



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

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*ACRE Review Request*  
*Maxatawny Township – Berks County*

Dear Ms. Nagy and Ms. Hughes,

This letter will detail the legal problems with Maxatawny Township's Zoning Ordinances concerning [REDACTED] proposal to build poultry barns on his property.

**I. STATE LAW**

We begin with a general overview of the State laws that regulate agricultural operations. The policy of the Commonwealth is to encourage agriculture and both the black letter and spirit of the laws concerning agriculture further this policy. It must be recognized that select Maxatawny Township ordinances admirably mirror these same policies and the Township should be commended for its efforts.

**A. AGRICULTURE COMMUNITIES AND RURAL ENVIRONMENT (ACRE)**

In 2005, the Legislature passed what is commonly referred to as Act 38 - the Agricultural Communities and Rural Environment (ACRE) law. ACRE prohibits local municipalities from adopting or enforcing "unauthorized local ordinances." 3 Pa.C.S. § 313. The ACRE law defines an "unauthorized local ordinance" as one that "[p]rohibits or limits a normal agricultural operation..." 3 Pa.C.S. §312. The Historical and Statutory Notes to ACRE state in pertinent part

that, “[t]he General Assembly of the Commonwealth of Pennsylvania declares that the Commonwealth has a vested and sincere interest in ensuring the long-term sustainability of agriculture and normal agricultural operations...In furtherance of this goal, the Commonwealth has enacted statutes to protect and preserve agricultural operations for the production of food and other agricultural products.”

ACRE requires municipalities to comply with State law in imposing requirements on normal agricultural operations. 3 Pa.C.S. §§ 312 & 313. Pennsylvania law provides various State agencies with broad regulatory and enforcement power over agricultural operations. Moreover, ACRE prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. 3 Pa.C.S. §§ 312(1)(ii) & 313(a).

## **B. THE RIGHT TO FARM ACT (RTFA)**

The RTFA states, “[i]t is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products...It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of...ordinances.” 3 P.S. § 951. RTFA defines “agricultural commodity” to include “[l]ivestock and the products of livestock.” 3 P.S. § 952. RTFA further states that a “normal agricultural operation” includes “[t]he activities, practices, equipment and procedures that farmers adopt, use, or engage in the production and preparation for market of...livestock and their products...” *Id.* RTFA also precludes a municipality from regulating normal agricultural operations as a nuisance and protects direct commercial sales of agricultural commodities. 3 P.S. § 953.

## **C. THE MUNICIPALITIES PLANNING CODE (MPC)**

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 state law. 53 P.S. § 10603(b). The MPC requires that “[z]oning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operation in geographic areas where agriculture has traditionally been present...” 53 P.S. § 10603(h).

Moreover, the MPC exists “to accomplish coordinated development...to promote the preservation of this Commonwealth’s...prime agricultural land...to encourage the preservation of agricultural land...to ensure that municipalities enact zoning ordinances that facilitate the present and future economic viability of existing agricultural operations in this Commonwealth and do not prevent or impede the owner or operator’s need to change or expand their operations in the future in order to remain viable...” 53 P.S. §10105. To achieve that end, the MPC requires a Township’s comprehensive plan to take into consideration “the protection of...prime agricultural land” and “[i]dentify a plan for the preservation and enhancement of prime agricultural land and encourage the compatibility of land use regulation with existing agricultural operations.” 53 P.S. §10301(a)(6) & (7)(iii).

The MPC also provides that a municipality may not under the guise of protecting public health and safety adopt a zoning ordinance that violates or exceeds the provisions of agricultural

state law. See 53 P.S. § 10603(h); *Commonwealth v. Richmond Township*, 2 A.3d 678, 687 n.11 (explaining that section 603(h) of the MPC “indicates that, as a matter of law, an agricultural operation complying with [state law] does not constitute an operation that has a direct adverse effect on the public health and safety.”) Finally, the MPC requires that “[z]oning ordinances shall protect prime agricultural land and may promote the establishment of agricultural security areas.” 53 P.S. §10603(g)(1); See *McGonigle v. Lower Heidelberg Township Zoning Hearing Board*, 858 A.2d 663 (Cmwlth. Ct. 2004) (Preservation of agricultural land is a legitimate government interest); *C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143 (Pa. 2002) (Zoning ordinances may be used to protect prime agricultural land and encourage agricultural activity).

## II. MAXATAWNY TOWNSHIP ORDINANCES

Maxatawny Township admirably recognizes the importance of agriculture. Certain sections of the Maxatawny Township Ordinances mirror State law and policy. For example, Section 400.1, AP and API-AGRICULTURAL PRESERVATION DISTRICT, *Purpose Statement*, provides that, “[t]he agricultural farmlands and open space within Maxatawny Township is a valuable natural resource” and it is established that “Maxatawny Township [is] a producer of agricultural goods and products....” Section 400.1 states that it is the goal of the Township, “[t]o protect and preserve the agricultural base...which is a major component of the economy of the Township” in addition “[t]o permit[ing] only those land uses and activities, which are agriculture related and advance agricultural purposes.” The Township should be lauded for promoting agriculture within the municipality. There appears to be, however, a disconnect between the Township’s stated goals and the drafting and application of certain agricultural ordinances.

In concluding that certain Maxatawny Township ordinances fail to comply with the applicable state laws and regulations, the Office of the Attorney General (OAG) relies upon the standards set forth in *Commonwealth v. Richmond Township*, 2 A.3d 678, 682 (Pa.Cmwlth. 2010). *Richmond* stands for the proposition that Township Ordinances cannot be vague and ambiguous. *Id.* The OAG contends that the Township’s use of the term “Intensive Agriculture” runs afoul of the *Richmond* prohibition against vagueness and ambiguity. “Intensive Agriculture” is not utilized in the relevant state laws and regulations; as such, it is a term incapable of precise definition and application.

## III. CASE HISTORY

This matter concerns the [REDACTED] property located in the Agricultural Preservation District. As the OAG understands it, [REDACTED] wants to build two poultry barns on his property. He owns 45.5 and rents another 62.4 acres of tillable land. [REDACTED] currently plans to house 74,000 broilers in the barns as well as keeping 65 steer, 6 goats, 3 pigs, and 12 layers on the land.<sup>1</sup>

In 2014, [REDACTED] applied for a permit to build the barns and run the poultry operation as a permitted use by right under Section 400.2(a), AP and API-AGRICULTURAL PRESERVATION DISTRICT, *Permitted Uses*. The Township denied this application stating that what [REDACTED] proposed amounted to “intensive agriculture” and required him to file a

<sup>1</sup> The steer, goat, swine, and layer numbers are taken from [REDACTED] 2014 sketch plan.

conditional use application pursuant to Sections 400.5(b), AP and AP1-AGRICULTURAL PRESERVATION DISTRICT, *Intensive Agriculture*, 501(10), SUPPLEMENTARY REGULATIONS, *Environmental Performance Standards*, and 513, SUPPLEMENTARY REGULATIONS, *Intensive Agricultural Regulations*. [REDACTED] filed a Conditional Use application which the Township concluded was “largely incomplete.” (March 19, 2015 Letter to Maxatawny Township Planning Commission from Zoning Officer Christopher M. Paff). [REDACTED] through Red Barn Consulting, filed an ACRE request with the OAG. By letter dated September 22, 2016, the OAG received a letter from the Township Solicitor stating “that no plans are currently pending at the Township relative to the [REDACTED] Property and the Red Barn project.”

#### IV. LEGAL PROBLEMS WITH THE TOWNSHIP’S ORDINANCES

##### “Intensive Agriculture”

The Maxatawny ordinances refer in various forms to the term “intensive agriculture.” See Section 200, DEFINITIONS, *Agriculture (Intensive)*, and *Intensive Animal Husbandry*, and *Agricultural Industry*; Section 400.4(d), AP and AP1-AGRICULTURAL PRESERVATION DISTRICT, *Uses Permitted Only By Special Exceptions Issued By The Zoning Hearing Board, “Agricultural [I]ndustry.”*; and Section 400.5(b), AP and AP1-AGRICULTURAL PRESERVATION DISTRICT, *Intensive Agriculture*.

Nowhere in the Nutrient Management and Odor Management Act, 3 Pa.C.S. §§ 501-522, or in the regulations interpreting the Act found at 25 Pa.Code, Chapter 83, are the terms “intensive agriculture activity” or “intensive agriculture” defined. It has been the OAG’s experience that the use of these terms results in the imposition of additional regulations on farms with larger numbers of animals than so called “traditional” farms and by extension operates to unlawfully restrict the existence of Concentrated Animal Operations (CAOs) or Concentrated Animal Feeding operations (CAFOs) within the municipalities. In the *Richmond Township* case, the ordinance defining “Agriculture (Intensive)” is comparable to Maxatawny Township’s definition of “Agriculture (Intensive).” There, the Commonwealth Court concluded that the term “Agriculture (Intensive)” was vague and ambiguous and more significantly, preempted by various state laws. A township cannot preclude CAOs and CAFOs in a zoning district where agriculture is a permitted use. Yet, this is the practical effect of the Maxatawny Township Ordinances at issue in this case.

Moreover, in *Richmond Township* the Court held that an agricultural operation which complies with the Nutrient Management and Odor Management Act does not constitute an operation that has a direct adverse effect on public health and safety. This Office has previously dealt with municipalities that sought to require conditional use or special exception approval to operate proposed CAOs or CAFOs in a zone in which agriculture is a permitted use. In those situations, we advised the municipalities that while it is within their authority to require a conditional use or special exception for a CAO/CAFO, the conditions imposed to obtain that approval cannot conflict with or exceed State law. 53 P.S. § 10603(b); *Richmond Township, supra*, 2 A.3d at 686-87 (holding that municipality exceeded its authority in imposing requirements for a special exception that conflict with the Nutrient Management Act (NMA)); *Commonwealth v. Locust Township*, 49 A.3d 502, 509-511 (Pa.Cmwlt. 2012)(*en banc*) (holding

that a municipality exceeds its authority and is preempted from requiring smaller animal operations to comply with the NOMA).

### **Why "Intensive Agriculture" Is Vague and Ambiguous.**

Even if the current Ordinances concerning "Intensive Agriculture" were authorized under State law, the use of this term in the Maxatawny Township ordinances is confusing, inconsistent, and unworkable. Section 400.2 reads that "[o]nly the following uses are permitted by right in the AP District and AP1 District, provided that the requirements for specific uses and Section 400.12<sup>2</sup> are met...Agricultural...uses including...poultry..." As ██████████ is proposing to use his land for poultry operations it could be argued that he is permitted to do so by right in the AP/AP1 District where his land is located.

However, Section 400.2 also includes a proviso about "requirements for specific uses" where it appears the Township considers the proposed operation as "intensive agriculture" requiring a conditional use under Section 400.5(b), AP and AP1-AGRICULTURAL PRESERVATION DISTRICT, *Intensive Agriculture*. "Intensive Agriculture" relevant to this case is defined in Section 202, DEFINITIONS, *Specific Terms*, Intensive Animal Husbandry, as "200,000 poultry" plus "[t]he keeping and handling of livestock quantities exceeding an average adult weight for...layer chickens and/or an average market weight of all other livestock of 2,000 pounds per acre as referenced in the following table..." ██████████ proposes to build barns holding broiler, not laying, chickens making the "average adult weight" portion of the Section inapplicable. Maxatawny's table lists a broiler chicken as 4 pounds.

██████████ proposes 74,000 chickens which is well under the 200,000 figure set by the Township. That ends the inquiry under the Ordinances as they now exist. Nevertheless, with regard to the second requirement for "intensive agriculture," there is no indication that "all other livestock" on the land would exceed 2,000 pounds per acre. The OAG construes the term "all other livestock" to include the livestock on the land, exclusive of the broilers. "All other livestock" on the land would be the 65 steer, 6 goats, 3 pigs, and 12 layers mentioned in footnote 1 above. In our calculations, the OAG used the highest weights the Township has listed in its table to err on the side of caution:

- 65 steer x 1400 pounds (beef cattle) = 91,000 pounds.
- Goats are not listed on the Township's table so we will use Table 1 from the Pennsylvania State University's (PSU) Department of Crop and Soil Sciences Agronomy Fact Sheet # 54, *Pennsylvania's Nutrient Management Act (Act 38): Who is Affected?*<sup>3</sup> The highest weight for a goat on the PSU table is 200 pounds (buck meat goat). 6 goats x 200 pounds = 1,200 pounds.
- 12 heavy layers x 7 pounds = 84 pounds.
- 3 pigs (sow and 8 pigs) x 375 pounds = 1,125 pounds.

The total weight for all other livestock, at most, would be 93,409 pounds (91,000 + 1,200 + 84 + 1,125). ██████████ owns 45.5 and rents another 62.4 acres for a total of 107.9 acres. 93,409 pounds ÷ 107.9 = approximately 865 pounds per acre which is well below the 2,000 pound limit.

<sup>2</sup> Section 400.12, AP and AP1-AGRICULTURAL PRESERVATION DISTRICT, *Requirements Respective To Non-Agricultural Uses Other Than Residential Uses*, appears to have no applicability to this case.

<sup>3</sup> Fact Sheet #54 is attached hereto for the Township's review.

The OAG acknowledges Maxatawny Township's attempt to define "Intensive Agriculture" in Section 202, DEFINITIONS, *Specific Terms, Intensive Animal Husbandry*, by listing the numbers of and ascribing various weights to a variety of animals. The OAG remains concerned, however, that this list is not as thorough as Fact Sheet #54 in that it does not include the amount of animals listed in the Fact Sheet and does not recognize that some animals spend less than a year on a farm. Additionally, the weights on the Township's list do not match the weights found on the Fact Sheet, which is produced by the preeminent experts in the field.

Another instance of vagueness, ambiguity, and inconsistency in the Ordinance is the Township's use of the term "solid waste" in Section 200, DEFINITIONS, *Agriculture (Intensive) and Solid Waste*. Under "Agriculture (Intensive)" solid waste is mentioned in connection with "the disposal of liquid and solid wastes." However, when one looks at the definition of "solid waste" in the Ordinances it specifically states that "[s]uch waste shall not include biological excrement." It seems inconsistent to provide for the disposal of solid waste, as it relates to intensive agriculture (i.e. a large number of animals), but then define solid waste, generally, to exclude biological excrement. It would appear necessary for the solid waste of an "intensive agriculture" operation to include biological excrement.

Section 400.5(b) mandates that an intensive agricultural operation comply with the requirements of Section 513, SUPPLEMENTARY REGULATIONS, *Intensive Agricultural Regulations*, in order to have a conditional use approved. But it appears, under the OAG's calculations, that the proposed poultry operation does not rise to the level of intensive agriculture as defined by the Township's own ordinances. As the Township's Ordinances are now written, Section 513 is inapplicable.

Even if compliance with Section 513, SUPPLEMENTARY REGULATIONS, *Intensive Agricultural Regulations*, was necessary there are multiple problems. For example, Section 513(d) prohibits more than "500 birds per acre or 2000 lbs. per acre, whichever is more restrictive." This means that not even a CAO is permitted under this Section. Section 513.f requires 200 foot setbacks to residential *property* lines but makes no mention of residential *districts* which leaves this Section vague and open for various interpretations.

### **Miscellaneous Problems – Sections 513 and 510**

#### **a. Section 513 "Manure Storage"**

Sections 513.l, 513.o, and 513.p run contrary to nutrient management regulations with regard to storage and application of manure. The Department of Environmental Protection (DEP) imposes mandatory requirements for the design and construction of manure storage facilities on animal agricultural operations. See 25 Pa.Code § 91.36. DEP requires that the design and construction of a liquid or semisolid manure storage facility must be certified by a professional engineer (PE) as meeting the *Pennsylvania Technical Guidelines* (Pa.TG) and the DEP's *Manure Management Manual* (MMM) standards. 25 Pa.Code §§ 83.351 & 91.36. The Pa.TG, Section IV, Code 313 reads that "[t]anks may be designed with or without covers." With respect to solid waste, Code 313 states that waste stacking facilities "shall be covered with a roof or be provided with a rainfall collection and separation system." The DEP pamphlet *The Basics of Manure Management Requirements*, dated January 2012, advises farmers that manure stored on an "improved stacking pad[ ] does not necessarily need to be covered." Maxatawny's Section 513.l requires that "[s]olid and liquid wastes *shall* be stored in an enclosed storage facility" and

Section 513.o states that “[a]ll manure storage areas *must* be covered....” (emphasis added). Maxatawny Township’s mandatory requirement that waste and manure shall be “enclosed” and must be “covered” exceeds state law.

Sections 513.l and 513.o mandate that the farmer dispose of his/her waste and manure “on a bi-weekly basis” or “every two weeks.” This requirement exceeds state law as well. There is no state requirement that waste/manure be removed every two weeks. DEP recommends, but does not require, that waste/manure be removed at least twice a year. In the absence of a state law mandating a specific schedule for manure removal, the Township cannot impose a more stringent standard.<sup>4</sup>

Section 513.o requires that “[a]ll manure storage areas must...be inspected by the Township at the cost of the Owner.” The Township cannot impose such a requirement. Again, the DEP requires a PE to certify that a waste storage facility meets state standards. The Township’s mandate that storage areas have to pass Township inspection as well is duplicative of state requirements. Under both the Clean Streams Law, 35 P.S. §§ 691.1 *et.seq.*, and the Nutrient Management and Odor Management Act, 3 Pa.C.S. §§ 501, *et.seq.*, a municipality that has an interest that is or may be adversely affected by an action of the DEP or State Conservation Commission (SCC) is entitled to appeal such an action to the Environmental Hearing Board (EHB). See 35 P.S. § 691.7(a); 3 Pa.C.S. § 517. Maxatawny can require that the owner or operator provide the Township with copies of the design and construction plans as well as the PE’s certifications/verification at the same time these documents are provided to the DEP and SCC so that the Township, at its own expense, can have its own engineer review the plans to determine whether to bring an appeal in the EHB. What the Township cannot do is require the owner/operator to have the Township inspect the storage area at the owner’s/operator’s expense.

b. Section 513 “Setbacks”

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<sup>4</sup> There are no state standards with respect to impervious surfaces. By way of information, however, Section 513.l establishes bulk regulations that are more restrictive than other district uses. “Bulk” is a “term used to describe the size, volume, area, or shape of buildings or other structures and their physical relationship to each other, to open space, or to tracts of land, to lot lines, or to other buildings.” Section 202, DEFINITIONS, *Specific Terms, Bulk*. Section 513.l.a limits impervious surface for “Intensive Agriculture” to 2%. Yet Section 400.9.c & d, AP and AP1-AGRICULTURAL PRESERVATION DISTRICT, *Maximum Building Coverage And Height*, allows a maximum building coverage of 10% and a maximum impervious coverage of 20%. As a result, impervious coverage allowance for “Intensive Agriculture” is limited to 2% whereas 20% is permitted for General Agriculture. This is an inequitable application of coverage requirements and is more restrictive than other district uses. Past experience shows that no “Intensive Agriculture” operation would ever be below 2% impervious surface on, for example, a 50 acre lot. In that example, the impervious surface would be closer to 5% at a very minimum and would therefore require a variance of this section. A farmer should be allowed up to 10% maximum building coverage and 20% impervious coverage for all uses on his/her farm regardless of whether it is part of “General Agriculture” or “Intensive Agriculture” use. The OAG brings this to the Township’s attention and recommends that the inequitable application requirements be addressed.

Sections 513.1.b & c list 300 and 200 foot setbacks respectively. Subsection (b) states that “[n]o new barns, animal shelters, stables, feed yards, or manure storage areas shall be located closer than 300 feet from all residential dwellings (except the dwelling of the owner or lessee) and from existing restaurants and existing office uses.” Barns, animal shelters, stables, feed yards, and of course, manure storage areas all concern the accumulation of animal waste. While the Township requires a 300 foot setback for all new “manure” areas, 25 Pa.Code §83.351(a)(vi)(H) mandates a 300 foot requirement for buildings constructed after 1997 only if the manure area “is located on slopes exceeding 8%, and if the slope is toward the property line, or a facility has a capacity of 1.5 million gallons.” As ██████████ is proposing new construction, this regulation is applicable to his poultry barns. The 300 foot setback is applicable only in very limited circumstances and the Township is without authority to require an extended setback distance in situations other than that described in 25 Pa Code §83.351(a)(vi)(H).

The Township’s Subsection 513.1.c reads, “[n]o existing barns, animal shelters, stables, feed lots, or manure storage areas shall be located closer than 200 feet from all property lines and residential dwellings (except for the dwelling of the owner or lessee).” State manure management regulations require 200 foot setbacks for existing manure sites in various situations. For manure areas in existence prior to 1997, 200 foot setbacks apply when manure is “[w]ithin 200 feet of an intermittent or perennial stream, river, spring, lake, pond or reservoir, or any water source, or wetland” and when waste is “[w]ithin 200 feet of a property line if the facility (except permanent stacking and compost facilities) is located on slopes exceeding 8% and if the slope is toward the property line, or a facility has a capacity of 1.5 million gallons or greater, unless the landowners within the 200 feet distance from the facility otherwise agree and execute a waiver in a form acceptable to the” SCC. 25 Pa.Code §§ 83.351(a)(v)(G & H). For those manure sites that came into existence after 1997, 200 foot setbacks apply to property lines and water sources. 25 Pa.Code §§ 83.351(a)(vi)(G & H).

The Township may establish setbacks but these distances must comply with state law as explained above. Additionally, state law does not have any setback requirements other than from property lines and water sources. Establishing additional setbacks from residences, restaurants, and offices effectively regulates manure/waste practices in a manner inconsistent with the requirements of state law and regulation. This necessarily results in the ordinances preemption under 25 Pa.Code § 83.205.

c. Section 510 “Environmental Performance Standards”

██████████ applied for a conditional permit after the Township denied his poultry operation as a use by right in the agricultural zone. In a letter dated November 18, 2014, the Township informed ██████████ that “[s]ection 501.10 and all of its subparts will...require compliance for further plan submissions.” (emphasis added). On March 19, 2015, the Township engineer and zoning officer opined that ██████████ had to comply with all of the requirements of Section 501.10, SUPPLEMENTARY REGULATIONS, *General Criteria for Uses, Environmental Performance Standards*. Zoning Officer Christopher M. Paff wrote in a letter to the Maxatawny Township Planning Commission that Mr. Weaver had to provide “written documentation to describe how the [poultry barn] proposal shall comply with Sections 501.10(a)-(q)...”

The introduction to § 501.10 reads “[n]otwithstanding the laws and regulations of the...Pennsylvania Department of Environmental Protection (PaDEP), the Environmental

Performance Standards listed under this Section will be utilized by the Township as supplemental regulations for reviewing existing or potential environmental impacts” within the Township. The OAG construes this to mean that the Township is requiring a farmer to do more than comply with state laws and regulations in order to secure a permit. Exceeding state law requirements violates ACRE.

There are nineteen (19) standards listed under that Section. Many of these standards are unauthorized ordinances under ACRE. Starting with Section 501.10(a), *Air Management*, agricultural odors are covered by the Nutrient Management and Odor Management Act (NOMA), 3 Pa.C.S. § 501, *et.seq.*, and accompanying regulations. 25 Pa.Code §§ 83.201 & 701. Moreover, 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). Therefore, state law and regulation preempts the standards established in Section 501.10(a).

The Clean Streams Law, 35 P.S. § 691.1, *et.seq.* and its accompanying manure and agricultural process waste regulations, 25 Pa.Code § 91.1, *et.seq.* and 92a.1, *et.seq.* entirely preempt Section 501.10(b) of the Township ordinances, *Liquid Wastes or Sewage*.

501.10(c) *Solid Waste Management*, does not mention biological excrement. As a result, the OAG presumes that subsection (c) refers to waste that would, for example, be placed in a dumpster and hauled away to a landfill. If this assumption is correct, subsection (c) should specifically state that it does not include biological excrement.

Section 501.10(g), *Groundwater and Surface Water Supplies and Quality*, states that “[n]o activity shall endanger groundwater levels and quality and surface water quality....” With respect to the quality of water, the Clean Streams Law and accompanying regulations are applicable. The Water Resources Planning Act (WRPA) governs the quantity of water used in agriculture. The WRPA precludes municipalities from allocating water resources and regulating “the location, amount, timing, terms or conditions of any water withdrawal by any person.” 27 Pa.C.S. § 3136(b). The DEP regulates consumptive water use pursuant to the WRPA and the Water Resources Planning regulations. 27 Pa.C.S. §§ 3118, 3131, 3133-34; 25 Pa.Code § 110, *et.seq.* These regulations establish the framework for permissible water withdrawal and use activities, along with registration, monitoring, record-keeping, and reporting requirements. 25 Pa.Code § 110.201(3). Therefore, Maxatawny’s ordinance pertaining to surface and ground waters is preempted by the Clean Streams Law, the WRPA, and the applicable regulations. *See Commonwealth v. Locust Township*, 49 A.3d 502, 514 (Pa.Cmwlth. 2012)(*en banc*)(Local underground water ordinance as applied to agricultural operations preempted by the WRPA and the DEP’s regulatory scheme).

The substance of § 501.10(l), *Erosion and Sedimentation Pollution Control*, is generally correct; however, it remains vague and ambiguous. Erosion and sediment issues are governed by 25 Pa.Code § 102.4, *Erosion and sediment control requirements*. Subsection (l) does not specifically address E&S controls other than briefly mentioning DEP “Chapter 102 regulations.” The language of subsection (l) can be construed to exceed state requirements. Subsection (l) should be rewritten to read that all E&S requirements found at 25 Pa.Code 102.4 must be followed.

The Storm Water Management Act directs the DEP to coordinate stormwater management in the State. 32 P.S. § 680.1, *et.seq.*; 25 Pa.Code § 102. A municipality’s stormwater management ordinance must be consistent with the DEP’s stormwater management

regulatory scheme and its respective County's DEP-approved stormwater management plan. 53 P.S. §§ 67701, 67704. Section 501.10(m), *Stormwater Management*, of the Township ordinances establishes requirements for new construction. As stormwater management is governed by DEP regulations, 25 Pa.Code § 92a.32(d), *Stormwater discharges associated with construction activity*, contains the applicable state regulatory standards. As it is currently written, Section 501.10(m) is not consistent with the requirements of § 92a.32(d).

Section 501.10(o), *Floodplain*, is also preempted by state law. The Flood Plain Management Act, 32 P.S. §§ 679.101-601, and the accompanying DEP regulations, 25 Pa.Code § 106.1, *et.seq.*, govern what activities are permissible in a floodplain, as well as the requirements for a flood plain plan. Therefore, Section 501.10(o) should state that floodplain concerns are governed by the applicable state laws and regulations.

Management of wetlands in the Commonwealth is governed by the DEP pursuant to 25 Pa.Code § 105, *et.seq.* Most activities involving wetlands require authorization or permitting from the DEP. Moreover, federal authorization is in some instances required in the form of a Pennsylvania State Programmatic General Permit (PASPGP-3). As a result, Section 501.10(p), *Wetlands*, is preempted by the regulations found at 25 Pa.Code § 105, *et.seq.*<sup>5</sup>

## V. CONCLUSION

In order to bring its ordinances in compliance with state law the OAG contends that Maxatawny Township must take the following action.

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<sup>5</sup> The OAG notes there are several area of Section 501.10 that are not applicable to the type of operation [REDACTED] desires to conduct. By way of example, Section 501.10(d)(1), *Outdoor Storage Control*, states "[e]xcept for farmer's normal agricultural operations...." It then lists limitations on flammable or explosive liquids, solids, or gases. The Township cannot make any farmer comply with subsection (d)(1) as NAO's are specifically exempted. Section 501.10(e) *Noise & Vibration*, is also inapplicable. There are no vibrations associated with the proposed poultry operation; the only noise would be from fans which cannot be heard from the property line. Section 501.10(f) *Visual & Heat*, does not apply. Poultry operations like that proposed by Mr. Weaver have only one dusk to dawn light at the front of the barn. Sections 501.10(h) *Electromagnetic and Radioactive Radiation* and 501.10(k) *Utility Management and Control* are likewise inapplicable.

In § 501.10(r), *Wooded Areas*, the Township is essentially regulating silvicultural activities. The RTFA specifically defines timber harvesting as an agricultural activity. 3 P.S. § 952. The MPC permits landowners the right to harvest timber. 53 P.S. § 10603(f). While the current matter does not involve timber harvesting, the OAG suggests it would be best for the Township to consult a publication entitled "Pennsylvania Model Forestry Regulations" that was developed by the Pennsylvania State University School of Forest Resources in 2000. "The model is intended to address fairly the needs and concerns of local citizens as well as forest landowners and the forestry industry." *Id.*, p. 1. "It is also designed to be consistent with the so-called 'Right to Practice Forestry' provision" of the MPC. *Id.*

A. "Intensive Agriculture." The Township may continue to utilize the term "Intensive Agriculture" and any variations of that term, but Maxatawny cannot define "intensive" in a manner inconsistent with state law and regulation. The definitions of that term must be amended to mirror the DEP's and SCC's definitions of CAO's and CAFO's.

- CAO's. The SCC defines and regulates CAO's under the Nutrient Management and Odor Management Act regulations. 25 Pa.Code. § 83.201, et.seq. These regulations comprehensively describe how to: calculate Animal Equivalent Units (AEU); compute the number of AEU's per acre; and determine what land is considered "land suitable for manure application." See 25 Pa Code §83.262, Identification of CAO's. These regulations also explain what is required in nutrient management plans, how to manage manure, and standards for manure storage facilities. See 25 Pa Code §§83.272, 83.281, 83.282, 83.291, 83.311 & 83.351.
- CAFO's. The DEP regulation at 25 Pa.Code §92a.2 defines which operations constitute a CAFO under Pennsylvania law. The regulation states that 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(b)(4) (relating to concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25))."
- The crux of whether an operation is a CAO or CAFO is the AEU calculations. The Township shall utilize Table 1 from the Pennsylvania State University's (PSU) Department of Crop and Soil Sciences Agronomy Fact Sheet # 54, *Pennsylvania's Nutrient Management Act (Act 38): Who is Affected?* in order to uniformly determine AEU's and thereby correctly determine which agricultural operations constitute CAO's and CAFO's.
- The Ordinances which must be amended are the following: Section 202, DEFINITIONS, Specific Terms, *Agriculture (Intensive)*; *Intensive Animal Husbandry*; and *Agricultural Industry*. Once the definitions of these terms mirror the DEP's and SCC's definitions of CAO's and CAFO's then all subsequent references to "intensive" will comply with state law.

B. Delete §§ 513.l, 513.o, and 513.p. These ordinances run contrary to nutrient management regulations with regard to storage and application of manure as explained above on pages 6 and 7. The Township cannot mandate that manure storage areas be "enclosed" or "covered." Moreover, Maxatawny Township cannot force farmers to pay for a Township inspection of manure storage areas.

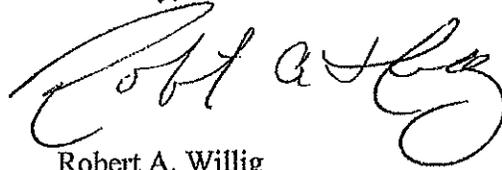
C. Replace §§ 513.1.b & c with the setback distances listed in 25 Pa.Code §§ 83.351(v) & (vi). The best way to do this is to simply insert the language of §§ 83.351 (v) & (vi).

D. Section 501.10.

- Section 501.10(a), *Air Management*. Add a subsection (6) stating “This environmental performance standard does not apply to operations engaged in the production of agricultural commodities.” This will clarify that agricultural odors are covered by the NOMA and accompanying regulations.
- Section 501.10(b), *Liquid Wastes and Sewage*. Change the language of subsection (b) to read “Liquid wastes and sewage will be handled in compliance with the Clean Streams Law and its accompanying manure and agricultural waste regulations.”
- Section 501.10(c), *Solid Waste Management*. Add a subsection (3) stating “Agricultural biological excrement is not covered by this environmental performance standard.”
- Section 501.10(g), *Groundwater and Surface Water Supplies and Quality*. This subsection is preempted by the Clean Streams Law, the WRPA, and the regulations applicable to those laws. Subsection (g) should read “No activity shall endanger groundwater levels and quality and surface water quality in the area of use, nor adversely affect groundwater supplies of nearby properties, pursuant to the Clean Streams Law, the Water Resources Planning Act, and the regulations accompanying those laws.”
- Section 501.10(l), *Erosion and Sedimentation Pollution Control*. This subsection should be changed to read “All erosion and sedimentation requirements found at 25 Pa.Code 102.4 must be followed.”
- Section 501.10(m), *Stormwater Management*. Subsection (m) should be changed as follows: “Stormwater management will be consistent with the DEP’s stormwater management regulatory scheme and Berks County’s DEP-approved stormwater management plan. Stormwater management for new construction will comply with the requirements listed in 25 Pa.Code § 92a.32(d).”
- Section 501.10(o), *Floodplain*. Subsection (o) should be changed to read “Floodplain management is governed by the Flood Plain Management Act, 32 P.S. §§ 679.101-601, and the accompanying DEP regulations, 25 Pa.Code § 106.1, *et seq.*”
- Section 501.10(p), *Wetlands*. Subsection (p) should state “Management of wetlands in the Commonwealth is governed by the DEP pursuant to 25 Pa.Code § 105, *et seq.*”

I look forward to the municipality's response to our proposal to resolve this matter through amending the above-referenced ordinances.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert A. Willig". The signature is fluid and cursive, with the first name "Robert" being the most prominent part.

Robert A. Willig  
Senior Deputy Attorney General

Agronomy Facts 54



# Pennsylvania's Nutrient Management Act (Act 38): Who Is Affected?

In spring 1993, the Pennsylvania legislature passed and the governor signed the Nutrient Management Act (Act 6) into law. The regulations implementing this law went into effect in 1997. In 2002 the State Conservation Commission began an effort to revise these regulations. In summer 2005, the Pennsylvania legislature replaced Act 6 with Act 38 as part of the Agriculture, Communities, and Rural Environment (ACRE) initiative. The new regulations, now falling under the new Act 38, were finalized in 2006 and went into effect in October of that year.

These revised regulations include several significant changes in the state's nutrient management program, including changes to who is affected by the regulations. This fact sheet addresses the question "Who is affected (regulated) by this legislation and regulations?"

## CONCENTRATED ANIMAL OPERATIONS

The act states that "concentrated animal operations" will be required to develop and maintain a nutrient management plan. Concentrated animal operations (CAOs) are defined as agricultural operations where the animal density of all livestock on the farm exceeds 2 animal equivalent units (AEUs) per acre on an annualized basis. This animal density criteria has not changed in the new regulations; however, two significant changes were made. First, the definition now includes all livestock, including nonproduction animals such as horses used for recreation and transportation. Second, an operation with less than 8 AEUs is not considered to be a CAO regardless of the animal density.

## Animal Equivalent Units (AEU)

An AEU is 1,000 pounds of live weight of any animal on an annualized basis. Annualized means that if animals are not present on an operation for a whole year, the animal units are adjusted for the proportion of time during the year that animals are present on the operation. The calculation involves determining the number of AEUs of all animals on the farm based on the number of animals and their average weights and then adjusting that for the actual number of days (out of 365) that the animals are on the operation. To determine the number of AEUs on a farm, the following

formula can be used for each type of animal and then added together to get the total AEUs on the farm:

$$\text{AEUs for each type of animal} = \left[ \frac{\text{average number of animals on a typical day that the animals are there} \times \text{animal weight (lb)} \div 1,000 \right] \times \left[ \frac{\text{number of days the animals are on the operation per year}}{365} \right]$$

Table 1 (page 3) lists standard animal weights that are used to calculate AEUs. It is strongly suggested that these standard animal weights be used for this calculation. However, if the farmer has records of actual weights of the animals on the farm, these may be used to determine the appropriate animal weight to be used for this calculation if the records are complete enough to justify the use of the nonstandard weights. Note that for growing animals, an average weight for their growth over the year is used. For example, for broilers that grow from 0.09 to 5.9 pounds per animal over the growth cycle, the average weight would calculate to be 3.0 pounds per animal.

## Acres Suitable for Application of Manure

The acreage number used in the animal density calculation is all acres, owned and rented, that are suitable for the application of manure. This acreage is determined to be those lands that meet the following criteria:

- cropland, hay land, or pastureland (owned or rented) that is an integral part of the operation
- land that is under the management control of the operator
- land that is or will be used for the application of manure from the operation

Farmstead and forestland cannot be included in this calculation as land suitable for manure application.

## Animal Density

The number of acres that meet the criteria listed above are then divided into the total AEUs on the farm to determine the overall animal density for the operation. Use the blank worksheet on page 4 to calculate the animal density on your farm.

**Concentrated Animal Operations Requirements**

A CAO as defined under the original regulations that was in existence on the effective date of the revised regulation (October 1, 2006) should already have an approved nutrient management plan. The following are the new plan submission requirements of CAOs as defined in the revised regulations:

- An existing operation that becomes a CAO due to the changes in the regulations listed above must have submitted a nutrient management plan for approval by October 1, 2008.
- A new CAO that comes into existence after the effective date must have an approved plan prior to the commencement of manure operations.
- An agricultural operation that is planning an expansion that will result in that operation becoming a CAO must have an approved plan prior to the expansion.
- An agricultural operation that because of loss of land suitable for manure application now meets the criteria for a CAO must submit a nutrient management plan within six months after the date of the loss of land.

**EXAMPLE CAO CALCULATIONS**

The following is an example of an AEU per acre calculation.

**Example Farm Data**

Animal inventory	110 dairy cows @ 1,300-lb average weight each
(Average weights taken from Table 1)	35 helpers @ 900-lb average weight each
	20 calves @ 375-lb average weight each
	15,000 heavy broilers @ 3-lb average weight each
Production Period	Cows = 365 days per year
	Broilers = 5 flocks for 57 days each, or 285 days per year
Land inventory	Farmstead = 5 acres
	Woodland = 3 acres
	Pasture = 4 acres
	Cropland, home farm = 60 acres
	Cropland, rented farm = 36 acres

This example farm would be defined as a CAO and would be required to develop and implement an approved nutrient management plan. The animal density criterion is not to be construed as prohibiting development or expansion of agricultural operations that would exceed the criterion. It simply means that these operations will be required to have an approved nutrient management plan. Farms with an animal density higher than 2 AEU's per acre are likely to have more nutrients than can be fully used by the crops grown on the farm. Thus, nutrient management plans for CAOs often will describe on-farm manure utilization, as well as procedures for moving some manure off the farm.

**OTHER REQUIRED PLANS**

Farms receiving financial assistance for nutrient management, such as from the Chesapeake Bay Program, are also required to have a nutrient management plan. Any farm that violates the Clean Streams Law also may be required to develop a nutrient management plan.

**VOLUNTARY PLANS**

Farms with fewer than 2 AEU's per acre and farms with fewer than a total of 8 AEU's on the operation are encouraged to voluntarily develop nutrient management plans. Nutrient management plans, whether required or voluntary, can improve farm profits, help protect the environment, provide some protection from liability, and enhance the image with the general public of agriculture as a good steward of our natural resources.

**FOR MORE INFORMATION**

For more information, contact your local Penn State Cooperative Extension office or your local conservation district. For a summary of the Nutrient Management Act and regulations, see Penn State's *Agronomy Facts 40: Nutrient Management Legislation in Pennsylvania: A Summary of the 2006 Regulations*, which is available from your local Penn State Cooperative Extension office.

Using this example data and the worksheet, the calculation of animal density (AEU's per acre) for this farm would be as follows:

ANIMAL TYPE	NO. ANIMALS	X ANIMAL WEIGHT (LBS)	X PROD. DAYS	+ FACTOR =	AEU
Dairy	110	x 1,300	x 365	÷ 365,000 =	143.0
Helpers	35	x 900	x 365	÷ 365,000 =	31.5
Calves	20	x 375	x 365	÷ 365,000 =	7.5
Broilers	15,000	x 3	x 285	÷ 365,000 =	35.14
		x	x	÷ 365,000 =	
		x	x	÷ 365,000 =	
		x	x	÷ 365,000 =	
				Total* =	217.14
				Acres available for manure**	÷ 100
				AEU's/acre	= 2.17

\*If this figure is less than 8, then the farm would not be a CAO, regardless of the AEU/acre figure calculated below.

\*\*Includes only cropland, hayland, and pastures; for this example there are 96 acres of cropland/hayland and 4 acres of pasture.

**Table 1. Standard animal weights used to calculate animal equivalent units to identify concentrated animal operations.**

TYPE OF ANIMAL	STANDARD WEIGHT (LBS) DURING PRODUCTION (RANGE)
<b>Dairy</b>	
<i>Holstein/Brown Swiss</i>	
Cow	1,300
Heifer: 1-2 yr.	900 (650-1,150)
Calf: 0-1 yr.	375 (100-650)
Bull	1,500
<i>Ayrshire/Guernsey</i>	
Cow	1,100
Heifer: 1-2 yr.	800 (575-1,025)
Calf: 0-1 yr.	338 (100-575)
Bull	1,250
<i>Jersey</i>	
Cow	900
Heifer: 1-2 yr.	600 (400-800)
Calf: 0-1 yr.	225 (50-400)
Bull	1,000
<b>Swine</b>	
Nursery pig	30 (15-45)
Wean to finish	140 (15-265)
Grow finish	155 (45-265)
Gestating sow	400
Sow and litter	470
Boar	450
<b>Poultry</b>	
Layer: 18-65 wk.	3.10 (2.75-3.45)
Layer: 18-105 wk.	3.15 weighted avg.
Layer, brown egg: 20-65 wk.	3.8 (3.3-4.3)
Layer, brown egg: 20-105 wk.	4.00 (3.3-4.7)
Pullet: 0-18 wk.	1.42 (0.08-2.75)
Broiler, large: 0-53 days	3.0 (0.09-6.0)
Broiler, medium: 0-35 days	2.3 (0.080-4.5)
Roaster	3.54 (0.09-7)
Male: 0-7 wk.	
Female: 0-9 wk.	
Turkey, tom: 0-18 wk.	20.0 (0.12-40)
Turkey, hen: 0-12 wk.	7.1 (0.12-14)
Duck: 0-43 days	3.56 (0.11-7)
Guinea: 0-14 to 24 wk.	1.9 (0.06-3.75)
Pheasant: 0-13 to 43 wk.	1.53 (0.05-3)
Chukar: 0-13 to 43 wk.	0.52 (0.04-1)
Quail: 0-13 to 43 wk.	0.26 (0.02-0.5)
<b>Beef</b>	
Calf: 0-8 mo.	300 (100-500)
Finishing: 8-24 mo.	950 (500-1,400)
Cow	1,400
Bull	1,500
<b>Veal</b>	
Calf: 0-20 wk.	270 (95-445)
<b>Larger Breed Sheep</b>	
Lamb: 0-1 yr.	80 (10-150)
Ewe	175
Ram	225

TYPE OF ANIMAL	STANDARD WEIGHT (LBS) DURING PRODUCTION (RANGE)
<b>Smaller Breed Sheep</b>	
Lamb: 0-1 yr.	50 (10-90)
Ewe	150
Ram	185
<b>Meat Goats</b>	
Kid: 0-1 yr.	65 (5-125)
Doe	150
Buck	200
<b>Dairy Goats</b>	
Kid: 0-1 yr.	45 (5-85)
Doe	125
Buck	170
<b>Miniature Horses and Miniature Donkeys</b>	
Foal: 0-6 mo.	35 (25-45)
Weanling: 6-12 mo.	60 (45-75)
Yearling: 12-24 mo.	100 (75-125)
Two-Year-Old: 24-36 mo.	150 (125-175)
Mature	200
<b>Ponies and Donkeys</b>	
Foal: 0-6 mo.	65 (30-100)
Weanling: 6-12 mo.	150 (100-200)
Yearling: 12-24 mo.	300 (200-400)
Two-Year-Old: 24-36 mo.	400 (300-500)
Mature	600
<b>Light Horses and Mules</b>	
Foal: 0-6 mo.	190 (80-300)
Weanling: 6-12 mo.	450 (300-600)
Yearling: 12-24 mo.	700 (600-800)
Two Year Old: 24-36 mo.	900 (800-1,000)
Mature	1,100
<b>Draft Horses</b>	
Foal: 0-6 mo.	360 (120-600)
Weanling: 6-12 mo.	800 (600-1,000)
Yearling: 12-24 mo.	1150 (1,000-1,300)
Two-Year-Old: 24-36 mo.	1450 (1,300-1,600)
Mature	1,800
<b>Bison</b>	
Calf: 0-1 yr.	525 (50-1,000)
Cow	1,200
Bull	2,000
<b>Deer</b>	
Fawn: 0-6 mo.	36 (7-65)
Yearling Doe: 6-18 mo.	95 (65-125)
Yearling Buck: 6-18 mo.	110 (85-155)
Mature Doe	145
Mature Buck	200
<b>Alpaca</b>	
Young	80 (15-145)
Mature Female	145
Mature Male	170
<b>Llama</b>	
Cria: 0-1 yr.	85 (20-150)
Yearling: 1-3 yr.	225 (150-300)
Mature	325

Using this worksheet to determine if your farm is a CAO:

ANIMAL TYPE	NO. ANIMALS	X ANIMAL WEIGHT (LBS)	X PROD, DAYS	÷ FACTOR =	AEU
		X	X	÷ 365,000 =	
		X	X	÷ 365,000 =	
		X	X	÷ 365,000 =	
		X	X	÷ 365,000 =	
		X	X	÷ 365,000 =	
		X	X	÷ 365,000 =	
		X	X	÷ 365,000 =	
				Total* =	
			Acres available for manure		÷
			Animal density: AEU/acre**		=

\*If the total AEU's on the farm are less than 8, the farm is not a CAO, regardless of the animal density.  
 \*\*Farms with an animal density of greater than 2 AEU's/acre are defined as CAOs.

Prepared by Douglas Beegle, distinguished professor of agronomy, and Jerry Martin, senior extension associate, in cooperation with and with funding from the Pennsylvania State Conservation Commission.

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