



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO  
ATTORNEY GENERAL

June 21, 2018

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

*Re: ACRE Complaint- East Penn Township - Carbon County – Katie Cunfer*

Dear Mr. Yeager, Ms. Williams, and Ms. Cunfer,

The Office of the Attorney General (“OAG”) received an ACRE request for review from Ms. Cunfer challenging the legality of East Penn Township’s Ordinance 77 which covers the agricultural use of biosolids. Ms. Cunfer contends that the Ordinance violates the Agricultural Communities and Rural Environment (“ACRE”) law. 3 Pa.C.S. § 311, *et.seq.* “Within 120 days after receiving a request...the Attorney General shall advise the person that made the request whether or not the Attorney General will bring legal action....” *Id.*, § 314. The OAG refers to the §314 requirement as the “120 Day Letter” section. This correspondence is the 120 day letter. Even though under no obligation under § 314 to do so, the OAG also sends this letter to the attorneys representing the Township.

The OAG’s review of the ACRE request for review continues but this Office has preliminarily concluded that Ordinance 77 does violate ACRE. A longer letter, which the OAG calls the “Acceptance Letter,” will be coming at some point in the future. The Acceptance Letter will explain in greater detail why the Ordinance violates ACRE and the steps the Township must take in order to comply with state law. The purpose of this 120 day letter is to inform the parties that the OAG had accepted this case and to briefly explain some of the main reasons why the case has been accepted. Furthermore, this letter is meant to let the parties know that the OAG will work cooperatively with East Penn Township to resolve this matter amicably short of litigation in the Commonwealth Court if the Township so desires.

It is respectfully submitted that Ordinance 77 is the Township’s attempt to essentially prohibit the use of biosolids. East Penn will of course deny this but the countless requirements of the Ordinance are so numerous, burdensome, and onerous that the practical effect of the Ordinance is to make it impossible for a farmer to utilize a long-standing and widely accepted agricultural practice. 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 would stand as an obstacle to the [Solid Waste Management Act's, 35 P.S. § 6018.101, *et. seq.*] comprehensive regulatory scheme." *Liverpool Township v. Stephens*, 900 A.2d 1030, 1038 (Pa.Cmwlth. 2006). 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 that preclude the accomplishment and execution of the legislature's goal of a uniform scheme of municipal sewage regulation.

In order for the ACRE statute to apply, the case must involve a "normal agricultural operation." ("NAO"). 3 Pa.C.S. §§ 311, 312, 314. East Penn contends that the use of biosolids does not constitute an NAO, therefore, ACRE does not even apply. The Pennsylvania Supreme Court has conclusively spoken on this issue when it held that "the use of biosolids as fertilizer falls within the definition of" an NAO. *Gilbert v. Synagro Central, LLC*, 131 A.3d 1, 20 (Pa. 2015). The Township argues that *Gilbert* was a statute of repose, 3 P.S. § 954, and not an ACRE case, therefore, it does not apply. Yet the Supreme Court held that the definition of an NAO for statute of repose purposes is found in the Right to Farm Act ("RTFA") at 3 P.S. § 952. *Gilbert, supra*, at 679-687. The ACRE statute says that the definition of an NAO for ACRE purposes is found in the RTFA at 3 P.S. § 952. 3 Pa.C.S. § 312. Regardless of whether a case is one involving a statute of repose or one involving ACRE the definition of an NAO is the same, that is, the one found in the RTFA and the Township's position that § 952 has to be interpreted differently depending on what kind of case it is makes no sense. ACRE applies in this case.

East Penn's response to the ACRE request for review mentions state regulations just a handful of times and only in passing at that. The Township essentially ignores the extensive state regulatory framework that already governs the use of biosolids throughout the Commonwealth. The law of preemption is well-established in the Commonwealth. A municipal ordinance cannot be sustained where it is contradictory to or inconsistent with a state statute. In those instances, the judicially created preemption principle applies to bar a municipality, as agent of the State, from acting contrary to the State. *Duff v. Northampton Township*, 532 A.2d 500, 504 (Pa.Cmwlth. 1987), *aff'd per curiam* 550 A.2d 1939 (1988)("Obviously local legislation cannot permit what a state statute or regulation forbids or prohibit what a state enactments allow."). East Penn does not address in any meaningful manner the regulations applicable to this matter found at various points in 25 Pa. Code §§ 83, 91, 271, and 275.

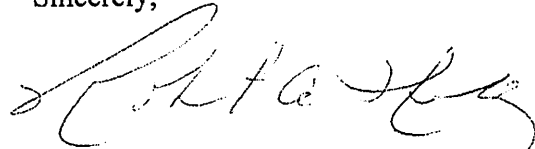
Nor does the Township adequately counter the fact that the Commonwealth Court has interpreted the Solid Waste Management Act ("SWMA"), 35 P.S. § 6018.101, *et.seq.*, and its regulations, 25 Pa.Code § 271.1, *et.seq.*, as preempting local regulation of solid waste management operations. *Liverpool Township v. Stephens*, 900 A.2d 1030, 1037 (Pa.Cmwlth. 2006). The Nutrient Management Act's ("NMA"), 3 Pa.C.S. § 501, *et.seq.*, core purpose is to ensure the proper utilization and management of nutrients on land in order to protect the quality of surface and ground water after application. *Id.*, § 503; 25 Pa.Code § 25 Pa.Code § 83.203(1) & (3). As will be discussed in greater detail in the forthcoming Acceptance Letter, Ordinance 77 is preempted under the NMA because it includes mandatory actions not required by the State Conservation Commission ("SCC") and imposes more stringent requirements than the NMA. To secure the uniformity of the regulatory scheme covering nutrient management, the NMA expressly prohibits

a municipality from enacting ordinances that regulate practices already regulated by the NMA, including the land application of biosolids, inconsistently or more stringently. 3 Pa.C.S. § 519.

The stated policy goals of the Agricultural Area Security Law (“AASL”), 3 P.S. § 901, *et seq.*, are to protect the viability of NAO’s and to encourage landowners to make long-term commitments to agriculture. *Id.*, § 902. East Penn is doing exactly the opposite with an ordinance that in reality precludes the use of biosolids. The Second Class Township Code grants the Township authority to adopt ordinances so long as they are “not inconsistent with or restrained by the Constitution and laws of this Commonwealth.” 53 P.S. § 66506. The OAG contends that East Penn has exceeded this authority by adopting Ordinance 77 that is inconsistent with and restrained by ACRE, the SWMA, the NMA, and the AASL at a minimum. The case law, statutory provisions, and regulations that will be more clearly spelled out in the Acceptance Letter establish that Ordinance 77 cannot stand.

The OAG has worked with other municipalities to bring their ordinances into compliance with state law. In biosolid cases, the OAG has used a model biosolid ordinance drafted with the assistance of Penn State University School of Agricultural Sciences biosolid experts. This model ordinance complies with state law and if enacted would resolve the instant ACRE case. I attached the model ordinance to my March 12, 2018 letter to the Township. In the event that you do not have a copy of the model ordinance, I have attached it for your review. I thank you for your time and look forward to East Penn’s proposals for moving forward in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. A. Willig', written in a cursive style.

Robert A. Willig  
Senior Deputy Attorney General

ORDINANCE NO. 2009-3

**AN ORDINANCE AMENDING ORDINANCE NUMBER 2008-2 TITLED "AN ORDINANCE TO PROTECT THE SAFETY AND HEALTH OF CITIZENS OF EAST BRUNSWICK TOWNSHIP BY PROVIDING FOR ACCESS TO INFORMATION RELATING TO SLUDGE APPLICATION IN THE TOWNSHIP AND FOR MEASURES TO ASSURE PUBLIC SAFETY DURING AND AFTER LAND APPLICATION AND/OR STORAGE OF SEWAGE SLUDGES"**

**PREAMBLE**

East Brunswick Township is a rural community, and consists of farms, tree farms, equestrian activities and riding trails, which are located in proximity to residential communities and businesses. Citizens of East Brunswick Township have expressed concern that the public health will be adversely impacted by exposure to sewage sludge on lands in the Township. Ordinance Number 2008-2 was adopted to address health and welfare concerns of the Township and its citizens from exposure to sewage sludge.

The Supervisors of East Brunswick Township are hereby amending Ordinance Number 2008-2, so as not to duplicate the regulatory scheme of the Pennsylvania Department of Environmental Protection regarding the land application of non-exceptional quality sewage sludge. The amended Ordinance is intended to (1) provide the Township with notice of the land application of non-exceptional quality sewage sludge in the Township; and (2) provide local monitoring to ensure that the public health and safety is not adversely impacted as a result of the land application of such sludge.

The Supervisors of East Brunswick Township hereby repeal the following provisions of Ordinance 2008-2 in entirety: Section VI; Section VII(A), (B),(D); Section VIII(B), (D) and (E) and Section X(A), (B), (C) and (D). The remaining provisions of this Ordinance, as amended, are hereby adopted and anything contrary hereto in Ordinance 2008-2 is likewise repealed.

Section I: General Provisions

The purposes of this Ordinance shall be as follows:

A. To provide to the citizens of East Brunswick Township and others notice, information and records relating to non-exceptional sewage sludge (hereinafter referred to as Class B sewage sludge) application and storage practices within the Township.

B. To provide for the health, safety and general welfare of all East Brunswick Township citizens and others and, to the extent possible, prevent unknowing or inadvertent exposure to Class B sewage sludge.

C. To preserve and protect agriculture and agriculture-related activities and the commercial and agricultural economy and land base in East Brunswick Township.

D. To assure that local concerns are addressed in the planning, management and application of Class B sewage sludge to lands within the Township.

Section II: Title

This Ordinance shall be known and may be cited as "An Ordinance Providing Notice to East Brunswick Township of the Land Application of Sewage Sludges and Assuring Local Public Health and Safety During and After Land Application of Sewage Sludges."

Section III: Definitions

Terms used in this Ordinance shall have the meanings set forth in the Solid Waste Management Act, 35 P.S. §6018.101 et seq., and accompanying Department of Environmental Protection Regulations.

Section IV: Compliance with PaDEP Standards

Application or storage of Class A or Class B sewage sludge, as defined in 25 PA. Code §271.1, within East Brunswick Township shall be in accordance with the requirements set forth by the Pennsylvania Department of Environmental Protection.

Section V: Notification to the Township and its Occupants of Land Application of Class B Sewage Sludge

A. Any person or company intending to store or apply Class B sewage sludge to agricultural land in East Brunswick Township shall, at least thirty (30) days prior to the first intended application, notify the Township by submitting to the Township copies of all information required to be submitted to the Pennsylvania Department of Environmental Protection pertaining to the land application of Class B sewage sludge in the Township.

B. (repealed by Board of Supervisors October 15, 2009).

C. At least 48 hours prior to the actual land application of Class B sewage sludge, any person or company intending to apply Class B sewage sludge to agricultural land in East Brunswick Township shall notify the Township of:

1. the dates and times of the intended land applications so that the Township can monitor the spreading operations pursuant to Section IX(B) below; and
2. how the site restrictions specified in 25 Pa. Code Section 271.932(b)(5)(vii) or (viii), as applicable, will be complied with following the land application of Class B sewage sludge.

Section VI: Public Safety and Environmental Data Assessment Fee (repealed by Board of Supervisors October 15, 2009).

Section VII: Providing Post-Application Information to the Township

- A. (repealed by Board of Supervisors October 15, 2009).
- B. (repealed by Board of Supervisors October 15, 2009).
- C. A person or company that prepares or applies Class B sewage sludge that is applied on agricultural lands within the Township shall provide to the Township copies of any information required to be submitted to the Pennsylvania Department of Environmental Protection at the time the recordkeeping information is submitted to the Pennsylvania Department of Environmental Protection.
- D. (repealed by Board of Supervisors October 15, 2009).

Section VIII: Protection of Public Health and Welfare

- A. Sludge application in the Township shall not take place on the holidays of Christmas, New Year's Day, Easter, Memorial Day, July 4<sup>th</sup>, Labor Day and Thanksgiving.
- B. (repealed by Board of Supervisors October 15, 2009)
- C. When Class B sewage sludge is applied to lands abutting a public road, the applicant and/or landowner shall place clearly visible signs written in English and Spanish at intervals at least every 50 feet along said road or roads at least 48 hours prior to sludge

application and for the duration of operations at such lands. The signs shall state "WARNING" in red, contain notice that Class B sludge has been applied to the land and prohibit public access to such lands. Such signs shall be at least 12" by 12" and in format similar to that set forth at Attachment A to this Ordinance or other form acceptable to the Township.

D. (repealed by Board of Supervisors October 15, 2009).

E. (repealed by Board of Supervisors October 15, 2009).

Section IX: Investigation and Inspection

A. Prior to the first land application of Class B sewage sludge, the Township or its agent may inspect the fields on which land application is to take place to assess conditions on the fields and to ensure compliance with the DEP permit requirements. The Township or its agent may also obtain one representative soil chemical sample for each field on which sewage sludge is to be land applied for pH and those constituents listed in the tables in 25 Pa. Code Section 271.914(b). The Township may test well water only with the consent of the landowner. The Township must provide the landowner and the land applier 72 hours advance notice prior to an inspection. The Township will bear the expense of the inspection and testing. The Township will only conduct one inspection prior to the first land application at the DEP approved site.

B. During the spreading of Class B sewage sludge, the Township or its agent may inspect the spreading operations to ensure compliance with the DEP permit requirements and regulations. Samples of the sewage sludge being applied may be collected by the Township and analyzed utilizing Department-approved procedures. Samples may be tested for the pollutants listed in the DEP regulations. The Township may require written proof from the land applier to indicate which pathogen reduction treatment alternative and which vector attraction reduction option was used to produce the Class B sewage sludge used at the site. The Township may test



well water only with the consent of the landowner. The Township will bear the expense of all inspections and testing and may only conduct an inspection during the land application at the DEP approved site. Copies of any test results shall be maintained by the Township as part of the land application history within the Township.

Section X: Enforcement and Penalties

- A. (repealed by Board of Supervisors October 15, 2009).
- B. (repealed by Board of Supervisors October 15, 2009).
- C. (repealed by Board of Supervisors October 15, 2009).
- D. (repealed by Board of Supervisors October 15, 2009).
- E. If the operation or application of Class A or Class B sewage sludge is in violation of the Pa. DEP regulations or this ordinance, the Township hereby empowers its authorized representative to seek such equitable remedy for the violation(s) as the Township may seek under the Solid Waste Management Act or the Second Class Township Code.

Section XI: Administration

The provisions of this Ordinance shall be administered by the East Brunswick Board of Supervisors or their duly authorized representatives who shall keep and maintain records hereunder of sewage sludge land application, disposal, or storage within the Township, make such records available to residents and other interested parties and enforce the provisions of this Ordinance.

Section XII: Severability

The provisions of this ordinance are severable, and if any section, clause, sentence, part or provision shall be held illegal, invalid or unconstitutional by any court of competent

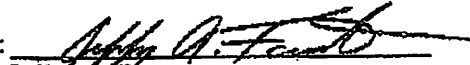
jurisdiction, such decision of the court shall not affect, impair or invalidate any of the remaining sections, clauses, sentences, parts or provisions of this Ordinance. It is hereby declared to be the intent of the Board of Supervisors that this Ordinance would have been adopted if any such section, clause, sentence, part or provisions determined to be illegal, invalid or unconstitutional had not been included.

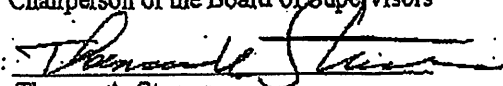
ENACTED AND ORDAINED into law by the Township of EAST BRUNSWICK,  
Schuylkill County, Pennsylvania, this 15 day of October, 2009.

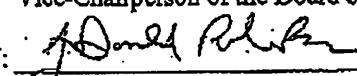
ATTEST:

TOWNSHIP OF EAST BRUNSWICK

  
Lisa M. Stanclick, Secretary

BY:   
Jeffrey A. Faust,  
Chairperson of the Board of Supervisors

BY:   
Thomas A. Strauss,  
Vice-Chairperson of the Board of Supervisors

BY:   
Donald Rubinkam, Member  
Board of Supervisors

**CERTIFICATE OF ADOPTION**

The undersigned, Secretary of the Township of East Brunswick, Schuylkill County, Pennsylvania, does hereby certify that the foregoing ordinance was duly adopted by a majority vote of the East Brunswick Township Board of Supervisors at a duly advertised, called and held public meeting of said Council, which meeting was held on the 15 day of October, 2009, at the Offices of the Township.

**TOWNSHIP OF EAST BRUNSWICK**

BY: Lisa M. Stanchick  
Lisa M. Stanchick, Secretary

**WARNING/CUIDADO !!**

**DO NOT ENTER**

**NO TRESPASSING**

**NO TRESPASE**

**CLASS B SEWAGE SLUDGE HAS BEEN APPLIED TO THIS LAND**

**for additional information contact:**

**(Name of landowner or applicer)**