



The Agricultural Law Resource & Reference Center

The Agricultural Law Brief

Summarizing Local, State, National, and International Legal Developments Impacting Food and Agricultural Law in Pennsylvania

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SUPREME COURT RULES THAT ACRE APPLIES TO PRE-EXISTING ORDINANCE REGARDLESS OF ENFORCEMENT

On April 29, 2009, the Pennsylvania Supreme Court ruled that the Attorney General (AG) has authority to challenge a local ordinance that was promulgated prior to the enactment of the Agriculture, Communities, and Rural Environments Act (ACRE), 3 PA. CONS. STAT. §§ 311-18, regardless of whether the municipality has acted to enforce the ordinance. *Commonwealth v. Locust Twp.*, 968 A.2d 1263 (Pa. 2009). ACRE was enacted on July 6, 2005, to address local ordinances that unlawfully regulate normal agricultural operations. At the time of the passage of ACRE, an ordinance regulating “intensive animal operations” was in force in Locust Township, Columbia County. The AG filed suit under ACRE challenging this ordinance as being preempted by Pennsylvania law. The township filed a preliminary objection to the use of ACRE because section 313(b) of the statute required either the “enactment or enforcement” of an ordinance, neither of which had been alleged. Based upon the application of the Statutory Construction Act, 1 PA. CONS. STAT. § 1921(a), and the precedent of *Arsenal Coal Co. v. Department of Environmental Resources*, 477 A.2d 1333 (Pa. 1984), the court rejected this argument, finding that the AG was not required “to wait for the Township to attempt to enforce the Ordinance” before he could file suit. Accordingly, the court remanded the case to the Commonwealth Court for further proceedings. This opinion may be obtained from www.aopc.org/OpPosting/Supreme/out/J-158a&b-2008mo.pdf.



Photo from USDA Farm Service Agency Web site.

DISTRICT COURT DENIES GAS COMPANY'S MOTION TO DISMISS MINIMUM ROYALTY ACT LITIGATION

A federal district court has denied a natural gas company's motion to dismiss litigation requiring an interpretation of Pennsylvania's Minimum Royalty Act. *Kropa v. Cabot Oil & Gas Corp.*, No. 3:08-cv-551, 2009 WL 1044610 (M.D. Pa. Apr. 17, 2009). In this case, landowner John Kropa seeks to terminate his natural gas lease based upon non-compliance with 58 PA. STAT. § 33, which requires that a natural gas lease guarantee payment of at least a one-eighth royalty. Kropa argues that this statutory minimum royalty provision has been violated because his lease authorizes post-production expenses to be deducted from his one-eighth royalty. After consideration of whether the term “royalty” should be construed according to its common usage or to its peculiar meaning within the industry, the court concluded that neither party, at this stage of the litigation, had established the meaning of the term. To ascertain its proper meaning, the court opined that it will need to review additional documents as the case proceeds. In a footnote in its opinion, the court indicated that it disagreed with the analysis in *Kilmer v. Elexco Land Services*, No. 2008-57 (Susq. Ct. Com. Pl. Mar. 16, 2009), which was the first opinion to address this issue. The *Kilmer* court ruled in favor of the gas company. For more information on natural gas issues, please visit the [Agricultural Law Center Natural Gas Exploration Resource Area](http://www.dsl.psu.edu/centers/aglaw/gas.cfm) Web page at www.dsl.psu.edu/centers/aglaw/gas.cfm.

FDA Extends Compliance Date for Animal Disposal Regulation Until October 26, 2009

In 2008, the U.S. Food and Drug Administration (FDA) promulgated a final rule designed to strengthen preventive measures against Mad Cow Disease (BSE). 73 Fed. Reg. 22,720 (Apr. 25, 2008) (to be codified at 21 C.F.R. § 589.2001). Pursuant to this rule, which became effective on April 27, 2009, cattle material at the highest risk for containing BSE—primarily brains and spinal cords from cattle thirty months or older—can no longer be used in any animal feed. The restrictions under prior law had applied only on feed for ruminant animals. 21 C.F.R. § 589.2000. The new rule will necessitate substantial changes in the disposal of dead livestock. Producers may need to dispose of cattle using alternative means, such as composting, incinerating, or utilizing a landfill, because some rendering plants have indicated that they no longer will accept cattle due to the new requirements. In response to these concerns, FDA has delayed enforcement of the new rule and has established October 26, 2009, as the compliance date. 74 Fed. Reg. 18,626 (Apr. 24, 2009). For more information on this topic, visit the [FDA BSE](#) Web page.

Senators Specter and Casey Introduce Legislation to Reform Milk Pricing System

Pennsylvania Senators Arlen Specter and Robert Casey introduced the Federal Milk Marketing Improvement Act of 2009, S. 889, on April 23, 2009, in an effort to stabilize milk prices received by farmers. These prices have dropped approximately fifty percent within the last year. Under current law, milk prices are established through a series of milk marketing orders at the federal and state level. The specific price received by a farmer is based upon a set of complex formulae utilizing the market prices for cheese, butter, dry whey, and nonfat dry milk. The price received also depends upon other factors such as whether the milk is likely to be sold for fluid consumption or processed into a manufactured dairy product. The proposed legislation would require that a national average production cost be factored into the milk pricing formulae. Under the bill, prices would be updated every three months to reflect changes in the cost of production. For more information on milk pricing in Pennsylvania, visit the [Pennsylvania Milk Marketing Board](#) Web site at www.mmb.state.pa.us.

Pennsylvania Governor's Food Safety Council Holds Initial Meeting

On April 22, 2009, Dr. Joshua Sharfstein, acting Commissioner of the U.S. Food and Drug Administration, addressed the members of the Governor's Food Safety Council at their inaugural meeting. Governor Rendell created the Council to provide advice on "the development and implementation of food safety and defense protocols and practices" in the state and to facilitate coordination among the various agencies with a role in food safety and public health. Exec. Order No. 2008-09 (Dec. 17, 2008). The Council is co-chaired by the Secretaries of Agriculture and Health and is composed of thirty-one members representing a wide range of entities that are involved with the prevention of, or response to, food contamination events. Members of the Council include agricultural producers, food processors, retailers, law enforcement personnel, health officials, transportation interests, and academics. For more on food safety, visit the [Penn State—Food Safety Throughout the Food System](#) Web site at www.foodsafety.psu.edu.

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ABOUT THE AGRICULTURAL LAW RESOURCE & REFERENCE CENTER

The Agricultural Law Resource and Reference Center is a collaboration between The Pennsylvania State University's Dickinson School of Law and College of Agricultural Sciences as well as the Pennsylvania Department of Agriculture. The Center is designed to provide the highest quality educational programs, information, and materials to those involved or interested in agricultural law and policy.

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