



Pennsylvania Farm Bureau

510 S. 31st Street • P.O. Box 8736 • Camp Hill, PA 17001-8736 • (717) 761-2740 • www.pfb.com

February 16, 2006

Mr. Johan Berger
Pennsylvania Department of Agriculture
2301 North Cameron Street
Harrisburg, Pennsylvania 17110

Sent via e-mail to: joberger@state.pa.us, irrc@irrc.state.pa.us

Re: Public Comment on Proposed Rulemaking for Commercial Manure Hauler and Broker Certification (7 Pa. Code Ch. 130e)

Dear Mr. Berger:

On behalf of Pennsylvania Farm Bureau's 37,500 member families, many of whom will feel the impacts of the proposed regulations referenced above, we thank you for the opportunity to submit the following comments. As the Commonwealth's largest general farm organization, Pennsylvania Farm Bureau represents both the agronomic and animal production sectors of the industry. Farm Bureau represents both the small family farmer and the large-scale producer. Accordingly, the proposed certification program is sure to affect a high percentage of Farm Bureau members, either directly or via secondary impacts.

I. General Comments

Commercial manure haulers and brokers perform a service critical to Pennsylvania agriculture. Their existence provides multiple benefits, both to the environment and to the agricultural community. By exporting through haulers and brokers, farmers generating manure in excess of their own farm's crop needs are able to manage excess nutrients in a reasonable and environmentally sound manner. Importing farmers benefit from the ability to receive commercially transported manure efficiently and at a reasonable price, thereby providing optimum crop yields without reliance on chemical fertilizers.

The burdens that the proposed regulations would impose on commercial manure haulers and brokers would serve as a disincentive to continue providing their services—services upon which the agricultural community increasingly depends. In addition, the burdens would likely discourage prospective haulers and brokers from entering into the field.

The changes that have been proposed for Pennsylvania's commercial manure hauler and broker industry pose a serious threat to Pennsylvania farmers. As a result of the

burdens accompanying the proposed regulations, farmers run the risk of losing manure hauling services at a time when the movement of manure has become critical to protecting the Commonwealth's natural resources. This loss of service could result in improper manure application, costing farmers thousands of dollars in penalties and negatively impacting the environment and water quality. In those instances where manure hauling services do remain available, farmers will no doubt be forced to bear significant cost increases passed on by commercial haulers and brokers who will be forced to adjust their fee structure to compensate for the proposed certification requirements. The hauling and brokering industry simply cannot be expected to bear the proposed exam and certification costs, in addition to the costs associated with lost work time spent fulfilling record keeping, training, testing and continuing education requirements.

The Commercial Manure Hauler and Broker Certification Act was passed with the intent of insuring that manure generated by agricultural operations is safely transported and applied, in order to protect the Commonwealth's natural resources and the health of its citizens. But neither Pennsylvania's citizens nor its environment stand to gain anything from an overly burdensome and impractical commercial manure hauler and broker certification program.

Farm Bureau strongly objects to any interpretation of Act 49 that would require each employee of a commercial manure hauling or brokering business to be certified. Practically speaking, such an interpretation seriously fails to reflect the daily realities of commercial manure hauling and brokering, as well as the struggles that managers of these businesses continually face. Legally speaking, the limitations specifically prescribed by Act 49 relative to the scope of persons to be regulated and certified in the Act prohibit the Department from invoking such an interpretation in its final regulations. Further, these limitations demonstrate that such an interpretation and application of the Act was not intended by the legislature. The word "employee" does not appear anywhere in Act 49, and the definitions of "commercial manure hauler" and "commercial manure broker" make clear that only businesses and contractors must be certified under the Act.

Pennsylvania Farm Bureau believes that administration of the Department's regulatory responsibilities under Act 49 must be performed in a manner that addresses the need of farmers to receive effective and timely manure hauling and brokering services, both to enhance the future viability of agriculture and to preserve environmental quality on the farm. The excessive approach taken by the Department in the proposed regulations places the first objective in serious jeopardy, and may, as a practical consequence, place the second objective in serious jeopardy as well.

As revisions to the program may become necessary, we ask that the Department of Agriculture provide the State Conservation Commission and Nutrient Management Advisory Board ample opportunity to work "in conjunction" with the Department to ensure a program that is workable for haulers, brokers and farmers.

Finally, Pennsylvania Farm Bureau would like to take this opportunity to express serious concern regarding the extent to which the Nutrient Management Board and State Conservation Commission initially were not provided the opportunity to play an active role in developing these proposed regulations. While the Commercial Manure Hauler and Broker Certification Act of 2004 requires the Department to establish a certification program “in consultation” with the State Conservation Commission and the Nutrient Management Advisory Board, no opportunity for significant consultation was provided until quite late into the regulatory process.

II. Specific Comments on Subchapter A. General Provisions

1. Scope : § 130e.1.

Scope of persons required to be certified as a commercial manure haulers.

Act 49 defines a “commercial manure hauler” as “a person that transports or land-applies manure as contract agent for an agricultural operator or commercial manure broker under the direction of the operator or broker.” In order for a “person” to fall within the definition of “commercial manure hauler,” Act 49 requires the person to meet 3 conditions:

1. The person must be transporting or land applying manure; and
2. The person must be doing so under the direction an agricultural operator or commercial manure broker; and
3. The person must be doing so “as contract agent” for the agricultural operator or commercial manure broker.

An individual who works as an employee of a business engaged commercially in the transportation or land application of manure cannot be a “commercial manure hauler” under Act 49, since the individual is not acting “as contract agent for the agricultural operation or commercial manure broker”, as required in the definition of “commercial manure hauler.” Only the business employing the individual is engaged as “contract agent” for the agricultural operator or commercial manure broker in the transportation and land application of manure.

Rules of statutory construction¹ direct that every statute be construed, if possible, to give effect to all of its provisions. The use of the term “commercial” before “manure hauler” subject to certification requirements reflects an intent of the General Assembly to qualify and limit the scope of persons required to be certified under Act 49 to only those persons who commercially contract to perform manure transportation and land application activities.

¹ 1 Pa.C.S. § 1921(a).

Rules of statutory construction² also direct that the intent of the General Assembly in statute may be ascertained by considering former law, including other statutes that address the same or similar subjects. The General Assembly developed the Commercial Manure Hauler and Broker Certification Act in the context of other laws, such as the state Pesticide Control Act that regulate and impose requirements for certification of specified practices. Unlike the proposed regulations, the Pesticide Control Act does not impose on employees of a certified pesticide applicator business the same requirements for training, testing and certification that are required for the business.

Nothing among the technical changes made to the definition of “commercial manure hauler” during the General Assembly’s consideration of Act 49 reasonably supports any conclusion that the General Assembly had changed the intent reflected in the legislation’s original version to limit the scope of “persons” to be regulated under the Act to only those “persons” who meet all 3 of the conditions stated in the definition.

Scope of persons required to be certified as commercial manure brokers.

Act 49 defines a “commercial manure broker” as “a person that is not working for or under the control of an agricultural operator and that assumes temporary control or ownership of manure from an agricultural operation and arranges for transport to and utilization at an importing operation or other location.” In order for a “person” to fall within the definition of “commercial manure broker,” Act 49 requires the person to meet 3 conditions:

1. The person must not be working under the control of an agricultural operator; and
2. The person must be assuming temporary control or ownership of manure from an agricultural operation; and
3. The person must be arranging for the transport to and utilization at an importing operation or other location.

An individual who works as an employee of a business engaged commercially in the commercial brokering of manure cannot be a “commercial manure broker” under Act 49, since the individual is neither “arranging for” the transportation and utilization of manure at importation operations or other locations nor is “assuming temporary control or ownership” of manure, as are required in the definition. It is the business entity, not the employee, that is performing these functions.

Rules of statutory construction³ direct that every statute be construed, if possible, to give effect to all of its provisions. The use of the term “commercial” before “manure broker” subject to certification requirements reflects an intent of the General Assembly to qualify and limit the scope of persons required to be certified under Act 49 to only those persons who are commercially engaged in the brokering of manure.

² 1 Pa.C.S. § 1921(c)(5).

³ 1 Pa.C.S. § 1921(a).

Nothing among the technical changes made to the definition of “commercial manure broker” during the General Assembly’s consideration of Act 49 reasonably supports any conclusion that the General Assembly had changed the intent reflected in the legislation’s original version to limit the scope of “persons” to be regulated under the Act to only those “persons” who meet all 3 of the conditions stated in the definition.

Scope of farmers to be regulated as “commercial manure handlers” and “commercial manure brokers.”

The proposed regulations do not specifically recognize who is not to be regulated as a commercial manure hauler or commercial manure broker. More specifically, the regulations do not specifically recognize that farmers and employees of farmers who are hauling manure to or from the farmer’s farms or between neighboring farms without receiving monetary compensation are not required to be regulated or certified as a “commercial manure hauler” or “commercial manure broker.”

The Department’s original failure to provide information on persons who are not to be regulated or certified created substantial confusion and concern among the agricultural community. While we appreciate the Department’s most recent efforts to recognize and inform the agricultural community in its draft “Question and Answer” document that certification will not be required for farmers and their employees who are not hauling manure “commercially,” we still believe specific recognition of this needs to be stated in the final regulations, in order to allay the fears of the agricultural community and to ensure that any future rethinking by the Department on this issue is subject to regulatory review and the opportunity for public comment by the agricultural community.

Pennsylvania Farm Bureau is still concerned, however, with the references made several times in the Department’s recently issued draft “Question and Answer” document to a farmer who “has equipment” to transport or haul manure in the context of the Department’s discussion of a farmer who is not required to be regulated or certified as a commercial manure hauler. We think that basic logic and reason would practically necessitate that a farmer who is actually transporting or land applying manure in and around his farm “has the equipment” to do so.

More importantly, however, we fear that the inclusion of the “has equipment” language in the Department’s “Question and Answer” document suggests and may be interpreted as a required condition for the farmer to be excluded from regulation under Act 49. Nothing in Act 49 requires or suggests that a farmer performing the act of hauling manure in and around his or farms is required to hold permanent or temporary ownership of the equipment being used in performance of the act in order to be excluded from regulation under the Act.

We believe that any regulation to specifically recognize that farmers hauling manure in and around their farms fall outside the scope of regulation should not make references to “having equipment” or include other similar references that may be misinterpreted or misapplied as imposing a condition that Act 49 does not prescribe.

3. Fees : §130e.3.

Pennsylvania Farm Bureau objects to the proposed certification fee structure. The proposed regulations would impose fees for examination and certification of each commercial manure hauler and broker, with fees ranging from \$175 to \$425 per hauler and from \$425 to \$500 per broker.

The certification fees that have been proposed for all levels of hauler and broker are too high, especially if the every employee working for a commercial hauler or broker will have to be certified. As it relates to commercial manure haulers, the proposed fee structure does not take into account the transient nature of the industry. If a business owner is forced to certify every hauler he hires who works for him for only a few weeks or months and then leaves, that business owner will lose significant money, both in terms of testing and certification fees and in terms of lost work time while his employee was undergoing training and testing. It will be very difficult for a manure hauling operation owner to justify the time and expense of certifying an employee who may work only one week. The proposed fee structure will make it more difficult for owners to stay in business and will lead those owners who can afford to stay in business to hire fewer workers. All of this will have the ultimate effect of leaving farmers with fewer manure hauling services to properly manage excess manure.

For this reason, as well as others that will be discussed later, we recommend that the regulations provide for certification of a business entity. In the alternative, if the Department does decide to require training and certification for all employees, we propose that individuals certified on behalf of a business entity be authorized to test and certify that entity's employees in-house. In addition to benefiting the business entity by allowing for quick turnaround, this process would have the effect of reducing operational and administrative costs for the Commercial Manure Hauler and Broker Program.

4. Prohibition: §130e.5.

Pennsylvania Farm Bureau has serious concerns regarding the wording of section (b), which reads; "A person who hauls or applies manure, generated by animals not under that person's management control, to land not under that person's management control, shall be certified at the proper certification level as a commercial manure hauler or broker."

We object to the use of the word "person" in this section. Act 49 defines a "commercial manure hauler" as "a person that transports or land-applies manure as a contract agent for an agricultural operator or commercial manure broker under the direction of the operator or broker." The use of the word "person" in Section 130e.5 goes beyond the intent of Act 49 of 2004 by failing to limit the application of "person" to commercial manure haulers (i.e. those operating as contract agents). (*See related comments in section relating to Scope [130e.1].*)

As written, this section allows for broad and varying interpretations. Due to its lack of clarity, section (b) could be read to imply that a farmer helping his neighbor would be required to be certified under the proposed regulations. For this reason, we recommend section (b) be deleted. In the alternative, we recommend section (b) be rewritten to reflect the clear intent of Act 49 to regulate *only* those persons acting as contract agents for an agricultural operator or commercial manure broker under the direction of the operator or broker.

5. Authority, duties and prohibitions: §130e.5

(a)(1)(i) Level 1 commercial manure broker.

This section should be clarified to recognize that if a person (such as a feed or seed salesman) brings together potential sellers and buyers of manure without charging a fee, the person is not subject to regulation as a commercial manure broker. Agricultural salesmen often provide a valuable resource for farmers looking to properly manage excess nutrients by bringing farmers and brokers or haulers together. Where they do not charge a fee, they should not be regulated as commercial manure brokers for simply bringing two parties together. As mentioned before, the rules of statutory construction direct that every statute be construed, if possible, to give effect to all of its provisions. The use of the term “commercial” before “manure broker” subject to certain requirements reflects an intent of the General Assembly to qualify and limit the scope of persons required to be certified under Act 49 to only those persons who are commercially engaged in the brokering of manure.

(a)(1)(ii) Level 2 commercial manure broker.

Farm Bureau recommends that the nutrient balance sheets that a level-2 commercial broker is authorized to develop under the proposed regulations be consistent with those that will be used under Act 38, Act 49 or any other state regulatory program. Nutrient balance sheet requirements must be simple and easily understood by brokers. To ensure that reasonable requirements are developed, these requirements should be developed in consultation with the Nutrient Management Advisory Board.

(a)(1)(iii) Direct Supervision.

Farm Bureau objects to the Department’s proposed interpretation of “supervision” as implying “direct supervision” for the purposes of this section. We see no justification for requiring a certified commercial manure broker “on site” where the manure is being land applied by a level-2 or level-3 certified commercial manure hauler. To require “on site” supervision by a certified broker is cost prohibitive, impractical and overly burdensome.

We recommend an interpretation of “supervision” that would allow certified commercial brokers to meet supervisory requirements by being accessible via technological advances such as the cell phone and/or two-way radio. Requiring on-site broker supervision for the land application of manure by certified haulers would lead to

significant increases in the fees charged by commercial manure hauling and brokering operations. And in the end, these increased fees would be passed on to farmers.

(a)(2) Duties.

Farm Bureau believes it is unreasonable to require brokers to provide nutrient balance sheets to both the importing and exporting operations “no later than the time of transfer of the manure”. This requirement fails to allow for instances where manure transport must take place with limited notice (for instance, where a truck becomes available at the last minute or where a producer needs to export manure immediately). To provide more flexibility, we suggest the timeframe for providing nutrient balance sheets to importing or exporting operations should be within five (5) business days.

(b)(1)(ii) Level 2 commercial manure hauler.

Farm Bureau recommends that level-2 haulers not be required to have direct on-site supervision from a commercial manure broker or level-3 hauler (*See section (a)(1)(iii) Direct Supervision*).

We recommend that clause (C) of subparagraph 1 be deleted. This clause states: “A level 2 commercial manure hauler may not land apply manure as a contract agent for an agricultural operator, unless the level 2 commercial hauler has entered into an agreement and is directly supervised by a certified commercial manure broker.” It is unreasonable to preclude a level 2 hauler from working as an employee of a certified level 3 hauler where the level 3 hauler has the authority to offer instruction and assume joint liability for any misapplication or violations on the part of the level 2 hauler.

(b)(1)(iii) Level 3 commercial manure hauler.

Pennsylvania Farm Bureau recommends that level-3 haulers not be required to provide direct on-site supervision for employees operating under a commercial hauler level-2 license (*See section (a)(1)(iii) Direct Supervision*).

For the purpose of these regulations, we recommend that level 3 haulers be considered a business unit or entity authorized to oversee the operation of all haulers under the entity’s authority and supervision.

6. Display of Certification: §130e.6

Pennsylvania Farm Bureau recommends that the Department make substantial revisions to the requirements proposed in this section.

(a) Vehicles.

Farm Bureau recommends that the Department remove the requirement that all commercial manure haulers must display on every vehicle involved in the transport or

land application of manure—and on both sides of the vehicle at a “readily visible location”—certification numbers printed in 3-inch type with colors contrasting the vehicle.

The proposed requirement is both impractical and unnecessary. Since a given driver does not always operate the same truck or vehicle, compliance would require business owners to display certification numbers for *all* employees on *every* truck and vehicle. This requirement becomes even more burdensome where tractors and vehicles used in manure application do not have adequate surface area available to accommodate the prominent display of multiple certification numbers.

Beyond being impractical, the proposed requirement is likely to result in serious unintended consequences. First, such a prominent display of certification numbers will surely draw the attention of passersby. Secondly, this prominent display is likely to send the wrong message. The uninformed passerby will likely infer that where such prominent hauler/applicator certification identification is required, the substance being hauled or land applied *must* pose a significant threat, either to their health or to the environment. To this extent, the prominent display of certification numbers is likely to lead to unwarranted public scrutiny and complaints that will place a further burden on the Department and increase program costs via complaint investigations. Such prominent display of certification numbers also is likely to draw the attention of local law enforcement officials who may attempt to take action against those hauling and applying manure.

Ultimately, we propose that the requirement that all certified commercial manure brokers and haulers carry with them (either on their person or in the vehicle being utilized to transport or land apply manure) a copy of their current certification is sufficient for purposes of identifying haulers and brokers and insuring proper certification.

In the alternative, if certification display on vehicles is to be required, we recommend that each truck or vehicle used in manure transport and/or application be required to bear only one visible but discrete certification number, to be assigned not to individual haulers but to the controlling business entity.

(b) Possession of certificate.

Again, we propose that the requirement that all certified commercial manure brokers and haulers carry with them (either on their person or in the vehicle being utilized to transport or land apply manure) a copy of their current certification is sufficient for purposes of identifying individuals and insuring proper certification.

(c) Contracts.

We recommend that if certification numbers must be included in contracts or agreements entered into by commercial manure brokers and/or haulers to transport and/or land apply manure the Department not require individual hauler certification numbers.

As noted earlier, when two parties contract to transport and/or apply manure, it may not be known which driver from a particular operation will be available to transport and/or apply that manure on a given day. For this reason, where applicable, we recommend that contracts entered into by commercial manure brokers and/or haulers require only the certification number of the controlling business entity.

III. General Comments on Subchapter B. Certification

Pennsylvania Farm Bureau recommends that the commercial manure hauler and broker certification requirements be streamlined and clarified to facilitate understanding on the part of the regulated community and to make compliance less burdensome.

Overall, we believe it is the responsibility of the business entity to ensure that each of its employees carries out his duties in compliance with all relevant laws and regulations. Accordingly, we recommend that each commercial manure hauling and/or brokering business be required to obtain only one certification. Furthermore, we recommend that company owners and managers with broker or hauler 3 certification be allowed to provide temporary in-house certification to get newly hired haulers on the road quickly. This temporary certification could be achieved through in-house completion of Department approved workbooks.

We recommend extending the proposed ten-day period during which applicants who have taken the exam may submit certification paperwork to the Department. We also recommend shortening the time allowed for the Department to take action on application requests. It simply is not workable for a newly hired manure hauler to wait more than thirty days from the time he submits his certification application to the time he can begin hauling and/or applying manure.

We recommend that training and testing requirements for this program be tailored to match the actual work that each level of hauler and broker will be authorized to perform. If a commercial manure hauler is not authorized to land apply manure, he should not be required to be trained and tested on the rules of manure application.

We recommend workbook and computer-based testing options, especially for level 1 and level 2 haulers. We recommend open-book testing to aid in the learning process. Furthermore, we recommend testing options that allow test-takers to receive timely, if not immediate, results.

We recommend that testing for all levels of broker and hauler certification be provided throughout the year and that in-house testing options be made available if individual testing is to be required of each employee of a commercial manure hauling or brokering operation. As many individuals in the manure hauling industry either do not speak English as their primary language or do not read well, we further recommend that accommodations be made for oral testing and testing in Spanish.

Regarding the revocation and suspension of certification, we recommend that clear provisions be included in the regulations allowing an applicant to challenge or appeal his suspension or revocation.

We recommend that the Department not require retesting in order to obtain recertification. To require such retesting would only increase program costs.

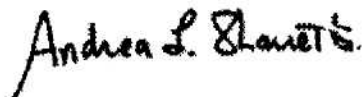
Finally, we recommend that record keeping requirements under this program be simple and effectual. We believe such record keeping should occur at the business management level and that level 1 and level 2 haulers should not be expected to bear this burden. We object to the proposed requirement that records be sent to the Department of Agriculture. This requirement serves no practical purpose when records must be kept on site with copies sent to the local county conservation district office.

IV. Concluding Remarks

Thank you for your consideration of Pennsylvania Farm Bureau's comments on the proposed regulations.

Please feel free to contact me with any questions you may have regarding these comments.

Respectfully submitted,

A handwritten signature in black ink that reads "Andrea L. Sharretts". The signature is written in a cursive, slightly slanted style.

Andrea L. Sharretts
Director of Natural Resources,
Pennsylvania Farm Bureau