



July 10, 2019

Chairperson Miranda Leis,
Department of Agriculture, Trade and Consumer Protection Board
2811 Agriculture Drive
PO Box 8911
Madison, WI 53708

Dear Chairperson Leis and Board Members,

Thank you for the opportunity to submit testimony regarding WMC's significant concerns with the hearing draft of proposed rule ATCP 51.

WMC is a business trade organization with nearly 4,000 members statewide of all sizes and throughout all business sectors. Since our founding in 1911, WMC has been dedicated to making Wisconsin the most competitive state in the nation in which to conduct business. Our members include some of the most highly regulated industries in the state. WMC's membership includes livestock organizations, dairy producers, cheesemakers, and other industry that relies heavily on agriculture. These members provide employment, support local businesses, pay taxes, give charitably and represent an integral part of Wisconsin's heritage. They go to great lengths, and at great cost, to be good stewards of the environment. Consistency and predictability from the regulating agency is necessary to facilitate compliance.

You have heard from numerous farmers and their representatives regarding the detrimental impact this rule will have on farming in Wisconsin if enacted. Farmers and Wisconsin cannot afford this rule as drafted. Setting aside the fact that the requirements of this rule are completely unworkable, practically speaking, WMC has serious concern that this rule proposal is not supported by the requisite statutory authority.

Pursuant to Wis. Stat. 227.10(2m), "no agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issues by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter..." Administrative agencies are creatures of statutes and those statutes are strictly construed to inhibit the exercise of power that is not explicitly granted.¹

¹ See *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40 P 14, 270 Wis. 2d 318, 677 N.W.2d 612; *Lake Beulah Management District v. DNR*, 335 Wis. 2d 47 (2011) (No. 2008AP3170).

Wisconsin Statutes Sec. 93.90(2)(b), requires the Department of Agriculture, Trade and Consumer Protection (DATCP) to promulgate rules “specifying standards for siting and expanding livestock facilities.” Those rules must be, (i) “practicable and workable”; (ii) “cost effective”; and, (iii) “designed to promote the growth and viability of agriculture in this state.” Interestingly, the first order of business in this proposed rule is the complete repeal of a legislative intent section and the incorporation of these statutory factors in the introductory note. It seems this deletion serves no purpose other than the set the tone for the rest of the proposal, which abandons these statutory requirements.

Namely, odor management, setback requirements, and additional, inconsistent regulatory burdens anticipated by this proposed rule are antithetical to the legislative intent of the livestock siting law. The extreme setbacks anticipated by the rule would, in fact, run in direct contravention to the statutory requirement that a rule be “practicable and workable.” In the vast majority of cases, existing facilities would be unable to expand without some type of locally granted variance. This would result in a patchwork of regulations on livestock facilities, a complete departure from Wisconsin Stat. 93.90(1) which identifies livestock siting as an issue of statewide concern “for the purpose of providing *uniform* regulation of livestock facilities” (emphasis added).

Because the Wisconsin Legislature has deemed the issue of livestock siting to be a matter of statewide concern, it follows then, that local governments can only regulated where they have been given express authority to do so in the statutory scheme. The rule attempts to grant local governments authority outside of the authority granted to them in Wis. Stat. 93.90(3). For example, the proposed rule grants local governments the authority to adopt more stringent manure spreading standards in certain cases, without making the statutorily required public health and safety findings. Wis. Stat. 93.90 could not be more clear that a local government may only impose more stringent requirements if it does all of the following, (1) adopts the requirement by ordinance before the applicant files their application and (2) *bases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision that clearly show that the requirement is necessary to protect public health or safety.* Wis. Stat. 93.90((3)(ar). A rule cannot delete a statutory requirement. The requirements enacted by the legislature are not just suggestions and cannot be ignored by administrative code.

The proposed rule provides numerous opportunities for local governments to deny an expansion where they otherwise would not be able to do so per the very strict statutory exceptions found in Wis. Stat. 93.90. For example, under the proposed rule a local government is able to deny a project if a nutrient management planner does not, in the local government’s sole discretion, “reasonably substantiate” and answer to a nutrient management plan checklist. This is not an enumerated reason for which a local government may deny a project under Wis. Stat. 93.90(3).

The stated mission of DATCP is to “partner with all of the citizens of Wisconsin to grow the economy by promoting quality food, healthy plants and animals, sound use of land and water resources, and a fair marketplace.” This proposed rule does nothing to further that mission. This rule threatens to do irreparable harm to Wisconsin’s farmers, economy and agricultural heritage. The proposed ATCP 51 makes numerous changes to livestock siting that are unworkable, expensive, and without requisite legal authority. WMC asks that the proposed rule not be heard

until such a time as affected stakeholders have had a meaningful opportunity to participate in the rule drafting and the rule is reviewed and determined to comply with Wis. Stat. Chapter 227 and the underlying statutory grant of authority found in Wis. Stat. 93.90.

WMC appreciates the opportunity to comment on ATCP 51 and we look forward to working with the Department in crafting a workable, legal rule.

Sincerely,

/s/ Lane Ruhland

Lane Ruhland
Director of Environmental and Energy Policy
Wisconsin Manufacturers & Commerce

CC: Governor Tony Evers
Senate Majority Leader Scott Fitzgerald
Assembly Speaker Robin Vos
Senator Howard Marklein
Senator Steve Nass
Representative Joan Ballweg
Representative Gary Tauchen