



Memo: Proposed revisions to ATCP 51, Livestock Siting Standards

From: Kara O'Connor, Wisconsin Farmers Union

Date: August 6, 2019 (revised from August 2, 2019)

Background

ATCP 51 is the rule promulgated by the Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) to implement the Livestock Siting Law (Wisconsin Statutes section 93.90). The law requires that DATCP review ATCP 51 every 4 years. Despite DATCP convening two panels of technical experts in 2010 and 2014 to review the technical standards and make significant recommendations, DATCP has never revised the standards since ATCP 51 came into effect over a decade ago in 2006. Large livestock operations have grown significantly in number, size, and complexity since these rules first came into effect.

In 2018, DATCP convened a third Technical Review Committee to recommend changes to ATCP 51. On July 10, 2019, the DATCP Board did vote to send a new draft of ATCP 51 out for public comment. This is the opportunity of a decade for concerned stakeholders to weigh in on the proposed changes to the state rules that regulate large livestock facilities.

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

- replacing the flawed odor score calculation with greater setbacks.
- setbacks are calculated from neighbors' property lines, not neighbors' residences or buildings. It is critical that this element of the draft rules be maintained. Neighbors must be able to protect their current and future property rights on the entirety of their property, not just their use of existing buildings.
- 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.

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.

(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 a manure storage pit overtops or 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.

- 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 20% 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:

- 20% is a significant increase in the number of animal units. If a modification procedure is instituted, a 10% expansion would be a more appropriate cutoff.

- Even then, 10% of 3,000 is a lot more than 10% of 500. If a modification procedure is instituted, its use should be limited to expansions of *either 10%, or 200 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. Input from political subdivisions should be solicited to determine whether 45 is generally sufficient. In addition, 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.

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 simply require greater setbacks for new permits, and dispense with credits for odor practices.**

- **In addition, 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.

These setbacks are inadequate to protect public health and safety, and neighbors' peaceful enjoyment of their own private property. In 2017 the Department of Revenue reduced residents' property taxes in two counties – Green and Kewaunee – in response to CAFOs built on adjacent properties. This case is part of a growing national trend of property taxes being reassessed downward due to nearby CAFOs. Counties cannot afford a significant redistribution of their property tax burden due to the impact of 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.**

- the proposed revisions would allow an existing operation to expand an existing structure in a manner that violates the setbacks, provided that such an expansion increases the area of the structure or manure storage by no more than 20%. This should not be allowed. It is appropriate to “grandfather in” existing livestock housing and manure storage. However, **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.

- The proposed rule provides for **more lenient setbacks for operations that “cluster” animals in multiple housing structures with multiple manure storages**, rather than putting the same number of animals in a single barn and/or using a single manure storage facility. These “clustering” provisions in the draft rule are indefensible and should be removed. Having multiple barns and manure storage facilities spread out along a property line could actually create *more* odor problems for neighbors, rather than fewer, and yet farms using this “clustering” strategy would enjoy more lenient setbacks under the draft rule.

- 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. 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, employees of nearby businesses, 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.

- **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.

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.

- In addition, if the operator is relying on rented acres, he or she should be required to **provide copies of written and signed 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