



Pennsylvania Forest Products Association

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July 10, 2020

Secretary Patrick McDonnell
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101

Dear Secretary McDonnell,

Many municipalities throughout Pennsylvania have adopted ordinances related to forestry, and more specifically timber harvesting operations. A common unauthorized ordinance that seems to plague foresters and timber harvesters across the Commonwealth is the widespread requirement that written Erosion & Sedimentation Control Plans (E&S Plans), required by the Department of Environmental Protection (DEP) for the vast majority of timber harvesting operations in Pennsylvania, be submitted to and approved by the local County Conservation District prior to the granting of a timber harvesting permit even when there is no state regulatory requirement to do so. Most, if not all, County Conservation Districts charge a review fee for these approvals, and those fees can unnecessarily add several hundred or even thousands of dollars to the cost of a timber harvesting operation.

Through Act 38 of 2005, also known as “ACRE” (Agriculture, Communities and Rural Environment) an owner or operator of a normal agricultural operation, which by definition includes forestry, has the ability to request that the Pennsylvania Office of the Attorney General (OAG) review a local ordinance that the owner or operator believes to be unauthorized. An unauthorized local ordinance is one that is illegal under state law. A local municipality cannot duplicate, exceed, or conflict with an already existing state regulatory scheme nor can it impede a comprehensive statewide scheme of regulation.

Through ACRE the OAG has addressed the issue of whether a municipality can require an owner/operator to first receive approval of the DEP required E&S Plan from the local County Conservation District before a timber harvesting permit will be issued. The OAG has an ACRE website, <https://www.attorneygeneral.gov/resources/acre/>, which includes letters that the OAG has sent to various municipalities addressing the E&S Plan issue (See e.g. Exhibit A; April 13, 2016 Letter to East Nantmeal Township; June 8, 2018 Letter to North Coventry Township; September 28, 2018 Letter to Clay Township; November 29, 2018 Eldred Township; December 21, 2018 East Brandywine Township). Every case is unique. Every case is fact specific and the letters do not necessarily have predictive value as to how the OAG would handle future cases. However, the Pennsylvania Forest Products Association (PFPA) interprets the OAG letters as concluding the following:

The DEP's erosion and sediment control regulations do not require an E&S plan to be submitted for review and approval to the Conservation District and the Conservation District has no role in DEP's approving of such plans, thus the Township cannot impose this requirement because it is stricter than State law. 25 Pa. Code § 102.4(b)(8). The Township can require an applicant to provide a copy of the written E&S Plan. We also note that the Township may, at its own expense,

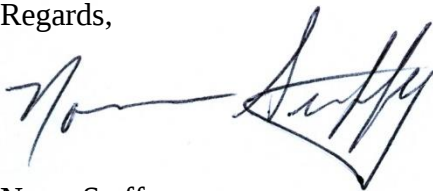
submit an applicant's E&S Plan to the Conservation District for review to check compliance with the regulations. What the Township cannot do is require the owner or operator to get approval from the Conservation District prior to harvesting.

PFPA submits that a reading of the OAG's letters leads one to conclude that this is type of ordinance violates the Municipal Planning Code (MPC). The OAG has written in its letters:

Under ACRE, "[a] local government unit shall not adopt or enforce an unauthorized local ordinance." 3 Pa.C.S. § 313(a). An "unauthorized local ordinance" is one that is "preempted under State law...." Id., § 312(1)(ii). A local municipality cannot duplicate a state regulatory scheme nor can it "impede a comprehensive, statewide scheme of regulation." Com., Office of Attorney Gen. ex rel. Corbett v. E. Brunswick Twp., 980 A.2d 720, 733 (Pa. Commw. Ct. 2009). When a municipality has ordinances that duplicate and/or impede upon state standards those state requirements override the local regulations.

While this issue originates with the municipalities' ordinances, it clearly extends to the County Conservation Districts that conduct these types of approvals. Many such Conservation Districts have Memorandums of Understanding (MOU's) with their municipalities that facilitate these unauthorized approvals (See Exhibit B). Because the Conservation Districts' ultimate authority is delegated to them by DEP, PFPA is calling on DEP to address this issue by providing clear and direct guidance to all County Conservation Districts that clarifies when they are and are not authorized to review and/or "approve" E&S Plans and charge associated review fees. PFPA agrees with those OAG's letters which state that a municipality cannot require Conservation District review and approval of E&S Plans as a prerequisite to obtaining a timber harvesting permit. PFPA contends that DEP must prohibit County Conservation Districts from engaging with illegal municipal ordinances that require unauthorized E&S Plan approvals. The guidance should also direct County Conservation Districts to remove any such language that facilitates these types of unauthorized approvals from MOUs they hold with municipalities.

Regards,

A handwritten signature in black ink, appearing to read 'Norm Steffy', written over a white rectangular background.

Norm Steffy
Chairman
Pennsylvania Forest Products Association

Copy: Deputy Secretary Ramez Ziadeh
Karl Brown
Wayne Bender
Brenda Shambaugh

EXHIBIT A

Cover page and excerpt from ACRE acceptance letters provided here. Full letters are available on the PA Office of Attorney General's website:

<https://www.attorneygeneral.gov/resources/acre/acre-archive/>



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

April 13, 2016

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120



Via Email and First Class Mail

Thomas F. Oeste, Esquire
Parke, Barnes, Spangler, Oeste & Wood, P.C.
126 West Miner Street
West Chester, PA 19382

RE: ACRE Review Request
East Nantmeal Township, Chester County

Dear Mr. Oeste:

This letter is in follow up to our letter dated November 9, 2015, in which we explained that we were preparing a letter detailing the legal problems with East Nantmeal Township's zoning ordinance provisions regulating timber harvesting and suggesting how they may be resolved through enactment of ordinance amendments. Although we are prepared to bring legal action against the Township pursuant to Section 315 of ACRE to invalidate or enjoin the enforcement of the Ordinance provisions, we provide this letter in an effort to start negotiations to resolve this matter by agreement on ordinance amendments.

I. STATE LAWS PROTECTING/REGULATING TIMBER HARVESTING/FORESTRY

We begin our legal analysis with an overview of the State laws that regulate and/or protect timber harvesting and forestry operations.

The Municipalities Planning Code (MPC) explicitly addresses the limit on municipal authority to regulate forestry activities, including timber harvesting, as it provides:

Zoning ordinances may not unreasonably restrict forestry activities. To encourage maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land

period. Forestry, as defined in Article II, herein, shall be considered a timber harvesting operation, and shall require a timber harvesting permit.

This definition is overly broad and unreasonable because it encompasses many activities that are not considered timber harvesting in the field of forestry. Our PSU expert has opined that a minimum threshold of four trees of greater than six inches in diameter per acre is so low that it would qualify almost any cutting operation as a timber harvest. Also, the removal of dead, diseased, or invasive trees, shrubs or vines is related to forest management and is not considered a timber harvest. The removal of trees for personal firewood use or removal on orchards, Christmas tree farms or tree nurseries is also not timber harvesting. The same is true for activities related to maintaining or restoring forest stand conditions by removing competitive vegetation, such as a thinning or removal of invasive species. The owner of forested land should not be required to obtain a permit to engage in forest management activities.

We suggest that the Township amend the definition for timber harvesting operation to state: "Timber harvesting operation means that part of forestry involving cutting down trees and removing logs from the forest for the primary purpose of sale or commercial processing into wood products." This revision balances the Township's objective to require a permit for commercial timber harvesting operations with the rights of the woodland owner to engage in personal use and routine forest management activities without a permit. This is also consistent with the MPC requirement for zoning ordinances to "encourage the maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land throughout the Commonwealth." 53 P.S. § 10603(f).

B. Timber Harvesting Permit and Permit Application Requirements

At the outset, we want to make it clear that we do not have an issue with the general principle that the Township requires a permit for timber harvesting operations. However, the Ordinance permit requirements for timber harvesting operations are overly restrictive and unreasonable, thus beyond the Township's authority under the MPC, violate the AASL, and conflict with the DEP's comprehensive Erosion and Sediment Control and Dam Safety and Waterway Management regulatory schemes. The "[c]omprehensive state regulations already cover many aspects of a timber harvesting operation[, thus in most cases,] a permit should only serve to verify that state laws are being followed." (Exhibit A at 14.)

1. Section 1327(A)(2) Approval of E & S Plan

Section 1327(A)(2) requires an E&S plan along with a "letter of approval of such plan from the Chester County Conservation District." The DEP's erosion and sediment control regulations do not require an E&S plan to be submitted for review and approval to the Conservation District, thus the Township cannot impose this requirement because it is stricter than State law. 25 Pa. Code § 102.4(b)(8). The DEP requires that the written E&S plan, inspection reports and monitoring records be available "at the project site during all stages of the

earth disturbance activities.” Id. § 102.4(b)(8). This Section should be amended to remove this approval requirement.

The Township can require an applicant to provide a copy of the written E&S Plan. We also note that the Township may, at its own expense, submit an applicant’s E&S Plan to the Conservation District for review to check compliance with the regulations.

2. Section 1327(A)(3) Proof of Insurance Requirements

This section requires that a timber harvesting operator must provide proof of “state workmen’s compensation” and liability insurance coverage. There are several problems with this requirement. First, in the typical timber harvest a landowner first obtains a municipal permit before the timber goes out for bid to timber harvesters, thus this information would not be available at the time of submitting the application. Second, the township’s authority to request proof of insurance for worker’s compensation is limited to the issuance of building permits, not timber harvesting permits. 77 P.S. § 462.2. We are not aware of any authority to support the Township’s requirement for proof of liability insurance. Finally, the Worker’s Compensation Act provides for certain employer/employee exemptions from providing worker’s compensation coverage. 77 P.S. §§ 22; 462.7; 484. We suggest that the Township either delete this section or amend this Section to state: “The identity of the timber harvesting operator shall be provided to the Township upon the award of the bid for the timber harvest covered by the approved timber harvesting permit and proof of any insurance required under State law or proof of exemption therefrom for the timber harvester shall also be provided at the same time.”

3. Section 1327(A)(4) Escrow for Reviewing Fees

Section 1327(A)(4) requires payment of a non-refundable permit fee. This fee requirement is within the Township’s authority so long as the fee is established as part of a permit fee schedule, so that the amount is ascertainable by the landowner prior to application. However, the requirement to escrow funds for review of the application is beyond the Township’s authority under the MPC. Section 10617.3 precludes a municipality from charging costs or expenses for “engineering, architectural or other technical consultants” in administering the zoning ordinance. 53 P.S. § 10617.3. Moreover, the Township’s attempt to escrow funds for reviewing a permit application for a permitted use by right is tantamount to converting the application to a conditional use proceeding, which it cannot do. The Township should amend this section to delete the following language: “and escrow funds, based upon a reasonable estimate by the Township, for the review of the application.”

4. Section 1327(A)(5) Imposition of Liability

Under Section 1327(A)(5), the Township requires a landowner and a timber harvesting operator to attest to their joint and several liability for “compliance with all timber harvesting requirements.” The Township has no authority to impose liability, but rather only has authority to enforce zoning ordinance provisions as provided for under the MPC. Enforcement for purported violations of zoning ordinance provisions requires the Township to initiate

cost prohibitive. The intervals on most topographic maps in Pennsylvania are 20 feet. The requirement to create a map with five foot intervals would be very costly and require a site specific surveying. This requirement is overbroad, unreasonable, and unnecessary for a timber harvest. This subsection can be amended to provide "topography with contour intervals typically used for timber harvest mapping."

7. Section 1327(C)(4) Erosion and Sediment Control Plan

Section 1327(C)(4) requires the submission of an Erosion and Sediment Control Plan and compliance with the DEP's permit requirements under the Dam Safety and Waterway Management regulations. The Township is within its authority to request copies of these plans and permits. However, the requirements under subsections (b)-(d) are already fully addressed through a written E&S plan prepared in compliance with DEP's erosion and sediment control regulatory scheme. 25 Pa. Code § 102.4. An E&S plan is "[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities." *Id.* § 102.1. The E&S plan for a timber harvest must include identification and mapping of all landings, skid roads, haul roads, and water source crossings, as well as identifying all erosion control BMP measures and structures. See DEP Erosion and Sediment Control Plan for a Timber Harvesting Operation form 3930-FM-WM0155 (Exhibit D). The plan requires identification of a "sequence of BMP installation and removal in relation to the scheduling of earth disturbance activities, prior to, during and after earth disturbance activities that ensure the proper functioning of all BMPs." 25 Pa. Code § 102.4(b)(5)(vii). The plan also must establish a "maintenance program which provides for the operation and maintenance of BMPs and the inspection of BMPs on a weekly basis and after each stormwater event, including the repair or replacement of BMPs to ensure effective and efficient operation. The maintenance program must provide for completion of a written report documenting each inspection and all BMPs repair, or replacement and maintenance activities." *Id.* § 102.4(b)(5)(x). The DEP requires that the written E&S plan, inspection reports and monitoring records be available "at the project site during all stages of the earth disturbance activities." *Id.* § 102.4(b)(8). The Township does not have authority to duplicate the DEP's regulatory requirements. Commonwealth v. East Brunswick Township, 980 A.2d 720, 733 (Pa. Cmwlth. 2009) (explaining that a township cannot duplicate the regulatory regime established by the SWMA and cannot impose more stringent requirements than the SWMA."). Therefore, the Township should delete subsections (b)-(d) because that information will be included in the written E&S plan. (Exhibit A at 16-17.)

Subsection 1327(C)(4)(e) requires the applicant to submit the E&S plan to the conservation district for review and approval. As explained above with respect to Section 1327(A)(2), the DEP's erosion and sediment control regulations do not require an E&S plan to be submitted for review and approval to the Conservation District, thus the Township cannot impose this requirement because it is stricter than State law. 25 Pa. Code § 102.4(b)(8). This subsection should be deleted.



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

June 8, 2018

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*Re: ACRE Request – Gary Westlake
North Coventry Township-Chester County*

Dear Mr. Thompson and Mr. Sager,

Mr. Gary Westlake of the Westlake Tree Farms, LLC filed two requests with the Office of the Attorney General (“OAG”) pursuant to the Agricultural Communities and Rural Environment (“ACRE”) law, 3 Pa.C.S. § 311, *et seq.* His first ACRE request concerned Ordinance #30 of May 26, 2009 which regulates silvicultural practices within the Township.¹ Mr. Westlake’s second ACRE petition challenged the 2016 “Motor Vehicle Weight Limitation Ordinance of North Coventry.” Township Solicitor Lawrence Sager, Esq., provided the OAG with North Coventry’s response to Mr. Westlake’s ACRE complaints. In the meantime, Mr. Thompson, Esq., began his representation of Westlake Tree Farms in this matter. Mr. Thompson summarized his client’s claims in a letter to the OAG that he also sent to Mr. Sager.

BACKGROUND

The Westlake family has owned and operated Westlake Tree Farms, LLC for three generations. In 2006, Gary Westlake harvested some timber after receiving approval from the Township. The areas that were harvested in 2006 were areas that Mr. Westlake and his consulting forester determined were ready, mature, economically viable, and that required TSI (timber stand

¹ “Silviculture is the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society such as wildlife habitat, timber, water resources, restoration, and recreation on a sustainable basis.” <https://www.fs.fed.us/forestmanagement/vegetation-management/silviculture/index.shtml>

Right to Farm Act (“RTFA”). 3 P.S. § 952. The Municipalities Planning Code (“MPC”) explicitly addresses the considerable limitations on municipal authority to regulate timber harvesting as follows:

[z]oning ordinances may not unreasonably restrict forestry activities. To encourage maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land throughout this Commonwealth, forestry activities, including but not limited to, timber harvesting, shall be a permitted use of right in all zoning districts in every municipality. 53 P.S. § 10603(f).

This provision explicitly states the intent of the General Assembly to encourage and promote timber harvesting throughout the Commonwealth as a use as of right in all zoning districts. As noted in the PSU College of Agricultural Sciences publication, *Dealing with Local Timber Harvesting Ordinances*, p. 4 (attached as “Exhibit B”), “[i]n 1992, the Pennsylvania legislature enacted the first MPC forestry-related provision, referred to as ‘the right to practice forestry’ provision, which prohibits municipalities from unreasonably restricting forestry activities.” Timber harvesting is the only agricultural practice that is a *use as of right* in all zoning districts. Attached is a Penn State publication on timber harvesting practices explaining how most concerns supporting local regulation are addressed by State law requirements, removing the need for local regulation of forestry activities. See PSU College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials* (attached as “Exhibit C”).

Moreover, the objective of the General Assembly to broadly encourage and promote all types of agriculture, including forestry, is made perfectly clear in the RTFA³ and other provisions of the MPC.⁴ The General Assembly’s Historical and Statutory Notes to ACRE declare the Commonwealth has a “vested and sincere interest in ensuring the long-term sustainability of agriculture and normal agricultural operations” and “[i]n furtherance of this goal...has enacted statutes to protect and preserve agricultural operations for the production of food and other agricultural products.” Both the black letter and the spirit of the law require municipalities to encourage and support, not hinder, timber harvesting.

E&S REQUIREMENT

The North Coventry Township Timber Harvesting Ordinance (“Ordinance”) generally requires an E&S Plan that has been approved by the Chester County Conservation District be included in the application for a timber harvesting permit, *Ordinance # 30, Section 370-29B(7)(g)(2)(a)(ii)*. The Ordinance contains detailed criteria for inclusion in the E&S Plan; these exacting requirements are at a **minimum**. *Id.*, See also (2)(c)(iii)(a-e)(emphasis added).

³ “It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products...It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances.” 3 P.S. § 951, **Legislative policy**.

⁴ “It is the intent, purpose and scope of this act...to promote the preservation of this Commonwealth’s...prime agricultural land...to encourage the preservation of prime agricultural land....” 53 P.S. § 10105, **Purpose of act**. “Zoning ordinances shall encourage the continuity, development and viability of agricultural operations.” 53 P.S. § 10603(h). **Ordinance provisions**.

Under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the DEP regulates erosion and sediment control and “requires persons proposing or conducting earth disturbance activities to develop, implement and maintain [best management practices] to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater.” 25 Pa. Code § 102.2(a). Timber harvesting is subject to the DEP’s E&S regulations. *Id.* § 102.4(b), 102.5(b), & (d). DEP defines “timber harvesting activities” as “[e]arth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices.” *Id.* § 102.1.

A timber harvest operation that disturbs more than 5,000 square feet must develop and implement a written E&S plan. *Id.* § 102.4(b)(2)(i). An E&S plan is “[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities.” *Id.* § 102.1. DEP requires an E&S plan to be “prepared by a person trained and experienced in E&S control methods and techniques applicable to the size and scope of the project being designed.” *Id.* § 102.4(b)(3). The E&S plan must identify and account for the “types, depth, slope, locations and limitations of the soils.” *Id.* § 102.4(b)(5)(ii). A timber harvesting operation involving 25 acres or more of earth disturbance activity must obtain an E&S permit from DEP, in addition to the E&S plan. *Id.* § 102.5(b).

North Coventry requires Mr. Westlake’s E&S Plan to receive prior approval from the Chester County Conservation District. Conversely, the DEP’s erosion and sediment control regulations do not require submission of an E&S plan to the Conservation District and the Conservation District has no role in DEP’s approving of such plans. 25 Pa. Code § 102.4(b)(8). The DEP requires the written E&S plan, inspection reports and monitoring records be available “at the project site during all stages of the earth disturbance activities.” *Id.*, § 102.4(b)(8). The Township may, at its own expense, submit an applicant’s E&S Plan to the Conservation District for review to check compliance with the regulations. What North Coventry cannot do is require Mr. Westlake to get approval from the Conservation District prior to harvesting. That portion of subsection (2)(a)(ii) requiring Conservation District approval exceeds state regulatory requirements and must be deleted.

Ordinance # 30, Section 370-29B(7)(g)(2)(c)(iii)(a-e) lists the minimum requirements for an E&S Plan. While the Township is within its authority to request copies of these plans and permits, the requirements under subsections (a-e) are fully addressed through a written E&S plan prepared in compliance with DEP’s erosion and sediment control regulatory structure. See 25 Pa. Code § 102.4. The Township does not have authority to duplicate the DEP’s regulatory requirements through its Ordinance. See *Commonwealth v. East Brunswick Township*, 980 A.2d 720, 733 (Pa. Cmwlth. 2009) (explaining that a township cannot duplicate the regulatory regime established by the Solid Waste Management Act and cannot impose more stringent requirements than the SWMA.”). As a result, subsection (c)(iii)(a-e) must be deleted.

CONSULTING PROFESSIONAL FORESTER

North Coventry requires that an applicant’s timber harvesting plan to be “prepared by a Professional Consulting Forester....” Ordinance # 30, Section 370-29B(7)(g)(2)(a)(i). The Definitions Section of the Ordinance states that a:



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

September 28, 2018

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[REDACTED]
Jennifer Mejia, Esq.
Mejia Law Group, LLC
1390 West Main Street
Ephrata, PA 17522

Re: ACRE Complaint – Clay Township- [REDACTED]

Dear Ms. Mejia and [REDACTED]

[REDACTED] as the operator of the [REDACTED], filed an Agricultural Communities and Rural Environment (“ACRE”), 3 Pa.C.S. § 311, *et seq.*, complaint wherein he contends that Clay Township’s (“Township”) ordinance, *Section 540, Forestry*, violates state law.

After the OAG notified the Township of the ACRE complaint Ms. Mejia, Township solicitor, informed the OAG “that the Township, complainant.. [REDACTED] and property owner, [REDACTED] have successfully reached an agreement and a Zoning Permit was issued for Timber Harvesting on the subject property.” (August 8, 2018 email from Ms. Mejia to Mr. Willig). The OAG commends, and greatly appreciates, the Township’s willingness to work cooperatively with its citizens in this matter.

The Township is of the opinion that since the matter between it, [REDACTED], and [REDACTED] has been resolved, it did not “believe further Ordinance review by [the OAG] is required.” *Id.* The OAG respectfully submits that an ACRE review of municipal ordinances operates independent of any immediate disagreement between the farmer/owner/operator and a municipality. The OAG ACRE review continues regardless of whether the parties amicably resolve their differences. Here, the review of the Township’s Forestry Ordinance reveals several problems as explained below. The OAG sincerely hopes the cooperative spirit that guided discussions between the Township, [REDACTED] and [REDACTED] continues between the OAG and the Township in the instant matter.

Silviculture¹ is a “Normal Agricultural Operation” (“NAO”) and “[f]orestry and forestry products” are agricultural commodities as defined by the Right to Farm Act (“RTFA”). 3 P.S. §

¹ “Silviculture is the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society such as wildlife habitat, timber, water resources, restoration, and recreation on a sustainable basis.”
<https://www.fs.fed.us/forestmanagement/vegetation-management/silviculture/index.shtml>

same age as the large trees. The difference in size is often the result of a difference in tree species, a genetically inferior tree, or the result of poor location. Diameter limiting harvesting will eventually shift the composition of the forest and may even degrade the quality of the forest by promoting inferior trees. This practice may also limit future options for forest management and slow the stand's ability to recover from disturbance through the elimination of seed trees for the species removed. As a result, requiring this method of harvest is unreasonable.

See Exhibit A, PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, p. 17.

II. FOREST MANAGEMENT PLAN/BEST MANAGEMENT PRACTICES

Sections 540(B) & (C), *Forestry*, mandate that a Forest Management Plan consistent “with the Timber Harvesting Guidelines of the Pennsylvania Forestry Association” be filed with the Township. The OAG acknowledges the Township may require an owner/operator to file a management plan developed by a professional forester. These plans normally include best management practices (“BMP”) designed to sustain and improve the health of the forest. However, the “Timber Harvesting Guidelines of the Pennsylvania Forestry Association” no longer exist and have been out of print for over twenty (20) years. The OAG recommends the Township change its ordinance to require compliance with the PSU College of Agricultural Sciences, *Best Management Practices for Pennsylvania Forests* (Exhibit C).

III. EROSION AND SEDIMENTATION CONTROL

Section 540(D), *Forestry*, requires the Erosion and Sedimentation (E&S”) Plan to “be submitted by the Applicant to the Lancaster County Conservation District for review, recommendation, and approval.” As explained below, the Township lacks the authority to compel such a submission.

Pursuant to the Clean Streams Law⁹ the Department of Environmental Protection (“DEP”) regulates erosion and sediment control. Its regulations require “persons proposing or conducting earth disturbance activities to develop, implement and maintain [best management practices] to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater.” 25 Pa. Code § 102.2(a). Without question, timber harvesting is subject to the DEP’s E&S regulations. *Id.* § 102.4(b), 102.5(b) & (d). DEP defines “timber harvesting activities” as “[e]arth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices.” *Id.* § 102.1.

A timber harvest operation that disturbs more than 5,000 square feet must develop and implement a written E&S plan. *Id.* § 102.4(b)(2)(i). An E&S plan is “[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities.” *Id.* § 102.1. DEP requires that an E&S plan must be “prepared by a person trained and experienced in E&S control methods and techniques applicable to the size and scope of the project being designed.” *Id.* § 102.4(b)(3). The E&S plan must identify and plan for the “types, depth, slope, locations and limitations of the soils.” *Id.* § 102.4(b)(5)(ii). A timber harvesting operation that involves 25 acres or more of earth

⁹ 35 P.S. §691.1 *et. seq.*

disturbance activity must obtain an E&S permit from DEP in addition to the E&S plan. *Id.* § 102.5(b).

The DEP's erosion and sediment control regulations do not require submission of an E&S plan to the Conservation District for review and approval; the Township itself cannot impose a requirement stricter than state law. 25 Pa. Code § 102.4(b)(8). The DEP requires that the written E&S plan, inspection reports and monitoring records be available "at the project site during all stages of the earth disturbance activities." *Id.* § 102.4(b)(8). We also note that the Township may submit, at its own expense, an applicant's E&S Plan to the Conservation District to review compliance with the regulations; however, it may not impose that duty on the Applicant.

IV. CLEAR CUTTING

Section 540(E), *Forestry*, prohibits clear cutting "except on tracts of less than two (2) acres." Section 540(G) prohibits clear cutting on slopes in excess of 15% and within the one hundred (100) year floodway. Both sections run contrary to the principles of ACRE.

Often unfairly characterized as a destructive practice, clear cutting is a beneficial practice. The PSU silviculture expert advises that "clear-cutting," in which an entire stand (or most of it) is cut, is a recognized silvicultural tool leading to regeneration and establishment of even-aged forests; this type of forest is predominant across Pennsylvania. "Like large-scale natural disturbances, clear-cutting promotes the establishment and growth of intolerant and intermediate species, such as black cherry and oak," which require full sunlight to reproduce and grow well. See PSU College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials*, p. 5 (Exhibit B). For Pennsylvania's two major forest types, northern hardwood and oak/hickory, clear-cutting is the appropriate practice. *Id.* Moreover, the proportion of black cherry and oak in Pennsylvania risks reduction in the absence of clear-cutting or other even-aged management and harvesting techniques. *Id.*

A PSU publication further explains:

Clear-cutting refers to the forestry practice whereby all trees are removed with the purpose of reestablishing an even-aged stand. Restricting clear-cutting in forests is an unreasonable ordinance provision. Often, these provisions are developed and included based on a common misperception that this type of harvesting is ugly and detrimental to the forest ecosystems. This is not true, and in fact, shade-intolerant forest stands require clear-cutting to ensure proper regeneration. Additionally, this type of management practice is often beneficial with respect to the landowner's opportunities for the stand's future management. . . . There are a variety of acceptable silvicultural methods, and clear-cutting is one of them. It can be used to meet goals at a timber harvesting site and to ensure the proper regeneration. To restrict its use is unreasonable.

See Exhibit A, PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, pp. 17-18. Plainly, the Township's prohibition on clear-cutting on tracts smaller than two acres is an unreasonable restriction on timber harvesting.

Another common misperception occurs when clear-cutting takes place on slopes; here the belief is that the hillside will significantly erode or even slide away entirely. The PSU expert advises that both an E&S plan and the timber harvesting plan address harvesting on steep slopes.



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

November 29, 2018

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Mezzanine Level
Pittsburgh, PA 15222
rwillig@attorneygeneral.gov

[REDACTED]

*Re: ACRE Request – [REDACTED]
Eldred Township-Monroe County*

Dear [REDACTED]

[REDACTED] filed a complaint under the Agricultural Communities and Rural Environment (“ACRE”) law¹, requesting review of Eldred Township’s (“Township”) forestry ordinance. The Township has provided the Office of the Attorney General (“OAG”) with a response to the ACRE complaint.

The Township correctly notes the Municipalities Planning Code (“MPC”) makes timber harvesting a use as of right in all zoning districts. *See* 53 P.S. §10603(f). The Township also recognizes silviculture² as a “Normal Agricultural Operation” (“NAO”) and that “[f]orestry and forestry products” are agricultural commodities as defined by the Right to Farm Act (“RTFA”). 3 P.S. § 952. There are a few problems, however, with the Township’s forestry ordinances (“Ordinances”).

I. EROSION AND SEDIMENTATION PLAN

[REDACTED] contends the Ordinances require the Monroe County Conservation District to review and approve the Erosion and Sedimentation (“E&S”) plan; Section 701.13, *Storm Water Management and Soil Erosion Control*, states an E&S plan “shall be required for review and

¹ 3 Pa.C.S. §311, *et. seq.*

² “Silviculture is the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society such as wildlife habitat, timber, water resources, restoration, and recreation on a sustainable basis.” <https://www.fs.fed.us/forestmanagement/vegetation-management/silviculture/index.shtml>

approval.” The Township furnished the OAG with an April 16, 2018, letter it sent to [REDACTED]³ explaining “the Zoning Officer’s decision [to deny a permit] does not require that [the Monroe County Conservation District] review and approve the [E&S] plan. Instead, the decision notes that an E&S control plan complying with Sec. 701.13 of the Township Zoning Ordinance has not been provided as required under Sec. 815.2 of the Ordinance.” This demonstrates the Ordinances do not expect Monroe County Conservation District’s review and approval of the E&S plan, which is consistent with state law. The Department of Environmental Protection’s (“DEP”) erosion and sediment control regulations do not require submission of an E&S plan to the local Conservation District for review and approval; the Township itself cannot impose an obligation stricter than state law. 25 Pa. Code § 102.4(b)(8).

Section 701.13 does state an E&S plan “shall be prepared and implemented pursuant to the standards contained in the Township Subdivision Ordinance or other applicable Township regulations and County Conservation District Standards...”⁴ As explained below, the Township cannot compel compliance with standards in excess of state law requirements. 25 Pa. Code § 102.4(b)(8).

Pursuant to the Clean Streams Law,⁵ the DEP regulates erosion and sediment control. Its regulations require “persons proposing or conducting earth disturbance activities to develop, implement and maintain [best management practices] to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater.” 25 Pa. Code § 102.2(a). Without question, timber harvesting is subject to the DEP’s E&S regulations. *Id.* § 102.4(b), 102.5(b) & (d). DEP defines “timber harvesting activities” as “[e]arth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices.” *Id.* § 102.1.

A timber harvest operation that disturbs more than 5,000 square feet must develop and implement a written E&S plan. 25 Pa. Code § 102.4(b)(2)(i). An E&S plan is “[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities.” *Id.* § 102.1. DEP requires an E&S plan to be “prepared by a person trained and experienced in E&S control methods and techniques applicable to the size and scope of the project being designed.” *Id.* § 102.4(b)(3). The E&S plan must identify and plan for the “types, depth, slope, locations and limitations of the soils.” *Id.* § 102.4(b)(5)(ii). A timber harvesting operation that involves 25 acres or more of earth disturbance activity must obtain an E&S permit from DEP in addition to the E&S plan. *Id.* § 102.5(b).

The DEP requires that the written E&S plan, inspection reports and monitoring records be available “at the project site during all stages of the earth disturbance activities.” 25 Pa. Code § 102.4(b)(8). The Township may submit, at its own expense, an applicant’s E&S Plan to the Conservation District to review compliance with the regulations; however, it may not impose that duty on the Applicant. Moreover, Eldred Township cannot impose E&S requirements more strict than state law. The OAG is not necessarily saying that the Township is imposing additional requirements in excess of those found in state law. What the OAG is saying is that to the extent Eldred is imposing additional requirements it cannot do so.

³ [REDACTED] is the logger hired to harvest the timber on the property.

⁴ Timber harvesting is not included in the definition of “subdivision” in the MPC, 53 P.S. § 10107.

⁵ 35 P.S. §691.1 *et. seq.*



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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December 21, 2018

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[REDACTED]
East Brandywine Township
Board of Supervisors
1214 Horseshoe Pike
Downingtown, PA 19335

Re: ACRE Review Request – [REDACTED] – East Brandywine
Township-Chester County

Dear [REDACTED] and Board of Supervisors,

[REDACTED] the owner of [REDACTED] helped a landowner, [REDACTED] sell timber from her property. Upon completion of the job, East Brandywine Township ("Township") informed [REDACTED] that it would enforce a portion of its timber ordinance requiring all tops and slash¹ to be removed from the timber harvesting site. [REDACTED] spoke with the Township Manager expressing his concerns as to why this portion of the ordinance violated state law, was cost prohibitive, and contrary to good silvicultural practices;² he also filed an Agricultural Communities and Rural Environment ("ACRE")³ complaint with the Office of the Attorney General ("OAG") challenging the legality of the Township's timber ordinance.

I requested the Township to provide any information that it believed would assist the OAG in its review; a second letter, sent three weeks later, instructed the Township to respond within 30 days. To date, the Township has not responded to the OAG's requests for information.

Having examined the Township's timber ordinance, as well as the information provided by [REDACTED] the OAG concludes the entire timber ordinance, not just the specific provision dealing with tops/slash, violates ACRE.

¹ "Top' means the upper portion of a felled tree that is unmerchantable because of small size, taper, or defect."

"Slash' means woody debris left in the woods after logging, including logs, chunks, bark, branches, uprooted stumps, and broken or uprooted trees or shrubs." Penn State School of Forest Resources, *Pennsylvania Model Forestry Regulations*, p. 3 (Attached hereto as "Exhibit A").

² "Silviculture is defined as the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis." USDA Forest Service, White Paper, F14-SO-WP-SILV-34, p.2.

³ 3 Pa.C.S. §311 *et. seq.*

and approval. The Township cannot independently impose this requirement because it is stricter than State law. See 25 Pa. Code § 102.4(b)(8). The DEP requires that the written E&S plan, inspection reports and monitoring records be available “at the project site during all stages of the earth disturbance activities.” *Id.* § 102.4(b)(8). The Township may require that an applicant provide it with a copy of the written E&S Plan. We also note that the Township may, at its own expense, submit an applicant’s E&S Plan to the Conservation District for review to check compliance with the regulations. What the Township cannot do is require the owner/logger to get preapproval of the E&S plan from the Conservation District.

SITE MAP INFORMATION REQUIREMENTS

Woodland protections and logging standards, §399-102.1.D(2)(f), mandates that the owner/logger provide a site map with his/her permit application. This site map must include the six (6) items listed in subsections [1]-[6].⁹

Pursuant to its authority under the Clean Streams Law¹⁰, the DEP regulates erosion and sediment control and “requires persons proposing or conducting earth disturbance activities to develop, implement, and maintain BMPs to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater.” 25 Pa.Code § 102.2(a). Timber harvesting is subject to the DEP’s E&S regulations. *Id.*, §§ 102.4(b) & 102.5(b) & (d). A timber harvest operation that disturbs more than 5,000 square feet must develop and implement a written E&S Plan. *Id.*, § 102.4(b)(2)(i). An E&S plan is “[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities.” *Id.*, § 102.1. As a result, the information required under the six subsections of the Township’s Ordinance is already included in the E&S plan prepared under 25 Pa.Code § 102.4(b)(2)(i). By preparing the state mandated E&S plan, [REDACTED] and [REDACTED] have essentially complied with the Township’s Ordinance.

Regardless, state law preempts those six subsections. Under ACRE, “[a] local government unit shall not adopt or enforce an unauthorized local ordinance.” 3 Pa.C.S. § 313(a). An “unauthorized local ordinance” is one that is “preempted under State law...” *Id.*, § 312(1)(ii). A local municipality cannot duplicate a state regulatory scheme nor can it “impede a comprehensive, statewide scheme of regulation.” *Com., Office of Attorney Gen. ex rel. Corbett v. E. Brunswick Twp.*, 980 A.2d 720, 733 (Pa.Cmwlth. 2009). When a municipality has ordinances that duplicate and/or impede upon state standards those state requirements override the local regulations. That is the situation here. The six subsections of §399-102.1.D(2)(f)[1]-[6] identified above duplicate requirements found in the DEP regulations pertaining to erosion and sediment control and are therefore invalid.

⁹ (1) Site location and boundaries including the boundaries of the property on which the logging will occur as well as the boundaries of the proposed harvest area within the property; (2) the location of all earth disturbance activities such as road, landings, and water control measures and structures; (3) the location of all proposed crossing of waters of the Commonwealth; (4) the general location of the operation in relation to Township and state roads; (5) Topography including slopes of 15%-25%, those over 25%, and the soils on the harvest site; and (6) the location of wetlands or other sensitive environmental areas and the measure to protect those areas.

¹⁰ 35 P.S. §691.1 *et. seq.*

EXHIBIT B

MEMORANDUM OF UNDERSTANDING

Between the

BERKS COUNTY CONSERVATION DISTRICT

and

This Memorandum has been prepared jointly and agreed upon by each party for the following purposes:

To serve as a joint commitment by the signatory parties to control accelerated erosion and to prevent sediment pollution to the Waters of the Commonwealth which may result from the conduct of earth disturbance activities in _____ (“Municipality”).

I. In carrying out the intent of this Memorandum, the Berks County Conservation District (“District”) shall:

1. Provide the Municipality with District project application packets and promptly notify Municipality of any changes in the plan review fee schedule.
2. Receive and review all Erosion and Sedimentation Control Plans (“E&S Plan” or “Plan”) for earth disturbance activities 5,000 square feet or greater, which are required to be written in accordance with Chapter 102.4 of the PA Code.
3. Within ten (10) working days of completion of review, notify the consultant, the applicant, the Municipality, and the municipal engineer of all E&S Plan/NPDES Permit approvals, deficiencies, and all determinations including all project inspection reports and valid complaint inspection reports. Providing this information supports the Municipality with respect to Municipality’s MS4 reporting requirements as required to satisfy Minimum Control Measure #4 related to services provided under this Memorandum.
4. Notify the consultant, the applicant, and the Municipality that a Plan submission has been returned based on either the lack of response within the specified time period or the lack of the development of a complete Plan in compliance with PA Department of Environmental Protection (PA DEP) Chapter 102 Erosion and Sediment Control Rules and Regulations.
5. Upon request, provide all applicants with the PA DEP Erosion and Sediment Pollution Control Program Manual and related forms, worksheets, checklists, etc., necessary to successfully prepare a Plan.
6. Upon the filing of a complaint by the Municipality and/or a third party, the following will occur:
 - a. The District will inspect the complaint within (10) ten calendar days of its receipt.
 - b. If warranted, the District will provide documentation of the associated findings. The source of the complaint shall remain anonymous in accordance with PA DEP policy.
7. Serve as the repository for all Plans, complaints, Earth Disturbance Inspection Reports, correspondence, etc., within the limitations stated by PA DEP, that involve earth disturbance activities within the said Municipality. All such information, except the complaint forms, shall be contained in a filing system which shall be available for inspection by Municipal officials upon receipt of a formal written request.
8. When requested by the landowner, provide technical assistance in the development of needed Agricultural E&S Plans and Manure Management Plans. 09/7/2016

In carrying out the intent of this Memorandum, the Municipality shall:

1. Retain a sufficient quantity of the District's project application packets and provide such packets to all parties for projects that require a review. The Municipality shall provide instructions to have the Plans (residential, commercial, industrial, timber harvest, agricultural expansion construction, etc.) for earth disturbance activities greater than or equal to 5,000 square feet, which are required to be written in accordance with Chapter 102.4 of the PA Code, submitted to the District for review per Chapter 102 of the PA Code.
2. Notify the District within (5) five days of receipt of an application for a project disturbing greater than or equal to (1) one acre, pursuant to Chapter 102.42.
3. Pursuant to Chapter 102.43, the Municipality shall not issue building or other permit or approval to those proposing or conducting earth disturbance activities requiring a PA DEP permit until the PA DEP or District has issued the E&S or individual NPDES Permit or approved coverage under the general NPDES Permit for Stormwater Discharges Associated with Construction Activities under Chapter 102.5.
4. Forward all questions pertaining to the preparation of Plans and applications to the District.
5. Forward all third party complaints about ongoing earth disturbance activities to the District for its inspection.
6. Not issue final close-out, or grant final release of improvement/E&S escrow until the applicant has submitted a Notice of Termination for all NPDES Permitted activities and received Permit termination correspondence from the District.
7. Forward to the District, any third party agricultural complaint relating to: nutrient pollution and sediment pollution.
8. The District highly recommends that the Municipality necessitate the development of written Agricultural E&S Plans, which are required under Chapter 102.4 for agricultural plowing or tilling activities and animal heavy use areas disturbing 5,000 square feet or greater of land, as well as necessitate the development of Manure Management Plans, before building permits for agricultural operations are approved. Manure Management Plans are required under 25 PA. Code Section 91.36 (b) for all farming operations that land apply manure or agricultural process wastewater, whether they generate the manure or import it from another operation. All farming operations that include an Animal Concentration Area (ACA) or pasture must also have a written Manure Management Plan. In addition, the Municipality should not issue a building permit, or other permit or approval, to those proposing to construct a liquid or semi-solid waste storage facility unless they have a design that has been approved and stamped by a professional engineer.

II. This Memorandum of Understanding shall become effective immediately. It shall be reviewed as the need arises by either or both parties, and may be amended by mutual consent of both parties. This Memorandum of Understanding may be terminated at any time, by either party, following a thirty (30) day written notice to the other party.

FOR _____ (municipality)

By: _____ DATE _____

Attest: _____

FOR THE BERKS COUNTY CONSERVATION DISTRICT

CHAIR

DATE