

**Willig, Robert A.**

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**From:** [REDACTED]  
**Sent:** Tuesday, October 8, 2024 5:29 PM  
**To:** Willig, Robert A.  
**Cc:** [REDACTED]  
**Subject:** [ EXTERNAL ] East Coventry Township ACRE Request  
**Attachments:** 2024-10-08 ACRE Complaint to OAG re East Coventry Twp FPR Ordinance-C.pdf

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Dear Mr. Willig:

On behalf of [REDACTED] (copied above), please accept the attached request for the Pennsylvania Office of Attorney General to investigate East Coventry Township's improper Food Processing Residual Ordinance that the Township enacted earlier this year. We will also provide a courtesy copy via first class mail.

Should you have any questions or need any additional information, please feel free to contact me directly (contact information below).

Sincerely,

[REDACTED]

[REDACTED]

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[REDACTED]

Partner

[REDACTED]

[REDACTED]

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October 8, 2024

**VIA EMAIL AND FIRST-CLASS MAIL**

Robert A. Willig, Esq.  
Senior Deputy Attorney General  
Office of Attorney General  
1251 Waterfront Place  
Mezzanine Level  
Pittsburgh, PA 15222

**RE: ACRE Complaint – East Coventry Township, Chester County**

Dear Mr. Willig:

I write to request that the Pennsylvania Office of Attorney General (“OAG”) investigate East Coventry Township’s (“Township”) unauthorized adoption of its Food Processing Residual Ordinance, ordinance no. 2024-268 (“Ordinance”), in violation of the Pennsylvania Agricultural, Communities and Rural Environmental (“ACRE”) Act.<sup>1</sup> I own property at [REDACTED] Pennsylvania that is over 60 acres in size, where I farm crops and previously land applied “food processing residuals” pursuant to a Manure Management Plan. A copy of the Ordinance is attached to this letter as Exhibit A. The Ordinance illegally establishes a local permitting scheme for the land application of food processing residuals (“FPR”) with requirements far more stringent than those required by the Solid Waste Management Act (“SWMA”) and Pennsylvania Department of Environmental Protection (“PADEP”) waste regulations. Under SWMA and related waste regulations at 25 Pa. Code § 287.101(b)(2), the land application of FPR is expressly *exempt* from permitting provided that the use is consistent with PADEP “best management practices” discussed in the FPR Management Manual.

Perhaps even more egregious is the Ordinance’s illegal total prohibition of the land application of anything considered a “residual waste” under PADEP’s regulations. This very likely includes FPR, meaning FPR land application is effectively a prohibited activity. As discussed further below, the land application of FPR is a recognized and protected “normal agricultural operation” under ACRE and the Right to Farm Act. The Township’s total prohibition of FPR is a direct violation of these statutes and the Legislature’s policy of protecting farmers.

**Background on Food Processing Residuals in Pennsylvania**

The land application of FPR on farm fields to help crop growth in Pennsylvania is a very common agricultural practice and has been for decades. SWMA, which was passed over forty years ago in 1980, explicitly defines the term “food processing waste” (a synonym for FPR) and

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<sup>1</sup> The Township also intervened in a challenge brought by a local advocacy group against land application of FPR at property I own in the Township to the Environmental Hearing Board. See *East Coventry Advocacy, [REDACTED] and East Coventry Township Board of Supervisors v. DEP and [REDACTED]*, EHB Docket No. 2023-008-CS.

exempted the use of it during “normal farming operations.” Under SWMA, “Food Processing Waste” is defined to mean:

Residual materials in liquid or solid form generated in the slaughtering of poultry and livestock, or in processing and converting fish, seafood, milk, meat, and eggs to food products; it also means residual materials generated in the processing, converting, or manufacturing of fruits, vegetables, crops and other commodities into marketable food items.

35 P.S. § 6018.103. This definition is reflected as well in PADEP’s solid waste regulations.<sup>2</sup>

PADEP first published its “Food Processing Residual Management Manual” (“FPR Manual”) over thirty years ago in June 1994, to further encourage and guide the use of FPR.<sup>3</sup> In general, the term “Food Processing Residuals” is an umbrella term used to describe a category of residual materials that are distinct from manure, biosolids, and fertilizer, but similar because each can be used to aid in crop growth and are environmentally friendly. These materials are often generated from food manufacturing operations such as beef or poultry processing or food products. They contain vital nutrients like nitrogen to aid in crop growth and, therefore, can be used on farm fields as a fertilizer or manure alternative.

Under PADEP’s regulations, this type of use is considered a “beneficial use” because the materials can be re-used in a productive way that is environmentally safe and as an alternative to wasteful and unnecessary landfill disposal. PADEP’s FPR Manual specifically encourages the land application of FPR as a soil conditioner. The benefit from land application of FPR is two-fold – the FPR adds valuable nutrients to the soil and the beneficial reuse avoids wasteful and unnecessary disposal in landfill.

### PADEP’s Oversight of FPR Land Application Activities

PADEP oversees and implements environmental waste regulations under SWMA. FPR falls under the scope of PADEP’s regulations under Chapter 287. However, both SWMA and Chapter 287 make clear that the use of FPR is exempt from permitting provided that the use is consistent with PADEP’s “Best Management Practices” (often referred to as BMPs). *See* 35 P.S. § 6018.501(a); 25 Pa. Code § 287.101(b)(2). In this case, that means PADEP’s FPR Manual. PADEP waste regulations also address the storage and transportation of residual waste materials. 25 Pa. Code Chapter 299.

To be clear, the FPR Manual is a guidance document. It is not to be interpreted as a prescriptive regulation. Consistent with that, the FPR Manual includes the following disclaimer:

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<sup>2</sup> 25 Pa. Code § 287.1: Food Processing Waste - Residual materials in liquid and solid form generated in the slaughtering of poultry and livestock, or in processing and converting fish, seafood, milk, meat and eggs to food products. The term includes residual materials generated in the processing, converting or manufacturing of fruits, vegetables, crops and other commodities into marketable food items. The term also includes vegetative residuals from food processing activities that are usually recognizable as part of a plant or vegetable, including cabbage leaves, bean snips, onion skins, apple pomace and grape pomace.

<sup>3</sup> [greenport.pa.gov/eLibrary/GetDocument?docId=7953&DocName=THE FOOD PROCESSING RESIDUAL MANAGEMENT MANUAL.PDF](http://greenport.pa.gov/eLibrary/GetDocument?docId=7953&DocName=THE FOOD PROCESSING RESIDUAL MANAGEMENT MANUAL.PDF)

**Disclaimer:** The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures will affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework, within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

*See FPR Manual, at i.*

The recommendations discussed and listed in the Manual are just that – recommendations for the land application of FPR to assist farmers and encourage good practices. Unlike a promulgated regulation, a PADEP guidance document does not have the force and effect of law. *See Pa. Human Relations Comm'n. v. Norristown Area Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977); *see also United Refining Co. v. DEP*, 2006 EHB 846, 850-51.

### **The Right to Farm Act and ACRE**

The Legislature has declared the protection of farmers to be an important policy of the Commonwealth. Through the Right to Farm Act, the General Assembly explicitly stated its policy to protect and encourage farming:

It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances.

3 P.S. § 951; *see also OAG Letter to Latimore Township* (Aug. 4, 2017), at 2. ACRE and the Municipalities Planning Code (“MPC”) similarly emphasize the policy of the Commonwealth to encourage agriculture. As recognized by OAG,

The Historical and Statutory Notes to ACRE state in pertinent part that, ‘[t]he General Assembly of the Commonwealth of Pennsylvania declares that the Commonwealth has a vested and sincere interest in ensuring the long-term sustainability of agriculture and normal agricultural operations ... In furtherance of this goal, the Commonwealth has enacted statutes to protect and preserve agricultural operations for the production of ... agricultural products.’

*See OAG Letter to Latimore Twp.*, at 2; 3 Pa.C.S. § 311 et seq.

Likewise, the MPC states that “[z]oning ordinances shall encourage the continuity, development and viability of agricultural operations...” 53 P.S. § 10603(h). It also expressly precludes a municipality from enacting or interpreting an ordinance regulating activities related to agricultural production in a manner that exceeds requirements imposed under state law. 53 P.S. § 10603(b).

As to the land application of FPR specifically, Pennsylvania Courts have recognized that both the land application and the storage of FPR are recognized “normal agricultural operations” under the Pennsylvania Right to Farm Act. *See Branton v. Nicholas Meat, LLC*, 159 A.3d 540, 555 (Pa. Super. 2017) (“We therefore hold that spreading FPW on farmland to provide nutrients for the soil is a normal agricultural operation. Moreover, storage of FPW is also a normal agricultural operation.”).<sup>4</sup>

Regarding ACRE, the law provides the Pennsylvania Office of Attorney General (OAG) authority to review and challenge an “unauthorized local ordinance” when it receives a complaint from interested parties. *See* 3 Pa.C.S. §§ 313 and 314. Under ACRE, an “unauthorized local ordinance” is defined to mean:

An ordinance enacted or enforced by a local government unit which does any of the following:

1. Prohibits or limits a *normal agricultural operation* unless the local government unit:
  - i. has expressed or implied authority under State law to adopt the ordinance; and
  - ii. is not prohibited or preempted under State law from adopting the ordinance.
2. Restricts or limits the ownership structure of a normal agricultural operation.

3 Pa.C.S. § 312 (emphasis added).

Applicable OAG review letters, as well as case law, demonstrate the following key concepts with respect to land application of FPR:

1. Local regulation of land application of FPR is preempted by SWMA and PADEP’s waste regulations. That is, local regulations cannot regulate how, when and where FPR may be used to fertilize farmland.<sup>5</sup>

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<sup>4</sup> This holding applies to ACRE as well. ACRE incorporates by reference the definition of a “normal agricultural operation” from the Right to Farm Act. *See* 3 Pa.C.S. § 312. As such, activities that are “normal agricultural operations” under the Right to Farm Act are also considered such under ACRE. *See OAG Letter to East Penn. Twp.* (May 21, 2019), at 2 (“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.”)

<sup>5</sup> The OAG found a biosolids related ordinance to violate ACRE because it “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

2. Local regulation that is otherwise permissible cannot be interpreted in a manner that prohibits or limits a normal agricultural operation.<sup>6</sup> Per *Branton*, this includes the land application of FPR.
3. Local regulation cannot duplicate PADEP's regulatory regime established in SWMA and cannot impose more stringent requirements than the Act.<sup>7</sup>

Examples of such ordinances which have been held to be preempted by 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. 2d410, 420-21 (M.D. Pa. 2003).

As to the land application of FPR, any local ordinances must respect that SWMA and PADEP's waste regulations exempt the land application of FPR from permitting provided that the use is consistent with PADEP's FPR Manual. Local regulation cannot impose restrictions and essentially void the statutory and regulatory exemption from permitting or impose separate, more stringent storage and transportation requirements. To do so stands in direct violation of Legislative intent.

### The Township's Ordinance Violates ACRE

The Township's FPR Ordinance is a clear violation of ACRE. The Township's Ordinance is squarely preempted by SWMA. See *OAG Letter to East Penn Twp.* (May 21, 2019), at 5 ("... SWMA and the accompanying regulations 'indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of waste.'"). Despite this, the Ordinance illegally creates a local permitting regime for the land application of FPR where SWMA and PADEP waste regulations otherwise explicitly exempt the activity. The Ordinance also illegally prohibits the activity by making the land application of "residual waste" illegal - FPR may be considered a "residual waste" under PADEP's regulations and therefore would fall within the Ordinance's prohibition.

For these reasons, among others, the Township's Ordinance violates ACRE by:

1. regulating how, when, and where FPR may be used in the Township,

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extensive records on the biosolids and report back to the Township (§XII. 11 & 13); 5) follow burdensome and costly transportation of biosolids requirements (§ V.I & 3); and 6) permit East Penn to have its own inspection and enforcement mechanisms (§ XII.5 & 8)." See *OAG Letter to East Penn Twp.* (May 21, 2019), at 6.

<sup>6</sup> See *OAG Letter to Latimore Twp.*, at 1 ("Section 402 in and of itself does not violate state law. However, Latimore Township's interpretation and implementation of 402 violates [ACRE] as applied to [redacted].")

<sup>7</sup> See *OAG Letter to East Hopewell Twp.* (Oct. 20, 2014), at 1-2 (citing *Commonwealth v. East Brunswick Twp.*, 980 A.2d 720, 733 (Pa. Cmwlth. 2009) and *Liverpool Twp. v. Stephens*, 900 A.2d 1030, 1037 (Pa. Cmwlth. 2006)).

2. duplicating and imposing a regulatory scheme that is far more stringent than that required by SWMA and PADEP's regulations and guidance, and
3. effectively prohibiting the activity by outlawing the land application of "residual waste."

*Review of Specific Provisions of the Township's Ordinance.* It is my opinion that the entire Ordinance violates ACRE. Below is a brief review of specific provisions.

Food Processing Residual Land Application and Storage Compliance Review Form. The Township requires that any person who plans to land apply or store FPR must first complete a "Compliance Review Form"<sup>8</sup>:

No person or entity shall engage in any storage or land application of Food Processing Residual in the Township without first having provided to East Coventry Township a completed Food Processing Residual Land Application and Storage Compliance Review Form, together with supporting documentation.

This form demonstrates the Township's intent to step into PADEP's role and regulate the how, when, and where FPR may occur. It requires that an applicant submit information not otherwise required by PADEP, requires that the applicant attest to the information subject to penalties, and provides the Township authority to review the application and mark it "Completed" – that is, effectively "approve" the application as if it were PADEP. This is reflected in section 10-601 of the Ordinance ("The purpose of this Part is to establish uniform standards for land application and storage of food processing residual ("FPR")). Indeed, a memorandum drafted by the local FPR Steering Committee expressly encourages the Township to act as a regulatory authority:

The committee is recommending that the township establish an application process that will inform the landowner what documentation should be submitted to the township to be reviewed for compliance.

*Memorandum of the Food Processing Residual and Water Quality Steering Committee Members* (Sept. 19, 2023).<sup>9</sup>

To be clear, the Township has no authority to compel this application, no authority to review and approve an applicant's satisfaction of the Township's Ordinance, and no authority to impose or enforce penalties. PADEP has sole authority to enforce violations of environmental statutes and regulations.

Ordinance Section 10-602 Required Minimum Distances. The Township has no authority to regulate setback requirements that are recommended in PADEP's FPR Manual. As discussed above, the FPR Manual is a guidance document – not a regulation or ordinance. The Township

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<sup>8</sup> Available at [4b37b5\\_ba7ad659afd949018a1b2f4dfdc99217.pdf \(eastcoventrypa.org\)](https://www.eastcoventrypa.org/4b37b5_ba7ad659afd949018a1b2f4dfdc99217.pdf).

<sup>9</sup> The Township established an FPR Steering Committee, with a mission statement "To provide the Board of Supervisors advice, guidance and recommendations on good stewardship and the protection of potential public and private drinking water sources located within the township; including but not limited to, the potential for local regulation for storage and limitations on the land application of food processing residual." (emphasis added) [4b37b5\\_25b7d10fd95a4f6e897daa20b056365d.pdf \(eastcoventrypa.org\)](https://www.eastcoventrypa.org/4b37b5_25b7d10fd95a4f6e897daa20b056365d.pdf).

may not duplicate or exceed PADEP's regulatory scheme. Further, the clear implication is that if the Township disagrees that these setbacks are complied with, it will take an enforcement action under Section 10-611. The Township has no enforcement authority in this regard.

Ordinance Section 10-603 Slopes. The Township has no authority to regulate slope requirements that are recommended in PADEP's FPR Manual. The Township may not duplicate PADEP's regulatory scheme, nor impose more stringent requirements. The FPR Manual is a guidance document and therefore provides general guidelines as to land application on sloped areas. See FPR Manual, at Table 8.10. Here, the Township both duplicates PADEP's FPR Manual and imposes more stringent restrictions by requiring compliance with certain slope criteria and prohibiting land application under certain circumstances. See, e.g., section 10-603(4) (Application of FPR on slopes of 25% or greater is prohibited.). It also imposes mapping requirements and slope determinations that exceed the FPR Manual. Further, the clear implication is that if the Township disagrees, it will take an enforcement action under Section 10-611. The Township has no enforcement authority in this regard.

Ordinance Section 10-604 Ground Water, Seasonal High-Water Table, Bedrock. The Township has no authority to regulate depth to groundwater and other soil condition requirements that are otherwise listed and recommended in PADEP's FPR Manual. The Township may not duplicate PADEP's regulatory scheme, nor impose more stringent requirements. The FPR Manual is a guidance document and therefore provides general guidelines as to geographic siting conditions. See FPR Manual, at Table 8.10. Here, the Township both duplicates PADEP's FPR Manual and imposes more stringent restrictions by requiring compliance with certain siting criteria. See, e.g., section 10-604(1) (The regional groundwater depth under the site to which FPR will be applied *must* be greater than 4 feet) (emphasis added). The Ordinance also imposes measurements and other certifications that exceed that which is required by the FPR Manual. See, e.g., section 10-604(2)(a) ("The seasonal-highwater table is determined by the presence of mottling as determined by a licensed hydrogeologist or soil scientist). Further, the clear implication is that if the Township disagrees, it will take an enforcement action under Section 10-611. The Township has no enforcement authority in this regard.

Ordinance Section 10-605 Erosion and Sediment Control, Field Markings. The Township has no authority to review and approve an erosion and sediment control plan developed under PADEP's Chapter 102 regulations. See section 10-605(1) ("Township approval of the E & S Plan must be obtained prior to the land application of FPR."). In comparison, PADEP's chapter 102 regulations require that an E&S plan be prepared, available for review and inspection, and submitted to PADEP or a local conservation district for review and approval only upon a complaint or site inspection. See 25 Pa. Code §§ 102.4(a)(8) and 102.4(b)(9).

Ordinance Section 10-606 Quality, Sampling, Testing and Certification. This section illegally imposes sampling requirements of FPR materials that are not otherwise required under PADEP's FPR Manual (e.g., TCLP), requires a written certification, and imposes penalties if there are errors in the certification. See section 10-606(3). It also requires that a person storing FPR provide the Township access to the storage to conduct sampling in advance of land application. See *id.* This is not required by PADEP regulation or the FPR Manual.



Most egregiously, the Ordinance prohibits the land application of “residual waste,” which effectively prohibits all land application of FPR. See section 10-606(2) (“FPR for land application in the Township must not contain any “hazardous waste” or “residual waste” as defined by Chapter 287 of Title 25 of the Pennsylvania Code, or any non-FPR waste.”). Under Chapter 287, “residual waste” is defined to mean:

Garbage, refuse, other discarded material or other waste, including solid, liquid, semisolid or contained gaseous materials resulting from industrial, mining and agricultural operations and sludge from an industrial, mining or agricultural water supply treatment facility, wastewater treatment facility or air pollution control facility, if it is not hazardous. The term does not include coal refuse as defined in the Coal Refuse Disposal Control Act. The term does not include treatment sludges from coal mine drainage treatment plants, disposal of which is being carried on under and in compliance with a valid permit issued under the Clean Streams Law.

25 Pa. Code § 287.1.

This definition is broad and includes materials discarded from industrial and agricultural operations – thus likely including FPR within its scope. It should be noted that FPR is defined and the exemption from permitting is contained under Chapter 287 *residual waste* regulations. The Township clearly conflates the term for something that might be hazardous. That is simply not the case. Moreover, there is no prohibition of the land application of “residual waste” generally under PADEP’s regulations. Indeed, that activity is explicitly permissible under 25 Pa. Code Chapter 291, which is titled “Land Application of Residual Waste.” Given this, the Township’s Ordinance is an illegal *de facto* prohibition of the land application of FPR. See *OAG Letter to East Penn Twp.* (May 21, 2019), at 2-3 (“The requirements of the Ordinance are so numerous and burdensome that its practical effect is to make it impossible for a farmer to utilize a long-standing and widely accepted agricultural practice.”).

Finally, the Ordinance is vague in that it relies on the undefined term “non-FPR” waste, which has no basis in SWMA or PADEP regulation.

Ordinance Section 10-608 Water Supply Protection. The Township has no authority to require a water supply protection plan and impose financial security obligations as a condition of FPR land application activities.

Ordinance Section 10-610. Records, Compliance with Laws and Regulations, Notice. This section illegally requires the submittal of the Compliance Form discussed above and provides the Township authority to review and approve the submittal. It further requires that the applicant maintain records that will explicitly be subject to public disclosure under the Pennsylvania Right-to-Know Law. This Ordinance imposes obligations that are not otherwise required by the Solid Waste Management Act or PADEP’s regulations and guidance.

Ordinance Section 10-611 Violations and Penalties. This section provides the Township authority to enforce the Ordinance and seek penalties of up to \$1,000 for each violation. The Township has no authority to regulate an activity otherwise authorized by SWMA and PADEP’s

regulations and guidance. PADEP retains exclusive authority to oversee compliance with environmental laws. See *Commonwealth v. East Brunswick Twp.*, 980 A.2d 720, 733-34 (“The SWMA does not authorize the Township to set up its own sewage sludge police force to enforce the SWMA. The Township cannot establish a comprehensive scheme of sewage sludge regulation to replicate the one set forth in the SWMA and the Department's regulations at 25 Pa. Code, Chapter 271.”).

The Township's Ordinance is a violation of ACRE and limits my ability to use my farmland in a manner that is allowed by law. I appreciate your attention to this matter and look forward to your assistance.

Sincerely,

[REDACTED]

[REDACTED]

Cc:

[REDACTED]

Enclosures