



MEMORANDUM

This memorandum analyzes the draft ACRE legislation presented to our office on or about April 12, 2005. The draft legislation includes four major policy changes: the preemption of local ordinances, the creation of an Office of Ordinance Review and an Agricultural Review Board, the requirement of those who land apply manure to follow either a manure application setback or plant a vegetated buffer zone, and the requirement for new and certain expanding concentrated animal operations to obtain an odor management plan. The critiques and concerns related to each of these policy changes are detailed below.

In summary, this draft legislation produced by Secretary Wolff is a stunning reversal from how ACRE was described in press releases shortly after the Governor vetoed House Bill 1222. Indeed, the draft legislation is worse than the bill that the Governor vetoed.

The draft legislation sweepingly eviscerates local governments' abilities to protect local property owners from even the most menacing threats created by industrial farming facilities. It does so by direct prohibitions and by creating a legal minefield that would deter almost any local government from adopting even the most needed ordinances for fear of being subject to costly litigation. For example, the draft legislation outlaws the ability of local governments to adopt reasonable ordinances that limit the siting of industrial farming facilities next to houses of worship, schools, hospitals, nursing homes, playgrounds, and parks.

The draft legislation destroys the authority of local governments to protect their houses of worship, schools, hospitals, nursing homes, playgrounds, and parks, even though nothing in state law either provides meaningful protection for these facilities or prevents industrial farming facilities from opening right next to them. The dangerous weakness of current state law and regulation of industrial farming facilities was again in full view just this month in Lebanon County when a 2 million gallon egg wastewater retention pond collapsed, spilling its contents into surrounding areas and posing a potential threat to drinking water.

Sooner or later the inadequacy of state law and the inability of local governments to protect their citizens will cause a disaster in Pennsylvania that will harm the state's reputation and most tragically sicken or kill people. This draft of ACRE, therefore, is a ticking time bomb.

Gone from the draft legislation is any pretense that ACRE would create a way to mediate conflicts between local property owners and industrial farming operations. Instead the draft legislation creates a new, expensive bureaucracy that will be a forum for litigation

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and for lawyers to do battle. This new bureaucracy duplicates the court system and is a typical example of government growing without need.

Moreover this new bureaucracy would create an Agricultural Review Board whose membership almost certainly contains real bias or the appearance of bias. The composition of the board at best is unbalanced.

What follows is a detailed legal analysis of the draft legislation.

I. PREEMPTION OF LOCAL ORDINANCES (Section 311(a))

Under the ACRE legislation, virtually any local ordinance that impacts a farming operation could be subject to review. Previous drafts of the legislation (specifically the August 9, 2004 draft) limited the scope of review of local ordinances to those that were potentially in conflict with the Right to Farm Law and the Nutrient Management Act. The proposed legislation does not have this limited scope and exposes all local regulations to preemption challenge under any State law.

The proposed legislation prohibits local governments from adopting ordinances that prohibit or limit normal agricultural operations and those that restrict or limit the ownership structure of these operations. Of these two prohibitions on local governments, the first is the much more expansive. Local governments seeking to defend their ordinances against allegations of limiting or restricting an agricultural operation would have to show that they had express or implied authority under State law. The local government, in defending the validity of its local ordinance, would also have to show that it is not prohibited or preempted under State law.

A. Local Zoning, Subdivision and Land Development Ordinances Exposed to Review

This expansive ordinance review provision might expose local ordinances developed under the Municipalities Planning Code (hereinafter “MPC”) (such as zoning ordinances, subdivision ordinances and land development ordinances) to challenge and review by the Office of Ordinance Review (hereinafter “OOR”) and Agricultural Review Board (hereinafter “ARB”). The MPC states that zoning ordinances must encourage the “viability of agricultural operations.”¹ The same section of the MPC further states that zoning ordinances may not restrict the development of agricultural operations in geographic areas where agriculture has historically been present, except when such an operation will present a threat to the public health and safety. Challenges to zoning ordinances before the OOR and ARB would center on whether the ordinance is beyond the authority given in the MPC or is preempted by ACRE or other State law.

The issue created by ACRE is whether the OOR and ARB would even have authority to review zoning, subdivision and land development ordinances or whether review of these

¹ 53 P.S. § 10603(h)

provisions is exclusive to zoning hearing boards and municipal governments. The MPCCode states:

A landowner who, on substantive grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts the use or development of land in which he has an interest shall submit the challenge either: (1) to the zoning hearing board under section 909.1(a); or (2) to the governing body under section 909.1(b)(4), together with a request for a curative amendment under section 609.1.²

Section 916.1 provides that challenges to the validity of an ordinance are proper before a zoning hearing board or municipal government. According to the MPC, this jurisdiction is exclusive to the zoning hearing boards and municipal governments,³ whose decisions on the validity of such ordinances are subject to review by the courts of common pleas.⁴

Today, it is clear how one challenges the validity of local ordinances under the MPC and clear who has authority to rule on the validity of local ordinances. But ACRE confuses the issue.

Although Section 331 provides that ACRE does not modify or supersede any other statute, it grants the OOR and ARB authority to review the validity of any ordinance that is purported to violate the prohibition in Section 331, and it does not state that the OOR and ARB may not review ordinances adopted under the MPC. If the proposed legislation is intended to authorize the OOR and ARB to review MPC ordinances, it is an unnecessary expansion of government. It is duplicative of a process that already exists for the purpose of reviewing the validity of local ordinances. This duplication is a wasteful and inefficient expansion of government.

If, instead, challenges to the validity of zoning and land development ordinances are intended to remain exclusively before zoning hearing boards and municipalities, as provided in the MPC, ACRE should make clear that the OOR and ARB have no authority to review such ordinances.

B. Regulations Promulgated Under Police Powers Exposed to Review

Many local governments rely upon their police powers for authority to implement general local ordinances. The authority to enact these ordinances is derived from the police power of the State. The State delegates its police power to the local government through a series of municipal codes. Local ordinances that are developed under the police powers of a township may address issues such as protecting sensitive installations (nursing homes, hospitals, daycares, schools) from odors or fly swarms resulting from manure storage and spreading or large confinement operations. Under ACRE, for example, a municipality could not establish a manure storage setback from a nursing home that is

² 53 P.S. § 10916.1

³ 53 P.S. § 10909.1

⁴ 53 P.S. §§ 11001-A through 11006-A

more stringent than the general 100-foot restriction from a property line provided by the existing state regulation for all residences.⁵

Again, ACRE would unnecessarily create a duplicative mechanism for challenging the validity of municipal ordinances adopted pursuant to delegated police powers. Local ordinances are already subject to judicial review for their validity by the courts of common pleas.⁶ Review by the courts of common pleas also exists for challenges to the enforcement or application of an ordinance in a particular circumstance.⁷

II. OFFICE OF ORDINANCE REVIEW AND AGRICULTURAL REVIEW BOARD

A. Structure of OOR/ARB (Sections 312(h) and 313(a-c))

1. Lack of Expertise in SCC

The State Conservation Commission's principal function to date has been the development and implementation of the state standards governing nutrient management. Placement of the Office of Ordinance Review within the SCC is unwise, because the SCC does not have expertise in reviewing ordinances to determine their legality. Additionally, the SCC is currently a very small administrative agency without access to its own independent legal staff.

2. Issues Related to Bias Toward Agricultural Interests

The structure of the ARB is heavily stacked to favor agricultural interests and is not impartial. The appointee to the ARB from a college of agricultural science at a State-related university would lack impartiality. The agricultural science departments at State-related universities are heavily funded by agribusiness, which obviously has a direct, vested interest in the litigation before the ARB. The ARB will be comprised of political appointees, most of whom will not be familiar with the issues of public health, environment, and property values surrounding industrial farming. Many of these officials will often not be well versed in constitutional or municipal law. Since the OOR and ARB lack expertise in constitutional and municipal law, decisions before the OOR and ARB will essentially be made by attorneys for the Department of Agriculture and adopted by the OOR and ARB.

Having a representative of the Department of Agriculture defend the decisions of the OOR and ARB creates a perception of bias in favor of agricultural interests. Additionally, concerns may be raised about whether these attorneys would vigorously defend decisions of the OOR and ARB in the somewhat unlikely event that the ARB upheld a local ordinance.

⁵ 25 Pa. Code § 83.351(a)(2)(iv)(E)

⁶ 53 P. S. § 66601(f) as to Second Class Townships

⁷ 2 Pa. C. S. §§ 751-754

3. Costly Process

A two-tiered review will add additional expense for all parties, since virtually all parties will need legal representation before the OOR and ARB to establish a proper legal record. Failure to obtain counsel would put any party in legal peril.

B. Lack of Mediation (Sections 314-316)

The original ACRE initiative was touted as a means of mediation. The goal was to bring parties to the table to negotiate in a structured process.

But now we find that the draft ACRE legislation is completely void of any mediation like dispute resolution processes. The OOR and ARB proceedings, however, are quasi-judicial. They involve oaths, subpoenas, cross-examination. They collect evidence and hand down an adjudication, which then can be appealed to the formal court system. ACRE is not a mediation process but rather an additional, duplicative adjudication.

C. Lack of Meaningful Public Participation (Sections 314-316)

Residents and landowners will also have to be included very early in the process to ensure that their concerns are addressed and heard by the OOR and ARB. These interested parties would be well advised not to rely upon the township to represent their interests, as their interests could become divergent. Generally, a municipality would have an interest in seeing that the validity of its ordinance is upheld. This may not, however, be the case when there is a change in the local government. New government officials may not be eager to support a local ordinance initiated by the old officials.

While petitions to and decisions of the OOR are noticed to the public, appeals to the ARB are not noticed to the public and notification of a hearing before the ARB comes, at a maximum, 10 days before the hearing. This offers little opportunity for landowner/resident concerns to be heard, de novo, before the ARB. Intervention before the Commonwealth Court will have little meaning for landowner/resident interests where the record below does not fully reflect community concerns.

D. Jurisdiction and Procedural Nightmares (Section 317)

The provisions related to a cease and desist order lack clarity as to the effect of such an order. The local government is placed in a quagmire when a farmer or landowner/resident obtains a cease and desist order against it, but an appeal to Commonwealth Court has yet to be heard or ruled upon. Section 317 does not provide that an appeal to the ARB or to the Commonwealth Court acts as a supersedeas of the appealed adjudication. It also authorizes the OOR or ARB to seek enforcement of their cease and desist orders immediately. This suggests that an adjudication by the OOR or ARB is immediately enforceable.

No mechanism exists for the local government to supersede the OOR or ARB adjudication while completing the administrative process and obtaining a ruling from a judicial body. Given the time involved in seeking ARB review and the inability to obtain a supersedeas, a township that wants to continue to enforce its ordinance must defy the OOR or ARB adjudication, force the OOR or ARB to issue a cease and desist order, defy that order, and force the OOR or ARB to seek enforcement of the cease and desist order by the Attorney General. This could result in three, or more, proceedings at once.

The first would be the township's appeal to the ARB or to Commonwealth Court. The second would be the Attorney General's enforcement action against the township to cease and desist enforcing the local ordinance. The third would be the township's enforcement against a farmer for violation of the ordinance.

In light of the above, the legislation should expressly address what effect decisions by the OOR and ARB have on implementation of an ordinance that remains subject to further appeal. The legislation must clarify if appeal to the ARB or Commonwealth Court acts as an automatic supersedeas, and if not, the legislation should include a provision to ask the ARB or court for one immediately.

A related hypothetical occurs when review of the ordinance is begun before both the quasi-judicial OOR/ARB and before the court of common pleas. Both of these reviewers could come to very different conclusions about the legality of the local ordinance. The Commonwealth Court would review decisions by both of these bodies. The problem would be which decision should be given effect before the Commonwealth Court rules in either or both of the cases.

Another consideration is whether a court must accept the adjudication of an executive branch agency (the OOR or ARB) on a legal issue (the validity or invalidity of a local ordinance) in a collateral enforcement proceeding. For example, this situation would present itself when the Attorney General seeks an order from a court of common pleas for a local government to cease and desist enforcement of a local ordinance. If the ordinance review proceeding remains pending before the ARB or Commonwealth Court, but Commonwealth Court has not yet ruled, may the township defend against the Attorney General's action on the ground that the ordinance is valid, and may the court decide that issue?

E. Existing ordinances (Section 311(b))

The ACRE legislation applies to existing ordinances, as well as those proposed after the effective date of the legislation. This creates an immediate concern regarding ordinances that are currently being litigated before courts of common pleas, and the possibility of conflicting rulings on those ordinances. It may, additionally, cause a race to Commonwealth Court. The legislation also fails to include a statute of limitations, indefinitely exposing local ordinances to challenge.

III. BUFFERS/SETBACKS AND OTHER NUTRIENT MANAGEMENT ACT CONSIDERATIONS

A. Repeal of Nutrient Management Act (Section 2)

It is unclear why the Nutrient Management Act is repealed and then restated in virtually identical language. This seems illogical and only creates opportunity for mischief.

B. Preemption Language (Sections 311 and 519)

The preemption language in the draft legislation mimics that of the Nutrient Management Act. The draft, however, continues to include two contradictory preemption doctrines that are likely to create even greater confusion as to the standard of review by the OOR and ARB. The ACRE legislation uses both the “occupy the field” preemption and “conflict” preemption language. Occupy the field preemption means that the governmental body intends to be the sole regulatory body, and no other body can regulate on this issue. An example of this would be the Nuclear Regulatory Commission, which has sole legal authority to regulate nuclear facilities. States and local governments are not provided any authority to regulate nuclear facilities because the federal government occupies this field. Conflict preemption means that multiple bodies may regulate on a topic so long as the lower body’s regulations (i.e. municipal government) are consistent with (and, in the context of the Nutrient Management Act, also no more stringent than) the higher body’s regulations (i.e. state government).

The likely result is that people who support a local ordinance will claim that it is consistent with the Nutrient Management Act (or equivalent language in ACRE) and, therefore, is expressly authorized under Section 519(d), which allows for local regulation so long as it is consistent with and no more stringent than the state regulations adopted under the Nutrient Management Act/ACRE. Those opposed to a local ordinance will claim that it is preempted because the Nutrient Management Act (or equivalent language in ACRE) occupies the whole field and that local governments are not allowed to enact any more regulation.

According to the language of the draft legislation, both sides will be correct. This creates a quagmire.

C. Definition of Surface Water (Section 503)

The definition of surface water for the purpose of setbacks and buffers fails to address many critical water bodies. The definition fails to include: rivers, reservoirs, wetlands, springs, natural seeps, and estuaries as a similar definition in 25 Pa. Code § 92.1 (related to the National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance definition of surface water) does.

D. Setbacks (Section 507)

1. Inconsistency with Proposed CAFO Rulemaking

DEP has proposed regulations related to setbacks in the CAFO program update that are similar to those stated in ACRE. DEP's regulations would be applicable to a broader category of farming operations than those proposed in the ACRE legislation.

The CAFO regulations, as published as a proposed rulemaking, would require CAFOs, CAOs and all other farming operations to maintain a vegetated buffer or manure application setback from surface waters.⁸ The provision, as drafted in the ACRE legislation, only applies to manure generated by a CAO and utilized by a CAO or importer. It fails to include any mention of manure generated by a CAFO or other smaller agricultural operations. There are some facilities that are classified as a CAFO without additionally being classified as a CAO. Additionally, there are many agricultural operations that are neither a CAFO nor a CAO. Thus, under the ACRE legislation many facilities will be exempted from being required to follow this setback. In sum, this provision fails to fully close the export loophole.

2. Does DEP Retain Authority to Establish Setbacks and Buffers in Light of ACRE Legislation?

By placing the manure application setbacks and buffers in both the CAFO Rulemaking and the ACRE legislation a serious issue is raised. The ACRE legislation authorizes the Commission to develop and enforce the setback and buffer regulations. The CAFO Rulemaking, however, authorizes DEP to require appropriate buffers and setbacks.⁹ A question, thus, arises whether DEP retains authority to regulate buffers and setbacks under the CAFO Rulemaking when the legislature has given specific legislative authority to the SCC to regulate buffers and setbacks. The principle being that where the legislature has spoken, effect should be given to the specific legislative standard. A valid argument, therefore, can be made that the SCC gains authority to establish setbacks and buffers for manure applications.

The ACRE legislation, however, also contains a "savings" clause that may preserve the DEP's authority to regulate under the Clean Streams Law.¹⁰ DEP currently has authority to require manure application setbacks and buffers under Section 402 of the Clean Streams Law. Thus, DEP can argue that the language in ACRE allowing the SCC to establish setbacks and buffers does not reduce DEP's authority to similarly establish setbacks and buffers.

It is unclear what effect the draft ACRE legislation will ultimately have on DEP's ability to establish setbacks and buffers for manure application, especially in light of the

⁸ Proposed 25 Pa. Code § 91.36(b)(2) and Proposed 25 Pa. Code § 92.5a(d)(1)

⁹ DEP's buffers and setback authority has not, to date, been removed from the Proposed Rulemaking though it could possibly occur before final publication of the Rules.

¹⁰ See Section 521

regulatory revisions to the CAFO program that have not yet been published as a final Rulemaking. That lack of clarity creates uncertainty and endangers important state regulatory authority.

3. Severability Clause

If DEP decided to remove language from the CAFO regulations establishing setbacks and buffers, there would be reason for concern. Section 523 contains a severability clause. It states that the provisions of the Act are severable. It further states that if any of the provisions related to the ARB (Chapter 3) are invalidated then any changes related to the Nutrient Management provisions will also be void. This provision merely memorializes a trade off negotiated between the drafters of ACRE and agribusiness. Agribusiness agrees to CAO and importer setbacks in ACRE, if, and only if, they are provided a quasi-judicial forum for challenging local regulations.

If the ACRE legislation becomes law and any provision related to the ARB is invalidated, the Commission would lose its authority under ACRE to establish setbacks and buffers, leaving surface waters unprotected by a buffer requirement unless the EQB amended the CAFO regulations.

4. Continuity with Pennsylvania Technical Guide

The technical requirements of a 100-foot manure application setback or alternatively the 35-foot vegetated buffer are both contained in the CAFO Rulemaking and the ACRE legislation. Thus, the same standards are utilized. The CAFO Rulemaking, however, specifically sought comment on increasing the size of the vegetated buffer to 50 feet to be in line with the current standard for a vegetated buffer established under the “Pennsylvania Technical Guide,” published by the United States Department of Agriculture, Natural Resources Conservation Service. The ACRE legislation only proposes a 35 foot vegetated buffer.

F. Proposed Regulatory Updates (Sections 504(4), 506 and 522)

The draft legislation fails to allow for the continued update of the Nutrient Management Regulations by the State Conservation Commission. The sections that used to contain language related to regulatory updates (Sections 504(4) and 506) have been partially removed.¹¹ An entire section (Section 522) has been added regarding regulations. The old sections related to regulatory revisions were housed in a section dealing with duties of the SCC. The new section authorizes the Department of Agriculture to adopt regulations to enforce the chapter. This creates ambiguity as to who actually has statutory authority to promulgate regulations and whether the currently proposed regulations to the Nutrient Management Program would be carried through by the SCC or the Department.

¹¹ These sections used to state that at a time certain and periodically thereafter, the Commission would evaluate the regulations and suggest changes when necessary. This language was replaced by inserting the actual date and removing the “and periodically thereafter” language.

IV. ODORS AND ODOR MANAGEMENT

The major selling point of the ACRE legislation to environmental and community interests has been the inclusion of regulation of odors from certain animal production and manure storage areas. This might have been an improvement over the existing regulation of odors and air pollution, which is none. The proposed system, however, has major loopholes that would make it completely ineffective. These loopholes are discussed below.

A. Failure to Regulate Existing Facilities (Section 509(a))

One can infer from the qualifying criteria of the ACRE legislation that it does not address odor management concerns at existing facilities (including existing animal housing facilities and manure management facilities at an expanding facility). Pennsylvania researchers have found that utilizing a feed additive or treating manure most significantly reduces odors. Both of these management practices can certainly be applied to existing facilities as well as expanding or new facilities. Additionally, odor concerns at these facilities are no less than at farming operations that will be constructed in the future. The legislation, therefore, should require odor management at all animal housing facilities and all manure management facilities.

B. Failure to Address Land Applications (Section 509(a))

One can infer from the qualifying criteria of the legislation that land application will not be included in odor management plans. Land application of manure contributes heavily to the “stink” regarding large animal production facilities. In fact, it is the spreading of manure that often threatens local institutions like houses of worship and leads to complaints by neighboring property owners to the Department of Environmental Protection and the county conservation districts.

Spreading manure is often what takes the farm up to the doorstep of neighbors. Additionally, when manure is spread on rented lands or on “importing” farms, it takes the odor of the manure beyond the farm where it is generated or stored. Failure to include land application fails to capture a significant part of the problem related to odor. The legislation should require odor management practices to be implemented for the land application of manure on all lands (owned, rented, and exported/imported lands of CAFOs and CAOs).

C. Failure to Include Proximity to Public Buildings/Lands (Section 504(1.1)(i))

The site-specific factors examined in the development of an odor management plan fail to consider proximity to public buildings and lands, such as schools. Additionally, the factors fail to include proximity to churches and other public meeting places.

D. Technology Standard is Weak (Section 504(1.1)(ii))

The ACRE legislation only requires reasonably available technology, practices, standards and strategies to manage odor impacts. This term is not defined in the legislation and may create confusion with an air quality standard (“Reasonably Available Control Technology” or “RACT”) applicable to the emissions of ozone precursors.

E. Review of Odor Management Plans (Section 509(c))

The legislation states that the SCC should review odor management plans. The SCC does not have the expertise to address such an issue.

F. Sole Focus on Odor is Inappropriate (Sections 504(1.1) and Section 509)

The ACRE legislation focuses exclusively on odors associated with animal production facilities. While this is a concern for neighbors, the major risks of air pollution are not from odor. Odor is merely a symptom, but eliminating it does not cure the disease. Serious health risks are presented by emissions of nitrogen oxide, hydrogen sulfide, ammonia, volatile organic compounds, and particulate matter from agricultural production facilities. All of these would remain unregulated under the ACRE legislation.

V. CONCLUSION

It is regrettable and in fact insulting that this draft legislation was sent to the Legislative Reference Bureau without meaningful, good faith consultation with conservation groups and many others that have raised legitimate concerns about industrial farming. PennFuture for one made it plain that it was a willing partner in a serious dialogue on this matter. That dialogue now cannot proceed, if it ever will, until this disastrous, flawed draft is withdrawn from the Legislative Reference Bureau and a real commitment is made to equal inclusion of all concerned parties in a future process. PennFuture regrets this circumstance but knows that responsibility for it lies elsewhere.