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House of Representatives

COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

October 6, 2010

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2777

PA Independent Regulatory Review Commission
Chairman Arthur Coccodrilli
333 Market Street
14th Floor
Harrisburg, PA 17101

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IRRC
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Dear Chairman Coccodrilli,

As a member and past Chairman of the Commonwealth of Pennsylvania's House Agriculture and Rural Affairs committee, I would like to offer the following comments on the proposed final form regulations concerning the Department of Agriculture's (Department) Milk Regulations. As I have previously expressed, I am deeply concerned with the regulations pertaining to raw milk and my concerns were not alleviated upon reading the Department's response in their Final Rulemaking. I still believe that these regulations violate the constitutionally-protected rights of private contract and search and seizure and I respectfully urge IRRC to disapprove the regulations.

In the Department's Final Rulemaking (response to Comment 139), they state that they "very clearly [have] the authority *and obligation* to regulate direct farmer-to-consumer transactions." They go on to state that it was the obvious intent of the Legislature in 1935 to include direct farmer-to-consumer transactions in the Milk Sanitation Law based upon the lack of exemption within the law. I respectfully disagree with the Department's opinion of their "obligation" and their reasoning, as the Milk Sanitation Law was clearly written to regulate dairy products that are intended to be offered or exposed to mainstream commerce and subsequently could have an effect on the health and well-being of the general public.

As I mentioned in my previous comments, the distinction must be made between raw milk that enters into mainstream commerce, which the Department does have the authority and obligation to regulate, and raw milk that does not enter into mainstream commerce. In the situation where a farmer does not offer or expose the raw milk for sale (there is no advertising and there is no roadside stand) and an individual makes a clear and distinct effort to contact the farmer for the express purpose of purchasing raw milk, they enter into a constitutionally-protected private contract. In such a situation, the milk is in no way exposed to mainstream commerce and poses no threat to the health of the general public, and therefore does not fall under the Department's authority for regulation. The Department has no obligation to regulate, and they have no

authority to infringe upon, a farmer's right to enter into a private contract when the raw and unaltered agricultural product does not pose a threat to the public health.

The Department has, in some cases, a history of upholding the farmer's natural right of property, to offer for gift or trade raw and unaltered agricultural products (i.e. fruits and vegetables) that he has produced via his own labor, without licensing or registration restrictions. In these cases, there is no requirement for the farmer to disclose any pesticides that were used in the production of the product, and since many pesticides are systemic this means that pesticide residue seeps into the product and cannot be removed by washing or peeling. As this could present a health risk for certain population groups, it creates an interesting dichotomy in the Department's regulations. In one case, they trust that the individuals who are seeking a raw and unaltered agricultural product will use appropriate discretion in purchasing products that come from a safe environment and in the other case, they seem to determine that the individual cannot be trusted to make a safe determination and therefore the Department must step in and regulate the product.

Another area that I found particularly concerning was the Department's answers to Comments 205 and 206, regarding the Department seizing, condemning, denaturing, or destroying raw milk that, in the Secretary's opinion, are "unsafe" or a "menace" to public health. The Department's stance is that the referenced language comes directly from the Milk Sanitation Law, and while almost verbatim, the final form regulations add a specific word that I find profoundly troubling: "opinion." Firstly, I am troubled that the Secretary can seize and destroy personal property simply based on a "belief stronger than impression and less strong than positive knowledge," as defined by Merriam-Webster. Secondly, I am concerned that there is no stipulation on what the Secretary must base this opinion; most law enforcement agencies, as the Department describes itself, must base the destruction of personal property on objective evidence, not equivocation. The Department has amended the regulations to include examples of circumstances that would lead to the seizure and destruction of raw milk, however, they are simply examples and do not place any restrictions or parameters on which the Department must substantiate its determination. The Department, in its response, has stated that since they must defend their basis for their decisions, that requirement will temper their actions. However, since there is no clear appeal process for an individual whose property has been seized and destroyed, and since the Department has stated that there is no "just compensation" for the seized product, the lack of a clear and objective method of determination is considerably disconcerting.

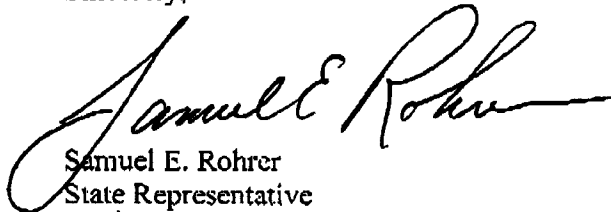
It is also interesting to note that the Department chose to insert the clarifying phrase "for human consumption" 25 times within 15 of the 16 sections of the subchapter pertaining to raw milk and chose not to include that phrase in §59a.416. This dangerously leaves the section open to pertain to all raw milk, whether meant for pasteurization, animal consumption, or for human consumption.

Due to our current economic environment, it is more important than ever to look not only at the overall policy changes that regulations make, but also their fiscal impact. As Secretary Redding recently stated in an article in the *Herald Standard*: "At a time when dairy farmers are struggling to make ends meet...we must remain proactive in ensuring the largest sector of our agriculture industry remains viable today and in the years to come." These regulations will add significant financial burdens to raw milk producers that would make it difficult, if not impossible, to remain

in business. These burdensome requirements include mechanical bottling machines, the necessity to bottle and wash bottles in a room other than the milk room (which will require many producers to incur the expense of constructing separate rooms), and the additional testing requirements (which will cost each permit holder an extra \$740 per year). Placing these additional financial burdens onto dairy farmers who are already struggling will force many to go out of business and will certainly create a negative effect on the viability of Pennsylvania's agricultural industry.

For the aforementioned reasons, I view the proposed regulation as excessive, in some cases unconstitutional, and certainly an undue financial burden on the already struggling dairy industry. I respectfully urge IRRC to disapprove proposed regulation #2777.

Sincerely,



Samuel E. Rohrer
State Representative
128th Legislative District

cc: Rep Mike Hanna, Majority Chairman, House Agriculture and Rural Affairs Committee
Rep. John Maher, Republican Chairman, House Agriculture and Rural Affairs Committee
Sen. Mike Brubaker, Majority Chairman, Senate Agriculture and Rural Affairs Committee
Sen. Mike O'Pake, Democratic Chairman, Senate Agriculture and Rural Affairs Committee