

Emerging Environmental Issues in Agriculture

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Topics for Today's Presentation

- Nutrient Management Act Preemption- The Berner Case
- Agriculture Exemption Under Air Pollution Control Act – Methodologies to estimate emissions?
- Revisions to PAG-12 General NPDES Permit for CAFOs – Due Process Concerns
- Climate Change – Recommendations for Agriculture
- Chesapeake Bay TMDL – WIP 3

Scott Sponenberg's Proposed Swine Farm

The application for special exception proposed housing 4800 swine in a 78.5 foot by 201 foot barn with under building concrete manure storage capacity of approximately 645,000 gallons. The farm is not a Concentrated Animal Operation (CAO) or a Concentrated Animal Feeding Operation (CAFO).

Section 402 of Zoning Ordinance contains criteria for special exception

Commercial feedlots, veal finishing, hog raising, poultry breeding or egg or meat production operations, livestock auctions, wholesale produce centers, fertilizer and seed distributors, commercial horse farms, grain storage and feed mills, and similar uses **shall submit facility designs and legally binding assurances with performance guarantees which demonstrate that all facilities necessary for manure and wastewater management, materials storage, water supply and processing or shipping operations will be conducted without adverse impact upon adjacent properties.** For purposes of this chapter, adverse impacts may include, but are not limited to, groundwater and surface water contamination, groundwater supply diminution, noise, dust, odor, heavy truck traffic, and migration of chemicals offsite.

Zoning Hearing Board Ruling

The ZHB determined that the ordinance, which could be interpreted to impose greater burdens on a landowner than one of the NMA's regulations, 25 Pa. Code § 83.351 ("Minimum standards for the design, construction, location, operation, maintenance and removal from service of manure storage facilities.") is preempted by the NMA.

[Berner v. Montour Twp. Zoning Hearing Bd.](#), 176 A.3d 1058 (Pa. Cmwlth. 2018)

Opinion at Tab A of extra materials

... a careful reading of that regulation reveals that the standards set forth within it apply only to "new manure storage facilities and the expansion of existing manure storage facilities, **as part of a plan** developed for an NMP operation." 25 Pa. Code §83.351(a).

Because Applicant's proposed use does not require development of an NMP, **the regulation** cited by the ZHB, which applies only to new manure storage facilities that are constructed as part of a plan developed for an NMP operation, **does not apply here.**

Pennsylvania Supreme Court Granted Allocatur for the Following Question:

See Tab B of extra materials

Whether the Commonwealth Court erred by holding that the Nutrient Management Act (“NMA”), 3 P.S., §519, only preempts local ordinances as applied to farms that have an approved nutrient management plan and that small farms that are not required to submit nutrient management plans can be subjected to more stringent regulation than larger more intensive agricultural operations that are required to obtain approval of a nutrient management plan under the Nutrient Management Act.

What Type of Preemption?

Occupy the Field?

- 519(a) General.—This chapter and its provisions are of Statewide concern and **occupy the whole field** of regulation regarding nutrient management and odor management, to the exclusion of all local regulations.

Conflict Preemption?

- 519(b) Nutrient management.—No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter **if the municipal ordinance or regulation is in conflict** with this chapter and the regulations or guidelines promulgated under it.

Local Government Can Be No More Stringent

- 519(d) Stricter requirements.—Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this chapter and the regulations or guidelines promulgated under this chapter. No penalty shall be assessed under any such local ordinance or regulation under this subsection for any violation for which a penalty has been assessed under this chapter.

Scott Sponenberg's Argument

See Tab C of extra materials

The Commonwealth Court's Decision Must be Reversed Because the NMA Preempts Montour Township's Attempt to Regulate Nutrient Management Through its Zoning Ordinance

A. The NMA Must be Read in Pari Materia With Other Agricultural and Environmental Statutes

B. The NMA Expressly Preempts the Field of Nutrient Management to the Exclusion of All Other Local Regulation Impacting the State's Statutory Regulation of Nutrient Management Matters

C. The Commonwealth Court's Interpretation of the NMA Is Not Supported By Pennsylvania Cases Concerning the Preemption Of Zoning Ordinances

Argument of Amici Commonwealth on Behalf of Attorney General, DEP and Agriculture

See Tab D of extra materials

The NMA preempts the Montour Township Zoning Ordinance's requirements for the storage and use of manure to the extent they are inconsistent with state law and regardless of whether the farms are subject to the specific requirements governing large farm operations (concentrated animal operations and concentrated animal feeding operations) under the NMA

Agrees NMA provides for conflict preemption, but lower court misapplied

Brief for Amici Pennsylvania Farm Bureau and PennAG Industries- Tab E

1. Commonwealth Court's holding that Montour Township ordinance is not subject to state preemption under the Nutrient Management Act is contrary to the express provisions of the Act and interpretations of the Act's preemption applied in relevant case law.

2. The Nutrient Management Act's state preemption of Section 402(1)(E) of Montour Township is well supported by and consistent with pervading policy objectives established under Pennsylvania statutes to preserve and enhance through uniformity in regulatory standards the economic welfare and integrity of Pennsylvania agriculture and its farm families and discourage impeding regulatory actions by local governments.

Additional argument from Farm Bureau and PennAG Industries

3. Commonwealth Court's holding will lead to results that are absurd and run in contravention of the purposes of agricultural statutes to sustain viability of farming operations within a uniform, statewide regulatory framework.

Citizen Objectors' Argument

See Tab F of extra materials

- **COMMONWEALTH COURT CORRECTLY DETERMINED SECTION 519 OF THE NUTRIENT MANAGEMENT ACT PROVIDES FOR CONFLICT PREEMPTION**
- **SECTION 402.1.E OF THE ZONING ORDINANCE DOES NOT CONFLICT WITH THE NUTRIENT MANAGEMENT ACT**
- **INTERPRETING THE NUTRIENT MANAGEMENT ACT IN *PARI MATERIA* WITH OTHER STATUTES DOES NOT CHANGE THE OUTCOME**
- **COMMONWEALTH COURT DECISION IS CONSISTENT WITH PREVIOUS CASELAW**

Air Emissions and the Ag Exemption

- Permittee intends to construct eight cage-free layer barns along with one manure storage building designed to house a total of 2,400,000 chickens. Requests authorization to operate under NPDES PAG-12.
- Except as may be required by the Clean Air Act or the regulations promulgated under the Clean Air Act, this act shall not apply to the production of agricultural commodities and the Environmental Quality Board shall not have the power nor the authority to adopt rules and regulations relating to air contaminants and air pollution arising from the production of agricultural commodities. 35 P.S. 4004.1(a).

General Information Form (GIF)

The Notice of Intent application package requires completion of the GIF

One of the coordination questions in the GIF inquires “[w]ill the project involve operations (excluding during the construction period) that produce air emissions (i.e. NOX, VOC, etc.)? If ‘Yes’, identify each type of emission followed by the amount of that emission.” Permittee’s consultant answered “no.”

Citizen Group Objections

- Citizen group submitted comments, claimed response in GIF was patently false. Asserted CAFO has potential to emit air emissions that would trigger major source status
- DEP response to comment cited Agriculture exemption in Air Pollution Control Act
- Citizen Group appealed, EHB Docket No. 2017-080-R

Parties Submit Dispositive Motions

DEP and Permittee sought dismissal of the paragraphs related to the air issues, arguing the Board lacks jurisdiction to consider the air issues in an appeal of the PAG-12. DEP also asserted it had yet to determine whether air permitting was required and the “no” answer in the GIF was harmless error.

Objectors argues the GIF is part of the application and did not contain true and accurate information.

EHB Denies Motions

- There is no dispute that the Permittee provided incorrect and incomplete information regarding air emissions in the General Information Form. However, the continuing relevance of that error is in dispute, both from a factual and legal standpoint. We are loathe to dismiss objections in an Appellant's appeal where questions of law and fact exist. Likewise, summary judgment is not appropriate where material facts remain in dispute and neither party is clearly entitled to judgment as a matter of law. These questions may be answered as we proceed further with this litigation, and it is possible that dispositive motions may be appropriate at a later time.

Permittee Submits Estimated Air Emissions

See Tabs H, I and J of extra materials

- Following the Board's denial of the dispositive motions, Permittee submitted a revised GIF and provided an estimate of air emissions
- DEP requested additional information and Permittee provided more detailed basis for its methodology
- DEP sent technical deficiency letter, Permittee has refused to respond any further
- Board denied Appellant motion to re-open discovery, but authorized a second round of dispositive motions

Renewal of NPDES PAG-12 (CAFO)

- NPDES General Permits Have 5-Year Terms
- Authorizations to Operate Under General Permits Used to be 5-Years
- EPA Objected to Authorizations Beyond Term of General Permits
- Renewals or Reissuance of General Permits Required NOI Package
- The reissuance of the General Permit for CAFOs (PAG-12) was noticed in the Pennsylvania Bulletin on March 31, 2018.
<https://www.pabulletin.com/secure/data/vol48/48-13/499.html>.

Authorization for Renewal of Coverage

- **Submission of a Notice of Intent to renew coverage is no longer necessary. The submission of annual reports in January will serve as the notice of intent to continue coverage under PAG-12.**
- **In response to public comments, DEP stated notice of receipt of annual reports will be published on DEP web page Tab K of extra materials**
- **Appeals of the automatic renewal of coverage without notice and comment are pending at EHB Docket Nos. 2018-041 and 2018-042.**

Climate Change and Agriculture

- See Tab L of extra materials for summary of recommendations in Gerard and Dernbach compilation

The chapter 30 examines the agricultural strategies, practices, and technologies available to increase soil carbon sequestration and reduce GHG emissions. It summarizes on the research documenting the many agricultural practices that have been demonstrated to reduce GHG emissions and increase carbon sequestration in soil, including cover cropping, more varied crop rotations, agroforestry and silvopasture (adding trees into cropping or grazing systems), perennial crops, prescribed rotational grazing, dry manure management, and others.

Chesapeake Bay TMDL

- By 2025, Pennsylvania must reduce nitrogen pollution levels by 34 million pounds per year; phosphorous levels by .7 million pounds per year; and sediment levels by 531 million pounds per year.
- Pennsylvania Must Develop Watershed Implementation Plans (WIP)
- Pennsylvania developed its [Phase 1 WIP](#) in 2010, and its [Phase 2 WIP](#) in 2012.
- Agriculture is a main contributor of nitrogen, phosphorus and sediment. In fact, Pennsylvania is responsible for fully 69 percent of the nitrogen reduction the U.S. Environmental Protection Agency requires for the Chesapeake Bay by 2025. With more than 33,000 farms in our 43 counties in the watershed, agriculture is responsible for 80 percent of that reduction.
- Phase 3 WIP Presented to Steering Committee on April 3.