



Delaware Nutrient Management



The Delaware Nutrient Management Commission Rules and Regulation Minutes of the Meeting Held January 5, 2006

In attendance:

<i>Commission Members Present</i>	<i>Others Present</i>
E. Lewandowski, Chairman	S. Hollenbeck
B. Vanderwende	T. Garrahan
D. Baker	K. Foskey
C. Larimore	S. Kepfer
T. Keen	B. O'Neill
<i>Commission Members Absent</i>	
C. Fifer	
<i>Ex-officios Present</i>	
W. Rohrer	

This meeting was properly notified and posted as required by law.

Minutes:

Call to Order/Welcome

Chairman Ed Lewandowski called the meeting to order at 5:00 p.m. and welcomed those in attendance.

Discussion and Action Items:

Discuss Mandate for Post 2007:

E. Lewandowski stated this item is being discussed this evening for a possible resolution to the post 2007 Mandate matter due to the discussion from the December 13, 2005 Full Commission meeting. He asked the Program Administrator to provide a brief synopsis.

B. Rohrer referred to the minutes from the December 13, 2005 Full Commission meeting (attached to minutes). He outlined two issues:

- 1) After 2007 there is no longer a phase-in system to bring land owners who are managing nutrients into mandatory nutrient management. The matter that needs to be addressed is how individuals will be brought into mandatory nutrient management. Situations of concern would be when an individual buys property or changes their operation and is no longer below eight animal units.
- 2) When a property is sold it creates concern for the Mandate process. It also raises concern as it relates to Reimbursement/Cost Share. The Commission needs to assure the money spent is going to the property and how is it tracked when ownership is changed.

The Nutrient Management Program has been dealing with the Mandate concern by stating if a landowner has not received notification through the program or if an individual does not own property and there not been mandated would be responsible for nutrient management planning by 2007. B.

Rohrer stated there is enough language in the law that states nutrient management planning needs to be at 100%.

B. Rohrer noted that all compliance issues in the past were given at least three to six months depending on the circumstances to come into compliance. B. Rohrer's recommendation to bring individuals into compliance does not require a change with the law.

B. Rohrer stated Reimbursement/Cost Share is tracked through increases or decreases in acreage or other modifications to last year's application for cost share. When there are changes to the application it is flagged and questions are prompted. If a tract of land is taken out of production the program will bill the individual if they received cost share for more than one year.

T. Keen's asked if an individual picks up 600 acres how will it be known that it was not paid for last year. It would not be a concern if the program was handled on a one-year basis. It is only a concern for three-years. B. Rohrer reported the program is not at 100% for a one-year. B. Rohrer stated there reviewed applicants for one-year vs. three-year. They found that 60% of the acreage that are managed is three-year plans; the other 40% being managed are one-year plans. B. Rohrer stated that T. Keen's assessment is correct as it is hard to track three-year plans that were paid in full. One-year plans can be tracked. Tracking is maintained through a database and is tracked by operator. Specifically, it is tracked through who applies.

T. Keen asked what happens when one operator loses acreage and another picks it up or that is has not been picked up by anyone. B. Rohrer understands this concern. B. Vanderwende stated that it may not be picked up for a year or two. D. Baker stated that unless the planner or the operator volunteers the information the program will not know this. Most of the individuals involved in the program will do the ethical thing and report it. D. Baker suggested applying a penalty to the planner through loss of certification as the planner would know.

B. Vanderwende asked if farmers are expected to reimburse cost share if they received it and were not entitled to it. B. Rohrer stated this has been done in the past and have bill farmers for the monies.

T. Keen asked what happens to land when it is sold to a developer and when the developer is questioned reports who the land is being farmed by someone and is in the farmer's nutrient management plan as the question becomes, how can it known this acreage is in the plan. He further stated this is occurring. B. Rohrer stated for these situations it is recommending write a one-year plan. T. Keen stated it will be hard to have a planner in the private sector write the plan for \$1.35 an acre and pull soil samples. B. Rohrer stated claims are submitted for one-year plans. D. Baker agrees that it will not pay for a new one-year plan.

K. Foskey stated it is the individual's responsibility to contact the district for all district and EQIP plans if they cannot fulfill all the obligation of the contract to avoid any possible repercussions. K. Foskey suggested this should be written in the plan and should be fairly simple. E. Lewandowski asked if this is a condition of the cost share agreement and K. Foskey stated it is. T. Keen asked how the district handles changes and K. Foskey stated they are handled on a case-by-case basis. D. Baker asked what happens if the district is not contacted. K. Foskey stated they are fined.

B. Vanderwende stated there will be some slippage and is not sure what the Commission can do to track it. E. Lewandowski stated the Commission will not be able to catch of the scenarios discussed. He further stated that a disclaimer needed to be added that it is the farmer's responsibility to notify the Nutrient Management program of any changes.

T. Keen stated there are several acres that have been purchased by developers of which there is a concern. B. Vanderwende agreed.

T. Keen stated the farmer needs to be told he will owe the state money if he does not continue for the next two years when he has a three-year plan written. B. Rohrer stated the program has worked with farmers and has agreed the farmer will be they will apply and claim for reimbursement on an annual basis. This is due to uncertainty of the acreage.

T. Keen stated that three-year plans need to be tracked but does not know how to do this without it becoming a bookkeeping nightmare. B. Rohrer stated the easiest way to accomplish this is to go on a one-year reimbursement schedule. However, the minimum requirement within the law is a three-year plan. Individuals would have a legitimate gripe as the law requires a plan no older than three-years.

D. Baker asked if there is anything prohibitive to add an additional annual acreage report in order to create a paper trail should there be any suspicion. B. Rohrer stated there is an annual report which are due by March 1st, but do not have 100% submission rate. Acreage changes would be reported on the annual report. T. Keen stated this will give some idea.

C. Larimore stated another option on the Mandate Notice should have been who owns the land. Another possibility could be that the owner is identified on the annual report. This could be a way to track it. B. Rohrer stated there is a place on the Mandate Notice, but only about half fill this in. T. Keen stated that some land is rented out to two or three operators.

C. Larimore stated there is no full proof way to address this matter. T. Keen agreed but would like as tight of a system as possible. C. Larimore agreed with D. Baker's suggestion to add a disclaimer. This will protect the Commission.

B. Rohrer stated the Claim for Payment will be reviewed and be sure there is some language incorporated to protect the Commission and make the applicant aware that the office needs to be contacted should there be a change in acreage. B. Vanderwende stated his opinion is that the Consultant should not be made responsible. If there is any slippage and it is missed, it may not be reported. B. Rohrer stated it is not always collected. If the land transferred the program asks for the soil samples and recommendations go with the property. If agreed, the program will not bill the individual. The only time the individual is billed is when the land is sold.

E. Lewandowski stated there is an enforcement issue as there is no policy in place and asked B. Rohrer if any regulations are necessary. B. Rohrer stated the statues states nutrient management plan is required based on the method the Commission adopts to bring them into compliance. The last portion of the bill states plans will be cycled in under a five-year period beginning in 2003 and ending in 2007. It further states that contingent upon adequate funding the Commission shall have fully implemented the state nutrient management program by 2007. B. Rohrer is unaware of any language of absolute that everyone needs a plan by 2007 and may need to ask counsel about it. It is clear nutrient management planning needs to be completed over a five-year period. B. Rohrer will ask counsel to review this.

D. Baker stated there may be someone coming into the green industry that would need certification, not necessarily nutrient management planning. D. Baker asked if three to six months would also apply to this industry. B. Rohrer stated those individuals who are not certified have been give until the next round of sessions to become certified before anything formal occurs. A formal complaint may be lodged, but a Memorandum of Resolution is done.

There is still a concern with enforcement. B. Rohrer stated for certification the regulations require certification of everyone by January 1, 2004. The Commission has established a system to phase in individuals over a five-year period. The only unclear area is for those individuals that did not fall under the mandate because they did not own property prior to 2007. The question remains as to how they will be required to have nutrient management planning. The question was raised if regulations would take care of the issue.

B. O'Neill stated individuals are given every opportunity to become registered and for whatever reason they do not. It is his opinion there is regulation created to address this. He further stated the agricultural side is strong, but on the urban side there are a lot of individuals not taking it seriously. Therefore, B. O'Neill states there is a need for regulations. Once the formal complaint process is done there is a need to determine whether the individual is fined or may their license is taken away. This will occur more often as nutrient management planning grows.

B. Vanderwende stated urban situations are growing. It is obvious there are commercial applicators that are not certified.

T. Keen asked if the commercial applicator was required to have a license. B. O'Neill stated the individual is required to have a Commercial Applicator's license. T. Keen asked if these situations could be identified through the business license as the application states what the nature of the business is. It was noted some of the individuals do not have a phone number listed on the truck and they use a cell phone for their business and is purposely done. The individual's obtain business through referrals and door-to-door.

E. Lewandowski stated there are two issues how are the individuals identified and once identified how much time is given for certification. As far as implementation B. Rohrer stated for those who were not included in mandate phase-in deadline, new operations should have six months to come into compliance. He further stated that he is comfortable handling this administratively and not necessarily through regulations. B. O'Neill restated his position there needs to be regulations for those individuals that do not become certified.

B. Rohrer reported there are two lawn care companies that are not certified. One of them has been formalized through the complaint process and has signed a Memorandum of Resolution. The other has been formalized through the complaint process and after the next Full Commission meeting the Program Administrator will recommend to enter into a Memorandum of Resolution. The Memorandum of Resolution will be an agreement that they will attend the next round of sessions to become certified. If they do not become certified, the Commission will act on the formal complaint because the Memorandum of Resolution failed and go to a formal hearing and assess a fine. Past fines have been for \$100.

B. Rohrer stated commercial applicators may need to be fined differently. B. Rohrer reported the Pesticides Department addresses commercial applicators differently.

B. Vanderwende asked what would happen should the fine not be paid and do not become certified. Also, they could pay the fine and not become certified. B. Rohrer stated the Commission has authority under the law to pass the matter to a JP or a judge and request an injunction. This basically means they could not perform their business. B. Rohrer stated he has never been involved in this but is sure it is a very long and drawn out and difficult process.

D. Baker stated urban operates under a more competitive scenario than a farming operations and asked B. O'Neill if under his opinion this could be utilized. B. O'Neill stated he has spoke to individuals who states they could use certification as a marketing strategy in order to obtain customers. B. O'Neill stated it is the smaller businesses that are of concern and is mostly in New Castle. He further stated urban nutrient management is a growing business and is a big business. It is an opportunity for individuals, but is a business that effects the environment. The bigger businesses have been a part of the process and have gone through the process. D. Baker noted some of the employees of the bigger business do moonlight on the side.

T. Keen asked how many are certified and is in lawn care. B. O'Neill stated there is a list of about fifty. B. Rohrer stated it was more like thirty. B. O'Neill stated he is in receipt of a list from Pesticides of lawn care and it listed about 250. B. Rohrer stated a mailing went out utilizing this database indicating

they may need to be certified if they apply nutrients to 10 acres of property. B. O'Neill stated he has heard some individual not needing to worry about certification as they do not a 10 acre parcel. He informs them this is not the case. He further stated this is a misunderstanding that could be rectified through certification, but it is a matter of getting them to come. T. Keen stated it should be advertised in the newspapers that certain individuals are certified and is clients do not use them they could be in violation of the law.

D. Baker asked how things were progressing with the Governors Conference on Ag. B. Rohrer stated there is an agenda. D. Baker stated this topic gets good public relation. B. Rohrer noted there is flexibility with the agenda.

B. O'Neill stated this topic would be better addressed at the Nurseryman's Convention which is held in January at the Modern Maturity Center. The convention is very well attended as they receive pesticide credits. D. Baker asked if there were displays. T. Keen stated there have been distributors in the past. B. Rohrer noted this convention is during Ag- Week and agreed it was something to look into. B. O'Neill stated it would make them aware it is required to be certified but something needs to be in place in order to emphasize it is mandatory they comply.

Discuss Policy for State Agencies Requesting Certification Database:

E. Lewandowski stated there is a contractor working for the Delaware Department of Agriculture (DDA) that has requested the mailing list of the Commission. The question is whether to treat this as a public request or to adopt a policy.

B. Rohrer stated the topic goes beyond this as this request has been treated as a Freedom of Information Act (FOIA) request. The contractor was given two options. The first is to wait until the Commission establishes a policy on how agency requests are handled or the second being the request would be treated as a FOIA request. It was determined to treat the request as a FOIA request and the contractor paid a fee of \$40.

B. Rohrer stated the issue is whether the Commission wanted to establish a policy for agencies that request mailing addresses or that they should be treated as FOIA requests. M. Cooke told B. Rohrer there is more flexibility with the database for non-public entities.

D. Baker states information is available through a FOIA request and does not see any advantage in creating a policy. He further stated it would be hard to craft a policy that everyone would be comfortable with when the types of requests are unknown. D. Baker's preference is to leave it the way it is and treat all requests as a FOIA request.

B. Rohrer stated the only three agency requests were made through the DDA. Two of the requests were for names and address to mail crop insurance information and the second was for a contractor to establish a list of state farmers. B. Rohrer suggested maybe considering a policy for the DDA and to treat other requests as FOIA. B. Rohrer is confident that Nutrient Management will be asked for names and addresses by the DDA.

B. Vanderwende stated he wanted to cooperate with the DDA to the fullest extent. He asked why the Commission could not give them what they request other than what FOIA requires without rule or policy. B. Rohrer stated currently the request is received from DDA in writing and a \$40 fee is assessed. E. Lewandowski asked if it was necessary for the DDA to be assessed \$40 in order to best cooperative with them. B. Vanderwende stated a written request should be necessary, but to waiver the fee. B. Rohrer stated it wouldn't be a matter of waiving the fee. The fee is only associated with a FOIA request, public requests for information.

E. Lewandowski asked if the Program Administrator is suggesting making a request for information by the DDA a formal request, but not a FOIA request. He further asked if policy is necessary to restate it in

order to handle this. B. Rohrer stated the DDA has a policy for lists. The DDA's policy states that lists of names and addresses of any grower or producer that is regulated by the department is considered public information with no FOIA request. B. Rohrer further stated the Commission is not necessarily abiding to DDA's policy because in most cases requests to the Commission would be assessed \$40 under FOIA.

B. Rohrer stated he would be comfortable with a policy or agreement that the Certification database can be used within the DDA. Further, all other requests are approved on a case-by-case basis. E. Lewandowski asked B. Rohrer to craft the language for presenting to the Full Commission to the effect and for a motion to accept the recommendation.

B. Vanderwende motioned to craft a policy and present it to the Full Commission.

D. Baker raised the possible concern of including commodity groups that may be part of the DDA. The policy would be an open policy for any association with the DDA may be inviting to more than what is being addressed. The DDA does provide services for commodity groups. D. Baker stated in his opinion it would be better to state specifically names and addresses and not a computer file. A computer file could get outside the control of DDA. B. Rohrer clarified names and addresses are exported from the database and attached to an email. D. Baker stated there is no control when sending attached to an email. E. Lewandowski asked if the suggestion is to provide labels produced by the staff. D. Baker does not want undue burden on the staff. D. Baker stated once a file is emailed it can be exported anywhere. E. Lewandowski stated the concern is understood and further stated that the information could be typed and sent out also.

Discussion ensued as to how information was provided in the past. B. Rohrer reported name and address listings were provided on labels and mandate listings have been provided electronically. D. Baker asked what protocol or security is utilized for the internet. B. Rohrer stated no one can alter the database but the staff. D. Baker agreed to let it go.

With a motion on the table, E. Lewandowski asked if there was anymore discussion. B. O'Neill asked what the motion was.

E. Lewandowski stated the motion is for B. Rohrer to craft language; the language is not before the subcommittee. The language to be crafted is for a policy for consideration by the Full Commission as to how to handle requests for information made by the DDA.

E. Lewandowski asked if all other state agency including the Department of Natural Resources and Environmental Control (DNREC) requests would be considered a FOIA request. B. Rohrer stated if DNREC requested information, he would provide them with two options. The first option would be to make the request a formal FOIA request and the second option would be to present the request to the Commission. B. Rohrer stated he would not make the decision due to the sensitivity of the information.

E. Lewandowski asked if everyone understood the motion.

With a motion on the table, E. Lewandowski called for the vote. The motion passed unanimously.

Discuss Policy for Winter Fertilizer Applications:

E. Lewandowski policy for winter fertilizer applications for discussion. He stated there is a lawn care company applying fertilizer on frozen ground. E. Lewandowski reported that B. Rohrer is in receipt of a complaint. Some of the contracts lawn care companies have with their client require a specific number of fertilizer applications within a year period. If they do not apply during the appropriate time, they do so in December whether the ground is frozen or not.

B. Rohrer was asked to place this topic on the agenda to discuss the policy. B. Rohrer reported the original complaint was due to a small pile of fertilizer on the road in front of a house. The staff of Nutrient Management investigated and found a sign in the yard indicating clearly that the lawn had just been fertilized. This all occurred around December 12th.

The sign listed the company and contact information. The Nutrient Management staff then contacted the company and asked them why the small pile of fertilizer was laying there. The second issue they found was they are not certified and asked them why they were not. S. Hollenbeck communicated with the company in reference to the lack of certification.

The Nutrient Management staff called the company and asked what their policies for applying in the winter. There is a clear concern as to why they are applying fertilizer in the winter. They informed B. Rohrer it was part of their contract and faxed some information to the office. This information stated plants are taking the urea up in the middle of winter, which B. Rohrer knows better. The issue is the Commission adopted a policy that fertilizer is not applied to frozen ground. The policy identifies the timeframe of December 1 and February 1 in which nitrogen or phosphorus based fertilizers cannot be applied.

B. Rohrer stated there may need to be a stronger policy to be put in place. He noted the policy could not be enforced unless it is stronger than a policy.

B. Vanderwende stated the urea goes straight into the air if there is no rain. B. O'Neill asked if the fertilizer application occurred around the time we had the rain. B. Rohrer stated it was when we had the very cold weather and was frozen about a quarter of an inch to half an inch. Discussion ensued as to the weather conditions during the time period in question.

E. Lewandowski asked what the Commission could do to tighten up the policy. B. Rohrer stated in order to enforce a standard would be through regulation. Enforceable policies must be taken through the regulatory process.

B. Vanderwende has seen a pile of manure not half as high as the table and half way across the field. D. Baker stated the situation being discussed is a good example someone who does not have awareness of the program nor training.

B. Rohrer noted the situation will be discussed in more detail at the next Full Commission meeting as there is a formal complaint. The company is out of Chadsworth, Pennsylvania and the client is in Felton, Delaware. The company has been notified of the meeting and is aware technical standards will be discussed. The company has agreed to sign a Memorandum of Resolution to become certified and has formally committed to attend the classes.

The company is adamant that there are times where fertilizers need to be applied. B. Rohrer called TruGreen to verify this and was informed there are times in December it needs to be done. B. Rohrer has trouble with this position scientifically and feels it is due to a contractual obligation with the client.

E. Lewandowski asked the Program Administrator if he is looking for regulation to prohibit the application of fertilizer December through February. B. Rohrer stated it is his job to implement policy and the Commission's job to establish it.

T. Keen stated his opinion is anyone who applies nutrient beginning December 1 through February 1 is in a disposal mode for manure and does not see any agronomic benefit. Further the environmental hazard outweighs any benefit.

B. Vanderwende stated new developments disturbing soils anytime they can when the ground is not frozen. Once it is done, time is needed for the ground to stabilize. Fertilizer is more than likely being used if the ground is seeded and mulched. B. O'Neill stated he has seen this first hand. It was reported that fertilizer is being used for hydro-seeding.

E. Lewandowski would like the motion to bring the issue to the Commission to begin the regulatory process to forbid the application of fertilizer from December 1 until February 1. B. O'Neill asked if the language would also be incorporated in the agriculture language as well.

B. Rohrer stated there are currently four regulations in place:

- 1) Certification,
- 2) Processing complaints,
- 3) Mandatory Nutrient Management, and
- 4) CAFO Regulations.

B. Rohrer stated regulations forbidding application of fertilizer would fit best under nutrient handling requirement under certification. If Commercial Handlers are addressed within this section, nutrient handling requirements include Best Management Practices (BMPs) such as not applying fertilizer within the specified timeframe. B. O'Neill stated it should be separated due to manure. T. Keen agrees that it should be separated due to tillering.

B. Rohrer stated regulations could allow for flexibility to allow application of fertilizer during the specified timeframe as long as a certified Consultant approves the application and place it in writing. This would hold someone accountable for the decision. T. Keen stated the agriculture community needs flexibility. B. O'Neill stated the agriculture community already had enough of a burden.

D. Baker suggested instead of writing separate regulations it could include an exemption for agriculture under specific circumstances. T. Keen, C. Larimore and B. O'Neill agreed.

E. Lewandowski asked if exemption would be permitted for urban. T. Keen stated a lawn will germinate without any fertilizer. Fertilizer is necessary in order to make it knit in.

B. Rohrer asked if should be incorporated with current regulations and hold a certification holder responsible for the BMP. The level of certification would have to be a Consultant or a Commercial Nutrient Handler. B. O'Neill stated this would work, but there are individuals working in the business that does not speak good English and is probably not certified. B. Rohrer noted this would be two violations.

B. Rohrer asked if it is determined to go forward with the regulatory process that would be held accountable. B. Rohrer recommends holding a commercial business accountable for applying the wrong rate or applying at the wrong time, which is what Pesticides does.

B. Vanderwende motioned to present to the Full Commission to go forward with the regulatory process for fertilizer application as discussed and concluded. C. Larimore seconded the motion which passed unanimously.

B. Rohrer clarified the concern is with nitrogen and phosphorus based commercial fertilizer. The regulation is to prevent the commercial application of nitrogen and phosphorus based fertilizer between December 1 and February 1 and to provide flexibility for operations that equipment limitations.

D. Baker noted B. O'Neill's comment earlier as to some individuals not speaking the language. D. Baker suggested having translators available.

D. Baker suggested this as a project for one of the universities. It would be a good thesis for a student to provide translation.

Public Comments: NONE

Next Meeting: NONE

Adjournment:

Chairman Lewandowski adjourned the meeting at 6:30 p.m.

Approved,

Tony Keen, Chair
Technology Subcommittee

BRR/mrp