



*Advocating for Wisconsin's Large Environmental Permitted Operations
Who Comply with a Zero Discharge Standard*

September 13, 2019

**VIA E-MAIL (livestocksitingcomments@wisconsin.gov)
AND VIA HAND-DELIVERY**

DATCP-ARM

Attn: Christopher R. Clayton
2811 Agriculture Drive
Madison, WI 53718

Dear Mr. Clayton:

On behalf of the Wisconsin Dairy Alliance and its farmer members (WDA), please consider these comments concerning the Wisconsin Department of Agriculture, Trade and Consumer Protection's (DATCP or the Department) efforts to revise Ch. ATCP 51, Wis. Admin. Code, the state's livestock siting standards. WDA represents modern, regulated dairy farms throughout Wisconsin and works diligently to preserve Wisconsin's heritage as the Dairy State.

WDA has joined most all of the animal agriculture associations in the state in a letter of opposition to the proposed rule revisions. WDA is opposed to the 2019 public hearing draft of ATCP 51 and the process DATCP followed after the DATCP Board previously returned to staff in 2017 for further work essentially the same hearing draft now being considered. The proposed rule revisions violate the legislative mandates of the rule's authorizing statute and, if adopted, would be subject to legal challenge. The rulemaking process cannot serve as a referendum on the Livestock Siting Law, a bi-partisan measure adopted in 2004 and signed by Governor Doyle. If changes to the statutory directives of the law are to be made, they are to be made by the elected representatives of the state's voters, not agency staff.

Beginning earlier this year, WDA leadership was in direct contact with DATCP leadership, DATCP staff and the DATCP Board and articulated our concerns with the rule revisions' approach. Many of those concerns mirrored concerns that had been raised by Wisconsin's livestock industry representatives in 2017. WDA specifically asked that DATCP slow this revision process down so as to effectively work with the industry to pursue constructive changes prior to moving the proposed rule forward for public comments. Unfortunately, DATCP leadership choose to move forward without addressing any of the livestock industry stakeholders' suggestions.

WDA immediately began working with Assembly Speaker Robin Vos and Senate Majority Leader Scott Fitzgerald regarding DATCP's unwillingness to work with stakeholders to make improvements to the proposed rule revisions. DATCP failed to ground-test the impacts of the rule on actual dairy operations, in contravention to a direction the DATCP Board gave in 2017,



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resulting in likely significant impacts on the industry's ability to grow and monumental loss of economic generation to the state's \$46 billion dollar dairy industry. In response to these concerns, these legislative leaders sent a joint letter (copy attached) requesting Secretary Designee Pfaff not move the proposed rule forward until additional work with stakeholders was completed. Unfortunately, this request was also disregarded by DATCP.

Chapter 93.90 of the Wisconsin Statutes (the state's Livestock Siting Law) directs DATCP to adopt rules specifying standards for siting and expanding livestock facilities. DATCP adopted ATCP 51, Wis. Admin. Code in 2006 and the siting law has been working ever since. The statute also directs DATCP to review these rules at least once every four years. Nothing in the statute requires DATCP to *revise* the rules, particularly when the rules are working as intended upon initial adoption. Importantly, the legislature set forth mandates to DATCP to guide the adoption and revision of the siting rules. DATCP must only adopt rules or revisions that are "practical and workable," "cost effective," "objective," "based on peer reviewed science," "designed to promote the growth and viability of agriculture" and that "balance the economic viability of farm operations with protecting natural resources and other community interests." Sadly, these proposed revisions miss the mark in several respects and violate these legislative directives.

The process DATCP has followed to date utterly fails to appreciate the cost of these proposed revisions on farmers that want to gradually grow their business. Hidden from the cost impact analysis is the cost of lost opportunity. The farmers that decide *not* to pursue expansion because of the costly or overly restrictive provisions in this proposed revision is the true hidden cost of this latest example of "legislation by bureaucrat." If adopted unchanged, this revised rule would result in significant costs to operations that want to expand, resulting in a "chilling effect" on livestock industry growth. Unless changed, the rule will have a negative impact on future potential growth in the dairy industry. After five years of a very problematic farm economy, with farmers dealing with distressed milk prices, trade wars and historical weather events, more uncertainty could be devastating.

But it is not just the farmers to consider. Meat and milk processors move new investment (and the jobs that go with it) to where the supply is. Livestock producers are moving projects out of state as a result of more welcoming regulatory environments. Adoption of this rule without change will simply declare war on livestock expansion in the state, in direct contravention of the underlying legislative purpose of the Livestock Siting Law. Manufacturing jobs will be the "collateral damage" of such a declaration.

Much work is needed to be done to make this set of proposed revisions workable and cost effective. That work can only be accomplished with the cooperation of livestock industry representatives. This cooperation has been offered, but sadly to date rejected by DATCP.



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WDA has attached a list of its objections to specific items in the proposed revision. We remind the Department of its duty set forth in Wis. Stat. § 93.90, specifically.

(2)(b) In promulgating rules under par. (a), the department shall consider whether the proposed standards, other than those incorporated by cross-reference, are all of the following:

1. Protective of public health or safety.
 - 1m. Practical and workable.
2. Cost-effective.
3. Objective.
4. Based on available scientific information that has been subjected to peer review.
5. Designed to promote the growth and viability of animal agriculture in this state.
6. Designed to balance the economic viability of farm operations with protecting natural resources and other community interests.
7. Usable by officials of political subdivisions.

WDA respectfully requests that DATCP pull back the proposed revisions to ATCP 51 until all issues presented by stakeholders have been addressed to meet the requirements in WI Stats. 93.90.

Respectfully,

Cynthia Leitner

Cynthia Leitner
President



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WDA Specific Objections to ACTP 51 :

Local control:

The statute that authorizes this rule was clearly enacted as an “enactment of statewide concern.” This preemptive language was upheld by the Wisconsin Supreme Court to wrest approval or control over livestock siting from local units of government (with limited exceptions). Any livestock siting rule that seeks to expand the authority of local government flies in the face of the legislative intent of the authorizing statute and is therefore illegal. This proposed rule expands local control by allowing monitoring compliance. In the case of CAFOs, this is certainly unnecessary, since CAFO’s are already being monitored and enforced upon by the federal and state laws that protect natural resources. Local mischief on matters that have been fully delegated by the legislature to DATCP or DNR to enforce was one of the purposes of the livestock siting law in the first place!

Locals have asserted they have been shut out of the siting approval process. But this comment is disingenuous. Since the law was adopted 15 years ago, local governments have had the ability to adopt siting standards that are more stringent local standards provided that they follow the path outlined in the law. *See, Wis. Stat. § 93.90(3)6.* Local governments have by and large ignored this provision and pathway opting instead to attempt to “zone out” or adopt moratoria solely in response to a specific CAFO project or application.

This power of “compliance monitoring” will only creep. This will add many additional hurdles to expanding and will make it much more difficult for farmers. The proposed draft also allows neighbors the ability to file a formal odor complaint against the operation. Yet that right already exists and the DNR is the responding agency. *See, NR 429, Wis. Admn. Code.* Agency comity should prevail and not allow DATCP to direct this jurisdiction elsewhere. No additional oversight should be given to Local Government Units. The whole reason Siting was initiated and passed into law was because the local units of government were on a pathway to halt the expansion of Wisconsin’s critical dairy industry by simply adopting a “Not In My Backyard” approach to land use controls or otherwise “social engineering” the size of an individual’s business. The result was a Hodge podge of local regulations where a farmer’s right to expand was determined not by the efficacy of her business plan and technology but rather where her farm happened to sit locally. Towns and Counties do not have the technical expertise and should not be allowed any additional powers. Let’s avoid this step backward.

Set Backs for Manure Storage Structures:

DATCP staff have unilaterally decided to scrap the current approach to odor management in the siting rule and replace it with wholly unreasonable property line setbacks. Yet the track record of cases reviewed by the Livestock Siting Review Board does not support an assertion that the current approach to odor in the existing rule is not working. This is a classic bureaucratic “solution in search of a problem.” Worse still, the setbacks make no distinction between whether there are any receptors (a home, a school, a park) at the neighboring property. To DATCP, the same setback is required from a home as a corn field, which of course makes no sense. Shockingly, DATCP has wholly failed to “ground test” the impact of the new colossal proposed setback requirements for manure structures from property lines to truly judge the “on the ground” impact of this proposal across the state.



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These overburdensome setbacks are not practical and lack common sense. The rule's overly conservative approach has no rational basis when one considers that the adjoining land use is not considered. Setbacks must be determined from a receptor (neighbor home), not property lines. Some livestock operations will never be allowed to grow and expand based just on this flawed requirement.

Minimum Property Line Setbacks for New and Expanded Manure Storage Structures (+20%)
(*some road right of ways are considered property lines*)

Less than 1,000 AU's (700 cows) = 600' Property Line Setback

1,000 AU's (700 cows) to 2,500 AU's (1,800 cows) = 1,000' Property Line Setback

2,500 AUs (1,800 cows) to 4,000 AU's (2,900 cows) = 1,400' Property Line Setback

4,000 AUs (2,900 cows) = 1,700' + 200' for every 1,000 AU over 4,000 AU's; but no more than 2,500' from Property Line Setback

These outrageous setbacks are a not too subtle mechanism to simply shut down the growth of Wisconsin's dairy industry disguised as a "siting standard."

Odor Reduction BMP's to Reduce Setback's from Manure Storage Structures:

The proposed rule allows a CAFO to reduce its setbacks by use of Odor Mitigation Control Practices. The extreme setbacks can be mitigated by "earning back" setback through implementing odor control practices. We have no idea of the scientific basis for these practices, their scoring or the appropriateness of setback earned back. Many of the practices are cost-prohibitive to employ meaning it is a false promise to farmers to think they can "earn back" setback at all. The setbacks therefore become prohibitions. At a time when livestock operations are being courted by other states, this rule would constitute yet another hurdle for the industry in Wisconsin.

Control Practices allowed and are considered "High Effectiveness" in reducing setback distances include:

- Wastewater Treatment
- Impermeable cover
- Compost

Control Practices allowed and are considered "Medium Effectiveness" in reducing setback distances include:

- Natural crust
- Bio cover
- Geotextile cover
- Anaerobic digestion
- Manure Solids Separation and Reduction (Higher efficiency)



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You are allowed to combine (1) highly effective odor reduction practice with (1) medium odor reduction practice to reduce your setback requirement.

A Dairy is also allowed to propose an odor reduction practice not stated in the rule “if, in the department’s opinion, there is adequate scientific evidence to show that under relevant conditions the practice will result in odor reduction commensurate with the approved credit.” A reduction that will be essentially based on an opinion.

Regardless, even if you choose to use odor mitigation control practices to reduce your setback distance, your setback can never be reduced below:

350’ for facilities under 1,000 AU’s (700 cows)

500’ for facilities 1,000 AU’s (700 cows) to 2,500 AU’s (1,800 cows)

750’ for facilities over 2,500 AU’s (1,800 cows)

A 2,500-foot setback from a manure storage structure to a property line is close to a ½ mile setback. Under this approach, a dairy farmer would need an 80-acre setback from a property line to locate and utilize a manure structure.

Feed Storage Run-Off Waste:

WDA’s members employ the latest technology and engineering designs in managing feed storage run-off waste in Wisconsin.

If this is passed, compliance costs for medium sized farms would be astronomical by regulating most farms to collect all the rainwater that runs off their feed storage area. Many farms would need to add and or construct a new storage facility for the added volume and also have additional costs to upgrade their existing feed pads. This doesn’t include the additional annual costs of hauling and land applying this additional volume of rainwater. The inclusion of this overburdensome requirement alone has the potential to put livestock operations out of business or force them to increase the size of their herds just to offset costs of compliance. The WI-NRCS standard on VTAs must be removed from this proposed rule.

Increased Setbacks for Livestock Housing

Existing livestock structures are allowed a 200’ setback from a property line and 150’ setback from a public road right-of-way. The proposed draft increases this setback for certain livestock facilities. The setback should be the same for all size operations and should remain as written in the existing rule.

Livestock Siting Must be Consistent with Other Areas of Regulation

CAFO’s are already accountable to DNR standard NR243 and the federal Clean Water Act. These rules already address groundwater and surface water protections. There is no need for the proposed ATCP 51 rule to add more regulations since CAFO’s are already mandated and are being enforced against if they don’t comply. Another set of regulations is cost-prohibitive.



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Economic Impact of Proposed Rule

The economic impact of this rule as proposed without being reworked could be disastrous for the livestock industry. The setbacks are far expanded and extreme and would limit a farmer's ability to site or expand rather than assist it. Depending on the size of the facility and local land base, areas of the state will simply be off limits from any further livestock growth. This rule hasn't been "ground checked" yet to gauge its impacts on farmers. The economic impact of the rule revisions will not be truly understood until the indirect cost of its expansion "chilling effect" is accounted for. How many operations will be unable to expand or choose to move out of the state because of these overly restrictive setbacks and other problems identified with the rule revisions? That impact needs to be analyzed and added to the cost impact of the rule for it to have efficacy.



ROBIN J. VOS

SPEAKER OF THE WISCONSIN STATE ASSEMBLY

July 3, 2019

Secretary Brad Pfaff
Department of Ag, Trade & Consumer Protection
2811 Ag Drive
Madison, WI 53708

Dear Secretary Pfaff,

We are writing to encourage that you return the draft ATCP 51 revisions back to staff for further work and consultation with affected stakeholders prior to advancing the rule to the full DATCP Board for its consideration. As we understand matters, the revisions DATCP staff are recommending could add significant new costs to existing and expanding CAFO operations and have a chilling impact on any future potential growth in the dairy industry. This added uncertainty compounds an already problematic farm economy, which is struggling with low commodity prices and trade issues.

According to Ch. 93.90(2)(b), Wis. Stats. DATCP is required to promulgate rules "specifying standards for siting and expanding livestock facilities." Those rules must be, *inter alia* (i) "practicable and workable"; (ii) "cost effective"; and, (iii) "designed to promote the growth and viability of agriculture in this state." Unfortunately, the revisions under consideration by DATCP fail to meet these legislative charges and should not advance to the DATCP Board until it is reworked with stakeholder input.

Every four years, DATCP must review the siting rule, ATCP 51. However, DATCP does not have to revise the rule it adopted in 2006, which we understand has been working as it is written without any revisions in the previous four-year reviews.

The 2003 ACT 235, which created the Livestock Siting law, was a bipartisan compromise between legislative Republicans and Democrat Governor Jim Doyle. The final product included negotiated agreements between the Ag community, Wisconsin Towns' and Counties Associations. The Livestock Siting law struck a fair balance between Wisconsin's desire to maintain its' position as the dairy state while providing local governments the tools they needed to ensure CAFOs were operating in an environmentally safe manner to protect the health and safety of residents.

If local governments or neighbors were unhappy about some aspect of a CAFO operation, they could take their complaint to the Livestock Siting Review Board. The amount of traffic before the Livestock Siting Review Board is an indicator of whether the siting law is working as intended.

In recent years, the Review Board was largely inactive. These years coincided with significant expansion of the livestock industry in Wisconsin and yet the controversy was minimal as evidenced by the paucity of cases before the Review Board. That is a good thing. The cases that have appeared of late have not centered on the adequacy of setbacks or odor complaints; rather, these cases have largely focused on local units of government attempting to condition local approvals with "operational" restrictions, nothing whatsoever to do with the adequacy of ATCP 51.

The Livestock Siting law was intended to apply to the siting and expansion of livestock facilities and related structures, not to mandate a host of operational conditions that are already covered under other laws (i.e., NR 151, NR 243, ATCP 50, etc.). These revisions expand ATCP 51 to include "operational provisions" and would grant local officials' powers over operations that they do not currently have under state law. That was never the intent of 2003 ACT 235.

The rule proposes hugely expanded setbacks that would limit a farmer's ability to site or expand, rather than assist them. These extreme setbacks are not "designed to promote the growth and viability of animal agriculture in this state." Depending on the size of the facility and local land base, areas of the state will simply be off limits from any further livestock growth. This rule has not been adequately examined to gauge its impacts on farmers.

Setbacks in the revised rule are from property lines, not neighbors, or receptors. A livestock operation that abuts a third-party owned 100-acre cornfield with no residence, should not have to be set back nearly ¼ of a mile, as if it were located next to an elementary school.

It appears your staff is creating a solution in search of a problem. The ATCP 51 revisions are not ready for a public hearing, the next stage of the process, and should be sent back to staff for further work with the affected stakeholders. We have asked Ag Committee Chairman Howard Marklein and Gary Tauchen to monitor this process and, if necessary, reject the current revisions and send them back to DATCP.

Thank you for your attention to this important matter.

Sincerely,



Scott Fitzgerald
Senate Majority Leader



Robin J. Vos
Assembly Speaker

Cc: Senator Howard Marklein
Representative Gary Tauchen