

2003 DRAFTING REQUEST

Bill

Received: **10/07/2003**

Received By: **btradewe**

Wanted: **As time permits**

Identical to LRB:

For: **David Ward (608) 266-3790**

By/Representing: **Mark Patronsky**

This file may be shown to any legislator: **NO**

Drafter: **btradewe**

May Contact:

Addl. Drafters:

Subject: **Agriculture - miscellaneous
Land use**

Extra Copies: **MES**

Submit via email: **YES**

Requester's email: **Rep.Ward@legis.state.wi.us**

Carbon copy (CC:) to: **mark.patronsky@legis.state.wi.us**

Pre Topic:

No specific pre topic given

Topic:

Siting livestock facilities

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							S&L
/P1	btradewe 01/15/2004	kfollett 01/16/2004 kfollett 01/21/2004	pgreensl 01/22/2004		lemery 01/22/2004		S&L

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/P2	btradewe 02/02/2004	csicilia 02/03/2004	rschluet 02/03/2004	_____	mbarman 02/03/2004		S&L
/1	btradewe 02/11/2004	csicilia 02/12/2004	rschluet 02/12/2004	_____	lemery 02/12/2004	lemery 02/20/2004	

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Handwritten notes:
/P2 gjs 2/3 04
[Signatures]

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/?	btradewe	<i>1 P.1 KJF 1/21</i>	<i>1/21 PS</i>	<i>Y 2/7 PS/MS</i>			S&L

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11/19/03
rec'd

ELIZABETH KOHL 241-46210
RICHARD CASTELNUOVO 241-4608

Recommendations of the Advisory Committee on Siting Livestock Facilities
November 12, 2003 Version

Draft: Drafting Instructions

Overview

These drafting instructions make a few simple changes to the process and criteria that counties and municipalities use to approve or deny the expansion or new siting of livestock a facility.

County and municipality decision-making authorities remain largely intact. Under this proposal, counties and municipalities would be required to use certain state-established best management practices and performance standards, along with their comprehensive planning and local regulations, to decide whether to approve or deny a livestock facility that seeks to site in a new location or expand. The DATCP developed best management practices and performance standards will be developed by an expert technical panel and promulgated by DATCP as administrative rules.

These instructions also create a State agricultural facility siting review board. The review board is given authority to review the county or municipal decision (Local Decision) that either approves or denies an application to site a new livestock facility or expand an existing livestock facility. The board's review is confined to whether the county or municipality properly applied the DATCP best management practices and performance standards in its decision to approve or deny the livestock facility siting or expansion.

The purpose of this new legislation is to:

- Retain county and municipal decision-making authorities
- Retain the ability of counties and municipalities to manage their local affairs
- To facilitate the ability of working family farmers to expand and site new livestock facilities
- Provide more certainty for family farmers wishing to expand or site livestock facilities
- Provide predictability for family farmers to know the criteria that counties and municipalities will use when they review and make decisions that allow family farmers to expand and site their operations.
- Provide a clear process and more uniformity in county and municipal decision-making related to the siting and expansion of a farmer's livestock facilities
- Help ensure our state and local natural resources and environment are protected as farms expand.

A. Definitions

1. ***Animal units*** – as defined in NR 243.
2. ***Application for Expanding or Siting a Livestock Facility***: may need a definition of ‘application’ or this phrase.
3. ***DATCP Best Management Practices and Standards for Livestock Farms***: may need a definition of this phrase.
4. ***Livestock Farm/Facility*** – may have to define livestock farm/facility, or if not, those facilities that are affected by this new law.
5. ***Local Approval*** – see the definition under 289.33(3)(d) as a possible definition for the county and municipal government decision that is made to approve or deny an application to expand or newly site a livestock facility.
6. ***Municipality*** includes towns, cities, and villages.

B. DATCP Authorities

1. DATCP shall develop objective state, environmental best management practices/standards to be used by county and municipal governments as decision-making criteria to approve or deny an application to expand or newly site a livestock facility.
2. The DATCP best management practices and performance standards shall be incorporated into administrative rule..
3. The Secretary of the DATCP shall convene a panel of technical experts to develop the DATCP practices and standards.
4. The development of the practices and standards shall take into account any existing agricultural best management practices and performance standards, and to the extent possible, incorporate and build on NR 151, Wis. Adm. Code and NR 243, Wis. Adm. Code. Any new practices and standards developed shall not conflict with NR 151 and NR 243. (Are there any DATCP administrative rules we want to cite here?)

5. The DATCP practices and standards shall be:
 - a. Practical and workable
 - b. Cost-effective
 - c. Objective
 - d. Scientifically based, as much as is applicable and available
 - e. Intended to promote the long term viability of animal agriculture in Wisconsin
 - f. Intended to balance the economically viability of the farm operation with protecting natural resources and other community interests.
 - g. Usable and workable for county and town zoning officials in a way that is likely to be interconnected with county and town ordinances.
6. The state standards developed by the expert technical panel shall be drafted as administrative rule by March 1, 2004.
7. The state standards shall be reviewed and updated periodically by the expert technical panel named by the Secretary of DATCP, but the intervening time period shall not be less than three to five years.

C. Applicability of State Standards

1. If a county or municipality chooses to regulate the siting and expansion of livestock facilities within its jurisdiction, then it shall incorporate the DATCP livestock facility practices and standards into its regulations.
2. If a county or municipality chooses to regulate the siting and expansion of livestock facilities within its jurisdiction, then it may incorporate state water quality standards set forth in NR 151 and ATCP 50.
3. If a county or municipality chooses to regulate livestock facilities within its jurisdiction, it shall incorporate the DATCP practices and standards for livestock facilities and shall not impose practices or standards that exceed the DATCP practices and standards, except:
 - a. A county or municipally may exceed state water quality standards set forth in NR 151 and ATCP 50 with permission of DNR or DATCP as provided in s. 92.15, Stats., and implementing regulations.
 - b. A county and municipality may adopt a standard which is less stringent than the DATCP standard if the DATCP standard is a numerical value, (such as a distance for a setback), if the county or municipal adopts the standard through its comprehensive plan and it is incorporated into the municipal or county regulations.

4. If a county or municipality chooses to adopt other practices and standards to regulate livestock facilities that are more stringent than the DATCP practices and standards, then it shall present findings of fact to demonstrate the regulations are necessary for public health and safety and codified in a municipal or county ordinance or regulation.
5. As of July 19, 2003, the DATCP practices and standards shall apply as follows:
 - a. If counties and municipalities have regulations or ordinances that pertain to livestock agriculture, then they shall use the DATCP practices and standards.
 - b. If counties and municipalities do not have regulations or ordinances that pertain to livestock agriculture, then they shall not use the DATCP practices and standards.
 - c. If counties and municipalities choose to develop regulations or ordinances that pertain to livestock agriculture in the future, then they shall use the DATCP practices and standards.
 - d. If livestock farmers choose to expand a livestock facility by more than 500 animal units or site a new livestock facility of more than 500 animal units in those counties and municipalities, these livestock farmers shall meet the DATCP practices and standards.
 - e. If counties and municipalities have chosen to regulate livestock operations under 500 animal units, they may continue to apply their regulations as codified.

D. County and Municipal Authorities

1. Counties and municipalities shall retain their existing comprehensive land use planning and regulatory authorities.
2. Counties and municipalities shall retain their existing authorities to enforce their county and municipal regulations.
3. Counties and municipalities shall be the government entities to decide whether an application for expanding or siting a livestock facility meets the DATCP practices and standards.
4. A county or municipality shall approve or deny an application to expand or site a livestock facilities consistent with DATCP livestock facility practices and standards (or incorporate into its regulations?).

5. A county or municipality shall approve or deny an application to expand or site a livestock facility consistent with its comprehensive land use plans and regulations adopted by the county or municipality prior to July 19, 2003.
6. Counties and municipalities shall retain their authority to regulate such things as lights, noise, and traffic related to agriculture, just as these things may be regulated for other businesses and industries in their communities. If a county or municipality chooses to regulate such things as lights, noise, and traffic, then the regulations shall be incorporated into a local ordinance and applied similarly to all businesses whether they are agricultural or not.
7. If a county or municipality designates a general 'agriculture' area or zone in its comprehensive plan and local regulations, under a general designated land use, the county or municipality shall not restrict the size of livestock facilities. If it chooses to disallow one category of agriculture in favor of another then it shall do so based on findings of fact related to health and safety and shall incorporate the regulation into its local regulations.
8. If a county or municipality chooses to designate different agricultural zones through its comprehensive planning which may vary in the agricultural activities permitted, then it shall incorporate the designation into its county or municipal ordinance.
9. A county or municipal shall approve a new livestock facility or an expanding livestock facility if it meets the DATCP practices and standards and is consistent with its local regulations.
10. In making a decision to approve or deny an application to site or expand a livestock facility, a county or municipality shall develop a record of decision, including a recording of any public hearing, documents submitted at any hearing, and all papers filed in connection with the application for expansion or siting.
11. A county or municipality shall prepare complete findings of fact based on evidence in the public record when it makes a decision to approve or deny an application for a livestock facility to expand or be sited.

E. State Agricultural Facility Siting Review Board

1. Create an Agricultural Facilities Siting Review Board (referred to as "Board" throughout this document).

2. The Board shall consist of 3 or 5 or 7 members (yet to be decided). It has not been decided who will appoint the Board members. The Board members shall have knowledge of environmental siting practices, livestock farming, and other knowledge to objectively and reasonably assess if an application to expand or site a livestock facility meets the DATCP practices and standards.
3. The Board shall be attached to DATCP for administrative purposes. The Board shall have authority to adopt administrative rules.
4. The Board shall have authority to review a county and municipal government decision to approve or deny an application to expand or site a livestock facility. The Board shall have the authority to determine whether a county or municipality properly applied the DATCP practices and standards when the county or municipal made the decision. The Board shall (may?) uphold or overturn the county or municipal decision.
5. The Board shall not have authority to review county and municipal decisions to expand or site livestock facilities that are unrelated to the DATCP practices and standards, including county or municipal governmental procedural issues. For water quality matters involving DATCP environmental siting practices/standards, the Board shall consult with DNR and/or DATCP in making any determinations.
6. The Board shall work as follows:
 - a. The Board shall conduct its review based on the record of decision, and shall not receive additional evidence. In making its decision, the Board shall make a *de novo* decision and shall not defer to the decision made by the county or municipal authority.
 - b. The Board may review matters within its jurisdiction even if an aggrieved party has not exhausted non-judicial appeal or review mechanisms provided by a county or municipality.
 - c. Use of the Board review of a county or municipal decision shall be optional -- an aggrieved person has the choice of using the Board to review a county or municipal decision or appealing the county or municipal decision to circuit court.
 - d. The Board shall review a county or municipal decision at the request of any party aggrieved by the decision. An aggrieved person shall be limited to the applicant or any legal resident or landowner of the county or municipality living within two miles of the proposed livestock facility siting or expansion.
 - e. In conducting its review, the Board may revise findings of fact and determinations relevant to the applicant's compliance with the DATCP practices and standards. Consistent with its findings and determinations, the Board shall have the authority to approve or deny an application, and enter orders affirming or reversing a county or municipal decision or directing a county or municipal government to approve an application for expanding or siting a livestock facility.

- f. The decision of the Board shall be the final decision and may be appealed to circuit court.
- g. If the Board orders a county or municipality to approve an application for siting or expansion, no party may appeal the Board's order without first posting a bond. The filing of an appeal shall not stay the effect of a Board order approving an application, unless the circuit court enjoins the Board's order.
- h. The circuit court shall affirm the decision of the Board, unless its review of the record demonstrates a substantial basis for reversing the decision.

F. DNR Authorities

- 1. The Department of Natural Resources shall retain its existing authority governing the Wisconsin Pollution Discharge Elimination System (WPDES) permits. Nothing in this legislative draft shall be construed to impair DNR's authority under ch. 281 and 283, Stats. to issue a WPDES permit and nothing shall change the criteria DNR uses to make its WPDES permitting decisions, including the threshold standard of applicability of 1,000 animal units.
- 2. WPDES state standards shall continue to apply only to those new or expanding livestock facilities that will go above 1,000 animal units.

G. Process and Timeframe

- 1. There shall be a definition indicating clearly when the process starts for municipalities and counties to begin the decision-making to review and consider applications to site or expand a livestock facility. Likewise, there shall be a definition which indicates clearly when the process ends, and the application is either approved or denied.
- 2. There should be a definition of when an application to a municipal or county government for siting or expanding a livestock facility is considered complete. Municipalities and counties shall provide 'notice' to applicants seeking to site or expand a livestock facility and the notice shall state when the application is 'complete.'

- 3. There shall be a clearly defined set of circumstances defined in statute by which municipalities and counties may stop the process for reviewing a proposal and

making a decision on the siting or expansion application, such as the need for additional information, an amendment to the application, or emergency situations beyond the control of the applicant, municipality, or county. The set of circumstances shall be reasonable, practical, and shall not unfairly disadvantage the applicant or proposal.

4. Once the farmer's application for approval to expand or site a livestock facility is complete, the time for counties and municipalities to review and make a final decision should be between three and six months (This will be depend on how we decide to set this up, depending on the role and authority given to the county and municipal Board of Adjustments in this process.



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-3453/P1

RCT: kj

Wanted Thurs (1/22), if possible

(if that difficult, please let me know)

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Note

Gen

1 AN ACT ...; relating to: the siting and expansion of certain livestock facilities,
2 creating a livestock facility siting review board, and granting rule-making
3 authority.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.
For further information see the *state and local* fiscal estimate, which will be
printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 SECTION 1. 15.135 (1) of the statutes is created to read:
5 15.135 (1) LIVESTOCK FACILITY SITING REVIEW BOARD. There is created a livestock
6 facility siting review board which is attached to the department of agriculture, trade
7 and consumer protection under s. 15.03. The board consists of 5 members, appointed
8 for 5-year terms, who have knowledge of environmental considerations in siting
9 livestock facilities, of livestock farming, and of other matters that will enable the
10 members to objectively and reasonably discharge the duties of the board.

****NOTE: The instructions did not indicate how many members the board should have, what their terms should be, or who should appoint them. If a statute does not specify who appoints the members of a board, they are appointed by the governor. Please let me know what is wanted with respect to the board. We usually include a nonstatutory provision establishing different term lengths for initial members of boards so that there terms do not all end at the same time. I will add that in a later version of the draft unless it is not wanted.

their X

1 SECTION 2. 93.90 of the statutes is created to read:

2 93.90 Livestock facility siting and expansion. (1) DEFINITIONS. In this
3 section:

4 (a) "Animal unit" has the meaning given in s. NR 243.03 (3), Wis. Adm. Code.

5 (b) "Application for approval" means an application for approval of a covered
6 livestock facility siting or expansion.

7 (c) "Board" means the livestock facility siting review board.

8 (d) "Covered livestock facility siting or expansion" means siting a livestock
9 facility that will have more than 500 animal units or expanding a livestock facility
10 so that it has more than 500 animal units.

11 (f) "Livestock facility" means a place at which a person keeps animals that are
12 used in the production of food, fiber, or other animal products.

****NOTE: Is this what is intended?

13 (g) "Political subdivision" means a city, village, town, or county.

14 (2) DEPARTMENT DUTIES. (a) For the purposes of this section, the department
15 shall promulgate rules specifying site selection standards, best management
16 practices, and performance standards for siting and expanding livestock facilities,
17 including best management practices or performance standards for the management
18 of odor, dust, and manure. In promulgating the rules, the department shall consider
19 existing site selection standards, best management practices, and performance
20 standards and shall, to the extent possible, incorporate performance standards,

1 prohibitions, conservation practices, and technical standards contained in rules
 2 promulgated under s. 281.16[✓] (3) and requirements applicable to concentrated animal
 3 feeding operations contained in rules promulgated under ch. 283[✓]. The department
 4 may not promulgate rules under this paragraph[✓] that conflict with performance
 5 standards, prohibitions, conservation practices, and technical standards contained
 6 in rules promulgated under s. 281.16[✓] (3) or with requirements applicable to
 7 concentrated animal feeding operations contained in rules promulgated under ch.
 8 283[✓].

****NOTE: I am uncertain whether this conveys the scope of (the rules that is
 intended. Is this description adequate in that respect? (Note that NR 243 refers to
 "design standards.") It would be good to specify any other statutory sources of existing
 practices and standards that DATCP is supposed to consider in promulgating the rules.
 Should the draft prohibit DATCP from making rules that are inconsistent with rules
 under s. 92.16 or 92.17? If not, those sections should perhaps be added to the list of
 statutes "notwithstanding" by sub. (3)(a). Should the reference to ch. 283 be modified (e.g.
 only apply to situations in which the ch. 283 rules already apply [1000 animal unit
 operations, generally])? ch. X

9 (b) The department shall promulgate rules under par. (a)[✓] that are all of the
 10 following:

- 11 1. Practical and workable.
- 12 2. Cost[✓]-effective.
- 13 3. Objective.
- 14 4. Based on available scientific information.
- 15 5. Designed to promote the long-term viability of animal agriculture in this
 16 state.
- 17 6. Designed to balance the economic viability of farm operations with
 18 protecting natural resources and other community interests.
- 19 7. Designed to be usable by officials of political subdivisions.

1 (c) The department shall review rules promulgated under par. (a) at least once
2 every 4 years.

****NOTE: Is this the desired period for review? I think that if one used a range and also said "at least," as in the instructions, that would have the same legal effect as using the longest period in the range.

3 (d) The secretary shall appoint a committee of experts to advise the department
4 on the promulgation of the rules under par. (a) and on the review of rules under par.
5 (c).

6 (3) POLITICAL SUBDIVISION AUTHORITY. (a) Notwithstanding ss. 59.03 (2) (a),
7 59.69, 59.692, 59.693, 60.61, 60.62, 60.627, 61.34 (1), 61.35, 61.351, 61.354, 62.11 (5),
8 62.23, 62.231, 62.234, 92.07 (2), and 92.11, a political subdivision that regulates the
9 siting or expansion of livestock facilities through zoning or other means shall apply
10 the site selection standards, best management practices, and performance
11 standards promulgated under sub. (2) (a), and no other requirements related to the
12 matters covered by those site selection standards, best management practices, and
13 performance standards, to a proposed covered livestock facility siting or expansion,
14 except as provided in pars. (b) to (f).

****NOTE: In this provision, I am trying to preempt the local requirements that are desired to be preempted but not leave gaps in regulation that could occur if the draft preempted local regulation of matters that DATCP does not cover in its rules. Please see the discussion of this provision in the drafter's note to this draft.

15 (b) Paragraph (a) does not apply to a covered livestock facility siting or
16 expansion if the site is located in a zoning district in which livestock facilities are
17 prohibited or livestock facilities of the size proposed are prohibited, subject to pars.
18 (g) and (h).

19 (c) A political subdivision may apply a requirement to a covered livestock
20 facility siting or expansion that is less stringent than a site selection standard, best
21 management practice, or performance standard promulgated under sub. (2) (a) if the

1 site selection standard, best management practice, or performance standard is
2 expressed as a numerical value, such as a setback distance, and the political
3 subdivision has incorporated the requirement into an ordinance or resolution.

****NOTE: Please carefully consider what this provision would allow. I am not very well acquainted with the kinds of standards that DATCP would promulgate or which ones would be expressed as a numerical value. But, for example, would this authorize a political subdivision to approve an application that would result in manure spreading on a field with a steeper slope than state standards allow, that would result in erosion at greater than the tolerable soil erosion level, or that would authorize manure storage facilities with a capacity less than would be sufficient to maintain one foot of freeboard storage (see s. NR 151.05 (2) (a))? Performance standards might be likely to be expressed as numerical values yet relate to some kinds of matters about which you might not want to allow political subdivisions to be less stringent than the state standards. Given pars. (d) and (e), should this provision apply to requirements related to water quality? Also, the instructions indicated that requirements under this provision must be adopted through the political subdivision's comprehensive plan. My impression is that not all political subdivisions have yet adopted a comprehensive plan. Note that the requirement in the "Smart Growth" law that actions of local governmental units be consistent with their comprehensive plans does not take effect until January 1, 2010. I am also uncertain whether it would be workable to include all of the kinds of requirements to which this provision might apply into a planning document.

4 (d) A political subdivision may apply, to a covered livestock facility siting or
5 expansion, requirements related to water quality that exceed the site selection
6 standards, best management practices, and performance standards promulgated
7 under sub. (2) (a) if those requirements are consistent with and do not exceed the
8 performance standards, prohibitions, conservation practices and technical
9 standards in rules promulgated under s. 281.16 (3), notwithstanding ss. 92.15 (4)
10 and 281.16 (3) (d).

****NOTE: Might there be problems telling whether a specific requirement relates to water quality?

11 (e) A political subdivision may apply, to a covered livestock facility siting or
12 expansion, requirements related to water quality that exceed the site selection
13 standards, best management practices, and performance standards promulgated
14 under sub. (2) (a) and the performance standards, prohibitions, conservation

1 practices and technical standards in rules promulgated under s. 281.16[✓] (3) if those
2 requirements are approved under s. 92.15[✓] (3) (a), notwithstanding s. 92.15[✓] (4).

3 (f) A political subdivision may apply, to a covered livestock facility siting or
4 expansion, a requirement that exceeds the site selection standards, best
5 management practices, and performance standards promulgated under sub. (2)[✓] (a)
6 and that is not related to water quality, if the governing body of the political
7 subdivision makes findings of fact that demonstrate that the requirement is
8 necessary to protect public health or safety and the political subdivision has
9 incorporated the requirement into an ordinance or resolution.

****NOTE: Is this what is intended?

10 (g) Notwithstanding ss. 59.69[✓], 60.61[✓], 60.62[✓], 61.35[✓], and 62.23[✓], if a political
11 subdivision has a zoning ordinance with only one category of agricultural district and
12 the zoning ordinance allows livestock facilities in the agricultural district, the
13 political subdivision may not limit the size of livestock facilities that may be located
14 in the agricultural district.

****NOTE: I'm not sure that this is what is intended.

15 (h) Notwithstanding ss. 59.69[✓], 60.61[✓], 60.62[✓], 61.35[✓], and 62.23[✓], a political
16 subdivision may not enact or enforce a zoning ordinance with a category of
17 agricultural district in which livestock facilities are prohibited unless the political
18 subdivision bases that exclusion on findings of fact related to health and safety made
19 by the governing body of the political subdivision.

20 (i) Notwithstanding ss. 59.03[✓] (2) (a), 59.69[✓], 60.61[✓], 60.62[✓], 61.34[✓] (1), 61.35[✓], 62.11[✓]
21 (5), 62.23[✓], and 254.51[✓] (5) (a), a political subdivision may impose, on a covered livestock
22 facility siting or expansion, requirements relating to light, noise, and traffic only if

1 the requirements are included in an ordinance or regulation and apply uniformly to
2 all types of businesses and industries.

***NOTE: Is this intended to apply more broadly, to more than covered sitings and expansions? I could not think of how to generalize this to other things besides light, noise, and traffic as seems to have been contemplated by the instructions. There was a reference in the materials produced for the committee to regulating with respect to view. Should that be added to this provision? I am not certain that it will work to require the requirements to apply uniformly to all types of businesses and industries. There are probably other statutes giving political subdivisions authority to regulate light, noise, or traffic that should be "notwithstanding" in this provision. Please consider whether s. 348.16, 349.15, or 349.16 fall into that category.

3 (4) POLITICAL SUBDIVISION PROCEDURE. (a) No later than ??? days after a political
4 subdivision receives an application for approval, the political subdivision shall notify
5 the applicant whether the application for approval is complete and, if it is not
6 complete, what information is needed to complete the application for approval. As
7 soon as the applicant has provided all of the required information, the political
8 subdivision shall notify the applicant that the application for approval is complete.

***NOTE: How much time should political subdivisions be given to determine whether an application is complete? Might there be a situation in which siting is regulated but no application is needed (e.g., no conditional use permit is required)? If so, is that a problem?

9 (b) A political subdivision shall make a record of its decision^gmaking on an
10 application for approval, including a recording of any public hearing, copies of
11 documents submitted at any public hearing, and copies of any other documents
12 provided to the political subdivision in connection with the application for approval.

13 (c) A political subdivision shall base its decision on an application for approval
14 on written findings of fact that are supported by the evidence in the record under par.
15 (b).

16 (d) Except as provided in par. (e), a political subdivision shall approve or
17 disapprove an application for approval no more than 180 days after the day on which
18 it notifies the applicant that the application for approval is complete.

****NOTE: Is this the time limit that is wanted? Who makes the decisions on these approvals? Is the board of adjustment (or zoning board of appeals) where one would normally take an appeal of a siting decision? How do those boards fit into this proposal?

1 (e) A political subdivision may extend the time limit in par. (d) if the political
2 subdivision needs additional information to determine whether to approve or deny
3 the application for approval, if the applicant makes a material modification to the
4 application for approval, or in case of an emergency beyond the control of the political
5 subdivision.

****NOTE: Are these the situations that are wanted? Should there be some notice or other procedural requirements?

6 (5) REVIEW OF SITING DECISIONS. (a) In this subsection "aggrieved person" means
7 a person who applied to a political subdivision for approval of a covered livestock
8 facility siting or expansion, a person who lives in the political subdivision within 2
9 miles of the site at which the livestock facility is proposed to be sited or expanded,
10 or a person who owns land in the political subdivision within 2 miles of the site at
11 which the livestock facility is proposed to be sited or expanded.

****NOTE: Is this what is intended? What about a person who lives very close to a proposed facility, but not within the same political subdivision? Might there be due process or equal protection challenges to the effect that this definition would have?

12 (b) An aggrieved person may request the board to review the decision of a
13 political subdivision on an application for approval on the grounds that the political
14 subdivision incorrectly applied the site selection standards, best management
15 practices, and performance standards promulgated under sub. (2) (a) that are
16 applicable to the covered livestock facility siting or expansion. An aggrieved person
17 is not required to exhaust the political subdivision's administrative remedies before
18 requesting review by the board.

****NOTE: A time limit for requesting review should be added. Are there any statutes that require exhaustion of administrative remedies? If so, this provision should "notwithstanding" them.

1 (c) Upon receiving a request under par. (b), the board shall determine whether
2 the application for approval complies with the site selection standards, best
3 management practices, and performance standards promulgated under sub. (2) (a)
4 that are applicable to the covered livestock facility siting or expansion. The board
5 shall make its decision without deference to the decision of the political subdivision
6 and shall base its decision on the evidence in the record under sub. (4) (b). In a case
7 that involves the application of requirements related to water quality, the board shall
8 consult with the department of agriculture, trade and consumer protection or with
9 the department of natural resources concerning the application of the requirements
10 related to water quality.

11 (d) If an aggrieved person requests the board to review the decision of a political
12 subdivision to disapprove an application for approval and the board determines that
13 the political subdivision incorrectly determined that the application for approval
14 does not comply with the site selection standards, best management practices, and
15 performance standards promulgated under sub. (2) (a) that are applicable to the
16 covered livestock facility siting or expansion and that this was the basis for denying
17 the application, the board shall reverse the decision of the political subdivision. If
18 an aggrieved person requests the board to review the decision of a political
19 subdivision to approve an application for approval and the board determines that the
20 political subdivision incorrectly determined that the covered livestock facility siting
21 or expansion complies with the site selection standards, best management practices,
22 and performance standards promulgated under sub. (2) (a) that are applicable to the
23 application for approval, the board shall reverse the decision of the political
24 subdivision.

***NOTE: Does this need to say what happens if the board agrees with the political subdivision?

1 (e) An aggrieved person or the political subdivision may appeal the decision of
 2 the board to circuit court. An aggrieved person who appeals a decision of the board
 3 that an application for approval complies with the site selection standards, best
 4 management practices, and performance standards promulgated under sub. (2) (a)
 5 shall post a bond. The filing of an appeal does not stay the effect of a decision of the
 6 board that the application for approval of a covered livestock facility siting or
 7 expansion complies with the site selection standards, best management practices,
 8 and performance standards promulgated under sub. (2) (a).

✓ ***NOTE: How would the amount of the bond be determined? See, for example, ss.
 813.06 and 867.01 (3) (c). Should the political subdivision be able to appeal? If so, would
 it have to post bond?

9 (f) A circuit court to which a decision of the board is appealed under par. (e) shall
 10 affirm the decision of the board unless the court determines that the board's action
 11 depends on any finding of fact that is not supported by substantial evidence in the
 12 record.

***NOTE: This is based in part on s. 227.57 (6).

13 SECTION 3. Nonstatutory provisions.

14 (1) PROPOSED RULES. The department of agriculture, trade and consumer
 15 protection shall submit in proposed form the rules required under section 93.90 (2)
 16 (a) of the statutes, as created by this act, to the legislative council staff under section
 17 227.15 (1) of the statutes no later than the first day of the 5th month beginning after
 18 the effective date of this subsection.

***NOTE: I do not know whether this is a realistic deadline.

create Auto Ref A

SECTION 4. Initial applicability.

Create auto ref B

1 (1) The treatment of section 93.90 of the statutes first applies to applications
2 for approval of livestock facility siting or expansion that are received on the effective
3 date of this subsection.

4 **SECTION 5. Effective dates.** This act takes effect on the day after publication,
5 except as follows:

A.R. A (2) A.R. B

6 (1) The treatment of section 93.90 of the statutes and SECTION takes effect on
7 ?????.

***NOTE: There will need to be a delayed effective date for s. 93.90 to give time for DATCP to get the rules promulgated, for political subdivisions to adjust to the rules, and to get the board up and running.

8 (END)

Note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3453/P1dn

RCT: *KJ*

Date

This is a preliminary version of the proposal on siting livestock facilities based on instructions dated November 12, 2003. There are a number of notes in the draft with my questions and comments. I am certain that the draft raises other questions that have not occurred to me. The draft should be reviewed very carefully to ensure that it is workable and that it carries out the intent of the proposal.

With regard to proposed s. 93.90 (3) (a), it is important to specify the sources of local authority for imposing requirements on the siting or expansion of livestock facilities that are wanted to be preempted to ensure that there are no conflicts in the statutes that could cause ambiguity and might allow a court to interpret the statutes in a way that is inconsistent with the intent of the proposal. The list of statutes in proposed s. 93.90 (3) (a) represents my first attempt to identify these sources of local authority. I reviewed the list of statutes in the definition of "local approval" in s. 289.33(3) (d) for possible use in this provision, as suggested in the instructions. That definition includes cross-references to a number of statutes that are not relevant to this proposal, for example, provisions relating to county authority to remit forfeited bail bonds and regulation of obscenity. That definition also excludes some statutory provisions that should probably be "notwithstanding" in this provision. X

Proposed s. 93.90 (3) (a) provides that the standards promulgated by DATCP under this proposal prevail over the authority for zoning of shorelands and construction site erosion control and storm water management zoning. It seems that shoreland zoning requirements, for example, might be more restrictive in some ways than the standards that DATCP would promulgate under this proposal. Should the standards that DATCP promulgates control over the authority for zoning of shorelands and construction site erosion control and storm water management zoning? Should the draft "notwithstanding" s. 87.30? Note that there may federal requirements that relate to shoreland and floodplain zoning. Might there be other statutes that provide authority to political subdivisions that should not be preempted? (be)

The "smart growth" law requires that beginning on January 1, 2010, any action of a political subdivision that affects land use must be consistent with the political subdivision's comprehensive plan (s. 66.1001 (3)). Unless language is added to this draft requiring political subdivisions to enact DATCP's standards, rather than just

applying them, s. 66.1001 (3) should be added to the list of statutes in proposed s. 93.90 (3) (a). Might the standards promulgated by DATCP cover matters also covered by building codes? If so, which should prevail? See s. 59.70 (1). What about construction site erosion control requirements under s. 101.1205? X

Does s. 66.0415 provide authority to cities, villages, or towns that could interfere with the intent of this proposal? What about s. 33.455 (3), 60.10 (2) (i), or 236.45? of

This proposal might be challenged as violating the home rule provision of the Wisconsin Constitution, Article XI, Section 3. The home rule amendment to the constitution was adopted to empower cities and villages to determine their own local affairs, and "makes a direct grant of legislative power to municipalities," subject only to the constitution and legislative enactments of statewide concern. See *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526 (1977), citing *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 637 (1926). ^{add a comma}

The provision also stands for the proposition that the state legislature is limited "in its enactments in the field of local affairs of cities and villages" (*Michalek*, 526 citing *Ekern*, 638) and cannot prohibit a city or village from acting in an area that solely involves local affairs and that is not a matter of statewide concern. In effect, this proposal limits local zoning and regulatory authority in the area of livestock facilities, as defined in the bill. It could be argued that these zoning and regulatory issues, if not solely a "local affair," are at least areas of predominantly local concern. The Wisconsin Supreme Court "recognize[s] that many matters while of 'state-wide concern,' affecting the people and state at large somewhat remotely and indirectly, yet at the same time affect the individual municipalities directly and intimately, can consistently be, and are, 'local affairs' of this [home rule] amendment." *Ekern*, at 640 and *Michalek*, 527, citing *Ekern*.

In *Ekern*, the Supreme Court held that a state statute that regulated the heights of buildings in all cities violated the home rule authority of cities. See *Ekern*, at 639. Consequently, under *Ekern* and *Michalek*, a court could hold that a statute that limits city and village authority in the area of livestock facility siting and expansion violates Article XI, Section 3, of the Wisconsin Constitution because the statute deals with a local affair. If a court so held, a city or village could elect not to be governed by the statute. See *Ekern*, at 642. X X

A court could also hold that the proposal does not violate constitutional home rule provisions because of the statewide importance of agriculture.

We try to avoid including cross-references to administrative rules in the statutes. Rule numbers can be changed, making references in the statutes incorrect. For the most part, I have tried to refer to rules that are referenced in the instructions by referring to the statutes that authorize them. I used a cross-reference to the rule containing DNR's definition of "animal unit" because there did not seem to be a good alternative in that instance.

The instructions included some references to July 19, 2003. I did not understand the intended legal effect of those references and, therefore, did not include them in the draft.

Should any funding or positions be provided in this draft?

Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3453/P1dn
RCT:kjf:pg

January 21, 2004

This is a preliminary version of the proposal on siting livestock facilities based on instructions dated November 12, 2003. There are a number of notes in the draft with my questions and comments. I am certain that the draft raises other questions that have not occurred to me. The draft should be reviewed very carefully to ensure that it is workable and that it carries out the intent of the proposal.

With regard to proposed s. 93.90 (3) (a), it is important to specify the sources of local authority for imposing requirements on the siting or expansion of livestock facilities that are wanted to be preempted to ensure that there are no conflicts in the statutes that could cause ambiguity and might allow a court to interpret the statutes in a way that is inconsistent with the intent of the proposal. The list of statutes in proposed s. 93.90 (3) (a) represents my first attempt to identify these sources of local authority. I reviewed the list of statutes in the definition of "local approval" in s. 289.33 (3) (d) for possible use in this provision, as suggested in the instructions. That definition includes cross-references to a number of statutes that are not relevant to this proposal, for example, provisions relating to county authority to remit forfeited bail bonds and regulation of obscenity. That definition also excludes some statutory provisions that should probably be "notwithstanding" in this provision.

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building codes? If so, which should prevail? See s. 59.70 (1). What about construction site erosion control requirements under s. 101.1205?

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This proposal might be challenged as violating the home rule provision of article XI, section 3, of the Wisconsin Constitution. The home rule amendment to the constitution was adopted to empower cities and villages to determine their own local affairs, and “makes a direct grant of legislative power to municipalities,” subject only to the constitution and legislative enactments of statewide concern. See *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526 (1977), citing *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 637 (1926).

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Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell
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Phone: (608) 266-7290
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WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: BECKY TRADEWELL, LEGISLATIVE REFERENCE BUREAU
FROM: Mark C. Patronsky, Senior Staff Attorney
RE: Instructions for Modifications to LRB-3453/P1
DATE: January 27, 2004

This memorandum contains instructions for a redraft to LRB-3453/P1, relating to the siting and expansion of certain livestock facilities. At this point in the process, the draft can remain a "preliminary" draft.

Page 1, lines 5 to 10

The material from the comma on line 8 to the end of line 10 should be deleted.

The board members are as follows:

- The Secretary of Agriculture, Trade, and Consumer Protection or his or her designee.
- A member representing the interest of towns, appointed by the Secretary from a list submitted by the Wisconsin Towns Association.
- A member representing the interests of counties, appointed by the Secretary from a list of names submitted by the Wisconsin Counties Association.
- A representative of environmental interests, appointed by the Secretary from a list submitted by environmental organizations.
- A representative of livestock farming interests, appointed by the Secretary from a list submitted by statewide farm organizations.

The members appointed by the Secretary should be subject to confirmation by the Senate, and should serve for staggered five-year terms.

Board members should receive a payment to cover costs of attending meetings. Board members will not be eligible for per diem payments.

Page 2, line 2

Language should be added to the bill draft at the appropriate location to specify that s. 93.90, Stats., addresses matters of statewide concern, for the purpose of assuring that the state standards established by the bill are applicable to and bind cities and villages, notwithstanding home rule authority.

Page 2, lines 8 to 10

The definition of "covered livestock facility..." should be deleted and the term "covered" should be deleted wherever it appears in the draft. The comments below regarding pages 4 to 7 more fully discuss the effect of this change. The basic concept is that the bill, and the state standards, should apply to all livestock facility siting or expansion. The distinction between those that have more than 500 animal units and those that have 500 or fewer animal units will remain in relation to the applicability of the state review process.

Page 2, lines 11 and 12

The definition of "livestock facility" should be replaced by the following:

"Livestock facility" means "a feedlot or facility, other than a pasture, where animals used in the production of food, fiber or other animal products will be fed, confined, maintained or stabled for a total of 45 days or more in any 12-month period."

Page 2, line 16

The bill draft needs to address the issue of applicability of state standards after livestock facilities are sited or expanded. Some of these standards may consist of preexisting standards (adopted under other statutes) that are enforceable. The standards adopted under the bill may or may not be separately enforceable. The approval process for livestock facility siting and expansion should involve a commitment by the applicant to continue to comply with the state standards, in the nature of a permit condition.

Page 2, line 18

Delete "odor, dust, and manure" and substitute "livestock facilities." The rule should also contain a list of information and documentation that the application must contain in order to determine, both by the political subdivision and the siting board, whether the livestock facility siting or expansion meets the state standards.

Page 3, after line 8

The issue of consistency (see the drafter's note) should be addressed by incorporating existing statutes and rules by cross-reference into the state standards, rather than by adopting new rules in the state standards on the same subject as existing statutes and rules. The Department of Agriculture, Trade,

and Consumer Protection (DATCP) should be directed to adopt by cross-reference existing statutes and rules to the maximum extent feasible.

Page 3, lines 9 and 10

This introductory paragraph establishes standards for rules. First, the language in the introductory paragraph should be changed as follows: "The department, in promulgating rules under par. (a), shall consider whether the rules are all of the following:". Second, these provisions should apply only to new rules that are promulgated under s. 93.90, Stats., and not to any existing statutes or rules, or future statutes or rules, that are incorporated by cross-reference.

Page 3, line 14

Add "peer-reviewed" before "scientific information."

Page 4, line 6 to page 7, line 2

The bill draft needs to be modified to provide for the applicability of the new state standards to all siting or expansion of livestock facilities. The bill should make the state standards applicable to all political subdivision decision-making regarding a livestock facility siting or expansion. A political subdivision may not disapprove or prohibit a livestock facility siting or expansion unless one or more of the following conditions applies at the time of application:

- The proposed livestock facility location is zoned, and the zoning is not agricultural.
- The proposed siting or expansion equals or exceeds 500 animal units, and fails to meet local ordinance standards (for operations of that size) that are consistent with DATCP standards. A political subdivision is not required to adopt ordinance standards for livestock facilities.
- The proposed facility exceeds a lower size threshold specified by a local ordinance that was enacted prior to July 19, 2003, and the facility fails to meet local ordinance standards (for operations of that size) that are consistent with DATCP standards.
- The proposed facility location is in an agricultural zoning district that prohibits the facility. A zoning ordinance may not prohibit livestock facilities based on size, in agricultural zoning districts that allow smaller facilities of the same type, unless other agricultural zoning districts allow facilities of that type (as permitted or conditional uses) without respect to size. A zoning ordinance may not prohibit livestock facilities in any agricultural zoning district unless the political subdivision makes findings of fact that justify the prohibition.
- The proposed facility violates generally applicable codes (such as building or sanitary codes) that are not merely designed to exclude livestock facilities.

A local standard as applied under the second and third bullet points, above, may exceed DATCP standards if one of the following applies:

- (1) The local government makes specific findings of fact showing that the higher standard is needed to protect public health or safety.
- (2) The standard pertains to water quality, and DATCP or the Department of Natural Resource (DNR) approves the standard under s. 92.15 (3) (a), Stats. DATCP may incorporate current water quality standards by reference in its standards.

Page 4, lines 6 to 8

Delete the following “notwithstanding” references: ss. 59.692, 59.693, 60.627, 61.351, 61.354, 62.231, 62.234, and 92.07 (2). Add the following “notwithstanding” references: ss. 66.0415, 60.10 (2) (i), and 33.455.

Page 4, line 19 to page 5, line 3

Substitute the following: “(c) A political subdivision may apply a site selection standard, such as a setback distance, that is less stringent than a site selection standard promulgated under sub. (2) (a) if the site selection standard is incorporated into an ordinance and expressed as an objective numerical standard.”

Page 6, line 9

Require that the ordinance or resolution has been in effect for at least 12 months prior to submission of the application for the livestock facility siting or expansion.

Page 7, line 3

Substitute 45 days for the question marks.

Page 7, line 9

Add a requirement for DATCP rules that establish what is an adequate record for the decision of the political subdivision.

Page 7, line 17

Change 180 days to 90 days.

Page 7, line 18

At the end of that line add: “If an applicant complies with DATCP rules related to applications for local approval (see comment at page 2, line 18), and makes a *prima facie* showing that the applicant meets applicable requirements for approval, the local government shall approve the application unless the local government finds, based on clear and convincing rebuttal evidence in the record, that the applicant fails to meet applicable requirements.”

Page 8, line 4

Delete "or in the case of an emergency beyond the control of the political subdivision" and substitute "or for other good cause specified in writing by the political subdivision."

Page 8, lines 8 and 10

Delete the requirement that the person must live in the same political subdivision, and retain the two-mile limitation.

Page 8, line 12

Add a 30-day time limit from the date that the political subdivision issues its decision in order to request board review of the decision. If an aggrieved person chooses to exhaust all local remedies, the 30 days commences to run after all local decisions are complete.

Page 9, line 6

The draft should be clear that the decision of the siting board is based only on the evidence in the record and that the siting board does not conduct a hearing.

Page 9, lines 11 to 24

This part of the bill draft should be modified so that the board issues a decision that is binding on the political subdivision. The board may reverse a decision of the political subdivision, whether granting or denying a permit. If the board issues a decision and the political subdivision does not comply with the decision in further actions of the political subdivision regarding the application, the owner of the livestock facility may seek court enforcement of the board's decision. The board's decision is final and binding on the court.

Page 10, line 5

The bond should not be applied to an aggrieved person who is the applicant for approval of a livestock facility siting or expansion. The court should be required to determine the amount of bond, which should be the estimated amount of the court costs, attorneys' fees, and expert witness fees incurred by the applicant if the applicant prevails. If the applicant prevails in the action, the applicant is entitled to costs and attorney and expert witness fees.

Page 10, lines 11 and 12

The draft should be clarified so that the substantial evidence test is not the only requirement. All elements of judicial review should apply to court review of the board's decision.

Page 10, line 17

Change this deadline to the 12th month.

Page 11, line 7

Change this deadline to the 18th month.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

MCP:jal;tlu

Tradewell, Becky

From: Patronsky, Mark
Sent: Friday, January 30, 2004 1:07 PM
To: Tradewell, Becky
Cc: Matson, James K DATCP
Subject: Livestock siting

Becky---

I discussed several of the questions you had with Jim Matson. Here is the result.

page 4, lines 6 to 8.

✓ ---for shoreland zoning, construction site, and floodplain zoning, those programs should apply, that is, should be a potential grounds for denying an application for a livestock facility.

✓ ---for the county conservation standards, those should be applicable under the s. 92.07 authority, and may be different from the state standards---s. 92.07 should be kept on the "notwithstanding" list.

✓ page 6, line 18. Keep health and safety as a requirement for the finding for the ordinance.

page 10---re the appeal by the political subdivision. Yes the P.S. should be able to appeal, on the same grounds as any other aggrieved person.

✓ I also got a note from John O'Brien, who says that the draft should exclude aquaculture facilities from the definition of livestock facilities.

Mark Patronsky

Tradewell, Becky

From: Patronsky, Mark
Sent: Thursday, January 29, 2004 3:47 PM
To: Tradewell, Becky
Cc: Matson, James K DATCP
Subject: LRB-3453/P1--issue regarding local regulation

Becky--

You asked for some clarification of my memo of 1/27/04, in the 3rd bullet point on page 3. Here it is.

The key is in the introductory paragraph---the political subdivision may not prohibit a livestock facility except as allowed in the bullet points.

The third bullet point relates to a preexisting (before 7/19/03) local ordinance that regulates livestock facilities, applies to livestock facilities below 500 animal units, and the ordinance is consistent with the state standards. If that all applies, the political subdivision can prohibit based on the ordinance.

What is not expressed in this is what happens if the ordinance applies to livestock facilities below 500 animal units, and does not comply with the state standards. In this case, the political subdivision may regulate the livestock facility based on the ordinance, but as above, may not prohibit it.

Mark