

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

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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