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April 20, 2018

Robert A. Willig, Esq.
Senior Deputy Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
6th Floor, Manor Complex
564 Forbes Ave.
Pittsburgh, PA 15219
[redacted]

Re: ACRE Complaint of [redacted] – East Penn Township
Carbon County

Dear Mr. Willig:

We represent East Penn Township in connection with the Township's response to your letter regarding [redacted] complaint concerning Township Ordinance No. 77. Please note that while the letter was dated March 12, 2018, the Township did not receive the letter, with all intended attachments, until March 21, 2018. Thank you for the opportunity to respond [redacted] ACRE[1] complaint.

[redacted] does not identify specific legal bases for her arguments, and only generally references ACRE and Com., Office of Atty. Gen. ex rel. Corbett v. E. Brunswick Twp. ("East Brunswick II"), 980 A.2d 720 (Pa. Commw. Ct. 2009). Because of the vagueness of her complaint, the potential breadth of issues in any ACRE analysis, and the variety of statutes discussed in East Brunswick II, in the discussion that follows we will, out of an abundance of caution, attempt to identify and address potential arguments on which [redacted] might be seeking to rely.

Thus, this letter will provide: 1) an overview of Ordinance 77; 2) an analysis pertaining to the validity of Ordinance 77 under ACRE (to the extent it applies), East Brunswick II, and the other statutes raised in East Brunswick II, and 3) a discussion of potential conflict of interest and bias concerns as to the Attorney General's Office in this matter. In sum, Ordinance 77 is a valid

[1] 3 Pa.C.S. §§ 311-318.

exercise of the Township's authority. The Ordinance is one way in which the Township carries out its constitutional obligations as a trustee under Article I, Section 27 of the Pennsylvania Constitution to affirmatively enact legislation to address local environmental conditions and, in turn, conserve and maintain public natural resources relied on by Township residents.

I. Overview of Ordinance 77

[redacted]relies heavily on East Brunswick II and incorrectly claims that Ordinance 77 is just like the ordinance at issue in that case. In reality, Ordinance 77 is very different than the ordinance in East Brunswick II.

The entire point of Ordinance 77 is tailoring the impact of waste operations, including land application of sewage sludge, to local environmental conditions. The Ordinance specifically states that the Township found this to be a necessary thing to do to protect residents' environmental rights. (Ordinance 77, p.7, last ¶.) As counsel to various third-party appellants challenging PADEP actions, we can confirm that the PADEP rarely takes local conditions into account, including in the biosolids land application 30-day notice review process. In fact, PADEP's check-the-box approach is particularly pronounced in the biosolids site review process.[2]

Ordinance 77's registration requirement for waste operations is specifically tied to a process of determining a proposed operation's potential impact on drinking water given the Township's specific geologic conditions, history of industrial activity, and heavy reliance on groundwater for drinking water. (Ord. 77, § IV.A.1.(a), (b); see also § III; pp.6-7). A secondary purpose of the registration requirement and associated information that must be submitted is so that the Township can be prepared in the event of a spill or other accident. (Ord. 77, § IV.B.7; see also p.4, ¶ 3; pp.6-7). Thus, the registration is directly tied to addressing the Township's unique local conditions and ensuring that a waste operation, including land application of sewage sludge, is done in a matter that is protective of the local environment given such local conditions. Also, although the registration establishes a preference for municipal entities, private persons such as the [redacted]re allowed to obtain a registration certificate. The Ordinance merely requests information demonstrating that private entities have the requisite financial and other resources to properly manage the waste operation. (Ord. 77, § III.2.). This furthers the goal of protecting residents and the local environment by ensuring that private entities have economic ability to comply with the law and will not simply abandon their operations, leaving the Township and its residents with potential contamination and a cleanup burden.

[2] See cited deposition testimony of PADEP officials and Synagro employees and representatives: http://ehb.courtapps.com/efile/documentViewer.php?documentID=26359

For instance, the Township requires that applicants submit information on waste characteristics, which informs the Township and residents about both: 1) potential impacts to water supplies and the degree of risk; and 2) emergency response needs. (Ord. 77, § IV.B.7).

The hearing process in Section IV.A. of Ordinance 77 allows residents and the applicant to present evidence such that the Township can evaluate the impacts on local residents. The Ordinance's financial security requirements are likewise tied directly to the costs of replacing water supplies harmed by waste operations, such as sludge application. (Ord. 77, § IV.A.3). Residents in East Penn Township are reliant entirely on private water, and thus such financial security is necessary to prevent innocent residents from bearing the costs of other individuals' operations on their land. Further, the Ordinance specifically limits the Township's ability to place conditions in the registration to the matters under the Ordinance, such as water supply protection. (Ord. 77, § IX.2.). Thus, the Township cannot simply overburden an approval with conditions to block a project. The application fee associated with registration is also nominal ($100), and specifically tied to administrative costs. (Ord. 77, § XIV).

Separate from drinking water, Ordinance 77 addresses waste truck routes in order to protect sensitive populations (e.g. schoolchildren) from potential accidents. (Ord. 77, § V). It likewise addresses the hours and days of *delivery* (not disposal) of waste to waste operation sites to minimize disruption to local residents, (Ord. 77, § VI), and addresses potential adverse local impacts like odors, insect breeding, and rodents. (Ord. 77, § IV.B.6.). Thus, the entire Ordinance is focused on the impact of a proposed waste operation on local residents given local conditions, including geology, groundwater reliance, and other factors specific to East Penn Township.

II. [redacted] Complaint

As noted earlier, there is very little detail in [redacted] complaint that identifies what, beyond the registration requirement, is the basis for her challenge to Ordinance 77. [redacted] does not identify any legal bases for her challenge other than general references to ACRE and East Brunswick II. The Township does not read [redacted] complaint to challenge the *entirety* of Ordinance 77 or to challenge it under any other law except for ACRE. However, the Township will address other laws beyond ACRE out of an abundance of caution. In particular, due to [redacted] reliance on East Brunswick II, which delved into other laws beyond ACRE, we are constrained to likewise address the Solid Waste Management Act, the Nutrient Management Act, and the Agricultural Area Security Law.

Thus, the Township will address two areas of inquiry: 1) [redacted] express identification of the registration requirement for land application of biosolids as a basis for her ACRE complaint; and 2) her erroneous argument that Ordinance 77 is just like the ordinance in East Brunswick II.

To the extent that the AG's Office reads [redacted] complaint to challenge the Ordinance in its entirety, or as a challenge under other statutes, the Township would respectfully request a further opportunity to respond accordingly.

A. Registration Requirement and Associated Water Protection Requirements Are Valid under ACRE and Statutes Addressed in *East Brunswick II*

Ordinance 77's registration requirement and associated water protections are valid under ACRE because: 1) land application of biosolids is not a "normal agricultural operation" under ACRE and thus ACRE does not apply; 2) the Township is neither prohibited nor preempted from enforcing the Ordinance's requirements; and 3) the Township has express and implicit authority for the requirements.

According to ACRE, a local ordinance is "unauthorized" if it:

> 1) is enacted or enforced by a local government unit;
> 2) prohibits or limits a normal agricultural operation; and does so
> 3) without expressed or implied authority under State law to adopt the ordinance; and/or
> 4) the municipality is prohibited or preempted under State law from adopting the ordinance.

3 Pa.C.S. § 312. Despite ACRE's ban on enacting and enforcing "unauthorized local ordinances," it specifically states that it does not:

> diminish, expand or otherwise affect the legislative or regulatory authority of local government units under State law, including the following:
>
> > (1) Chapter 5 (relating to nutrient management and odor management).
> > (2) The regulation, control or permitting procedures for the land application of class A or B biosolids.

3 Pa.C.S. § 313.

1. Land Application of Sewage Sludge is Not a "Normal Agricultural Operation" and Is Thus Not Protected by ACRE

A "normal agricultural operation" under ACRE refers to the Right-to-Farm Act, which says that such an operation is:

> The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of

> poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and is:
>
> > (1) not less than ten contiguous acres in area; or
> > (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least $10,000.
>
> The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by . . . the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

3 P.S. § 952.

Land application of biosolids is not included in the definition of "normal agricultural operations."[3]

The Township recognizes that the Pennsylvania Supreme Court addressed a similar question in Gilbert v. Synagro Cent. LLC, 131 A.3d 1 (Pa. 2015); however, the Gilbert case is distinquishable. The question of whether application of sewage sludge to agricultural land is a "normal agricultural operation" for purposes of ACRE was not addressed by the Pennsylvania Supreme Court in. Gilbert was a case under the Right to Farm Act and a statute of repose, not ACRE. Although ACRE and the Right to Farm Act use the same definition, the Pennsylvania Supreme Court noted that "fact finding [is] inherent in the application of Act 38 [ACRE]." Id. at 16. Further, because Gilbert dealt with the application of a statute of repose, the Court

[3] Hempfield Twp. v. Hapchuck, 620 A.2d 668 (Pa. Commw. Ct. 1993) is not applicable here for several reasons. First, the case predates ACRE. Second, as the Commonwealth Court pointed out in East Brunswick I, if the General Assembly wanted to cross-reference the definition of "normal farming operations" in the SWMA, which discusses sewage sludge, it could have done so, but did not. 956 A.2d at 1115. Indeed, the fact that the SWMA, but not ACRE or the Department of Agriculture, addresses sewage sludge lends support to the Township's argument that sewage sludge is a waste product, not a benign agricultural fertilizer or even akin to manure. Third, that case had to do with whether a use continued to be agricultural under a zoning ordinance, and was not an ACRE matter.

determined that such matters are questions of law and that a farmer should not have to fight through to a jury just to establish that a suit is barred.

ACRE is a different law. The farmer is not a party in an ACRE case. The AG's Office is. The Right to Farm Act is far narrower in scope than ACRE. Also, when the AG's Office challenged the East Brunswick Township ordinance, the Commonwealth Court determined that the question of whether sludge application to farms is a "normal agricultural operation" is a question of fact under ACRE, *not* a matter of law. Com., Office of Atty. Gen. ex rel. Corbett v. East Brunswick Twp. ("East Brunswick I"), 956 A.2d 1100, 1114-16 (Pa. Commw. Ct. 2008).[4]

Thus, Gilbert's bare legal determination cannot simply be imported into ACRE, which requires development of facts.

When the facts are considered, it is clear that sewage sludge application on farmland is not a "normal agricultural operation." Indeed, the scientific evidence demonstrates the damage sewage sludge application has caused *to farms* and the threats posed by industrial contaminants in sludge.

Unlike manure, the composition of which is generally predictable based on the type of animal, feeds, and medicine, the composition of biosolids (which we use interchangeably with sewage sludge) is highly variable and contains industrial waste. Sewage sludge is essentially material removed from and left behind by the wastewater treatment process. The composition of sewage sludge can vary significantly depending on the type of wastewater plant in question, including what industrial wastewater is accepted at the plant.

The majority of what is in sewage sludge is not regulated by anyone, not even the PADEP or the U.S. E.P.A. This is despite the fact that governmental agencies have widely documented that biosolids contain a broad range of unregulated constituents, including flame retardants, pharmaceuticals, steroids, hormones, organics, and unregulated metals.[5] In January

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[4] East Brunswick II did not address this question because the Court had to assume for the purposes of the Township's demurrer that the application of sewage sludge to agricultural land is a "normal agricultural operation." 980 A.2d at 729.

[5] https://nepis.epa.gov/Exe/ZyPDF.cgi/P1003RNO.PDF?Dockey=P1003RNO.PDF; https://nepis.epa.gov/Exe/ZyPDF.cgi/P1003RL8.PDF?Dockey=P1003RL8.PDF; https://nepis.epa.gov/Exe/ZyPDF.cgi/P100534B.PDF?Dockey=P100534B.PDF. This is also despite US EPA efforts to discredit certain biosolids research that investigated adverse effects. Attachment A, pp. 38-41. Further,

> The EPA's Inspector General has criticized the EPA's biosolids program sharply, finding in a 2002 report that the "EPA does not have an effective program for ensuring compliance with land application requirements of Part 503. Accordingly, while EPA promotes land application, EPA

2011,[6] the PADEP identified barium, strontium, and radioactive material in sewage sludge coming from a municipal wastewater treatment plant that accepted fracking wastewater.[7] That sludge was applied to a farm in Bedford County, Pennsylvania.[8]

Further, researchers have documented silver nanoparticles in sludge, found uptake of nanoparticles in crops, and documented adverse impacts on microbial biomass in soils and on certain types of crops from nanoparticles in sludge.[9] Compounds in sewage sludge, including the variety of unregulated compounds, can leach out when exposed to rainwater, resulting in steroids and hormones in runoff, or other materials migrating downward into soil and thus groundwater. It is likely that new testing would find PFOAs in sludge, given the increasing degree to which they are being found at military and other facilities.

A significant amount of truck traffic, far beyond what is normal for agriculture, is also associated with sewage sludge application. PADEP regulations distinguish between "exceptional quality" (or Class A) and "non-exceptional quality" (Class B) sludge. To be "exceptional quality," one requirement is that the sewage sludge be both nonliquid and nonrecognizable as human waste. 25 Pa. Code § 271.911(b)(1). In the case of the Cunfer Farm, all but two of the 51 facilities slated to deliver sludge to the Farm supply Class B, or non-exceptional quality sludge, meaning the material can be quite liquid. Synagro documents confirm this.

As stated by the Environmental Quality Board:

> Liquid sewage sludge has the potential to be much more variable than a nonliquid sludge, particularly with respect to pathogen and vector attraction reduction. Limiting the EQ sewage sludge to

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> cannot assure the public that current land application practices are protective of human health and the environment."

Attachment A, p.4.

[6] This was before PADEP's call on municipal wastewater treatment plants to "voluntarily" stop accepting fracking wastewater.

[7] Attachment B. The facility in question, the Johnstown WWTP, is one of the facilities approved for the Cunfer Farm. However, at this time, it is believed that the WWTP does not currently accept fracking wastewater. https://www.epa.gov/sites/production/files/2015-06/documents/johnstown_0.pdf

[8] Attachment B.

[9] http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0057189; see also https://pubs.acs.org/doi/abs/10.1021/acs.est.5b01208 (finding *inter alia* increased metal uptake in crops treated with sludge containing nanoparticles).

> nonliquid products will reduce the potential for adverse effects to human health, which are caused by using sewage sludge that may not continuously meet the required pathogen and vector reduction standards. In addition, contrary to the EPA assumptions, ***liquid sewage sludge is not fertilizer-like*** and due to its variability is not always marketed. ***Because of the low nitrogen and high water content, it may be necessary to bring 40 times more liquid sludge to a site to get the same amount of nutrients supplied by one load of liquid commercial fertilizer. This intense traffic and the management practices associated with land applying the huge volumes of liquid*** require the more intensive management techniques that are necessary for non-EQ sewage sludges.

27 Pa. Bull. 521, 523 (Jan. 25, 1997) (emph. added).[10] Synagro's documentation for 27 of the 51 facilities supplying the sludge for the Cunfer Farm confirms the low-nitrogen, high-liquid quality of the Class B sludge. The amount of truck traffic for a supposedly agricultural operation is going to approach that of a fracking operation, not an agricultural operation.

To illustrate, Synagro's documentation identifies that the Hamden Township WWTP sludge is 25.25 percent solid (approximately ¾ liquid) and has an average of 7.2 pounds of plant-available nitrogen of per wet ton of sewage sludge. If corn were planted on Field H3 at the Cunfer Farm, the total amount of nitrogen needed for the corn, according to Synagro's calculations, is 954 pounds of nitrogen. With an average of 7.2 pounds of plant-available nitrogen, that means 6,868.8 wet tons of sewage sludge would be needed, *just for one field.* There are 33 fields at the Cunfer Farm, which is approximately 124 acres.

Further, the history of how this country has dealt with sewage sludge reinforces that it is not within the ACRE definition of "normal agricultural operations." ACRE's definition of "normal agricultural operations" includes "new activities, practices, equipment and procedures consistent with technological development ***within the agricultural industry***." 3 P.S. § 952 (emph. added). Biosolids land application is not a technological development within the agricultural industry. It is something created from outside the industry as a waste disposal method. Until the Clean Water Act, nearly everything ended up in streams. After the Clean Water Act, wastewater treatment resulted in sludge containing pollutants that used to be discharged. However, this new wastestream had to be dealt with in some fashion. Thus, this

[10] Despite mention of "more intensive management techniques," there is nothing in the regulations that address traffic, or other impacts. Instead, the regulations treat sludge like manure, 27 Pa. Bull. at 524-25, despite openly admitting that sewage sludge has particular concerns that need to be addressed. See also cited deposition testimony of PADEP officials and Synagro employees and representatives: http://ehb.courtapps.com/efile/documentViewer.php?documentID=26359

waste product – sewage sludge – was exported to other sites, including farms. Thus, the advent of sewage sludge land application reflected a technological development within the wastewater treatment industry, not a technological development within the agricultural industry. With the land application of sewage sludge, farm fields become waste disposal sites. Thus, despite attempting to clean up streams, the sludge containing what would have been discharged directly into waterways is sent back into the environment to enter streams and groundwater sources, and to expose rural communities to industrial contaminants.

Sewage sludge is not a benign fertilizer. It is not manure. It is not even merely human waste; it is industrial waste too – including industrial contaminants not addressed by any regulation or limits. It is a waste product that must be treated as such.[11] Ocean dumping of sewage sludge had significant adverse impacts on the marine environment, resulting in ocean dumping prohibitions.[12]

Despite being marketed as safe, free fertilizer to farmers, sewage sludge application has harmed livestock, farm workers, and the community surrounding the agricultural operation.[13] Farmers have sued biosolids entities after their animals died from eating crops grown in sludge.[14] One culprit is molybdenum, which is taken up into crops *more* readily the *higher* the pH of the soil.[15] Typically, lower pHs mean that most metals (molybdenum and arsenic being exceptions) will be taken up by crops more readily.[16] Unlike some metals, there is no "cumulative pollutant loading rate" for molybdenum in the regulations. 25 Pa. Code. § 271.914(b)(2).[17] This means that even if there are levels of molybdenum in fields, and thus in crops, toxic to cattle, sludge can continued to be applied so long as the levels of the regulated metals have not been exceeded. To the extent that molybdenum leaches more readily than other metals out of the soil and into the groundwater, it poses a threat to neighbors, some of whom may use their groundwater for

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[11] Even the U.S. E.P.A.'s Part 503 regulations on sewage sludge use the term disposal at times. 40 C.F.R. § 503.5.

[12] https://www.epa.gov/ocean-dumping/learn-about-ocean-dumping

[13] https://www.nytimes.com/2003/06/26/us/sludge-spread-on-fields-is-fodder-for-lawsuits.html; Attachment A.

[14] https://www.nytimes.com/2003/06/26/us/sludge-spread-on-fields-is-fodder-for-lawsuits.html; Attachment A.

[15] Attachment A, p.26.

[16] Attachment A, p.26.

[17] There is a ceiling concentration for molybdenum pertaining to the batches of sludge that get applied to the fields; however, even the USDA has expressed concerned that the ceiling concentration is too high. Attachment A, p. 23, n.6.

agricultural or other uses. Another culprit identified in one case of cattle death was an unregulated pollutant present in the sewage sludge due to industrial wastewater.[18]

Anything approaching "normal agricultural operations" should, at the very minimum, be something that does not harm farmers, the food supply, or the local environment in either the short-term or long-term.[19] Land application of sewage sludge is none of that. As a result, the land application of biosolids is not a "normal agricultural operation" and thus ACRE does not apply to Ordinance 77.

2. Ordinance 77 Is Not Preempted or Prohibited by State Law

Assuming that ACRE did apply, Ordinance 77 is not preempted or prohibited by state law. Further, to the extent state law is construed to preempt or prohibit the Township from addressing local environmental conditions to protect residents' constitutional environmental rights, such a construction is unconstitutional and invalid.

A. State Law Can Only be a Floor, Not a Ceiling on Local Authority to Address Local Environmental Conditions

The Ordinance is a valid exercise of the Township's authority, and carries out the Township's obligations to respect its residents' environmental rights and property rights under Article I, Sections 1 and 27 of the Pennsylvania Constitution. Specifically, the ordinance tailors the impacts of waste operations, including sewage sludge land application, to local conditions. This is a crucial part of the Township's role as a trustee of public natural resources under Article I, Section 27 of the Pennsylvania Constitution. Robinson Twp. v. Commonwealth ("Robinson II"), 83 A.3d 901, 953, 977-81 (Pa. 2013) (plurality); id. at 1006, 1007-08 (Baer, J., concurring); see Pa. Envtl Defense Found'n v. Com. ("PEDF"), 161 A.3d 911, 919 (Pa. 2017).

No state law can remove a municipality's constitutional obligations, or command it to ignore such obligations because those obligations trump state legislative action. Robinson II, 83 A.3d at 977-78 (plurality); id. at 1000-08 (Baer, J., concurring). No state law can remove a municipality's implicitly necessary authority to carry out its Section 27 obligations, and no state law can leave local protection unaccounted for, even under the guise of a statewide law that seeks to preempt all local regulation, or place a ceiling on it. Id.; Robinson Twp. v. Commonwealth ("Robinson IV"), 147 A.3d 536, 565 (Pa. 2016)(discussing Act 13's provisions as a "ceiling" on local regulation that could not be exceeded, "no matter what unique local conditions or needs existed in a particular municipality.").

[18] Attachment A, p. 27 & n.7.
[19] This is particularly true in this state in which Pennsylvanians' environmental rights are protected from governmental interference – including sewage sludge approvals – to the same extent as their political rights.

Ordinance 77's exercise of authority to tailor the impact of industrial operations to local conditions is the type of municipal action that the Pennsylvania Supreme Court implicitly found valid in Robinson II. Indeed, Act 13's express attempts to *block* local governments from exercising such authority, despite municipal obligations under Article I, Sections 1 and 27 of the Pennsylvania Constitution, were the very reason why a majority of the Pennsylvania Supreme Court found *both* Sections 3303 *and* 3304 of Act 13 unconstitutional. Robinson II, 83 A.3d at 953, 977-81 (plurality); id. at 1006, 1007-08 (Baer, J., concurring). The Court's invalidation of Section 3303 of Act 13 is particularly important because Section 3303 related broadly to the many other ways a municipality can act to protect its residents by addressing local environmental conditions. Robinson II was repeatedly clear that environmental protection in Pennsylvania cannot be dealt with solely by means of statewide averages to the exclusion of local considerations. Id. Rather, local considerations are necessary given Pennsylvania's extreme diversity in geology, topography, population, and other factors. Id. Unlike the operational or technical aspects of a wastewater plant, for example, which may not vary from municipality to municipality, environmental conditions differ markedly across the state. Id.; cf. Retail Master Bakers Ass'n of W.Pa. v. Allegheny County, 161 A.2d 36, 38-39 (Pa. 1960)(contrasting public health issues that vary depending on population density, climate, and other factors to regulation of how elevators function). Here, the Township has taken an active role to address local environmental conditions through Ordinance 77, consistent with its trustee obligations under Section 27, and consistent with its role in respecting residents' property rights and their environmental rights.

As a result, any application of state law that purports to impose a ceiling, not a floor – to attempt to preempt or prohibit local governments like the Township from tailoring activities' impacts to local conditions to protect residents' constitutional rights – is invalid. Robinson II, 83 A.3d at 953, 977-81 (plurality); id. at 1006, 1007-08 (Baer, J., concurring); see PEDF, 161 A.3d at 919. This includes ACRE, the Nutrient Management Act, and the Solid Waste Management Act ("SWMA"), all of which East Brunswick II essentially applied as ceilings, not floors, to block local regulation of sludge operations. Any case law prior to Robinson II and PEDF that purports to curtail municipality authority over local environmental conditions must be re-evaluated.

For example, Liverpool Twp. v. Stephens, 900 A.2d 1030 (Pa. Commw. Ct. 2006), incorrectly found that the SWMA *did* establish a preemptive, comprehensive scheme of regulation. This is directly contrary to the language of the SWMA, particularly as to sewage sludge, as will be explained below. Liverpool endorsed a complete blocking of local regulation, even for pressing local conditions. Such a result does not survive Robinson II and PEDF. The Pennsylvania Supreme Court rejected Liverpool's reasoning, see id. at 1038[20], in Robinson II

[20] In contrast, the dissent in Liverpool specifically stated: "Because the General Assembly recognized that the ***statewide administrative regulations*** issued by DEP ***do not take into consideration local conditions***, and only deal with the operation of waste sites, it gave second class township the authority to enact legislation regulating the

and PEDF. Robinson II, 83 A.3d at 953, 963, 977, 979-82 (plurality); id. at 1006, 1007-08 (Baer, J., concurring); see PEDF, 161 A.3d at 919 (quoting Robinson II, 83 A.3d at 963)("Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications . . . .") id. at 930-32 & n.23.

The General Assembly is tasked with looking at issues broadly from a statewide perspective. This does not mean that local governments have no role. Robinson II specifically *affirmed* that a local role in addressing local conditions is absolutely necessary in a state as diverse as Pennsylvania. Robinson II, 83 A.3d at 953, 977, 979-81 (plurality); id. at 1006, 1007-08 (Baer, J., concurring). This is consistent with the general rule that municipalities may make such regulations in furtherance of the general law, particularly those regulations that pertain to local needs. 32 A.3d at 594-95, Brazier v. City of Phila., 64 A. 508 (Pa. 1906). Any of the General Assembly's general determinations on health and safety do not mean that sewage sludge is safe to apply under all circumstances, regardless of proximity to humans, geology, or other factors. Thus, the Township, through Ordinance 77, has established a valid system for ensuring that sewage sludge land application is not harmful to residents based on local conditions.

B. Traditional Preemption Analysis Standards

There are three types of preemption: 1) express; 2) implied, and 3) conflict. Hoffman Min. Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cty., 32 A.3d 587, 593-94 (Pa. 2011). Implied preemption can occur when "the state regulatory scheme so completely occupies the field that it appears the General Assembly did not intend for supplementation by local regulations." Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 964 A.2d 855, 863 (Pa. 2009). Conflict preemption addresses situations in which a local ordinance "stand[s] as an obstacle to the execution of the full purposes and objectives of the Legislature," id., or "irreconcilably conflicts with" a statute. Hoffman Min. Co., 32 A.3d at 594. "Conflict preemption is applicable when the conflict between a local ordinance and a state statute is irreconcilable, ***i.e., when simultaneous compliance with both the local ordinance and the state statute is impossible***." Id. at 594 (emph. added). Further,

> We will refrain from holding that a local ordinance is invalid based on conflict preemption "***unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be***

placement of sludge and other solid waste to protect the health, safety, and welfare of their citizens." 900 A.2d at 1038 (Pellegrini, J., dissenting)(emph. added). The dissent further noted that "what is being preempted is the ability of the municipality, through its elected local officials, to address the needs of its citizens." Id. at 1039. Overall, the substance of the dissent is consistent with the reasoning of Robinson II and PEDF.

> ***protected.***" *United Tavern Owners of Philadelphia v. School District of Philadelphia,* 441 Pa. 274, 272 A.2d 868, 871 (1971). It is a long-established general rule that "in determining whether a conflict exists between a general and local law, [ ] where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, ***a municipal corporation with subordinate power to act in the matter may make such additional regulations*** in aid and furtherance of the purpose of the general law ***as may seem appropriate to the necessities of the particular locality*** and which are not in themselves unreasonable." *Mars Emergency,* 740 A.2d at 195 (quoting *Western Pennsylvania Restaurant Association,* 77 A.2d at 620). For example, "municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations." *Western Pennsylvania Restaurant Association, supra* at 620.

Id. at 594-95 (emph. added); see also Retail Master Bakers Ass'n, 161 A.2d 36.

There is a presumption against preemption of local regulation. Provident Mut. Life Ins. Co. of Phila. v. Tax Review Bd. of City of Phila., 658 A.2d 500, 502 (Pa. Commw. Ct. 1995). Indeed, total preemption of local authority is rare in Pennsylvania, and has only been found in three cases: anthracite strip mining, alcoholic beverages, and banking. Id. at 593. Further, preemption is something that is done by the General Assembly, *not* by agencies through regulations because agencies and municipalities are on the same level under state law – neither is superior or inferior to one another. See Com., Dept. of Gen'l Servs. v. Ogontz Area Neighbors Ass'n, 483 A.2d 448, 452 (Pa. 1984). Thus, Department regulations, including Department determinations on health and safety, cannot preempt local government authority, including the Township's exercise of authority via Ordinance 77. Further, the PADEP is tasked with looking at matters from a statewide perspective. This does not prevent local governments from acting to address local conditions.

C. No Preemption or Prohibition by the SWMA

The SWMA contains no express preemption provisions. The SWMA likewise does not meet the standard for implied preemption. There is no comprehensive scheme of regulation leaving no room for local action. The SWMA repeatedly addresses local participation and action, and expressly contemplates local and state cooperation. 35 P.S. §§ 6018.102(1); 6018.104(2), (3), (4). When read *in pari materia* with Act 101,[21] which also addresses state and local cooperative efforts on waste, the express and clear intent of the SWMA is that a local role

[21] Also known as "The Municipal Waste Planning, Recycling and Waste Reduction Act."

in waste operation regulation must be present. 35 P.S. §§ 4000.102(b)(1), 4000.301(2), (3), 4000.304; see also 35 P.S. § 4000.104(b) (requiring that Act 101 be read *in pari materia* with the SWMA); 1 Pa.C.S. § 1932. This cooperative framework is further reinforced by Section 67101 of the Second Class Township Code, on which the Township relies, in part, for authority to enact Ordinance 77. Section 67101 specifically gives the Township the authority to regulate waste *operations* as authorized by the SWMA and Act 101.[22]

Specifically as to sewage sludge, there are simply no site-level standards in the SWMA or Act 101, not even isolation distances between streams or human habitations and land-applied sludge. Rather, the PADEP is directed to "encourage" beneficial use of municipal and other waste "when the department determines that such use does not harm or present a threat of harm to the health, safety or welfare of the people or environment of this ***Commonwealth***," and to "establish waste regulations to effectuate the beneficial use" of municipal and other waste, including through ***general*** permits for ***regional*** or ***statewide*** use. 35 P.S. § 6018.104(18) (emph. added). These general permits, as will be explained below, are for the actual sewage sludge producers. The statute contains no restrictions, requirements, or other standards pertaining to sites for land application. Thus, nothing in the SWMA demonstrates field preemption in the area of site-specific environmental protections for land application of biosolids.

Nothing in Ordinance 77 irreconcilably conflicts with or stands as an obstacle to the beneficial use of sewage sludge. As already noted, the SWMA lacks standards such as isolation distances or water protection requirements that would stand in the way of an operator complying with both the SWMA and Ordinance 77. There are no site-level requirements relative to sewage sludge application. Further, although the SWMA seeks to promote beneficial use, it seeks to do so in a manner protective of human health and the environment. The Pennsylvania Supreme Court has said that a key part of protecting human health and the environment in Pennsylvania is addressing local environmental conditions. Robinson II, 83 A.3d at 953, 977, 979-81 (plurality); id. at 1006, 1007-08 (Baer, J., concurring). Thus, Ordinance 77 furthers the goals of the SWMA by ensuring that land application of sewage sludge is done in a manner protective of the local environment, including via addressing *inter alia* groundwater contamination risks.

In addition, Ordinance 77 does not ban waste facilities, such as biosolids land application sites. Thus, Ordinance 77 does not stand as an obstacle to the beneficial use of such waste. In fact, a waste facility such as a land application site for sewage sludge is not prohibited from operating under Ordinance 77 even if it encounters difficulty demonstrating that it cannot protect local water supplies. Instead, it must provide financial security for water replacement to ensure that local residents do not bear the costs of the operator's failures to protect local water supplies. In other words, the Ordinance "internalizes" an "externality" by requiring the operator to pay the

[22] Ordinance 77 cites a prior version of this statutory provision that did not include specific reference to the SWMA and Act 101.

costs of the damage it causes. Without such provisions, neighboring residents would be forced to bear the cost of damaged water supplies, which violates their right to clean water under Section 27. Consistent with Section 27, the bonding is a protection against private appropriation of a public natural resource through pollution of groundwater. Ill. Cent. RR. Co. v. State of Illinois, 146 U.S. 387 (1892); In re Borough of Downingtown, 161 A.3d 844, 876-77 (Pa. 2017). To contrast Ordinance 77's framework with East Brunswick II, the bonding in East Brunswick II had no connection to local water protection and was *specifically* about making the operation cost-prohibitive.

D. No Preemption or Prohibition by the Nutrient Management Act

Consideration of the Nutrient Management Act ("NMA") leads to the same result. First, the NMA does *not* require nutrient *or* odor management plans for biosolids application. The key purpose of the NMA is to address odors and manure application but only related to certain agricultural operations (concentrated animal operations and concentrated animal feeding operations, and manure generated by such operations). 3 Pa.C.S. §§ 502(1); 506, 507, 509. There is nothing in the NMA that occupies the field in regard to waste facilities of the type addressed by Ordinance 77, including biosolids land application sites. Likewise, there can be no conflict between the NMA and Ordinance 77 because they address different subjects. The NMA is focused on manure practices at certain large agricultural operations, while Ordinance 77 looks at the local impact of waste operations, including biosolids application.

Further, to the best of our knowledge, the [redacted]Farm has no nutrient management plan. This is distinguishable from East Brunswick II, in which the farm had such a plan.

To the extent that Sections 503 and 519 of the NMA are interpreted to preempt local regulation of *land application of biosolids* merely because biosolids qualify as a "nutrient," despite the fact that the NMA supplies *no* standards for biosolids, such an interpretation would make the NMA unconstitutional under Robinson II. Any application of the NMA that would allow imposition of statewide uniformity to the exclusion of local conditions would run directly afoul of Robinson II. Burkholder v. ZHB of Richmond Twp., 902 A.2d 1006, 1013-15 (Pa. Commw. Ct. 2006).

E. No Prohibition or Preemption by the Agricultural Area Security Law ("AASL")

To the extent that the Cunfer Farm is in an Agricultural Security Area, the AASL does not prohibit or preempt Ordinance 77's registration requirement and associated standards because these regulations do not "unreasonably restrict . . . farm practices" and "bear a direct relationship to the public health or safety" and 3 P.S. § 911(a). First, for the reasons explained above, sewage sludge land application is simply not a farm practice. It is a waste disposal

practice, and Ordinance 77 regulates it accordingly. Indeed, under the AASL, the definition of "normal farming operations" does *not* include the application of sewage sludge. 3 P.S. § 903. Second, even if it were a "farm practice," it is inherently reasonable to ensure that certain farm practices do not contaminate groundwater supplies on which other residents rely. Indeed, Section 27 requires the Township to act as a trustee to protect groundwater as a public natural resource. Also, the Ordinance's requirements do not prevent the land application sewage sludge; the Ordinance allows private actors to obtain registration from the Township upon proof of financial and other resources showing an ability to properly manage the waste operation, and thus farmers are not barred from using sludge on their operations.[23] Finally, because Ordinance 77's registration requirement is directly tied to protection of groundwater supplies and local emergency response for the protection of residents, it "bear[s] a direct relationship to the public health or safety" of the community. 3 P.S. § 911(a).

3. Ordinance 77 is a Valid Exercise of the Township's Authority

Again, even if ACRE applied here, the Township has multiple sources of authority that support Ordinance 77's enactment and enforcement. This authority includes the Pennsylvania Constitution, statutes and case law.

First, Robinson II and PEDF confirmed that municipalities are trustees under Section 27 and as part of that role, have an obligation "to act affirmatively to protect the environment, via legislative action." Robinson II, 83 A.3d at 958 (plurality); see also id. at 950, 955-56; PEDF, 161 A.3d at 933. Municipalities possess those "powers expressly granted to them by the Constitution of the Commonwealth or by the General Assembly, and other authority implicitly necessary to carry into effect those express powers." Fross v. Cty. of Allegheny, 20 A.3d 1193, 1202 (Pa. 2011); cf. Com. ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971). Because Section 27 imposes an affirmative obligation on trustees, including municipalities to enact to enact legislation in furtherance of conserving and maintaining public natural resources, the Township possesses that inherent authority necessary to enact legislation to address and account for local environmental conditions. Robinson II, 83 A.3d at 950, 955-56, 958, 977-978 (plurality).

Municipalities are the experts on local environmental conditions. Municipalities are the closest to the people who will be exposed to land-applied sludge. They are the ones who know the land, the waterways, and the local way of life. They are the first people who have to deal with a problem when that sludge is applied. They are often the first people who residents look to for help. The Pennsylvania Supreme Court has confirmed the importance of local municipalities and environmental protection in Robinson II, and in prior cases. Franklin Twp. v. DER, 452

[23] Although the Ordinance does not prohibit private entities from operating, it should be noted that the Commonwealth Court upheld a zoning ordinance that excluded private, but not public, landfills from the municipality. Kavanaugh v. London Grove Twp., 382 A.2d 148 (Pa. Commw. Ct. 1978).

A.2d 718, 721-22 (Pa. 1982)(plurality) (adopted by Susquehanna Cty. by Susquehanna Cty. Bd. of Comm'rs v. Com., Dep't of Envtl. Res., 458 A.2d 929, 931 (Pa. 1983)).

Addressing local conditions is crucial to Township residents' quality of life, and the Pennsylvania Supreme Court has agreed. The Township must be allowed to exercise its authority to address local conditions and fulfill its trustee obligations. Barring the Township from exercising its authority to address local environmental conditions would be unconstitutional, as it was in Robinson II. 83 A.3d at 963 ("Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.").

In addition, the Township has statutory authority to fulfill its Section 27 trustee obligation to "act affirmatively via legislative action to protect the environment." Robinson II, 83 A.3d at 977-78, 1007-08, PEDF, 161 A.3d at 919, 933. All statutory grants of authority must be read consistent with these constitutional principles.

For example, the Second Class Township Code states:

> The board of supervisors may make and adopt any ordinances, bylaws, rules and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth necessary for the proper management, care and control of the township and its finances and the maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce and manufacturers.

53 P.S. § 66506. This must be read to authorize the Township to implement its trustee obligations via ordinances, such as Ordinance 77, that account for local environmental conditions.

Further, Act 101 *requires* municipalities to, *inter alia,* "assure the proper and adequate transportation, collection and storage of municipal waste which is . . . present within its boundaries." 53 P.S. § 4000.304(a). Further:

> In carrying out its duties under this section, a municipality other than a county may adopt resolutions, ordinances, regulations and standards for the recycling, transportation, storage and collection of municipal wastes . . . , which shall not be less stringent than, and not in violation of or inconsistent with, the provisions and purposes of

> the Solid Waste Management Act, this act and the regulations promulgated pursuant thereto.

53 P.S. § 4000.304(b)(1). Ordinance 77's provisions protect against groundwater harm and other threats to local residents from the transportation and storage of biosolids.

Additionally, host municipalities – municipalities in which municipal waste landfills or resource recovery facilities are located[24] – have express authority regarding delivery of waste, including hours and days of *delivery*, and routing of trucks. 53 P.S. § 4000.304(b)(2). Ordinance 77 is consistent with this. The Vehicle Code provides additional authority for the Township as to roads. 75 Pa.C.S. §§ 6102, 6109.

The Second Class Township Code also provides:

> The board of supervisors in the manner authorized by . . . the "Solid Waste Management Act," and . . . the "Municipal Waste Planning, Recycling and Waste Reduction Act," [Act 101] may prohibit accumulations of ashes, garbage, solid waste and other refuse materials upon private property, including the imposition and collection of reasonable fees and charges for the collection, removal and disposal thereof.

53 P.S. § 67101. It further provides that the "board of supervisors may adopt ordinances to secure the safety of persons or property within the township . . . ." 53 P.S. § 66527. The Township may prohibit nuisances. 53 P.S. § 66529. Additional statutory authority includes the prohibition of discharge of sewage onto public highways, 36 P.S. § 2621, and the Clean Streams Law's prohibition on unpermitted discharge of sewage, either indirectly or directly, into waters of the Commonwealth. 35 P.S. § 691.202; see also 35 P.S. § 691.401. The Clean Streams Law defines "sewage" "to include any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals," which sewage sludge does. 35 P.S. § 691.1. "Waters of Commonwealth" includes both streams and groundwater, among other waters sources. 35 P.S. § 691.1.

Federal regulations on sludge also specifically state that municipalities are not precluded "from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge." 40 C.F.R. § 503.5(b). All of these provide additional support for Ordinance 77's protections.

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[24] 53 P.S. § 4000.103.

B. Distinguishable from *East Brunswick II*

To the extent [redacted] complaint is based solely on East Brunswick II, that case involved different facts and a substantially different ordinance than Ordinance No. 77. First, as already explained, East Brunswick II's interpretation and application of state laws as ceilings, not a floors, on municipal regulation is inconsistent with the Pennsylvania Constitution and has been effectively overruled by Robinson II and PEDF. Also, in contrast with East Brunswick II, Ordinance 77 is consistent with and valid under the SWMA, the NMA, and the AASL..

The posture of East Brunswick II is important. The Commonwealth Court had preliminary objections from the Township, and had to make certain assumptions based on that procedural posture, including assumptions that favored the AG's Office over the municipality. Thus, the degree to which extensive principles of law can be drawn from East Brunswick II is limited by that procedural posture.

East Brunswick II is also distinguishable on the fact that the farmer in the case had a nutrient management plan, although the case failed to identify if it addressed sewage sludge. To the Township's knowledge, the [redacted] have no nutrient management plan for the application of sewage sludge.

Also, the municipality in East Brunswick II originally banned land application of sewage sludge outright, and then, in response to an ACRE challenge, changed the ordinance to regulate sewage sludge in such a manner as to effectively be a ban in alternative form. 980 A.2d at 723-24, 724-25. In contrast, the Township here has not banned sewage sludge.

Likewise, Ordinance No. 77 does not single-out land application of sewage sludge, as did the ordinance in East Brunswick II. Rather, Ordinance 77 is concerned with waste disposal more broadly, and ensuring that it be done in a way that is respective of local environmental conditions, especially groundwater quality. All of Ordinance 77's requirements flow from that basic premise, in contrast to the East Brunswick II ordinance, which was solely focused on preventing sludge application (including that which was already occurring) by making it as cost-prohibitive as possible, not by focusing on tailoring operations based on impact and local conditions. 980 A.2d at 722-25.

In East Brunswick II, the Commonwealth Court specifically said that hours and days limitations on *delivery* of sludge could be valid, but not limitations on when sludge could be *applied.* 980 A.2d at 733. Ordinance 77's hours and days restrictions are valid because they govern delivery of waste only. Id. (discussing Synagro-WWT, Inc. v. Rush Twp., 299 F.Supp.2d 410 (M.D. Pa. 2003)).

As another example, the financial security provisions in Ordinance 77 are only for when an applicant cannot demonstrate that it can conduct its operations in a manner that will not

contaminate local groundwater supplies, and the security is tied directly to the cost of water supply replacement. There are no public water systems in East Penn Township, so this provision is crucial to protecting residents. East Brunswick II's bonding was an operational bond designed to be burdensome and an obstacle to sludge application because it applied *per acre* of land that was to have sludge applied to it. 980 A.2d at 727.

Thus, Ordinance 77 is significantly more targeted than the East Brunswick II ordinance because it focuses on addressing and ameliorating local environmental impacts. At the same time, it applies equally to all waste operations, not simply land application of biosolids. Thus, East Brunswick II is distinguishable.

III. Conflicts of Interest and Bias Concerns

We are concerned about the appearance of impropriety related to [redacted] repeated references to her prior employment with the AG's Office, including regarding the East Brunswick II matter. These concerns are compounded by [redacted] current high-ranking position with the PADEP. We trust that the Attorney General's Office is taking all necessary action to screen off all employees with relationships and work experience with [redacted] and to otherwise prevent even the appearance of bias stemming from [redacted] invocation of her present and prior positions.

IV. Conclusion

For the foregoing reasons, Ordinance 77 is valid. Please feel free to contact us to discuss this matter so that we can address any further questions or concerns you may have. We look forward to hearing from you.

Sincerely,

Jordan B. Yeager

Lauren M. Williams
For CURTIN & HEEFNER LLP

Attachments