

Statement of Position

I. Introduction

The following Statement of Position is submitted on behalf of twenty-eight aggrieved persons by their attorneys, Midwest Environmental Advocates, Inc. These aggrieved persons request review of a decision by Crawford County to approve an application submitted by Roth Feeder Pig, Inc. ("Roth") for the expansion of a livestock facility in Wauzeka, Wisconsin. The approval was granted by letter dated January 23, 2008.

We respectfully request that the Livestock Facility Siting Review Board (hereinafter, the "Board") reverse the decision of Crawford County. As explained in detail below, the application submitted by Roth fails to demonstrate that the applicable standards contained in Wis. Admin. Code ATCP § 51.16 pertaining to nutrient management have been or will be met. Furthermore, clear and convincing evidence in the record indicates that the nutrient management plan submitted by Roth fails to meet requisite state standards, and is likely to result in hazardous runoff of manure and an over-application of nutrients to the fields identified by Roth in its application.

II. Factual Background

In early fall of 2007, Roth applied for a license from Crawford County for the expansion of a livestock facility, as required by county ordinance. Crawford County Code of Ordinances § 12.07. This application was ruled complete by the Crawford County Land Conservation Committee ("LCC") on October 3, 2007.¹ In the application, Roth requested approval for a maximum livestock facility size of 1703 Animal Units. On November 26, 2007, the LCC held a public meeting to discuss the potential impacts of the Roth CAFO and to allow the public an opportunity to speak. At this meeting, citizens of the community – organized by the citizens' group known as the Crawford Stewardship Project ("CSP") – presented several volumes of data describing the environmental, public health, and economic impacts of CAFOs generally, and of this particular CAFO.

Among the data presented by members of CSP were reports by leading soils and groundwater scientists analyzing the Nutrient Management Plan ("NMP") and other technical materials submitted by Roth as part of his license application. Many members of the community also spoke at the public hearing urging the LCC to deny the application.

In early December, seeking to address the Roth application's discrepancies presented by members of CSP and the experts retained by them, the LCC hired an independent nutrient management consultant to review the Roth NMP for compliance with state livestock

¹ The county's Land Conservation Committee is the designated body for the administration of the licensing provisions in the county ordinance. Crawford County Code of Ordinances § 12.07(5).

siting standards. This consultant issued a written report on December 28, 2007 in which he identified numerous deficiencies with the NMP.

On January 3, 2008, the LCC held a meeting at which the nutrient management consultant presented to the committee the results of his analysis. At that meeting, the LCC voted to grant Roth a county license for expansion of his CAFO.

The LCC's formal written approval, including written findings of fact and various conclusions drawn by the Committee, were issued to Roth by letter dated January 23, 2008.

III. Legal Background

A. Crawford County's Livestock Facility Licensing Ordinance

Crawford County issued county ordinance 12.07 in 2006, incorporating by reference into the ordinance the state standards for livestock facility siting found in Wis. Admin. Code ATCP § 51 ("ATCP 51"). Crawford County Code of Ordinances § 12.07(6)(a). The county ordinance includes criteria for issuance of a license that closely follow ATCP 51. Specifically, the ordinance states that

A license shall be denied if any of the following apply: (a) The application, on its face, fails to meet the standard for approval . . . [or] (b) The County finds, based on other clear and convincing information in the record, that the proposed livestock facility does not comply with applicable standards in this section [including the state standards of ATCP 51].

Crawford County Code of Ordinances § 12.07(10). In most other respects, Crawford County's ordinance tracks the language of ATCP 51, and does not appear to be "more stringent than the state standards" contained in ATCP 51. Wis. Stat. § 93.90(3)(a)(6).

B. Relevant State Standards under ATCP 51.16

ATCP 51 contains state standards for a variety of impacts to public health and the environment likely to accompany the siting or expansion of a livestock facility. Relevant to this challenge, ATCP 51.16(a) contains state standards pertaining to nutrient management, and requires in pertinent part as follows:

- (1) Land applications of waste from a livestock facility approved under this chapter shall comply with NRCS nutrient management technical standard 590 (September, 2005) [with some exceptions not relevant to this dispute].
- (2) A nutrient management checklist . . . shall accompany an application for local approval. A qualified nutrient management planner, other than the livestock operator, shall answer each checklist question. The planner shall have

reasonable documentation to substantiate each answer but neither the planner nor the operator is required to submit that documentation with the checklist.

Wis. Admin. Code ATCP § 51.16(1)(a).² Furthermore, ATCP 51.16 provides that the political subdivision “may ask a nutrient management planner to submit the documentation that the planner relied upon to substantiate the planner’s answer to one or more questions on the nutrient management checklist The political subdivision may deny local approval if the planner’s documentation does not reasonably substantiate the answer.” Wis. Admin. Code ATCP § 51.16(1)(b).

There also exists a regulatory “presumption” that an operator’s application for local approval meets the requisite standards if the application itself is completed and filed properly. Wis. Admin. Code ATCP § 51.16(2).

C. Standard of Review under Wis. Stat. § 93.90

The Livestock Siting Law authorizes aggrieved persons to “challenge the decision of a political subdivision on an application for approval on the grounds that the political subdivision incorrectly applied the state standards” found in ATCP 51. Wis. Stat. § 93.90(5)(b). Exhaustion of the political subdivisions’ administrative remedies is not required. *Id.*

Upon receiving a request for review, the Board must determine, based on a certified copy of the record submitted by the political subdivision, if the challenge is valid. *Id.* at § 93.90(5)(c). The Board makes this determination without deference to the decision of the political subdivision. *Id.* If the Board finds that the challenge is valid, it must reverse the decision of the political subdivision, an outcome that is binding upon the political subdivision. *Id.* at § 93.90(5)(d). Nothing in the law prevents the operator from re-applying for a local license.

IV. **Argument**

The Crawford County Land Conservation Committee incorrectly applied the state standards in ATCP 51, specifically ATCP 51.16 pertaining to nutrient management, because the information contained in the record and in Roth’s application clearly shows that NRCS technical standard 590 will not be met by Roth Feeder Pig, Inc. Every single expert who reviewed the Roth application, including the independent nutrient management expert hired by Crawford County, identified numerous deficiencies in Roth’s application and attendant Nutrient Management Plan (“NMP”). The essential purpose of the minimum state standards contained in ATCP 51.16 – prevention of

² While the note to this provision states that the applicant “is not required to submit a complete nutrient management plan with an application for local approval[,] in this case Roth did prepare and submit to the LCC a nutrient management plan. The plan was prepared by Mr. Ed Ruff, and should be in the record as submitted by Crawford County.

excessive, potentially hazardous nutrient runoff from livestock facilities and the land where animal manure is spread – will not be achieved if the application is approved as submitted.

NRCS technical standard 590 forms the backbone of most NMPs in Wisconsin and elsewhere, and generally dictates the appropriate application rates, nutrient concentrations, and spreading location for the land-spreading of manure. This minimum standard is crucial for ensuring that Wisconsin's waters are protected from harmful nutrient pollution. As DATCP has explained,

Preserving and enhancing the quality of Wisconsin's water resources is a high priority of the citizens of Wisconsin and the Department of Agriculture, Trade and Consumer Protection. [The] NRCS 590 Nutrient Management standard . . . contains significant requirements for the protection of surface and groundwater. Survey work conducted in Wisconsin presents convincing evidence that "nutrient management plans can influence N and P application rates and reduce the threat of non-point sources of pollution" (Shepard, 2005). A Wisconsin study on silt loam soils showed that applying N only to the crop's need, as required by the 590 standard, resulted in N concentrations that complied with the health standard (Norman, 2003). Increasing the cropland acreage following a NM plan is, therefore, expected to significantly reduce negative impacts to the state's valuable water resources.

Wisconsin Department of Agriculture, Trade, and Consumer Protection, *Water Quality Protection: Features of the "590" Nutrient Management Standard* (January 2008) (attached).

While applicants are not required to submit an NMP as part of the livestock siting license application process, *see* ATCP § 51.16(1)(a)(2) and Note, Roth submitted its NMP to the Crawford County Land Conservation Committee as part of the application process. Citizen members of the Crawford Stewardship Project hired several experts in groundwater hydrogeology, soil science, and nutrient management planning to review the NMP submitted by Roth, and each expert revealed numerous deficiencies in the NMP, explaining how the NMP does not meet NRCS Standard 590.

A. Expert Review by Kathy J. Martin, P.E., November 23, 2007

In the official record is a Technical Review by Kathy J. Martin, P.E., dated November 23, 2007. Ms. Martin is an engineer with over 30 years experience in civil engineering, specializing in industrial permitting for air and water quality. She performs engineering review and critique of permit applications submitted by swine facilities to regulatory agencies with respect to compliance with environmental regulations. She has provided sworn expert testimony at CAFO hearings in seven states, and technical and regulatory reviews of hundreds of CAFO permit applications nationwide.

This review was submitted to the LCC at the public hearing on November 26. The detailed report prepared by Ms. Martin demonstrates that essential components of the 590 standard will not be met if the application is granted as submitted. In her conclusion, Ms. Martin states:

In my review of the Roth Feeder Pigs, Inc. Permit Application materials and engineering drawings, I easily detected numerous deficiencies and inaccuracies in (1) the type and number of swine, (2) method used to calculate volume of waste, (3) crop yield by soil type, (4) the methods used to calculate the minimum number of acres for land application, (5) aspects of the concrete design and performance specifications, (6) the perimeter tile design and location of shallow groundwater and seasonal high water table, and (7) the veracity of the Abandonment Plan.

Further review is recommended with respect to Abandonment Plan to insure that the extent of groundwater contamination is fully defined for the areas around the barns and breezeways, the trenching system used to transport manure from the barns to the lagoons, and the lagoons.

Further review is recommended with respect to the Odor Worksheet, Carcass Management Plan, onsite recordkeeping for current operation, adherence to NRCS Standard 590, and soil conservation practices at each land application area proposed for disposal of swine manure and wastewater.

This permit application is incomplete with respect to the accuracy of its contents and as such cannot be considered to be a complete application at this time. Any agency decision to grant a permit under those conditions would be ill-conceived and indicative of a lack of understanding of the issues at hand or a complete disregard for the protection of human health and the environment.

Kathy J. Martin, *Deficiencies of Permit Application - Expansion of Roth Feeder Pig, Inc.* at 11 (November 23, 2007) (attached herein). Ms. Martin's most important conclusion relating to the 590 standard is that the available acreage for land spreading and anticipated crop production provided by Roth in the NMP is approximately one-half of what is required for acceptable uptake of nitrogen, and approximately one-fifth of what is required for acceptable uptake of phosphorous. As she explains in her report:

The acres required to land apply according to nitrogen uptake ranges from 307 to 431 acres. The acres required to land apply according to phosphorus uptake ranges from 532 to 1,123 acres. The applicant provided information for 182 acres.

Id. at 4. The available acreage is therefore substantially below what is required by the 590 standard.

B. Preliminary Environmental Review by Dr. Byron Shaw, October 31, 2007

In the official record is a Preliminary Environmental Review prepared by Dr. Byron Shaw, one of Wisconsin's most noted experts on nutrient management and groundwater hydrogeology. Dr. Shaw is an Emeritus professor of Water Resources, retired after 32 years at UW Stevens Point and UW Extension. He is currently a Wisconsin Licensed Professional Soil Scientist and Professional Hydrologist. He has authored numerous publications on soil and water quality issues in Wisconsin.

Dr. Shaw performed a review of the NMP submitted by Roth and also found numerous deficiencies. Most importantly, relating to the 590 standard, Dr. Shaw found that the NMP follows a nitrogen-based fertility management system which will allow drastic increases of phosphorous application, threatening water quality. While the 590 standard recommends no additional applications of phosphorus to fields that have existing phosphorous concentrations of 100ppm, many of the corn fields included in the Roth NMP have current phosphorous concentrations of 200ppm or greater. Dr. Byron Shaw, *Roth Nutrient Management Plan – Preliminary Environmental Review* (October 31, 2007) (attached herein).

In addition, Dr. Shaw found that the nutrient concentrations in existing manure included in the NMP are unusually low compared to standard values, and that the data is based on an unacceptably small number of samples. Replacing the depressed reported values with standard values will increase the amount of phosphorous contained in the manure by a factor of ten or more, thus demonstrating the need for at least ten times the amount of available acreage for land spreading. *Id.*

C. 590 Review of Roth Feeder Pigs, Inc. by Randy Busch, CCA/TSP, December 28, 2007

In the record is a Standard 590 Review performed by Mr. Randy Busch, a Nutrient Management Specialist with Rock River Laboratory, Inc. of Watertown, Wisconsin. In late December 2007, the LCC, already made aware of the various deficiencies in the Roth NMP, hired Mr. Busch as an independent nutrient management specialist to review the NMP and provide an objective assessment of it. Mr. Busch is a USDA Certified Crop Advisor and a NRCS certified Technical Services Provider, and has a Bachelor's Degree in Soil Science from the University of Wisconsin – Stevens Point.

Mr. Busch's report indicates similar deficiencies in the NMP, and the consultant advised the County that the NMP as submitted falls short of the 590 standard in the many crucial respects, including the following:

- The manure application maps do not show relevant restrictions on manure spreading (such as distances to private wells, property lines, surface waters, winter application restrictions, etc.), even though some restrictions are present (p. 1)

- Several of the fields listed in the NMP had missing soil tests (p. 2)
- The manure analysis used contains nutrient concentrations substantially lower than book values from Wisconsin Extension Publication A2809 (Nutrient Application Guidelines for Field, Vegetable, and Fruit Crops in Wisconsin) (p. 2)
- Replacing the nitrogen value given in the NMP with the accepted book value leads to an over-application of nitrogen (p. 3)

Randy Busch, *590 Review of Roth Feeder Pigs, Inc.* (December 28, 2007).

Mr. Busch concluded the 590 Review by stating:

“I believe that all fields *would comply* with the 590 nutrient management standard *if*: (a) Restricted areas are identified on map as defined from NMP Checklist – including well locations, surface water, concentrated flow channels, slopes, SWQMA’s, etc.; (b) Confirm with Conservation Plan or other how concentrated flow channels are to be protected with vegetative cover; (c) Include all soil tests results as analyzed in Snap-Plus; (d) Confirm proposed animal numbers; (e) Confirm nutrient content from all sources of manure and apply to nutrient management plan. Confirmation of proposed animal numbers along with confirmation of nutrient content should likely confirm if available acreage is sufficient.

Id. at 3 (emphasis added). Thus, the LCC’s own independently-hired nutrient management consultant clearly expressed his misgivings about the Roth NMP, noting that compliance with the 590 standard had not yet been achieved.³

- D. The presumption of compliance in ATCP 51.16(2) has been rebutted by the extensive written evidence in the record that the 590 standard has not been met.

The LCC claims that its decision to approve the application is “based in part on the presumptions created by ATCP 51.” Letter from Russell Hagen, Crawford County Land Conservationist, to Roth Feeder Pig, Inc., January 23, 2008, at 2. However, this presumption may be rebutted by other evidence contained in the record. Wis. Admin. Code ATCP § 51.16(2) Note. In this instance, the evidence in the record (namely, written testimony from several noted nutrient management experts) clearly demonstrates that not only has the presumption been rebutted, but that the 590 standard will not and cannot be met according to Roth’s NMP and application materials.

³ As part of his review, Mr. Busch also examined the Roth NMP for compliance with the standards for nutrient management found in NR 243, and found a host of inadequacies. Randy Busch, *590 Review of Roth Feeder Pigs, Inc.* at 4-5. The standards contained in NR 243, however, do not apply to the Livestock Siting Law.

Even if Roth's application complied with the requirements of ATCP 51.30, which we do not concede, a presumption of compliance with ATCP 51.16 merely requires that the evidence contained in the record demonstrates "that the nonexistence of the presumed fact [i.e., that the 590 standard has been met] is more probable than its existence." Wis. Stat. § 903.01. The contents of the record of the decision, including the statements by Ms. Martin, Dr. Shaw, and Mr. Busch, makes it more than probable that the 590 standard – and therefore the standards of ATCP 51.16 – have not been met.

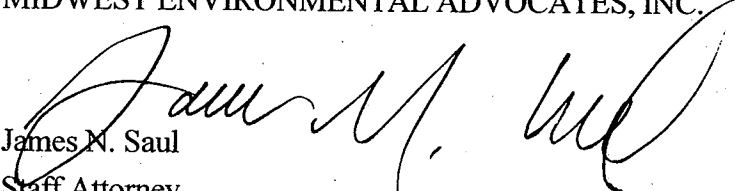
Indeed, to the best of our knowledge the only document in the record that will suggest that the 590 standard has been met is the application completed by Roth, and the NMP prepared by his own paid consultant.

V. Conclusion

For the foregoing reasons, we ask the Board to find that the Crawford County Land Conservation Committee "incorrectly applied the state standards" of ATCP 51, specifically the nutrient management requirements of ATCP 51.16, and reverse the decision of the County to issue Roth Feeder Pigs, Inc. a license for a livestock facility expansion.

Respectfully Submitted,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.


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