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## INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 25, 2009

Honorable Russell Redding, Acting Secretary  
Department of Agriculture  
211 Agriculture Building  
2301 North Cameron Street  
Harrisburg, PA 17110

Re: Regulation #2-149 (IRRC #2793)  
Department of Agriculture  
Pesticides

Dear Acting Secretary Redding:

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](http://www.irrc.state.pa.us). If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman  
Executive Director  
wbg  
Enclosure

cc: Honorable Michael W. Brubaker, Majority Chairman, Senate Agriculture and Rural Affairs Committee  
Honorable Michael A. O'Pake, Minority Chairman, Senate Agriculture and Rural Affairs Committee  
Honorable Michael K. Hanna, Sr., Majority Chairman, House Agriculture and Rural Affairs Committee  
Honorable John A. Maher, Minority Chairman, House Agriculture and Rural Affairs Committee  
Robert A. Mulle, Esq., Office of Attorney General  
Andrew Clark, Esq., Office of General Counsel

# Comments of the Independent Regulatory Review Commission



## Department of Agriculture Regulation #2-149 (IRRC #2793)

### Pesticides

**November 25, 2009**

We submit for your consideration the following comments on the proposed rulemaking published in the September 26, 2009 *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. Sections 128.2. Definitions.; 128.3. Fees.; 128.10. Licensing requirements for pesticide dealer.; and 128.12. Licensing of a pesticide dealer manager. – Consistency with statute.**

*Pesticide dealer manager*

The statute defines “pesticide dealer” at 3 P.S. § 111.24(32) and sets forth details of pesticide dealer licensure at 3 P.S. § 111.32, including a \$10 annual fee. The Department’s existing regulation includes the \$10 fee in § 128.3(a) and specifies recordkeeping requirements in § 128.11.

The Department is proposing to add a category of licensure of “pesticide dealer manager.” Section 128.2 defines the term “pesticide dealer manager.” Paragraph 128.3(a)(1) sets an annual fee of \$15 for licensure. Section 128.10 specifies further licensure requirements, including Subsection (b) which requires each pesticide dealer to employ at least one pesticide dealer manager. Section 128.12 sets forth details for licensing a pesticide dealer manager.

We have two concerns. First, since the statute only addresses “pesticide dealer,” how is it consistent with the statute to create in regulation the new licensure category of “pesticide dealer manager”? Second, why does the \$15 annual fee for “pesticide dealer manager” exceed the \$10 annual fee for “pesticide dealer,” as contained in 3 P.S. § 111.32(b)?



**2. Section 128.53. Recordkeeping. – Need; Protection of the public welfare; Clarity.**

*Personal identification records*

Subsection (b) requires the pesticide application business to keep and maintain copies of personal information, such as driver’s licenses, valid passports, military identification or Social Security cards. It is not clear what purpose this requirement serves under the Pennsylvania Pesticide Control Act of 1973. Also, if a pesticide application business is required to maintain these records, how must the records be secured to protect against identity theft? The Department should explain the need to copy and maintain these personal identification records. In addition, it is unclear whose records the business is required to maintain: employees, management or both. The final-form regulation should clarify this issue.

**3. Section 128.85a. Ornamental or turf application notification. – Protection of the public health, safety and welfare; Reasonableness; Need; Clarity.**

*Notification*

The notification process in Subsection 128.85a(a) raises five concerns. First, the written request for notification process in Paragraph (a)(1) is not clear. Does “a person” refer to the person receiving the pesticide application, a neighboring property owner or any other person who would want notification from local pesticide businesses? Also, how would a person know that he or she is required to submit a written request for notification? What responsibility does the pesticide application business have if that request is not made? Can the pesticide be applied if the list of property owners required under Subparagraph (a)(1)(i) is not provided?

Second, Subparagraph (a)(1)(i) is confusing regarding to whom notice should be given. It is not a complete sentence. In addition, the provision itself is circuitous, as it is unclear what is the actual “subject” of the provision. Is it the notice itself or the owners of the relevant properties? Also, how would the pesticide business know or verify that the list provided is complete and accurate?

Third, under Subparagraph (a)(1)(ii) it is not clear what is implied by the statement “The notification requirement becomes effective 7 days following receipt of the request...” What was the status of the notification requirement prior to the seven days?

Fourth, Paragraph (a)(2) only requires a 12-hour notice “upon receiving a written request at least 7 days prior to the application date.” Would the 12-

hour notice be required if a written request was received less than seven days before the date of application?

Finally, Paragraph (a)(3) requires the application business to provide a copy of pesticide labels within ten days of receiving a request for them. The ten-day period could allow the application of the pesticide before the labels are provided. There are many circumstances that could raise concerns with the application of a pesticide by a neighbor, including its effects on pregnancies, children, well water and pets. The ten-day period may not allow a neighbor sufficient time to question the application of a pesticide.

We recommend that the Department review Subsection (a) so that it provides a logical notice process and sufficient notice to neighbors who may be concerned about the application of a pesticide near their dwelling.

*Mutual border/contiguous lands*

Subparagraph (a)(1)(i) would require the written request for notification to list the “premises sharing a mutual border.” A commentator states this could be onerous for a large property owner. The commentator notes the existing definition of “land contiguous to a restricted use pesticide application site” excludes premises located more than 100 feet from the application site. The Department should explain why all premises sharing a mutual border must be notified.

In addition, Paragraph (a)(2) requires constructive notice of application on “contiguous lands.” Is this different than “premises sharing a mutual border”? We recommend that the Department use one clearly defined term in Subsection (a).

*Request for notification shall expire on December 31*

Subsection (b) states that “A request for notification made under this subchapter shall expire on December 31 in the year in which it is made.” We question the practicality of this deadline. If a person needs to exterminate pests in December, for example, why should the notice request expire in just a few weeks, particularly after the applicant did all of the work to determine who must be notified? Would the applicant have to re-apply on January 1<sup>st</sup>? We recommend that the Department consider a different method of expiration, such as twelve months after the written request is received.



# Facsimile Cover Sheet



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## INDEPENDENT REGULATORY REVIEW COMMISSION 333 MARKET STREET, 14<sup>TH</sup> FLOOR, HARRISBURG, PA 17101

To: Nicole McCrone  
Agency: Department of Agriculture  
Phone: 2-2853  
Fax: 5-8402  
Date: **November 25, 2009**  
Pages: 5

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INDEPENDENT REGULATORY  
REVIEW COMMISSION  
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**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Department of Agriculture's regulation #2-149 (IRRC #2793). 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: Nicole McCrone Date: 11-25-09