule draft, the setback protection for manure storage structures was not as great as those for other livestock structures (*i.e.*, the maximum setback was at least 350' for manure structures, but 100 – 200 feet for other structures.) However, the definition of "livestock structure" includes a manure storage structure.

We have amended the rule to treat *all livestock structures* identically such that a new or expanded manure storage structure can be linked to an existing manure storage structure if the new structure is built behind or parallel to an existing structure. This amendment allows farmers to more efficiently and cost-effectively build additional manure storage, while maintaining consistency with regard to setback distances for all livestock structures.

##### **2. Complete Grandfathering of Livestock Structures that are NOT Being Expanded**

Existing livestock structures *that are not being expanded* should be completely grandfathered under this rule. We agree that if a farmer adds animal units and a new barn

to house them, then all of the provisions of ATCP 51 should apply to that new barn. However, any existing livestock structure that does not need to be expanded or remodeled due to the addition of those animal units, should not have to comply with the provisions of the rule because no local approval is needed for that pre-existing structure since it is not part of the expansion. This will make compliance with ATCP 51 significantly more cost-effective for expanding operations and will protect the status of any existing structures that are legal, non-conforming uses.

Accordingly, we changed the following provisions:

- a. Revised definition of "expanded livestock facility" to include "only those livestock structures in the expanded facility that are new or expanded as a part of an application filed under ss. ATCP 51.30(1) to(3)." *See* ATCP 51.01(12).
- b. Created definitions of "expanded livestock structure" and "new livestock structure" in order to clarify those structures that must comply with the provisions under the rule. *See* ATCP 51.01(13) and (25).
- c. Throughout the rule, we made it clear that the provisions only apply to "new or expanded" livestock structures. These changes protect existing structures that are not being expanded. *See* ATCP 51.12 (setbacks), 51.14 (air quality), 51.18 (waste storage facilities) and 51.20 (runoff management).

### 3. Revision of the Animal Unit Calculation

As you know, a major concern of livestock producers throughout this rulemaking process has been the application of the nutrient management provisions of NRCS 590 to facilities that have 500 - 1,000 animal units in a way that only previously applied to facilities *over* 1,000 animal units (i.e., CAFOs) prior to this creation of this rule. The effect of this rule is that very expensive nutrient management practices will be required for medium-sized operations without cost-sharing, when there are other state and local regulations that can apply these same standards to these mid-sized operations *with* cost-sharing (e.g., nonpoint source pollution laws and local manure management regulations).

In addition, livestock groups have been continually concerned about the use of a mixed animal unit calculation as a trigger for an "expansion" under this rule. For example, a small dairy farmer who decides to add turkeys to his operation can easily trigger an "expansion" under this rule that will apply the rule provisions not only to the new turkey portion of his operation, but also to his small (under 500 animal units) existing dairy structures.

We do not believe that these results were the intent of this rule. Accordingly, we have amended the application of this rule to expansions over 500 animal units within a

particular animal category. (See our revised definition of “animal unit” and revised *Appendix A, worksheet 1*). Calculating animal units in this manner is consistent with the federal animal feeding operation rules adopted by the Environmental Protection Agency. See 40 CFR 122.23.

4. Creation of Air Quality Management Provisions that Address BOTH Odors and Air Emissions

One of the most important changes requested by livestock producers who testified and provided written comments to the Department during the public comment period, is the creation of best management practices that will address *air quality* – that is, odor AND air emissions. The reason that this is so critical to livestock producers is because the Department of Natural Resources has granted agriculture a 3-year exemption from air quality standards in Wis. Admin. Code § NR 445, while best management practices intended to address air emissions are developed. We anticipated using the livestock siting rulemaking process to develop these air emission BMPs or, at a minimum, set up a structure whereby these BMPs could be developed. Yet, this rulemaking has failed to do so.

We believe that the livestock siting rule was intended to be a “one stop shop” for permitting of new and expanding livestock operations. If only odor is addressed and the air emissions issue is overlooked, this rule is incomplete and creates the risk that if livestock producers have to apply for a separate air permit from the DNR to address air emissions, then that permit will require inconsistent or contradictory BMPs when compared to those created under the siting rule.

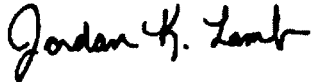
Accordingly, we recommend that the proposed odor management model contained in the current draft of the rule be replaced with a more flexible, but scientifically tested, set of BMP’s that are intended to allow producer flexibility, while requiring them to manage odor *and* air emissions. In addition, we request that this matrix be tested, reviewed and updated as Wisconsin-specific information becomes available through the study conducted with the Conservation Innovation Grant money marked to study odor and air emissions on livestock operations in Wisconsin.

We have amended section 51.14 of the rule to address “air quality” and have created a new BMP matrix in *Appendix A, worksheet 2* to impose air quality requirements on all applicants for a permit under this rule.

**C. Conclusion**

It has been said recently that livestock producers have received the benefit of most of the revisions to this proposed rule. Therefore, no additional revisions should be made. We believe that this argument is indefensible when this is a rule that is designed to regulate the business of producing livestock in Wisconsin with the intent of *growing* the livestock industry in Wisconsin. Each of the above-proposed additional revisions are intended to balance the practical needs of producers in terms of economic ability to grow a business, and their continued recognition for the need for increased local control over the siting of livestock operations. We believe that our proposal does accomplish this goal.

Sincerely,



Jordan K. Lamb, Wisconsin Pork Association and Wisconsin Cattlemen's  
Association

*/s/ Paul Zimmerman*

Paul Zimmerman, Wisconsin Farm Bureau Federation

*/s/ Laurie Fischer*

Laurie Fischer, Dairy Business Association

cc. Judy Ziewacz, Deputy Secretary, DATCP  
Members of the DATCP Board  
Representative David Ward  
Senator Dale Schultz  
Representative Al Ott  
Senator Dan Kapanke