COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

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Office of Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222
rwillig@attorneygeneral.gov

Jordan Yeager, Esq. & Lauren Williams, Esq.
Curtin & Heefner, LLP
200 S. Easton Rod-Suite 100
Doylestown, PA 18901

[redacted]

Keith R. Pavlack, Esq.
Pavlack Law Offices, P.C.
1415 Blakeslee Boulevard, Dr. E
Lehighton, PA 18104

Andrew C. Silton, Esq.
Beveridge & Diamond, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005

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

Dear Ladies and Gentlemen,

The Office of the Attorney General ("OAG") received an ACRE request from [redacted] challenging the legality of East Penn Township's ("East Penn") Ordinance 77 which governs the agricultural use of biosolids. [redacted] contends the Ordinance violates the Agricultural Communities and Rural Environment ("ACRE") law. *See* 3 Pa.C.S. § 311, *et.seq.* The OAG agrees - Ordinance 77 is an "unauthorized ordinance" under the ACRE law and must be repealed.

I. NORMAL AGRICULTURAL OPERATION

The first issue to address is whether the ACRE complaint involves a "normal agricultural operation." ("NAO"). The ACRE statute incorporates the Right to Farm Act's ("RTFA") definition of a NAO. 3 Pa.C.S. § 312. Under the RTFA a NAO includes "[t]he activities, practices, equipment and procedures that farmers adopt, use or engage in the…production, harvesting and preparation for market or use of agricultural…commodities.[1]" 3 P.S. §952, *Normal agricultural operation.* This term includes any "new activities, practices…and procedures consistent with technological development within the agricultural industry." *Id.* The use of fertilizer (in general)

[1] An agricultural commodity includes agricultural products and/or any products intended for human consumption produced on the farm, transported or intended to be transported in commerce. 3 P.S. §952, *agricultural commodity* (1) & (6).

and biosolids (in particular) to grow crops unquestionably constitutes an activity, practice or procedure used by farmers to produce agricultural commodities and consequently constitutes a NAO.

East Penn contends that the use of biosolids does not constitute an NAO, so that ACRE does not apply. *See* East Penn Township Response, pp. 4-10. The Pennsylvania Supreme Court has conclusively spoken on this issue, holding "the use of biosolids as fertilizer falls within the definition of" a NAO. *See Gilbert v. Synagro Central, LLC,* 131 A.3d 1, 20 (Pa. 2015). The Supreme Court could not have been more clear; East Penn's recitation of the alleged adverse effects of biosolids use in an attempt to distinguish *Gilbert* from the instant case is unpersuasive. In deciding *Gilbert,* the Court was fully aware of the nature of biosolids including the claimed adverse effects of biosolids application on farm fields. *Id.,* 131 A.3d at 654, footnote 1. Despite being presented with this litany of potential adverse effects (which are identical to the claims East Penn presents in the instant matter) the *Gilbert* Court did not hesitate to find that the use of biosolids was a NAO.

East Penn believes *Gilbert* inapplicable because it dealt with a statute of repose, rather than an unauthorized ordinance under ACRE. This distinction is immaterial – the critical point is that biosolid use falls within the RTFA's definition of a NAO. *Gilbert, supra,* 131 A.3d at 679-687. The ACRE statute unambiguously incorporates the definition of a NAO from exactly same statute - the RTFA. *See* 3 P.S. § 952; 3 Pa.C.S. § 312. Regardless of whether a case involves a statute of repose or an unauthorized ordinance under ACRE, the definition of an NAO is the same. East Penn's position that § 952 has to be interpreted differently depending on the type of case is erroneous and unpersuasive.

II. UNAUTHORIZED ORDINANCE

The overarching principle of ACRE is this: "[a] local government unit shall not adopt nor enforce an unauthorized local ordinance." 3 Pa.C.S. § 313(a). An "unauthorized ordinance" is one that "prohibits or limits" a NAO when the local municipality does not have the "authority under State law to adopt the ordinance" and when the municipality is "prohibited or preempted under State law from adopting the ordinance." 3 Pa.C.S. § 312. Ordinance 77 is an "unauthorized local ordinance" under ACRE for the following reasons:

A. DEFACTO ELIMINATION OF BIOSOLIDS USE

It is respectfully submitted that Ordinance 77 is the Township's attempt to essentially prohibit the use of biosolids.[2] The requirements of the Ordinance are so numerous and burdensome

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[2] The OAG made that same assertion in *Commonwealth of Pennsylvania, Office of the Attorney General v. East Brunswick Township,* 980 A.2d 720, 729, 733, 735-736, (Pa.Cmwlth. 2009)(The OAG "asserts that the substantive provisions in the 2008 Ordinance...severely limit, if not prohibit, the ability of a generator to apply sewage sludge to land in the Township.")("[T]he Attorney General asserts that the 2008 Ordinance renders the practice of using sewage sludge to fertilize land cost prohibitive.")(The OAG claimed that East Brunswick's biosolids ordinance "will effectively make it impossible to use sewage sludge in the Township.") The *East Brunswick* Court agreed with the OAG that the Township's Preliminary Objections should be rejected.

that its practical effect is to make it impossible for a farmer to utilize a long-standing and widely accepted agricultural practice.[3] An ordinance cannot "interfere with the General Assembly's goal of a uniform and comprehensive scheme of regulation of municipal sewage that leaves no room for side-by-side municipal regulation...Balkanized regulation of the disposal of municipal sewage sludge[4] would stand as an obstacle to the [Solid Waste Management Act's ("SWMA"), 35 P.S. § 6018.101, *et. seq.*] comprehensive regulatory scheme." *Liverpool Township v. Stephens,* 900 A.2d 1030, 1038 (Pa.Cmwlth. 2006)(footnote added). Moreover, "certain local regulations may be permissible but they 'cannot impose onerous requirements that stand as obstacles to the accomplishment and execution of the full purposes and objectives of the legislature.'" *Commonwealth of Pennsylvania, Office of the Attorney General v. East Brunswick Township,* 980 A.2d 720, 732 (Pa.Cmwlth. 2009) *quoting Synagro-WWT, Inc. v. Rush Township,* 299 F.Supp.2d 410, 419 (M.D.PA 2003). Ordinance 77 imposes onerous requirements, some of which are listed below on page 5 in the Preemption section of this letter, that preclude the accomplishment and execution of the legislature's goal of a uniform scheme of municipal sewage regulation.

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[3] There is no doubt that the use of biosolids is a long-standing and widely accepted practice. The Pennsylvania Supreme Court explains in *Gilbert, supra,* 131 A.3d at 21-22 (citations omitted) "as the trial court and Superior Court observed, 'over the past 20 years, [PaDEP] has permitted approximately 1,500 sites, including farms, for the application of biosolids, and more than 700 of those sites had active permits as of 2010.' Notably, *amicus* City of Philadelphia's history of producing biosolids for agricultural use illustrates the practice's acceptance: the City has engaged in such production for over 30 years; since 1990, over one-third of its biosolids have been used on farms in Pennsylvania and elsewhere; since 2008, the City has recycled 100% of its biosolids, with half of them being applied to land; and in 2014, 15,524 dry tons of the City's biosolids were used on Pennsylvania farms. In the past 15 years, the PaDEP has approved biosolids use on over 70 sites in York County...Thus, biosolids have been used as fertilizer for decades in Pennsylvania. Nationwide, biosolids application has substantially increased, more than doubling since 1976. Over half of the biosolids produced in the United States are used for land application. ("In 1995, 54% of all biosolids produced in the United States were beneficially used for land application."); ("Approximately 5.6 million dry tons of sewage sludge are used or disposed of annually in the United States; approximately 60% of that is used for land application."); (stating 33% of sewage sludge generated annually in United States is applied to land; 67% of that amount is applied on agricultural lands)."

[4] The *Gilbert* Court explained the link between sewage sludge and biosolids when it wrote "we note the Pennsylvania Department of Environmental Protection (PaDEP) defines 'biosolids' as 'nutrient-rich organic material produced from the stabilization of sewage sludge and residential septage that meet specific criteria and are suitable for land application[,]' and defines 'sewage sludge' as 'a solid, semisolid or liquid residue generated during the treatment of wastewater in a treatment works.' *http://www.dep.pa.gov/Business/Water/PointNonPointMgmt/WastewaterMgmt/Biosolids/layouts/mobile/dispform.aspx?List=491a3e8f-ecc5-4d61-9747-9871b71c7255&View=abe0d60e-80f1-404a-a8b4-7042bee07677&ID=4* last visited December 21, 2015. Similarly, the United States Environmental Protection Agency (EPA) defines 'biosolids' as 'treated sewage sludge that meets the EPA pollutant and pathogen requirements for land application and surface disposal[,]' and in turn defines 'sewage sludge' as 'the solids separated during the treatment of municipal wastewater.' http://www.epa.gov/region9/water/npdes/sludge.html last visited July 27, 2015; *see also* http://www.merriam-webster.com/dictionary/biosolid last visited July 27, 2015 (defining 'biosolid' as 'solid organic matter recovered from a sewage treatment process and used especially as fertilizer'). *Gilbert, supra,* 131 A.3d footnote 1.

B. ENVIRONMENTAL RIGHTS AMENDMENT

East Penn argues that Ordinance 77 is a valid exercise of its authority under the Environmental Rights Amendment ("ERA) found in the Pennsylvania Constitution at Article I, Section 27. *See* East Penn Township Response, pp. 10-12.

The Courts disagree. "While expansive in its language, the ERA was not intended to be read in absolutist terms so as to prohibit development that enhances economic opportunities and welfare of the people currently living in Pennsylvania." *Funk v. Wolf,* 144 A.3d 228, 233 (Pa.Cmwlth. 2016) *citing to Payne v. Kassab,* 361 A.2d 263, 273 (1976). *See Borough of Moosic v. PUC,* 429 A.2d 1237, 1239 (Pa.Cmwlth. 1981)("...although Section 27 is self-executing, its terms are not absolute...."). East Penn repeatedly cites to *Robinson Township v. Commonwealth,* 83 A.3d 901 (2013) as support for its Section 27 argument. This reliance on *Robinson Township* is erroneous, as this case endorses the exact opposite proposition; there, the Pennsylvania Supreme Court held that "the duties to conserve and maintain [public natural resources] are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry." *Id.,* p. 958.

Cases interpreting *Robinson* have explained that it does not stand for the proposition that municipalities can enact ordinances pursuant to the ERA that undermine or circumvent state statutes and their accompanying regulations. *See Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 697 (Pa.Cmwlth. 2018)("Moreover, *Robinson*...did not give municipalities the power to act beyond the bounds of their enabling legislation. Municipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies."; *UGI Utilities, Inc. v. City of Reading,* 179 A.3d 624, 631 (Pa.Cmwlth. 2017); *Delaware Riverkeeper Network v. Sunoco Pipeline, L.P.,* 179 A.3d 670, 695-696 (Pa.Cmwlth. 2018).

The SWMA itself states that the legislative intent of the law is to "implement Article 1, section 27 of the Pennsylvania Constitution," so that the Commonwealth can "protect the public health, safety and welfare..." of its citizens. 35 P.S. § 6018.102(4) & (10). To that end, an extensive regulatory regime, which East Penn does not address in its response, governs the use of biosolids:

> [t]he application of biosolids to farmland has been ***closely regulated*** by the PaDEP for 30 years, and the RTFA is part of a ***comprehensive regulatory framework*** for biosolids use. We cannot ignore the existence of other statutes, regulations, and case law that classify biosolids use on farmland as an ordinary farming practice to be encouraged. The RTFA should not be considered in isolation, but in the context of the ***elaborate regulatory framework*** for biosolids use in which it exists.

Gilbert, supra, 131 A.3d at 22 (emphasis added).

At a minimum, the following laws and regulations address biosolids use as fertilizer: SWMA, 35 P.S. §§ 6018.101, *et.seq.*; Nutrient and Odor Management Act ("NOMA"), 3 Pa.C.S. § 501, *et.seq.;* Agricultural Area Security Law ("AASL"), 3 P.S. § 901, *et.seq.;* 25 Pa.Code § 271.1, *et.seq.* This list is not all-inclusive - it is but an example of the extraordinary care with which the Commonwealth of Pennsylvania regulates biosolids.

When laws and regulations are enacted to govern activities with an environmental impact, the protections of the ERA are satisfied. For example, in *Concerned Citizens of the Yough v.*

Department of Environmental Resources, 639 A.2d 1265, 1275 (Pa.Cmwlth. 2002), the Court wrote:

> In *National Solid Waste Management v. Casey,* 143 Pa.Commonwealth Ct. 577, 600 A.2d 260 (1991), we stated that [the SWMA], and the regulations promulgated thereto, indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of solid waste, consequently, the balancing of environmental concerns mandated by Article 1, Section 27 has been achieved through the legislative process.

See also EQT Production Company v. Department of Environmental Protection, 181 A.3d 1128, 1147 (2018)("We appreciate the critical need for protection to vindicate the constitutional entitlement [Art. I, Sec. 27] of the citizenry to a clean environment and recognize that the Clean Streams Law is designed as a mechanism to advance this salutary objective."). The numerous laws and regulations concerning the use of biosolids as a NAO adequately address the environmental concerns of the ERA.

C. PREEMPTION

There are three types of preemption: "(1) express or explicit preemption, where the statute includes a preemption clause...(2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments." *Hoffman Min. Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cty.,* 32 A.3d 587, 593–94 (2011).

While the SWMA does not have express preemption language, numerous cases conclusively demonstrate that local control over biosolids/sewage sludge use is subject to conflict and field preemption. As noted above in *Concerned Citizens of the Yough, supra,* 639 A.2d at 1275, the Court could not have been more explicit – the SWMA and the accompanying regulations "indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of solid waste...." This is textbook field preemption and East Penn's position that there is room for municipalities to maneuver within the biosolids area is mistaken.

The *Concerned Citizens* case does not stand alone. The Commonwealth Court has consistently interpreted the SWMA and its accompanying regulations as preempting local regulation of the land application of biosolids with requirements that duplicate or exceed the DEP's regulatory scheme. *See Commonwealth v. East Brunswick Township,* 980 A.2d 720, 733 (Pa. Cmwlth. 2009)(explaining that "*Liverpool* and *Synagro* teach that a township cannot duplicate the regulatory regime established by the SWMA and cannot impose more stringent requirements than the SWMA."); *Liverpool Township v. Stephens,* 900 A.2d 1030, 1037 (Pa. Cmwlth. 2006) (*en banc*) (holding that to the extent the ordinance "regulates the application of municipal waste to agricultural land, [it] is preempted.").

A few examples of ordinance provisions found to be preempted by the SWMA include: requiring a separate local permitting process, regulating hours of operations, charging testing and bonding fees, imposing different setbacks and soil pH levels, and other such regulation of how, when, and where biosolids may be used to fertilize farmland. *Liverpool Township,* 900 A.2d at 1037; *Abbey v. Zoning Hearing Bd. of the Borough of East Stroudsburg,* 559 A.2d 107, 112 (Pa. Cmwlth. 1989); *Southeastern Chester County Refuse Auth. v. Bd. of Supervisors of London Grove*

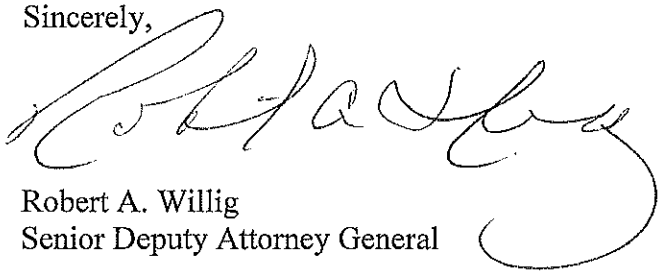
Township, 545 A.2d 445, 446 (Pa. Cmwlth. 1988); *Longenecker v. Pine Grove Landfill, Inc.*, 543 A.2d 215, 217 (Pa. Cmwlth. 1988); *Township of Ross v. Crown Wrecking Co.*, 500 A.2d 1293, 1293 (Pa. Cmwlth. 1985); *see also Synagro-WWT, Inc. v. Rush Township*, 299 F. Supp. 2d 410, 420-21 (M.D. Pa. 2003).

Among its many provisions East Penn Ordinance 77 requires that those seeking to use biosolids do the following: 1) comply with very stringent set-backs (§ III.3(a)); 2) adhere to strict vector and odor control standards (§ IV.B); 3) provide sampling data on the biosolids' characteristics (§ IV.B.7); 4) maintain extensive records on the biosolids and report back to the Township (§XII. 11 & 13); 5) follow burdensome and costly transportation of biosolids requirements (§ V.1 & 3); and 6) permit East Penn to have its own inspection and enforcement mechanisms (§ XII.5 & 8). SWMA regulations already cover every one of these Ordinance No. 77 provisions. *See e.g.* 25 Pa.Code §§271.915(c)(3), 933, 906, 918, 919, 915(i), & 421. Unambiguously, East Penn is doing nothing more than trying to regulate the how, when and where of biosolid use, which it cannot do.

III. CONCLUSION

East Penn tries in vain to distinguish the *East Brunswick* case. *East Brunswick* is not just indistinguishable, it is fatal to Ordinance No. 77. The OAG recommends that East Penn seriously consider doing what East Brunswick did after the Commonwealth ruled against it in pretrial motions: settle this ACRE matter by enacting the model ordinance that the OAG provided to it on two earlier occasions. East Brunswick Township recognized the inevitable – defending its biosolids ordinance was a lost cause and realized that it was best to enact the model ordinance to avoid costly, fruitless litigation. The OAG respectfully submits that East Penn should do the same.[5]

Sincerely,



Robert A. Willig
Senior Deputy Attorney General

[5] The ACRE law allows for the collection of attorney fees and the costs of litigation. "In an action brought under [ACRE]...if the court determines that the local government unit enacted or enforced an unauthorized local ordinance with negligent disregard of the limitation of authority established under State law, it may order the local government unit to pay the plaintiff reasonable attorney fees and other litigation costs incurred by the plaintiff in connection with the action." 3 Pa.C.S. § 317(1), **Attorney fees and costs.**