



## Clearing PNDI Hits Can Delay Stormwater Construction Permits

by *M. Joel Bolstein*

In the movies, contractors seeking to develop land that plants, animals, and water creatures call home are often portrayed as greedy and malicious. In reality, contractors are more often attempting to create a habitable environment for an expanding population, often reclaiming problem areas like brownfields for the good of the community. But protected plants, birds, bunnies, fish, or reptiles can still pose a problem – particularly when a developer discovers that to clear a threatened or endangered species “hit” from a Pennsylvania Natural Diversity Index (PNDI) search can take up to 70 days or more.

When a developer files an application for a National Pollutant Discharge Elimination System (NPDES) stormwater construction permit, a PNDI search must be run to determine whether there are any threatened or endangered species located at or around the construction site. In many instances, especially when developing property near a body of water, the PNDI search may come back with a "hit," meaning that the system identified "known occurrences" of threatened or endangered species in the vicinity of the site.

To clear a hit, developers must contact the particular agency that has jurisdiction over the protected plant, bird, animal, fish, or reptile. The list of possible agencies with jurisdiction is a long one, and can include:

- the PA Department of Conservation and Natural Resources (DCNR)
- the PA Fish & Boat Commission
- the PA Game Commission
- the U.S. Fish & Wildlife Service

Developers must send site specific information to the agency that will allow it to determine whether the project will have an impact on the species identified in the hit. The problem for developers isn't so much that threatened and endangered species are likely to be found on the site (although that can happen), but that it can take a long time to clear the hit.

For brownfield sites being redeveloped for residential or non-residential purposes, previous Pennsylvania Department of Environmental Protection (PADEP) policy was that an NPDES stormwater construction permit was not needed in order to conduct site remediation work. In the first few years after Act 2 was enacted, PADEP allowed developers to break the project into two phases – the cleanup phase and the redevelopment phase. Developers did not need an NPDES stormwater construction permit until they had completed the site remediation and moved toward actually developing the site (i.e., building structures or houses on the

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clean site). PADEP subsequently changed the policy and required developers to apply for and obtain an NPDES stormwater construction permit before moving any dirt, even during the project's remediation phase. The rationale was that the NPDES permit is a federal permit (not a state-only permit) that is issued by PADEP pursuant to delegated authority from the U.S. Environmental Protection Agency.

Early in 2007, a PNDI search for a Fox client involved in a brownfield development project in the proximity of the Delaware Canal came back with a hit. With Fox's advice, the developer contacted the PA DCNR and sent additional information to help convince the Department that the threatened or endangered species identified in the hit was unlikely to be found at the brownfield site.

When asked how long it would take to clear the hit, the PNDI office replied that there were approximately 400 PNDI requests awaiting review in that office (which had only one staff person) and that the review time was expected to be up to 70 days. In that instance, Fox was able to convince PA DCNR to expedite the process for clearing the hit by explaining the importance of this project and the harm that a 70-day delay would cause.

All developers in Pennsylvania should be aware that the NPDES stormwater construction permit application process, and the need to conduct a PNDI search, represents one of the potential bottlenecks in moving a project forward.

If you need more information on the PNDI review process or help clearing a PNDI hit, please contact Joel Bolstein at 215.918.3555 or [jbolstein@foxrothschild.com](mailto:jbolstein@foxrothschild.com).



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