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New Environmental Permit Policy Presents Significant Changes

BY MICHAEL DILLON
AND TODD D. KANTORCZYK

Special to the Legal

On November 3, 2012, the Pennsylvania Department of Environmental Protection (DEP) published its new Permit Decision Guarantee for activities subject to environmental permitting. With the Permit Decision Guarantee, which replaces the DEP's Money-Back Guarantee policy, the DEP intends to prioritize high-quality applications for projects with demonstrative positive economic impacts. At the same time, to combat what DEP Secretary Michael Krancer described as a widespread problem of the DEP fixing subpar permit applications during the review process, the new policy indicates that the DEP will have less tolerance for initial applications that fail to meet what the DEP believes are established legal and technical standards. As will be discussed in greater detail below, by placing greater emphasis on the initial application, the Permit Decision Guarantee may alter the way businesses approach the environmental permitting process and position applications going forward.

The Permit Decision Guarantee applies to 244 types of environmental permits issued by the DEP across the department's four major program offices, including surface mining permits, natural gas well permits, permits for activities resulting in air emissions, National Pollutant



DILLON



KANTORCZYK

MICHAEL DILLON and TODD D. KANTORCZYK
are attorneys for the environmental, energy and land use law and litigation firm of Manko, Gold, Katcher & Fox in Bala Cynwyd, Pa. They can be reached at 484-386-6161 and mdillon@mgkflaw.com or 484-430-2359 and tkantorczyk@mgkflaw.com.

Discharge Elimination System (NPDES) permits and stream crossing permits, among others. The policy provides a timeframe for each applicable permit, listed in Appendix A, by which the DEP is supposed to complete its review. If the DEP fails to meet the Permit Decision Guarantee timeframe, then a decision on the application must be made within five business days by the appropriate program manager and regional director. If that five-day timeframe is not met, then a meeting with the secretary is scheduled to determine why the deadline was missed.

The Permit Decision Guarantee similarly applies not only to the DEP, but to the local agencies to whom the DEP has

delegated authority to administer any of the permitting programs subject to the policy, including county conservation districts and health departments. Significantly, the policy does not alter any timeframe or review framework that has been established by statute or regulation. For example, approvals associated with Pennsylvania's Act 2 Land Recycling Program are not subject to the Permit Decision Guarantee because the program establishes its own review framework by statute.

The Permit Decision Guarantee timeframes, however, apply only to "complete and technically adequate" applications. According to the policy, a complete and technically adequate application is one that "meets all applicable regulatory and statutory requirements and contains all information needed by the department to make a final permit decision." The onus to prepare a complete and technically adequate application rests entirely with the applicant, and the penalty for not doing so is a forfeiture of the guarantee.

Given the high stakes associated with preparing a complete and technically adequate application, the policy strongly encourages applicants to request and attend pre-application conferences with DEP personnel. Though pre-application conferences are not technically required by the policy, failure to attend a conference that the DEP has specifically requested could result in the applicant forfeiting the Permit Decision Guarantee.

After submission of an application, the DEP will conduct an initial “completeness review,” which it will typically finish within 10 business days. The Permit Decision Guarantee timeframe does not begin to run until this completeness review is over. During the completeness review, the DEP will look to confirm that the application contains all of the required types of information (e.g., maps, diagrams, fees, etc.), and that the information is of sufficient technical detail for the DEP to be able to later undertake a more thorough technical review. The DEP will deny as incomplete any applications that contain mistakes or deficiencies that cannot be easily corrected with a phone call, and the applicant will forfeit its application fee. The DEP is supposed to issue a letter accompanying its denial that cites the specific regulatory and statutory requirements that justify its incompleteness finding. Any resubmitted permit applications following a denial on the basis of incompleteness are treated by the DEP as new applications and the permitting process starts from the beginning.

Applications that survive the completeness review become eligible for the guaranteed review timeframes of the Permit Decision Guarantee. After notifying the applicant that its application is complete, the DEP will begin to perform a more detailed technical review to ensure that all technical aspects of the application meet statutory and regulatory standards, as well as any applicable technical guidance standards that the DEP has published. If the DEP finds an application to be technically deficient, it will issue the applicant a deficiency letter that specifies the regulatory or statutory basis of the deficiency finding and sets a deadline by which the applicant must respond.

The consequence of a technical deficiency finding is severe; namely, the application is no longer eligible for the Permit Decision Guarantee timeframe. Though the guarantee will lapse, the applicant will

not be required to restart the permitting process if it adequately responds to the DEP’s deficiency letter.

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With regard to technical deficiencies, the Permit Decision Guarantee establishes a “two strikes” policy, meaning that a response to a technical deficiency letter that does not meet all applicable requirements subjects the application to the policy’s “elevated review” procedure. Elevated review includes a face-to-face or telephone meeting between the applicant, the applicant’s consultant, the DEP program manager and DEP regional director. If this meeting results in a solution, the regional director may provide the applicant with up to 10 additional business days to submit a technically adequate application. If a solution is not reached at this meeting, the application will be elevated to the bureau director for a decision on further action, which may be denial of the application. The entire elevated review process is intended to be very quick, with a bureau director’s decision coming within 15 business days of the first notification of elevated review. In most instances, the DEP will only allow for one technical deficiency letter, but the policy allows for additional technical deficiency letters for certain complex applications.

In addition to the new operating procedures and review timeframes, the Permit Decision Guarantee rescinds its

broad-based “first-in, first-out” policy in favor of a hierarchy that explicitly favors applications associated with projects that have verifiable positive economic impacts. The top of the review hierarchy is reserved for applications necessary to protect public health, safety, or the environment, such as a permit for a drinking water facility where there are concerns about current drinking water quality. The DEP will then review applications “necessary” for economic development or job creation in Pennsylvania. The DEP has not yet provided any guidance as to specifically how applicants can demonstrate these economic impacts in conjunction with an application. At a minimum, however, applicants who wish to receive a more prompt decision on an environmental permit application based upon economic issues will likely need to draft the initial application in a way that clearly communicates to the DEP the project’s positive economic impacts.

As with any new policy, it remains to be seen exactly how the DEP will implement the policies and procedures outlined in the Permit Decision Guarantee. What is clear, however, is that the policy places a great emphasis on applicants submitting high-quality applications in the first instance. Applicants who invest the time and money in preparing a complete and technically adequate application will be rewarded with predictable — or even accelerated — processing times. On the other hand, applicants who fail to expend the necessary resources to prepare a high-quality application will have to endure extended reviews and will risk losing money spent on application fees. •

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