Understanding Pennsylvania Act 38

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Pennsylvania recently passed HB 1646, commonly known as Pennsylvania Act 38 of 2005, or ACRE. This Act is part of a larger plan to address certain issues effecting agriculture litigation in Pennsylvania. The two issues that HB 1646 deals with are (1) conflicts between agricultural operations and local ordinances and (2) odor management for concentrated animal feeding operations. Both of these issues are reactions to the larger problem of the recent broadening of development in traditionally rural areas.

The ACRE program is Pennsylvania's answer to the conflict between local government ordinances and the interest of farmers to continue to operate. Pennsylvania's many municipalities and t have a serious impact on agriculture. The Right to Farm Law protects agricultural operations but requires that farmers go to court to over turn illegal ordinances, often financially burdening operations or completely barring resolution. Various agricultural groups have called for a more cost effective method of settling conflicts between farmers and local government units.

The bill as originally introduced into the Pennsylvania House of Representatives would have created an Agricultural Review Board. This board was to be made up of five members; the Secretaries of Agriculture, Environmental Protection and Community and Economic Development and two other members, one of which was to be a dean or faculty member of a college of agriculture or a State related university who is knowledgeable about animal agriculture. The Board would have responded to complaints about restrictive local ordinances impacting a normal agricultural operation, or the ownership structure of an agricultural operation, by conducting hearings and issuing a ruling that would be appealable to the courts. However, the Agricultural Review Board concept did not survive the Committee hearings on the bill.

The Board was replaced by a prohibition on unauthorized local ordinances and a process by which aggrieved farmers can request that the Attorney General review potentially unauthorized ordinances. The Attorney General must respond in writing to all requests, informing the appropriate parties of the Attorney General's decision. After the Attorney General reviews the ordinance, a decision must then be made whether or not to bring an action against the local government in the Commonwealth Court. The Attorney General does not have the power to declare a local ordinance void; the court must make that decision. There is also a private right of action for any person who is affected by an unauthorized local ordinance.

Regardless of whether the Attorney General or a private individual brings a suit against a municipality, the case will be heard in the Commonwealth Court. The Act allows for the Commonwealth Court to appoint masters that conduct hearings on complaints brought under the bill. The master would then make findings and a recommendation in writing to the court and to the parties of the proceeding. The President Judge may then adopt the finding and recommendation of the master.

Act 38 allows for the shifting of attorney fees and other litigation costs if certain conditions are met. Fee shifting is available for both plaintiffs bringing actions against local governments and to local governments who are the defending their ordinance. In order for the assignment of those fees to the plaintiff, the Court must determine that the unauthorized local ordinance was enacted or enforced with "negligent disregard of the limitation of authority established under state law." 2005 PA H.B. 1646 §317(1). For the fee shifting to take effect *against* the party bringing the suit, the Court must determine that the suit was "frivolous or was brought without substantial justification in claiming that the local ordinance in questions was unauthorized." 2005 PA H.B. 1646 §317(2).

There is also a requirement that the Attorney General provide an annual report to the chairmen and minority chairmen of the House and Senate Committees of Agricultural and Rural Affairs. This report will contain information on the number of reviews requested, the number of reviews conducted, and the number of actions brought by the Attorney General including information on the outcome of those actions.

The second part of the ACRE bill is a substantial change to Pennsylvania's nutrient management law. This change concerns the addition of odor management to the traditional scope of Nutrient Management Regulatins.

A new definition added to the statute is "odor management plan". This is defined as "a written site specific plan identifying the practices, technologies, standards and strategies to be implemented to manage the impact of odors generated from animal housing or manure management facilities located of to be located on the site". 2005 PA H.B. 1646 §503. The new law requires the State Conservation Commission promulgate regulations establishing "practices and technologies, standards strategies and other requirements for odor managements plans." 2005 PA H.B. 1646 §504(1.1). When creating these regulations the Commission is to consult the Department of Agriculture, the Department of Environmental Protection and the Nutrient Management Advisory Board. The Commission is to consider these factors when creating the regulations: site specific factors (such as proximity of adjoining landowners, land use of the surrounding area, and direction of the prevailing winds), reasonably available technology, practices, standards and strategies (considering both practical and economic feasibility). These regulations must be created within two years of the effective date of Act 38. (which is July 6, 2005)

The law also requires that the PA Department of Agriculture establish an Odor Management Certification Program for the purposes of "certifying individuals who have demonstrated the competence necessary to develop odor management plans." 2005 PA H.B. 1646 §508(a). The Department is required to develop such testing and educational requirements as it deems necessary to ensure that the require competence is demonstrated.

The requirement of an odor management plan only applies to concentrated animal feeding operations (CAFO) and concentrated animal operations (CAO). The law automatically applies to any new agricultural operation that is a CAFO or CAO. Existing CAFO or CAO operations only are required to have an odor management plan when they expand by constructing a new of expanded animal housing facility of manure management facility. The requirement for a plan only applies to the new or expanded part of the operation. Existing agricultural operations that are not a CAFO or CAO but become one because of an expansion are required to have a plan, but only for the newly constructed or expanded part of the operation.

The odor management plan is required to be made and fully implemented before the expansion or construction or the CAFO or CAO. Plans must be certified by an odor management specialist. The plans must be submitted to the Commission, or at the Commission's discretion to the local conservation district for review and approval. Plans

can be transferred with ownership of the agricultural operation. Plans can also be adopted voluntarily by agricultural operations that are not required to have a plan. Financial assistance is available in the forms of grants and loans and loan guarantees to the extent that funds are available. The requirement for an odor management plan takes effect 180 days from the signing of Act 38.

Failure to comply with the requirement for an odor management plan or any regulation adopted under this law is illegal. Failure to comply with an odor management plan is also unlawful. There is a civil penalty of up to $500 for the first day of each offense and up to $100 for each additional offense. If the offense did not cause harm to human health or an adverse effect of the environment Pennsylvania shall issue a warning instead of a fine where the operator that's immediate action to address the violation. In addition to civil fines, any violation may be abated in the manner provided by law or equity for the abatement of public nuisances. On the other hand, full implementation of an odor management plan shall be considered a mitigating factor in any civil action for damages alleged to be caused by the use or management of nutrients.

The state odor management laws preempt municipal ordinances prohibiting or regulating odors generated from animal housing or manure management facilities if the municipal ordinances are in conflict with state law or regulations. Local governments are prohibited from adopting stricter requirements than state law. There is also a restriction on imposing fines on any violation which has a fine assessed under state law.