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Analysis of Hogan Administration Proposed Phosphorus Management Tool Regulations

Differences between Hogan Administration Regulations vs. O'Malley Administration Regulations

The significant differences between the two Phosphorus Management Tool (PMT) regulations, one proposed by the O'Malley Administration (O'Malley PMT) and one proposed by the Hogan Administration (Hogan PMT), are as follows (note: Senate Bill 257/ House Bill 381 puts into statute the O'Malley regulations that were withdrawn by Governor Hogan on January 21, 2015):

1. **Full implementation:** Hogan PMT makes full implementation of the PMT "contingent upon" a the results of an evaluation determining that there is in place "sufficient capacity" in manure markets, transport programs, land application infrastructure, and alternative uses to handle any excess animal manure generated by implementation. If the evaluation results "indicate insufficient capacity," a one-year delay of the phasing-in of implementation occurs along with a subsequent re-evaluation. The evaluation is conducted by MDA and the Nutrient Management Advisory Committee (NMAC)
2. **Initial implementation:** Hogan PMT delays initial implementation by another year; it shifts the five year phase-in forward, allowing for another year of testing.
3. **Secrecy:** Hogan PMT defines specifically what farm field tests and results must be conducted and filed with MDA and creates two reports. One of the reports includes personal identification details; the regulation states that those details shall be fully protected by MDA. Hogan PMT has specific language about this protection while O'Malley PMT refers to Agriculture Article § 8-801.1(b), Annotated Code of Maryland, which has a 3-year limit language. ("The Department shall maintain a copy of each summary for 3 years in a manner that protects the identity of the individual for whom the nutrient management plan was prepared.")
4. **Ban:** Hogan PMT bans application of phosphorus to fields with a Fertility Index Value (FIV) of 500 or greater.

Please see the attached table for additional comparison details.

Interpretation of Differences

The Hogan PMT, unlike the O'Malley PMT, does not have a date certain for full implementation of the PMT.

The Hogan PMT provisions for an "evaluation" for assessing manure markets and transportation programs, available land acreage, etc., allow for this "evaluation" to stall movement of PMT implementation for a year while MDA conducts a re-evaluation. **The result is the possibility of an endless year by year postponement and re-evaluation possibility.**

While the "evaluation" language initially suggests this is only a one-year delay, there is subsequent language explicitly stating that "advancing" the PMT is "contingent upon" results of the evaluation indicating "sufficient capacity" to address management of the additional volume of animal manure "expected to be created" by the PMT. There is nothing in the regulatory language to prevent this evaluation and delay occurring year after year after year. With the poultry industry's current expansion on the Delmarva, manure levels will continue to increase while capacity to handle the manure may well not. As a result, it is unclear if the Hogan PMT regulations would ever result in full implementation of the PMT.

Note: The evaluation is done by MDA in consultation with the Nutrient Management Advisory Committee (NMAC). MDA retains control over the final decision regardless of the NMAC conclusion or advice. MDA also exercises control over the NMAC: it is the Secretary of Agriculture who makes the appointments to NMAC. Moreover, NMAC's statutory makeup is heavily weighted towards agricultural interests. While its current membership includes Doug Myers of the Chesapeake Bay Foundation, he appears to be the only member with a strong environmental, versus agricultural or business, background.¹

The Hogan PMT does ban application of manure on farm fields with a Fertility Index Value (FIV) of more than 500. Unfortunately, both the extent of acreage to which this applies as well as the impact on pounds of manure land applied is unknown. Even MDA cannot advise on the scope of this provision. Further complicating the assessment of the value of this provision are the unanswerable facts of 1) how many of these fields already, under existing regulations, cannot currently apply phosphorus or manure, and 2) whether these fields have a low, medium, or high risk of polluting Maryland waters. **Thus, it is unclear if this ban has any impact on reducing the amount of manure being applied to farm fields or protecting Maryland water quality.**²

Finally, the Hogan PMT explicitly furthers the concept of farm-specific secrecy. Though it does clearly delineate the information which MDA must collect, the MDA fact sheet on the Hogan PMT suggests that this provision is for the purpose of monitoring trends. However, the Hogan PMT does not provide for any reporting requirements from MDA or any sharing of results of the trend analysis with

¹The makeup of the NMAC, per the MDA website, is as follows: "[T]he Nutrient Management Advisory Committee includes representatives from the US Department of Agriculture, MDA, University of Maryland, Maryland Departments of the Environment and Natural Resources, Maryland Farm Bureau, Delaware-Maryland Agribusiness Association, Chesapeake Bay Foundation, Alliance for the Chesapeake Bay, commercial lawn care companies, the biosolids industry, as well as local governments and the state legislature." NMAC used to file an annual report to the legislature. The most recent one located dates to 2012. http://dlslibrary.state.md.us/publications/Exec/MDA/AG8-804%28a%29%282%29_2012.pdf. MDA's – not NMAC's – 2014 report can be seen at

http://mda.maryland.gov/resource_conservation/counties/MDANMPAnnual2014.pdf

²The FIV does not measure the risk of phosphorus polluting the water. Rather, it is a "method for expressing the relative level of plant available nutrients measured by soil testing." Putting any particular field's risk of water pollution in context requires an index like the PMT. A field with an FIV of 150 can have a greater risk of polluting than a field with an FIV of 500. It is entirely dependent on a host of field factors ranging from soil type to surface runoff potential to the absence or presence of buffers.

the public. It does, however, as previously noted ensure that no farm-specific data shall ever be released. A requirement for reporting trend results should be included explicitly, regardless of whether individual farmer information is kept confidential. As for the associated six-year soil testing requirements, as opposed to a more frequent testing (e.g. every three-years in parallel with the traditional nutrient management plan cycle), it is unclear how this once-every-six year data collection will establish trends at any time in the near future.

Table 1. Comparison of Specifics of Hogan PMT and O’Malley PMT

Hogan PMT	O’Malley PMT
Both regulations start with Title 15 Department of Agriculture, Subtitle 20, Soil and Water Conservation, Chapter 04, Nutrient Management Certification and Licensing. (15.20.04). However the Hogan regulations start at 15.20.04.11 (with no reference to 15.20.04.1-10) [page 1]	The published regulations start with 15.20.04.01-.10 and state “text unchanged” for these sections. These sections include provisions for scope, definitions, certification and licensure requirements, application & examination requirements, certificate renewal, license renewal, etc. (unrelated to PMT). [page1]
15.20.04.11.B(1) and (2) both regulations require planners to file reports with the Department that includes information related to NMPs developed for operations with soils with P FIV values > 150 (1) and that the report shall include information that the Department determines necessary to evaluate implementation of the PMT (2). [page 1]	Same as Hogan PMT [page 1]
15.20.04.11.B(3) sets the date by which certified consultants should file the report requirement to implement the PMT at Sept. 30 th . [page 1]	15.20.04.11.B(3) indicates certified consultants shall file a report with a schedule determined by the Department. [page 1]
15.20.04.11.B(4) relates to confidentiality of reports filed by certified planners. “The Department will maintain reports in a manner that protects the identity of the person for whom the plan was prepared and that person’s personal information.” [page 1]	15.20.04.11.B(4) MDA maintains confidentiality of the report information as required by Agriculture Article § 8-801.1(b), Annotated Code of Maryland (“ The Department shall maintain a copy of each summary for 3 years in a manner that protects the identity of the individual for whom the nutrient management plan was prepared.”) [page 1]
15.20.04.11.C requires planners to submit information on soil P (FIV) for fields along with acreage and county. The first such reports are due by 9/30/15 and subsequent reports are due every 6 years. Reports cannot contain identifying farmer info. [page 1]	No change to nutrient management license holder record-keeping requirements
. 15.20.04.11D requires planners to submit a separate report including names, farm names and addresses of operations for which soil P data has been provided to MDA. [page 1]	

Hogan PMT	O'Malley PMT
<p>15.20.07 (Agricultural Operation Nutrient Plan Requirements) starts with 15.20.07.02. No reference to 15.20.07.01 Sections .01 (Scope – applies to farmers or ag operators) and .03 to .07 are not mentioned even to say “text unchanged.” Note .03 to .07 deals with farmer obligations to get an NMP, file it in a timely manner, and penalties for failing to do so. [page 2]</p>	<p>All sections in 15.20.07 are referenced. Except for 15.20.07.02, all sections say “text unchanged.” In the current version of the regulations (updated 9/18/13) 15.20.07 .01 covers the scope (applies to farmers or ag operators), .03 to .07 deals with farmer obligations to get an NMP, file it in a timely manner, and penalties for failing to do so. [pages 2-3]</p>
<p>15.20.08 starts with section .02 [page 2]</p>	<p>15.20.08 (Content and Criteria of a NMP Developed for an Ag Operation) starts with 15.20.08.01 (scope) and clarifies “Text is unchanged.” [page 2]</p>
<p>15.20.08.01.D Phases PMT in over a 7 year period [page 2]</p>	<p>15.20.08.01.D Phases PMT in over a 6 year period [page 2]</p>
<p>15.20.08.02 not referenced or included [page2]</p>	<p>15.20.08.02 included with “Text unchanged” [page 2]</p>
<p>15.20.08.0.3 Definitions: because of the addition of definitions, the numbers of the definitions change. These are abbreviated with “text unchanged” rather than being written out. [pages 2-3]</p>	<p>15.20.08.0.3.B Definitions. Numbers change but regulations include all definitions even those that are not changed. [pages 2 – 6]</p>
<p>15.20.08.0.3 Definitions – adds “31” definition of PMT – phased-in between 2016 and 2022. [page 3]</p>	<p>15.20.08.0.3 Definitions – adds “31” definition of PMT – phased-in between 2015 and 2021. [page 5]</p>
<p>15.20.8.05.E. (4), (5), and (6) (a-e) Delays timeframe for implementation of phases (PMT+PSI/ Transition Management Phase I, Transition Management Phase II, and PMT) by 1 year. [pages 5-8]</p>	<p>15.20.8.05.E. (4), (5), and (6) (a-e) Planners use both PSI and PMT for plans prior to 2018, July 1, 2019 to June 30, 2019 plans are based on Phosphorus Transition Management Phase 1; July 1, 2019 to June 30, 2020 use Phosphorus Transition Management Phase 2; Plans written for July 1, 2020 and after use PMT. [pages 7-8]</p>
<p>15.20.8.05.E. (4)-(6) d (i) and e (i) Before July 1, 2020 (for Tier A and B) and before July 1, 2019 for Tier C, and again in July 1, 2021, the Dept., in consultation with the Nutrient Management Advisory Committee, will evaluate whether there is enough infrastructure/alternatives to land application. [pages 4-8]</p>	<p>No comparable language</p>
<p>15.20.8.05.E. (4)-(6) d (ii) and e (ii) Delays by one year the advancement from Phosphorus Transition Phase 1 to 2, or from Transition Management Phase 2 – PMT if results of the infrastructure/alternatives analysis indicate insufficient capacity to support additional volume of animal manure. [pages 4-8]</p>	<p>No comparable language</p>

Hogan PMT	O'Malley PMT
15.20.8.05.E. (4)-(6) d (iii) and e (iii) Advancing to Transitional Management Phase 2 and PMT is contingent upon results of the evaluation indicating sufficient capacity to address additional volume of animal manure expected due to stricter regulations. [pages 4-8]	No comparable language
15.20.8.06F [page 10], 15.20.8.07E [page 11], 15.20.8.08E [12] (PSI, and Phosphorus Transition Management Phase I and II). No additional P can be applied to fields with an FIV of 500 or greater for Phosphorus Transition Management Phase I.	No comparable language

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The Maryland Clean Agriculture Coalition is working to improve Maryland waterways and protect public health by reducing pollution, and increasing transparency and accountability, from agriculture and other associated sources of water degradation.

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