In the Zone

Fox Rothschild LLP
ATTORNEYS AT LAW

A newsletter of the Real Estate Department and the Zoning and Land Use Practice Group

APRIL 2012

Supreme Court Opinion on Judicial Review of EPA Compliance Orders

By M. Joel Bolstein

In a unanimous decision issued March 21, 2012, the U.S. Supreme Court for the first time gave property owners the right to pursue immediate judicial review of a compliance order issued by the EPA under the Clean Water Act. Up until now, it had been universally understood and accepted that the Clean Water Act precluded pre-enforcement judicial review of EPA compliance orders. After *Sackett v. EPA*, that is no longer the case.

The case involved Chantall and Mike Sackett who bought a vacant lot near Priest Lake, Idaho. The lot was zoned residential and was located in a subdivision with municipal water and sewer. The Sacketts obtained municipal building permits and began laying gravel for the foundation when the EPA hit them with a compliance order alleging that the property contained federally regulated wetlands and they were building without a wetlands permit in violation of the Clean Water Act. The compliance order subjected the Sacketts to civil penalties of $37,500 per day. When they tried to challenge the compliance order in federal court, seeking a declaratory judgment and an injunction under the Administrative Procedure Act, both the district court in Idaho and the Ninth Circuit ruled against them.

When the case was argued in January before the U.S. Supreme Court, many observers detected that the justices were leaning towards the Sacketts' side. Justice Alito remarked that "most ordinary homeowners would say this kind of thing can't happen in the United States." Maybe that should have been a signal to the rest of us as to where the court would be going with its decision.

Justice Scalia found that "nothing in the Clean Water Act expressly precludes judicial review under the APA or otherwise." He said that the APA created a "presumption favoring judicial review of administrative action," and the issuance of a compliance order to the Sacketts had to be seen as a final agency action. He rejected the EPA's assertion that the compliance order wasn't final because the recipient could choose to voluntarily comply. Justice Scalia wrote: "[I]t is hard for the government to defend its claim that the issuance of the compliance order was just 'a step in the deliberative process' when the agency rejected the Sacketts' attempt to obtain a hearing and when the next step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action)." Justice Scalia also rejected the EPA's argument that its compliance orders issued under the Clean Water Act needed to be insulated from judicial review because Congress passed the Act in response to the inefficiency of then-existing remedies for water pollution and compliance orders resulted in "quick remediation through voluntary compliance." In response, Justice Scalia wrote: "The government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true — but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable **the strong-arming of regulated parties** into 'voluntary compliance' without the opportunity for judicial review — even judicial review of the question of whether the regulated party is within

In This Issue:

the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity."

It is particularly interesting that Justice Scalia referred to the EPA's action in this case as "strong-arming," which is a term that I hear business owners frequently use in describing government regulatory over-reach in many other contexts.

Justice Alito seemed particularly sympathetic to the Sacketts' plight. He felt so strongly about their predicament that he wrote his own concurring decision, in which his first words were as follows: "The position taken in this case by the federal government—a position that the court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees." He added: "In a nation that values due process, not to mention private property, such treatment is unthinkable." Those are welcome words to many business owners who often find themselves under the government's thumb, feeling powerless, and with little will to fight back.

Justice Alito also got to the larger point, specifically, that the EPA was led to over-reach in this case because of Congress' failure to "provide a reasonably clear rule regarding the reach of the Clean Water Act." He said short of that congressional clarification, giving aggrieved property owners the explicit right to sue the EPA under the Administrative Procedure Act in these circumstances is "better than nothing." Maybe, but it only helps those aggrieved property owners who can afford to bring an action for declaratory and injunctive relief in federal court, which no doubt would still be an expensive proposition.

So what does this all mean? Presumably, it means that property owners now have a right to seek judicial review to challenge compliance orders issued by the EPA under the Clean Water Act on jurisdictional grounds. At the root of their case, the Sacketts were arguing that their property wasn't subject to the Clean Water Act because, they said, there were no federally regulated wetlands present. It appears the Sacketts will now "get their day in court" and will be able to make their arguments on the merits to the U.S. District Court. The Supreme Court has now opened that door for them and other potential future litigants who receive similar compliance orders from the EPA. Can *Sackett* be read to go beyond these specific facts and be used in cases that don't just involve wetlands? I'm not sure at this point. But it certainly invites speculation as to whether there may be other compliance orders that the EPA issues that might now be open to pre-enforcement judicial review.

Author

M. Joel Bolstein
215.918.3555
jbolstein@foxrothschild.com

Stormwater Authority Legislation Moving in PA Senate

By Lauren W. Taylor

The Pennsylvania Senate has passed state legislation expressly authorizing the creation of stormwater management authorities. Sen. Ted Erickson's (R-Chester) Senate Bill 1261 allows municipalities the ability to create independent stormwater authorities.

The legislation amends the Municipality Authorities Act by adding stormwater management planning and projects to the purposes and powers of municipal authorities. Section 5607 enumerates the specific purposes and powers of municipal authorities. For example, the list includes purposes such as sewer systems, water distribution systems, airports, parking spaces, industrial development projects, etc. Senate Bill 1261 adds "storm water management planning and projects" as a purpose and power of municipal authorities.

According to Erickson, local governments in Pennsylvania are seeking tools to help them respond to escalating costs of stormwater management to address regulatory requirements and flooding problems.

Supporters of the bill argue stormwater authorities will help create a stable source of funding for municipal stormwater management planning and projects. These authorities could also provide incentives for private stormwater management that would reduce costs to local governments and taxpayers. Additionally, they could allow for multi-municipal planning efforts that tackle stormwater management on a watershed-wide basis.

Several municipalities in Pennsylvania that have considered creating stormwater authorities have been reluctant to do so in the absence of express authorization by the General Assembly. Erickson's legislation will expressly provide that authorization.

Author

Lauren W. Taylor
215.918.3625
lwtayor@foxrothschild.com

PA Property Tax Reform – House Bill 2230

By Herbert K. Sudfeld, Jr.

The Pennsylvania House Finance Committee held a public hearing on March 12, 2012 to analyze Rep. Seth Grove's (R-York) House Bill 2230, which would offer local taxing authorities options to eliminate dependence on property taxes.

House Bill 2230 would allow all counties except Philadelphia to enact a one percent county-level sales tax to reduce school property tax millage rates through a voter referendum. The one percent county sales tax could only be used for tax reductions, even if a school district were to eliminate its property taxes. Reductions under the Act would be based on school district population.

The legislation also would allow local taxing authorities to levy a local income tax, with the option of a Personal Income Tax (PIT) or an Earned Income Tax (EIT). The revenue collected would offset a reduction in property taxes by a maximum of 100 percent (complete elimination) to a minimum of 30 percent.

Property tax millage rates would be permanently frozen at reduced levels to ensure taxing authorities continue advancing toward property tax elimination, if a local taxing authority authorizes an income tax shift and does not eliminate property taxes.

The local taxing authorities would be permitted to raise the new income tax rates, but only to an index based on inflation. Public school districts would still be held to Act 1 property tax increase restrictions.

House Bill 2230 is awaiting a vote of the House Finance Committee.

We have seen versions of this Bill before. Tax reform has to come sooner or later. This appears to be a simple yet perhaps effective way to start.

Author

Herbert K. Sudfeld, Jr.
215.918.3570
hsudfeld@foxrothschild.com

Access to Solar Energy the Focus of Complaint in Douglass Township, PA

By Robert W. Gundlach, Jr.

On February 15, 2012, Citizens for Pennsylvania's Future (PennFuture) served Douglass Township, Berks County, a 30-day notice of intent to file a lawsuit on behalf of its clients, the Noonans, against their neighbors to enforce the municipality's solar energy zoning law.

In September 2010, the Noonans installed by-right solar panels on their property to generate electricity for their residence. Upon doing so, they notified the Township as well as surrounding neighbors to secure protection from future structures on adjoining properties that may block exposure to the sun.

PennFuture's complaint alleges that in response to the Noonans' solar energy system, a neighbor planted various trees and shrubs that encroach on land and airspace that must remain open to assure proper access to solar energy. Furthermore, the complaint alleges that Douglass Township then failed to take the necessary steps to enforce its zoning ordinance despite numerous requests from the Noonans to do so.

Douglass Township's zoning ordinance states:

> §27-743(2)(A) Solar Access. To obtain solar access protection, the owner of a solar collector shall file a statement with the Zoning Officer that a solar energy system has been installed. At such time, the owner shall also document that he has located his solar collector on his property to obtain maximum exposure to the sun and requires protection from future lawful buildings or structures located on adjoining properties. In addition, the owner shall document the land and airspace which must remain open to assure adequate solar access to his collector.

PennFuture maintains that the zoning law guarantees solar access protection for the owners of solar energy systems who file a statement with the township zoning officer. The Noonans installed solar panels on their property and filed the necessary paperwork, but their neighbors proceeded to plant tall, fast-growing trees that interfere with the Noonans' right to solar access.

If ultimately heard before the courts, the extent to which the solar collectors' current location maximizes exposure to the sun warranting protection as well as the specificity of documentation identifying the land and airspace to be protected may likely be argued. Additionally, questions over a property owner's right to plant trees on his own property ,as well as whether such landscaping fits the description of prohibited "buildings or structures," may also arise.

Author

Robert W. Gundlach, Jr.
215.918.3636
rgundlach@foxrothschild.com

OSHA Extends Enforcement Measures in Residential Construction

By Clair E. Wischusen

Occupational Safety Health and Administration (OSHA) will extend its temporary enforcement measures in residential construction for an additional six months. Originally set to expire on March 15, 2012, the temporary enforcement measures have been extended through September 15, 2012.

The following general policy guidance is to be followed for enforcement of the new residential fall protection directive (Compliance Guidance for Residential Construction, STD 03-11-002) and for compliance assistance related to that directive.

OSHA has made it a priority for its Compliance Assistance Specialists (CASs) to provide assistance to the residential construction industry. Residential fall protection requests have been made the CASs' highest priority. In addition, excluding imminent danger situations, requests from residential construction businesses have been made their highest priority for receiving an on-site visit.

During inspections of employers engaged in residential construction who are not complying with the new residential fall protection directive, but are following the old directive (Plain Language Revision of OSHA Instruction STD 3.1, Interim Fall Protection Compliance Guidelines for Residential Construction, STD 03-00-001), the Regional Administrators and Area Directors will take the following actions:

- Area Directors will allow an additional good faith reduction in penalties of up to 10 percent for employers engaged in residential construction. In addition to the safety and health management system good faith determination in Chapter 6 of the Field Operations Manual, the Area Director shall consider examples of attempting to comply in good faith to include requesting and scheduling an on-site consultation visit, ordering protective fall equipment for its employees or performing a documented evaluation of feasible means of abatement. This good faith reduction does not apply in cases of a fatality, catastrophe or serious injury resulting from a fall during residential construction activities.
- Area Directors will allow residential construction employers at least 30 days to correct fall protection violations identified under the new residential fall protection directive. During that time, if such employers are not in compliance at that site or another site, no additional citations or repeat citations shall be issued. This policy does not apply in cases of a fatality, catastrophe or serious injury resulting from a fall during residential construction activities.

All of the measures described in this policy apply only to employers that are, at a minimum, following the old directive (STD 03-00-001). If the employer is not complying with either the new directive or the old directive, the Area Director shall issue appropriate citations.

Over the past year, OSHA has worked closely with the residential construction industry, conducting more than 1,000 outreach sessions nationwide to assist employers in complying with the new directive. OSHA will continue to work with employers to ensure a clear understanding of, and to facilitate compliance with, the new policy.

OSHA's website also has a wide variety of educational and training materials to assist employers with compliance, including multiple easy-to-read fact sheets, PowerPoint and slide presentations, as well as other educational materials. To access these materials, visit OSHA's Fall Protection in Residential Construction page.

Author

Clair E. Wischusen
215.918.3559
cwischusen@foxrothschild.com

NAHB Urges Passage of Federal Lead Exposure Reduction Act

By Kimberly A. Freimuth

Responding to concerns from the National Association of Home Builders, remodelers and affiliated trade groups, Sen. James Inhofe (R-Okla.) introduced legislation to make much-needed improvements to the Environmental Protection Agency's Lead: Renovation, Repair and Painting (LRRP) rule on March 1.

The Lead Exposure Reduction Amendments Act of 2012 (S. 2148) was introduced with five original co-sponsors: Sens. Charles Grassley (R-Iowa), David Vitter (R-La.), Michael Enzi (R-Wyo.), Tom Coburn (R-Okla.) and Roy Blunt (R-Mo.).

The rule, which took effect on April 22, 2010, requires that remodelers and contractors working in homes built before 1978 be trained and certified by the EPA on lead-safe work practices

before they can legally work in those homes.

On July 6, 2010, the EPA removed the "opt-out" provision in the LRRP that allowed remodelers working in a home built prior to 1978 to forego more expensive work practices according to the owner's wish if no children under the age of six or pregnant women resided there. By removing the opt-out provision, the EPA more than doubled the number of homes subject to the LRRP, and the agency has estimated this will add more than $336 million per year in compliance costs to the remodeling community.

Further, the EPA has failed to approve a test kit that meets the "false positive" and "false negative" criteria stated in the regulation.

By not performing a study of lead exposure rates from work on commercial and public buildings, the agency has also exceeded its mandate granted by Congress by starting the process of extending the LRRP to those structures through an Advanced Notice of Proposed Rulemaking.

Sen. Inhofe's legislation would address these concerns and offer other reforms for EPA enforcement of the lead paint rule. Specifically, the bill would:

- Reinstate the opt-out provision to allow home owners without small children or pregnant women residing in them to decide whether to require LRRP compliance, not the government.
- Suspend the LRRP if EPA does not approve a commercially available test kit that meets the regulation's requirements.
- Allow remodelers the "right to cure" paperwork errors found during an inspection.
- Eliminate the "hands on" recertification training requirements.
- Prohibit the EPA from expanding the LRRP to commercial and public buildings until at least one year after the agency conducts a study demonstrating the need for such an action.
- Clarify the definition of "abatement" to specifically exclude remodeling and renovation activities.
- Provide an exemption to the regulation for emergency renovations.

Author

Kimberly A. Freimuth
215.918.3627
kfreimuth@foxrothschild.com

A Whole New Crop of Cell Tower Issues in PA

By Andrew W. Bonekemper

The Pennsylvania Commonwealth Court recently upheld the grant of a dimensional variance to a farmer to build a silo tall enough to house cellular antennas. In doing so, the court rejected the Township's argument that a "substantial" dimensional variance from the zoning code should require a heightened showing of hardship, as in a use variance, rather than the relaxed standard applicable to dimensional variances.

In *Appeal of Towamencin Township*, No. 1310 C.D. 2011 (April 3, 2012), the landowner operated a dairy farm on his property, on which he had existing 55-foot and 80-foot silos. Due to the moist and soft soil on the land, any corn stored on the ground, even in specially designed containers, would spoil before it could be used for feed. The landowner sought a variance to build a 120-foot silo, even though the zoning ordinance limited the silo to 65 feet. The landowner contended that if he built multiple silos, the loss of land and cost involved would be catastrophic to his dairy farm. In addition, the landowner offered evidence that modern silos were no longer being built within the size prescribed by the ordinance. In conjunction with the erection of the silo, the landowner sought to lease space on the silo for cellular antennas, which was permitted as a conditional use on "existing" buildings. None of the neighbors of the property opposed the application.

Based on the relaxed standard for the granting of a dimensional variance set forth in *Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (1998), the ZHB granted the variances and approved the application subject to the governing body's review of the conditional use application. Further, the ZHB found that proposed buildings fit within the definition of "existing" buildings for the purposes of the placement of cellular antennas. The Township appealed, arguing that the substantial nature of the dimensional variance should require the court to apply the more stringent hardship standard applied to use variances. The trial court affirmed the ZHB, and the Township appealed to the Commonwealth Court.

In support of its argument, the *Township cited Township of East Caln v. ZHB* of East Caln, 915 A.2d 1249 (Pa. Commw. 2007). In *Township of Caln*, the court rejected a purported dimensional variance to permit the encroachment of an advertising sign into a buffer district by a few feet. The court rejected the comparison, saying that the Caln variance was actually a use variance because the landowner

sought to extend his sign into the buffer district, where the use was not permitted. In this case, the court noted that the silo would not encroach on any other district or use regulation, but merely extend higher into the skyline.

The Township also relied on *Schomaker v. ZHB of the Borough of Franklin Park*, 994 A.2d 1196 (Pa. Commw. 2010)[1], where the Commonwealth Court had rejected a variance for the height of cellular antennas as an appurtenant conditional use where the primary and conforming use of the property as a storage facility was not faced with hardship imposed by the height limitations. The court again distinguished the cases because in *Schomaker*, the court found that the dimensional variance was only necessary to add the cellular antennas, but that it did not benefit the existing primary use of the property as a storage facility. To the contrary, the court reasoned, the silo was necessary to the primary use of the property as a dairy farm.

Importantly, the court rejected the application of the heightened hardship standard where any dimensional variance is involved. The court emphasized:

> [O]ur Supreme Court has recognized a distinction between the showing necessary to receive a dimensional variance and that required for relief in the form of a use variance; the court has never accepted the proposition advanced by the Township that there exists an intricate spectrum of dimensional relief, where each point on this continuum requires a greater or lesser showing of hardship.

As a result, landowners can take comfort that regardless of the size of the dimensional variance they request, they will be subjected the relaxed hardship standards of *Hertzberg* and not the more stringent standard applied to use variances.

Author

Andrew W. Bonekemper
610.397.7976
abonekemper@foxrothschild.com

[1] In the Zone article on Schomaker at http://foxrothschild.com/newspubs/newspubsArticle.aspx?id=15037

Army Corp Revises and Renews Nationwide Permits

By Robert W. Gundlach, Jr.

On February 12, 2012, the U.S. Army Corps of Engineers provided notice in the Federal Register of revised and renewed nationwide permits necessary for work in streams, wetlands and other waters of the United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The permits are necessary to replace existing permits, which expire on March 18, 2012. The new nationwide permits will take effect March 19, 2012.

The Clean Water Act of 1977 requires the Army Corps to reissue nationwide permits (NWPs) every five years.

NWPs are a type of general permit designed to authorize certain activities that have minimal individual and cumulative adverse effects on the aquatic environment and generally comply with the related laws cited in 33 CFR 320.3. Activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment cannot be authorized by NWPs.

NWP 29 governs residential development, specifically discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development or a residential subdivision. NWP 29 authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. (View NWP 29's final decision document)

Per NWP 29, the discharge must not cause the loss of greater than .5 acres of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds. For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed .5 acres. This includes any loss of waters of the United States associated with development of individual subdivision lots. The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity.

The Army Corps modified NWP 29 by changing the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

Author

Robert W. Gundlach, Jr.
215.918.3636
rgundlach@foxrothschild.com

Updated Regional Wetland Delineation Manual Released

By Carrie B. Nase

The U.S. Army Corps of Engineers, Pittsburgh District, announced the availability of the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region, Version 2.0. It provides technical guidance and procedures for identifying and delineating wetlands that may be subject to regulatory jurisdiction under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. Version 2.0 replaces the "interim" version, which was published in October 2009.

The development of regional supplements is part of a nationwide effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland-delineation procedures. The supplement is applicable to the Northcentral and Northeast Region, which consists of all or portions of 15 states: Connecticut, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont and Wisconsin.

The following changes were incorporated into Version 2.0 of this supplement:

1. Wording and organizational changes have been made throughout the document in an attempt to improve its clarity and consistency with other regional supplements. Several web links have been updated.
2. In Chapter 3, some new photos of hydric soil indicators have been added. In addition, the wording of several hydric soil indicators has been updated to conform to Version 7.0 of the National Technical Committee for Hydric Soils (NTCHS) field indicators. In particular, see hydric soil indicators A5, A11, A12, S6, S7, S8, S9 and others for updated wording. Also, indicator A16 Coast Prairie Redox remains in the section addressing hydric soil indictors for problem soils.
3. An addition has been made to the section on Hydrology and Growing Season (page 79) based on deliberations of regional working group members and the National Technical Committee for Wetland Vegetation.
4. The section defining where to start soil observations (page 40) was updated to include the use of indicator S3.
5. Soil indicator TF2 – red parent materials has been removed and replaced by F21 – red parent material. This indicator has been approved for testing nationwide. Changes are based on National Technical Committee for Hydric Soils determinations.
6. Definition of DBH added to glossary based on working group comments. "Diameter at breast height (DBH). A standard method of expressing the diameter of the trunk or bole measured at 1.37 meters (4.5 ft) above the ground. On sloping ground, measurements should be taken from the uphill side of the trunk. If the DBH point falls on a swelling in the trunk measure the girth below the swelling at the point where the diameter is smallest."

The Corps will continue to accept comments/suggestions and new data on this supplement.

Author

Carrie B. Nase
215.299.2030
cnase@foxrothschild.com

Legislative Update in PA

By David H. Comer

Senate Bill No. 1419 proposes to amend the Pennsylvania Municipalities Planning Code ("MPC") by allowing municipalities in certain situations to retain a payment in lieu of dedication of land for park or recreation purposes for 10 years instead of the now-permitted three years.

Currently, Section 503(11)(vii) of the MPC provides that any person who paid a fee to a municipality, as stated above, is entitled to a refund if the municipality fails to use the fee paid for the purposes set forth in the MPC within three years from the date such fee was paid. Senate Bill No. 1702, however, proposes to allow a municipality to retain the fee for 10 years if the "retention is necessary for the construction of local recreation facilities and savings for the project must extend beyond the three-year time limit."

As for the status of Senate Bill No. 1419, it was introduced on February 14, 2012 and referred to local government committee that same day; it remains with the local government committee.

Author

David H. Comer
610.397.7963
dcomer@foxrothschild.com

PECO and the HBA Discuss Gas and Electric Contracts

By Robert W. Gundlach, Jr.

Please find minutes attached here from a recent meeting between representatives of the Homebuilders Association of Bucks and Montgomery counties and PECO regarding gas and electric contracts with PECO for new residential projects. Maureen Sharkey, from PECO's Economic Development Department, is a good source for information on this topic.

Please contact Fox Rothschild if we can be of assistance with the negotiation of any of your gas and electric contracts with PECO.

Author

Robert W. Gundlach, Jr.
215.918.3636
rgundlach@foxrothschild.com

Perkiomen Creek Water Quality to be Assessed

By M. Joel Bolstein

On March 10, 2012, the Pennsylvania Department of Environmental Protection (PA DEP) provided notice in the *Pennsylvania Bulletin* that it will be undertaking an evaluation of the Perkiomen Creek Basin, which flows throw Montgomery, Berks, Bucks and Lehigh counties.

Under 25 Pa. Code § 93.4d (relating to processing of petitions, evaluations and assessments to change a designated use), PA DEP will be conducting evaluations of the stream to determine the proper aquatic life use and/or special protection designations per the Commonwealth's water quality standards. The study area will include the entire Perkiomen Creek Basin.

The Perkiomen Creek Basin is currently designated High Quality Trout Stocking from its source to state route (SR) 1010 and Trout Stocking (TSF) from SR-1010 to the Green Lane Reservoir Dam. The West Branch Perkiomen Creek Basin is currently designated Cold Water Fishes (CWF) from its source to SR-1022, Exceptional Value from SR-1022 to SR-2069, and CWF from SR-2069 to the mouth. The Hosensack Creek and Macoby Creek Basins are currently designated CWF and TSF, respectively.

Technical data concerning the water quality, in-stream habitat or biological condition of the stream can be submitted to the PA DEP for consideration in the assessment. These assessments may lead to recommendations to the Environmental Quality Board for re-designation.

An upgrade in water quality designation can produce significant changes to the steps necessary to obtain state and local land development permits. For example, an upgrade may necessitate a more highly scrutinized individual National Pollutant Discharge Elimination System permit versus a general permit. Additionally, waterways in special protection waters benefit from mandatory riparian buffers under Chapter 102 regulations.

Author

M. Joel Bolstein
215.918.3555
jbolstein@foxrothschild.com

New Notification Requirements for Water and Sewer Authority in Bucks County, PA

By Robert W. Gundlach, Jr.

House Bill No. 823 has made its way out of the Rules Committee and is in the process of being finalized for a vote in the Pennsylvania House and Senate. This Bill will now require the delivery of written notice to a waste water system official for any new residential or commercial/industrial projects, the redevelopment of any existing commercial/industrial buildings and/or the request for a building permit for certain projects. However, this notification is only required, and this Bill is only applicable, when the project will use waste water treatment service provided by a county waste water treatment authority incorporated in a county of the second class A (not including home rule counties) and which serves 10 or more municipalities. It is my understanding that this limitation makes this Bill only applicable to the Bucks County Water and Sewer Authority. It is also my understanding that this Bill is being passed so that the Bucks County Water and Sewer Authority has notice when an existing user attempts to "change and/or expand their use" without purchasing additional sewer capacity for their new or expanded use. For example, a shopping center owner who desires to substitute a restaurant for a clothing store will now be required to give notice to the Bucks County Water and Sewer Authority so that they can confirm capacity for this new use and charge the owner for the additional sewer connections.

Please contact Fox Rothschild if you have any questions concerning House Bill 823 and its applicability on your project.

Author

Robert W. Gundlach, Jr.
215.918.3636
rgundlach@foxrothschild.com