

January 11, 2006

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Commercial Manure Broker and Hauler Program
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Mr. Berger,

Citizens for Pennsylvania's Future ("PennFuture") hereby submits for your consideration the following comments concerning the proposed rulemaking regarding commercial hauler and broker certification (7 Pa. Code Ch. 130e), as published at 35 Pa. Bull. 6751 (December 17, 2005).

I. REGULATIONS REQUIRE CLARITY REGARDING WHO IS THE REGULATED COMMUNITY

The regulations make it quite clear that commercial manure haulers and commercial manure brokers are part of the regulated community. 7 Pa. Code § 130e.4(a). However, the regulations fail to adequately detail who comprises the remainder of the regulated community. Section 130e.4(b) states that, "[a] person who hauls or applies manure, generated by animals not under that person's management control, to land not under that person's management control, shall be certified at the proper certification level as a commercial manure hauler or broker."

- A. The term "management control" must be specifically defined in the regulations.

The ambiguity over who falls into the regulated community under Section 130e.4(b) revolves around the critical term "management control," which is not defined in the regulations. PennFuture suggests that this term should be specifically defined in the definitions section of the regulations. PennFuture suggests that the definition of "management control" should be modeled after that in *Pennsylvania's Nutrient Management Act Program Technical Manual*, October 1998, p. 4. The Technical Manual states that "management control can be thought of as including the authority to determine what crops are grown, what nutrients are to be applied and where the operator or a person working for the operator is doing the actual farming practices on the land." *Technical Manual*, p. 4. Clearly this definition of management control goes to the control of lands, which is only part of the consideration of management control in the manure hauler and broker regulations at issue here. PennFuture suggest that a new definition of "management control" added to Section 130e.2 should read, "management control of land exists when one has an ownership interest in the land or one has the authority to

make determinations regarding what crops are grown, what nutrients are applied, and what management practices are installed or followed. Management control of animals exists when one has a direct ownership interest in the animals or is responsible for the day to day care of the animals, such as the authority to make determinations regarding feed rations, veterinary care, and when the animals are ready to be slaughtered.”

- B. A person should have to obtain certification under the regulations if he either hauls or land applies manure that is not generated by animals under his management control or applies manure to fields not under his management control.

Section 130e.4(b) states that, “[a] person who hauls or applies manure, generated by animals not under that person’s management control, to land not under that person’s management control, shall be certified at the proper certification level as a commercial manure hauler or broker.” This wording suggests that a person only has to obtain certification under the regulations if the manure is generated by animals not under the person’s management control *and* the manure is applied to land not under the person’s management control. PennFuture suggests that the wording should be changed to make it explicit that a person must obtain certification under the regulations if he *either* hauls or land applies manure that is generated by animals not under his management control *or* land applies manure on fields over which he has no management control.

The regulations do not assume that haulers and brokers undertake the same activities and responsibilities. The regulations understand that some persons may only haul manure while other persons may only land apply manure. The regulations clearly distinguish the responsibilities of the different levels of haulers and brokers. The regulations place restrictions on individuals given the increased level of responsibility they take over manure, requiring more of those who land apply manure than of those who haul manure. The catchall provision of Section 130e.4(b) should mimic the requirements for commercial haulers and brokers in order to fully protect water quality. Persons who haul or land apply manure generated by animals not under their management control should have to meet the requirements of the regulations. Additionally, persons who land apply manure to fields not under their management control should have to meet the requirements of the regulations. In sum, Section 130e.4(b) should be amended to read, “[a] person who hauls or applies manure shall be certified at the proper certification level as a commercial manure hauler or broker if either: 1) the person hauls or applies manure generated by animals not under that person’s management control, or 2) the person applies manure to land not under that person’s management control.”

- C. A farmer’s exemption from the certification requirements should not be extended to his direct employees.

Section 130e.4(b) is fairly clear that a farmer himself is generally not required to obtain certification if the farmer has management control over the land or the animals that generate the manure. However, this raises an issue as to whether a farmer’s exemption from the regulations is extended to employees acting on the farmer’s behalf. PennFuture

suggests that the farmer’s exemption from certification requirements in certain situations should not be extended to his employees.

The situation of farm employees and the issue of their exemption from the certification requirements is analogous to manure haulers acting on behalf of a manure broker. Manure brokers may have one or more manure haulers working on their behalf. However, each of the individual haulers must be certified to transport or land apply manure under the regulations. Individual certifications are required because knowledge regarding the proper handling, transport and land application of manure is based on the individual who is undertaking the activity, not the knowledge of the broker for whom he works. The regulations should adopt a policy for farmers and their employees that is similar to manure brokers and haulers, each individual is responsible for his or her own certification and exemptions from the regulations do not pass through one individual to another.

II. DEFINITIONS NEED TO BE CLARIFIED OR ADDED TO THE REGULATIONS

- A. The definition of “nutrient” under these regulations should be identical to the definition given to that term in the proposed nutrient management regulations.

The definition of a nutrient in Section 130e.2 attempts to mimic that in the proposed, but not yet published, nutrient management regulations. While, the definition proposed in the manure hauler and broker regulations at Section 130e.2 is similar to that in the proposed nutrient management regulations at 25 Pa. Code § 83.201, it is not identical. There are two main differences between the definitions of nutrient. The first is that the nutrient management regulations’ definition indicates that the list of examples of nutrients is not an exhaustive list¹, while the definition in the manure hauler and broker regulations at Section 130e.2 indicates that the list of examples is exhaustive.² The second difference between the definitions is that the nutrient management regulations’ definition references “biosolids” as an example of a nutrient, where Section 130e.2 uses the term “sewage sludge.” For consistency, “sewage sludge” should be replaced with “biosolids” in Section 130e.2. More generally, PennFuture suggests that the manure

¹ A substance or recognized plant nutrient, element or compound which is used or sold for its plant nutritive content or its claimed nutritive value. The term includes, but is not limited to, livestock and poultry manures, compost as fertilizer, commercially manufactured chemical fertilizers, biosolids or combinations thereof. The only nutrient elements of concern under this subchapter, based on their potential to impact the quality of surface waters or groundwater, are nitrogen and phosphorus. Unless the context clearly indicates otherwise, “nutrients” as used in this subchapter shall mean nitrogen and phosphorus. Proposed, but not yet published, 25 Pa. Code 83.201.

² *Nutrient* –

- (i) A substance or recognized plant nutrient, element or compound that is used or sold for its plant nutritive content or its claimed nutritive value.
- (ii) The term includes livestock and poultry manures, compost used as fertilizer, commercially manufactured chemical fertilizers, sewage sludge or combinations thereof.

7 Pa. Code § 130e.2

hauler and broker regulations define the term “nutrient” by referencing the definition in the nutrient management regulations or adopting that proposed definition verbatim.

- B. The regulations should add a definition for the term “manure.”

The purpose of the proposed regulations is to establish a certification process for persons who transport and land apply “manure.” However, the proposed regulations fail to define that essential term. To avoid confusion about the scope of the regulations, PennFuture suggests that the manure hauler and broker regulations avoid an attempt to reinvent the wheel and adopt the definition of manure by reference or verbatim from the nutrient management regulations. The proposed nutrient management regulations define manure as, “[a]nimal excrement, including poultry litter, which is produced at an agricultural operation. The term includes materials such as bedding, washwater and other materials which are commingled with that excrement.” 25 Pa. Code § 83.201.

- C. The definition of the term “supervise” should be moved to the general definitions section of the regulations.

The definition of the term supervise should be moved from Section 130e.5(a)(1)(iii) to the general definitions location at Section 130e.2. Section 130e.5(a)(1)(iii) states that “[f]or purposes of this section, ‘supervise’ means direct supervision. When a level 2 certified commercial manure hauler is land applying manure on behalf of a commercial manure broker, the commercial manure broker shall have at least a level 1 certified commercial manure broker on the site where the manure is being land applied. The commercial manure broker is responsible for assuring the proper application of the manure to that site and is jointly responsible for any misapplication or violation.”

The term supervise, along with supervision, is used in additional sections of the regulations. To more clearly convey what is meant by this term and the responsibilities it places upon various members of the regulated community, the term should be defined in Section 130e.2. PennFuture suggests that the definition of supervise should state, “in-person, direct observation and monitoring of manure hauling and the land application of manure. The person responsible for observing and monitoring such activity is jointly responsible for the proper hauling and land application of manure. The person responsible for observing and monitoring such activity is also jointly responsible for any mishandling of manure or misapplication of manure or other violations of the regulations.”

III. GENERAL CLARIFICATIONS NEEDED IN THE REGULATIONS

- A. A typographical error related to the general purpose of the regulations should be corrected.

Section 130e.4(a) of the regulations attempts to establish the general rule of the regulations, that a person can not transport or land apply manure unless that person has

satisfied the requirements of the regulations. However, this section appears to contain a typographical error that negates the intended purpose of the regulations. Section 130e.4(a) states, “[n]o commercial manure hauler or commercial broker may *not* transport or land apply manure in this Commonwealth on behalf of an agricultural operation, regardless of where the manure is generated, unless the hauler or broker has satisfied the following requirements. . . .” Section 130e.4(a), emphasis added. The italicized “not” should be removed from this section to restore the intended meaning of the regulations.

- B. The payment of the certification fee should not be required until an applicant has successfully passed the written examination or the certification fee should be refundable.

The certification requirements sections of the regulations detail the steps that an applicant must take to obtain certification after completion of the written examination that determines competence in the specified subject areas. Sections 130e.12(d), 130e.22(b), 130e.32(b), and 130e.42(b). Generally, the applicant must apply for certification without the luxury of having the results from the written examination in hand, thus not knowing whether he or she has indeed proved competence. The application sections refer to the necessity of the appropriate certification fee being submitted with the application. This certification fee is in addition to the examination fee paid by the applicant to take the written examination. However, those sections do not detail what should happen to the fee if the applicant fails to successfully pass the written examination.

Section 130e.3(a) establishes the fees for certification, which range from a low of \$125 to a high of \$450. This section notes that the fees are nonrefundable. It appears that one must apply for certification and pay the applicable nonrefundable certification fee without knowledge that one has in fact met the requirements. Thus, if the applicant fails to pass the written examination he or she forfeits the certification fee.

PennFuture suggests one of two alternative approaches regarding the payment of fees for certification. First, the timing of the application for certification could be delayed until after the results of the written examination are known to the applicant. This would allow for the applicant to clearly know if he or she has satisfied the competency requirements before paying the nonrefundable certification fee. Alternatively, the certification fee could be refunded if the applicant fails to successfully complete the written examination. While both alternatives are acceptable to PennFuture, the first is preferred since it would be easier for the Department to administer.

IV. TO OBTAIN RECERTIFICATION, ALL MANURE HAULERS AND BROKERS SHOULD BE REQUIRED TO BE IN GOOD STANDING

The regulations indicate that level 1 and 2 manure brokers and level 3 manure haulers do not need to be in good standing to obtain recertification. Section 130e.51(1) and (4). The regulations indicate in other sections that being in good standing means not

having any “current, pending or unsatisfied past violations of the act, Act 38 or The Clean Streams Law.” Section 130e.51(2) and (3). Thus, a hauler or broker that is *not* in good standing could have current, pending or unsatisfied violations.

The purpose of regulating manure haulers and brokers is to ensure that only those who are properly qualified are transporting and land applying manure. Having violations of any of the above referenced acts indicates a lack of qualification or lack of understanding of the requirements of those acts. Additionally, level 1 and 2 manure brokers and level 3 manure haulers are those persons whose actions are most likely to have an impact on water quality since they are given the authority to apply manure or oversee the application of manure. For water quality protection reasons, these are the persons that should have the most restriction placed upon them so as to sufficiently protect the water resources of the Commonwealth. PennFuture suggests that the Sections 130e.51(1) and (4) be modified to require that level 1 and 2 manure brokers and level 3 manure haulers be in good standing to obtain their recertification under the regulations.

V. RECORDS SUBMITTED BY MANURE HAULERS AND BROKERS TO THE DEPARTMENT SHOULD BE MAINTAINED AS PUBLIC RECORDS UNDER THE RIGHT TO KNOW LAW

Section 130e.52(c)(1) states that commercial manure brokers and commercial manure haulers must send an annual summary to the Department detailing the amount of manure brokered, stored, transported, stacked and land applied. PennFuture suggests that these records should be open and available to the public for inspection under the Right to Know Law. Information regarding the movement of manure and its land application is critical to those individuals that monitor water quality. This information could also help those in the industry identify areas of nutrient concentration and areas where nutrients are needed. For the above reasons, PennFuture suggests that the Department maintain the records sent to the Department under Section 130e.52(c)(1) as public documents.

Respectfully submitted,

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cc: Jim Smith, Regulatory Analyst
Independent Regulatory Review Commission