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

December 6, 2004

Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-391 (IRRC #2412)
Environmental Quality Board
Concentrated Animal Feeding Operations and Other Agricultural Operations

Dear Chairperson McGinty:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will 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 Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable William F. Adolph, Jr., Majority Chairman, House Environmental Resources and Energy Committee
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation #7-391 (IRRC #2412)

Concentrated Animal Feeding Operations and Other Agricultural Operations

December 6, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Environmental Quality Board (EQB) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on November 5, 2004. 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regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

CHAPTER 91. GENERAL PROVISIONS

1. Section 91.1. Definitions. - Economic impact; Reasonableness; Clarity.

Earthen waste storage pond

This definition allows the use of linings made of "other material acceptable to the Department." The EQB should specify in the body of the regulation the criteria the Department uses to determine what other materials are acceptable. Also, how will the regulated community know what other materials have been approved for use?

Setback

This definition states "a specified distance from surface waters or potential conduits to surface waters where manure, litter and process wastewater may not be land applied." The same definition appears in Section 92.1. There are two concerns.

First, the measuring points for setbacks are not clearly stated. Commentators are unsure of how to measure this distance and questioned whether the distance is measured from the edge of the surface water or the bank. To allow consistent measurement of setback distances, the regulation should establish where the distance to be measured begins.

Second, the regulation does not specify what will be considered "surface waters or potential conduits to surface waters." Commentators are concerned that this includes intermittent streams, natural swales and roadside drainage. We agree that "potential conduits to surface waters" would encompass any area where surface water drains. This in turn restricts the land area available for application of manure. A definition of "surface waters or potential conduits to surface waters" is needed to clarify the regulation's intent.

2. Section 91.36. Pollution control and prevention at agricultural operations. - Protection of the public health, safety and welfare; Economic impact; Reasonableness.

Manure Management Manual and Pennsylvania Technical Guide

Subsection (a)(1) requires compliance with the “Manure Management Manual and the Pennsylvania Technical Guide.” The Environmental Protection Agency (EPA) made the following comment:

Overall EPA is also concerned that many of the technical guidance documents use terms such as “should” that arguably do not require the permittee to implement those recommendations. EPA understands that many of these manuals were written as specific guidance for the agricultural community where cost share funds are available through USDA conservation programs and as such DEP may need to develop its own Technical Standards that are regulatory. Please describe further how these “requirements” can be made enforceable NPDES permit conditions consistent with federal requirements.

The EQB should explain the following:

- Why does the regulation refer to the requirements in these documents rather than include the requirements directly in the regulation?
- Is compliance with the standards in these documents required or recommended?
- How will the regulated community receive notice of proposed amendments to these documents and offer input?

Clay-lined earthen waste storage pond

Subsection (a)(3)(i)(A) establishes a water quality management permit requirement for a manure storage facility that is a “clay-lined earthen waste storage pond.” The definition of “earthen waste storage pond” allows the use of other liners such as plastic or concrete. Why is Subsection (a)(3)(i)(A) limited to clay linings?

Freeboard requirements

Subsection (a)(5) includes minimum requirements for freeboards. Commentators believe that while these requirements are appropriate for outdoor storage facilities that may be subject to the elements, they are excessive for indoor storage facilities. The EQB should consider amending the freeboard requirements to differentiate between indoor and outdoor storage facilities.

Water quality management permit

Subsection (a) concludes with Paragraph (7) which states:

The Department may require a water quality management permit for any manure storage facility, based on relevant criteria such as proximity to special protection waters or impaired waters under Chapter 93, or the risk of pollution.

This requirement is vague because it does not directly specify or limit what “relevant criteria” the Department will use. The regulation should clearly establish the circumstances that will require a water quality management permit.

Appropriate vegetated buffers and setbacks

Subsection (b)(2) requires that “appropriate vegetated buffers and setbacks established by the Department shall be followed to protect and maintain water quality.” The final-form regulation should cross-reference the portion of the regulation where the Department has established these requirements.

Timely review of permit applications

These requirements will apply to existing operations and in certain instances will require permits. Commentators questioned how long it will take to get a permit approved and how to appeal the rejection of an application. The EQB should include in the regulation a cross-reference to the appeal procedures and explain how long it will take to review and approve permits.

**CHAPTER 92. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
PERMITTING, MONITORING AND COMPLIANCE**

3. Section 92.1. Definitions. - Feasibility; Clarity.

CAFO - Concentrated animal feeding operation

In the Preamble, the EQB states, “The primary purpose of the proposed rulemaking is to allow the Commonwealth to maintain delegation of the National Pollutant Discharge Elimination System (NPDES) CAFO program, which was revised by the Federal government in 2003.” However, the EQB did not adopt the federal definition. Instead, it explained several amendments to its existing Concentrated Animal Feeding Operation (CAFO) definition and asked for public comment on the amendments. Commentators, including the EPA, expressed concern that the proposed definition is not consistent with the federal definition. Many questioned why it does not include medium size facilities. The EQB should explain how Pennsylvania’s definition of “CAFO” will maintain delegation of the NPDES CAFO program, and why Pennsylvania’s definition needs to differ from the federal definition.

Also, the definition includes “any other agricultural operation designated as a CAFO by the Department based on risk of pollution of surface waters using relevant criteria such as the size, location and management plan of the operation.” The definition should include cross-references to the “relevant criteria” the Department will review in consideration of whether to invoke the CAFO designation.

Poultry

The term “poultry” should be defined because other definitions, such as “AEU-Animal equivalent unit” and “Agricultural operation,” use the phrase “livestock or poultry.”

4. Section 92.5a. CAFOs - Reasonableness; Economic impact.

Subsection (d)(1)(i) requires a plan to include “buffers and manure application setbacks for the CAFO of no less than 100 feet from downgradient surface water, or vegetated buffer no less than 35 feet in width.” Why are these distances appropriate?

Subsection (d)(1)(ii) references the requirements in Section 91.36(b)(2). However, as mentioned above, Section 91.36(b)(2) does not specify or cross-reference these requirements.

Facsimile Cover Sheet

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

To: Debra L. Failor
Agency: Department of Environmental Protection
Phone: 7-2814
Fax: 705-4980
Date: December 6, 2004
Pages: 5

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-391 (IRRC #2412). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Debra L. Failor Date: 12/6/04