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## **PENNSYLVANIA ENVIRONMENTAL UPDATE**

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# Components of Update:

1. SPEED Permitting Program
  2. Standing in Appeals Before the PA Environmental Hearing Board
  3. Regional Greenhouse Gas Initiative (“RGGI”) Litigation
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# Streamlining Permits for Economic Expansion and Development (SPEED)

- Existing Permit Review Landscape
  - Overview of SPEED Program
  - Discussion of Qualified Reviewers
  - SPEED Program Process
  - Practical Takeaways and Benefits
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## Existing Review Process and Permit Policy

- Nov. 2012: Gov. Corbet signs Exec. Order 2012-11
- DEP Implemented Permit Review Process and Permit Decision Guarantee (PDG)
- Replacing the “Money Back Guarantee Policy,” the PDG established a standardized review process and processing times for all DEP permits
- This policy was not meant to “streamline” or “expedite” the permitting process, but instead make permitting more predictable and efficient without compromising review standards

## Creation of the “SPEED” Program

### PERMIT MODERNIZATION



- July 2024
- The General Assembly amended the Fiscal Code by adding “The Streamlining Permits for Economic Expansion and Development Program”
- Based on S.B. 350 introduced by Sen. Kristin Phillips-Hill (R-York)
- The Program is codified at 72 P.S. §§ 1801-1805
- Effective September 9, 2024

## What Does the “SPEED” Program Do?

- The SPEED program provides additional flexibility to permit applicants by allowing applicants to choose to have a DEP-verified and qualified private professional conduct the initial review of the application for:
  - air permit plan approvals (PA Code Ch. 127)
  - earth disturbance permits (PA Code Ch.102)
  - water obstruction and encroachment permits (PA Code Ch. 105)

72 P.S. § 1803(c)

# Who Are The Private Reviewers?

- DEP issued an RFP to identify “qualified professionals” who satisfy the criteria:
  - is a professional engineer, land surveyor, geologist, landscape architect or other licensed professional;
  - has five years of relevant permitting experience in this Commonwealth;
  - holds all required professional licenses as required by law;
  - has not been convicted of, or pled guilty to certain crimes;
  - has not had a professional license revoked by a State licensing board or any other professional licensing agency within the previous 10 years;
  - agrees to be responsible for the qualified professional’s costs if the qualified professional does not perform the initial review according to the timeline

72 P.S. § 1803(d). DEP began issuing requests for proposals for private reviewers on October 9, 2024. *Id.* at § 1803(c).

# How Many Private Reviewers Have Been Approved?

- Earth Disturbance Permits (Ch.102): 103
- Water Obstruction and Encroachment Permits (Ch. 105): 89
- Dam Safety (Ch. 105): 2
- Air Permit Plan Approvals (Ch. 127): 4



## How Does the “SPEED” Program Work?

- Once a permit application is submitted, and if an application opts-in, DEP will solicit proposals from qualified professionals to review the application
- The qualified professional must not have any conflict of interest related to an applicant or a project
- An applicant must pay for any cost associated with the qualified professional’s review of a permit application
- The qualified professional conducts an initial review and make a recommendation to DEP

72 P.S. § 1803(e)-(h)

## How Does the “SPEED” Program Work?

- Once DEP receives the recommendations from the qualified professional, DEP conducts a final review according to its regulations and procedures
- DEP either issues the permit, denies it, or sends a technical deficiency letter to the applicant telling them what is required for compliance
- Once any issues in the application are resolved, DEP issues the permit; if issues are not or cannot be resolved, DEP denies the application
- DEP has final authority over all permit decisions

72 P.S. § 1803(i)

# How Long Does it Take to Get a Permit Through the “SPEED” Program?

- The Program relies on timelines established within the 2012 Permit Decision Guarantee Policy (PDG)
- Timing ranges from 43 business days for an Erosion and Sediment General Permit to 150 business days for a Major Facility Air Plan Approval
- The applicant and DEP can also separately establish a timeline by agreement if they prefer

72 P.S. § § 1802, 1803(i); Final Technical Guidance document 021-2100-001 (establishing the timelines)

# How Will I Know the Status of My Application?

- The SPEED Program requires DEP to create a secure tracking system for applications submitted electronically on DEP's website
- DEP will have five business days to notify an applicant that an application was received
- The system will include the relevant processing timing for each permit, relevant dates, and contact information for DEP staff assigned to assist
- This system will be operational by no later than January 7, 2025 (so long as funding is provided)

72 P.S. § 1804

# Practical Benefits and Takeaways

- Holds DEP accountable
- Faster approval times
- Consistent outcomes
- Greater flexibility for DEP staff and applicants
- Increased transparency
- If a sufficient number of private reviewers is reached, a wider and more diverse pool of qualified individuals reviewing permit applications
- OH and NJ have already adopted similar programs

# Standing Before the Environmental Hearing Board

Lessons Learned from Recent EHB Standing Opinion:

*Scrubgrass Creek Watershed Ass'n and Citizens For Pa.'s Future v. DEP and Scrubgrass Reclamation Company Lp.*

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# Case Background

- Scrubgrass Reclamation Co., LP operates a waste coal burning powerplant in Scrubgrass Township, Venango County
- Ash generated from the plant exceeded the facility's storage capacity.
- Scrubgrass and DEP entered into consent order which outlined a four-year schedule for Scrubgrass to remove the excess ash.
- Third party appellants, Scrubgrass Creek Watershed Association ("SCWA") and Citizens for Pennsylvania's Future ("PennFuture"), challenged the consent order.



# Standing Law at the EHB

- The standard of review and burden of proof related to standing shift throughout EHB proceedings.
- Two types of standing for environmental organizations:
  1. Organizational standing by virtue of the organization's mission.
  2. Representative standing on behalf of its members.
- In its representative function, an organization has standing if at least one member has been aggrieved by an action taken by the Department.
- Courts look at the following considerations:
  1. Do appellants use and enjoy the affected area?
  2. Are appellants' pollution concerns realistic and reasonable?
  3. Do appellants allege that pollution could impact their personal use and enjoyment of the area?

# The Board's Decision

- Board held that appellants met the first two requirements:
  1. They used and enjoyed the affected area.
  2. Their pollution concerns were realistic and reasonable.
- But the Board held the final consideration—personal impact on appellants—was a much closer question.
- Deposition testimony of SCWA and PennFuture members suggested that they experienced no impact.
- But despite not making the connection between the threat of pollution and the impact on individual members, the Board declines to grant summary judgment to Scrubgrass and DEP.

# Enough for Standing Under Favorable Summary Judgment Standard

- Board says several “brief statements” are sufficient:
  1. One member stated that the ash pile had “impacted my environmental activities.”
  2. Another member suggested that the enjoyment he experiences while hiking and biking is lessened due to his concern that the ash pile may be degrading the air quality in the area in which he recreates.
- The Board can only grant a motion for summary judgment when the question of a party's standing is “clear and free from doubt.”
- Here, Board suggests that while appellants may not prevail on their standing argument at a hearing, they showed enough to prevent summary judgment.

# Lessons and Takeaways

- Appellants must clearly show that they were impacted, not just that they fear potential harmful effects.
- Consider standing as point of leverage during settlement negotiations.
- While appellants may survive a motion for summary judgment, given the generous “free from doubt” standard, those same facts would likely be insufficient at a hearing.



# Regional Greenhouse Gas Initiative (“RGGI”) Litigation



# RGGI Background

- In 2019, then-Governor Wolf issued executive order directing DEP to present to the Environmental Quality Board (EQB) proposed rulemaking to establish a carbon dioxide trading program.
- Proposed rulemaking aimed at allowing Pennsylvania to join the Regional Greenhouse Gas Initiative (“RGGI”).
- RGGI is a market-based "cap-and-invest" program that reduces carbon dioxide (CO<sub>2</sub>) emissions from the power sector in eleven Northeastern and Mid-Atlantic US states.
- Participating states set a limit (cap) on CO<sub>2</sub> emissions from power plants, and power plants must purchase allowances for each ton of CO<sub>2</sub> they emit.
- The regional emissions cap amount declines over time so that permissible CO<sub>2</sub> emissions decrease in a planned and predictable way.

**RGGI Inc.**



# Legal Challenges

- DEP and EQB proceeded through rulemaking consistent with the executive order.
- Number of lawsuits challenging the rulemaking, including:
  1. Coalition of companies that operate coal-and-natural-gas-fired power plants, affiliated coal interests, and labor unions;
  2. Elements of the Pennsylvania General Assembly; and
  3. Environmental groups arguing that RGGI would violate Environmental Rights Amendment.
- Commonwealth Court preliminarily enjoined implementation of the RGGI rulemaking process.
- Challengers asserted that RGGI rulemaking amounted to a tax imposed by the DEP and EQB and thus violated the Pennsylvania Constitution.

# Fee or Tax? That Is the Question.

- Fees are charges that serve to reimburse the government for services or privileges provided to the recipient.
- Fees must bear a reasonable relationship to the cost to the government of providing the service or privilege.
- Taxes are burdens imposed by the legislative power to raise money for public purposes and to defray the necessary expenses of government.
- Only the general assembly—and not executive agencies—may impose a tax.
- Challengers argue that money collected is a tax or is revenue because, if RGGI were operational, it is estimated that DEP would receive in auction revenue more than six times the total they would receive from traditional budgeting.
- DEP argues that the Air Pollution Control Act gave DEP sufficient authority allow for Pennsylvania's participation in RGGI without additional legislative action.

# Commonwealth Court Says Tax

- The Commonwealth Court held that the RGGI rulemaking amounted to a tax imposed by the executive branch and therefore violated the Pennsylvania Constitution.

Upon further review and consideration, we reaffirm our determination in this regard, and now hold that the Rulemaking constitutes a tax that has been imposed by DEP and EQB in violation of the Pennsylvania Constitution. Indeed, as

*Ziadeh v. Pa. Leg. Reference Bureau*, 309 A.3d 157 (Pa. Commw. Ct. 2023).

- DEP has appealed that ruling the Pennsylvania Supreme Court, which agreed to hear the case.
- Oral argument will be held in the related cases on May 13<sup>th</sup> in Harrisburg.



# Another Hurdle for RGGI?

- On April 8, 2025, President Trump issued an Executive Order directing the U.S. Attorney General to identify state laws and policies that burden the development of domestic energy resources and “are or may be unconstitutional, preempted by Federal law, or otherwise unenforceable.”
- The EO expressly takes aim at state cap-and-trade programs and programs requiring compensation for past greenhouse gas emissions.
- RGGI has previously survived a constitutional challenge, on the basis of the Compact Clause (limiting the ability of states to enter into agreements or compacts with other states without the consent of Congress).
- Preemption is new threat to programs like RGGI and aggressive action from the Trump administration is expected on this front.



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