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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 20, 2002

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

Re: Regulation #2-116 (IRRC #2267)
Department of Agriculture
Application of Soil and Groundwater Contaminated
with Agricultural Chemicals to Agricultural Lands

Dear Secretary Hayes:

Enclosed are the Commission's Comments which list objections and suggestions for consideration when you prepare the final version of this regulation. These Comments are not a formal approval or disapproval; however, they specify the regulatory criteria which have not been met.

The Comments will soon be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce". The signature is written in a cursive style.

Robert E. Nyce
Executive Director
evp
Enclosure

cc: Honorable Raymond Bunt, Jr., Majority Chairman, House Agriculture and Rural Affairs Committee
Honorable Peter J. Daley, II, Democratic Chairman, House Agriculture and Rural Affairs Committee
Honorable Mike Waugh, Chairman, Senate Agriculture and Rural Affairs Committee
Honorable Michael A. O'Pake, Minority Chairman, Senate Agriculture and Rural Affairs Committee

Comments of the Independent Regulatory Review Commission

on

Department of Agriculture Regulation No. 2-116

Application of Soil and Groundwater Contaminated with Agricultural Chemicals to Agricultural Lands

June 20, 2002

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regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

1. Legislative Comment. – Legislative Intent; Reasonableness.

Representatives Raymond Bunt and Peter Daley, Majority and Democratic Chairmen of the House Agriculture and Rural Affairs Committee respectively, wrote to express concern with this regulation. Representative Bunt states that the regulation, as written, “unduly complicates...a very straightforward and scientifically defensible solution to a potential environmental problem.” He goes on to state that this complication was not envisioned when the legislation prompting this regulation was passed. Representative Daley asserts, “...this regulation is far in excess of what the legislature intended in drafting the bill.” He encourages the Department to change the regulation by simplifying the process.

We agree that this regulation, as drafted, establishes an overly complex manner of disposing of soil or groundwater contaminated with agricultural chemicals from the remediation of an agricultural chemical facility. Because of the additional burden this regulation imposes, we believe that this option will not be utilized, thus the beneficial use of the contaminated material will not be achieved. As written, the regulation would not accomplish the previously stated intent of the Legislature. The Department should address these concerns by creating a process that is less burdensome to those who may want to utilize the benefits of the regulation, but would not, due to its complexity.

2. General. – Reasonableness; Clarity.

As currently drafted, we believe that the Department could improve the reasonableness and clarity of this regulation by adding some clarifying language and changing the way it is organized. We offer the following suggestions:

- Commentators have noted that it is unclear which state agency has jurisdiction over decisions relating to the application of soil or groundwater contaminated with agricultural chemicals that are applied to agricultural lands. The final-form regulation should provide

the applicant with a clear understanding of how this regulation will interact with the requirements of the regulations of the Department of Environmental Protection.

- The content of the regulation should be arranged in a streamlined, sequential manner that would mirror the requirements and duties of both the applicant and the Department. For example, a subchapter should be developed that consolidates the entire application process and outlines exactly what an applicant must do to meet all application requirements. We suggest organizing the regulation in the following manner:
 - Subchapter A. General provisions.
 - Subchapter B. Application requirements for permission to apply soil and groundwater contaminated with agricultural chemicals to agricultural land.
 - Subchapter C. Application review procedures.
 - Subchapter D. General operating requirements for land application of soil and groundwater contaminated with agricultural chemicals to agricultural land.
 - Subchapter E. General requirements and exceptions for use and application of groundwater contaminated with agricultural chemicals as tank mix.
 - Subchapter F. Closure.

Advanced Notice of Final Rulemaking

Commentators and our Comments suggest major language and organization changes. In order to allow full consideration of amendments to this regulation, the Department should issue an advanced notice of final rulemaking. This would allow interested parties and the Department the opportunity to resolve as many concerns as possible prior to the submittal of the final-form regulation.

3. Forms prepared by the Department. – Clarity.

Four sections use a phrase similar to “on forms prepared by the Department.” The four sections are: §130d.12(b); §130d.21(a); §130d.23(c); and 130d.51(a). However, the Department has not developed these forms. It is our understanding that these forms will dictate how this regulation is implemented. Before the final-form regulation is returned, those forms should be developed and the form names or numbers should be included in the regulation.

4. Labs approved by the Department. – Need; Clarity.

Under Sections 130d.13(d) and 130d.15(4), an applicant is required to use a lab approved by the Department and provide a record of the laboratory quality control procedures. We have three concerns.

First, how would an applicant know if a lab has been approved by the Department?

Second, since applicants must use laboratories approved by the Department, the requirement of submitting quality control procedures is not needed and should be deleted.

Third, Act 25 of 2002, the Environmental Laboratory Accreditation Act, was recently enacted. This law requires the Department of Environmental Protection (DEP) to accredit all labs that

wish to provide testing services to DEP or those that are regulated by DEP. Has the Department considered allowing testing to be performed by labs that are accredited by DEP?

5. Other approvals by the Department. – Clarity.

Sections 130d.16(c), 130d.62(7), 130d.63(a)(4), 130d.63(c), 130d.65(d) and 130d.68(8) refer to approvals of the Department and Section 130d.66(a) refers to an authorization by the Department. The procedure for obtaining the approval or authorization of the Department is never specified. Are the approvals or authorizations part of the application process? If they are not, the final-form regulation should specify how an applicant would obtain the necessary approval or authorization and the criteria the Department will use to evaluate whether an approval or authorization is warranted.

Subchapter A. GENERAL PROVISIONS

6. Section 130d.1. Definitions. – Clarity.

Agricultural chemical

This definition cites 3 Pa.C.S. Chapter 67. However, Chapter 67 was repealed. It appears that the appropriate citation would be 3 Pa.C.S. Chapter 68.

Agricultural chemical facility

This definition includes an address where one can obtain copies of cited material. This should be deleted from the definition and either moved to the body of the regulation or mentioned in the Preamble. In addition, it is our understanding that the U.S. Standard Industrial Classification (SIC) system has been replaced by the North American Industry Classification System (NAICS). While the Land Recycling and Environmental Remediation Standards Act specifically references the SIC, we believe it would be useful to the regulated community if the final-form regulation also included the more current NAICS number for affected businesses.

Agricultural land or farmland

The definition includes the term “Land...that is capable of supporting...” The phrase “capable of supporting” is vague and could allow contaminated material to be applied to land not being used for farming. The final-form regulation should provide a more specific definition of where contaminated material can be applied.

Cleanup or remediation

The words “in order” should be inserted between “environment” and “to” to be consistent with the definition in the Act.

General use pesticides

This phrase is defined, but not used in the regulation. Therefore, it should be deleted.

HAL

The written definition of this term is “Health Advisory Level.” The Department should also define the phrase using the language from the definition in the Act.

Land application proposal

The phrase “agricultural facility” in this definition should be changed to “agriculture chemical facility” to be consistent with the defined term.

MCL

The written definition of this term is “Maximum contaminant level.” What is the maximum contaminant level? This should be included in the definition.

7. Section 130d.2. Scope. – Reasonableness; Need; Clarity.

We have two concerns. First, what is meant by the word “contaminated”? Does the mere presence of substances other than agricultural chemicals constitute contamination? If the non-agricultural chemicals detected are at a level less than the residential standards of the Land Recycling and Environmental Remediation Standards Act, is the material considered contaminated? The final-form regulation should include a definition of “contaminated.”

Second, Subparagraphs (c)(1)(i) and (ii) are not needed and should be deleted from the final-form regulation.

Subchapter B. DUTIES OF APPLICATORS

8. Section 130d.11. Scope. – Need.

This proposed Chapter already includes a “Scope” section at § 130d.2. If the Department believes the content of § 130d.11 is needed, it should be included in § 130d.2.

9. Section 130d.12. Reports. – Need; Clarity.

This section addresses filing requirements for the annual report and final report. We have five concerns. First, this section is out of sequence with the other requirements of the regulation. This section should be moved to a subchapter that follows the application requirements and the review process.

Second, this section does not specify when the reports must be submitted to the Department. The final-form regulation should include a time period for submitting the reports.

Third, Subsection (a) requires a person who “solicits or receives approval from the Department” to file annual and final reports. However, these requirements would only apply to someone whose application was approved. Therefore, the phrase “solicits or” should be deleted.

Fourth, Paragraph (b)(3) should provide a citation to the appropriate section that deals with the daily and annual records that are required.

Fifth, the information required in Subparagraphs (b)(4)(i) and (ii) is also required in the initial application. This requirement is duplicative and should be deleted.

10. Section 130.d.13. Chemical analysis of waste. – Clarity.

This section addresses information that must be included in the land application proposal form. Therefore, it should be moved to that section.

Under Subsection (e)(3), who decides that the material applied to the land at acceptable agronomic rates will not negatively affect productivity of the land or cause harm to the environment? How does one demonstrate this?

11. Section 130d.14. Waste analysis plan. – Protection of public health; Clarity.

Sections 130d.13 and 130d.14 address the analysis of waste at the remediation site. For clarity and to reduce repetition, the Department should combine these sections.

Remediation activities performed under the Act require extensive testing and analysis of the contaminated material. The testing and analysis requirements are outlined in current Department of Environmental Protection (DEP) regulations. In order to avoid possible conflict or duplication of existing DEP regulations, Sections 130d.13 and 130d.14 should cross reference the testing requirements of the relevant DEP regulations and add any additional requirements that may be necessary.

Paragraph (3) requires a sampling method to contain at least one sample from each soil pile or quantity of groundwater. DEP has sampling requirements in place, under Act 2. Paragraph (3) should be deleted and a cross-reference should be added to the appropriate Section of DEP's regulations.

12. Section 130d.15. Application site analysis. – Need; Clarity.

This section addresses information that must be included in the land application proposal form. Therefore, it should be moved to that section.

In addition, this section requires testing of soil in each field or plot on which material will be applied. What is considered a "field" or "plot"? How many samples will be required? Will more samples be required for larger fields or plots? Are the fields or plots predetermined before the results of the chemical analysis are obtained? Can the dimensions of the fields or plots be altered to better accommodate the material that is to be applied?

Paragraphs (1) and (2) address the same topic and should be consolidated into one paragraph.

Paragraphs (3) and (5) repeat information contained in the opening paragraph of this section. The duplicative information should be deleted from the opening paragraph.

Paragraph (4) requires the submittal of the quality control procedures of a lab approved by the Department to both the Department and the landowner. Since the Department has approved the lab, this requirement is unnecessary and should be deleted.

13. Section 130d.16. Retained recordkeeping. – Need; Clarity.

Paragraph (b) says "shall be available for inspection or audit **at reasonable times** by the Department or its authorized agents" (Emphasis added). What does the Department consider a "reasonable time"?

Paragraph (c) contains the phrase, "5 years after the date on which the site closure plan and final report were submitted and approved by the Department." With this language, there would be two different dates that could be used to determine when the five-year clock starts. For clarity, the Department should clarify when the five-year period begins.

In addition, why does the Department require the retention of records for five years?

14. Section 130d.17. Public notice by applicant. – Clarity.

This section states that an applicant must comply with the public notice requirements established by the Pennsylvania Pesticide Control Act of 1973 (3 P.S. §§ 111.21—111.61) and the regulations in Chapter 128. The final-form regulation should include more specific citations to the relevant sections of the Pesticide Control Act and Chapter 128 pertaining to public notification.

Subchapter C. GENERAL REQUIREMENTS FOR PERMISSION TO APPLY SOIL AND GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS TO AGRICULTURAL LAND

15. Section 130d.21. General requirements for land application proposal form. – Need; Clarity.

Subsection (b) contains the phrase “and other data as may be required by the Department...” What other data might the Department require that isn’t already set forth in the regulation? The final-form regulation should specify that any additional information needed by the Department will be requested in writing.

Subsection (c) is not needed because the requirements are in other sections.

The requirements of Subsection (d) (relating to affirmation of chemical analysis and waste analysis plan) should be moved to Sections 130d.13 (relating to chemical analysis of waste) and 130d.14 (relating to waste analysis plan) respectively.

The requirement of Subsection (e) (relating to affirmation of operation plan) should be moved to Section 130d.42 (relating to operating plan).

16. Section 130d.22. Insurance. – Clarity

This section states that an applicant must comply with the insurance requirements established by the Pennsylvania Pesticide Control Act of 1973 (3 P.S. §§ 111.21—111.61) and the regulations in Chapter 128. The final-form regulation should include more specific citations to the relevant sections of the Pesticide Control Act and Chapter 128 pertaining to insurance.

17. Section 130d.23. Right of entry and agreement with landowner. – Clarity

Subsection (a) requires that a land application proposal shall contain a description of certain documents. The final-form regulation should allow the applicant to provide either a description or copies of those documents.

Subsections (a) and (b) require the same information to be included in the land application proposal. For clarity and to avoid repetition, these Subsections should be consolidated into one subsection.

Subsection (b)(1) does not address a situation where the applicator and the landowner are the same person. However, Section 130d.41(3) (relating to general requirements) states when the person responsible for the land application of the contaminated material is the landowner, an agreement is not required. This section should contain a similar provision.

Subsection (c) addresses an “irrevocable written consent” that allows the Commonwealth and its authorized agents to enter the proposed application site. We have two concerns. First, why must a landowner grant access to the land “for up to 3 years after the final closure”?

Second, would the “irrevocable written consent” enable the Department to enter the proposed application site if the land was sold? If the land is sold, must the new owner be notified that agricultural chemicals from a remediation site were applied to the land?

18. Section 130d.25. Compliance information. – Clarity.

We have two concerns with this Section.

First, what sort of documentation or information does the Department require to prove the land application will comply with all other Federal, State and local laws, rules and ordinances? The final-form regulation should require that the applicant attest or certify that they are in compliance with all applicable laws, rules and ordinances.

Second, what are the applicable Federal, State and local laws? If these can’t be specified, this provision should be deleted.

Subchapter D. LAND PROPOSAL REVIEW PROCEDURES

19. Section 130d.31. Criteria for approval or denial. – Clarity.

There is a typographical error in Subsection (a). The second sentence states, “...seek to apply soil of groundwater...” (Emphasis added). The word “of” should be changed to “or.”

Subsection (c) seems to conflict with the second paragraph of the Preamble which states, “The Department will not approve the land application of soil or groundwater contaminated with chemicals other than agricultural chemicals.” The Department should use consistent language throughout the regulation and the Preamble. Also, who is the “appropriate agency”? Is the Department referring to the Department of Environmental Protection? Could there be any other agencies that would qualify as an “appropriate agency”?

20. Section 130d.32. Receipt of land application proposal and completeness review. – Clarity.

Subsection (c) states that an application is complete “if it contains all the necessary information, approvals, maps and other documents required by this chapter.” Similar to our concerns in our opening comment, the requirements in Subsection (c) are found throughout this chapter. As currently drafted, an applicant would have a difficult time determining if all the forms, information, maps and other documents were included with the application. For clarity, these requirements should be listed in one place.

21. Section 130d.33. Review period. – Clarity.

Subsections (a) and (b) set forth a 60-day period for the Department to conduct its review of the land application proposal. However, Subsection (c) states “Failure by the Department to comply with the timetable established in this section will not be construed or understood to constitute grounds for an automatic approval of a land application proposal.” What is the purpose of the 60-day period in Subsections (a) and (b)?

Subsection (b) is entitled "Incomplete land application proposal." For clarity, this subsection should be moved to § 130d.32 (relating to receipt of land application proposal and completeness review).

22. Section 130d.34. Review process. – Clarity.

Subsection (a)(2) states that if other chemicals are present in the material, the Department will review the application, but "will not give final approval to the land application proposal." This conflicts with § 130d.31(c) which states "Where the soil or groundwater sought to be applied contains chemicals other than agricultural chemicals, the Department may approve the land application proposal contingent upon the applicant obtaining the necessary approvals or permits (when applicable) to land apply those chemicals from the appropriate agency." The Department should use consistent language throughout the regulation.

We have three concerns with Subsection (a)(3). First, the topics included in this subsection are different issues and should be in separate subsections.

Second, how will the Department notify the applicant of its decision? Will the Department issue an approval letter or order? Will DEP be issuing a permit or approval in conjunction with Departmental approval?

Third, if additional information is requested at this stage, does the applicant get 90 days to respond? Once the information is provided, does the Department get an additional 60 days to review the material?

Subsection (b) starts with "The decision of the Department to approve or deny a land application proposal is final..." There is no mention of an appeal process for a denied application in this regulation. The appeal process should be set forth in the regulations or by a cross reference to the applicable appeal procedures.

Subchapter E. GENERAL REQUIREMENTS FOR LAND APPLICATION OF SOIL AND GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS.

23. Section 130d.41. General. – Clarity.

This section describes general requirements that include compliance with other subchapters. Since this section does not provide any new information or requirements, it should be deleted.

24. Section 130d.42. Operating plan. – Need; Clarity.

The beginning of Paragraph (3), which states, "The general operating plan for the proposed operation, including" is not needed, because the heading, under which it is located, already explains that. For clarity, it should be deleted.

Also, what is the meaning of the phrase "proposed life of the operation"?

Paragraph (8) states, "The use that will be made of the proposed application area and the crops that will be planted on each application plot for 3 years following the application." We have two concerns.

First, will the Department monitor this to ensure compliance? What is the penalty for non-compliance?

Second, are there any prohibitions from the land being sold to a developer or rezoned for residential use?

25. Section 130d.43. Maps and related information. – Clarity.

Subsection (b) contains the phrase “other reliable data.” What does the Department consider to be “other reliable data”? This should be clearly set forth in the regulation.

Subchapter F. GENERAL REQUIREMENTS AND EXCEPTIONS FOR USE AND APPLICATION OF GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS AS TANK MIX

26. Section 130d.51. General requirements. – Clarity.

We have three concerns with this Section. First, must an applicant “seeking approval to utilize and apply groundwater contaminated with agricultural chemicals generated as a result of remediation activities at an agricultural facility as tank mix” comply with all other requirements of this chapter? If not, what requirements must be met?

Second, how will the review process for this type of application work? Are the time frames and process the same as in Subchapter D?

Third, the word “with” should be inserted between the words “contaminated” and “agricultural” in Subsection (b).

27. Section 130d.52. General exceptions. – Clarity.

This section allows the Department to waive certain requirements of this chapter. However, the procedure that must be followed by the applicant to obtain a waiver is not included. This should be set forth in the regulation.

Subchapter G. GENERAL OPERATING REQUIREMENTS FOR LAND APPLICATION OF SOIL AND GROUNDWATER CONTAMINATED WITH AGRICULTURAL CHEMICALS

28. Section 130d.61. General provisions. – Need.

This Section sets forth the fact that the applicant must comply with “...the act and this chapter...” This provision is not needed and should be deleted.

29. Section 130d.62. Standards for land application of soil and groundwater contaminated with agricultural chemicals. – Need; Clarity.

The introduction to this Section begins, “Persons seeking to apply...” In order for a person to apply the material, they must obtain the approval of the Department. Therefore, the opening phrase of the introduction should be changed to, “Persons approved to apply...”

Paragraphs (4), (9), (10) and (11) contain criteria or provisions that will be used by the Department to determine whether a land application proposal will be approved or disapproved.

Therefore, the requirements of these paragraphs should be moved to a section that addresses application requirements.

The requirements of Paragraph (1) are repeated in Paragraphs (2) and (3). Therefore, Paragraphs (2) and (3) should be deleted.

Paragraph (1) states that the “Department may require a safety factor of one-half the label application rate.” What factors will the Department consider when determining if one-half the label application rate would be appropriate?

Paragraph (6) requires the landowner to “account for the amount of nutrients being applied to the land as set forth in the *Pennsylvania Agronomy Guide*.” This requirement is not clear. Does the amount of nutrients refer to the material being land applied? Does it also include any additional nutrients that might be applied? Is the landowner required to submit this information to the Department?

In Paragraph (8), what does the Department consider “minor amounts”? This term is only used in this Section and it should be defined here.

What is “any applicable nutrient management plan,” as mentioned in Paragraph (9)? If there are nutrient management plans that one is to comply with, these should be cross-referenced in the regulation.

Paragraph (12) is very similar to Section 130d.25 (relating to compliance information). The Department should delete Section 130d.25.

Paragraph (13) repeats the requirements of Section 130d.72 (relating to final reports). Therefore, this paragraph should be deleted.

30. Section 130d.63. Land application rates and procedures. – Clarity.

Under Subsections (a)(7) and (8) the methodology used to determine application rates is confusing. The variables used in the formulas are not explained or defined. The final-form regulation should provide accurate formulas and a step-by-step process that would allow a person to accurately calculate an application rate.

Subsection (b) addresses application rate considerations and procedures that are to be included in the applicants operation plan. This information will be used by the Department to review all land application proposals. Therefore, the requirements of this subsection should be moved to a section that addresses application requirements.

Subsections (b)(2) and (6) both address the total amount of pesticides that may be present in material that is to be applied to agricultural land. These subsections should be consolidated.

Under Subsection (b)(4), what does the Department consider “valuable topsoil”? Also, how does one “...assure that valuable topsoil will not be lost...”? This should be set forth in the regulation.

31. Section 130d.64. Additional application requirements. – Clarity.

Will the Department monitor the landowner’s farming operation to ensure that the “crop rotation plan” and the “nutrient and pesticide management plan” are being followed? If one deviates from the plans submitted, what is the penalty? This should be set forth in the regulation.

32. Section 130d.65. Limitations on land application of soil and groundwater contaminated with agricultural chemicals. – Need; Clarity.

Under Paragraph (6), if an applicator wants to employ spray irrigation equipment or aerial equipment, do they have to apply in writing, as is required for the application of contaminated groundwater via a tank mix process in Subchapter F?

Paragraph (8) prohibits the grazing of livestock on application areas for five years. Commentators have noted that livestock are commonly grazed on land on which agricultural chemicals have been applied. What is the reason for this prohibition? Since Paragraph (9) requires that the application areas can only be used in a manner consistent with the labeling requirements of the pesticides contained in the contaminated material, Paragraph (8) should be deleted.

33. Section 130d.66. Prohibited applications. – Clarity.

The term “water source” in Subsection (b)(2) should be defined in Section 130d.1 (relating to definitions).

The term “exceptional value wetland” in Subsection (b)(4) should be defined in Section 130d.1 (relating to definitions).

34. Section 130d.68. Daily operational records. – Clarity.

In Subsection (a), what does the Department consider “generally accepted principles”? This phrase is also found in Section 130d.69(a).

The term “generator” is used in Subsection (b)(5). Who does the Department consider to be a “generator”? Is it the person who initially contaminated the material, the current owner of the remediation site or the person who excavated the contaminated material? For clarity, this term should be defined in Section 130d.1 (relating to definitions). This term is also found in Section 130d.69(b)(4).

35. Section 130d.71. Site closure plan. – Clarity.

We have two concerns with Subsection (a). First, the Department does not define the “parties involved.” Does this apply to the landowner, the generator, the applicator and the hauler of the waste? For clarity, this term should be defined in this section.

Second, this subsection and Subsection (b)(4) require the parties to report the results of the land application activity. The results to be reported should be moved to Section 130d.72 (relating to final reports).

Also, this section does not state when the site closure plan is to be submitted to the Department. How long do the parties have to complete all required testing? For clarity, this should be set forth in the regulation.

36. Section 130d.72. Final report. – Clarity.

This section does not state when the final report must be submitted. Also, who is responsible for submitting the final report? These provisions should be set forth in the regulation.