



Memo: Proposed revisions to ATCP 51, Livestock Siting Standards

From: Kara O'Connor, Wisconsin Farmers Union

To: Town and County Board Supervisors; County Land and Water Conservation committee members; County Land and Water Conservation staff; other interested parties

Date: September 19, 2017

Background

ATCP 51 is the rule promulgated by DATCP to implement the Livestock Siting Law (Wisconsin Statutes section 93.90). The law requires that DATCP review the rules every 4 years. DATCP is currently in the early stages of such a 4-year review. Despite the fact that DATCP convened two panels of technical experts in 2010 and 2015 to review the technical standards and make significant recommendations, since ATCP 51 came into effect over a decade ago in 2006, the standards have never been revised.

Moving forward, the DATCP Board will vote (in December 2017 at the earliest) whether to send the proposed changes to ATCP 51 out for hearing and public comment. Between now and December, and then during the public comment phase, would be the ideal time for interested parties, including counties, to suggest additional changes to the rules that would provide greater protections to neighbors and local governments. I have listed some potential additional changes below; I would welcome hearing about other suggestions.

Concepts that are positive in DATCP's proposed revisions to ATCP 51:

- replacing the flawed odor score calculation with greater setbacks.
- applying feed storage leachate control standards to all feed, not just high-moisture feed.
- requiring more frequent visual inspections of manure storage facilities to ensure their integrity.
- creating a process for neighbors of a large livestock facility to initiate an odor complaint.
- delineating a process to clarify when an application is "complete."
- requiring permit applicants to have, at the time of application, the land base necessary to implement a nutrient management plan for the maximum number of animal units requested in the application.

Concepts that are questionable in DATCP's proposed revisions to ATCP 51:

- Creating an accelerated/streamlined "modification" process for existing large livestock facilities to expand.
- Developing a confusing hybrid approach of setbacks combined with odor control practices to manage nuisance, rather than simply shifting to setbacks and abandoning credits for odor control practices that are difficult to monitor, enforce, and scientifically defend based on the scant and sometimes conflicting research available.

Things that should be changed in the current draft revision to ATCP 51:

Financial/Procedural:

- The draft maintains the current cap of \$1,000 on the permit fee that a political subdivision can charge. This amount is grossly inadequate. For example, Green County has spent over \$40,000 reviewing a single permit application. Very large operations with complex engineering are becoming the new norm. To account for this size and complexity, **the maximum allowable permit fee should be increased** to either:

- \$1 per animal unit, or
- recovery of reasonable and actual costs incurred by the political subdivision in the course of the permit review, modeled after the cost recovery provisions in the nonmetallic mining law. (Draft Rule Section 45, Line 738.)

(Note: This would be the maximum permit fee allowed under the rule. Political subdivisions are always free to charge less than the maximum.)

- Currently political subdivisions are prohibited from **requiring the large livestock facility to post a bond or other financial security**. This prohibition should be removed, in order to protect taxpayers from a costly cleanup if the operation goes out of business without a new buyer in place. As operations become extremely large, and as dairy and livestock markets become more volatile, the chances increase that we will see abandoned facilities for which no suitable buyer can be found. (Draft Rule Section 45, Lines 743-744.)

- With regard to modifications (Draft Rule Section 53): The proposed rule creates an **abbreviated process for modifying an existing permit**, rather than completing the full permitting process. The draft rule provides that the modification process could be used for expansions of up to 30% of existing animal units, provided that the modification does not require the operator to complete four or more of the required permit worksheets. A threshold question is whether an abbreviated modification process is desirable, or whether facilities should undergo the standard application procedure if they wish to modify or expand operations. Assuming a modification procedure is desirable, a number of commentators have noted that:

- 30% is a very significant increase in the number of animal units. If a modification procedure is instituted, a 20% expansion would be a more appropriate cutoff.
- Even then, 20% of 3,000 is a lot more than 20% of 500. If a modification procedure is instituted, it might be wise to limit its application to expansions of *either 20%, or 500 animal units, whichever is less*.
- Alternatively, the modification procedure could be limited to modifications of structures and facilities, but expansions of animal units would have to go through the normal permitting process.

- **Regarding completeness determinations:** The proposed rule requires a political subdivision to respond within 45 days to a livestock siting application, and provide either a notice that the application is complete, or a checklist of what would be required to make the application complete. In general 45 days may be sufficient, but the rule should allow for an extension of the 45-day period in the event of extenuating circumstances, such as the absence of key personnel, who are needed to determine whether the completeness criteria have been met. (Draft Rule Section 47, Lines 751-759.)

Setbacks:

- Although the proposed draft rule constitutes a shift toward greater reliance on setbacks to manage nuisance issues, the draft rules still allow an operation to obtain more lenient setbacks by adopting certain odor control practices. Odor control practices are difficult to monitor, enforce, and scientifically defend based on the scant and sometimes conflicting research available. Rather than this hybrid approach that blends setbacks with odor control practices, **DATCP should consider simply requiring greater setbacks for new permits, and dispense with credits for odor practices.**

- **In either case, the setbacks need to be more rigorous.** The proposed rules require only 300 feet of setback from a property line and 200 feet of setback from a public right-of-way for animal housing on an operation over 2,500 animal units, including operations of 20,000 or 30,000 animal units or more. The draft rule would then allow the setback to be even smaller if the operation adopts certain odor control practices. With allowable setback reductions under the proposed rule, a manure storage structure on a farm of 4,000 or more animal units (with an estimated surface area of 240,000 square feet) could be less than one quarter of a mile from a neighboring property line. (Draft Rule Section 36.)

These setbacks are inadequate to protect public health and safety, and neighbors' peaceful enjoyment of their own private property. This year a property tax review panel in Lafayette County reduced a 15-year resident's property taxes in response to a CAFO that built on the adjacent property. This case is part of a growing trend of property taxes being reassessed downward due to nearby CAFOs. Counties cannot afford to lose significant sums in property taxes due to proximity to large livestock operations. **Setbacks are a key tool in maintaining the property values for neighboring properties.**

- The proposed rule prohibits local governments from having setbacks that exceed the standards set forth in ATCP 51. This is a diminution of a fundamental local police power. ATCP 51 should create a default setback framework, but **the rule should allow local governments to require increased setbacks if local conditions so dictate.** (Draft Rule Section 36, Lines 259-261.)

- the proposed revisions would allow an existing operation to incrementally expand an existing structure in a manner that violates the setbacks, provided that each incremental expansion increases the area of the structure or manure storage by no more than 20%. This should not be allowed. Current operations should be "grandfathered in," *provided that they maintain their existing structures and permit.* **An operation should only be allowed to expand an existing structure if the expansion would be in compliance with the new setbacks,** the same as a new operation or structure would be required to meet. (Draft Rule Section 36, Line 274 and 332-335.)

- The proposed rule provides for **more lenient setbacks for operations that "cluster" animals in multiple housing structures,** rather than housing the same number of animals in a single structure. This "clustering" provision is indefensible and should be removed. (Draft Rule Section 37.)

- One positive change is that the proposed rules would allow a political subdivision to require an **odor management plan from a permitted facility if the subdivision receives a verified odor complaint** from the owner of an adjacent property. (Draft Rule Section 39, line 387.) This provision should be:

- clarified to explicitly state that a political subdivision may issue a fine or revoke a permit due to an operation's failure to comply with an odor management plan;

- expanded to allow other affected individuals in the area, such as renters, other property owners within 2 miles of the permitted site, and users of nearby public or natural amenities, to register an odor complaint.
- The proposed rules allow an operator to make the case for a novel odor control strategy not included Appendix A, Worksheet 2. Assuming that the final rule continues to give setback reductions for odor control practices, **political subdivisions should have the opportunity to present contrary evidence about the effectiveness of the proposed odor control strategy.** An operator seeking to use a novel odor control strategy not described on Worksheet 2 should also be required to give notice to neighbors within a 2-mile radius, whose property values will be most affected, and these individuals should also have the opportunity to present evidence about the effectiveness of the proposed odor control strategy. (Draft Rule Section 39, Lines 408-421.)
- Political subdivisions may also want to consider whether it is important for the rule to establish setbacks from feed storage structures, in addition to animal housing and manure storage. This would be important if feed storage structures have generated odor complaints.

Engineering Technical Standards:

- As noted above, the draft rule takes a step forward by requiring periodic visual inspections of manure storage facilities that are over 10 years old while empty to ensure their integrity. Unfortunately, actual experience in Wisconsin has taught us that manure storage facilities can start leaking within weeks or months of their construction. Thus, the requirement for an engineer to do a **visual inspection of manure storage while empty in order to demonstrate compliance should be extended to all manure storage structures**, not just those that are older than 10 years, in order to ensure that they are not cracked or leaking. (Draft Rule Section 41, lines 522-524.)

Nutrient Management Technical Standards:

- The nutrient management portion of the rules should require the operator to **specifically list owned and rented acres where he or she plans to spread manure** on Waste and Nutrient Management Worksheet 3. If the operator is relying on rented acres, he or she should provide documentation of rental agreements that cover the duration of the permit term. Recent experience has shown that without supporting documentation, operators' assertions that they have access to the necessary acres for manure spreading have not always been reliable.

For more information, contact:

*Kara O'Connor, Government Relations Director
Wisconsin Farmers Union*

koconnor@wisconsinfarmersunion.com / 608-514-4541