

Comments of the Independent Regulatory Review Commission



Department of Agriculture Regulation #2-159 (IRRC #3015)

Preferential Assessment of Farmland and Forest Land under the Clean and Green Act

October 3, 2013

We submit for your consideration the following comments on the proposed rulemaking published in the August 3, 2013 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (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. Determining whether the regulation is in the public interest.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the proposed regulation and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under § 745.5(a) in the Regulatory Analysis Form (RAF).

The Preamble included with the proposal only provides "a summary of some of the more significant provisions of the proposed regulation." This summary does not provide an adequate description for all of the sections of the rulemaking and the rationale behind the language being added or deleted. Without this information, this Commission is unable to determine if the regulation is in the public interest. In the Preamble submitted with the final-form regulation, we ask the Department to provide more detailed information, including a description of the language proposed for each section of the regulation and why the language is being added or deleted.

In addition, some of the information contained in the RAF submitted with this rulemaking is not sufficient to allow this Commission to determine if the regulation is in the public interest. Specifically, the Department has failed to describe how the regulation compares to those of other states, and the Department has not included a citation to the relevant provisions of the federal definition of small business that were reviewed in the development of the rulemaking and an analysis of their applicability or inapplicability to the regulation. Without this information, we cannot determine if this proposed regulation is in the public interest. In the RAF submitted with the final-form regulation, the Department should provide a description of how the regulation compares to those of other states and how many small businesses will be affected.

2. Implementation procedures.

Several sections of this proposal, including the definitions of “agricultural reserve” and “agricultural use” and § 137b.12(3), are being promulgated to incorporate the “alternative energy” provisions of Act 88 of 2010. These sections of the rulemaking include a phrase similar to the following, “. . . if a majority of the energy annually generated is utilized on the tract.” A commentator has questioned how this provision will be monitored. In the Preamble to the final-form regulation, we ask the Department to explain how this provision will be implemented.

3. Section 137b.2. Definitions. – Consistency with Statute; Implementation procedures; Clarity.

Agritainment

The statutory definition of this term includes the term “hay maze,” but the proposed regulatory definition does not include that term. This may lead to inconsistent administration of the Clean and Green Program under the Pennsylvania Farmland and Forest Land Assessment Act of 1974 (Act). §§ 72 P.S. 5490.1 –5490.13. We suggest that the regulatory definition be amended to include the term “hay maze.”

Change of Use

This definition contains a list of actions that are not considered a “change of use.” A commentator is concerned that the use of the term “sold” under Subsection (ii)(A) is too narrow and would not include conveyances other than sales. In addition, a commentator believes that the phrase “as long as the land continues in eligible use” lacks clarity. We ask the Department to explain how these provisions are to be implemented. We note that similar language is found in the definition of “division by conveyance or other action of the owner.”

Outdoor recreation

Examples of “passive recreational use of land” are included in this definition under Subsection (i). This list of examples is not as broad as the activities listed under Subsection (ii)(B) as it pertains to the allowable use of motorized vehicles. In addition, some, but not all of the examples listed in Subsection (i) are included in the definition of “recreational activity.” Is it the intent of the Department for the definitions of “outdoor recreation” and “recreational activity” to be consistent with each other? If so, we recommend that the definition of “outdoor recreation” be amended to track the definition of “recreational activity.” In the alternative, the definition of “outdoor recreation” could be amended to include a specific reference to “recreational activity.”

4. Section 137b.12. Agricultural use. – Implementation procedures; Clarity.

Example 1 includes the following sentence: “The horses are occasionally pastured, bred and sold.” Inclusion of the word “occasionally” makes this example unclear and difficult to

administer in a consistent manner. We recommend that it be deleted and replaced with a more definitive threshold.

5. Section 137b.51. Assessment procedures. – Consistency with the intent of the General Assembly; Implementation procedures.

The Department is adding Subsection (g), pertaining to valuation of farmstead land, to help implement Act 235 of 2004 and to clarify how farmstead land is to be treated under the Act. A commentator is concerned that this new language, and new language being added to §§ 137b.15(b) and 137b.51(c), does not expressly recognize the intent of §§ 3(g) and 4.2(d) of the Act. 72 P.S. §§ 5490.3(g) and 5490.4b(d). The commentator believes that the proposed regulation should recognize that the requirements for preferential assessment of farmstead land under the Act are not conditioned by enactment of an ordinance by the county commissioners. In the alternative, the commentator states that the rulemaking should expressly recognize the legal effect of the county’s enactment of an ordinance for farmstead land as expanding the scope of farmstead land within agricultural reserve or forest reserve areas to receive preferential assessment beyond what is already required under the Act. In the Preamble to the final-form regulation, we ask the Department to explain how the cited sections of the proposed regulation will be implemented and how these provisions are consistent with the Act.

6. Section 137b.72. Direct commercial sales of agriculturally related products and activities; rural enterprises incidental to the operational unit. – Clarity.

Subsection (b) pertains to roll-back taxes and status of preferential assessment. One commentator has asked if the half acre or less of enrolled land referenced in Paragraph (2) includes ingress, egress and parking areas. Another commentator has asked what is meant by the phrase “direct commercial sales.” We ask the Department to clarify in the final-form regulation how the half acre is to be calculated and what is meant by “direct commercial sales.”

7. Section 137b.73a. Gas, oil and coal bed methane. – Clarity.

Commentators have questioned the clarity of Examples 3 and 4 under Subsection (b). Specifically, they ask if the referenced 50% is a threshold that triggers the prohibition on imposing roll-back taxes. We suggest that these examples be clarified in the final-form regulation.

8. Section 137b.73b. Temporary leases for pipe storage yards. – Implementation procedures; Clarity.

This new section allows the owner of land enrolled in the Clean and Green Program to temporarily lease a portion of the land for pipe storage. A commentator has asked for guidance on the treatment of the land after the lease expires. Would the land that was leased continue to be assessed at fair market value after the expiration of the lease, or would it automatically revert to use value for taxing purposes? We ask the Department to include language in the final-form regulation that to address this situation.

9. Section 137b.81. General. – Consistency with the intent of the General Assembly; Implementation procedures; Clarity.

This section of the Department’s regulations explains how roll-back taxes are to be administered. A commentator is concerned with the new language that is proposed to be added to this section, specifically the commentator notes that the phrase “in accordance with applicable sections of the act” creates confusion relating to the legal effects of roll-back taxes and events that would require the payment of such taxes. We agree and ask the Department to clarify this provision.

The commentator also asserts that the remainder of the new language in this section is inconsistent with Section 6 (a.3) of the Act. 72 P.S § 5490.6(a.3). As noted in our first comment regarding determining if the regulation is in the public interest, the Preamble does not explain why the Department is adding language to this section or the effect it will have on the regulated community. We ask the Department to provide a detailed explanation of why this language is being added and how it is consistent with the intent of the General Assembly and in the public interest.