

JOHN R. MCGINLEY, JR., ESQ., CHAIRMAN
ALVIN C. BUSH, VICE CHAIRMAN
ARTHUR COCCODRILLI
ROBERT J. HARBISON, III
JOHN F. MIZNER, ESQ.
ROBERT E. NYCE, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

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

July 18, 2002

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

Re: Regulation #2-140 (IRRC #2272)
Department of Agriculture
Aquaculture Development Plan

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".

Robert E. Nyce
Executive Director

wbg

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. 2-140

Aquaculture Development Plan

July 18, 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regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.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. Program Costs. – Economic Impact.

The Preamble to the proposed regulation states that there is a separate account in the State Treasury called the Aquaculture Development Account. The Preamble further states that this account is funded by fees and charges generated under the Aquaculture Development Law (Act). However, the Department also acknowledges that “moneys for use in the development and administration of the grant and loan programs established by this proposed rulemaking will need to be provided through future appropriations to the Aquaculture Development Account.” We have questions relating to program funding.

- When will these programs be funded?
- How is the program “revenue neutral” as stated in the regulatory analysis form?
- Will registration fees for aquaculture producers increase as a result of implementation of the Aquaculture Development Plan?

The Department should respond to these questions in the Comment and Response document.

2. Issues Common to the Application and Review Processes for these Programs. – Need; Reasonableness; Clarity.

Payment of participation fees

The programs this proposed regulation will establish require applicants to pay participation fees. However, it is unclear when these fees must be paid. Subchapters C through G appear to contain contradictory language. They require the participation fee to be submitted with the application in one subsection, and then, in a later subsection, require the fee to be paid after receiving notice of acceptance into a program (e.g., Section 106.104(b)(5) and Section 106.107(a)). The final-form regulation should clarify when the participation fees for each program are due.

Return of participation fees

When a program requires a participation fee and the applicant is rejected, will the participation fee be refunded? If so, the final-form regulation should include provisions that prescribe how and when participation fees will be returned to the applicant.

Structure of regulations

The regulation is structured so the **Review of applications** sections comes before the **Processing of applications** sections. Since the **Processing of applications** sections of the regulation address items such as completeness of the application and requests for additional data, clarity may be improved by reversing the order of the **Review of applications** and **Processing of applications** sections.

Review of applications

The Aquaculture Education Enhancement Program (AEEP), the Aquaculture Product Information Program (APIP), the Aquaculture Product Promotion Program (APPP) and the Aquaculture Export Promotion Program (AEPP) each have sections relating to **Review of applications** (e.g. Section 106.53 and Section 106.105). Subsection (a), relating to evaluation, and Subsection (b), relating to applicant eligibility, are not needed and should be deleted from the final-form regulation. Subsection (c), relating to application completeness, duplicates provisions found in the sections relating to **Processing of applications**. Therefore, it should also be deleted.

The regulation contains a list of factors that the Department will consider in selecting participants for the Aquaculture Education Enhancement Activity Program, the AEPP and the APIP. Included in the list of factors is the applicant's "ability to pay, or cost share, the... activity costs." (Sections 106.53(d)(5), 106.135(d)(6) and 106.165(d)(6)). Sections 106.52, 106.134 and 106.104 require payment of the participation fee with the application. It is unclear if the ability to pay/cost share provision has any relationship to the participation fee for the programs. If the ability to pay/cost share provision is the same as the participation fee, then the ability to pay/cost share provision is duplicative and should be deleted.

Approval of applications

In Subchapters A, C, E, F and G, in the **Processing of applications** sections, the Department states that it may "approve, approve with special conditions or reject applications and issue participation approval...." We request the Department explain how "participation approval" is different from approval.

Release and hold harmless provisions

For each program authorized by this regulation, there is a requirement that eligible participants release and hold harmless the Department and Commonwealth from liabilities and losses (e.g., Section 106.53(e)). The regulation should specify if there are any forms or agreements that must be signed to comply with this requirement.

Aquaculture Advisory Committee member participation in programs

The regulation authorizes an Aquaculture Advisory Committee member to participate in the aquaculture development programs if “all decisions regarding the application are subject to 65 Pa. C.S. § 1103(j) (relating to restricted activities) and the action does not violate the State Adverse Interest Act (71 P.S. §§ 776.1—776.9) or 4 Pa. Code Chapter 7, Subchapter K (relating to code of conduct for appointed officials and State employees).” (Sections 106.3(e)(3), 106.44, 106.109, 106.140 and 160.170). We request the Department explain how the determination will be made that an Advisory Committee member’s participation meets these requirements.

Subchapter A. Aquaculture Production Development Program

3. Section 106.1. Program objectives. – Clarity.

This section states that low-interest financing will be available to businesses “unable to fully finance these projects with equity, bank financing, or other private and public sources.” The final-form regulation should specify the documentation that the applicant must provide to demonstrate that this criterion has been met.

4. Section 106.3. Eligibility. – Clarity.

Subsection (b) Eligible activities

Subsection (b)(2) states that, “the project adopts generally acceptable pollution prevention and environmental stewardship practices.” What are “generally acceptable pollution prevention and environmental stewardship practices”? These practices should be defined in the final-form regulation. Alternatively, if these practices are defined elsewhere in existing regulations or guidance documents, these documents or regulations should be cross-referenced in the final-form regulation.

Subsection (b)(3)(ii) states that the required certification can be obtained by an “environmental professional approved by the Department.” We have three concerns.

First, the term “environmental professional” is vague. Adding a definition of this term or citation to a definition would improve clarity.

Second, the regulation requires the “environmental professional” to be approved by the Department. We request the Department explain the approval process.

Finally, how will the list of environmental professionals approved by the Department be provided to the public? The final-form regulation should identify where and how this information will be made available.

5. Section 106.4. Ineligible activities. – Clarity.

Subsection (b) addresses nonprejudicial approvals. However, the title of this Section is “Ineligible activities.” Subsection (b) should be removed from Section 106.4 and either placed in a new section or moved to Section 106.3, relating to eligibility.

6. Section 106.5. Program requirements. – Fiscal Impact; Reasonableness; Clarity.

Subsection (c) Jobs

This subsection requires that one full-time job be created or preserved when the project is funded under the Aquaculture Product Development Program (APDP). What is the basis for this requirement? Given that loan amounts could be as small as \$10,000, is it reasonable to require the creation or preservation of one full-time equivalent job for each project funded under the APDP? If this requirement is not met within three years from completion of the project, is the loan recipient required to immediately repay the entire loan amount?

Subsection (e) Terms

This subsection sets forth the terms for loan agreements. Please explain the basis for the payment periods in Subsection (e).

Paragraph (g) Fees

Paragraph (2) states “reasonable loan processing fees may be charged.” On what basis will the “reasonable” fees be determined?

Additionally, Paragraph (2) states that the applicant “should” check with the local provider regarding fees. “Should” is nonregulatory language which is inappropriate in regulations. It would be clearer to simply state that the local service provider or area loan organization will set the fees.

Subsection (i) Priority

Paragraph (i)(1) refers to “good credit ratings containing no late payments or write-offs.” It appears that the standard which must be met under this paragraph is “no late payments or write-offs.” The use of the word “good” is superfluous and creates an undefined standard. The Department should either delete “good” or include criteria for determining what credit rating constitutes a “good” credit rating.

Paragraph (i)(4) refers to a “proven profit-making venture.” What criteria will be used to determine if a venture meets the “proven profit-making” requirement?

7. Section 106.6. Application submission and approval procedure. – Clarity.

Paragraph (d)(14) states, “The collateral position of the Department will not be less than a second lien on the assets being funded unless specifically approved in writing by the Department.” Under what circumstances would the Department accept a collateral position less than a second lien on the assets?

8. Section 106.12. Contact information. – Clarity.

Subsection (a) lists methods to contact the Department, but does not include an email address. If the Department is available by email, that information should be included in the final-form regulation.

Subchapter B. Aquaculture Producer Resource Program

9. Section 106.22. Limitations. – Clarity.

Subsection (a) references the Department’s Internet site but does not list the address. Has the Department considered including the Internet address in the final-form regulation?

Subchapter C. Aquaculture Education Enhancement Program

General Provisions

10. Section 106.43. Notice of activities. – Implementation procedures.

Subsection (a) states that the Department will use *one* of three methods to notify eligible applicants of AEEP activities. The three methods include publication in the *Pennsylvania Bulletin*, direct mailing and advertisements. If the Department uses only one method of notification, such as the *Pennsylvania Bulletin*, many eligible applicants may not be aware of upcoming activities. Is it the Department’s intent to use only one method of notification, or will the Department use a combination of the methods in Paragraphs (a)(1) through (a)(3)? If the Department intends to use a combination of methods, Subsection (a) should be modified to clearly reflect this intent.

Additionally, has the Department considered posting AEEP activities on their website?

Aquaculture Education Enhancement Activity Program

11. Section 106.54. Processing of application. – Reasonableness.

Subsection (b) addresses how the Department will process applications. We have two concerns.

First, under Paragraph (b)(5), relating to incomplete and inaccurate applications from eligible applicants, will five days be sufficient for the applicant to obtain the additional information? We note that the comparable provision in Section 106.65(b)(5) gives applicants ten days to respond.

Second, under Paragraph (b)(6)(iv), relating to order of participation availability, will seven days be sufficient time for the applicant to respond? Is the notification date the same as the date of mailing?

12. Section 106.55. Notice of disposition of application. – Reasonableness; Clarity.

Subsection (a), relating to applications deemed complete, states the Department will notify applicants within 15 days of its decision to approve, approve with special conditions or reject the application. Subsection (b), relating to applications deemed incomplete or ineligible, states the Department will notify applicants of its decision to reject the application or request additional information within ten days. We have three concerns.

First, what is the reason for the different time frame in Subsections (a) and (b)?

Second, if the Department does not render a decision within the allotted time for complete applications, is the application deemed approved?

Third, Subsection (a) requires an approved applicant to submit the participation fee within five days of receipt of the approval letter. The APPP and the AEPP allow ten days for the applicant to submit the fee. Why is the Department allowing only five days for the submittal of the fee for the AEEP?

Aquaculture Education Enhancement Grant Program

13. General. – Clarity.

Must an applicant return the unused portion of a grant? If so, when?

14. Section 106.65. Processing of applications. – Reasonableness.

Under Paragraph (b)(5), relating to incomplete and inaccurate applications from eligible applicants, is ten days sufficient to obtain the additional information?

Subchapter E. Aquaculture Product Identification Program

15. Section 106.102. Limitations. – Clarity.

Subsection (a) addresses applicant eligibility. The regulation requires the aquaculture propagator or aquaculture-related company to be “in good standing.” The final-form regulation should specify under what standards “in good standing” will be judged.

16. Section 106.103. General conditions. – Clarity.

Subsection (b) addresses renewal of APIP participation. Will renewal applications require a participation fee? If so, this Subsection should be revised to state that renewal applications require payment of a participation fee.

17. Section 106.104. Application. – Clarity.

The phrase “non-profit entity” is vague. The Internal Revenue Code and the Pennsylvania Tax Reform Code commonly use the phrase “not-for-profit.” A specific citation to the Internal Revenue Code (26 U.S.C.A.) describing the types of businesses at issue would add clarity to the regulation.

18. Section 106.105. Review of applications. – Clarity.

Subsection (d) addresses factors to be considered by the Department in selecting APIP participants. Under Paragraph (d)(2), what documentation must an applicant provide to verify that all products are produced in Pennsylvania?

19. Section 106.106. Processing of applications. – Reasonableness.

Paragraph (b)(5) gives an applicant ten business days to submit additional information at the Department’s request. Is this enough time to provide the additional information?

Subchapter G. Aquaculture Export Promotion Program

20. Section 106.162. Limitations. – Clarity.

Subsection (b) requires “a majority” of the displayed products at an AEPP to be grown or manufactured in Pennsylvania. The term “majority” is vague and open to interpretation. We note that the corresponding provision in Subchapter F relating to the APPP (Section 106.132(b)) establishes a threshold of 60%. The final-form regulation should include a specific threshold as a percentage of production.

21. Miscellaneous Clarity Issues.

Section 106.2.

- There are two typographical errors in this section. In the *Pennsylvania Bulletin* version of this regulation the word “aquaculture” is misspelled in the definitions of “AEEP” and “AEPP.”

Section 106.3

- There is a grammatical error in the first sentence of Subsection (d)(1). The word “is” should be changed to “are.”

Section 106.10.

- The last sentence in this Section includes the word, “thereon.” This word is unnecessary and should be deleted.

Section 106.163.

- In Paragraph (e)(1), it appears that the words “more than” before “80%” are extraneous and should be deleted.

Section 106.165.

- There is a typographical error in Subsection (a). The word “the” before “applicant” should be deleted.

Section 106.166.

- Subsection (b)(1) is unclear. Clarity would be improved if this Subsection was rewritten.

INDEPENDENT REGULATORY REVIEW COMMISSION

To: Derek Ruhl
Agency: Department of Agriculture
Phone: 2-2853
Fax: 5-8402

From: Kristine M. Shomper
Administrative Officer
Company: Independent Regulatory Review
Commission
Phone: (717) 783-5419 or (717) 783-5417
Fax: (717) 783-2684

Date: July 18, 2002
of Pages: 9

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Agriculture's regulation #2-140 (#2272). Upon receipt, please sign below and return to me immediately at our fax number 783-2684. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: _____

Derek Ruhl

Date: _____

7-18-02