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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 2, 2000

Honorable Samuel E. Hayes, Jr., Secretary
Department of Agriculture
211 Agriculture Building
2301 North Cameron Street
Harrisburg, PA 17110

Re: Regulation #2-133 (IRRC #2141)
Department of Agriculture
Preferential Assessment of Farmland and Forest Land Under The Clean and Green Act

Dear Secretary Hayes:

Enclosed are our Comments. They will soon be available on our website at www.irrc.state.pa.us.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director
cae
Enclosure
cc: Honorable Raymond Bunt, Jr., Majority Chairman, House Agriculture & Rural Affairs Committee
Honorable Italo S. Cappabianca, Democratic Chairman, House Agriculture & Rural Affairs Committee
Honorable Noah W. Wenger, Vice Chairman, Senate Agriculture & Rural Affairs Committee
Honorable Patrick J. Stapleton, Minority Chairman, Senate Agriculture & Rural Affairs Committee
Raymond C. Pickering, Director, Bureau of Farmland Preservation, Department of Agriculture
Douglas M. Wolfgang, Project Review Specialist, Department of Agriculture

Comments of the Independent Regulatory Review Commission

on

Department of Agriculture Regulation No. 2-133

Preferential Assessment of Farmland and Forest Land Under The Clean and Green Act

November 2, 2000

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Department of Agriculture (Department) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by October 2, 2002, the regulation will be deemed withdrawn.

1. Comments of Representative Raymond Bunt, Jr., and Senator Noah W. Wenger.

During our review of this regulation, we identified a number of sections that did not meet the criteria of the Regulatory Review Act. These same issues were also raised in the comments submitted by Representative Raymond Bunt, Jr., Chairman of the House Agriculture and Rural Affairs Committee, and Senator Noah W. Wenger, Acting Chairman of the Senate Agriculture and Rural Affairs Committee, in their letters to the Department dated October 23, 2000.

We concur with the objections and recommendations that were raised in the comments of Representative Bunt and Senator Wenger concerning the following sections of the regulation:

Section 137b.1. Purpose. – Consistency with statute; Legislative intent.

For consistency with the Pennsylvania Farmland and Forest Land Assessment Act of 1974, as amended by Act 156 of 1998 (72 P.S. §§ (5490.1 - 5490.11) (Act), the last sentence of Subsection (b) should be deleted.

Section 137b.2. Definitions. – Consistency with statute; Clarity.

The second sentence of the definition of "transfer" should be deleted, as it is inconsistent with Section 6(a.3) of the Act.

Paragraphs (i) and (ii) under the definition of "outdoor recreation" are inconsistent with the Act and should be deleted.

Section 137b.12. Agricultural use. – Clarity

The undefined term "agricultural production" should be replaced with the defined term "agricultural commodity."

Section 137b.13. Agricultural reserve. – Statutory authority; Clarity.

The Department should delete the requirement that at least 60 percent of the land in agricultural reserve must be in land classifications I through IV excluding wetlands and water areas, or explain its statutory basis. Additionally, the phrase "and woodlot" should be added at the end of the sentence, since this section describes agricultural reserve land.

Section 137b.14. Forest reserve. – Statutory authority; Clarity.

Since there is no statutory basis for the requirement of producing annual growth of 25 cubic feet per acre, it should be deleted. Paragraph (ii) from the definition of "forest reserve" should be added to this section.

Section 137b.27. Assessment of ineligible land. – Clarity.

The phrase "and buildings" is unnecessary and should be deleted.

Subsection 137b.52(b) No termination of preferential assessment without change of use. – Legislative intent; Consistency with the statute; Clarity.

The last sentence in the first paragraph of Subsection (b) is inconsistent with the Act and the intent of the General Assembly. This sentence should be deleted. Examples 3 and 4 under Subsection (b) are not applicable without the mechanism to make advance payments toward the roll-back tax. Therefore, they should be deleted.

Subsection 137b.52(d) Payment of roll-back taxes does not affect preferential assessment of remaining land. – Clarity.

The references to Section 2 of the Act in Examples 3 and 4 are incorrect. They should be changed to Section 3 of the Act.

Section 137b.54. Calculating the contributory value of farm buildings. – Clarity.

Paragraph (i) of the proposed definition for "contributory value of farm buildings" should be added to this section.

Section 137b.62. Enrolled "agricultural use" land of less than 10 contiguous acres. – Clarity.

Instead of using terms describing specific agricultural operations, the defined term "agricultural commodity" should be used.

Section 137b.71. Death of an owner of enrolled land. – Clarity.

This section should clearly indicate that the inheritors of the preferentially assessed land must file amended applications as required by Section 5490.4(f)(1) of the Act.

Section 137b.102. Recordkeeping. – Consistency with statute; Clarity.

To be consistent with Section 5(a)(1) of the Act, the term "property record cards" should be added to the first sentence of this section. In addition, the last sentence should be deleted.

Section 137b.131. Civil penalties. – Clarity

We agree with Representative Bunt, Senator Wenger and the Pennsylvania Farm Bureau that the term "violation" should be defined in this section. Additionally, the regulation should state that those who change the use of enrolled land are subject to roll-back taxes, not civil penalties.

2. Section 137b.2 Definitions. – Consistency with statute; Clarity.

General

The definitions of "agricultural commodity, agricultural reserve, agricultural use, capitalization rate, farm building, farmstead land, income approach, land use category, net return to land, and woodlot" are the same as the Act. The regulation should reference the statutory definitions, not repeat them verbatim.

The regulatory definitions of "contributory value of farm building, forest reserve, split off, roll-back taxes, and separation" are similar to the statutory definitions in the Act but include new language. To be consistent with the statute, the regulation should reference the statutory definitions.

Rural enterprise incidental to the operational unit

This phrase is defined as a "commercial enterprise or venture." Section 8(d) of the Act refers to this activity as "direct commercial sales of agriculturally related products and activities or for a rural enterprise incidental to the operational unit." The definition should be amended to incorporate the language of the Act.

3. Section 137b.4. Contacting the Department. - Clarity.

This section gives the street address of the Department along with a telephone and fax number that the regulated community can use. Can the regulated community contact the Department through electronic mail? If so, an e-mail address should also be included.

4. Section 137b.22. Landowner may include or exclude from the application tracts described in separate deeds. – Consistency with statute; Clarity.

This section states that if contiguous tracts are described in separate deeds, a landowner may include or exclude any of the tracts from the application for preferential assessment. Subsections 3(a.1)(1) and (2) of the Act (72 P.S. §§ 5490.3(a.1)(1) and (2)) state that contiguous tracts may be enrolled if the total area meets the minimum requirements for eligibility. Additionally, if a tract itself does not meet the minimum requirements, it may be enrolled if it is contiguous to a tract previously enrolled for preferential assessment.

This section in the regulation does not include these conditions. The regulation should be revised to reflect these statutory provisions governing the enrollment of contiguous tracts with separate deeds.

5. Section 137b.24. Ineligible land may appear on an application, although it cannot receive preferential assessment. – Statutory authority; Clarity.

This section includes the following sentence: "The ultimate determination of whether land is eligible or ineligible shall be made by the county assessor." Rather than using the word "ultimate," the regulation should state that eligibility determinations by the county assessor shall be based upon the requirements and standards set forth in the Act.

6. **Section 137b.26. Land located in more than one tax district. – Consistency with other regulations; Clarity.**

Example 2 under this section contains statements that conflict with Section 137b.43. Example 2 provides that when a tract of land is located in two counties, the landowner must file applications for preferential assessment in each county. Section 137b.43 states that when a tract is located in more than one county, the landowner must file the application with the county assessor in the county to which the landowner pays property taxes. Example 2 should be consistent with Section 137b.43.

7. **Section 137b.41. Application forms and procedures. – Legislative intent; Consistency with statute; Implementation procedure; Reasonableness; Clarity.**

Subsection (a) Standardized application form required.
Subsection (b) Application form and worksheets.

Subsection 4(c) of the Act (72 P.S. § 5490.4(c)) sets forth three conditions for "application forms for preferential assessment in all counties":

- Application forms shall be "uniform."
- "Application forms shall be developed by the department."
- Forms will include "the information the department shall deem appropriate."

Subsections 137b.41(a) and (b) refer to a "'Clean and Green Valuation Application' form" and "'Clean and Green Valuation Worksheet' form." However, nothing in this section or elsewhere in the regulation identifies the contents of these forms or the types of information needed to complete the forms.

To insure uniformity, the regulation should be amended to include the content and informational requirements of the application and worksheet forms.

Subsection (e) Additional information.

This subsection allows a county assessor to require an applicant to provide additional information or documentation. A county assessor must make the request in writing. This written request must clearly state the reasons why the application is insufficient and identify the necessary information required by the assessor. There are two concerns.

First, for consistency with Subsection 3(e) of the Act (72 P.S. § 5490.3(e)), Subsection 137b.41(e) should provide examples of the types of documentation or information that a county assessor may request.

Second, this section should direct counties to perform a completeness review. The completeness review should be finished within a certain time period, such as within 30 days of receipt. The county should then notify the applicant as to whether the application is complete or what additional information is required.

8. Section 137b.46. Fees of the county board for assessment appeals. – Consistency with statute; Clarity.

This section could be interpreted to allow counties to charge fees in addition to those authorized by Subsections 4(d), (e) and (f) of the Act. For clarity, the regulation should reference Subsections 4(d), (e) and (f) of the Act which specify both the application fee and the circumstances when a county may impose recording fees.

9. Section 137b.51. Assessment procedures. – Reasonableness; Clarity

Subsection (d) Determining preferential assessment.

This section contains a standard formula for determining preferential assessment of land. The formula includes the number of acres of land in each subcategory and the use value for the particular land use subcategory. However, each county uses its own "established predetermined ratio" in assessing land values. The term "established predetermined ratio" is defined in Section 102 of the General County Assessment Law (72 P.S. § 5020-102). In order to accurately determine the assessments of these lands, the regulation should incorporate a county's established predetermined ratio into the formula.

10. Section 137b.52. Duration of preferential assessment. – Legislative intent; Consistency with the statute; Clarity.

Subsection (g) Transfer does not trigger roll-back taxes.

This subsection states that there will be no roll-back taxes when enrolled land is transferred without a change to an ineligible use. There are two concerns.

First, the second sentence limits the protection from roll-back taxes to contiguous acreage when the enrolled land consists of several noncontiguous tracts in one application. However, the Act does not make a distinction between contiguous and noncontiguous tracts in the same application. The Department needs to explain its authority for the second sentence or delete it from the regulation.

Second, this subsection does not indicate who is responsible for roll-back taxes if there is a change in the use of the land. Subsection 6(a.3) of the Act provides: "The landowner changing the use of the land to one inconsistent with the provisions of Section 3 shall be liable for payment of roll-back taxes." This subsection of the regulation should include a reference to this provision of the Act.

11. Section 137b.53. Calculation and recalculation of preferential assessment. – Statutory authority; Reasonableness; Clarity.

Subsection (b) Option of county assessor in calculation of preferential assessment.

Subsection (b) gives county assessors the option of either calculating the preferential assessment annually, or establishing a "base year" for preferential assessment. However, the process for

calculating a "base year" value is not discussed. The regulation should include the acceptable process for calculating a "base year."

Subsection (g) Land enrolled prior to June 2, 1998.

Subsection (g) provides county assessors the option of not recalculating the preferential assessment of land covered in applications for preferential assessment filed on or before June 1, 1998. We have three questions regarding this subsection.

First, what is the Department's statutory authority for including this "grandfather clause"?

Second, why is this subsection optional?

Finally, how was the date of "June 1, 1998" determined?

12. Section 137b.61. Liability for roll-back taxes. – Clarity.

Subsection (a) provides that, if an owner of enrolled land changes the use of the land "...so that it otherwise fails to meet the requirements of section 3 of the Act (72 P.S. § 5490.3)...." the landowner is responsible for the payment of roll-back taxes. The regulation should include a phrase that states that, if the above condition is met, the land shall be removed from the preferential assessment program.

13. Section 137b.64. Agricultural reserve land to be open to the public. – Statutory authority.

Subsection (c) Reasonable restrictions on use allowed.

This section allows a landowner to place "...reasonable restriction to public access on enrolled land that is enrolled as agricultural reserve land." Subsection (c) also includes examples of restrictions, including "limiting access to the land to pedestrians only," and "prohibiting hunting or the carrying or discharge of firearms on the land."

Section 5490.2 of the Act (72 P.S. § 5490.2) defines "agricultural reserve" as "Noncommercial open space lands used for outdoor recreation ...and open to the public...on a nondiscriminatory basis." This definition does not contain the restrictions listed in Subsection (c). What is the statutory authority for including these restrictions?

14. Section 137b.75. Transfer of enrolled land for use as a cemetery.
Section 137b.76. Transfer of enrolled land or transfer of an easement or right-of-way across enrolled land for use as a trail. – Clarity.

Sections 137b.75 and 137b.76 allow an owner of enrolled land to sell, donate or otherwise *transfer any portion* of the enrolled land to a nonprofit corporation for use as a cemetery, or easement or right of way, without violating the land's preferential assessment.

The term "transfer" is not applicable in this instance. As defined in Section 137b.2, "transfer" includes "[a] conveyance of **all** the contiguous enrolled land described in a single application for

preferential assessment under the act" [emphasis added]. The scenarios included in Sections 137b.75 and 137b.76 only apply to **portions** of land being "transferred," not the entire parcel. The word "transfer" should be replaced in these two sections with the word "convey."

15. Section 137b.131. – Civil penalties. – Consistency with statute; Clarity

Subsection (c) Appeal hearing.

Subsection (c) provides that a hearing for contesting a civil penalty will be allowed upon "timely notification." The phrase "timely notification" is unclear. This subsection should be clarified by replacing "timely" with a reference to Section 137b.131(b)(2) in the final-form regulation.

Subsection (d) Final civil penalty.

This subsection, as well as Subsection (b)(2), includes the phrase "within 10 days" for the period to file an appeal. Section 5490.5b(b) of the act (72 P.S. § 5490.5b(b)) states, "If within ten **calendar** days...the person does not notify the county board for assessment appeals ...the civil penalty shall become final" [emphasis added]. Section 137b.131(b)(2) also uses the term "calendar days." For consistency with the statute, the phrase "within 10 calendar days" should be used in Subsections (d) and (b)(2).

16. Impact of proposed regulation on counties, municipalities and school boards. - Fiscal impact; Implementation procedures; Clarity.

The Preamble indicates that the regulation and the Act will impose costs on counties including revenue shortfalls. Neither the Preamble nor the Regulatory Analysis Form (RAF) provides any estimates concerning the fiscal impact of this regulation on local governments. What will be the economic impact of this regulation on municipalities and school districts?