

# Capitol LINK

CURRENT ISSUES AFFECTING WISCONSIN AGRICULTURE & AGRI-BUSINESS

---

May 6, 2011

## Hearing Held to Consider Suspension of DNR Air Rules for Ag Waste

*By Jordan Lamb -- DeWitt Ross & Stevens*

On April 27, 2011, the Joint Committee for Review of Administrative Rules (JCRAR) held a hearing to consider suspending the portions of Wis. Admin. Code § NR 445, related to regulating air emissions from agricultural waste.

### NR 445 Establishes Air Emissions Limitations

NR 445 establishes ambient air standards for specific contaminants for a variety of stationary sources. For purposes of air emissions from agricultural waste, NR 445 establishes acceptable ambient air concentrations for ammonia and hydrogen sulfide. Under the rule, "agricultural waste" includes livestock manure, animal waste byproducts, litter and bedding. Compliance with the limits in NR 445 is measured at a farm's property line.

### State Law Not Designed for Regulation of Emissions from Farms

When NR 445 was originally promulgated in the 1980's, it was not contemplated by the Legislature that the rule would be applied to sources like a livestock farm. Rather, the rule was designed to regulate air emissions from sources that had smokestacks.

However, in August of 2003, a group of citizens threatened to sue a Wisconsin dairy farm alleging that NR 445 should be used to regulate air emissions on that farm. The citizens group filed a notice of intent sue under the federal Clean Air Act alleging that the Wisconsin dairy farm had failed to apply for and obtain the required air quality permits from the DNR prior to expanding its dairy operation.

In response to the threatened litigation, the Wisconsin DNR opened a rulemaking which proposed changes to NR 445 that would regulate air emissions from farms. However, the Legislature was concerned. In October 2003, Senator Neal Kedzie, Chair of the Senate Environment and Natural Resources Committee, and Representative DuWayne Johnsrud, Chair of the Assembly Natural Resources Committee, sent a joint letter to the DNR stating their belief that NR 445 did not allow for the regulation of emissions from animal waste.

As a way to deal with the litigation and the fact that the DNR was not ready to regulate air emissions from farms under NR 445, on March 23, 2004 the DNR established final rules in Chapter NR 445 requiring livestock farms in Wisconsin to control emissions of ammonia and hydrogen sulfide but it also incorporated a 3-year exemption from the regulation of emissions from agricultural waste while federal and state regulatory approaches were further developed.

## **Federal Law Not Designed for Regulation of Ag Air Emissions**

In 2005, a federal court ruling spurred by a similar *federal* citizens' suit, propelled the U.S. EPA into trying to determine how to apply Clean Air Act requirements to livestock farms. Yet, the EPA was also not ready to establish protocols for air emissions from farms.

As a way to deal with the threatened federal litigation, the EPA announced a voluntary Air Compliance Agreement and corresponding national air study, called the National Air Emissions Monitoring Study (NAEMS). Under NAEMS, twenty-four (24) farms in nine (9) states have been monitored with EPA oversight for two years. EPA has studied emissions of particulate matter, ammonia, hydrogen sulfide and volatile organic compounds from each of these operations. In January 2011, EPA announced that it had gathered all its data from this study but that it had not yet evaluated or published air-emissions estimating methods for use to regulate farms. Those are expected in the next 12-18 months.

## **Agricultural Exemptions from NR 445 Linked to Federal Study**

There have been two exemptions from the application of NR 445 to agricultural waste. The first, in June 2004, exempted agricultural waste from the rule until June 2007 (with 12 additional months to comply). The second, in August 2008, exempted agricultural waste from the rule until July 31, 2011. (Parallel exemptions were provided in the air permitting rules, NR 406 and 407.) Without additional action, NR 445 will go into effect for farms on July 31, 2011.

Both of these exemptions were implemented in Wisconsin to allow the EPA time to complete its federal air monitoring study and to produce some methodologies based on that data upon which Wisconsin could base its regulation, and also to allow Wisconsin to conduct some air monitoring studies. As stated above, EPA has not yet completed its work and no federal recommendations have been proposed.

Despite the continuing lack of federal guidance, in February 2010, the NR Board authorized the DNR to proceed with NR 445 rulemaking for emissions from agricultural waste. The DNR convened a series of meetings of the Agricultural Waste Air Emissions Advisory Group, which developed "beneficial management practices" (BMPs) for the reduction of emissions of ammonia and hydrogen sulfide from various types of livestock farms in Wisconsin. On December 13, 2010, the Advisory Group completed their charge but, for the purposes of this report, the Advisory Group was neither asked to consider rule making nor asked how the BMPs might be implemented.

## **Problem is not "If" but "How" to Apply Emissions Limitations**

There is no question *whether* federal and state air emissions laws will be applied to livestock farms. The critical question that remains for regulatory purposes is *how* these laws will be applied to farms.

Neither the U.S. EPA nor the DNR have established uniform standards or calibrations to determine what size farms, what type of farms, or what manure-handling methods produce air emissions that exceed the legal thresholds of regulated pollutants (ammonia and hydrogen sulfide.) The purpose of the NAEMS study was to find those necessary answers before imposing regulations and that study is incomplete.

## **Ag Groups Request Delay Until Federal Guidance is Available**

At the April public hearing, several agricultural groups, including the Wisconsin Pork Association, the Wisconsin Cattlemen's Association, the Farm Bureau Federation and the Dairy Business Association either testified and/or registered in favor of JCRAR suspending those portions of NR 445, 406 and 407, that relate to the regulation and air permitting of air emissions from agricultural waste until the EPA provides all states with guidance as to how to apply emissions limitations to farms.

## Governor Appoints Three New Natural Resources Board Members

By Jordan Lamb -- DeWitt Ross & Stevens

Governor Scott Walker has announced three new appointees to the Natural Resources Board, the board that sets policy for the Department of Natural Resources. Wisconsin Farm Bureau President William Bruins; Wisconsin Hunters' Rights Coalition co-founder Greg Kazmierski; and Shawano businessman Terry Hilgenberg were appointed to represent the farm, hunting and business communities. Each has been nominated for a six year term on the Board.

William ("Bill") Bruins, Waupun, owns and operates the Homeland Dairy family farm in rural Fond du Lac County. He served as president of the Wisconsin Farm Bureau Federation, the state's largest general farm organization with more than 22,000 members, since 2003. Since 2010 he has also served on the Waupun Area Board of Education. He has been a member of the College of Agricultural and Life Sciences (UW-Madison) Board of Visitors and has been involved in a number of agricultural stewardship committees.

Gregory Kazmierski, Mukwonago, is the owner and operator of Buck Rub Outfitters, Ltd., an archery range and retail store in Pewaukee. He grew up on a Wisconsin dairy farm in Mukwonago and in the 1970s was a licensed well driller. He is a co-founder of the Wisconsin Hunters' Rights Coalition, current president of the Safari Club International Dairyland Committee of the Wisconsin Chapters, and is a former Wisconsin Bowhunters Association board member and chapter president.

Terry Hilgenberg, president of the family-run Hilgenberg Realty with offices in Shawano and Green Bay, has had a 35-year career in real estate marketing, development, and investment. He is the past vice chairman of the Wisconsin state Real Estate Board, past regional vice president of the National Association of Realtors and past president of the Wisconsin Realtors Association. A native of Wisconsin, he has been active in Shawano local service groups including Rotary, Optimist and Chamber of Commerce, and contributed to rewriting the Shawano County Shoreland Zoning and Animal Waste and Disposal ordinances. He has held a sportsman's license for years.

Bruins, Kazmierski, and Hilgenberg replace outgoing Board Chair Jonathan Ela, a conservationist and retired Sierra Club official; former Department of Agriculture, Trade and Consumer Protection Secretary and former Dean of the UW-River Falls College of Agriculture, Gary Rhode; and Eau Claire Attorney, John Welter. Their terms will expire on May 1, 2011.

The new appointees are expected to attend the next Natural Resources Board meeting, which is set for May 24-25 in Madison.

---

---

### Capitol Link Details

The PDPW *Capitol Link* monthly e-newsletter is sponsored by DeWitt Ross & Stevens law firm. DeWitt Ross & Stevens is a Wisconsin law firm whose members are leaders in their areas of practice and in their communities. Founded in 1903, today there are more than 80 attorneys in their Madison and Milwaukee offices. Nominated by peers as top lawyers nationally and locally, DeWitt's attorneys offer numerous services including strategic counseling, advocacy, collaboration, alternative dispute resolution, negotiation, mediation, lobbying, and litigation.

This newsletter is a periodic publication produced by PDPW and DeWitt Ross & Stevens. The information provided in this newsletter is provided for educational and informational purposes only. PDPW does not attempt to influence legislation or administrative rules at any level. The contents of this newsletter are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific situation. You are urged to consult an attorney concerning your own situation and any legal questions you may have.

Jordan Lamb is a partner at DeWitt Ross & Stevens' Capitol Square office in Madison. Jordan's law practice focuses on government relations and administrative law. She concentrates on legislative drafting, legislative research, and facilitating communication between clients and state government including administrative agencies and the State Legislature. Ms. Lamb also offers litigation support for administrative law issues. Jordan can be contacted at 608-252-9358 or at [jkl@dewittross.com](mailto:jkl@dewittross.com). For more information about DeWitt Ross & Stevens, go to [www.dewittross.com](http://www.dewittross.com).

---



Brought to you by:

Professional Dairy Producers of Wisconsin

N5776 County Road D, Suite 1 Fond du Lac, WI 54937

Phone: 800-947-7379

[mail@pdpw.org](mailto:mail@pdpw.org) [www.pdpw.org](http://www.pdpw.org)