

Current Environmental Issues for Commercial and Industrial Real Estate Professionals

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Presentation Outline

- Introduction and Overview
- Due Diligence and Contamination Liability
- Environmental Provisions of Contract Documents
- Environmental Insurance
- Brownfields Cleanup and Funding
- Permitting for Development
 - Stormwater
 - Wetlands and Water Encroachments
 - Wastewater Disposal

Presentation Outline (cont'd)

- Storage Tanks
- Drinking Water
- Historic Resources
- Endangered Species
- Conclusion
- Q&A

Introduction and Overview



Introduction and Overview

Environmental laws impact "real estate transactions" and real estate transactions in "corporate clothing," affecting purchasers, sellers, landlords, tenants, lenders, property managers . . . and brokers.

Ways Environmental Laws Affect Real Estate Transactions

- Natural restrictions on development
- Availability of infrastructure
- Permits
- Construction and property management activities

Ways Environmental Laws Affect Real Estate Transactions (cont'd)

- Liability for contamination
- Land transfer statutes
- Deed acknowledgements, disclosures, restrictions
- Liens and superliens
- Financial disclosure requirements
- Ethical dilemmas

The Broker's Role

Generally dependent on a commission for closing the transaction, the broker must understand the role to be played by, and the concerns of, each of the parties to the transaction.

Purchaser's Concerns

- Development potential
- Cleanup liability
- Construction problems

Purchaser's Concerns (cont'd)

- Land transfer and use restrictions
- Contractual protections
- Obtaining governmental cleanup liability protection
- Financeability, leasing and resale

Seller's Concerns

- Marketability
- Triggering notification and remediation obligations
- Entering regulatory “radar screen”
- Reducing environmental reserves
- Avoiding liability “tail”

Landlord's Concerns

- Will tenant's use create contamination?
- Contractual controversies
- Insurability

Tenant's Concerns

- Use of the leased premises
- Cleanup and/or third party liability

Lender's Concerns

- Development and use restrictions
- Borrower's creditworthiness
- Exit strategies - foreclosure or taking an active role in borrower's business
- Third party exposure

Property Manager's Concerns

- Traditional areas of liability -
asbestos, tanks, transformers and
indoor air
- Evolving areas of liability
 - toxic mold
 - lead-based paint
 - electromagnetic radiation and radon
 - terrorism

Natural Restrictions on Development

■ Wetlands

- Army Corps of Engineers (the “Corps”) and the Pennsylvania Department of Environmental Protection (“PADEP”) permits for the discharge of fill material
- “Advisory agencies:”
 - Federal (EPA, National Marine Fisheries and U.S. Fish and Wildlife Service)
 - State (Fish and Game Commissions, Coastal Zone Management)

Natural Restrictions on Development (cont'd)

- Local zoning, subdivision and land development requirements
- Stormwater management
- Stream quality upgrades
- Floodplains
- Steep slopes

Natural Restrictions on Development (cont'd)

- Soil limitations
- Farmland preservation
- Special siting limitations (use dependent)

Availability of Necessary Infrastructure

- Water supply
- Sewers
- Stormwater management
- Roads (and stream crossings)
- Utilities

Permits

- Permits are required for certain emissions to air, discharges to water and sewers, construction activities and the handling and disposal of waste
- Questions to ask
 - Is any permit (or other approval) needed?
 - Is the permit valid?
 - Is the permit transferable?
 - Is the permit compliant?
- Permit coordination

Construction and Property Management Activities

- Asbestos removal
- Excavation activities
 - Removal of construction debris
 - Clean Fill Policy
- Lead-based paint
- Indoor air quality
- Security against terrorism

Due Diligence and Contamination Liability



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Liability for Contamination

- Federal CERCLA liability
 - Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund")
 - Superfund Amendments and Reauthorization Act of 1986 ("SARA")
 - Lender liability amendments (1995)
 - Small business liability and brownfield revitalization amendments (2002)
- Other possible sources of federal liability:
 - Resource Conservation and Recovery Act ("RCRA")
 - Toxic Substances Control Act ("TSCA")
 - Occupational Safety and Health Act ("OSHA")
 - Clean Water and Clean Air Acts

Liability for Contamination (cont'd)

- Pennsylvania statutes also impose liability and provide remediation standards
 - Clean Streams Law
 - Solid Waste Management Act
 - Hazardous Sites Cleanup Act
 - Storage Tank and Spill Prevention Act
 - Land Recycling and Environmental Remediation Standards Act ("Act 2")

Liability for Contamination (cont'd)

- Common law remedies
 - negligence
 - private and public nuisance
 - trespass
 - strict liability for abnormally dangerous or hazardous activities

CERCLA Liability

- Four categories of potentially responsible parties (“PRPs”)
 - current owner or operator
 - former owner or operator at time of disposal
 - arranger (generator)
 - transporter
- Liability for response costs and natural resource damages is:
 - retroactive
 - strict
 - joint and several
- Parent/subsidiary and successor liability

CERCLA Landowner Defenses

- Limited statutory defenses:
 - innocent landowner
 - bona fide prospective purchaser
 - contiguous property owner

Innocent Landowner Defense

- Contamination arose solely through act or omission of *third party*
- *No contractual relationship* with third party
- Exercised due care regarding the hazardous substances
- Took precautions against foreseeable acts or omissions of the third party

Innocent Landowner Defense (cont'd)

- CERCLA excludes agreements of sale from “contractual relationship” if purchaser:
 - acquired facility after contamination occurred
 - *did not know or have reason to know* of contamination at time of purchase
 - cooperated with response actions
 - complied with any land use restrictions/institutional controls

Innocent Landowner Defense (cont'd)

- To show “did not know or have reason to know,” purchaser must have:
 - conducted, pre-acquisition, “all appropriate inquiries [“AAI”] . . . into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices”
 - taken reasonable steps to stop any continuing release, prevent future releases, and limit exposures to any existing release
- If AAI misses contamination, “innocent owner” may still have defense
 - if AAI identifies contamination, can try “BFPP” defense

Bona Fide Prospective Purchaser Defense (“BFPP”)

- Acquired ownership after 1/11/02
- Acquired ownership after disposal
- Conducted AAI [and identified contamination]
- Provided all legally required notices
- Took reasonable steps
- Cooperated with response actions
- Complied with land use restrictions/institutional controls
- Complied with EPA information requests/subpoenas
- Not potentially liable or affiliated with PRP

Contiguous Property Owner Defense

- Contaminated by contiguous property not owned by defendant
- Did not cause or contribute to release
- Not potentially liable or affiliated with PRP
- Took reasonable steps
- Cooperated with response actions
- Complied with land use restrictions/institutional controls
- Complied with EPA information requests/subpoenas
- Provided all legally required notices
- Conducted AAI [and did not identify contamination]

AAI Rule and ASTM Phase I Standard

- Sets regulatory/industry standard for environmental due diligence and establishing AAI element of CERCLA defenses
- Also applicable to site assessments using CERCLA grants
- ASTM revised its existing standard for Phase I Environmental Site Assessments to comply with AAI rule

AAI Rule and the “Environmental Professional”

- Most AAI tasks undertaken by an “environmental professional” (“EP”) or under EP supervision

AAI Objective

- Identify conditions “indicative of releases and threatened releases of hazardous substances on, at, in, or to subject property”
- To meet objective, must evaluate:
 - current/past property uses
 - current/past uses of hazardous substances
 - waste management and disposal activities
 - current and past remediation
 - engineering controls (e.g., caps, paving)
 - institutional controls (e.g., groundwater restrictions)
 - adjoining or nearby properties

AAI Shelf Life

- Must conduct AAI within one year before acquisition; certain elements must be updated within six months before acquisition:
 - interviews
 - environmental lien search
 - government record review
 - visual site inspection
 - EP declaration
- Rule provides for using/updating prior ESAs prepared for site

Basic AAI Components

■ Interviews (EP)

- current owners and occupants likely to handle hazardous substances
- as necessary: current and past facility managers; past owners, occupants, operators; employees of past and current occupants
- for abandoned properties with evidence of unauthorized use or uncontrolled access, at least one *neighboring* owner or occupant

Basic AAI Components (cont'd)

- Historical sources review (EP)
 - e.g., aerial photos, fire insurance maps, building records, title documents
 - at EP's discretion, go back as far as property contained structures or first used for agricultural, commercial, industrial, or governmental purposes
- Environmental lien search (EP or P)
 - search for cleanup liens filed or recorded under federal, tribal, state, or local law

Basic AAI Components (cont'd)

- Governmental records review (EP)
 - databases of site investigations and releases, permits, storage tanks, waste generators, engineering and institutional controls, etc.
 - for subject site and nearby properties (by radii)
- Visual inspection of site (EP)
 - unless physically impossible or access denied after good faith effort
- Visual inspection of adjoining properties (EP) from aerials, rights-of-way

Basic AAI Components (cont'd)

- Evaluate “specialized knowledge” of property and area (P)
- Evaluate if any purchase price discount below uncontaminated FMV is due to environmental impacts (P)
- Evaluate “commonly known or reasonably ascertainable” info about property within local community (EP or P)
- Evaluate obviousness of contamination and ability to detect by additional investigation (EP or P)
- Written report (EP)
 - opinion whether conditions indicate release/threatened release
 - data gaps and significance
 - EP qualifications and declaration of compliance with Rule

Phase I Practical Considerations

- Does not guarantee “clean” property or eliminate all risk
- Phase I should comply with AAI
- Lenders often require AAI to protect collateral value and avoid liability
- Lenders, major tenants have Phase I protocols
 - non-scope items, e.g., asbestos, mold, wetlands
- Update Phase I if beyond shelf life
- Some sellers will perform own Phase I
 - Buyers will scrutinize thoroughness
- RECs often lead to Phase II ESAs

Phase II ESAs

- Identifies nature and extent of potential contamination identified in Phase I
 - Not required by AAI, but may fill data gaps
- Common tasks:
 - sampling and analyzing soil, water, air, sediments
 - searching for subsurface tanks, vaults, etc.
- Can help form cleanup cost estimate
- May be needed for CERCLA defense criteria (due care/reasonable steps)

Phase II Practical Considerations

- Buyer and seller often negotiate scope of Phase II investigation, e.g.,
 - sampling locations
 - compounds to analyze
 - access, restoration, insurance, indemnities
- If short due diligence period, can combine Phase I and II (but not ideal)
- Results may trigger reporting obligations

Using Phase I/II Results

- Decide whether to proceed or walk
- Renegotiate purchase price
- Allocate identified risks by contract
 - indemnities
 - releases from liability
 - representations and warranties
 - escrow monies as insurance for risks or to pay for cleanup post-closing

Other Investigations

- Non-contamination building health risks
 - asbestos, radon, lead-based paint
 - mold, indoor air quality
 - lead in drinking water
- Developability/natural constraints
 - wetlands
 - endangered species, cultural/historic resources
- Regulatory compliance for ongoing businesses
 - permit requirements (e.g., air, waste water)
 - waste disposal
 - storage tank registration and technical rules
 - spill plans, community right-to-know reporting

Lender Liability

- Financing brownfield real estate transactions has been complicated by lenders' fear of environmental liability during workout:
 - foreclosing on collateral
 - operating business
- Lenders have been held liable as CERCLA "owners" after foreclosure or by taking a deed in lieu of foreclosure
- In rare cases (bad facts), lenders have been held liable as CERCLA "operators" for contributing to or causing contamination

Statutory Efforts on Lender Liability

- In mid-1990s, Congress and states enacted laws protecting lenders from environmental liability for traditional lending activities
 - Federal Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996
 - Pennsylvania Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act of 1995 (“Act 3”)

Federal Lender Liability Provision

- Protects lenders holding indicia of ownership primarily to protect security interest
- Applies to CERCLA and RCRA liability
- No “operator” liability before foreclosure, unless lender:
 - “exercises decision making control over...environmental compliance at the borrower’s facility”; or
 - exercises control over all or substantially all operational (not administrative/financial) functions *other* than environmental
- No “owner” liability after foreclosure and continued business operation if lender seeks to divest at “earliest practicable, commercially reasonable time, on commercially reasonable terms”

Pennsylvania Lender Liability Provision

- Act 3 applies to *all* Pennsylvania environmental statutes (unlike federal provisions)
- Lender faces environmental liability only if it:
 - willfully and knowingly causes borrower to cause release or violate environmental law; or
 - directly causes release or exacerbates existing release
- If lender violates Act 3, liability is divisible, not joint and several
- Act 3 presumes that any contamination found after foreclosure resulted from pre-foreclosure release


Implications for Lenders

- Permissible activities:
 - execution of assignment of rents, disposition of cash collateral
 - foreclosure, deeds in lieu of foreclosure
- Under federal law, lender must avoid:
 - day-to-day environmental decision making
 - significant involvement in operational affairs
- Despite protections, lenders still concerned about impact of environmental liabilities on borrower solvency (see insurance)
- Selling contaminated collateral after foreclosure can be difficult

Environmental Provisions of Contract Documents



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Players: Review

- Purchaser
- Seller
- Landlord
- Tenant
- Lender
- Property manager
- Broker

Documents

- Letter of Intent
- Agreement of Sale
- Lease provisions
 - In general
 - Option to purchase
 - Right of first refusal
- Deeds, easements, etc.
 - Liens and other title exceptions
- Loan documents

Letter of Intent

- Statute of frauds: requisite terms
- Confidentiality
- Non-binding vs. negotiating narrowing

Agreement of Sale

- Requisite terms
- Representations and warranties
- Covenants and agreements
- Conditions
 - precedent
 - subsequent

Agreement of Sale (cont'd)

- Due diligence
 - environmental
 - non-environmental
- Releases and indemnities
- Act 2
- Buyer/Seller Agreements
- Escrows and holdbacks

Leases

- Tenant's advantages
 - “Possession is 9/10 of the law”
 - Acquisition rights
 - Landlord's lease violations (including environmental)
- Landlord's advantages
 - Tenant's contamination and violations
 - Default exposure

Deeds

- Title objections
- Acknowledgements and restrictions
- Uniform Environmental Covenants Act (2/08)

Property Management Agreements

- Typical issues:
 - asbestos
 - lead paint
 - PCB transformers
 - storage tanks
 - mold

Broker Agreements

- What's disclaimable?
 - due diligence
 - prior knowledge
 - knowledge of “the law”
- How “uninformed” can a broker be?
- Indemnities – how effective
- Insurance

Ethical Dilemmas

- Who's your client?
- Conflicts of interest
- How confidential can confidential information be kept?


Being Creative: Getting to Dollars

- Taking a “haircut”
- Estimating the remedial costs
- Securing the compliance via escrows, letters of credit, etc.

Environmental Insurance



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Function of Environmental Insurance

- Various environmental risk management tools
 - due diligence
 - contract provisions (indemnities, covenants)
 - price reduction, escrows, public funding
 - regulatory cleanup programs
 - environmental insurance
- Each has limitations, often used in combination to fill risk gaps and get deal done

Limitations of Environmental Risk Management Tools

- Due diligence
 - could be incomplete
- Contract provisions
 - parties must agree; relies on promisor's solvency
- Price reduction, escrows, public funding
 - liability may exceed predicted amount
- Regulatory cleanup programs
 - reopeners
- Environmental insurance
 - cost, terms and exclusions, liability limits, policy period

Current Environmental Insurance Market

- Several experienced carriers (e.g., AIG, ACE, XL, Zurich, Chubb)
- Ability to compare competing quotes
- More cost-effective premiums and deductibles, higher limits
- Improved efficiency in underwriting
- Customizable policies to fit transaction
- Insureds include buyers, sellers, tenants, redevelopment authorities, lenders, etc.

Primary Types of Environmental Insurance

- Pollution legal liability
- Remediation cost cap
- Lender pollution liability
- Finite/blended risk

Pollution Legal Liability

■ Typical coverages

- on-site cleanup of preexisting and new conditions
- third-party claims for off-site cleanup from preexisting and new conditions
- third-party claims for on-site and off-site bodily injury and property damage (BI/PD)

■ Other coverages

- business interruption, construction delay
- cleanup at non-owned disposal sites
- cleanup of transported waste/product

Pollution Legal Liability (cont'd)

- Meant for *unknown* conditions
 - often also reopeners of completed cleanups for known conditions
- May cover natural resource damages, property value diminution
- Coverage usually “claims made and reported”
- Terms usually 5-10 years
- Premiums typically \$50-100K+
- Limits typically \$5-20MM
- Minimum deductibles \$5-10K per incident

Remediation Cost Cap

- Covers unexpected cost overrun for cleanup of *known* conditions, e.g.,
 - higher remediation expenses
 - regulatory changes
 - discovery of new or more contamination
- Insurer approves remedial action plan and budget
- Term usually coincides with cleanup
- Insured retains cleanup cost plus buffer layer (10-30%)
- Limits often 2-3 times expected cleanup budget
- Premiums typically 8-20% of limit selected
- Sometimes includes co-insurance above SIR

Lender Pollution Liability

- Covers specified loans at contaminated propert(ies) upon default, for
 - value of collateral
 - cleanup costs
 - loan balance (or cleanup costs, if less)
 - BI/PD
 - business interruption
- Term and premium negotiable
- Limits typically \$5-10MM
- Deductibles \$25K+
- Borrower often required to purchase policy (or include lender as additional insured on PLL)
- Takes lender “out” but doesn’t address the cleanup cost

Finite/Blended Risk

- Insured(s) pay carrier
 - PV of estimated cleanup cost for known conditions
 - risk premium for liability coverage, cost overruns
- Carrier responsible for expected cleanup cost, cost overruns, and unknowns
 - theoretically transfers all environmental liability to carrier for fixed, known fee
- Terms are tailored to project

Environmental Insurance


Practical Issues

- Can customize with menu of coverages
- Premiums, coverage vary significantly among carriers
- Policies cannot eliminate all risk
 - finite terms, deductibles, limits, exclusions
- Much negotiation (manuscripting, endorsements) among carrier, broker, counsel
- Finite/blended policies can promote corner-cutting
- Bottom line: environmental insurance can help deal happen, but often requires much time, effort, money

Brownfields Cleanup and Funding



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The Brownfield . . . Problem

- “Brownfields” are abandoned or underutilized industrial or commercial properties where expansion or redevelopment is complicated by real or perceived environmental contamination
- Historically avoided by developers due to:
 - unclear and inflexible cleanup standards
 - weak liability protections upon cleanup
 - unavailable governmental funding
- Left as eyesores and environmental threats
- Increased pressure to develop “greenfields,” leading to sprawl and declining open space

The Brownfield . . . Opportunity

- Often located near infrastructure and amenities
- Redevelopment returns abandoned properties to productive industrial, commercial, residential and/or recreational uses
 - boosts tax base, creates jobs, combats urban blight
- Alternative to sprawl development
- May offer easier land development approvals
- Cleanups protect public health and environment

Pennsylvania Land Recycling Program

- Act 2 of 1995, Land Recycling and Environmental Remediation Standards Act
 - Administration of Land Recycling Program regulations
 - Technical Guidance Manual
- Act 3 of 1995, Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act
- Act 4 of 1995, Industrial Sites Environmental Assessment Act

Act 2 Cleanup Standards

- **Statewide health:** numeric cleanup levels set by regulation, considering residential or nonresidential land use and used or nonuse aquifer
- **Background:** comparison of contamination to levels present at site unrelated to releases at site (permits cleanup to levels prevalent in area)
- **Site-specific:** develop site-specific cleanup levels based on exposure scenarios and land use, and/or use institutional and engineering controls

Act 2 Liability Protection

- Demonstrating attainment of cleanup standard(s) results in:
 - Release of liability for further cleanup under all PA environmental statutes for identified contamination
 - Protection from third-party citizen suits for further cleanup
 - Protection from contribution actions by responsible parties

Act 2 Liability Protection (cont'd)

- Cleanup standards apply to voluntary cleanups and enforcement actions
- Liability protection runs to current or future owner, other “participant in the remediation,” subsequent developer or occupier, successors or assigns, public utilities
- Limitations on liability protection
 - N/A to federal claims (e.g., CERCLA)
 - N/A to personal injury/property damage tort claims
 - Subject to limited “reopeners” (e.g., fraud, newly discovered information, failed institutional or engineering control, change in exposure)
 - Unavailable at pesticide-impacted farms/orchards

Act 2 Procedural Requirements

- Send Notice of Intent to Remediate (NIR) and notices of report submittals to DEP and municipality, publish in newspaper and PA Bulletin
- Prepare Final Report (and sometimes others) documenting attainment of applicable standard(s)
- Public involvement plans (some cases)
- Report review fees (\$250-\$500)
- DEP has certain time limits (60 or 90 days) to review reports or “deemed approved”

Act 2 Successes and Challenges

- National voluntary cleanup program model
 - flexible cleanup standards
 - definitive review deadlines
 - strong liability protection
 - limited reopeners
- Over 2,700 cleanups completed by 2/08
- But . . .
 - DEP comments can vary by case manager
 - DEP management changes can affect flexibility

Limitations on EPA Involvement at State Brownfield Sites

- 2002 CERCLA brownfield amendments provide that person conducting cleanup under state brownfield program after 2/15/01 will not face EPA enforcement for specific release remediated
- Enforcement bar n/a to future owners or tenants
- Enforcement bar applies only at defined “brownfield” sites, *excluding*:
 - petroleum, PCB, NPL sites
 - sites under federal enforcement or jurisdiction

Limitations on EPA Involvement at State Brownfield Sites (cont'd)

- April 2004 EPA – PADEP Memorandum of Agreement recognizes Act 2 program as qualifying for CERCLA enforcement bar
 - also promotes cooperation at RCRA sites
 - little effect at TSCA sites
- MOA gives EPA broad “reopener” authority
 - state requests federal action
 - interstate contamination
 - release is still “imminent and substantial endangerment to public health or environment”

Act 2 Buyer-Seller Agreements

- Facilitates sale before completing Act 2 cleanup
- Consent Order and Agreement among buyer, seller, DEP
 - model form
 - obligates party (usually seller) to remediate “Identified Contamination” based on remediation plan
 - provides buyer with temporary covenant not to sue for Identified Contamination
 - when obtained, Act 2 liability protection replaces CNTS
 - can apply to leasing deals
- Buyer cannot have contributed to contamination
- Remediator must have sufficient resources
- Need adequate site characterization and remediation plan

Act 2 and Deed Notice Requirements

- Seller at conveyance must acknowledge in deed the current or past disposal of:
 - “hazardous substances” (n/a to petroleum)
 - “hazardous wastes” (often n/a)
- Waived by Act 2 if “attaining and demonstrating compliance with” residential SHS or background
 - often attain these standards to avoid deed notice stigma
- DEP may extend deed notices to petroleum, interior groundwater exceedances
- Common law, other statutes (e.g., condo, residential disclosure acts) may make disclosure prudent or required anyway

Institutional and Engineering Controls

- Provide flexible Act 2 site-specific remedy
 - ICs: land use limitations (e.g., residential use, excavation, ingesting groundwater)
 - ECs: physical pathway elimination (e.g., capping, provision of public water)
- Other IC/EC challenges:
 - beware impacts to business operations
 - who has inspection, maintenance obligations?
 - possible marketability stigma (esp. residential)

Institutional/Engineering Controls: Uniform Env'l Covenants Act

- Enacted 12/07, effective 2/19/08
- Procedural and substantive requirements for “environmental covenants” for IC/ECs
- Loosely based on uniform national model
- Required for Act 2 or Tank Act cleanup relying on “activity and use limitations”
 - sets rules for format, signatures, recording, amendments, termination
- Five-year conversion period
- PADEP still determining implementation

Brownfield Public Funding – EPA and HUD

- EPA Brownfield Assessment Grants
 - ≥ \$350K per site to eligible entities (state, munic., RDA) for inventory, assessment, planning, local involvement
- EPA Brownfield Cleanup Grants
 - ≥ \$200K to eligible entities and nonprofits for cleanup
- EPA Brownfield Cleanup Revolving Loan Fund Grants
 - ≥ \$1MM to eligible entities to capitalize cleanup loan fund
- HUD Brownfield Economic Devel't Initiative Grants
 - ≥ \$2MM to CDBG communities for brownfield projects financed by HUD § 108 loan guarantees

Brownfield Public Funding – PA DCED

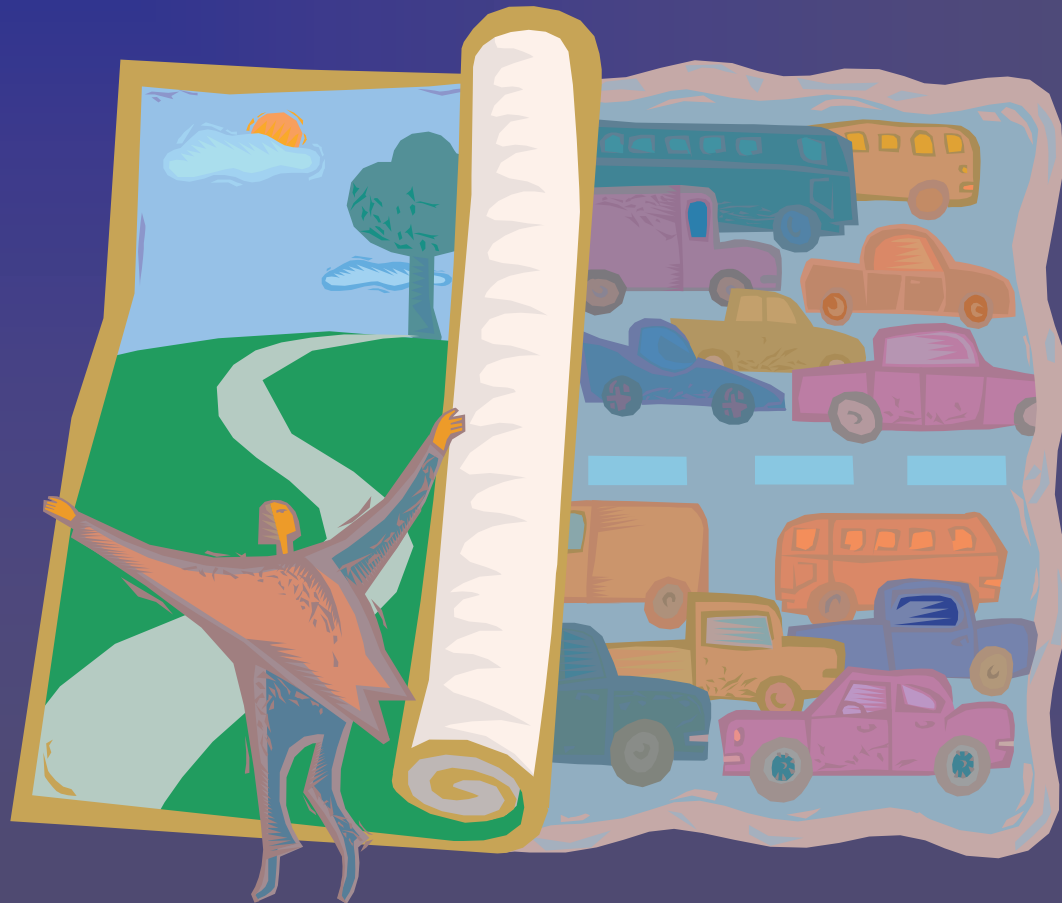
■ Industrial Sites Reuse Program

- grants and low-interest loans of up to \$200K for assessments, \$1 million for remediation, to municipalities, RDAs, private companies / developers (loans only) that did not cause or contribute to contamination


Brownfield Public Funding - PENNVEST

- Low-interest loans and/or grants to municipalities, authorities, utilities, developers for drinking water, wastewater, stormwater systems
 - Brownfield Remediation Loan Program: \geq \$11MM for site assessment and remediation addressing water quality threats

Permitting for Development



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Overview

- Real estate development is a heavily regulated activity
 - Infrastructure
 - Non-pollution
- Use of developed real estate is also heavily regulated
 - Permits: existence and status
 - Compliance

Federal Laws

- Clean Water Act (CWA)
 - NPDES permits
 - Section 404 dredge and fills
- Safe Drinking Water Act
- Endangered Species Act
- National Historic Preservation Act
- NEPA/EIS


State Laws

- Sewage Facilities Act (“Act 537”) (25 Pa. Code Chs. 71-73)
- Clean Streams Law (25 Pa. Code Ch. 102)
- Dam Safety and Encroachments Act (25 Pa. Code Ch. 105)
- Storage Tank and Spill Prevention Act

Municipal Laws

Example: Philadelphia

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Infrastructure

■ Stormwater

- pre-construction, during construction, post-construction
- Best Management Practices (“BMPs”)

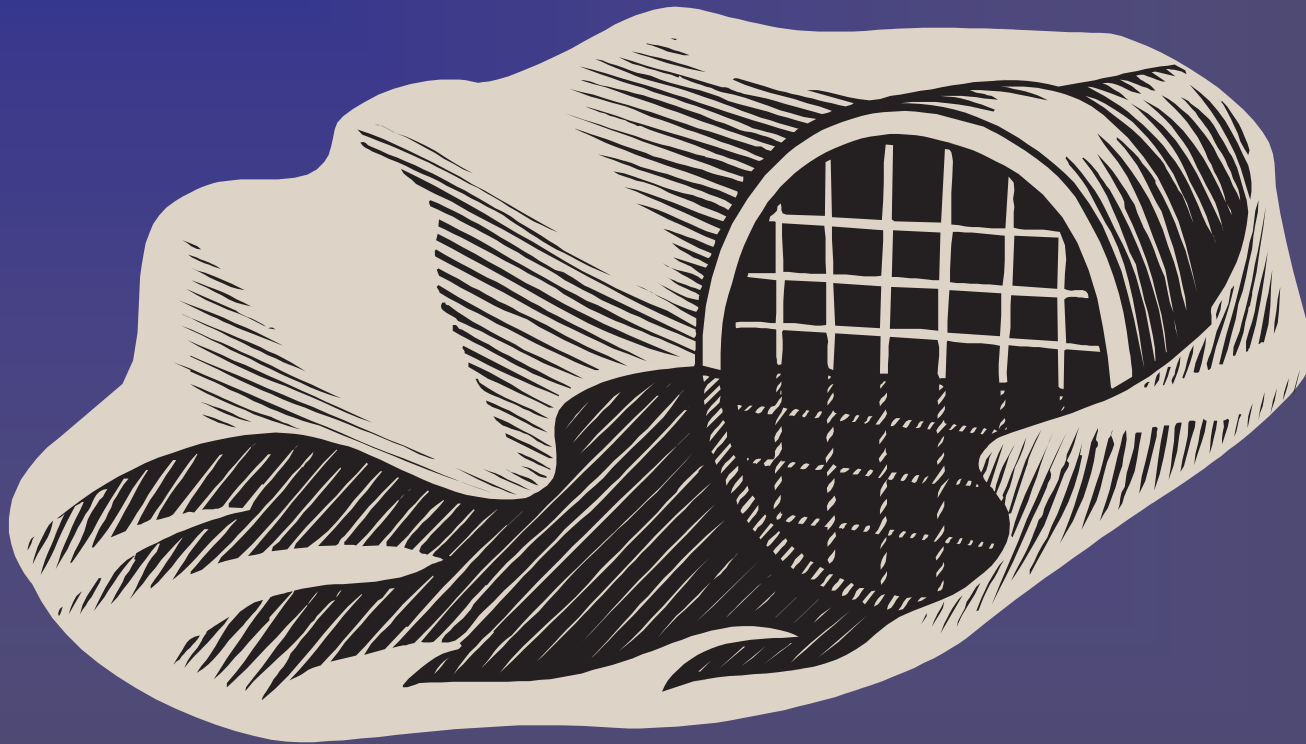
■ Sanitary sewer

- treatment and discharge
- Act 537


■ Drinking water

- source of supply
- distribution

Stormwater



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Stormwater Permitting

- EPA and DEP regulate stormwater discharges from construction sites and completed developments
 - sediment, debris, chemicals harm fish and wildlife
 - sedimentation destroys aquatic habitat
 - high runoff volume erodes stream banks
- Program requires best management practices (BMPs), often through permits, to minimize runoff leaving site

Construction Stormwater Permitting Regulatory Background

- CWA prohibits “discharge of pollutant” from “point source” without National Pollution Discharge Elimination System (“NPDES”) permit
- CWA 1987 amendments required two-phased program regulating point source stormwater discharges

Federal Construction Stormwater Permitting Program

■ Phase I (1990)

- regulated construction activities disturbing at least five acres of land, or less than five acres if part of “larger common plan of development or sale” affecting five acres
- includes clearing, grading, excavation

■ Phase II (1999)

- permit requirement extended to one-to-five acre projects

■ In PA, EPA delegated authority to DEP to implement permit program (but not enforcement)

Pennsylvania Stormwater/E&S Program Regulatory Background

- PA program includes CWA construction stormwater permits and erosion and sedimentation (E&S) control requirements under Clean Streams Law
- DEP E&S control regulations, 25 Pa. Code Part 102, require BMPs minimizing accelerated erosion and sedimentation for “earth disturbance activities”

Tiered Structure of Pennsylvania Stormwater/E&S Control Program

- In most counties, DEP delegates program to county conservation districts
- Type of planning and approvals vary:
 - BMPs required for all earth disturbance activity
 - keep written E&S Control Plan on site if disturbing at least 5,000 sf (or discharging to special protection waters, requiring other BMPs)
 - if need NPDES construction stormwater permit, submit written E&S plan as part of application

PA NPDES Construction Stormwater Permitting Program

- DEP requires stormwater permits for earth disturbance:
 - of at least one and less than five acres with point source discharge, or
 - greater than five acres (regardless of point source)
- General NPDES construction stormwater permit (PAG-2)
 - individual permit if special protection waters or hazardous runoff
- Conservation districts usually review PAG-2 Notices of Intent and E&S control plans (DEP issues individual permits)
- Permits now require integration of Post Construction Stormwater Management (PCSM) plans
 - design features and BMPs managing net post-construction stormwater runoff increases by maximizing infiltration, etc. (e.g., green roofs, capture and reuse)


E&S Control/Stormwater Permitting Practice Pointers

- Integrate stormwater management early in construction design
 - understand range of available BMPs
 - identify any special requirements for receiving waters
- Be creative and flexible with post-construction stormwater management approaches

Wetlands and Water Encroachments



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Wetlands and Water Encroachment Permitting

- DEP and U.S. Army Corps of Engineers regulate discharges of dredged or fill material into, or placement of structures in, wetlands or other surface waters
 - Clean Water Act (CWA) § 404
 - Rivers and Harbors Act of 1899 (RHA) § 10
 - Pennsylvania Dam Safety and Encroachments Act (DSEA) (25 Pa. Code Ch. 105)
- Permit review and approval process usually includes input from other resource agencies and the public, which may create time delays and frustration

Federal Jurisdictional Limits

- RHA § 10 requires Corps permit for any structure in, over, under, or affecting “navigable waters of U.S.”
 - subject to ebb and flow of tide, or used or susceptible to use in interstate or foreign commerce
- CWA § 404 requires Corps permit to discharge dredged or fill material into “navigable waters,” defined as “waters of U.S. including territorial seas,” which by regulation go beyond RHA jurisdiction to include
 - *interstate* waters (including wetlands)
 - *intrastate* waters whose use or destruction could affect interstate or foreign commerce
 - tributaries of the above
 - territorial seas
 - wetlands adjacent to above

Supreme Court Jurisprudence on CWA § 404 “Waters of U.S.”

- *Riverside Bayview Homes* (1985)
 - Upheld Corps interpretation that wetlands “actually abut[ting] on” traditionally navigable waters are within CWA jurisdiction
- *SWANCC* (2001)
 - By contrast, rejected Corps jurisdiction over nonnavigable, isolated, intrastate waters affecting interstate commerce only as migratory bird habitats

Supreme Court Jurisprudence on CWA § 404 “Waters of U.S.” (cont’d)

- *Rapanos v. U.S.* (2006) (Justice Kennedy)
 - wetlands are subject to CWA jurisdiction if “significant nexus between wetlands in question and [traditionally] navigable waters”
 - nexus exists if wetland “significantly affects the chemical, physical, and biological integrity” of traditionally navigable waters
 - Corps must establish significant nexus on case-by-case basis to regulate wetlands adjacent to non-navigable tributaries to navigable waters

Supreme Court Jurisprudence on CWA § 404 “Waters of U.S.” (cont’d)

■ *Rapanos* aftermath

- Corps and EPA issue guidance on applying *Rapanos* holdings (June 2007)
- “Temporary” suspension of jurisdictional delineations (“JDs”) and permit reviews lifted
- Some environmental groups believe guidance will hinder wetland protection

PA Jurisdictional Limits

- In light of *Rapanos*' potential retraction of CWA jurisdiction over wetlands and other waters, state regulation may become more important
- DSEA requires DEP permit for water obstructions or encroachments in "regulated waters of the Commonwealth" (including wetlands)

Threshold Issue 1: Impacting Regulated Water/Wetland?

- Aside from statutory jurisdiction, must be a “wetland”
- Federal and PA regulations define wetlands as:
 - Areas “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions . . . including swamps, marshes, bogs, and similar areas.”
- Corps *Wetland Delineation Manual* requires three wetland factors:
 - hydrophytic (water-loving) vegetation
 - hydric soils (saturated at least part of year)
 - hydrology (water source)
- Wetlands may not look “wet” and boundaries change
- JDs are usually available from Corps

Threshold Issue 2: Applicable Permit Waivers or Options?

- Permit waivers available for narrow list of minor construction activities in Commonwealth
- Simple Ch. 105 general permit for certain projects
- Ch. 105 individual permit for other non-federal projects
- If also need Corps permit, likely receive PASPGP-3 from DEP (Joint Permit Application)
- Joint application review may identify project requiring separate Corps permit

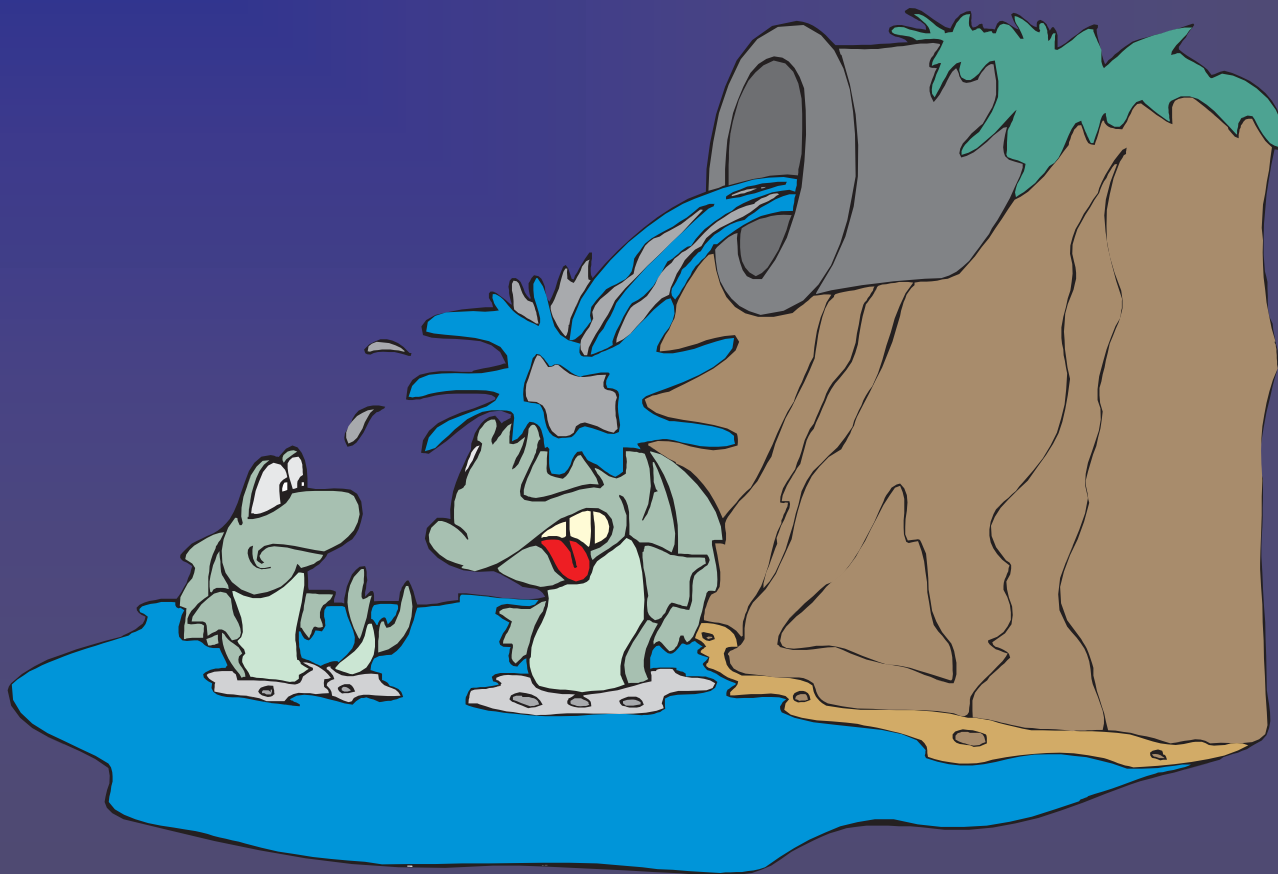
Threshold Issue 3: Does Project Meet Permit Evaluation Factors?

- If project cannot obtain waiver or general permit, evaluate permit evaluation factors
- DEP balances several factors:
 - potential threats to life, property, navigation
 - impacts on wetland
 - impacts on water supplies, historic resources
 - extent project is water-dependent
 - cumulative impacts with other projects
- Rare to obtain permit for exceptional value wetland projects
- All wetland projects must replace affected wetlands

Wetland/Water Encroachment Permitting Practice Pointers

- Identify potentially affected waters early in project planning
 - use competent consultant to prepare JD request
- Design project to avoid or minimize wetland impact
- Design project to obtain permit waiver or general permit
- If full permit application is necessary:
 - justify water-dependency
 - avoid impacts to wetlands or other regulated waters
 - if impacts are unavoidable, minimize and mitigate them
- Permitting process can be lengthy

Wastewater



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Wastewater Disposal

- Sewage Facilities Act requires every municipality to maintain DEP-approved sewage facilities plan (Act 537 Plan)
- Municipality must revise plan via sewage facilities planning module when, e.g.:
 - municipality or PADEP determines plan is inadequate
 - a PADEP surface water discharge permit is required for a new project

Wastewater Disposal (cont'd)

- Act 537 plans and revisions must be consistent with rules for wetlands, comprehensive municipal plans, historic resources, local stormwater plans, and safe drinking water

Wastewater Disposal (cont'd)

- If public sewer systems are unavailable, developer may have to construct and operate its own sewage treatment and disposal systems instead
- Permitting process for sewage disposal has several steps and potential pitfalls

Wastewater Disposal (cont'd)

- In certain cases (e.g., community on-lot system > 2,000 gpd), an Act 537 plan revision may require, e.g.:
 - Bond or escrow account to cover future O&M costs
 - Maintenance agreement between owner and sewage treatment system firm
- PADEP and delegated agencies may charge fees to review sewage facility planning modules for new projects

Wastewater Disposal (cont'd)

- Permits for on-lot systems (not community spray irrigation or any on-lot system $\geq 10,000$ gpd): two-stage process with local sewage enforcement officer (SEO)
 - SEO confirms site suitability of soils, slopes, etc.
 - Applicant designs system meeting site limitations for permitting by SEO
 - Permit review fees set by municipality
 - Applicant may appeal SEO permit denial to municipality and Common Pleas Court

Wastewater Disposal (cont'd)

- Two permits necessary for sewage systems discharging to surface water
 - Clean Streams Law (CSL) and Clean Water Act require National Pollution Discharge Elimination System (NPDES or Part I) permits for all *point source discharges to surface waters*
 - CSL also requires permit for *constructing* sewage treatment works (design or Part II permit)

Wastewater Disposal (cont'd)

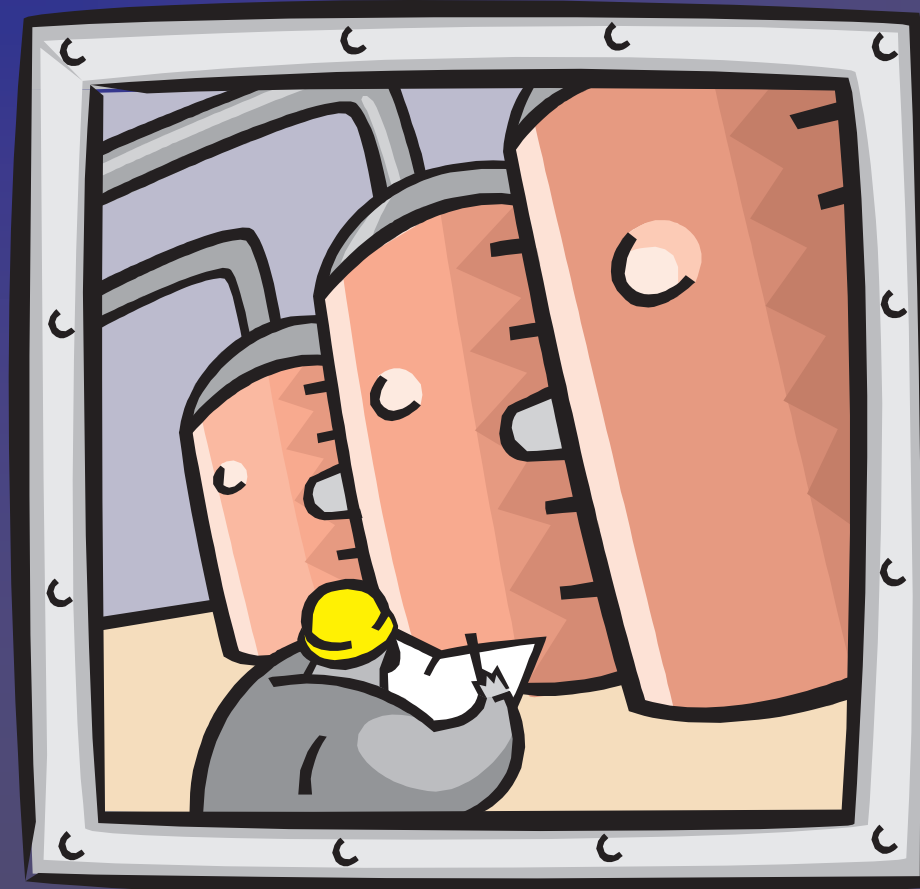
■ NPDES permit

- sets discharge effluent limitations (total flow, concentrations for various parameters)
- establishes sampling frequency and types for Discharge Monitoring Reports
- five-year length
- requires approximately six months lead time
- has application fee, public notice and comment

Wastewater Disposal (cont'd)

- All streams are assigned designated uses (e.g., cold water fishery, potable water supply)
 - PADEP anti-degradation regulations require that existing uses be protected and maintained (via permit effluent limitations)
- Certain streams are “special protection”
 - Exceptional Value (EV) streams (in parks, wildlife refuges, etc.)
 - High Quality (HQ) streams meet various chemical or biological conditions
- Very hard to permit new or additional discharges to EV or HQ streams (regulations focus on maintaining existing *quality*, not merely use)

Storage Tanks



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Overview of Federal and PA Storage Tank Programs

- Underground (UST) and above ground (AST) tank releases cause significant soil and groundwater contamination
- USTs regulated by EPA since 1984
- UST program delegated to states with laws and regulations meeting minimum federal standards
- Delegated states have primary permitting and enforcement authority
- PA has EPA-delegated UST program
- States, not EPA, regulate ASTs

Key Elements of PA Tank Program

- Storage Tank and Spill Protection Act and regulations include:
 - design and operational requirements for USTs/ASTs
 - financial responsibility for UST owners/operators (USTIF)
 - tank installer/inspector certification requirements
 - Corrective Action Process for releases

Definition of Regulated ASTs/USTs

- Certain tanks are exempt from Tank Act regulation, e.g.,
 - tanks storing motor fuel for noncommercial purposes
 - tanks storing heating oil for consumptive use on premises where stored
 - tanks regulated under Solid Waste Management Act
 - tanks storing propane gas
 - operational tanks (hydraulic lifts, electrical equipment)
- Tanks not regulated by Tank Act may still be regulated by other programs (e.g., spill planning)

Underground Storage Tank Indemnification Fund (“USTIF”)

- Regulated tank owners/operators pay annually into fund based on tank capacity or per-gallon fee
- Release must have occurred on or after 2/1/94
- USTIF pays for regulated UST corrective action and third party personal injury and property damage liability (with limits and deductibles)

Drinking Water



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Provision of Drinking Water

- If providing own drinking water, regulated by PADEP under the Safe Drinking Water Act (implementing federal program)
- Public water systems (PWS) regulated by categories:
 - **Community:** year-round serves at least 15 connections or 25 residents
 - **Nontransient noncommunity:** regularly serves at least 25 of same persons over 6 months/yr
 - **Transient noncommunity:** serves at least 15 connections or 25 individuals daily at least 60 days/yr

Provision of Drinking Water (cont'd)

- Two types of drinking water standards:
 - **maximum contaminant levels (MCLs):** limit concentrations of certain contaminants
 - primary MCLs for health consequences
 - secondary MCLs for aesthetic consequences
 - **treatment technique requirements:** technological requirements to decrease risk of contaminant entry
 - e.g., filtration, disinfection

Provision of Drinking Water (cont'd)

- Other requirements (vary with PWS category and other circumstances):
 - Monitoring compliance with MCLs
 - Public notification of noncompliance
 - PWS construction and operation permit requirements
 - Design and construction standards
 - System management requirements (monitoring reports to PADEP, operator certification, etc.)

Historic Resources



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Historic Resource Protection

- State or federally permitted projects affecting historic resources may require evaluation before permit issuance
- Authorities
 - National Historic Preservation Act (NHPA § 106)
 - Pennsylvania History Code

NHPA

- Balance historic preservation with needs of projects receiving federal funding or permits
- Requires consultation, early in project planning, between federal permitting agency, historic preservation agencies, and other interested parties regarding possible adverse effects to historic properties and ways to avoid, minimize, or mitigate them

NHPA (cont'd)

- If a historic property is present and may be affected, agency and consulting parties assess if undertaking may alter National Register characteristics
- If agency funds undertaking will have “adverse effect,” parties find options to avoid, minimize or mitigate them
- Parties develop Memorandum of Agreement on resolving adverse effects

Pennsylvania History Code

- Like NHPA, PA agencies coordinate with PHMC on permits or other activities that may impact archaeological resources
- Permit applicant submits Cultural Resource Notice for PHMC review (certain permits are exempt)

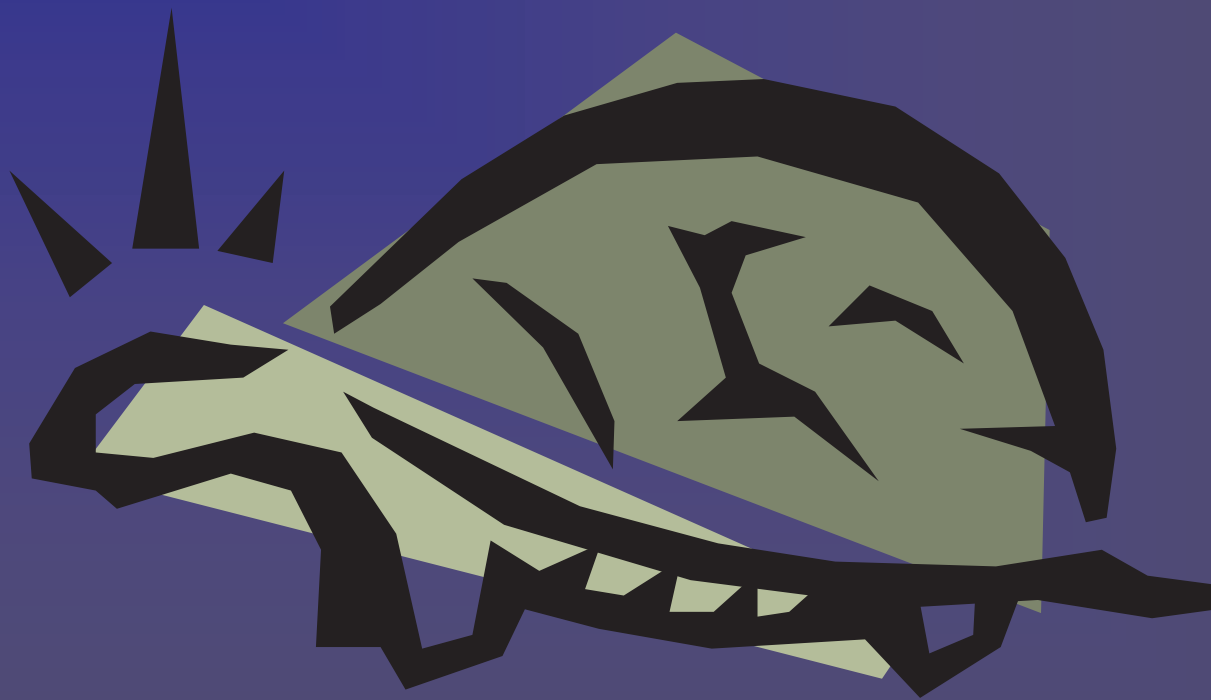
PHMC Review and Field Work

- PHMC 15-day review of recorded material evidence to find if project may adversely affect “significant archaeological site”
 - i.e., “extensive evidence of previous prehistoric or historic human habitation or stratified deposits of animal or plant remains or manmade artifacts or human burials”
 - if not significant archaeological site, permit may be issued
 - otherwise, PHMC may conduct archaeological survey within 60 days, field investigation (data recovery) within 90 days


Historic Resource Protection Practice Pointers

- History Code procedural notes:
 - must cooperate with PHMC in permit process, but PHMC may not perform field work without landowner consent
 - PHMC may not delay, deny, condition, or limit permit beyond History Code timeframes without consent
 - DEP may not stop permit process for archaeological resources
 - PHMC pays for field work at private projects

Endangered Species



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Endangered Species Protection

- Federal or state permit application reviews will evaluate presence of threatened or endangered species
- Authorities
 - Endangered Species Act (ESA)
 - Pennsylvania Wild Resources Conservation Act
 - Pennsylvania Fish and Boat Code
 - Pennsylvania Game and Wildlife Code

ESA Listing, Taking Prohibition

- ESA § 4 authorizes listing federal threatened or endangered species
- ESA § 9 prohibits “taking” listed species
 - i.e., “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect”

ESA § 7 Consultation

- ESA § 7 requires federal agencies to consult with Fish and Wildlife Service (FWS)
- PA-only permits follow similar (but less formal) consultation process

PA Natural Diversity Inventory ("PNDI")

- PA and federal permit applicants begin by searching PNDI database to see if project may affect listed species
- Three possible outcomes of PNDI search:
 - *No Impacts* - process ends
 - *Potential Impacts* – further consultation and clearance required
 - *Avoidance Measures* - if applicant agrees to implement avoidance measures, process ends

ESA Consultation Process

- If federal listed species/critical habitat may be present, consult with FWS

ESA Incidental Takes

- Federal agencies must also avoid violating ESA § 9 by “taking” listed species
 - FWS may authorize “incidental takes” resulting from otherwise lawful activity
 - permitting agency follows incidental take statement in biological opinion:
 - permissible impact (extent of allowable incidental taking)
 - reasonable and prudent measures to minimize impact
 - terms and conditions, including reporting on impacts
- Non-federal projects seek incidental take permits with habitat conservation plans to minimize incidental takes

Endangered Species Protection Practice Pointers

- Many projects modified in consultation to allow go-ahead, e.g., by relocating footprint or stormwater discharge
- Measures to minimize incidental takes include, e.g., preserving existing habitat or establishing buffers, restricting access
- Consultation and incidental take permitting may be lengthy


Conclusion

- We don't expect you to remember everything you've learned
- We really don't expect you to solve some of the problems we've reviewed

BUT

- We expect you now to spot the problems we've discussed . . . and then call a good environmental attorney

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