



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

April 19, 2010

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**Marcia Garland, Zoning Officer**  
COLERAIN TOWNSHIP  
1803 Kirkwood Pike  
Kirkwood, PA 17536

**RE: ACRE Review Request**  
**Colerain Township Zoning Ordinance**

**Dear Ms. Garland:**

As we discussed last week, our ACRE review determined that Colerain Township's refusal to issue a permit to [REDACTED] to build his state-approved dairy operation unlawfully prohibits a normal agricultural operation in violation of Act 38. We further determined that Colerain Township's Zoning Ordinance provisions regulating an "intensive agricultural production facility" unlawfully prohibit or limit a normal agricultural operation in violation of Act 38. This letter will detail the provisions of the Colerain Township Zoning Ordinance that present problems under Act 38 and suggest changes to the ordinance that would correct those problems.

We begin with a brief overview of state agencies and laws that regulate concentrated animal operations (CAOs), concentrated animal feeding operations (CAFOs), and animal operations that fall below the State-defined levels that would make the operation a CAO or a CAFO.

CAOs and CAFOs are regulated by the State Conservation Commission (SCC) and the Department of Environmental Protection (DEP). The SCC regulates all aspects of nutrient and odor management for CAOs and CAFOs pursuant to the Nutrient and Odor Management Act (NOMA), 3 P.S. § 501 *et seq.*, and NOMA regulations, 25 Pa. Code § 83.201, *et seq.* The SCC regulates the "design, construction, location, operation, maintenance, and removal from service of manure storage facilities." 25 Pa. Code § 83.351. NOMA regulations establish setback requirements for manure storage facilities ranging from 100 to 300 feet from water sources, wells, and property lines, depending on the date of operation and slope of the property. 25 Pa. Code § 83.351(a)(2)(v)-(viii). The regulations also provide that the setbacks from property lines

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can be waived by the neighboring landowners. Id. The SCC approves nutrient management plans for CAOs and CAFOs, which are specific to the agricultural operation, and which must be developed by a certified nutrient management specialist. 25 Pa. Code § 82.261(8).

The SCC's Facility Odor Management regulations (odor management regulations) require all CAOs or CAFOs to develop and implement odor management plans when building new animal housing or manure management facilities. The odor management regulations specify the criteria and requirements for the "construction, location and operation of animal housing facilities and animal manure management facilities, and the expansion of existing facilities." 25 Pa. Code § 83.702(3); SCC Fact Sheet, SUMMARIZING PA.'S ODOR MANAGEMENT REGULATIONS (ACT 38 OF 2005) (SCC-OM1, December 2008) ([www.agriculture.pa.us/scc](http://www.agriculture.pa.us/scc)) (Exhibit A hereto).

An odor management plan (OMP) is a "written site-specific plan identifying the Odor [Best Management Practices] to be implemented to manage the impact of odors generated from animal housing and manure management facilities located or to be located on the site." 25 Pa. Code § 83.701. An OMP must be prepared by a certified Odor Management Specialist and must be approved by the SCC prior to construction or use of the new facilities built after the effective date of the regulations (February 27, 2009). 25 Pa. Code § 83.741 (e), (f), (h); Exhibit A. An OMP is created by using the Pennsylvania Odor Site Index, which was developed by odor management experts from The Pennsylvania State University College of Agricultural Sciences, in cooperation with the SCC for carrying out NOMA. See Exhibit A. The Pennsylvania Odor Site Index (OSI) is the "field evaluation methodology developed specifically for this Commonwealth and approved by the [SCC], which applies site-specific factors such as proximity to adjoining landowners, land use of the surrounding area, type of structures proposed, species of animals, local topography and directions of prevailing winds, to determine potential for odor impacts." 25 Pa. Code § 83.701; Exhibit A. The OSI is designed to estimate the potential risk of odor impacts associated with a facility and guides the operator in the siting, sizing, design, construction, operation, and management of regulated facilities and their associated Odor Best Management Practices. The extent of the surrounding area included in the OSI evaluation is determined by the number of animal equivalent units on the agricultural operation. 25 Pa. Code § 82.771(b)(1)(i). An alternative method for assessing potential odor impacts on neighboring lands, other than the OSI, may be used if approved by the SCC.

In determining the appropriate location for an animal housing or manure storage facility, the odor management regulations do not impose a single uniform setback distance to address potential odor impacts. Instead, an OMP includes Odor Best Management Practices that are necessary to address the potential impact of offsite migration of odors based on the OSI evaluation of the proposed facility on the site. 25 Pa. Code §§ 83.771(c), .781. The distance of the regulated facility to the nearest property line is one of many factors considered in the OSI evaluation. For operations that are found through the OSI to have something greater than a low potential for odor impacts, there are two levels of Odor Best Management Practices that are required under an OMP. Level one are primarily management-oriented practices required based on the species of animal proposed on the site, and level two are primarily specialized structural

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practices that are applicable to the type of operation proposed and are in addition to level one practices. 25 Pa. Code § 83.781. The SCC approves the siting of a facility in coordination with imposing the required Odor Best Management Practices under the OMP in order to address potential odor impacts on neighboring properties. The NOMA and accompanying regulations preempt local regulation inconsistent with or more stringent than the act or regulations under the act. See 3 Pa. C.S. § 519; 25 Pa. Code §§ 83.205, .705.

DEP regulations require that all manure storage facilities be designed, constructed, operated, and maintained to ensure that the facility is structurally sound, water-tight, and located and sized properly to prevent pollution of surface and groundwater for events up to at least a 25-year/24-hour storm. 25 Pa. Code § 91.36(a)(1). These requirements are met by complying with the Natural Resources Conservation Service's Pennsylvania Technical Guide (PaTG) and DEP's Manure Management Manual (MMM). 25 Pa. Code § 91.36(a)(1)(i). DEP requires CAFOs to obtain various permits depending on the CAFO's size. All CAFOs must obtain a National Pollutant Discharge Elimination System (NPDES) permit, 25 Pa. Code § 92.5a, the requirements for which are based on the Pennsylvania Clean Streams Act, 35 P.S. § 691.1, *et seq.*, and various requirements of the federal Clean Water Act. Large CAFOs and manure storage facilities with large storage capacities are required to obtain a separate water quality management permit. 25 Pa. Code § 91.36(a)(2)-(4).

Animal operations that are not a CAO or CAFO are not subject to NOMA regulations, including the requirement of a certified nutrient management plan, the setbacks for manure storage facilities, or a certified odor management plan. Such operations, however, are not unregulated, as DEP regulates all agricultural operations that use or produce manure, 25 Pa. Code § 91.36, whether or not such operations are a CAO or CAFO. Section 91.36 sets forth requirements for manure storage facilities and for land application of manure.

In addition to the NOMA, the Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations as a nuisance, and also precludes nuisance actions against an agricultural operation expanding its facilities pursuant to an approved nutrient management plan. 3 P.S. §§ 953, 954. The Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or farm practices within the area. 3 P.S. § 911. The Municipalities Planning Code (MPC) precludes a municipality from enacting a zoning ordinance that regulates activities related to commercial agricultural production if it exceeds the requirements imposed under the NOMA, RTFA or AASL, regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation as defined by the NOMA. 53 P.S. § 10603(b). The MPC also provides that no public health or safety issues shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the NOMA, AASL, or RTFA. 53 P.S. § 10603(h); Commonwealth v. Richmond Township, 975 A.2d 607, 616 n.13 (Pa. Cmwlth. 2009) (explaining that through section 10603(h) of the MPC, the "legislature implicitly has determined that an agricultural operation complying with these acts does not constitute an operation that has a direct adverse effect on public health and safety").

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Against this background, we turn to the legal problems with the ordinance and to suggested changes that would correct those problems. The starting point is the ACRE law (Act 38), which prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. See 3 Pa. C.S. §§ 312, 313. The State laws implicated under our ACRE analysis are set forth above.

Section 3.02 of the Ordinance defines "intensive agricultural production facility" as follows:

A farm building, mushroom house, kennel, structure and/or facility specially designed, constructed and/or operated for the intensive and accelerated raising of poultry, animal or agricultural produce and/or processing of byproducts of the same for commercial sale including, but not limited to:

- A) Any confined housing for poultry, animals, mushrooms and/or by-products which structure is five thousand (5,000) square feet or larger, or;
- B) The keeping of more than two (2) animal units per acre of land. For purposes of this Ordinance one (1) animal unit shall be the equivalent of:
  - 1) Four (4) hogs;
  - 2) Three hundred (300) chickens;
  - 3) Each one-thousand pounds (1000 lbs.), total combined liveweight, for any other animals.

This definition conflicts with and is more stringent than the NOMA for several reasons. The State regulates animal operations that exceed a specified animal density through legally defined terms such as CAO or CAFO. These designations are defined not solely by a formula for Animal Equivalent Units (AEU), but also by land base for the purposes of nutrient management and regulating water quality based on carry capacities. The definition for concentrated animal operation is "an agricultural operation with eight or more animal equivalent units [AEUs] where the animal density exceeds two AEUs per acre on an annualized basis." 25 Pa. Code §§ 83.201, .262. The number of AEUs on an agricultural operation is calculated through the use of an established formula set forth in the SCC's regulations. 25 Pa. Code § 83.262(a)(1). The acreage used in the CAO formula to calculate the AEUs per acre includes land suitable for the application of manure, which may include rented or leased land outside the parcel where the agricultural operation is located. 25 Pa. Code §§ 83.201, .262(a)(2). In addition, a CAFO is a CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a large CAFO under 40 CFR § 122.23. 25 Pa. Code § 92.1.

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The Ordinance's definition of "animal unit" conflicts with the formulas used under the NOMA and, in its application, would encompass agricultural operations that are too small to be subject to the NOMA. In addition, using the size of an agricultural building is not a scientifically valid basis to identify an agricultural operation for nutrient or odor management purposes.

The definition problems would be corrected if Section 3.02 were amended to define "intensive agricultural production facility" by incorporating the State law definitions for CAO and CAFO. A better approach, however, would be to amend the ordinance to delete the term "intensive agricultural production facility" and simply add the terms CAO and CAFO using the State law definitions.

The mandatory 200 foot setbacks from property lines for an intensive agricultural production facility or animal and poultry shelter under Section 5.01.06.D.1 are preempted by the NOMA and SCC's regulations, which impose 100 to 300 foot setbacks for manure storage facilities and assess the appropriate location for buildings through an odor management plan for CAOs and CAFOs. Burkholder v. Zoning Hearing Bd. of Richmond Twp., 902 A.2d 1006, 1016-17 (Pa. Cmwlth. 2006) (holding that a 1500 foot setback for manure storage facilities from another zoning district or existing residence was preempted by the NOMA); 25 Pa. Code § 83.351(a)(2)(v)-(viii); 83.771. For these same reasons, the 200 foot setback from property lines for manure storage facilities under Section 6.43.04 is also preempted.

Section 5.01.06.D.2 imposes a 400 foot setback for an intense agricultural production facility from a dwelling. Section 5.01.06.D.3 states that the Zoning Hearing Board may grant a special exception to reduce this setback distance if it can be shown that "because of prevailing winds, unusual obstructions, new technology, topography, or other conditions, a lesser distance would protect existing residential buildings or schools from odor, dust, or other hazards." Taken together, these Sections are clearly an attempt by the Township to regulate odors on CAOs/CAFOs and to regulate normal agricultural operations as a nuisance. The 400 foot setback for animal housing and manure storage facilities on a CAO/CAFO conflicts with, and therefore is preempted by, the SCC's odor management regulations, which approve the siting of new animal housing facilities on CAOs/CAFOs in coordination with imposing the required Odor Best Management Practices under an OMP. Furthermore, based on consultation with our experts, a single uniform setback distance is not a scientifically defensible method to manage the impact of odors. The setback is also preempted by the NOMA's manure storage facility setbacks. Burkholder, 902 A.2d at 1016-17.

Moreover, the above-stated setback requirements are stricter than, and therefore preempted by, the NOMA and MPC insofar as they apply to animal operations too small to be CAOs/CAFOs, since the NOMA excludes such operations from its requirements.

The setback problems would be corrected if Sections 5.01.06.D.1-.3 and 6.43.04 were amended to provide that new animal housing and manure storage facilities on CAOs/CAFOs are to be sited and operated as required under approved Nutrient and Odor Management Plans, and to exclude from its requirements animal operations too small to be CAOs/CAFOs.

Section 5.01.07.A-D requires buffer landscape planting for intensive agricultural production facilities. These provisions are preempted by the SCC's Odor Management regulations which impose any required Odor Best Management Practices as part of an approved Odor Management Plan.

Below we address the legal problems in the subsections of 6.18 that impose requirements for an intensive agricultural production facility:

- Section 6.18.02's requirements for emission treatment for odors are preempted by the SCC's Odor Management regulations and are an attempt to regulate normal agricultural operations as a nuisance.
- Section 6.18.03 seeks to regulate the methods to dispose of dead domestic animals. The Domestic Animal Law (DAL) authorizes and regulates the procedures for disposal of dead domestic animals and animal wastes, which includes farm animal mortalities on an agricultural operation. 3 Pa. C.S. §§ 2303, 2352(a)(4)(iii). The DAL permits dead domestic animals to be disposed of by burial, incineration, rendering, or composting. Id. § 2352(a)(4)(i)-(iii). The DAL preempts any ordinances that pertain to the procedures for disposal of dead domestic animals. Id. § 2389. Accordingly, Section 6.18.03 is preempted by the DAL.
- Section 6.18.04 seeks to regulate the design and construction for storage and disposal of solid and liquid wastes. This section is preempted by the NOMA and SCC's regulations and DEP's regulations.
- Section 6.18.05 requires that structures be equipped with equipment to eliminate or reduce "odors, insects and the adverse effects of pollution . . . upon neighboring properties." It also requires the Zoning Hearing Board to determine what equipment should be utilized after it examines "the topography, the nature and cost of the equipment available, the size and magnitude of the intended operation and the proximity of the site to neighboring . . . properties." These provisions are preempted by the SCC's Odor Management regulations and DEP's regulations, including the DEP's Manure Management Manual providing agricultural best management practices for the owner's and operator's of agricultural operations.
- Section 6.18.06 allows the Zoning Hearing Board to impose other reasonable conditions on an intensive agricultural production facility. This provision is preempted by the NOMA and SCC's and DEP's regulations that establish the operating requirements for CAOs and CAFOs.

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The legal problems identified in Sections 5.01.07.A-D and 6.18.02-.06 would be corrected if the ordinance is amended to require simply and only that: *An owner or operator of a proposed CAO or CAFO shall obtain a Township permit to operate a CAO or CAFO, which the Township shall issue to the owner or operator upon the Township's receipt of proof that the owner or operator has an approved nutrient and odor management plans and has obtained all required DEP permits.*

Finally, as we discussed, Colerain Township has no authority to preclude [REDACTED] from building his state-approved dairy operation. You indicated that a permit would be issued to Mr. Stoltzfus upon your receipt of this letter outlining the result of our ACRE review.

I am available to discuss these matters at your convenience, and I look forward to your prompt response.

Sincerely yours,



**SUSAN L. BUCKNUM**  
**Senior Deputy Attorney General**

SLB/

Enclosure

cc: [REDACTED]



## Summarizing Pa's Odor Management Regulations (Act 38 of 2005)

### Who is regulated:

- ✓ When new or existing Concentrated Animal Operations (CAOs) or Concentrated Animal Feeding Operations (CAFOs) construct new or expand existing manure storage or animal housing facilities after February 27, 2009, (the effective date of the regulations) they will be required to develop and implement an Odor Management Plan (OMP) for those facilities. It should be stressed that **only** the manure storage or animal housing facilities that have new construction activities (building new or expanding existing facilities) are regulated facilities.
- ✓ The regulations do not apply to existing facilities nor do they address land application of manure.

### What is an Odor Management Plan (OMP):

1. An odor management plan is a written site-specific plan that assesses potential odor impacts from animal housing facilities and manure storage facilities, and identifies practices, where relevant, to be implemented to manage the impact of offsite odors generated from these facilities.
  - Odor management plans are not required to eliminate odors, they only need to manage odor impacts. This aspect of the statute reflects the impracticality of completely eliminating odors associated with agricultural operations, as well as the evolving nature of the science of odor management and of the regulation of odor management.
  - Regulated farms must have an approved plan prior to construction of the new or expanded facilities, and they must fully implement the plan prior to commencing use of the new or expanded animal housing facility or manure storage facility.
2. The OMP has two main components: 1) an evaluation of the potential impacts; the preferred tool for evaluating the potential impacts is the Pennsylvania Odor Site Index, and 2) a listing of any necessary Odor BMPs to address odor impacts coming from the facilities covered under the plan.
  - First, an evaluation must be conducted, identifying the *potential* for odor impacts to neighboring properties. The regulations authorize use of the Odor Site Index developed by PSU odor management experts and approved by the Commission to perform this evaluation. Other evaluation methodologies are allowed, if approved by the SCC.
  - Second, if the evaluation identifies a medium or high potential for odor impacts, then the second step must be taken – identification of Odor BMPs to manage the odor impacts. This section envisions two levels of Odor BMPs, depending on the significance of the potential for odor impacts identified in the evaluation step. The SCC has issued an Odor Management Guidance document listing Odor BMPs consistent with this approach, and will issue the PA Odor BMP Reference List which provides detailed information on specific Odor BMP.

### Notes:

- ✓ The new state odor management regulations preempt more stringent local regulations/ordinances on agricultural odors; however, they do not preempt the Nutrient Management Program criteria.
- ✓ Odor management plans must be written by a certified Odor Management Specialist. PDA administers the Odor Management Specialist Certification program.
- ✓ Odor management plans must be submitted for review and approval to the State Conservation Commission.
- ✓ Volunteers may also develop and implement odor management plans.
- ✓ The program allows for financial assistance for development of an odor management plan as well as for implementation of Odor BMPs in select situations. Farmers should contact the State Conservation Commission to assess the availability of funding for these efforts.
- ✓ For more information go to the State Conservation Commission's webpage at [www.agriculture.pa.us/scc](http://www.agriculture.pa.us/scc) and click on the Odor Management Program link at the bottom of the page or contact Karl Dymond at (570) 836-2181.