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

March 20, 2006

Honorable Dennis C. Wolff, Secretary
Department of Agriculture
211 Agriculture Building
2301 North Cameron Street
Harrisburg, PA 17110

Re: Regulation #2-150 (IRRC #2513)
Department of Agriculture
Commercial Manure Hauler and Broker Certification

Dear Secretary Wolff:

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 me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

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

Comments of the Independent Regulatory Review Commission

on

Department of Agriculture Regulation #2-150 (IRRC #2513)

Commercial Manure Hauler and Broker Certification

March 20, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the December 17, 2005 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Agriculture (Department) to respond to all comments received from us or any other source.

1. Commercial Manure Haulers and Brokers - Legislative Intent of Act 49 of 2004.

The Department received several letters from legislators stating the regulation does not conform to the legislative intent of Act 49 of 2004 known as the Commercial Manure Hauler and Broker Certification Act (Act). The authors of the letters include:

- Representative Allan Egolf (retired) who was prime sponsor of House Bill 1809 of 2003 that was signed into law as the Act.
- A joint letter from members of the Senate Agriculture and Rural Affairs Committee signed by Senator Michael Waugh, Chairman; Senator Noah Wenger, Vice Chairman; Senator Michael O'Pake, Minority Chairman; and Senator Roger Madigan, Member.
- Individual letters from Representative Arthur D. Hershey, Majority Chairman, House Agriculture and Rural Affairs Committee and Representative Peter J. Daley II, Minority Chairman.

These legislators state that the regulation exceeds the intent of the Act by regulating individuals engaging in manure hauling and manure brokering rather than just commercial haulers and brokers. The Department must respond to these concerns and explain why the final-form regulation is the appropriate interpretation of the Act.

2. Development of a Final Regulation.

Comments and suggestions were submitted on virtually all sections of the proposed regulation. These comments were submitted by a broad spectrum of commentators including legislators, the State Conservation Commission (SCC), the Nutrient Management Advisory Board (NMAB), trade associations, environmental advocates and individual farmers. Based on the volume and

scope of the comments and our discussions with the Department, we anticipate that the regulation may be substantially revised.

Should the Department wish to allow for additional input on the revisions before the regulation is submitted in final-form, we suggest that the revisions be submitted preliminarily to stakeholder groups and then published in an Advanced Notice of Final Rulemaking. These processes will allow all interested parties an opportunity to comment on the Department's revisions and will facilitate the resolution of objections before submittal of the final-form regulation to the standing committees and this commission.

3. Certification Requirements for Level 1 Commercial Manure Haulers - Need and Economic impact.

The regulation limits Level 1 Commercial Manure Haulers to hauling manure from Point A to Point B. Holders of this certification are prohibited from land applying manure. Even though their functions are strictly limited, they are subject to extensive costs and requirements. Level 1 Commercial Manure Haulers must pay a \$125 fee for certification and a \$50 fee for an examination. Sections 130e.21 and 130e.22 require extensive training and testing. Section 130e.52(b)(2)(ii)(C) requires continuing education credits. In addition to the monetary cost, it will take a substantial amount of time to gain and maintain this certification. The burdens of these requirements will result in higher costs to farmers. The Department should explain the need for these requirements to certify Level 1 Commercial Manure Haulers.

Subchapter A. GENERAL PROVISIONS

4. Section 130e.2. Definitions. - Clarity.

Act 38

This definition references Chapter 5. A more specific citation would add clarity.

BMP – Best management practice

The list in Paragraph (ii) of this definition may become outdated. Given that this definition is dependent on SCC regulations, we recommend just cross referencing the SCC regulation.

Concentrated animal feeding operation

The Department of Environmental Protection has numerous regulations related to the Clean Streams Law. A cross reference to the specific regulations should be added.

Concentrated Animal Operation or CAO

This definition references Chapter 130b. A more specific citation would add clarity.

Manure, Nutrient, Nutrient balance sheet and Nutrient management specialist

The Nutrient Management regulation at 25 Pa. Chapter 83 is expected to be published as final in

the very near future. The definitions in this Chapter 130e should be consistent with those in 25 Pa. Code § 83.201 to prevent confusion and unnecessary paperwork for those who fall under both sets of regulations.

5. Section 130e.3. Fees. - Reasonableness and Economic impact.

Subsection (a) Certification fees.

Several commentators questioned why these fees are so high and contend that this will discourage compliance. Several legislators also question why fees are “excessive.” The Department will gain experience on costs through managing the interim guidelines published as a Statement of Policy in the January 14, 2006 *Pennsylvania Bulletin* titled “Interim Commercial Manure Hauler and Broker Certification and Enforcement.” For the fees used in the final-form regulation, the Department should provide the costs and projections used to develop the fees and explain why the fees are reasonable.

Subsection (b) Examination fees.

Similar to certification fees, the Department should provide the costs and projections used to develop the examination fees and explain why the fees are reasonable.

6. Section 130e.4. Prohibition. - Clarity.

Subsection (a)

There is a double negative in the first sentence that is a substantive typographical error. To be consistent with the Act (3 P.S. § 2010.4(a)), the word “not” should be deleted from the first sentence.

Subsection (b)

Does the use of the word “person” in this subsection refer to anyone who is certified or only to commercial entities? If the former applies, the Department should justify how this interpretation conforms to legislative intent.

7. Section 130e.5. Authority, duties and prohibitions. - Need; Reasonableness and Clarity.

Levels of certification

The Act describes two categories of certification: commercial manure hauler and commercial manure broker. The regulation breaks these categories into five separate certifications: Levels 1, 2 and 3 for commercial manure haulers and Levels 1 and 2 for commercial manure brokers. The regulation then includes the authority and duties, such as supervision, that each level can or cannot perform.

We have three concerns. First, why are two levels of certification needed for commercial manure brokers?

Second, commercial manure haulers can only perform two actions under the Act, either hauling or spreading manure. Why are three levels of certification needed for commercial manure haulers?

Third, there are five levels of certification in the proposed regulation. The regulation is confusing regarding what functions can be performed at each level of certification and what degree of supervision is required. This could cause unnecessary confusion and enforcement. The regulation should more clearly explain each level of certification and how it interrelates to other certifications.

Direct supervision

There are five concerns. First, the term “supervise” is defined for brokers and haulers in Subparagraphs (a)(1)(iii) and (a)(2)(iii). Both of these definitions require the supervisor to be “on the site where the manure is being applied” and assigns the supervisor responsibility for the proper land application of the manure. Commentators believe this provision is excessive because it would require two people to be on site during the application. Further, communication between the person applying the manure and the supervisor can be done by cell phone if questions arise.

We agree that this provision is burdensome. Since responsibility lies with the supervisor, it is incumbent upon the supervisor to make sure the person applying the manure clearly understands the job to be done. The Department should explain the need for, and reasonableness of requiring a supervisor to be on site at all times.

Second, related to our concern with the number of levels of certification in the regulation, the assignment of who can supervise who is complicated in Subsections (a) and (b). For example, supervision relating to a Level 2 commercial manure hauler is described in seven places (Subparagraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iii), (b)(1)(ii)(A), (b)(1)(ii)(B), (b)(1)(ii)(C), and (b)(1)(iii)). These provisions present unnecessary difficulty to comply with the regulation. We recommend that the Department review the supervision required and simplify these provisions for the final-form regulation accordingly.

Third, Subparagraph (b)(1)(ii)(C) would prohibit an agricultural operator from supervising the land application of manure. This appears to conflict with the statutory definition of “commercial manure hauler” that includes land application as a contract agent for an agricultural operator under the direction of the operator. It also appears to conflict with Subparagraph (b)(2). The Department should reconcile these provisions in the final-form regulation.

Fourth, Subparagraph (a)(1)(iii) ends with the statement that the commercial manure broker “is jointly responsible.” With whom is the broker jointly responsible?

Finally, there is also a clarity problem in the definitions of supervisor. Both Subparagraphs (a)(1)(iii) and (a)(2)(iii) state their respective definitions are “for purposes of this *section*.” Since both definitions are within the same section of the regulation, they should state “for purposes of this *subsection*.”

8. Section 130e.6. Display of certification. - Consistency with statute; Economic and fiscal impact; Need and Reasonableness.

Subsection (a) Vehicles.

This subsection requires “prominent display on every vehicle involved in transport or land application, or both, of manure...the certification number...in figures at least 3 inches high, in contrasting color to the vehicle and be located on both sides of the vehicle at a readily visible location.” There is no similar requirement in the Act. We agree with commentators who questioned the need for this provision when Subsection (b) requires the person to possess their certificate. We also agree with commentators that this provision is impractical when vehicles are used for other purposes or by multiple certificate holders. Therefore, we recommend deleting Subsection (a).

Subsection (c) Contracts.

This subsection requires a contract or agreement to include certification numbers. This requirement is not in the Act. While certification is required to perform activities, the level of detail required by this provision would impede the normal business practice of finding the best price for services. The contract or agreement would have to be rewritten every time a broker or hauler is changed, or alternatively would require the listing of multiple brokers or haulers who may or may not be used. For these reasons, and given the record keeping requirements in Section 130e.71, we see no need for this provision and recommend deleting Subsection (c).

9. Section 130e.7. Notice of change in business or certification. - Feasibility; Need and Economic impact.

This section states:

Certified commercial manure brokers and certified commercial manure haulers shall notify the Department in writing within 15 days of a change in information regarding their level of certification or if that person is no longer engaged in or no longer intends to be engaged in the transport or land application, or both, of manure.

It is not clear why this written notification is needed or how it would be useful. The Department manages the certification program, charges fees for certification and has specified that certificates lapse if not renewed. The Department would already know within a reasonable amount of time when a certification level changed or expired. Also, why would a person forego the remainder of their certification period, even if the person “is no longer engaged in or no longer intends to be engaged” in these activities? We recommend deleting this section.

Subchapter B. CERTIFICATION

Sections 130e.11 through 130e.42 of Subchapter B contain virtually identical provisions for determination of competence and certification requirements. For simplicity, comments on these common concepts are combined when possible.

10. Sections 130e.11, 130e.21, 130e.31 and 130e.41. Determination of competence. - Need; Reasonableness and Clarity.

Written examination administered in a classroom or proctored classroom examination

Subsections (a) and Subsection 130e.11(b) use the language “proctored written examination... administered in a classroom setting” or similar language. Many state licensing boards use computerized examinations at centralized locations for professional licensing. These examinations are available at multiple locations throughout the state and on multiple dates. The Department should explain why examinations must be limited in regulation to “proctored written examination... administered in a class room.”

Training course administered in a classroom setting

Commentators have suggested that training and examinations may be needed more often than twice per year in the early years of the program. The regulation limits training to classroom settings. The Department should explore whether these courses could be offered over the internet or by other methods to make them more available.

Other course work

Subsections (a) use similar language that states, “...certification may also include other course work related to requirements set forth in this chapter, which are determined by the Department to be necessary and appropriate.” It is not clear what other related course work may be included beyond the specific “Certification orientation training” listed in either Subsections (b) or Subsection 130e.11(c) respectively. The Department should specify what other course work may be required and included in the examination or delete this language.

Certification orientation training

Subsection 130e.11(c) and Subsections (b) of the other certifications all end with “Other areas...as determined appropriate by the Department.” The Department should include in the regulation all of the areas that an applicant needs to prove proficiency. If other areas are needed in the future they should be added by rulemaking. The Department should justify the need for these provisions or delete them.

Nutrient Management Specialists

Commentators suggested exempting nutrient management specialists from certification requirements. Are nutrient management specialists qualified to perform the duties in this regulation? If so, they could be deemed equivalent and not required to have additional certification as a commercial manure broker or hauler.

11. Sections 130e.12, 130e.22, 130e.32 and 130e.42. Certification requirements. - Need; Reasonableness and Clarity.

Application for certification

The regulation requires:

- Exchange of verification signatures immediately following examinations, signed in the presence of both the applicant and proctor.
- The proctor to submit the application within 5 days.
- Payment of the application fee prior to scoring an examination.
- Short time frames (10 or 15 calendar days) to submit an application, or take the course again.
- The Department to review the documents and score the examination within 30 days.
- Certification to be issued to successful applicants, but does not state when.

Commentators found this process confusing and illogical. They question why an applicant bears the responsibility to verify information. We agree that these provisions are complicated and burdensome, and further question whether all of these requirements are needed. If any of the above requirements are not met, the result is a person waiting months for the next opportunity to get certified. It would be expedient for the applicant, proctor and Department if applicants know whether they passed the examination prior to submission of an application for certification to the Department with the certification fee. The Department should review and streamline this entire application process.

12. Section 130e.51. Certification time frames and recertification requirements. - Need and Reasonableness.

Certification periods

The regulation states some certifications are valid for two years while others are valid for three. Why do these vary? The Department should explain how it chose the certification periods and why they are appropriate.

Reexamination

Persons certified at all levels are required to take the written examination again to be recertified. The SCC and the NMAB both commented that reexamination is not needed. A commentator believes recertification is more burdensome than the original certification.

We agree. The Act does not require reexamination. Section 130b.31 of the Department's regulations does not require reexamination for recertification as a nutrient management specialist. State licensing boards, such as the State Board of Accountancy and the State Board of Pharmacy, provide for reexamination only when the applicant fails the initial examination. The Department should delete this requirement.

13. Section 130e.52. Commercial manure broker and hauler continuing education requirements. - Statutory authority; Need and Economic impact.

Statutory authority

We question the statutory authority for the continuing education requirement. The requirements for certification are specifically established under Section 3 of the Act. However, the Act does not make any mention of continuing education. It is a widely accepted rule of interpretation that when a statute sets forth certain requirements but does not include others, the exclusion of the other requirements is intended. Where the General Assembly intended to require continuing education, it has so stated in clear and unmistakable terms.

Need

If the Department believes it has a statutory basis to require continuing education credits, we further question the need for continuing education credits. For example, the Department needs to explain what benefit a Level 1 commercial manure hauler, who can only transport manure and is prohibited from land applying, would gain from six continuing education credits that justifies the costs imposed. The Department needs to explain the following for each level of certification:

- What developments, progression in technology or other changes does the Department anticipate that require continuing education?
- What subject matter will the Department find acceptable for credit?
- How much will these credit hours cost? How do the benefits outweigh these costs?
- Will courses be available so that certificate holders can easily meet the requirement?
- Can certificate holders get prior approval of continuing education credits? Will out-of-state courses qualify?

14. Section 130e.53. Continuing education credit course providers. - Reasonableness and Clarity.

Paragraph (a)(2) Application content.

This paragraph requires "...the specific locations and the proposed dates and times the course will be offered at each location." Why is it reasonable to require the applicant to make these arrangements prior to course approval? The regulation should allow an applicant to supply this information after receipt of Department approval for the course content.

Paragraph (a)(6) Revocation of course or denial or revocation of credit hours.

This paragraph addresses revocation of credit hours. We agree that when records are falsified, the applicant should not get credit for the course. However, this provision is not clear regarding what happens if a course provider's approval is revoked. Would course attendees lose credits if the provider's approval is revoked after the course is given?

Subchapter C. RECORD KEEPING

15. Section 130e.71. Recordkeeping. - Need; Reasonableness and Economic impact.

Annual records

Paragraphs (a)(3) and (b)(5) require commercial manure haulers and brokers to “compile the daily recordkeeping information into an annual report detailing:

- (i) The name and location of each agricultural operator or other person for which it transported or land applied manure, or both.
- (ii) The total amount of manure transported or land applied for each agricultural operator or other person, or both.
- (iii) The total amount of manure transported.
- (iv) The total amount of manure land applied and the total acreage to which it was applied.”

We question what purpose this annual record would accomplish and what costs it would impose on haulers and brokers. The Department should delete this requirement or explain the need for annual records and why the costs imposed are reasonable.

Facsimile Cover Sheet

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Director for Administration



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INDEPENDENT REGULATORY
REVIEW COMMISSION

To: Janna Ward
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Phone: 2-2853
Fax: 5-8402
Date: March 20, 2006
Pages: 11

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Agriculture's regulation #2-150 (IRRC #2513). 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: *[Signature]* Date: 3/20/06