



PennState Law

Center for Agricultural
and Shale Law



A photograph showing the interior of a high tunnel greenhouse. The structure is covered with a white plastic film supported by a series of curved metal ribs. The ground is covered with dark mulch, and several rows of young green plants are growing in the center. In the background, there is a wooden frame structure and a fan. The lighting is bright, suggesting a sunny day.

**High Tunnel Exemption
from Stormwater Management Act**



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CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation’s leading source of agricultural and food law research and information.

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Pennsylvania Agricultural Mediation Program

- Who can request mediation?
 - USDA-related issues:
 - Agricultural Loans
 - Wetlands determinations
 - Compliance with farm programs, including conservation programs
 - National organic program established under the Organic Foods Production Act of 1990
 - Agricultural Credit
 - Rural water loan programs
 - Grazing on National Forest System land
 - Pesticides
 - Non-USDA issues:
 - Land and Equipment Lease issues.
 - Family farm transition.
 - Farmer-neighbor disputes.



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ACRE: The law's fundamental text:

§ 313. Certain local government unit actions prohibited.

(a) Adoption and enforcement of unauthorized local ordinances.--A local government unit shall not adopt nor enforce an unauthorized local ordinance.

"Unauthorized local ordinance." An ordinance enacted or enforced by a local government unit which does any of the following:

- (1) Prohibits or limits a normal agricultural operation unless the local government unit:
 - (i) has expressed or implied authority under State law to adopt the ordinance; and
 - (ii) is not prohibited or preempted under State law from adopting the ordinance.
- (2) Restricts or limits the ownership structure of a normal agricultural operation.



Stormwater Management Act (1978)

- Any exemptions for agriculture have long ago gone away.
- Stormwater management is at the heart of the efforts to reduce nitrogen, phosphorus and sediment contributions to the Chesapeake Bay and all other surface waters.
- Stormwater Management Ordinances themselves vary by jurisdiction. It is the duty of counties to have a Stormwater Management Plan and then for municipalities within that county to adopt ordinances consistent with that plan.
- One stormwater management issue re: agricultural use of land is small enough to address here.



Basic Duty under the SWMA

Section 13. Duty of persons engaged in the development of land.

Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics **shall implement such measures** consistent with the provisions of the applicable watershed storm **water plan** as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:

- (1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or
- (2) to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.



DEP provides “guidelines” not regulations

(a) The Department of Environmental Resources shall have the power and its duty shall be to:

- (1) Coordinate the management of storm water in the Commonwealth.
- (2) Provide in cooperation with the Department of Community Affairs technical assistance to counties and municipalities in implementing this act.
- (3) After notice and public hearing and subject to the requirements of subsection (b) of this section, publish guidelines for storm water management, and model storm water ordinances for use by counties and municipalities.

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Act 15 of 2018 – SWMA High Tunnel Exemption

A high tunnel is exempt from Stormwater Management Act (SWMA), **if:**

1. Impervious surface \leq 25% of all structures on site; **and**

2. (a) if \leq 7% slope: 35 ft from watercourse, public road, property line; **or**
(b) if $>$ 7% slope: 100 ft from watercourse, public road, property line; **or**
(c) The high tunnel is supported with a buffer or diversion system that:
 - does not directly drain into a stream or other watercourse by managing storm water runoff in a manner consistent with requirements of this act.



Statutory/Legal Definition of High Tunnel

From Act 15 of 2018 (SWMA)*

1. used for production, processing, keeping, storing, sale or shelter of an agricultural commodity, or for the storage of agricultural equipment or supplies; **and**
2. (i) has a metal, wood or plastic frame; and (ii) when covered, has a plastic, woven textile or other flexible covering; and (iii) has a floor made of soil, crushed stone, matting, pavers or a floating concrete slab.

***Same definition is used for an exemption to property taxes (as a “structure”) in Act 114 of 2013 and Act 130 of 2013.**



Act 159 of 2014 (Uniform Construction Code)

Ag Bldg. Exemption specifically amended to include high tunnels:

"Agricultural building." A structure utilized to store farm implements, hay, feed, grain or other agricultural or horticultural products or to house poultry, livestock or other farm animals, a milk house and ***a structure used to grow*** mushrooms, ***agricultural or horticultural products***. The term includes a carriage house owned and used by members of a recognized religious sect for the purposes of housing horses and storing buggies. The term shall not include habitable space or spaces in which agricultural products are processed, treated or packaged and shall not be construed to mean a place of occupancy by the general public.

A high tunnel shall be **exempted from the provisions of this act** if:

1. the high tunnel or its flooring **does not result in an impervious area exceeding 25% of all structures located on the owner's total contiguous land area**; and
2. the high tunnel meets one of the following:
 - i. The high tunnel is located at least 100 feet from any perennial stream or watercourse, public road or neighboring property line, or
 - ii. The high tunnel is located at least 35 feet from any perennial stream or watercourse, public road or neighboring property line and located on land with a slope not greater than 7%, or
 - iii. The high tunnel is supported with a buffer or diversion system that does not directly drain into a stream or other watercourse by managing storm water runoff in a manner consistent with requirements of this act.

Note: Unclear if each high tunnel can be up to 25% of the impervious surface, or if the sum of all high tunnels must be $\leq 25\%$.

"High tunnel." A structure which meets the following:

1. Is used for the production, processing, keeping, storing, sale or shelter of an agricultural commodity . . . or for the storage of agricultural equipment or supplies.
2. Is constructed consistent with all of the following:
 - i. Has a metal, wood or plastic frame.
 - ii. When covered, has a plastic, woven textile or other flexible covering.
 - iii. Has a floor made of soil, crushed stone, matting, pavers or a floating concrete slab.

Note: Same definition was used for an exemption to property tax assessment in Act 114 of 2013 and Act 130 of 2013.



**Instead of an
exemption for this:**



**The exemption also
includes this:**





What is a SWMA violation? = “Nuisance”

Section 15. Civil remedies.

(a) Any activity conducted in violation of the provisions of this act or of any watershed storm water plan, regulations or ordinances adopted hereunder, is hereby declared a **public nuisance**.

(b) Suits to restrain, prevent or abate violation of this act or of any watershed storm water plan, regulations or ordinances adopted hereunder, may be instituted in equity or at law by the department, any affected county or municipality, or any aggrieved person. . . . *[provisions for an emergency requiring “immediate abatement”]*

(c) Any person injured by conduct which violates the provisions of section 13 may, in addition to any other remedy provided under this act, recover damages caused by such violation from the landowner or other responsible person.



More on SWMA violations & “Nuisance”

Section 16. Preservation of existing rights and remedies.

(a) The collection of any penalty under the provisions of this act shall not be construed as estopping the Commonwealth, any county, municipality or aggrieved person from proceeding in courts of law or equity to abate nuisances under existing law or to restrain, at law or in equity, violation of this act.

(b) It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate nuisances.



Right to Farm Law on Public Nuisance:

§ 953 Limitation on local ordinances.

(a) Every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every municipality that defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.



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Q & A?