



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

July 6, 2011

Litigation Section  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Frederick S. Wolf, Esquire  
HENRY & BEAVER, LLP  
937 Willow Street  
P.O. Box 1140  
Lebanon, PA 17042

RE: Heidelberg Township, Lebanon County Zoning Ordinance  
ACRE Review Request Submitted by [REDACTED]

Dear Mr. Wolf:

This letter will detail the provisions of the Heidelberg Township Zoning Ordinance that present legal problems under ACRE, Act 38, and suggest changes to the ordinance that would correct those problems.

**I. NUTRIENT AND ODOR MANAGEMENT ACT AND REGULATIONS**

We begin with a brief overview of relevant portions of the Nutrient and Odor Management Act (NOMA), 3 Pa. C.S. § 501 *et seq.*, and NOMA regulations, 25 Pa. Code § 83.201, *et seq.*, in relation to discussing the legal problems with the ordinance. The State Conservation Commission (SCC) regulates all aspects of nutrient and odor management for Concentrated Animal Operations (CAOs) and Concentrated Animal Feeding Operations (CAFOs). One purpose of the NOMA and accompanying regulations is to assure proper utilization and management of nutrients to protect the quality of surface and groundwater. 3 Pa. C.S. § 502; 25 Pa. Code § 83.203.

The SCC's Facility Odor Management regulations (odor management regulations) require all CAOs and CAFOs to develop and implement odor management plans when expanding or 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).

Frederick Wolf, Esquire

July 6, 2011

Page 2

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 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 the required Odor Best Management Practices to be implemented. 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.

The odor management regulations do not impose blanket setback distances to address potential odor impacts from animal housing or manure management facilities. 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 or surrounding residences 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 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. 25 Pa. Code § 83.702(3). The NOMA and its 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 § 83.705.

The Township should be aware the Commonwealth Court recently held that an ordinance requiring a 1500 foot setback from another zoning district or existing residence was preempted by the NOMA regulations to the extent it is applied to "any facility covered by the regulations." Commonwealth v. Richmond Township, 2 A.3d 678, 685-86 (Pa. Cmwlth. 2010) (emphasis added).

Frederick Wolf, Esquire

July 6, 2011

Page 3

## **II. CLEAN STREAMS LAW, SOLID WASTE MANAGEMENT ACT AND ACCOMPANYING DEP REGULATIONS**

Pursuant to its authority under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the Department of Environmental Protection's (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 National Resource 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 Clean Streams Law 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). In addition to requiring a separate leak detection system, the water quality management permit assures proper siting, design, construction, and operation for these facilities.

Animal operations that are not a CAO or CAFO are not subject to NOMA regulations, including the requirement for certified nutrient and odor management plans or the setbacks for manure storage facilities. 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 the construction of manure storage facilities and for land application of manure to protect surface and groundwater.

Pursuant to the Solid Waste Management Act and accompanying residual waste management regulations, the DEP comprehensively regulates the use of food processing wastes in normal farming operations. 35 P.S. §§ 6018.301-303; 25 Pa. Code §§ 287.1, *et seq.*

## **III. ADDITIONAL STATE LAWS PROHIBITING CERTAIN LOCAL REGULATION OF AGRICULTURAL OPERATIONS**

In addition to the SCC's and DEP's regulatory programs, the Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations as a nuisance. 3 P.S. § 953. The Air Pollution Control Act excludes operations engaged in the "production of agricultural commodities" from State air contaminant and air pollution regulations. 35 P.S. § 4004.1. The "production of agricultural commodities" includes "the commercial propagation . . . [of] livestock and livestock products." *Id.* § 4004.1(b)(1)(v). The Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or farm practices within the area. Richmond Township, 2 A.3d at 687; 3 P.S. § 911. The Municipalities Planning Code (MPC) precludes a municipality from enacting a

Frederick Wolf, Esquire  
July 6, 2011  
Page 4

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. Richmond Township, 2 A.3d at 687; 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); Richmond Township, 2 A.3d at 687 n.11 (explaining that the MPC’s language “indicates that, as a matter of law, an agricultural operation complying with the NMA, AASL, and the RFL does not constitute an operation that has a direct adverse effect on the public health and safety”).

Pennsylvania courts have consistently interpreted comprehensive State regulatory schemes as preempting local regulation of the same subject to the extent the regulation is inconsistent or in conflict with the statewide regulation. *See, e.g., Richmond Township*, 2 A.3d at 684 (holding that the Nutrient Management Act regulations preempted ordinance provisions that exceeded and conflicted with the requirements under the Act); Commonwealth v. East Brunswick Township, 980 A.2d 720, 723 (Pa. Cmwlth. 2009) (holding that “a township cannot duplicate the regulatory regime established in the SWMA and cannot impose more stringent requirements than the SWMA,” and explaining that “[r]equirements that are redundant or of stricter than those in the SWMA are preempted.”); Range Resources-Appalachia, LLC v. Salem Township, 600 Pa. 231, 244, 964 A.2d 869, 877 (2009) (holding that “not only does the Ordinance purport to police many of the same aspects of oil and gas extraction activities that are addressed by the [Oil and Gas] Act, but the comprehensive and restrictive nature of its regulatory scheme represents an obstacle to the legislative purposes underlying the Act, thus implicating principles of conflict preemption.”).

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, 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.

#### **IV. HEIDELBURG TOWNSHIP’S ZONING ORDINANCE**

##### **A. Section 202 — Definitions**

Section 202 defines “concentrated animal operation” as “those agricultural operations where the animal density exceeds two AEU’s per acre on an annualized basis.” This conflicts with the SCC’s definition for CAO as “an agricultural operation with eight or more animal equivalent units [AEUs] where the animal density exceeds two AEU’s per acre on an annualized basis.” 25 Pa. Code §§ 83.201, .262. The SCC has advised that excluding the “eight or more AEU’s” criteria from the ordinance definition results in identifying agricultural operations that are too small to be a CAO, thus it conflicts with and is more stringent than the NOMA. Also, the definition for “non-intensive agricultural operation” states “any agricultural operation that does

Frederick Wolf, Esquire  
July 6, 2011  
Page 5

not exceed two (2) Animal Equivalent Units per acre of land.” There is no definition for “intensive agricultural operation,” therefore, if it is the opposite of “non-intensive,” i.e., exceeds two AEUs, then it results in the identical problem with the ordinance definition for concentrated animal operation in identifying smaller animal agricultural operations as a CAO or “intensive.” We also note that the term “animal husbandry” excludes from its definition “Intensive Animal Operations,” but the term “Intensive Animal Operations” is not defined in the Ordinance.

Unlike the Ordinance, State law provides definitions and formulas that make a normal agricultural operation readily identifiable. Under the Right to Farm Act, a “normal agricultural operation” is defined in terms of the agricultural practices, acreage, and/or gross income of the operation. 3 P.S. § 952. The State Conservation Commission (SCC) and the Department of Environmental Protection (DEP) provide formulas and specific criteria to identify when an animal raising agricultural operation requires additional permits and nutrient and odor management plans. Those normal agricultural operations are known as “concentrated animal operations” (CAOs) and “concentrated animal feeding operations” (CAFOs). 25 Pa. Code § 83.262 (formula for CAO); 25 Pa. Code § 92.1 (definition for CAFO linked to formulas). Heidelberg Township’s definitions for CAO and “non-intensive agriculture operation” impermissibly create an additional category for an animal agricultural operation and impose requirements that exceed those under State law.

These definitional problems would be corrected if Section 202 were amended to correct the definition for CAO to the State law definition, define “intensive agricultural operation” by incorporating the State law definitions for CAO and CAFO, and amend “non-intensive agricultural operation” with reference to the State law definition for CAO. A better approach, however, would be to amend the ordinance to delete the terms “non-intensive” and “intensive” agricultural operation and simply use the terms CAO and CAFO with the State law definitions.

#### **B. Agricultural District — Conditional Use Criteria**

Section 604 permits concentrated animal operations as a conditional use in the Agricultural District. Heidelberg Township may require a conditional use permit for a concentrated animal operation; however, it cannot impose requirements to obtain that permit that exceed State law. 53 P.S. §§ 10603(c)(1), (h); Richmond Township, 2 A.3d at 687 n.11. There are several requirements under Section 604 that exceed and conflict with State law.

Section 604(A)(2) imposes a maximum impervious lot coverage of ten percent (10%) on a CAO and Section 604(A)(1) imposes a ten acre minimum lot size. The ordinance does not impose these requirements on agricultural operations defined as “animal husbandry,” which are permitted as of right in the Agricultural District. Section 606(A) provides that a “Non-Residential Use or Building” with a minimum lot area of 2 acres and a maximum lot area of 5 acres may have a twenty percent (20%) maximum lot coverage. The MPC requires that when a municipality creates a zoning district “all provisions shall be uniform for each class of uses or structures, within each district.” 53 P.S. § 10605; Ludwig v. Zoning Hr’g Bd. of Earl Township, 658 A.2d 836, 838 (Pa. Cmwlth. 1995) (“In promulgating a zoning ordinance, however,

Frederick Wolf, Esquire

July 6, 2011

Page 6

ordinance legislators are to provide for uniform uses in respective zoning districts pursuant to Section 605 [of the MPC].”). Sections 604(A)(1)-(2) are not uniform in regulating agricultural uses in the Agricultural District.

Moreover, to the extent the ten percent (10%) impervious lot coverage restriction is based on stormwater management, the SCC’s nutrient management regulations require CAOs and CAFOs to identify stormwater control best management practices (BMPs) according to the PaTG in a nutrient management plan that is prepared by a certified nutrient management specialist. 25 Pa. Code §§ 83.261(8); 83.282(b)(1) (include summary of “stormwater runoff control practices and other appropriate BMPs necessary to protect the quality of surface water and groundwater); 83.311(d), (g); 83.321. The Second Class Township Code provides authority to a municipality to enact stormwater management ordinances, but they must be consistent with the county’s DEP-approved stormwater management plan, the Storm Water Management Act, and DEP’s stormwater management regulations. 53 P.S. § 67701; 32 P.S. §§ 680.11, .14(a)(1), (3) (DEP “shall have the power and its duty shall be to: (1) coordinate the management of storm water in the Commonwealth.”). The DEP requires CAFOs to obtain “a separate NPDES permit for stormwater discharges associated with a construction activity meeting the requirements of Chapter 102.” 25 Pa. Code § 92.5a(f)(2). The DEP’s regulations require stormwater calculations in preparing erosion and sediment and post-construction stormwater management plans. 25 Pa. Code §§ 102.4(b)(5)(viii), 102.8(b)(1)-(8), 102.8(f)-(g).

At this time, the Attorney General does not have Heidelberg Township’s stormwater management ordinance, if one exists. The Attorney General requests that Heidelberg Township provide information to support imposing the ten percent (10%) impervious lot coverage limitation on CAOs, but allowing a twenty percent (20%) lot coverage maximum on other non-residential uses and buildings on a smaller amount of acreage in the Agricultural District.

Section 604(A)(3) imposes a 500 foot setback for animal housing facilities on CAOs from any residential zoning district. Section 604(A)(4) imposes a 300 foot setback for animal housing facilities on CAOs from any existing residential structure. Section 604(A)(5) imposes a 200 foot setback for animal housing facilities on CAOs from any property line or road right of way line. These setbacks for animal housing facilities on a CAO conflict with, and therefore are preempted by, the SCC’s odor management regulations, which approve the siting of new animal housing facilities on CAOs in coordination with imposing the required Odor Best Management Practices under a site-specific OMP. 25 Pa. Code §§ 83.771(c), .781, .703, .705, .761, .771, .781; Richmond Township, 2 A.3d at 684-686 (“We now hold that the 1500 foot setback is preempted by the NMA regulations to the extent that the Township applies the 1500-foot setback to **any facility** covered by the regulations.” (emphasis added)). Furthermore, based on consultation with our experts, utilizing blanket setback distances is not a scientifically defensible method to manage the impact of odors. To the extent the setbacks are to regulate air contaminant or air pollution, they are preempted by the Air Pollution Control Act. 35 P.S. § 4004.1.

Frederick Wolf, Esquire

July 6, 2011

Page 7

These setback problems would be corrected if Sections 604(A)(3)-(5) are repealed and replaced with a section requiring an applicant to provide the township with a copy of an approved OMP indicating the siting requirements for new animal housing facilities on the CAO.

Section 604(A)(9) requires that a CAO must present evidence certifying that Lebanon County Conservation District has either agreed to design all required manure storage facilities or agreed to review and approve the design of all required manure storage facilities for the CAO. The County Conservation Districts do not design or approve the design of manure storage facilities. The SCC's nutrient management regulations require that the "site specific design for the construction, expansion or major repair of a liquid or semisolid manure storage facility . . . shall be done or approved by an engineer registered in this Commonwealth." 25 Pa. Code § 83.351(c). The registered engineer that designs the manure storage facility is obligated to certify that the design meets regulatory requirements. *Id.* The registered engineer is also required to submit a verification at least two weeks prior to the installation of the manure storage facility that the design has been completed and submit a certification following the installation that the "construction of the manure storage facility was completed according to the design, construction and location standards." 25 Pa. Code § 83.351(d). Thus, the requirements in Section 604(9) conflict with, and therefore are preempted by, the SCC's nutrient management regulations.

Heidelberg Township may amend Section 604(A)(9) to require only that the CAO provide the township with copies of the registered professional engineer's approvals, certifications, and verifications that the manure storage facilities are designed and constructed to comply with the SCC's and DEP's regulatory requirements.

Section 604(A)(11) requires a CAO to provide a traffic plan "certified by a traffic professional." The Attorney General requests Heidelberg Township to provide information identifying what other business operations in the township must submit a certified traffic plan to obtain a township permit to engage in operations. 53 P.S. § 10605.

Section 604(A)(12) requires a CAO to "provide for buffering" for "any structure . . . within three hundred (300) feet of any residential structure." This requirement conflicts with, and therefore is preempted by, the SCC's odor management regulations, which approve the siting of new animal housing and manure management facilities on CAOs in coordination with imposing the required Odor Best Management Practices under an OMP. 25 Pa. Code § 83.781-.782. To the extent the buffering requirements are imposed to regulate air contaminant or air pollution, they are preempted by the Air Pollution Control Act. 35 P.S. §§ 4004.1, 4004.1(b)(1)(v). The Right to Farm Act also precludes regulating normal agricultural operations as a nuisance. 3 P.S. § 953.

Heidelberg Township may amend Section 604(A)(12) to require only that a CAO to provide the township with a copy of an approved OMP indicating the Odor Best Management Practices required to be implemented by the CAO.

Frederick Wolf, Esquire

July 6, 2011

Page 8

Section 604(A)(13) imposes use and storage requirements for the use of food processing wastes on a CAO. The DEP comprehensively regulates the use of food processing wastes in normal farming operations. 35 P.S. §§ 6018.301-.303; 25 Pa. Code §§ 287.1, *et seq.* The DEP's regulatory scheme for residual waste management exempts a person using food processing wastes in normal farming operations from having to obtain a permit if the person complies with established best management practices. 25 Pa. Code § 287.101(b)(2). Specifically, the DEP's residual waste management regulations provide as follows:

- (b) A person or municipality is not required to obtain a permit under this article, comply with the bonding or insurance requirements of Subchapter E (relating to bonding and insurance requirements) or comply with Subchapter B (relating to duties of generators) for one or more of the following:

....

- (2) The use of food processing waste or food processing sludge in the course of normal farming operations if the waste is not hazardous. A person managing food processing waste shall implement best management practices. The Department will prepare a manual for the management of food processing waste which identifies best management practices and may approve additional best management practices on a case-by-case basis. If a person fails to implement best management practices for food processing waste, the Department may require compliance with the land application, composting and storage operating requirements of Chapters 291, 295, and 299.

25 Pa. Code § 287.101(b)(2).

The best management practices are set forth in the DEP's Food Processing Residual Management Manual, which can be accessed on DEP's website at [www.depweb.state.pa.us](http://www.depweb.state.pa.us) under the residual waste management program links at document number 254-5400-100. The Food Processing Residual Management Manual provides technical guidance and reference manuals for best management practices in the use and storage of food processing wastes for animal use. The DEP's comprehensive regulation of food processing wastes utilized in normal farming operations preempts Section 604(A)(13). Commonwealth v. East Brunswick Township, 980 A.2d 720, 723 (Pa. Cmwlth. 2009) (holding that "a township cannot duplicate the regulatory regime established in the SWMA and cannot impose more stringent requirements than the SWMA," and explaining that "[r]equirements that are redundant of or stricter than those in the SWMA are preempted.").

Heidelberg Township may amend Section 604(A)(13) to require that a CAO provide the township with information to confirm that the use of food processing wastes complies with DEP's residual waste management regulatory scheme.

### **C. Agricultural Transition District**

Heidelberg Township describes the Agricultural Transition District as "comprised primarily of existing agricultural areas of the Township and those areas where environmental and locational conditions are most conducive to agriculture and non-intensive animal husbandry pursuits." See Ordinance Section 701. Section 709 also states that "[i]n the Agricultural Transition District, agriculture is the primary use."

Section 702(C) provides that a permitted use in the Agricultural Transition District is "animal husbandry, but not including concentrated animal operations." CAOs are not permitted in this District as a permitted, special exception, or conditional use. The Township cannot permit animal husbandry in an agricultural zoning district, but exclude CAOs. As discussed above, both CAOs and non-CAOs are normal agricultural operations defined by State law. The Township does not have authority to exclude a normal agricultural operation from a zoning district in which agriculture is a permitted use. 53 P.S. §§ 10603(b), (h) ("[z]oning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present"); 10605; Ludwig, 658 A.2d at 838.

Heidelberg Township should amend Section 702 to allow CAOs as a permitted use in the Agricultural Transitional District. In the alternative, Heidelberg Township may amend Section 704 to allow CAOs as a conditional use subject to the same requirements under Section 604 as amended to correct the legal problems set forth above.

### **D. Wellhead Protection Overlay Districts (WHP)**

Heidelberg Township established a voluntary WHP program to protect sources of public water supply pursuant to DEP's Safe Drinking Water regulations. 25 Pa. Code § 109.713. The Ordinance establishes Wellhead Protection Overlay Districts and delineates three WHP zones: Zones I, II, and III. Zone I encompasses an area of 100 to 150 feet around public water wells numbered 3, 5 and 8. Zone II encompasses 36 to 60 acres around public water wells numbered 3, 5 and 8. Zone III encompasses 1.3 to 1.64 square miles around public water wells numbered 3, 5 and 8. The Ordinance precludes "[l]ivestock animals in excess of two animal equivalent units per acre for operations, or twenty-five animal equivalency unit per acre in yarding areas" in all three WHP Zones. See Ordinance Sections 1432(A)(1)(g), (B)(1)(g), and (C)(1)(b).

Heidelberg Township does not have authority to exclude normal animal agricultural operations from any of the WHP Zones that overlay an agricultural district. 25 Pa. Code § 109.713. The WHP program is a voluntary program and a municipality does not obtain any additional authority beyond that provided under State law through the adoption of a WHP program. 53 P.S. §§ 10603(b), (h), 10605; www.dep.state.pa.us (Summary of Pennsylvania's Wellhead Protection Program for Drinking Water Source Protection Under the 1996 Safe Drinking Water Act Amendments (Exhibit B)). Furthermore, all agricultural operations that use

Frederick Wolf, Esquire

July 6, 2011

Page 10

or produce manure are already regulated by the State to prevent pollution to ground and surface water. 3 Pa. C.S. § 502; 25 Pa. Code § 83.203; 25 Pa. Code §§ 92.5a, 91.36.

Heidelberg Township can correct this problem by repealing Sections 1432(A)(1)(g), (B)(1)(g), and (C)(1)(b). Heidelberg Township may amend Section 1432(A), (B), and (C) to add a separate subsection (3) entitled "Agricultural Uses" and providing that "Agricultural uses are permitted as provided in the underlying zoning district. The owner or operator of an agricultural operation that uses or produces manure shall provide the township with information to confirm compliance with the State's regulatory scheme, including best management practices, for such operations."

#### V. CONCLUSION

As evident from the discussion above, local ordinances that attempt to regulate the how, when, and where of activities already subject to State uniform regulatory schemes "have not fared well under preemption challenges." East Brunswick Township, 680 A.2d at 730. Locust Township does not have authority to establish its own regulatory scheme for CAOs or CAFOs that duplicates, exceeds, or conflicts with the SCC's and DEP's regulatory schemes.

In light of the comprehensive regulation of CAOs and CAFOs by the SCC and DEP, and in place of the ordinance provisions that we've recommended that the Township amend, we suggest that the Township amend its ordinance to require for all zones in which agriculture is a permitted use 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 plan and has obtained all required DEP permits.*

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

Sincerely,



SUSAN L. BUCKNUM

Senior Deputy Attorney General

SLB/

Enclosures

cc: **Scott Good (w/encl.)**  
**Glendon Horst (w/encl.)**  
**Molly Hughes, Red Bard Consulting (w/encl.)**



## 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.

Search  
Subjects

Department of Environmental Protection  
**PENNSYLVANIA**



**SUMMARY OF PENNSYLVANIA'S  
 WELLHEAD PROTECTION PROGRAM  
 FOR DRINKING WATER SOURCE PROTECTION  
 UNDER THE 1996 SAFE DRINKING WATER ACT AMENDMENTS**



**Wellhead Protection Requirements Under the Safe Drinking Water Act (SDWA)**

- Section 1428 of the Federal Safe Drinking Water Act (SDWA) requires that states develop wellhead protection programs (WHPP) which include seven elements: identify roles and responsibilities, delineate wellhead protection areas, identify sources of contamination, develop management approaches, develop contingency plans, plan for new wells, and ensure public participation in the plan.
- EPA has approved 47 state programs as well as programs for two U.S. territories.
- Wellhead protection (WHP) is defined in Section 1428 of the SDWA as a comprehensive program to protect wellhead protection areas (WHPA) from man-induced contaminants which have an adverse effect on the health of persons.
- The SDWA recognizes an approved state WHPP as fulfilling the requirements for ground-water sources under the Source Water Protection Program.
- The Pennsylvania Safe Drinking Water regulations, 25 PA code Ch. 109, direct public water suppliers to find the best source available and take those measures necessary to protect that source to provide a continual and safe water supply. The state SDWA regulations define wellhead protection and wellhead protection areas, set permitting requirements for ground-water sources, set operations requirement and establish elements necessary for state approval of local WHP programs.
- The Municipal Planning Code and a local government's powers to protect public health and safety provides authority for local governments to plan and to act to protect water supplies and the environment. Not all, but many of the WHP management approaches for a comprehensive local WHP program would require local government action, cooperation or support.

**DEP's Wellhead Protection Program Plan for Pennsylvania**

- DEP has been actively developing a state WHP program since 1989. Most of these efforts have focused on encouraging voluntary local program development through education and incentive grants, formulating technical WHP area delineation strategies and the establishment of regulations and associated compliance assistance. Local voluntary WHP programs will continue to be supported and encouraged through technical, compliance and financial assistance to local communities and public water systems (PWSs).
- As of this writing, over 150 PWSs and many more municipalities are developing or implementing local WHP programs in Pennsylvania. The growing success of wellhead protection in Pennsylvania is because of the recognition of the common sense and benefits of planning and pollution prevention in protecting public health and reducing the cost of SDWA compliance.
- DEP has offered various incentive grants to seed local WHP development since 1991. Since 1993, the department has awarded grants totaling over one million dollars to 16 different counties under this competitive grant program. The county plans provide a multiple jurisdictional structure for WHPA delineation, management approaches, contingency planning, new well development and program implementation. These and other development grants will be offered under the WHPP as funds are available.
- The state's Wellhead Protection Program will form the cornerstone of the Source Water Assessment and Protection Program for ground-water sources serving PWSs.
- The focal point of a local WHP program is the WHPA delineation and the resulting map. The state SDWA regulations define a three-tiered WHPA approach for wells, springs and infiltration galleries.

The delineation of a more rigorous WHPA for an existing PWS source under a local WHP program will be the decision and responsibility of the water purveyor, the local municipalities and/or the planning agencies with jurisdiction over the WHPA. More rigorous WHPA delineations will be done by DEP as resources are available, through a combination of contracted services and department staff activities.

- Key to local WHP program development is public education and participation. A series of approaches will be developed to educate and involve the public in WHP. These approaches will be developed and implemented by a combination of contracted services and department staff activities.
- DEP will approve local WHP programs which meet the basic elements set-out in the state SDWA regulations. DEP will provide data to local WHP programs on state or federally regulated potential sources of ground-water contamination and will advise them on approaches for WHPA delineation, conducting contaminant source inventories, public education programs and management approaches. Existing federal guidelines and recommendations will be utilized for the program and guidance will be developed only if a need arises.
- The principles of the Comprehensive State Ground Water Protection Program will be applied to coordinate point and non-point source pollution prevention programs with the local WHP programs.

#### **Proposed Uses for SDWA State Revolving Fund Set-Aside Funds**

- Contracts for delineation of WHPA and assessments of PWS sources through 2001.
- Additional DEP field and central office staff and fixed assets to support WHPA delineations, assessments and management plan development, and to support public participation and public promotion of these activities.
- Grants for the development and implementation of local WHP programs.

---

7/99

[PA Home Site](#) | [Ask DEP](#) | [Plug-Ins](#) | [Home Page](#)