

COMMUNITY IMPACTS OF CAFOs: KNOW YOUR LEGAL RIGHTS

Presentation by:
Kim Ferraro, Attorney & Executive Director,
Legal Environmental Aid Foundation of Indiana, Inc. (LEAF)

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I. REQUIREMENTS & REMEDIES UNDER ZONING & LAND USE LAW

Zoning law is the process of regulating land use within a town, city or county. Indiana's zoning law follows traditional Euclidean zoning wherein land is divided into use districts that restrict where industrial, commercial, agricultural, residential and other defined land uses will be allowed. This style of zoning was upheld as constitutional in 1926 in the United State Supreme Court case of *Village of Euclid v. Ambler Realty Company*¹ under the states' police power for protection of the public health, safety, welfare and morals.

In Indiana, zoning and land use law is codified in Title 36 (Local Government), Article 7(Planning & Development), Chapter 4 (Local Planning & Zoning) of the Indiana Code. Broad discretion is afforded to local governments to regulate land use within their jurisdictions ("Home Rule") but all local land use and zoning decisions must be made in accordance with the statutory requirements set forth in I.C. 36-7-4.

a. Benton County Commissioners and Advisory Plan Commission

In Indiana there are four different organizational structures under which local governments may direct the planning and zoning of land in their jurisdictions. They include Area, Advisory, Metropolitan and Joint planning with the majority of local governments falling within the "Area" and "Advisory" planning structures. "Metropolitan" planning applies to only Marion, Delaware and Vanderburgh counties while Bartholomew county is under a Joint planning system. Benton County follows the "Advisory" planning law with the Benton County Commissioners and the Advisory Plan Commission having jurisdiction over unincorporated areas of the county and the towns of Boswell, Ambia, Otterbein and Oxford.

Under the statute, the purpose of a plan commission including that of Benton County's is "[t]o improve the health, safety, convenience, and welfare of citizens and to plan for the future development of communities to the end:

- (1) that highway systems be carefully planned;
- (2) that new communities grow only with adequate public way, utility, health, educational, and recreational facilities;
- (3) that the needs of agriculture, forestry, industry, and business be recognized in future growth;
- (4) that residential areas provide healthful surroundings for family life; and
- (5) that the growth of the community is commensurate with and promotive of the efficient and economical use of public funds."²

In Benton County, the Advisory Plan Commission makes recommendations to the County Commissioners (the legislative body of the county) on proposals to adopt and/or amend zoning ordinances, zoning map changes and environmental protection all within the stated policy goals and objectives of a comprehensive plan.

1 272 US 365 (1926).

2 IC § 36-7-4-601

1. Comprehensive Plan

Before the Plan Commission or County Commissioners can exercise zoning authority, a comprehensive plan or master plan must be prepared.³ The plan at a minimum must provide: 1) a statement of objectives for the future development of the jurisdiction; 2) a statement of policy for the land use development of the jurisdiction; and 3) a statement of policy for the development of public ways, public places, public lands, public structures, and public utilities.⁴ In addition to these elements, the Plan may also include "information, locations, extent, and character" of "[a]reas needing redevelopment and conservation; [a]ir, land, and water pollution; [l]and utilization, including agriculture, forests, and other uses; and [c]onservation of energy, water, soil, and agricultural and mineral resources" among other concerns.⁵

Keep in mind that a comprehensive or master plan is not a zoning ordinance or a zoning map, but is the guiding policy for future development and land use within the county. The adopted zoning ordinance and all decisions made thereunder must be consistent with the stated policy goals and objectives of the comprehensive plan.

A draft of Benton County's Comprehensive Land Use Plan dated December, 2006 is available for download at:

<http://ldm.agriculture.purdue.edu/Pages/Resources/Plans/BentonCounty/BentonPlan.pdf>.

When approved plan commission must certify the plan to each legislative body and a copy must be made available for public inspection at the county recorder's office.⁶

2. Benton County Zoning Ordinance

Any zoning ordinance adopted by the legislative body and Plan Commission must serve the purposes of: "securing adequate light, air, convenience of access, and safety from fire, flood, and other danger; lessening or avoiding congestion in public ways; promoting the public health, safety, comfort, morals, convenience, and general welfare; and otherwise accomplishing the purposes of [IC § 36-7-4]."⁷ The ordinance may also regulate how real property is developed, maintained, and used including: *requirements for site conditions; restrictions on development in areas prone to flooding; restrictions on the kind and intensity of uses; and performance standards for the emission of noises, gases, or particulate matter into the air or ground or across lot lines.*⁸

When a zoning ordinance is initially adopted, zone maps must also be prepared to indicate the districts into which the incorporated areas and unincorporated areas, if any, are divided and must follow the procedures for adoption set forth in IC. § 36-7-4-606.

3 IC § 36-7-4-501

4 IC § 36-7-4-502

5 IC § 36-7-4-503

6 IC § 36-7-4-509

7 IC § 36-7-4-601

8 *Id.*

The Benton County Zoning Ordinance adopted on March 20, 2007 is available for download at: <http://www.towncow.com/wind.pdf>. Relevant sections discussed in this guide are attached.

3. Zoning Ordinance Amendments

IC. § 36-7-4-607 governs the process for amending or partially repealing the text (not zone maps) of the initial zoning ordinance as follows:

If the proposal to amend the zoning ordinance is initiated by a participating legislative body (i.e. County Commissioners or a participating town council) instead of the advisory plan commission, the proposal must first be referred to the commission for consideration and recommendation before any final action is taken by the legislative body.

On receiving or initiating the proposal, the plan commission shall, within sixty (60) days, hold a **public hearing** in accordance with IC. § 36-7-4-604. Within ten (10) business days after the plan commission determines its recommendation (if any), it must certify the proposal in accordance with IC. § 36-7-4-605. The legislative body shall then vote on the proposal within ninety (90) days after the plan commission certifies the proposal.

If the proposal receives a favorable recommendation from the plan commission, the legislative body may adopt, reject, or amend the proposal after giving **public notice** under IC 5-14-1.5-5 of its intent to consider the proposal at a public meeting. If the legislative body adopts (as certified) the proposal, it takes effect as other ordinances. If the legislative body fails to act on the proposal within ninety (90) days after certification by the Plan Commission, the proposal takes effect as if it had been adopted (as certified) ninety (90) days after certification.

If the legislative body rejects or amends the proposal, it shall be returned to the plan commission for its consideration, with a written statement of the reasons for the rejection or amendment. The plan commission has forty-five (45) days in which to consider the rejection or amendment and report to the legislative body in accordance with IC. § 36-7-4-607.

If the proposal receives either an unfavorable recommendation or no recommendation from the plan commission, the legislative body may adopt, reject, or amend the proposal. The legislative body **shall give notice** under IC 5-14-1.5-5 of its intention to consider the proposal at that meeting. If the legislative body adopts (as certified) the proposal, it takes effect as other ordinances of the legislative body. If the legislative body rejects the proposal or fails to act on it within ninety (90) days after certification, it is defeated.

4. County Commissioner/Plan Commission Member Conflict of Interest

I.C. § 36-7-4-223 **prohibits** "[a] member of a plan commission or a legislative body from:

Participating as a member of the plan commission or legislative body in a hearing or decision of that commission or body concerning a zoning matter in which the member has a direct or indirect financial interest; (The commission or body shall enter in its records the fact that its member has such a disqualification.)

Directly or personally representing another person in a hearing before that commission or body concerning a zoning matter; or

Receiving any mileage or compensation under section 222.5 of this chapter for attendance at a meeting if the member is disqualified under subsection (b) during any part of the meeting.

A "**zoning matter**" as referred to in I.C. § 36-7-4-223 does not include the preparation or adoption of a comprehensive plan.⁹ Of significance, proposals to amend the zoning ordinance and applications for DPUD's and zoning map changes are considered zoning matters for purposes of the conflict of interest prohibition.

In determining whether to disqualify a member of a plan commission or legislative body for having a conflict of interest, Indiana courts are not limited to ascertaining whether the member actually exercised improper influence over other members or whether the prohibited interest actually affected the member's vote.¹⁰ Rather, courts may find a conflict of interest upon consideration of "whether the situation is one reasonably calculated to weaken public confidence and undermine the public's sense of security for protection of individual rights in exercise of zoning authority."¹¹ When a biased plan commission member participates in a zoning decision, the decision may be vacated by the reviewing trial court.¹²

b. Benton County Board of Zoning Appeals

Benton County Ordinance Section 8-19 establishes a five member Board of Zoning Appeals ("BZA") in accordance with I.C. § 36-7-4-901. Pursuant to IC § 36-7-4-918.2 and consistent with Zoning Ordinance Section 8-21 and 8-22, the BZA "shall approve or deny all: (1) **special exceptions**; (2) special uses; (3) contingent uses; and (4) **conditional uses**; from the terms of the zoning ordinance, **but only** in the classes of cases or in the particular situations specified in the zoning ordinance. The board may impose reasonable conditions as a part of its approval."

1. Conditional Uses/Special Exceptions & CFO's

Under **Section 8-10(b) of the Benton County Zoning Ordinance**, any "confined feeding operation" ("CFO") as defined by 327 IAC 16-2-5 and referred to in the Ordinance as a "Restricted

⁹ IC 36-7-4-223(a).

¹⁰ *Fail v. LaPorte County Bd. of Zoning Appeals*, 355 N.E.2d 455, 458 (Ind.App. 1976).

¹¹ *Id.*

¹² *See Couch v. Hamilton County Bd. of Zoning Appeals*, 609 N.E.2d 39, 42 (Ind.App. 1993).

Commercial Farm Enterprise¹³ must obtain a "**conditional use**"¹⁴ before the CFO can be built within an A-1 ("Agriculture") or I-1("Enclosed Industrial") use district.

Based on these statutory and ordinance provisions, if a developer wants to build a CFO in Benton County, the developer may build in an agricultural use district or an enclosed industrial use district but only after the developer applies for and obtains a conditional use/special exception from the Benton County Board of Zoning Appeals ("BZA").

The **procedure for obtaining a conditional use** is governed by several provisions set forth in I.C. § 36-7-4 and the Benton County Zoning Ordinance. Specifically, **Ordinance Section 8-10(c)** states:

Upon receipt of an application for an *Improvement Location Permit* for a *Conditional Use* by the *Building Commissioner*, it shall be referred to the *Board* accompanied by an application for a *Conditional Use*. A copy of each application shall be referred concurrently to the *Board* and *Commission* for examination and investigation as to the manner in which the proposed location and character of the *Conditional Use* will affect the *Comprehensive Plan*. **The *Commission* shall not be required to hold public hearings of any kind during their investigation, but may do so if in the judgment of the *Commission* it is deemed advisable.** The *Commission* shall report the results of its study to the *Board* within forty-five (45) days following their receipt of the application, provided that if no such report has been filed with the *Board* within this time, the *Board* may proceed to process the application. The *Board* shall then proceed with a hearing, provided that **notice** is given to parties in interest in accordance with the provisions of this Chapter and the rules of procedure of the *Board*.

(emphasis added).

As will be discussed fully below, the foregoing provision giving the plan commission discretion not to hold a public hearing "during their investigation" **may run afoul of Indiana's Open Door Law** that requires all meetings of governing bodies to be open to the public where a majority of the governing body meets for the purpose of taking official action upon public business.¹⁵

13 See Section 8-2 defining "**RESTRICTED COMMERCIAL ENTERPRISE**" as: "An operation or *use* which is inherent to or closely associated with a *farm* or *agriculture*, but not including industrial grain elevators, industrial mills, abattoirs, the manufacture of commercial fertilizer and similar operations which are of an industrial nature. Also, a *restricted commercial enterprise* is any similar operation which may: 1. Cause stream pollution by the disposal of wastes discharged into streams thus endangering water supply and health, or 2. Release odors to the atmosphere beyond the boundary of the property which may be strong and beyond the normal expectancy of a *farm* operation, or 3. Create any unusual or loud noises audible beyond the boundaries of the property, or 4. Emit poisonous and injurious fumes and gases beyond the boundaries of the property, or 5. Cause the emission of *smoke, particulate matter* or cause any undue *vibration* or excessive glare or heat beyond the boundaries of the property, or 6. Because of the location of its facilities influence adversely the *uses* of adjacent properties either existing or proposed."

14 *Id.* defining "**CONDITIONAL USES**" as "*Uses* publicly operated, traditionally affected with a public interest, or entirely private in character but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property and public facilities. Same as 'Special Exception.' "

15 IC § 5-14-1.5, *et. seq.*

A **public hearing before the BZA on a conditional use application** must be done in accordance with IC § 36-7-4-920 which requires the BZA to: fix a "reasonable time" for the hearing on the application for a conditional use; provide **public notice** and notice to all interested parties **at least ten (10) days prior to the hearing date**; and allow plan commission staff and other persons to appear at the hearing and present evidence in support of or in opposition to the granting of a conditional use.

Communications with any member of the BZA before the hearing "with intent to influence the member's action on the matter on the the application for a conditional use is **prohibited** except that "[n]ot less than five (5) days before the hearing, plan commission staff may file "a written statement setting forth any facts or opinions relating to the matter" and the BZA may require any adverse party "to enter a written appearance specifying the party's name and address." If the written appearance is entered more than four (4) days before the hearing, the board may also require the petitioner to furnish each adverse party with a copy of the petition and a plot plan of the property involved.¹⁶

Before approving a conditional use, **Ordinance Section 8-10(d) requires the BZA to find that six (6) basic conditions have been met.** The BZA may impose additional conditions set forth in Section 8-10(e), and for CFO's, **Section 8-10(m)(35) requires the BZA to impose five (5) additional conditions.**¹⁷

Under Indiana law, "**the burden of demonstrating satisfaction of the relevant . . . criteria rests with the applicant for a special exception.**"¹⁸ Those opposed to a conditional use application ("remonstrators"), are not required to negate or come forward with evidence to contradict evidence submitted by an applicant.¹⁹ Rather, a BZA may deny an application for a conditional use on the grounds that the applicant failed to carry its burden of proving with "substantial evidence" that the proposed use complies with the relevant criteria.²⁰ Evidence will be considered substantial if it is more than a scintilla and less than a preponderance.²¹ In other words, "**substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.**"²²

Finally, the BZA must keep minutes of its proceedings and record the vote on all actions taken; file all minutes and records in the BZA office as public records; and in all cases heard, make **written findings of fact.**²³ The BZA must also **file a copy of its decision** on the conditional use application with the BZA office within **five (5) days** after making its decision.²⁴

2. BZA Member - Conflict of Interest

As with a Plan Commission member, a BZA member "may not participate in a hearing or decision of [the BZA] concerning a zoning matter in which he [or she] has a **direct or indirect**

16 IC § 36-7-4-920

17 Relevant Sections 8-10(d), (e) and (m)(35) are attached hereto.

18 *Midwest Minerals Inc. v. Board of Zoning Appeals of Area Plan Dept./Com'n of Vigo County*, 880 N.E.2d 1264, 1269 (Ind.App.2008).

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 IC § 36-7-4-915

24 IC § 36-7-4-919

financial interest.²⁵ If a BZA member has such a conflict, the BZA "shall enter in its records: (1) the fact that a regular member has such a disqualification; and (2) the name of the alternate member, if any, who participates in the hearing or decision in place of the regular member."²⁶

A reviewing trial court is not limited to ascertaining whether the member actually exercised improper influence over other members or whether the prohibited interest actually affected the member's vote.²⁷ Rather, the trial court may find a conflict of interest upon consideration of "whether the situation is one reasonably calculated to weaken public confidence and undermine the public's sense of security for protection of individual rights in exercise of zoning authority."²⁸ If a conflicted BZA member participates in a hearing and decision on a conditional use, the decision may be vacated by the reviewing trial court.²⁹

c. Judicial Remedies for Improper Zoning Decisions

The following judicial remedies are available to Indiana citizens who are "aggrieved or adversely affected" by zoning decisions that do not comport with the foregoing legal requirements.

1. Writ of Certiorari (judicial review)

I.C. § 36-7-4-1003 provides in relevant part as follows:

Each decision of the . . . board of zoning appeals is subject to review by certiorari. Each **person aggrieved** by a decision of the board of zoning appeals or the legislative body may file with the **circuit or superior court of the county** in which the premises affected are located, a **verified petition** setting forth that the decision is illegal in whole or in part and specifying the grounds of the illegality. No change of venue from the county in which the premises affected are located may be had in any cause arising under this section.

The person shall file the petition with the court **within thirty (30) days** after the date of that decision of the board of zoning appeals.

IC § 36-7-4-1005 imposes stringent Notice requirements on Petitioners upon filing the writ petition that, if not strictly followed, will result in dismissal of the Petition. Those requirements in relevant part are as follows:

If the petitioner is not the applicant for the use, special exception, or variance and is a person **aggrieved** by the decision of a board of zoning appeals as set forth in section 1003 of this chapter, the petitioner shall have a **notice served by the sheriff** of the county on:

²⁵ IC § 36-7-4-909 (emphasis added).

²⁶ *Id.*

²⁷ *Fail v. LaPorte County Bd. of Zoning Appeals*, 355 N.E.2d 455, 458 (Ind.App. 1976).

²⁸ *Id.*

²⁹ *See Couch v. Hamilton County Bd. of Zoning Appeals*, 609 N.E.2d 39, 42 (Ind.App. 1993).

each applicant or petitioner for the use, special exception, or variance; and

each owner of the property that is the subject of the application or petition for the use, special exception, or variance.

The service of the **notice by the sheriff on the chairman or secretary of the board of zoning appeals** constitutes notice of the filing of the petition to the board of zoning appeals, to the municipality or county, and to any municipal or county official or board charged with the enforcement of the zoning ordinance. No other summons or notice is necessary when filing a petition.

Notice given must state: that a petition for a writ of certiorari, asking for a review of the decision of the board of zoning appeals, has been filed in the court; the premises affected; and the date of the decision.

As noted in the statutory provisions above, **person must be "aggrieved"** by a BZA decision in order to have standing to seek judicial review of that decision.³⁰ To be aggrieved, Remonstrators must experience **"a substantial grievance, a denial of some personal or property right, or the imposition of a burden or obligation."**³¹ Generally, "the BZA's decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal and the petitioner's resulting injury must be pecuniary in nature."³² Moreover, remonstrators must show some special injury other than that sustained by the community as a whole.³³

As recently noted by the Indiana Appellate Court in *Benton County Remonstrators v. Board of Zoning Appeals of Benton County*,³⁴ **adjacent landowners** can validly claim to be aggrieved parties. However, in the case of a proposed CAFO, **neighboring property owners** who can demonstrate that the **value of their property will decrease** if the CAFO is constructed, regardless of whether their property is adjacent to the proposed CAFO, can claim to be aggrieved parties.³⁵

Finally, it is important to note that when a trial court is asked to review a BZA decision, the court may only examine the board's decision to determine if it was incorrect as a matter of law.³⁶ The trial court's review is **not a trial de novo** and it may not substitute its decision for that of the board absent such a showing of illegality.³⁷ Consequently, if there is sufficient evidence to support the board's decision which is otherwise legal, it must be upheld.

2. Declaratory Judgment

A declaratory judgment is an appropriate remedy to determine a constitutional question or to test a constitutional right. Under the Uniform Declaratory Judgments Act, **any person whose rights,**

³⁰ *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind.2000).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 905 N.E.2d 1090, 1097-1098 (Ind.App.,2009).

³⁵ *Sexton v. Jackson County Bd. of Zoning Appeals*, 884 N.E.2d 889 (Ind.App.2008).

³⁶ *Metropolitan Bd. of Zoning Appeals, Div. II, Marion County v. Gunn*, 477 N.E.2d 289, 294 (Ind.App. 1985).

³⁷ *Id.*

status, or other legal relations are affected by a statute or ordinance may have determined any question or construction or validity arising under the statute or ordinance, and obtain a declaration of rights, status, or other legal relations thereunder.³⁸ In Indiana, **a person is so "affected"** by the challenged ordinance or statute only if the person has a "substantial present interest in the relief sought, such as there must exist not merely a theoretical question or controversy but a real or actual controversy, or at least the ripening seeds of such a controversy, and that a question has arisen affecting such right which ought to be decided in order to safeguard such right."³⁹

As a general rule, a declaratory judgment suit to challenge an ordinance may be allowed where it is clearly or patently illegal, where a waste of public funds is present or imminent, where the action is taken without jurisdiction over the subject matter, or where there is an unmistakable abuse of discretion.⁴⁰ Upon filing such an action, "all persons" who have or claim any interest that would be affected by the declaration must be made parties to the action.⁴¹ In addition, if the validity of an ordinance is at issue, the local government body must be made a party. Finally, if the statute or ordinance is alleged to be unconstitutional, the Attorney General of Indiana must be served and be entitled to be heard.⁴²

3. Action for Mandate

Many of the foregoing statutory and ordinance provisions impose non-discretionary duties on the state or local government body. Use of the words "shall" and "must" when describing the required actions or duties of a government body in a statute, regulation or zoning ordinance indicate that such activities or duties are likely mandatory or non-discretionary in nature and, therefore, must be performed by the government body.

When a government body does not perform a non-discretionary duty, an action for mandate may be filed with the trial court to force the government body to perform the required action. Specifically, IC § 34-27-3-1 allows an action for mandate to be prosecuted "against any inferior tribunal, corporation, public or corporate officer, or person to compel the performance of any: (1) **act that the law specifically requires**; or (2) duty resulting from any office, trust, or station."

An action for mandate is "an extraordinary remedy of an equitable nature and is generally viewed with disfavor" by Indiana courts. Accordingly, mandamus will be granted only where the petitioner establishes a **clear and unquestioned right to relief** and that the government body has **failed to perform a clear, absolute, and imperative duty imposed by law**. Mandamus should not be used to establish a right or to define and impose a duty.⁴³

When bringing such an action, the complaint and summons should be filed in the circuit or superior court, in the manner that other civil actions are filed. The complaint should identify the action as an "Action for Mandate" and all standing requirements apply.

38 IC § 34-14-1, *et. seq.*

39 *Stokes v. City of Mishawaka*, 441 N.E.2d 24, 27 (Ind.App.1982).

40 *Montagano v. City of Elkhart*, 271 N.E.2d 475 (Ind.App. 1971).

41 IC § 34-14-1-11

42 *Id.*

43 *Perry v. Ballew*, 873 N.E.2d 1068 (Ind. App. 2007).

II. REQUIREMENTS & REMEDIES UNDER THE CLEAN WATER ACT

Animal Feeding Operations that meet the definition of CAFO under federal regulation, are considered "point sources" and subject to permitting requirements of the Clean Water Act's National Pollution Discharge Elimination System (NPDES). The text of the federal rule, 40 CFR 122.23, is attached to this guide.

a. National Pollution Discharge Elimination System (NPDES) Permits

In Indiana, the Indiana Department of Environmental Management ("IDEM") has authority to implement and enforce the federal NPDES general and individual permitting programs including those requirements applicable to CAFO's. The state program which is set forth in 327 IAC 15, *et. seq.* (general permits) and 327 IAC 16, *et. seq.* (individual permits) must be at least as stringent as the federal requirements. Therefore, the federal regulations which govern public involvement and enforcement of the NPDES program are discussed in this guide.

1. Opportunities for Public Involvement

40 CFR 124.10 establishes public notice requirements for NPDES permits including those issued to CAFOs. Under this regulation, the public may submit comments on draft individual and general permits and may request a public hearing on such a permit. Various sections of 40 CFR part 122 and 40 CFR § 124.52 allow IDEM to determine on a case-by-case basis that certain operations may be required to obtain an individual permit rather than coverage under a general permit. 40 CFR § 124.52 specifically lists CAFOs as an example point source where such a decision may be made. Furthermore, 40 CFR § 122.28(b)(3) authorizes any interested person to petition IDEM to require an entity authorized by a general permit to apply for and obtain an individual permit.

40 CFR § 122.28(b)(3) also provides example cases where an individual permit may be required, including where the discharge is a significant contributor of pollutants. Finally, 40 CFR § 122.23(f)(3) provides opportunities for public involvement in the process for making a "no potential to discharge" determination.

Under Indiana law, a decision by IDEM to approve, deny, revoke, amend, require an approval, or impose additional requirements on an animal feeding operation is subject to administrative review under the **Administrative Orders and Procedures Act (AOPA)**.⁴⁴ Under I.C. § 13-15-6-1 a "**person aggrieved**" by IDEM's decision has "not later than fifteen (15) days after being served with notice" (of the decision) by IDEM to file an Administrative Review Petition with the Office of Environmental Adjudication.

2. Citizen Enforcement Suits

Section 505(a)(1) of the Clean Water Act ("the Act") authorizes any person or persons having an interest which is or may be **adversely affected** to commence a civil action on his own behalf to enforce the Act or to enforce certain requirements promulgated pursuant to the Act including NPDES permit

44 IC § 4-21.5-3-7

limits and conditions.⁴⁵ Because the NPDES program is part of the CWA, it is subject to this federal citizen suit provision as well as the Indiana citizen suit provision set forth in I.C. § 13-30-1, *et. seq.*

Notwithstanding the foregoing federal and state citizen suit provisions, under Indiana's permit program, if a CFO has a valid permit approval under Indiana regulation, a violation of the operational requirements in 327 IAC 16-9, or land application of manure requirements in 327 IAC 16-10, **may not be subject to an enforcement action** pursuant under IC 13-30-1 (citizen suit) or IC 13-14-2-6 (agency enforcement) if the violation: (1) has not caused a discharge to waters of the state; or a release of manure that has crossed a property boundary; (2) is corrected immediately or within a reasonable time frame as specified in a written notification of the violation by an IDEM representative; (3) is not the same type of violation as a violation that occurred within the previous five (5) years; and (4) is not one of multiple concurrent violations that represent a threat to the environment.⁴⁶

As with most citizen enforcement provisions under major environmental statutes, the CWA has detailed Notice and Service requirements.⁴⁷ Notably, among other requirements, a citizen suit cannot be filed "**prior to sixty days** after the plaintiff has given **notice** of the alleged violation to the EPA Administrator, the EPA Region V Administrator, the Indiana Attorney General, the Commissioner of IDEM and the alleged violator."⁴⁸

Following the sixty day notice period, if EPA or IDEM has commenced and is "diligently prosecuting a civil or criminal action" in federal or state court to require compliance, any citizen may not file a citizen suit but may intervene in the agency's enforcement action "as a matter of right."⁴⁹

III. COMMON LAW REMEDIES

a. Nuisance

Under Indiana law, a nuisance is defined as that which is "injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property."⁵⁰ Indiana law also provides that a lawsuit to abate or enjoin a nuisance may be brought by any person whose property is injuriously affected or personal enjoyment is lessened by the nuisance.⁵¹ A trial court may award injunctive relief to enjoin or abate the nuisance and may award damages proximately caused by the nuisance.⁵²

b. Indiana's Right to Farm Act

Unfortunately, as it applies to agricultural operations including CAFO's, Indiana's nuisance law is tempered by Indiana's Right to Farm Act⁵³ which provides that:

45 33 U.S.C. § 1365; 40 C.F.R. § 135.1

46 327 IAC 16-4-4

47 40 C.F.R. §§ 135.1, 135.2 and 135.3.

48 33 U.S.C. § 1365

49 *Id.*

50 IC § 32-30-6-6

51 IC § 32-30-6-7

52 IC § 32-30-6-8

53 IC § 32-30-6-9

An agricultural or industrial operation or any of its appurtenances **is not and does not become a nuisance**, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if the following conditions exist:

(1) **There is no significant change in the type of operation.** A significant change in the type of agricultural operation does not include: the conversion from one type of agricultural operation to another type of agricultural operation; a change in the ownership or size of the agricultural operation; the enrollment; or reduction or cessation of participation of the agricultural operation in a government program; or the adoption of new technology by the agricultural operation.

(2) **The operation would not have been a nuisance at the time the agricultural operation began on that locality.**

Significantly, the RTFA "**does not apply if a nuisance results from the negligent operation** of an agricultural or industrial operation or its appurtenances."⁵⁴ In a recent case interpreting this provision, the Indiana Appellate Court explained that even a negligently operated CAFO may enjoy the protections of the RTFA if the negligent operation or activity is also the proximate cause of the nuisance.⁵⁵ In other words, it is not enough that the CAFO is operated in a negligent manner, the negligence must also be the cause of the complained of nuisance conditions to avoid application of the RTFA.

c. **Trespass**

Indiana defines trespass as “the doing of an unlawful act or of a lawful act in an unlawful manner to the injury of another's person or property.”⁵⁶ The intent required for the tort of trespass is not intent to commit the tort of trespass, but simply the intent to commit the act that results in the trespass. Liability may be found even where the trespasser was not aware that she committed the tort of trespass.⁵⁷

Plaintiff in an action for trespass to real property must prove that the plaintiff was in possession of the land; and that the defendant had no right to enter the land. Unauthorized entry onto the land of another will constitute trespass. **Where a defendant does not trespass in person but projects something onto the land of another, this will constitute trespass as well.** Plaintiff bears the burden of proof as to the elements of trespass; and every trespass is presumed to result in a legal injury that allows plaintiff to be awarded at least nominal damages. Compensatory damages may be awarded for actual injury.⁵⁸

54 *Id.*

55 *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1260 (Ind.App.,2009).

56 23 INPRAC § 3:29

57 *Id.*

58 *Id.*

IV. Indiana's Open Government Laws

Please refer to the attached Citizen's Guide to Indiana's Open Government Law prepared by the Legal Environmental Aid Foundation of Indiana, Inc.

FEDERAL REGULATION OF CAFO'S

40 C.F.R. § 122.23

a) Scope. Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) Animal feeding operation (“AFO”) means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) Concentrated animal feeding operation (“CAFO”) means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) Large concentrated animal feeding operation (“Large CAFO”). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

- (vi) 500 horses;
- (vii) 10,000 sheep or lambs;
- (viii) 55,000 turkeys;
- (ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- (xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
- (xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
- (xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term manure is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) Medium concentrated animal feeding operation (“Medium CAFO”). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;

(B) 300 to 999 veal calves;

(C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(D) 750 to 2,499 swine each weighing 55 pounds or more;

(E) 3,000 to 9,999 swine each weighing less than 55 pounds;

(F) 150 to 499 horses;

(G) 3,000 to 9,999 sheep or lambs;

(H) 16,500 to 54,999 turkeys;

(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or

(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) Process wastewater means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) Small concentrated animal feeding operation (“Small CAFO”). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) How may an AFO be designated as a CAFO? The appropriate authority (i.e., State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) Who may designate?

(i) Approved States. In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

(ii) States with no approved program. The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) Who must seek coverage under an NPDES permit?

(1) Permit Requirement. The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit

available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

(2) Information to submit with permit application or notice of intent. An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(3) Information to submit with permit application. A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) When must the owner or operator of a CAFO seek coverage under an NPDES permit? Any CAFO that is required to seek permit coverage under paragraph (d)(1) of this section must seek coverage when the CAFO proposes to discharge, unless a later deadline is specified below.

(1) Operations defined as CAFOs prior to April 14, 2003. For operations defined as CAFOs under regulations that were in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (g) of this section.

(2) Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date. For all operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by February 27, 2009.

(3) Operations that become defined as CAFOs after April 14, 2003, but which are not new sources. For a newly constructed CAFO and for an AFO that makes changes to its operations that result in its becoming defined as a CAFO for the first time after April 14, 2003, but is not a new source, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

(i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time CAFO commences operation;

(ii) For other operations (e.g., resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; or

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until February 27, 2009, or 90 days after becoming defined as a CAFO, whichever is later.

(4) New sources. The owner or operator of a new source must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.

(5) Operations that are designated as CAFOs. For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.

(g) Duty to Maintain Permit Coverage. No later than 180 days before the expiration of the permit, or as provided by the Director, any permitted CAFO must submit an application to renew its permit, in accordance with § 122.21(d), unless the CAFO will not discharge or propose to discharge upon expiration of the permit.

(h) Procedures for CAFOs seeking coverage under a general permit.

(1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The

Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) For EPA-issued permits only. The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

(i) No Discharge Certification Option.

(1) The owner or operator of a CAFO that meets the eligibility criteria in paragraph (i)(2) of this section may certify to the Director that the CAFO does not discharge or propose to discharge. A CAFO owner or operator who certifies that the CAFO does not discharge or propose to discharge is not required to seek coverage under an NPDES permit pursuant to paragraph (d)(1) of this section, provided that the CAFO is designed, constructed, operated, and maintained in accordance with the requirements of paragraphs (i)(2) and (3) of this section, and subject to the limitations in paragraph (i)(4) of this section.

(2) Eligibility Criteria. In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge, as follows:

(i) The CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. The CAFO must maintain documentation that demonstrates that:

(A) Any open manure storage structures are designed, constructed, operated, and maintained to achieve no discharge based on a technical evaluation in accordance with the elements of the technical evaluation set forth in 40 CFR 412.46(a)(1)(i) through (viii);

(B) Any part of the CAFO's production area that is not addressed by paragraph (i)(2)(i)(A) of this section is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, or process wastewater; and

(C) The CAFO implements the additional measures set forth in 40 CFR 412.37(a) and (b);

(ii) The CAFO has developed and is implementing an up-to-date nutrient management plan to

ensure no discharge from the CAFO, including from all land application areas under the control of the CAFO, that addresses, at a minimum, the following:

(A) The elements of § 122.42(e)(1)(i) through (ix) and 40 CFR 412.37(c); and

(B) All site-specific operation and maintenance practices necessary to ensure no discharge, including any practices or conditions established by a technical evaluation pursuant to paragraph (i)(2)(i)(A) of this section; and

(iii) The CAFO must maintain documentation required by this paragraph either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(3) Submission to the Director. In order to certify that a CAFO does not discharge or propose to discharge, the CAFO owner or operator must complete and submit to the Director, by certified mail or equivalent method of documentation, a certification that includes, at a minimum, the following information:

(i) The legal name, address and phone number of the CAFO owner or operator (see § 122.21(b));

(ii) The CAFO name and address, the county name and the latitude and longitude where the CAFO is located;

(iii) A statement that describes the basis for the CAFO's certification that it satisfies the eligibility requirements identified in paragraph (i)(2) of this section; and

(iv) The following certification statement: "I certify under penalty of law that I am the owner or operator of a concentrated animal feeding operation (CAFO), identified as [Name of CAFO], and that said CAFO meets the requirements of 40 CFR 122.23(i). I have read and understand the eligibility requirements of 40 CFR 122.23(i)(2) for certifying that a CAFO does not discharge or propose to discharge and further certify that this CAFO satisfies the eligibility requirements. As part of this certification, I am including the information required by 40 CFR 122.23(i)(3). I also understand the conditions set forth in 40 CFR 122.23(i)(4), (5) and (6) regarding loss and withdrawal of certification. I certify under penalty of law that this document and all other documents required for this certification were prepared under my direction or supervision and that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons directly involved in gathering and evaluating the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."; and

(v) The certification must be signed in accordance with the signatory requirements of 40 CFR 122.22.

(4) Term of Certification. A certification that meets the requirements of paragraphs (i)(2) and (i)(3) of this section shall become effective on the date it is submitted, unless the Director establishes an effective date of up to 30 days after the date of submission. Certification will remain in effect for

five years or until the certification is no longer valid or is withdrawn, whichever occurs first. A certification is no longer valid when a discharge has occurred or when the CAFO ceases to meet the eligibility criteria in paragraph (i)(2) of this section.

(5) Withdrawal of Certification.

(i) At any time, a CAFO may withdraw its certification by notifying the Director by certified mail or equivalent method of documentation. A certification is withdrawn on the date the notification is submitted to the Director. The CAFO does not need to specify any reason for the withdrawal in its notification to the Director.

(ii) If a certification becomes invalid in accordance with paragraph (i)(4) of this section, the CAFO must withdraw its certification within three days of the date on which the CAFO becomes aware that the certification is invalid. Once a CAFO's certification is no longer valid, the CAFO is subject to the requirement in paragraph (d)(1) of this section to seek permit coverage if it discharges or proposes to discharge.

(6) Recertification. A previously certified CAFO that does not discharge or propose to discharge may recertify in accordance with paragraph (i) of this section, except that where the CAFO has discharged, the CAFO may only recertify if the following additional conditions are met:

(i) The CAFO had a valid certification at the time of the discharge;

(ii) The owner or operator satisfies the eligibility criteria of paragraph (i)(2) of this section, including any necessary modifications to the CAFO's design, construction, operation, and/or maintenance to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future;

(iii) The CAFO has not previously recertified after a discharge from the same cause;

(iv) The owner or operator submits to the Director for review the following documentation: a description of the discharge, including the date, time, cause, duration, and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address the cause of the discharge in addition to submitting a certification in accordance with paragraph (i) (3) of this section; and

(v) Notwithstanding paragraph (i)(4) of this section, a recertification that meets the requirements of paragraphs (i)(6)(iii) and (i)(6)(iv) of this section shall only become effective 30 days from the date of submission of the recertification documentation.

(j) Effect of certification.

(1) An unpermitted CAFO certified in accordance with paragraph (i) of this section is presumed not to propose to discharge. If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to paragraphs (d)(1) and (f) of this section, with respect to that discharge. In all instances, the discharge of a pollutant without a permit is a violation of the Clean Water Act section 301(a) prohibition against unauthorized discharges

from point sources.

(2) In any enforcement proceeding for failure to seek permit coverage under paragraphs (d)(1) or (f) of this section that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge when the CAFO either did not submit certification documentation as provided in paragraph (i)(3) or (i)(6)(iv) of this section within at least five years prior to the discharge, or withdrew its certification in accordance with paragraph (i)(5) of this section. Design, construction, operation, and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden.

[68 FR 7265, Feb. 12, 2003; 71 FR 6984, Feb. 10, 2006; 72 FR 40250, July 24, 2007; 73 FR 70480, Nov. 20, 2008]

SOURCE: 45 FR 33418, May 19, 1980, as amended at 48 FR 14153, Apr. 1, 1983, unless otherwise noted.

AUTHORITY: AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq.