

**NEWMAN, COMLEY & RUTH P.C.**

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January 14, 2010

**DELIVERED VIA FAX, EMAIL  
AND U.S. MAIL**

Mr. Joseph Slater, Director  
Fertilizer/Ag Lime Control Services  
University of Missouri  
Ag Experiment Station  
3600 E. New Haven Rd.  
Columbia, MO 65211-8080

Re: Proposed Amendments to 6 CSR 250.11.041 and 11.042

Mr. Slater:

I am writing you on behalf of the Missouri Pork Association, the Missouri Cattlemen's Association, the Missouri Egg Council, The Poultry Federation and the Missouri Dairy Association. This letter provides comment on the proposed changes to 6 CSR 250.11.041 and 6 CSR 250.11.042 published in the December 15, 2009 *Missouri Register*. Speaking on behalf of the membership of these associations, we oppose the proposed changes to these two regulations.

The authority to promulgate rules that implement the Missouri Fertilizer Law is vested with the Fertilizer and Ag Lime Advisory Council ("Council"). Therefore, only the Advisory Council may initiate rulemaking under the authority of the Missouri Fertilizer Law. To my knowledge, the Fertilizer and Ag Lime Advisory Council has not convened a meeting in compliance with the Missouri Sunshine Law to vote and authorize the filing of this proposed rulemaking. Consequently, this rule was filed with the Secretary of State's Office without authority and is null and void. We suggest Fertilizer Control Services convene a meeting of the Council to formally take up whether these proposed rule changes should be filed with the Secretary of State's Office and the Joint Committee on Administrative Rules ("JCAR").

Proposed changes to 6 CSR 250-11.041 purport to implement changes made to the Missouri Fertilizer Law by H.B. 734 (2009). Unfortunately, the proposed language does not conform to the legislative intent of House Bill 734. In an earlier letter sent to you by

several Missouri agricultural associations, they indicated that the “variable fee” interpretation described in 6 CSR 250-11.041 did not conform to the legislative intent of House Bill 734. Senator Bill Stouffer agreed with our analysis in a letter he wrote you dated August 26, 2009. Senator Stouffer was very clear that the intent of the Legislature was to create a tonnage tax that was “proportionate to the fertilizer content in manipulated manures . . . [and] set manipulated manures apart from other fertilizer products” because they have “lower nutrient value” than commercial fertilizers. Our memberships at the Missouri Pork Association and the Missouri Dairy Association agree with his analysis. In lieu of the proposed variable fee option, we suggest the following language:

The fee is established at \$0.02 for each percentage point of nitrogen in manipulated manure up to the first 4.9 percent, then \$0.04 for each percentage point of nitrogen in the manipulated manure between 5 percent and 9.9 percent of nitrogen, then \$0.06 for each percentage point of nitrogen in the manipulated manure for more than 10 percent nitrogen.

We ask the Council to adopt this language to conform to the legislative intent described by Senator Stouffer, and implement a “progressive fee” structure instead of a variable fee structure.

Another proposed change to 6 CSR 20-11.041 states that “manipulated manure fertilizers shall be guaranteed.” This is contrary to provisions of the Missouri Fertilizer Law that only require a guaranteed analysis for fertilizers that are “sold.” Manipulated manures that are given away or not sold are not required to be “guaranteed.”

The fiscal note for 6 CSR 20-11.041 states that “estimating savings is not easily calculated without prior knowledge of how many tons of fertilizer products will be distributed during the reporting period.” Nonetheless, the fiscal note, without explanation or hesitation, states that “this rule will reduce . . . collections by \$19,997.70. . . .” The fiscal note provides no information how this figure was calculated. Without providing these details, the fiscal note is deficient causing the rule to be null and void.

Strangely, the fiscal note does not provide a dollar figure by which collections will be reduced for “political subdivisions.” It only says that political subdivisions “should realize a decrease from 42% to 99.9% inspection fee decreases.” Why provide a percentage decrease with no dollar figure while providing a dollar figure but no percentages for all other distributors of manure fertilizers? The failure to explain this inconsistency renders the fiscal note deficient causing the rule to fail.

The proposed amendment to 6 CSR 20-11.042 requires distributors of manipulated manures to guarantee a nutrient value within 150% of its analysis. Under the Missouri Fertilizer Law, if a guaranteed fertilizer does not meet its guaranteed analysis, the distributor is subject to a monetary penalty. Therefore, distributors must be careful to not over-estimate a fertilizer's nutrient content for fear of being fined. This proposed rule places livestock producers in jeopardy of violating their guaranteed analysis should they choose to be prudent and guarantee a lesser value to ensure compliance with the guaranteed value.

The purpose of the Missouri Fertilizer Law is to protect consumers by ensuring that when they buy nutrients they are getting a product that tests at or above the guaranteed analysis. In other words, the law encourages fertilizer distributors to under-guarantee their product to avoid penalties. This proposed rule boxes in distributors of manure fertilizers. It imposes penalties or additional fees when the analysis is too low or too high. Since the law encourages the under-guarantee of fertilizers, it should not impose burdens or additional fees when a distributor tries to follow the intent of the law and avoid penalties or providing a deficient product. The bottom line is the Council should not dictate how a distributor guarantees its manure.

Nowhere in the Council's regulations is there a requirement that a distributor of inorganic fertilizer is charged additional fees or taxes for under-guaranteeing its product. This proposed change imposing additional fees on manure fertilizers clearly singles out livestock producers for unequal treatment on how they must guarantee their product. This proposed rule violates the constitutional right to equal protection by providing disparate treatment of distributors of manures and commercial fertilizers.

Our memberships ask that the Council withdraw the proposed amendments and re-file the rule in accordance with the comments described herein.

Sincerely,

NEWMAN, COMLEY & RUTH P.C.

By:



Robert J. Brundage

c: Don Nikodim, Mo Pork Association  
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