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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

November 30, 2007

Karl G. Brown, Executive Secretary
State Conservation Commission
407 Agriculture Building
2301 N. Cameron Street
Harrisburg, PA 17110

Re: Regulation #7-418 (IRRC #2634)
State Conservation Commission
Facility Odor Management

Dear Mr. Brown:

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

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Enclosure

cc: Honorable Michael W. Brubaker, Chairman, Senate Agriculture and Rural Affairs
Committee
Honorable Michael A. O'Pake, Minority Chairman, Senate Agriculture and Rural Affairs
Committee
Honorable Mickael K. Hanna, Majority Chairman, House Agriculture and Rural Affairs
Committee
Honorable Art Hershey, Minority Chairman, House Agriculture and Rural Affairs Committee

Comments of the Independent Regulatory Review Commission

on

State Conservation Commission Regulation #7-418 (IRRC #2634)

Facility Odor Management

November 30, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the September 1, 2007 *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 State Conservation Commission (SCC) to respond to all comments received from us or any other source.

1. Section 83.701. Definitions. – Protection of the public health; Reasonableness; Clarity.

Impacts

This term is defined as:

- (i) Conflicts arising from the offsite migration of the odors from agricultural facilities.
- (ii) The term does not include mental or physical health affects (sic), or changes in property values.

There are two concerns.

First, it is not clear what is intended by the exclusion of health effects and property values in Paragraph (ii). In the statutory criteria for eligibility for financial assistance, the SCC must consider whether a project will “improve the health, safety or environment of the people....” (3 Pa. C.S.A. § 511(b)(1)). Public health is also mentioned in civil penalties and remedies (3 Pa. C.S.A. § 514(d)). Moreover, what “conflicts” remain after the exclusion of health effects or changes in property value? Why would an odor that caused the health effect of loss of appetite be excluded from impacts? The SCC needs to explain why Paragraph (ii) is appropriate in the definition of “impacts.”

Second, the clarity of the regulation is affected by how the defined term “impacts” is used in the regulation. The text of the regulation uses the defined term, but then repeats the language from the definition. For example, Section 83.771(a) states, in part:

...Odor management plans are intended to address the potential for impacts from the offsite migration of odors associated with agricultural operations. The plans

are not required to completely eliminate the potential for impacts from the offsite migration of odors associated with agricultural operations.

The SCC should review how the defined term is used in the body of the regulation.

2. Section 83.741. General. – Clarity.

Subsection (h) relies upon certification procedures not yet finalized by the Department of Agriculture. For the final regulation, the SCC should include a cross-reference to the Department of Agriculture's final regulation.

3. Section 83.742. Identification of construction activities. – Reasonableness.

Paragraph (b)(1) exempts "improving storage integrity with less than or equal to a 15% increase in storage volume." The regulation does not specify how to make the 15% comparison. For example, the regulation could be interpreted to allow multiple 10% improvements as long as a single improvement does not exceed the 15% limit. The regulation should specify how to determine the percentage increase to qualify for the exemption.

4. Section 83.761. Identification of agricultural operations and regulated facilities. – Clarity.

Subparagraph (a)(2)(iii) requires a plan to include a description of land use of the "surrounding area." The scope of the "surrounding area" is not clear. This could be interpreted to require a description of adjacent land use, township land use, county land use, etc. The regulation should specify what land use needs to be described. We have the same concern with the phrase "surrounding area" in Sections 83.771(b)(1) and (2).

5. Section 83.771. Managing odors. – Reasonableness; Clarity.

Paragraph (b)(1) requires an evaluation of the "direction of the prevailing winds." The direction of the prevailing wind is one of the components of the calculation of the Odor Site Index which in turn determines the level of Odor Best Management Practices (BMPs) required. Manipulation or error in determining the direction of the prevailing wind can therefore undermine the effectiveness of the Odor Management Plan. The SCC should explain how the direction of the prevailing wind must be determined.

6. Section 83.781. Identification of Odor BMPs. – Reasonableness; Economic impact.

Level 2 Odor BMPs

The Ag Coalition commented urging the SCC to make Level 2 BMPs accessible to the public free of cost. It stated its understanding that level 2 BMPs will be maintained on a secure website and will not be available to the general public. We are concerned that pertinent information may not be readily available to the person most affected by the financial impact of the odor management plan. The SCC should explain what information is not publicly available, why it is not available, the projected cost to obtain the information and why the regulation is reasonable.

Vague phrases

There are two vague phrases in this section. Subsection (b) states BMPs are only required if they are “feasible from a practical and economic perspective.” Subparagraph (c)(1)(i) uses the phrase “normal maintenance activities used in the industry in this Commonwealth.” These phrases are subjective. The SCC should amend these phrases so that they set a specific standard to be followed by the regulated community and enforced by the SCC.

7. Sections 83.791. General recordkeeping requirements and 83.792 Recordkeeping relating to Odor BMPs. – Reasonableness; Economic impact.

These sections require recordkeeping and we note they reasonably allow the records to be kept onsite. However, commentators questioned what records will satisfy the requirements for recordkeeping. They questioned whether records are necessary for level 1 BMPs which are essentially routine maintenance of a farm. We agree that the regulation and Preamble do not contain sufficient information to evaluate what records will be required. We cannot determine what forms are required or the frequency of data entry onto the forms. The SCC should explain the typical recordkeeping envisioned, specify in the regulation the recordkeeping requirements and project the cost of preparing and storing the records.

8. Section 83.801. Initial plan review and approval. – Consistency with statute.

Under 3 Pa. C.S.A. § 509(d) *Plan review and approval*, “[W]ithin 90 days of receipt of an odor management plan or plan amendment, the reviewing agency shall approve or disapprove the plan or plan amendment.” The statute also provides that a complete plan can be implemented “if the reviewing agency fails to act within 90 days of submittal.”

However, Subsection (d) of the regulation states:

If the Commission or delegated conservation district does not act on the plan within the 90-day period, the agricultural operation that submitted the plan is authorized to implement the plan. **The Commission or delegated conservation district will thereafter have another 90 days to complete review of the plan, beginning on the expiration of the initial 90-day review period. If the Commission or delegated conservation district fails to act within the second 90-day period, it will be deemed approved.** (Emphasis added.)

This provision adds a second 90-day review period that is not in 3 Pa. C.S.A. § 509(d). The SCC needs to delete this second 90-day period from the regulation or explain the authority of a reviewing agency to review a plan after it does not act on the plan within the initial 90 days.

9. Section 83.811. Plan amendments. – Reasonableness; Economic impact; Duplication; Clarity.

What information does a plan amendment require?

Subsection (a) requires a plan amendment, but does not specify the amount of information required. Does the level of detail required in a plan amendment differ from an initial plan? The regulation should specify the information required in a plan amendment.

Would an upgrade of equipment require an amendment?

Commentators are concerned that using a new technology could trigger the need for an amendment. Can a farm operator upgrade equipment without the need for a plan amendment?

Vague requirement

Paragraph (b)(3) requires a plan amendment if a change in an operational management system “is **expected** to result in **an increase in the potential** for offsite migration of odors.” (Emphasis added.) This provision is vague and it is not clear how the farm operator can make the judgments required. Would an odor management specialist have to be consulted similar to Subsection (d)? We recommend amending Paragraph (b)(3) to provide a clear standard.

Facsimile Cover Sheet



Phone: (717) 783-5417
Fax #: (717) 783-2664
E-mail: irrc@irrc.state.pa.us

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

To: Amy Smith
Agency: State Conservation Commission
Phone: 787-8821
Fax: 705-3778
Date: November 30, 2007
Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the State Conservation Commission's regulation # 7-418 (IRRC #2634). 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: *Lena Jefferson* Date: 11-30-07