

## Comments of the Independent Regulatory Review Commission



### Department of Agriculture Regulation #2-177 (IRRC #3035)

### Pennsylvania Preferred Trademark Licensure Program

December 24, 2013

We submit for your consideration the following comments on the proposed rulemaking published in the October 26, 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 RRA (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. Section 107.3. Licensure of the Pennsylvania Preferred trademark with respect to fluid milk. – Determining whether the regulation is in the public interest; Clarity and lack of ambiguity; Implementation procedures.**

Paragraph (d)(1) provides that a person who is licensed to use the Pennsylvania Preferred trademark may commingle Pennsylvania-produced fluid milk with other fluid milk on an incidental, emergency or short-term basis. We find the use of the terms *incidental*, *emergency* and *short-term* to be ambiguous and unclear. What qualifies as incidental or emergency? How long is short-term? In the final-form regulation, the Department should clearly define *incidental*, *emergency* and *short-term*. We ask the Department to explain in the Regulatory Analysis Form (RAF) and Preamble of the final-form regulation the circumstances under which a licensee would be permitted to commingle Pennsylvania-produced fluid milk with other fluid milk under Paragraph (d)(1), and why commingling in these circumstances is reasonable and in the public interest.

We have additional concerns regarding commingling. As the Department states in the Preamble, the Pennsylvania Preferred trademark is an identifier of Pennsylvania origin, and a consumer who purchases milk identified as Pennsylvania Preferred should reasonably expect the milk to be entirely produced in Pennsylvania. Under the exception in Paragraph (d)(1), what quantity of other fluid milk is a licensee permitted to commingle with Pennsylvania-produced milk and still bear the Pennsylvania Preferred trademark? We have similar concerns regarding the basis on which the Department determines whether the commingling is acceptable in Paragraphs (d)(2) and (3). The Department should clearly identify acceptable limits for commingling in the final-form regulation, and explain in the RAF and Preamble why the limits are reasonable and in the public interest.

Also under Paragraph (d)(1), we note that the licensee is required to maintain a record of the commingling, but is not required to obtain approval from the Department in advance of the commingling, nor is the licensee required to notify the Department of the commingling at any time. We ask the Department to explain why it is in the public interest not to require either approval or notification regarding commingling under Paragraph (d)(1).

Finally, Paragraph (d)(3) provides that a licensee who seeks to commingle Pennsylvania-produced fluid milk with other fluid milk “may, before the commingling occurs, contact the Department as described in paragraph (1) for confirmation as to whether the proposed commingling is acceptable to the Department.” The term *may* is non-regulatory language which indicates that this provision is optional. It is inappropriate to include optional language in regulations. If the Department retains Paragraph (d)(3) in the final-form regulation, the Department should amend the provision to state what is required of licensees in advance of purposeful commingling. The provision should be further amended for clarity since Paragraph (d)(1) does not describe how a licensee would contact the Department. Alternatively, if the Department amends the regulation to include definitions and limits regarding acceptable commingling as previously recommended in this comment, the Department could delete this provision altogether.

We note that if the intent of Paragraph (d)(3) as proposed is to offer guidance to the regulated community, the Department should consider including the information in a policy statement.

## **2. Compliance with the RRA.**

We ask the Department to revise its response to Question #15 of the RAF in order to ensure that the new criteria required by Act 76 of 2012 related to small businesses are met. The Department should provide 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.