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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 #7-390 (IRRC #2413)
 State Conservation Commission
 Nutrient Management

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,

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
- Karl G. Brown, Executive Secretary, State Conservation Committee

Comments of the Independent Regulatory Review Commission

on

State Conservation Commission Regulation #7-390 (IRRC #2413)

Nutrient Management

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 State Conservation Commission (SCC) 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regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

1. General. - Fiscal impact; Reasonableness; Clarity.

Funding

In the preamble, the SCC notes that newly defined concentrated animal operations (CAOs) will have to develop and implement approved nutrient management plans. The SCC states that there will be funding for the development and implementation of the plans. Please describe the funding presently available and the funding expected to be available. Will all operations required to comply with the regulations qualify for funding?

Manure exporting

The SCC estimates that this regulation will result in approximately 500 newly designated CAOs. Many of the existing 840 CAOs rely on the exportation of manure as a component of their nutrient management plans. With the addition of 500 new CAOs, does the SCC anticipate that there will be enough exporters to take the manure off-site for spreading at another location? If not, what options will be available for CAOs that cannot find another location to export the manure?

Phosphorous index

Commentators have asserted that the phosphorous index does not provide adequate protection for water resources. Other commentators have suggested that a differentiation be made between phosphorous balancing and phosphorous indexing. Please explain why the phosphorous index is the best option, and how it will adequately protect water resources.

Incorporation by reference of other documents

The regulation appears to incorporate by reference the standards and requirements in the following documents:

- *Pennsylvania Technical Guide*
- *Manure Management Manual*
- *Pennsylvania Agronomy Guide*
- *Pennsylvania Soil and Water Conservation Technical Guide*
- *Agronomy Facts 54-Pennsylvania's Nutrient Management Act: Who Will Be Affected?*, published by the Pennsylvania State University
- *Recommended Soil Testing Procedures for the Northeastern United States, Bulletin #493*, published by the University of Delaware
- *Soil Test Recommendations Handbook For Agronomic Crops*, Penn State Agricultural Analytical Services Laboratory
- *Penn State Fact Sheets F254 through F257*
- *NRAES-89 Liquid Manure Application System Design Manual*
- *Soil Test Recommendations Handbook For Agronomic Crops*, Penn State Agricultural Analytical Services Laboratory

The SCC 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?

2. Section 83.201. Definitions. - Reasonableness; Clarity.

Existing agricultural operation

The last sentence of this definition refers to “a significant increase in the scope or magnitude of the operation.” How will an owner know when a significant increase in the scope or magnitude of the operation has occurred? The final-form regulation should specify the criteria the SCC will use to determine what qualifies as “significant.”

Nutrient balance sheet

This definition references the nitrogen needs of crops and the residual nitrogen from nutrient sources. Given that the regulation requires phosphorous to be included in the development of a nutrient management plan, why is phosphorous not referenced in this definition?

This definition also contains the phrase “using procedures acceptable to the Commission [SCC].” The final-form regulation should cross-reference the sections of the SCC’s regulations that contain these procedures.

3. Section 83.202. Scope. - Clarity.

Paragraph (1) includes new language, “. . . or other agricultural operations directed by the Commission [SCC] or the Department to follow the CAO criteria established under the act.” What are the “other agricultural operations” described in this paragraph? What criteria will the SCC or the Department use to decide if these other operations will be required to follow the CAO criteria?

4. Section 83.261. General. - Clarity.

Paragraph (7) provides that “operators and specialists who sign plans may be subject to penalties for any false information contained in the plans.” A cross-reference to the section containing the penalties should be added to the final-form regulation.

5. Section 83.291. Determination of available nutrients. - Fiscal impact; Reasonableness; Clarity.

Subsection (b)(3)(i) states, “. . . manure analyses shall be performed using accepted manure sampling and chemical analysis methods as specified by the Commission [SCC].” Are these accepted practices found in regulation? A cross-reference to the acceptable sampling and chemical analysis methods should be added to the final-form regulation.

Commentators believe that annual manure tests required in Subsection (b)(3)(iii) will be costly, particularly for growers with multiple manure types. How much do these tests cost? What is the basis for requiring annual testing? Did the SCC include the cost of this testing in its fiscal analysis?

6. Section 83.292. Determination of nutrients needed for crop production. - Clarity.

Subsection (e)(1) includes the phrase, “other Commission [SCC] approved procedures.” What are these procedures? Are they located elsewhere in the SCC’s regulation? The SCC should include a cross-reference to these materials in the final-form regulation.

7. Section 83.294. Nutrient application procedures. - Conflict with existing regulations; Reasonableness; Clarity.

Subsection (f)

This subsection contains setbacks that apply to manure spreading. Commentators have noted that to be consistent with federal regulations for concentrated animal farm operations (40 C.F.R. § 412.4(c)(5)), Pennsylvania's regulations must require a setback of 100 feet from sinkholes for manure spreading regardless of whether or not the manure is incorporated into the soil. Why wasn't this federal requirement included?

Commentators have noted that the use of fertilizer within the 100-foot setback is not prohibited. Is commercial fertilizer use permitted within the 100-foot setback, and if so, why?

Subsection (g)

This subsection addresses the winter application of manure. Several commentators have stated that spreading manure on frozen or snow-covered ground should be prohibited. Commentators assert that the nutrients are not sufficiently utilized for crop growth since there is no plant growth during the winter season. Since the nutrients are not absorbed by plants, they are concerned that winter application of manure could result in pollution of surface waters. Are the restrictions in the regulation sufficient to protect water quality?

Subsection (h)

There are two concerns with this subsection. First, the language is vague. This subsection states that in-field stacking of manure is permissible if the manure is applied "prior to the beginning of the next growing season." The final-form regulation should clearly specify for how long in-field stacking is permissible.

Second, this subsection includes a vague reference to "criteria approved by the Commission [SCC]." A cross-reference to the approved criteria should be included in the final-form regulation.

8. Section 83.301. Excess manure utilization for CAOs. - Reasonableness; Clarity.

Subsection (a)(1) requires the plan to include signed agreements "between the CAO and each importing operator agreeing to accept the manure from the exporting operation." Similarly, Subsection (b)(1) requires signed agreements between the CAO and the broker. Would the signed agreements be in place, and therefore available for inclusion in the plan, when the CAO submits the plan? If an agreement expires or the importer or broker goes out of business, is the CAO required to formally update the nutrient management plan?

Subsection (a)(5) requires the plan to list the name of the commercial hauler/applicator that will be used. Is the specific hauler/applicator that will be used for the duration of the plan always known when the plan is drafted?

Subsection (a)(5)(i) references “other means acceptable to the Commission [SCC]” for demonstrating knowledge of regulatory requirements. The final-form regulation should identify what qualifies as “other means acceptable to the Commission [SCC].” The same clarification should be made in Subsection (b)(1)(i).

In Subsection (a)(5)(ii), the regulation should specify how “substantial compliance” is determined. The same clarification should be made in Subsection (b)(1)(ii).

In Subsections (a)(5)(iv) and (b)(1)(iv), the regulation should specify what the “other requirements” are and where they can be found.

Subsection (a)(6) refers to certification under “a certification program approved by the Commission [SCC] or as required by statute.” Subsection (b)(2) contains the same language. The final-form regulation should specify where the regulated community can access a list of the approved certification programs. Additionally, if there are statutory provisions which require certification under a certain program, citations to those statutory provisions should be included in the final-form regulation.

9. Section 83.311. Manure Management. - Clarity.

Subsection (e)

Paragraph (6) states “Animal access to surface water in these areas shall be controlled.” It is unclear if this provision is intended to completely prohibit animal access or to restrict it in some manner. The final-form regulation should specify the degree of control that is required.

Subsection (i)

This subsection requires the siting, design and installation of manure storage facilities to meet the requirements in Section 83.351, the *Manure Management Manual* and the *Pennsylvania Technical Guide*, “as they relate to water quality protection.” Since these are large documents, specific citations to the water quality protection requirements would improve clarity.

10. Section 83.312. Site specific emergency response plans. - Reasonableness; Clarity.

Subsection (d) states, “It is recommended that the operator provide a copy of the emergency response plan to the local emergency management agency that would assist during a major discharge, leak or spill event.” This “recommendation” is a reasonable measure that could assist in containing a major discharge, spill or leak. However, as written, it is unenforceable because it is not mandatory. The SCC should revise this section to *require* that the plan be provided to the local emergency management agency.

11. Section 83.321. Stormwater control. - Clarity.

Subsection (a) authorizes the nutrient management specialist to confer with “others with expertise with nutrient runoff control.” The SCC should specify who “others” refers to and what level of expertise is required.

12. Section 83.342. Recordkeeping relating to application of nutrients. - Reasonableness; Clarity.

Subsection (b)(2) requires manure testing once a year for each manure group. How did the SCC determine that once a year is the appropriate interval for manure testing? What level of variance in manure analysis will require a plan update?

13. Section 83.362. Plan implementation. - Clarity.

Subsection (c) uses the phrase “significantly changed” in reference to nutrient content and soil tests. The final-form regulation should specify how “significantly changed” is determined.

14. Section 83.371. Plan amendments. - Clarity.

Subsection (a)(4) requires a plan amendment if figures used in the plan “are inconsistent with those contained in the *Pennsylvania Agronomy Guide* and associated fact sheets and manuals.” Clarity would be improved by specifically identifying the “associated fact sheets and manuals.”

Subsection (a)(8) requires a plan amendment if “additional lands are brought into the operation.” The final-form regulation should specify if a plan amendment is required when lands are sold or no longer available for lease or renting.

15. Section 83.391. Identification of agricultural operations and acreage. - Reasonableness; Clarity.

Subsection (a)

Paragraph (3) requires a signature “which meets the signature requirements of the Commission [SCC].” The signature requirements should be specified or cross-referenced in this section.

Subsection (d)

This subsection requires the plan to include signed exporter/importer and exporter/broker agreements. Would the signed agreements be in place, and therefore available for inclusion when the voluntary animal operation (VAO) submits the plan? If an agreement expires or the importer or broker goes out of business, is the VAO required to formally update the plan?

16. Section 83.401. Determination of available nutrients. - Clarity.

Subsection (b)(3)(i) states, “manure analyses shall be performed using accepted manure sampling and chemical analysis methods as specified by the Commission [SCC].” Where are these methods specified? They should be included in the final-form regulation.

17. Section 83.411. Alternative manure utilization plans. - Clarity.

Subsection (a)(5)(i) references “other means acceptable to the Commission [SCC]” for demonstrating knowledge of regulatory requirements. The final-form regulation should identify

what qualifies as “other means acceptable to the Commission [SCC].” The same clarification should be made in Subsection (b)(1)(i).

In Subsection (a)(5)(ii), the regulation should specify how “substantial compliance” is determined. The same clarification should be made in Subsection (b)(1)(ii).

In Subsections (a)(5)(iv) and (b)(1)(iv), the regulation should specify what the “other requirements” are and where they can be found.

18. Section 83.421. Manure management. - Clarity.

Subsection (a) contains the phrase “or others with expertise with nutrient runoff control.” The SCC should specify who the “others” may be and what level of expertise is required.

19. Section 83.422. Site specific emergency response plans. - Reasonableness.

Subsection (d) recommends providing the emergency response plan to the local emergency management agency. Consistent with our comment on Section 83.312(d), the SCC should revise this section to *require* that the plan be provided to the local emergency management agency.

20. Section 83.481. Plan amendments. - Clarity.

Subsection (a)(3) requires a plan amendment if figures used in the plan “are inconsistent with those contained in the *Pennsylvania Agronomy Guide* and associated fact sheets and manuals.” The final-form regulation should specifically identify the “associated fact sheets and manuals.”

Subsection (a)(9) requires a plan amendment if “additional lands are brought into the operation.” The final-form regulation should specify if a plan amendment is required when lands are sold or no longer available for lease or renting.

21. Miscellaneous clarity issues.

- As printed in the *Pennsylvania Bulletin*, in Section 83.204(b), there appears to be a bracket missing after the word “requirements.” The bracket should be inserted upon final publication in the *Pennsylvania Bulletin*.
- As printed in the *Pennsylvania Bulletin*, in Section 83.312(e), there appears to be a missing right parenthesis between the words “facilities” and “shall.” The parenthesis should be inserted upon final publication in the *Pennsylvania Bulletin*.
- In Sections 83.291(b)(2) and 83.401(b)(2), the term “AEUs” is deleted and replaced with “animal units.” We request the SCC explain why it is proposing this change.