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The PA DEP's New Permit Decision Guarantee Policy and You

By Philip L. Hinerman

On November 2, 2012, the Pennsylvania Department of Environmental Protection (PA DEP) adopted a Permit Decision Guarantee Policy replacing the older "money back guarantee" program adopted during the last administration. The policy applies to a variety of state-issued permits, including permits issued by agencies that are delegated review, such as a county conservation districts or health departments.

Each permit classification now has a "guaranteed" turn-around time ranging from several weeks to several months. The new focus is intended to be "how long have we had the application" as opposed to the old policy emphasis of "how much time do we have left to take action on a permit."

In its discussion of the new policy, PA DEP cites its internal reviews, which show that 40 percent of the environmental permit submissions received are deficient. PA DEP staff currently spends additional time helping applicants bring those submissions into compliance. The new policy limits this.

Now, the new policy encourages applicants to schedule pre-application meetings with the PA DEP, including representatives from all appropriate regulatory programs to ensure clear design and permitting expectations. Once filed, the permit application will be reviewed for administrative completeness within 10 business days. While minor changes can be made by telephone, any meaningful errors or omissions will cause the application to be deemed incomplete and the application will be denied. Likewise, if the applicant amends the application and resubmits it, the PA DEP will treat the package as a new application.

An important change deals with what happens if the permit is not complete. After reviewing the permit for completeness, the technical review follows. Only one technical deficiency letter will be sent. If the technical deficiency is not fixed, the application may be denied. A new application will need to be submitted and will be treated as if it is a totally new application. This means that new fees must be paid and new time periods begin. One concern is that certain mining and waste permits can cost thousands of dollars in application fees. PA DEP will retain the original application fee if the permit is denied.

If there is a PA DEP staff determination of insufficiency, this can be reviewed. The Regional Director and/or the Bureau Director can evaluate and make a final department decision. This elevated review process may include more face-to-face meetings with the applicant as well as an additional 10 days to implement a resolution. Finally, there is always an appeal available to the Environmental Hearing Board.

The policy also implements a permit review hierarchy to prioritize certain projects for review prior to others. Instead of a "first-in, first-out" method of reviewing submissions, the PA DEP will place a premium on reaching a decision for certain types of environmental permits. These projects relate to health and safety or economic development.

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SCOTUS Hears Arguments on Temporary Takings Case

By Robert W. Gundlach, Jr.

On October 3, 2012, the Supreme Court of the United States heard oral arguments in a case whose outcome may change federal takings and the just compensation owed property owners subjected to a temporary physical taking by the government. In *Arkansas Fish & Game Commission v. United States* (No. 11-597), the court is considering whether the temporary, but reoccurring downstream flooding events caused from dam releases by the Army Corps of Engineers, constituted a "taking" of property warranting payment of just compensation.

The Fifth Amendment to the U.S. Constitution, in part, protects property owners from government abuse by requiring the government pay just compensation for any takings of private property put to public use. Generally, the Supreme Court has held that "where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation" (*Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538(2005)). However, a clear and consistent rule has yet to be articulated for the reverse situation. That is to say, what standard applies where the invasion is temporary, but the damage inflicted to the property is permanent? *Arkansas Fish & Game Commission* may well provide such needed clarity.

In its amicus brief to the Supreme Court, the National Association of Home Builders (NAHB) supported a grant of certiorari and urged the court to ultimately hold that a temporary physical occupation can indeed result in a compensable taking.

Arkansas Fish & Game Commission deals with the periodic release of water from a dam by the Army Corps of Engineers over a six year period. The result of the release was downstream flooding that permanently destroyed the Commission's timber resources and compromised the land's usage as an important wildlife habitat. The lower court awarded the Commission $5.6 million in compensation, while on appeal, the Federal Circuit Court reversed and essentially arrived at a *per se* test that forgoes the need for just compensation in temporary physical occupations.

The Federal Circuit Court's *per se* rule found that a temporary taking occurs only when the flooding is inevitably recurring. However, NAHB argues in its brief that a string of court precedent points to the fact that a variety of temporary physical taking circumstances can trigger compensatory payment from the government – the court has just not yet defined a broadly applicable rule. NAHB concedes that a *per se* rule should likewise not be utilized to justify a taking anytime a temporary occupation occurs. Rather, a balancing test should be employed by the courts that accounts for both the physical impact caused by the occupation as well as the occupation's duration.

In fact, in advocating for a balanced, middle-ground approach, NAHB points to a previous Federal Circuit Court decision for guidance: *McKay v. United States*, 199 F.3d 1376 (Fed. Cir. 1999). In *McKay*, the court determined a temporary physical takings had occurred as a result of damage caused by ground water monitoring wells placed on a property owner's land. The court examined the monetary and physical damages cause by the wells in arriving at its decision.

The Supreme Court is expected to rule on *Arkansas Fish & Game Commission* in the upcoming weeks.

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Not All Takings for Private Development Are Illegal

By Marc E. Needles

After the U.S. Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), confirmed an expanded view of the scope of the government's eminent domain power under the U.S. Constitution, many states – including Pennsylvania – passed legislation that restricted those powers within their jurisdictions. In May 2006, Pennsylvania enacted the Property Rights Protection Act, which was incorporated into a revised Eminent Domain Code at 26 Pa.C.S.A. §§ 201-207.

One of the central goals of the Property Rights Protection Act was to prohibit the taking of private property in order to use it for private enterprise, subject to certain exceptions, including takings under redevelopment laws. Ever since this restriction went into effect in September 2006, there have been debates as to how it would be applied by Pennsylvania courts. The recent case of *Reading Area Water Auth. v.*

Schuylkill Riv. Greenway Assoc., 2012 WL 3079156 (Pa.Cmwlth.), provides some insight.

In this case, the Water Authority condemned an easement over property of the Greenway Association for water, sewer and storm sewer facilities which would serve the needs of a residential subdivision being developed on property adjacent to the Greenway Association's property. The Greenway Association filed preliminary objections to the taking which asserted, among other things, that the condemnation violated the Property Rights Protection Act, since the easement would primarily benefit the adjacent development. In fact, the water, sewer and storm sewer facilities were to be installed by the developer. Although this taking of private property would significantly benefit the adjacent development as a private enterprise, the Commonwealth Court nonetheless held that the provision of these types of utility services constitutes a sufficient public purpose to withstand a challenge under the Property Rights Protection Act.

Although the result of this case is good news for developers and bad news for those who would oppose similar condemnations to assist development, it is important to note that this outcome is not assured in every case. The court's opinion indicates that, had the condemnation been structured differently, the outcome may very well have been different. Accordingly, any similar situation should be evaluated on a case-by-case basis, and developers and utility authorities should be careful in their planning.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 2595 proposes to amend what is known as the "Outdoor Advertising Control Act of 1971" (Act) by adding language to the Act that would further provide control criteria for the lighting of outdoor advertising signs pursuant to the Act. The Act generally provides for the control and regulation of outdoor advertising adjacent to the interstate and primary highway systems within the Commonwealth of Pennsylvania.

The proposed legislation, in pertinent part, would add additional regulations for the lighting of digital billboards. Specifically, the following language is proposed: "No sign that is a digital billboard may change the displayed message more frequently than once every six seconds. Display brightness shall not exceed 0.3-foot-candles over ambient light levels and the digital billboard shall have automatic dimming capabilities. Foot-candle readings shall be measured using an appropriate meter at a distance of 250 ft. perpendicular to the face of the digital billboard."

In essence, the proposed legislation would restrict how frequently a digital billboard may change its displayed message and also dictate the display brightness on digital billboards.

Shortly after House Bill No. 2595 was introduced, it was referred to the committee on transportation where it remains.

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