



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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May 7, 2021

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Canton Township
ATTN: Board of Supervisors
1265 West Chesnut Street
Washington, PA 15301

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: ACRE Request for Review – Canton Township, Washington County

Dear Board of Supervisors and [REDACTED]

Act 38 of 2005, the Agricultural Communities and Rural Environment (“ACRE”) law, 3 Pa.C.S. §311, *et.seq.*, requires that the Office of Attorney General (“OAG”), upon request of an agricultural owner or operator, review a local government ordinance for compliance with Act 38. The Act authorizes the Office, in its discretion, to file a lawsuit against the local government unit if, upon review, the Office believes that the ordinance unlawfully prohibits or limits a normal agricultural operation.

[REDACTED] filed an ACRE request for review challenging Canton Township’s timber harvesting ordinance. A copy of the ACRE request is attached for your review. He raises several issues two of which will be addressed in this letter: 1) Canton’s requirement that the Washington County Conservation District (“CCD”) review and approve the Erosion and Sedimentation (“E&S”) Plan as a prerequisite to securing a timber harvesting permit in addition to providing the Township with the logging and E&S Plans for its review; and 2) the information Canton Township wanted from [REDACTED] concerning PennDOT excess weight agreements and permits was too onerous.¹

¹ [REDACTED] also complains about Canton allegedly adding requirements not found in the Township’s ordinances and Canton taking too long to review his permit application. Those issues are not normally the type that would fall within the purview of the ACRE law, but rather, would probably be issues covered by various general provisions of the Municipalities Planning Code, 53 P.S. § 10101, *et.seq.*

Silviculture² 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. § 952. The Municipalities Planning Code (“MPC”), 53 P.S. §§ 10101-11202, explicitly addresses the considerable limitations on municipal authority to regulate timber harvesting as it provides:

[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)(emphasis added). This provision clearly indicates the intent of the General Assembly to encourage and promote timber harvesting throughout the Commonwealth as a use of right. Moreover, the intent of the General Assembly to generally encourage and promote all types of agriculture is made perfectly clear in the RTFA, 3 P.S. § 951, and other provisions of the MPC. 53 P.S. §§ 10105 & 10603(h). Indeed, the General Assembly’s Historical and Statutory Notes to ACRE declare that 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.”

The OAG has an ACRE Resource Center. You can go there at this link: <https://www.attorneygeneral.gov/resources/acre/>. Therein you will see a list of the ACRE cases that have come into this Office along with what we call “Acceptance Letters.” If the OAG believes that certain ordinances violate ACRE we draft these Acceptance Letters explaining why the ordinances violate ACRE and what the municipality must do to remedy the situation. You will see that there are many timber harvesting cases listed with links to the Acceptance Letters.

The OAG has addressed the issue of whether a Township can mandate, by ordinance or just by common practice, that the local CCD review and approve the E&S Plan as a prerequisite to securing a timber harvesting permit. The bottom line is that a Township cannot do so. The Department of Environmental Protection’s (“DEP”) 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). The Township may submit, at its own expense, a permit 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. I direct the Township’s attention to the following Acceptance Letters with pinpoint cites addressing the E&S/CCD issue: *East Nantmeal Township*, April 2016 Letter, pp. 6-7, 11; *East Brandywine Township*, pp. 5-6; *North Coventry Township*, pp. 4-5; *Eldred Township*, pp. 1-2; and *Clay Township*, pp. 4-5.

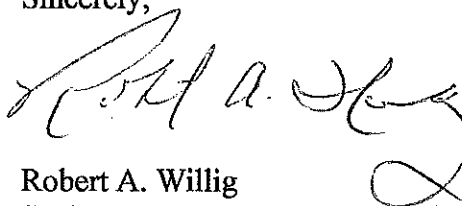
² “Silviculture is defined as the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis.” USDA Forest Service, White Paper, F14-SO-WP-SILV-34, p.2.

The Pennsylvania Sustainable Forestry Initiative ("PaSFI") and the Pennsylvania Forest Products Association ("PFPA") wrote a letter to the DEP in 2020 asking that agency to clarify for the CCDs what they could and could not do with respect to E&S Plans. The DEP responded and I attach that letter for Canton Township's review. This letter thoroughly and succinctly summarizes the DEP's position on CCD review of E&S Plans, which mirrors the OAG view, and is offered to Canton Township for informational purposes so that it can be well-versed on the role of the CCDs in the E&S process.

██████████ also complains that Canton Township required too much information from him concerning PennDOT excess weight agreements and permits. It is unclear whether that is even an ACRE issue. Regardless, I direct Canton Township's attention to two PennDOT publications concerning road posting and bonding: 1) PennDOT LTAP, Technical Information Sheet # 195, Fall/2019, *How to Post and Bond a Municipal Road, An Overview of Publication 221: Posting and Bonding Procedures for Municipal Highways*; and 2) PennDOT LTAP, Technical Information Sheet #158, Winter/2013, *Posting and Bonding Procedures for Municipal Roadways*. Once again, the OAG simply offers these publications for informational purposes. If Canton Township follows the guidance contained therein, as well as the requirements of the statutes and regulations referenced in those documents, then it is in compliance with state law.

Canton Township issued the necessary permits. The harvest went forward and was completed on April 23, 2021. As long as the Township going forward does not mandate prior CCD review and approval of the E&S plan as a prerequisite to securing a timber harvesting permit, the OAG considers this matter closed.

Sincerely,



Robert A. Willig
Senior Deputy Attorney General



December 2, 2020

Norm Steffy, Chairman
Pennsylvania Forest Products Association
301 Chestnut Street, Suite 102
Harrisburg, PA 17101

Dear Mr. Steffy:

We are in receipt of your letter dated July 10, 2020, which describes the Pennsylvania Forest Products Association's (PFPA) concern for municipal requirements related to Erosion and Sedimentation Control Plans (E&S Plans) for timber harvesting. Specifically, the letter notes PFPA's understanding that many municipalities across the state attempt to require county conservation district approval of E&S Plans for timber harvesting in instances when county conservation district approval is not required under 25 Pa. Code Chapter 102 (Chapter 102), and the impacts to timber harvesting projects in terms of cost and time delays that may result. Among other things, your letter requests that the Department of Environmental Protection (DEP) provide guidance on this issue to the county conservation districts to facilitate statewide consistency on the issue to resolve the concern.

We are aware of this issue and hope that we can provide clarity and consistency in implementation of Chapter 102 and Erosion and Sedimentation Control requirements. As you identify in your letter, there are challenges in creating a one-size-fits-all approach to this issue because every case is unique. Further, the process for review of municipal ordinances under Act 38 of 2005, known as "ACRE," is under the purview of the Pennsylvania Office of the Attorney General, not DEP, and the ACRE law does not affect the requirements of Chapter 102. However, we have developed the following guidance for the county conservation district staff, which we hope provides clarity to the districts and the regulated community. The guidance is as follows:

The issue: DEP has received many questions regarding when and how a Conservation District (District) can and should review an Erosion and Sediment Control Plan (E&S Plan) for timber harvesting activities involving less than 25 acres of earth disturbance. Such activities do not require a permit under Chapter 102.

*To clarify an issue that has come up recently regarding the Agriculture, Communities, and Rural Environment ("ACRE") law: **The ACRE law does not modify or eliminate any requirements under Chapter 102.** Districts should continue to perform all of their delegated duties under Chapter 102, and all persons proposing or conducting timber harvesting activities must comply with all applicable requirements of Chapter 102. The ACRE law may prohibit a municipality from enacting a local ordinance imposing certain requirements – such as E&S Plan reviews – beyond those required by Chapter 102, but that is a determination for the municipality to make based on the information provided by the Pennsylvania Office of the Attorney General.*

What Chapter 102 does and does not require: Chapter 102 requires any person proposing to conduct timber harvesting activities resulting in a total earth disturbance of 5,000 square feet or

more to develop and implement a written E&S Plan (25 Pa. Code § 102.4(b)(2)(i)). So long as a permit is not required, Chapter 102 generally does not require the person proposing the earth disturbance to submit their E&S Plan to DEP or the District for review prior to commencing their earth disturbance. The E&S Plan must be available for review by DEP or the District during an inspection and can be requested for review by DEP or the District based upon a complaint or investigation (25 Pa. Code § 102.4(b)(8) and (9)). Additionally, submission of an E&S Plan may be required to qualify for a general permit under Chapter 105 regardless of the project size (25 Pa. Code § 102.4(b)(2)(ii)). The ACRE law does not eliminate or modify any Chapter 105 requirements, so landowners/operators seeking to qualify under a Chapter 105 general permit must meet all applicable regulatory requirements and permit conditions.

What municipalities can and cannot do: In an effort to force E&S Plan review prior to earth disturbance, some municipalities have adopted ordinances requiring that a landowner or operator submit an E&S Plan to the District for review and approval prior to the municipality issuing its own permit, regardless of the size of the earth disturbance. The Pennsylvania Attorney General has issued letters to some municipalities stating that an ordinance requiring the landowner or operator to submit an E&S Plan to a District for review when not otherwise required by Chapter 102 violates the ACRE law. The Attorney General's letters have, however, indicated that no ACRE violation would occur if a municipality requested a copy of the E&S Plan and submitted the plan to a District at the municipality's sole cost.

The following basic reminders may be helpful:

- ***Districts are not prohibited from reviewing E&S Plans under the ACRE law.** If a landowner/operator or municipality requests a District to review an E&S Plan, the District may do so.*
- ***Even where an E&S Plan is not required to be reviewed prior to earth disturbance, if an E&S Plan is required to be developed and implemented, it must be available on site during all stages of the earth disturbance activity (25 Pa. Code § 102.4(b)(8)).** DEP or the District can request to review the E&S Plan at any time during an inspection or upon complaint (25 Pa. Code § 102.4(b)(9)). If a landowner/operator refuses to provide their E&S Plan upon request in one of these situations, the refusal may constitute a violation of Chapter 102 and should be addressed through appropriate enforcement means.*
- ***According to the Attorney General, municipalities may not require a landowner/operator to submit an E&S Plan to DEP or a District if Chapter 102 does not require such a review.** Although DEP does not enforce the ACRE law, DEP respects the opinion of the Attorney General. If a District is aware of a municipal ordinance that requires a landowner to submit an E&S Plan for review outside of Chapter 102 requirements, the District can suggest that the municipality review their ordinance and the opinions of the Attorney General's office on this issue. The District cannot provide legal advice, however the Attorney General's website provides publicly-available resources on the ACRE law that may be of assistance to the municipality (see, for example, www.attorneygeneral.gov/resources/acre/).*

- ***Districts and municipalities may enter into MOUs that include the review of timber harvesting E&S Plans, however, in accordance with the opinion of the Attorney General, any such MOU should not require that landowners/operators submit E&S Plans to the District if not otherwise required to do so under Chapter 102. An MOU that allows the municipality to submit E&S Plans for review at the municipality's sole expense is acceptable. Districts should review any existing MOUs with municipalities to ensure that the MOU is not in conflict with the opinions of the Attorney General regarding the ACRE law.***

The ACRE law does not affect a District's ability to review voluntarily submitted E&S Plans; provide education and assistance on the development of E&S Plans; or request and review E&S Plans during inspections or upon receipt of a complaint. Districts should continue to work with landowners and operators conducting timber harvesting activities to ensure compliance with Chapter 102 regardless of the size of the earth disturbance.

We appreciate the opportunity to try and address PFPA's concerns on the implementation of Chapter 102 as it relates to timber harvesting and the impact the program has on PFPA members and the regulated community. If you have questions or concerns on this or other issues as they relate to the Chapter 102 Program, please contact Mr. Sean Furjanic, P.E. in DEP's Bureau of Clean Water via email (sefurjanic@pa.gov) or by calling 717.787.2137.

Sincerely,



Patrick McDonnell
Secretary