



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

November 29, 2018

Office of Attorney General
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Mezzanine Level
Pittsburgh, PA 15222
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[REDACTED]

[REDACTED]

[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.*

II. PLOT PLAN

The Ordinances, at Section 1202.3.C.6, *Applications*, also require [REDACTED] to submit a "plot plan." Subsection 6 presents a list of ten (10) mandatory items for completion of the plot plan. *See* Section 1202.3.C.6.a-j.⁶ The OAG consulted with a forestry resources expert at the Pennsylvania State University ("PSU") College of Agricultural Sciences;⁷ that expert concluded the items in subsections "b" through "g" are duplicative of information included in an E&S Plan completed pursuant to 25 Pa.Code § 102.4(b)(2)(i). As a result, state law preempts these 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. Ct. 2009). When a municipality's ordinances duplicate and/or impede upon state standards the state requirements override the local ordinance. That is the situation here. The six subsections identified above duplicate requirements already found in DEP regulations pertaining to erosion and sediment control. Moreover, Ordinance 701.13 requires submission of the E&S Plan to the Township, making this separate submission obligation wholly unnecessary.

III. TWENTY-FIVE (25) FEET BUFFER ZONE-WATER BODY OR STREAM

Section 815.2, *Soil Erosion and Sedimentation and Storm Water Control*, states "[n]o earth disturbance or clear cutting shall be permitted within twenty five (25) feet of any water body or stream except for approved stream crossing." This Ordinance conflicts with the state regulatory programs which protect "[a]ll surface waters, lakes, ponds, streams and wetlands in Pennsylvania." *See* Pennsylvania DEP, *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, July 2009, p. 4. (Attached as "Exhibit A"). The DEP's Erosion and Sediment Control and Waterway Management regulatory schemes⁸ both regulate best management practices for timber harvesting near streams, ponds, wetlands, floodplains, and other waters of the Commonwealth. The regulations do not preclude timber harvesting activities in these water-sensitive areas; instead, the amount of buffer zone required near water sources depends on many variables, including soil type, slope, vegetative cover, and stream character. Exhibit A, p. 21. *See e.g.* 25 Pa.Code § 102.14. As noted above, all timber harvesting activities are required to have a written E&S Plan to establish controls for activities near water sources. 25 Pa. Code § 102.4(b). Certain activities associated with timber harvest operations may require a permit under the Waterway Management regulations, such as the "deposition of solid fill, gravel, soil, slate and other such material in wetlands, streams and floodways for construction of temporary and

⁶ a) Name of the development; b) Name and address of land owner and/or land developer; c) Location map; d) North arrow, true or magnetic; e) Graphic scale; f) Written scale; g) Date plot plan was completed; h) names of adjacent property owners and tax map numbers, including those across adjacent roads; i) Proposed and existing street and lot layout including street names and right-of-way widths; and j) Existing and proposed man-made and/or natural features.

⁷ 3 Pa.C.S. § 314(d) states that the PSU College of Agricultural Sciences "shall, upon request of the Attorney General, provide expert consultation regarding the nature of normal agricultural operations in this Commonwealth."

⁸ 25 Pa.Code Chapters 102 and 105.

permanent roads.” Exhibit A, p. 8. However, “[p]ermits are not required to cut timber and other vegetation, including cutting in wetlands.”⁹ *Id.*

The best management practices manual for the Waterway Management regulations requires adequate buffer zones “where roads, skid trails, or log landings will be located near streams or wetlands.” *Id.*, p. 19.¹⁰ The width of the buffer zone depends on the slope between the forestry activity and the stream/wetland. *Id.* As explained in the manual:

Buffer zones are land areas adjacent to both flowing and nonflowing water bodies where specific management strategies should be applied. Buffer zones protect wetlands, streams, lakes and ponds by helping to:

- protect water quality by filtering sediments and other pollutants from surface runoff;
- maintain proper water temperatures and degree of shading for both aquatic plant and animal life; and
- help retain sources of food and cover for wildlife species that use forested wetlands.

Id., p. 20.

Although trees may be harvested within buffer zones around water sources, the DEP’s best management practices requires retention of 50% of the tree canopy so that there is no increase in water and ground surface temperature. *Id.* Moreover, the season, soil type, soil moisture, and type of equipment used has to be taken into account when harvesting. *Id.*, pp. 24-25. The “[c]areful implementation of BMPs will protect and enhance important wetland functions while allowing for cost-effective timber harvesting.” *Id.*, p. 25. The DEP requires certain best management practices when felling trees near wetlands or other water sources, which includes buffer zone requirements. *Id.*, pp. 21, 27-28.

As this regulatory scheme demonstrates, the best management practices for a particular forest is entirely dependent upon the unique conditions of that forest. For this reason, the Township’s blanket prohibition on harvesting within 25 feet of “any water body or stream except for approved stream crossing” conflicts with the DEP’s Erosion and Sediment Control and Waterway Management regulations, which allow timber harvesting activities near water sources using required best management practices tailored to the particular site conditions of a specific property. Therefore, Section 815.2 is an unreasonable restriction on timber harvesting.

⁹ The Federal Clean Water Act exempts silvicultural activities within wetland areas from permit and regulatory requirements when managed under best management practices. 33 U.S.C. § 1344(f)(10(A)).

¹⁰ The DEP’s *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, July 2009, and BMP Manual are one and the same. “This Timber Harvesting Operations Field Guide for Waterways, Wetlands and Erosion Control was developed as a quick reference guide and contains the most commonly used best management practices (BMPs) for silviculture activities.” Exhibit A, page immediately following the front cover and immediately before page i, Table of Contents.

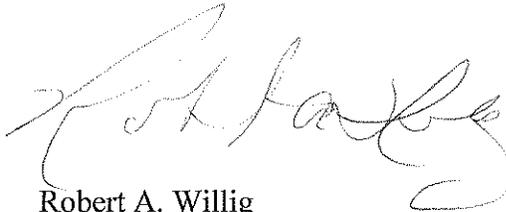
IV. CONCLUSION

In order to comply with ACRE, Eldred Township:

1. Must not prescribe requirements for an E&S Plan in addition to already existing state requirements for E&S Plans;
2. Delete § 1202.3.C.6.b-g;
3. Delete the Township's wholesale prohibition on harvesting within 25 feet of "any water body or stream except for approved stream crossing" found at § 815.2.

Please respond to this letter within thirty days of receipt. I look forward to your response as to how the Township intends to proceed and I thank you for your consideration of this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert A. Willig".

Robert A. Willig
Senior Deputy Attorney General