

Citizen’s Guide to the Permitting and Approval Process for Land Development in Pennsylvania

**Prepared by:
Matthew B. Royer, Staff Attorney
Citizens for Pennsylvania’s Future
610 N. Third Street, Harrisburg PA 17101
(717) 214-7928**

Introduction	1
Local Approvals and Permits	
1. Subdivision and Land Development Plan Approvals	2
2. Zoning Approvals	4
a. Zoning Variances	4
b. Conditional Use Approvals	5
c. Special Exceptions	6
d. Rezoning	7
e. Substantive Challenges to the Validity of the Zoning Ordinance	7
(i) Challenges brought before the Zoning Hearing Board	8
(ii) Challenges brought before the Governing Body (the Curative Amendment Process)	8
3. Stormwater Management Plan Approvals	9
4. Sewage (Act 537) Approvals	10
5. Building Permits	10
State Approvals and Permits	
1. NPDES Permits for Discharges of Stormwater Associated with Construction Activities	11
2. Water Obstruction and Encroachment Permits	12
3. Sewage (Act 537) Approvals	12
4. NPDES Permits for Discharges of Sewage and Water Quality Management (Phase II) Permits	14
5. Public Water Supply Permits	14
6. Pennsylvania Historical and Museum Commission (PHMC) Review	15
7. Pennsylvania Natural Diversity Inventory (PNDI) Review	16
8. Highway Occupancy Permits	17
Federal Approvals and Permits	
1. Section 404 Clean Water Act Permits	18
2. National Environmental Policy Act (NEPA) Review	18
3. Endangered Species Act Review	19

Introduction

The land development process in Pennsylvania is a lengthy, multi-step and often confusing process. Municipalities, counties, state agencies and federal agencies may all play a role, as various layers of permits and approvals are needed. This guide provides a brief description of some of the local, state and federal permits and approvals that may be required for a given land development proposal. After the description of each step, opportunities for public involvement and comment are discussed, along with any options for challenging the decision made by the applicable entity.

This guide is not necessarily a comprehensive list of every permit or approval that is required for every land development project across the Commonwealth. Nor are all of the permits or approvals listed and described in this guide required for every project. This document should be used as a reference guide only, as you feel your way through the land development process. You should consult with the applicable local, state and federal agencies to determine what permits and approvals are necessary for a given project.

Local Approvals and Permits

1. Subdivision and Land Development Plan Approvals

Your municipality is likely to have a Subdivision and Land Development Ordinance (SALDO). The SALDO regulates how a subdivision and/or land development may be constructed. A SALDO requires the submission of land development plans to the governing body of the municipality (i.e., Board of Supervisors, Borough Council). There are three types of land development plans, and they are submitted in the following order: (i) Sketch Plans; (ii) Preliminary Plans; and (iii) Final Plans. Of the three, Preliminary Plans involve the most substantive municipal review, and provide the most opportunity for public participation and comment.

Sketch Plans. Sketch Plans are sometimes, but not always, submitted by developers. Sketch Plans are informal plans for the development project that are submitted prior to the Preliminary Plan, so that a developer can give the municipality a “heads up” on what will be submitted. It also gives the municipality a chance to raise issues of concern so that the developer can correct them early on in the process, before significant time and resources are spent on developing more detailed plans. The submission of a Sketch Plan does not trigger a formal review process and the municipality is not obligated to take action on the plan.

Preliminary Plans. Formal review of a proposed land development commences when a Preliminary Plan is submitted to the governing body for consideration. A municipality’s SALDO generally sets forth specific requirements for elements of the land development, such as street size, sidewalks, provision of park and recreation area, water supply etc.). The development as proposed in the Preliminary Plan must meet these requirements.

The governing body has the authority to grant various **waivers** of specific requirements of the SALDO as they apply to individual subdivision and/or land development plans. The governing body exercises its discretion to permit deviations from a strict application of particular requirements of the SALDO. Waivers may be granted if peculiar conditions relating to the land to be developed cause undue hardship on the applicant, so long as the granting of the waiver is not contrary to the public interest and the purpose and intent of the SALDO is observed. Municipalities Planning Code § 512.1(a).

Each municipality’s SALDO is different, so you should read your municipality’s SALDO carefully. The governing body will review the Preliminary Plan with the requirements of the SALDO in mind, consider and act upon any requests for waivers, and determine whether the Plan can be approved. If the requirements of the SALDO are met and appropriate waivers are granted to the governing body’s satisfaction, it will approve the Preliminary Plan.

During review of the Preliminary Plan, the municipality may also raise certain zoning issues that must be addressed before the proposed development can move forward (see “Zoning Approvals”, pages 4-6, for a description of the types of zoning approvals that

may be needed). Some municipalities allow developers to proceed with Preliminary Plan review and zoning review concurrently, while others require zoning issues to be resolved before Preliminary Plan review can take place.

Most municipalities have a **planning agency**, such as a Planning Commission or Planning Department. Depending on the operating procedures of your municipality, it may be customary to submit Preliminary Plans to the Planning Commission or Department prior to submission to the municipal governing body. Planning Commissions or Planning Departments generally do not have the power to approve or deny a Preliminary Plan. However, they may give recommendations to municipal governing bodies upon review of such Plans. Planning Commissions and Planning Departments often have some level of experience in planning, so municipal governing bodies may rely quite heavily on these recommendations.

The Pennsylvania Municipalities Planning Code also requires that the municipality forward the Plan to the appropriate County Planning Commission for its review and comment. The amount of weight that the municipality gives to the County Planning Commission varies by municipality.

Others involved in the review process include the municipality's engineer, who provides technical review and advice to the municipal governing body, and the municipal solicitor, who provides legal review and advice.

Section 508 of the Municipalities Planning Code requires that governing bodies make a decision on a Preliminary Plan no later than 90 days after the first regular meeting of the governing body or planning agency following the date the Plan was submitted. Sometimes developers waive this deadline at the municipality's request. Revisions to the Plan may restart the review clock, depending on how extensive the revisions are.

For most municipalities, it is at the Preliminary Plan review stage that most, if not all, of the issues concerning compliance with the specific requirements of the SALDO (and perhaps the municipality's Zoning Ordinance or other codes) are addressed. Thus it is the Preliminary Plan review process that you should follow most carefully, and seek to provide comment if necessary and appropriate.

Final Plans. Final Plans are submitted and approved once the developer has completed improvements (streets, sidewalks, utilities etc.) or, alternatively, has guaranteed completion of improvements through land development agreements with the municipality and the posting of adequate bond. Review and approval of the Final Plan will rarely involve substantial new issues of concern. Generally speaking, if the Preliminary Plan has been approved, the Final Plan will be approved.

Opportunity for public participation and comment. Review of the Preliminary Plan offers the best opportunity for public participation and comment. Once a Preliminary Plan is submitted to a municipality, it should be made available for public review in the municipal offices. Consideration of the Preliminary Plan should then be placed on the

agenda for the next meeting of the municipal governing body and/or planning agency. Meetings of the governing body and planning agency are open to the public, and at each meeting opportunity is made available for public comment. You can provide public comment, both written and oral, at these meetings. If you know that you or your organization wishes to provide public comment on the Preliminary Plan, you should call ahead and attempt to get placed on the agenda for the meeting(s).

Challenges to decisions on Preliminary Plans. Pursuant to Article X-A of the Municipalities Planning Code, a decision by a municipal governing body approving or denying a Preliminary Plan may be appealed to the Court of Common Pleas in the county where the land proposed to be developed is located within 30 days after the decision was made. Note that a decision on a Preliminary Plan is a final action that must be appealed to the Court of Common Pleas within 30 days; you may waive your right to appeal by waiting until the Final Plan is approved. *See In re Appeal of Busik*, 759 A.2d 417 (Pa. Cmwlth. 2000).

2. Zoning Approvals

Your municipality may also have a Zoning Ordinance that governs specific land uses throughout your municipality. The Zoning Ordinance regulates how land may be used. It is possible that a proposed development meets all provisions of your municipality's Zoning Ordinance and does not need to undergo any of the procedures to seek special approval to move forward with the plans. However, more than likely, there is some zoning-related approval that must be met in order for the development to proceed.

a. Zoning Variances

The proposed development may require what is known as a zoning **variance**. A variance is a deviation from the existing standards and requirements of the Zoning Ordinance. It is a quasi-judicial approval to use land in a manner that is otherwise prohibited. Variances may be granted where there are unique circumstances with respect to a particular property that inflict unnecessary hardship on the applicant.

Zoning variances must be reviewed and considered by a municipality's Zoning Hearing Board (ZHB). An application for a variance is made to the ZHB, and the ZHB holds hearings on the request, at which evidence is presented by the applicant in support of the variance request. Protestants (such as adjacent landowners) may also appear before the ZHB during the hearing and present evidence or public comment against the variance.

The standards that must be met in order to grant a variance are quite high. Pursuant to Section 910.2 of the Municipalities Planning Code, in order for a ZHB to grant a variance, the applicant must prove the following:

- (1) There are unique physical conditions peculiar to the property and unnecessary hardship is due to those conditions.

- (2) Because of the physical conditions, there is no possibility that the property can be developed in strict conformity with the Zoning Ordinance, and the variance is needed to enable reasonable use of the property.
- (3) The unnecessary hardship has not been created by the applicant.
- (4) Granting the variance will not be detrimental to the public welfare.
- (5) The requested variance is the minimum variance that will afford relief and is the least modification of the regulation at issue.

Opportunity for public participation and comment. As mentioned above, parties such as adjacent owners may participate in a ZHB variance hearing as a protestant. This will provide the protestant with the opportunity to present evidence and testimony against the variance. In addition, the ZHB should provide members of the public with the opportunity to comment on the requested variance prior to the ZHB rendering its decision.

Challenges to decisions on variance requests. Pursuant to Article X-A of the Municipalities Planning Code, a decision by a ZHB on a request for a variance may be appealed to the Court of Common Pleas in the county where the land proposed to be developed is located within 30 days after the decision was made.

b. Conditional Use Approvals

Your municipality's Zoning Ordinance may contain some uses of land that are permitted by right and do not require any additional approval by the municipality. The Zoning Ordinance may also include **conditional uses** of land that are generally acceptable uses, but require a certain level of control by the municipality. The provisions of the Zoning Ordinance that set forth the conditional uses generally also set forth specific standards and criteria that the municipality follows in deciding whether to grant or deny a conditional use. An example of a conditional use might be the cutting of trees in an area zoned for conservation, so long as the tree cutting is part of an approved forestry plan.

The municipal governing body, not the ZHB, hears and considers applications for conditional uses. Once a conditional use application is received by the municipality, the governing body will hold hearing on the request and take evidence from the applicant in support of the conditional use request. Affected parties such as adjacent landowners may participate in the hearings as protestants and offer evidence against the proposed conditional use.

During the conditional use hearing, the applicant for a conditional use approval must establish that the proposed use satisfies all of the specific requirements set forth in the Zoning Ordinance. Once this burden is satisfied, the burden shifts to the protestant to prove that the proposed use is injurious to the public health, safety and welfare of the community. *Sunnyside Up Corp. v. City of Lancaster Zoning Hearing Board*, 739 A.2d 644 (Pa. Cmwlth. 1999).

Opportunity for public participation and comment. As mentioned above, parties with standing, such as adjacent owners, may participate in a conditional use hearing as protestants. Protestants will be provided with the opportunity to present evidence and testimony. In addition, the municipal governing body should provide members of the public with the opportunity to comment on the requested conditional use approval prior to the governing body rendering its decision.

Challenges to decisions on conditional use approval requests. A decision by a municipal governing body on a request for a conditional use approval may be appealed to the Court of Common Pleas in the county where the land proposed to be developed is located. An appeal must be filed within 30 days after the decision was made.

c. Special Exceptions

Special exceptions are very similar to conditional use approvals, with the only material difference being that the ZHB, not the municipal governing body, hears the request and makes the decision whether to grant it. Like conditional uses, the Zoning Ordinance will set forth specific standards and criteria that must be met in order for a special exception to be granted.

The procedure for hearing and approving special exceptions is similar to that for conditional use approvals. Once a conditional use application is received by the municipality, the ZHB will hold a hearing on the request and take evidence from the applicant in support of the special exception request. Affected individuals and organizations such as adjacent landowners may participate in the hearings as protestants and offer evidence against the proposed special exception.

Requests for special exceptions are governed by the same standards that are used for conditional uses. The applicant for a special exception must establish that the proposed use satisfies all of the specific requirements set forth in the zoning ordinance. Once this burden is satisfied, the burden shifts to the protestant to prove that the proposed use is injurious to the public health, safety and welfare of the community. *Sunnyside Up Corp. v. City of Lancaster Zoning Hearing Board*, 739 A.2d 644 (Pa. Cmwlth. 1999).

Opportunity for public participation and comment. As mentioned above, parties may participate in a special exception hearing as protestants and present evidence and testimony. In addition, the ZHB should provide members of the public with the opportunity to comment on the requested special exception prior to the governing body rendering its decision.

Challenges to decisions on special exception requests. Pursuant to Article X-A of the Municipalities Planning Code, a decision by the ZHB on a request for a special exception may be appealed to the Court of Common Pleas in the county where the land proposed to be developed is located within 30 days after the decision was made.

d. Rezoning

If land proposed to be developed is not zoned for development (for example, agricultural instead of R-1 residential), the developer may file a request to have the property rezoned via an amendment to the Zoning Ordinance. Rezoning is a legislative act by the municipal governing body. Section 609 of the Municipalities Planning Code sets forth a process for petitioning the municipal governing body to enact a zoning amendment. Before voting on a proposed amendment, the governing body must give public notice of the proposed amendment and hold a public hearing on the rezoning request. If the proposed amendment requires a zoning map change, notice of the public hearing must also be posted in the vicinity of the tract to be rezoned.

The governing body should also submit the proposed amendment to the municipal and county planning agencies at least 30 days prior to the public hearing, for their review and comment.

Opportunity for public participation and comment. The public hearing mentioned above provides citizens with the opportunity to comment on the proposed rezoning.

Challenges to rezoning amendments. Once a rezoning amendment is enacted, its validity can be challenged either on procedural or substantive grounds. Municipalities Planning Code § 909.1(a)(1),(2). Procedural challenges to the amendment (i.e., failure to hold public hearing, failure to submit proposed amendment to municipal or county planning agencies) must be made within 30 days of the enactment of the amendment, and are filed with the Zoning Hearing Board. Municipalities Planning Code § 909.1(a)(2). Substantive challenges to the validity of the amendment are also filed with the Zoning Hearing Board, and must be made once the municipality takes an action (such as granting a Preliminary Plan approval or building permit) under the rezoning amendment. Municipalities Planning Code § 909.1(a)(1); *Sharp v. Zoning Hearing Board of the Township of Radnor*, 628 A.2d 1223 (Pa. Cmwlth. 1993).

e. Substantive Challenges to the Validity of the Zoning Ordinance

If a rezoning request is denied, a developer may seek to challenge the validity of the Zoning Ordinance by filing a validity challenge pursuant to Section 916.1(a) of the Municipalities Planning Code. An example of a substantive validity challenge is that the municipality has practiced “exclusionary zoning” (by failing to zone for a legitimate land use). See *West v. Township Supervisors of Adams Township*, 513 A.2d 1114 (Pa. Cmwlth. 1986). Section 916.1(a) of the Municipalities Planning Code provides two vehicles for substantive validity challenges: (i) a challenge to the Zoning Hearing Board; and (ii) a challenge to the governing body with a curative amendment.

(i) **Challenges brought before the Zoning Hearing Board**

A validity challenge to the ZHB must be brought in writing with a request to hold a hearing on the challenge. Public notice of the hearing must be given. The ZHB must make a decision on the request within 45 days after the conclusion of the last hearing. If the ZHB finds that the challenge has merit, its decision shall contain recommended amendments to the Zoning Ordinance which will cure the defects found.

Opportunity for public participation and comment. ZHB hearings are open to the public, and certain parties may be permitted to participate in the hearing as protestants, with the right to present evidence and testimony. Municipalities Planning Code § 908(3). In addition, the written validity challenge, together with plans, proposed amendments and other material must be made available for public review.

Challenges to Zoning Hearing Board decisions. Once the municipal governing body accepts the recommendation of the ZHB and enacts the curative amendment, its validity can be challenged either on procedural or substantive grounds. Municipalities Planning Code § 909.1(a)(1),(2). Procedural challenges to the amendment must be made within 30 days of the enactment of the amendment, and are filed with the ZHB. Municipalities Planning Code § 909.1(a)(2). Substantive challenges to the validity of the amendment must be made once the municipality takes an action (such as granting a Preliminary Plan approval or building permit) under the amendment. Municipalities Planning Code § 909.1(a)(1); *Sharp v. Zoning Hearing Board of the Township of Radnor*, 628 A.2d 1223 (Pa. Cmwlth. 1993).

(ii) **Challenges brought before the Governing Body (the Curative Amendment Process)**

Substantive challenges to the validity of a Zoning Ordinance may also be made directly to the municipal governing body. Such challenges must be accompanied by a **curative amendment** that cures the invalidities alleged.

Procedures for curative amendment challenges are set forth in Section 609.1 of the Municipalities Planning Code. The landowner making the challenge must submit its challenge and proposed amendment in writing. The governing body must then hold a hearing on the challenge within 60 days of the request. Public notice of the hearing must be given, and the challenge and accompanying curative amendment must be referred to the applicable municipal and county planning agencies for review and comment.

Opportunity for public participation and comment. Hearings on curative amendments are open to the public, and certain parties may be permitted to participate in the hearing as protestants, with the right to present evidence and testimony. Municipalities Planning Code § 908(3). In addition, the challenge and accompanying curative amendment should be made available for public review.

Challenges to curative amendment decisions. Once the municipal governing body enacts the curative amendment, its validity can be challenged either on procedural or substantive grounds. Municipalities Planning Code § 909.1(a)(1),(2). Procedural challenges to the amendment must be made within 30 days of the enactment of the amendment, and are filed with the ZHB. Municipalities Planning Code § 909.1(a)(2). Substantive challenges to the validity of the amendment must be made once the municipality takes an action (such as granting a Preliminary Plan approval or building permit) under the amendment. Municipalities Planning Code § 909.1(a)(1); *Sharp v. Zoning Hearing Board of the Township of Radnor*, 628 A.2d 1223 (Pa. Cmwlth. 1993).

3. Stormwater Management Plan Approvals

Your municipality is likely to have a Stormwater Management Ordinance. In addition, if your county has adopted an Act 167 Stormwater Management Plan for your watershed, the municipality's Stormwater Management Ordinance should be designed to implement the requirements of the Act 167 Plan. If your municipality operates a municipal separate storm sewer system (MS4), it is required to have adopted the DEP Model Stormwater Ordinance, or a more restrictive DEP-approved ordinance.

As a general rule, Stormwater Management Ordinances require developers to submit a stormwater management plan for approval by the municipality prior to commencing any earth disturbance. If the area to be disturbed is one acre or greater, an NPDES permit for the discharge of stormwater associated with construction will also be required. These permits are reviewed and issued by DEP (or, where duties have been properly delegated, to the County Conservation District). (See page 11, below).

If the area to be disturbed is less than one acre, an NPDES permit is not needed, although a stormwater management plan must still be submitted and approved by the municipality.

Opportunity for Public Participation and Comment. Review of a developer's stormwater management plan by the municipality is likely to occur as part of the Preliminary Plan review process. You should feel free to address stormwater issues when making public comment on the Preliminary Plan for the development. Public participation in the NPDES permit process is discussed on page 11, below.

Challenges to decisions on Stormwater Management Plans. Review and approval of a developer's Stormwater Management Plan is conducted as part of the Preliminary Plan approval process, and is usually spearheaded by the municipality's engineer as part of the technical review. Thus issues with respect to the Stormwater Management Plan may be raised in an appeal of the approval of the Preliminary Plan. Such appeals must be made to the Court of Common Pleas in the county where the land proposed to be developed is located, within 30 days after the decision was made.

4. Sewage (Act 537) Approvals

The proposed development must undergo sewage facilities planning approval (the “Act 537” process). Act 537 is the Pennsylvania Sewage Facilities Act. It requires municipalities to develop and implement an official sewage plan (“Act 537 Plan”) that addresses their present and future sewage disposal needs. 35 P.S. § 750.5(a). When a new land development project is proposed for the municipality, the municipality must modify its Act 537 Plan to meet the additional sewage disposal needs of the new development. 35 P.S. § 750.5(a.1). The municipality then submits the modification to DEP for review and approval. 35 P.S. § 750.5(a.1).

For a more detailed discussion of the Act 537 Plan revision and approval process, see pages 12-14, below.

5. Building Permits

Applications for building permits are submitted after Final Plan approval. As a general rule, building permits are required by a section of the municipality’s Code, and, to a limited extent, the State Fire and Panic Act. Presently, Pennsylvania is transitioning to the Uniform Construction Code, which will require permits under the International Construction Code. Building permits for lots may not be issued until final approval of the applicant’s land development plan is given.

Opportunity for public participation and comment. There is little opportunity for public participation, as no requirement for public notice exists with respect to review of building permits.

Challenges to building permits. Although building permits may be challenged, they rarely are. Unless the municipality has committed an egregious abuse of discretion in issuing them, there is little to appeal. Local Codes generally provide a procedure for appealing a decision on a building permit to a body of the municipality, such as the governing body. Appeals from decisions of the governing body can then be made to the Court of Common Pleas.

State Approvals and Permits

1. NPDES Permits for Discharges of Stormwater Associated with Construction Activities

All construction activities disturbing greater than one acre of land must obtain an NPDES permit for discharges of stormwater associated with those activities. The NPDES permit covers not only stormwater associated with the actual construction process, but post-construction stormwater as well.

Applicants are required to submit an Erosion and Sedimentation (E&S) Control Plan designed to control runoff and protect the water quality of the receiving stream during construction. Applicants must also submit a Post-Construction Stormwater Management Plan that identifies Best Management Practices (BMPs) for managing stormwater and protecting the water quality of the receiving stream after construction is completed. Where Act 167 Stormwater Management Plans have been adopted, applicants must also meet the requirements of the municipality's Stormwater Management Ordinance adopted pursuant to the Act 167 Plan.

For the most part, a general permit (PAG-2) is sufficient. However, in certain circumstances, such as proposed construction in High Quality or Exceptional Value watersheds, an individual permit is required.

DEP is responsible for reviewing and issuing NPDES permits for discharges of stormwater associated with construction activities. However, in many counties throughout Pennsylvania, the County Conservation District has been delegated certain authority to process permits. Check your regional DEP office and County Conservation District Office to see which agency has what duties under this program.

Opportunity for public participation and comment. Notice of applications for individual NPDES permits received by DEP or County Conservation Districts is published in the *Pennsylvania Bulletin*, www.pabulletin.com. Notice of applications for general permits is not published. Once received, permit applications are public information and can be reviewed upon request. As a general rule you can submit comments on applications any time prior to a final decision on the application. Notice of issuance of both general and individual permits is published in the *Bulletin*.

If the application is one for an individual permit because of its location in a High Quality or Exceptional Value watershed, you may be able to request a public hearing on the application. Requests for a public hearing should be made in writing to appropriate DEP regional staff, and should state the reasons for the request. Whether to hold a public hearing is left to DEP's discretion.

Challenges to NPDES stormwater permits. Permit issuances may be appealed to the Environmental Hearing Board within 30 days after notice of the issuance is received.

2. Water Obstruction and Encroachment Permits

If the proposed development contemplates any fill or earth disturbance in a wetland, watercourse or floodway, or the placement of any crossing (such as a bridge or culvert) over a wetland, watercourse or floodway, the developer will need a Water Obstruction and Encroachment Permit (also known as a “Chapter 105 Permit”) from DEP.

General permits are available for some minor encroachments and water obstructions (such as minor road crossings, utility line crossings and private residential construction in wetlands where the impact to wetlands is no greater than one-half acre and the lot is part of a subdivision approved prior to November 22, 1991). For some counties in Pennsylvania, the County Conservation District may be authorized to process such general permits. However, for water obstructions and encroachments of greater impact, individual permits are needed, and DEP reviews and issues them.

Opportunity for public participation and comment. As with NPDES permits, notice of applications for individual encroachment and water obstruction permits received by DEP is published in the *Pennsylvania Bulletin*, www.pabulletin.com. Once received, these applications are public information and can be reviewed upon request. As a general rule you may submit comments on applications any time prior to a final decision on the application. Notice of final individual permits issued is also published in the *Bulletin*.

Although whether to hold a public hearing on a water obstruction and encroachment permit is wholly within DEP’s discretion, you can request a public hearing by writing to appropriate DEP regional staff, stating the reasons for the request.

Challenges to water obstruction and encroachment permits. Permit issuances may be appealed to the Environmental Hearing Board within 30 days after notice of the issuance is received.

3. Sewage (Act 537) Approvals

The proposed development must undergo sewage facilities planning approval (the “Act 537” process). Act 537 is the Pennsylvania Sewage Facilities Act. It requires municipalities to develop and implement an official sewage plan (“Act 537 Plan”) that addresses their present and future sewage disposal needs. When a new land development project is proposed for the municipality, the municipality must modify its Act 537 Plan to meet the additional sewage disposal needs of the new development. The municipality then submits the modification to DEP for review and approval. Methods of handling sewage can include: (1) connections or extensions to existing public sewage systems; (2) on-lot systems; or (3) small wastewater treatment facilities (commonly referred to as “package plants”). The type of system that is appropriate for each development will vary according to the specific circumstances of each case, such as site conditions, local requirements, and the size and nature of the proposed development.

Act 537 does allow for certain developments under certain circumstances to be exempt from the Act 537 planning process. These include:

- (1) Developments to be served by individual on-lot systems, where: the current Act 537 Plan shows the area is to be serviced by on-lot systems; the soils are adequate to handle the waste and prevent ground and surface water contamination; the lots are greater than one acre and allow for both a primary and replacement system on each lot; and the development is not located in a High Quality (HQ) or Exceptional Value (EV) watershed.
- (2) Developments to be served by a connection to or extension of existing public sewers where: the sewer system (including the treatment plant) is in compliance; it is not overloaded and is not expected to overload within the next 5 years; it has sufficient capacity to receive and treat the new sewage flows; and the municipality has a current Act 537 Plan that is being implemented.

25 Pa. Code § 71.51.

If the proposed development does not qualify for an exemption, requests for modifications to the municipality's Act 537 Plan must be submitted as a "Planning Module." Typically the developer or its consultant prepares the Planning Module, and then submits it to the municipality for review. If the municipality approves the Module, it is then submitted to DEP for review and approval.

Upon its review, DEP may determine that the development qualifies for an "exception," if the development does not exceed ten lots and has soils and site conditions suitable for on-lot systems. If these circumstances do not exist, upon its review, DEP will determine whether to approve the Module as a "revision" to the municipality's official Act 537 Plan. In some instances, DEP may delegate its review and approval authority to a local agency (municipal, multi-municipal, county or multi-county). The local delegated agency reviews and approves the Module, not as a revision, but as a "supplement" to the Act 537 Plan.

Opportunity for public participation and comment. The sewage facility planning regulations require either the developer or the municipality to publish notice of Planning Modules for certain proposed developments (i.e., subdivisions of 50 lots or more; developments that will increase flow to existing sewage treatment plants by 50,000 gallons/day or more; developments that will involve a major change in the growth projections set forth in current the Act 537 Plan, etc.). The notice will be published in a local newspaper, will state where the Module can be reviewed by the public, and will invite comments to be sent to the municipality.

The municipality is not required to conduct public meetings or hearings on an Act 537 Plan revision request, but may, at its discretion, hold a meeting or hearing upon the request of concerned residents.

Challenges to Act 537 approvals. DEP approvals of Act 537 Plan revisions may be appealed to the Environmental Hearing Board within 30 days after notice of the approval is received.

4. NPDES Permits for Discharge of Sewage and Water Quality Management (Part II) Permits

If the sewage from the development is proposed to be treated using a small sewage treatment system that collects and treat the wastewater from the subdivision (commonly referred to as a “package plant”), the developer will need to apply for an NPDES point source discharge permit for the discharge of treated sewage from the plant. If the treatment facility is a “Small Flow Treatment Facility” (i.e., designed to treat flows not greater than 2000 gallons/day), does not discharge into a High Quality (HQ) or Exceptional Value (EV) watershed, and various other conditions are met, a recently issued general permit (PAG-4) may be sufficient. In most circumstances, however, an individual NPDES permit will be needed.

In addition, an application for a Water Quality Management (Part II) Permit will be needed, which authorizes and sets forth the specifications for construction and operation of wastewater treatment facilities. If the treatment facility is a “Small Flow Treatment Facility” (i.e., designed to treat flows not greater than 2000 gallons/day) and does not discharge into a High Quality (HQ) or Exceptional Value (EV) water body, a Part II general permit (WQG-01) is sufficient. Otherwise, an individual permit is required.

Opportunity for public participation and comment. Notice of applications for NPDES and Water Quality Management (Part II) permits received by DEP are published in the *Pennsylvania Bulletin*, www.pabulletin.com. Once received, these applications are public information and can be reviewed upon request. As a general rule you can submit comments on applications any time prior to a final decision on the application.

Although whether to hold a public hearing on NPDES or Water Quality Management (Part II) Permits is wholly within DEP’s discretion, you can request a public hearing by writing to appropriate DEP regional staff, stating the reasons for the request.

Challenges to encroachment permits. Permit issuances may be appealed to the Environmental Hearing Board within 30 days after notice of the issuance is received.

5. Public Water Supply Permits

If the development proposes to construct a community or non-community public water supply system to serve the water supply needs of the proposed subdivision, a water supply permit from DEP will be needed. A **public water supply system** is defined as one that has at least 15 service connections and regularly serves an average of at least 25 individuals at least 60 days out of the year. A **community** public water system is one that serves at least 15 service connections used by year-round residents or regularly

serves at least 25 year-round residents. All other public water systems are categorized as **non-community** systems.

When reviewing applications for water supply permits, DEP must consider whether the issuance of the permit will be prejudicial to public health, and whether it would violate all other applicable laws, including the Clean Streams Law. In *Oley Township v. DEP and Wissahickon Spring Water, Inc.*, 1996 EHB 1098, where the withdraw of water for a public water supply may dewater and therefore adversely affect adjacent Exceptional Value wetlands, the Clean Streams Law would be violated, and failure of DEP to consider this was grounds for vacating the permit.

No DEP permits are needed if water is to be supplied to residents of the proposed subdivision via individual private wells or an extension of existing public water lines.

Opportunity for public participation and comment. Notice of applications received for public water supply permits are published by DEP in the *Pennsylvania Bulletin*. As with any permit under DEP review, members of the public may submit comments any time prior to the permit's issuance.

Challenges to public water supply permits. DEP permit issuances may be appealed to the Environmental Hearing Board within 30 days after notice of the issuance is received.

6. Pennsylvania Historical and Museum Commission (PHMC) Review

As part of the permit review process for some DEP permits, a cultural resource review is conducted by the Pennsylvania Historical and Museum Commission (PHMC). With respect to those DEP permits that may be needed for a development, a PHMC cultural resource review is required for: (i) individual encroachment and water obstruction (Chapter 105) permits; (ii) NPDES permits for discharges of stormwater associated with construction activities where the earth disturbance is greater than 10 acres; and (iii) sewage (Act 537) approvals for new development.

Pursuant to the Pennsylvania State History Code, PHMC is charged with protecting significant archeological and historic resources. DEP cooperates with PHMC in this regard by requiring permit applicants to submit a "Cultural Resource Notice" to PHMC. PHMC staff reviews the proposed project to determine the presence of and impact on archeological and historical resources. If PHMC determines that the project site is a significant archeological site, it may conduct an archeological survey and, further, an archeological field investigation ("Phase 3 Study").

Although PHMC has no authority to deny a permit or stop a proposed project, PHMC may provide comment to DEP that archeological or historical resources will be adversely impacted by the proposed project. DEP may then consider these comments in deciding whether to issue the permit.

Opportunity for public participation and comment. There is no formal public participation and comment period for PHMC reviews. However, if you are aware of potential archeological or historic features on a particular site, you should contact PHMC and share this information.

Challenges related to historical issues. Depending on the facts and circumstances of the case, failure to consider archeological or historical resources may be an issue to be raised in the appeal of the issuance of a DEP permit to the Environmental Hearing Board.

7. Pennsylvania Natural Diversity Inventory (PNDI) Review

All DEP permits and approvals involve a Pennsylvania Natural Diversity Inventory (PNDI) review to determine if the proposed project will impact plant or animal species of special concern, rare and exemplary natural communities, or unique geologic features.

The PNDI is a database that identifies and describes Pennsylvania's most rare and significant ecological features. It was established through a partnership between the Pennsylvania Department of Conservation and Natural Resources (DCNR), the Western Pennsylvania Conservancy and The Nature Conservancy. This partnership works to survey and collect information on plant and animal species of special concern (such as state or federally listed threatened or endangered species or candidate species), rare and exemplary natural communities, or unique geologic features.

Applicants for all DEP permits and approvals must complete a "PNDI Search Request Form" with their application. DEP or County Conservation District staff will then perform a PNDI search. If the search reveals that there is a known occurrence of a species or resource of concern (referred to as a "hit"), DEP or the County Conservation District will inform the applicant and the agency responsible for jurisdiction over the protection of the resource (the "Jurisdictional Agency"). For example, in the case of a state listed threatened or endangered fish, the Pennsylvania Fish and Boat Commission would be the Jurisdictional Agency. In the case of a federally listed threatened or endangered species, the U.S. Fish and Wildlife Service would be the Jurisdictional Agency.

If a "hit" is found, the Jurisdictional Agency will take the lead in coordinating further review. This will include requests for more detailed information and, potentially, a field review to determine the potential impact on the species or resource of concern. Because of staff limitations, Jurisdictional Agencies will often request that the applicant secure the services of a professional environmental consultant to conduct the field review.

Jurisdictional Agencies then coordinate and work with the applicant and DEP and/or the County Conservation District to develop a mitigation plan ensuring that impacts to the species or resource of concern are avoided or minimized.

If the PNDI search for the property results in a "hit" for a federally listed threatened or endangered species, the U.S. Fish and Wildlife Service is contacted as the "Jurisdictional

Agency.” For more information on Fish and Wildlife Service involvement, see pages 19-20 (“Endangered Species Act Review”).

Opportunity for public participation and comment. The PNDI review is part of the DEP permit review process, so issues concerning species or resources of concern can be raised by members of the public under the standard public participation and comment procedures for the permit or approval at issue. In addition, the PNDI partnership is in the process of making the PNDI database available to the public online, so that anyone can access it and perform PNDI searches.

Challenges related to PNDI issues. Depending on the facts and circumstances of the case, failure to consider or properly mitigate impacts to species or resources of concern may be an issue to be raised in the appeal of the issuance of a DEP permit to the Environmental Hearing Board.

8. Highway Occupancy Permits

If the proposed development requires access to a state highway, the developer must obtain a Highway Occupancy Permit (HOP) from Pennsylvania Department of Transportation (PennDOT). A Traffic Impact Study analyzing the impact of the proposed development on existing traffic patterns may also be required.

Opportunity for public participation and comment. Although you can make a request at the PennDOT District Office to review an HOP application, recent case law suggests that PennDOT may deny such a request. *Martella v. Department of Transportation*, 941 A.2d 633 (Pa Cmwlth. 2004) (holding that HOP application is not a public record under the Right-To-Know Law in that, because it was not approved, it is not a decision fixing the personal or property rights of a person).

Challenges to HOPs. PennDOT issuances of HOPs may be appealed to a PennDOT administrative law tribunal, which hears and adjudicates the appeal. Final adjudications of the PennDOT hearing officer may be appealed to Commonwealth Court.

Federal Approvals and Permits

1. Section 404 Clean Water Act Permits

As stated above, if the proposed development contemplates any fill or earth disturbance in a wetland, watercourse or floodway, or the placement of any crossing (such as a bridge or culvert) over a wetland, watercourse or floodway, the developer will need a state Chapter 105 Permit from DEP. In addition, the developer may need a federal Section 404 Permit. Section 404 Permits are issued by the U.S. Army Corps of Engineers (the “Corps”) pursuant to their authority under Section 404 of the Clean Water Act. They are required for any discharge of dredged or fill material into “waters of the United States.”

Some minimal activities (such as activities that impact less than 250 linear feet of stream or less than one acre of wetlands) may avoid Section 404 permit review by the Corps by qualifying for a “joint permit” review process. If the Corps determines that an activity is eligible for a joint permit, DEP (or an authorized County Conservation District) will take the lead in reviewing the permit application and, if a permit is warranted, will issue concurrently a state Chapter 105 Permit and a federal Section 404 general permit known as the “Pennsylvania State Programmatic General Permit (PASPGP-2).” If a developer’s proposed activity does not qualify for joint permit review, DEP and the Corps will conduct independent permit reviews and will make separate decisions on Chapter 105 and Section 404 permits.

Opportunity for public participation and comment. The Corps gives public notice of receipt of Section 404 permit applications and invites public comment. Public Notices are distributed for posting in post offices or other appropriate public places in the vicinity of the site, to local and county officials, and other interested parties. 33 CFR § 325.3(d). Members of the public may submit written comments and may also request a public hearing. Public hearings are held at the Corps discretion when it feels that public comments received raise substantial issues which cannot be resolved informally and a hearing will aid the permit decision making process.

Challenges to Section 404 Permits. Section 404 Permits issued by the Corps may be challenged by filing an action in federal district court.

2. National Environmental Policy Act (NEPA) Review

The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental consequences of “major federal actions” that “significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA review first requires federal agencies undertaking major federal actions to prepare an Environmental Assessment (EA), which analyzes the proposed action’s effect on the environment. If the EA concludes that the impact is insignificant, the agency will prepare a “Finding of No Significant Impact” (FONSI), which will conclude the NEPA review process. If the EA concludes that significant impacts to the environment will occur, the agency proceeds to prepare an Environmental Impact Statement (EIS). The results of the EIS can help guide

the agency in its decision making process with respect to whether to proceed with the major federal action as planned.

Obviously, the vast majority of land development projects are not undertaken by federal agencies but, rather, private developers. Nonetheless, aspects of a land development project may be sufficiently “federalized” such that they are considered “major federal actions,” triggering NEPA review. For example, if Section 404 Permits are needed to fill wetlands or streams, the Corps’ issuance of these permits may be considered a “major federal action.” Another possibility may be federal funding for the sewage treatment system to be constructed for the development, depending on the amount of federal funding involved and provided that federal dollars are an actual, not just potential, funding source.

Opportunity for public participation and comment. Members of the public are to be notified of NEPA-related hearings, public meetings and the availability of environmental documents. 40 CFR § 1506.6(b). Hearings may be held at the discretion of the reviewing agency if there is substantial environmental controversy concerning the proposed action, or substantial interest in holding a hearing. 40 CFR § 1506.6(c)(1). Once a draft EIS is prepared, the public is invited to submit written comments. 40 CFR § 1503.1.

Challenges to NEPA decisions. NEPA challenges may be raised in an action filed in federal district court pursuant to the federal Administrative Procedure Act.

3. Endangered Species Act Review

If the PNDI search (see page 16) for the property results in a “hit” for a federally listed threatened or endangered species, the U.S. Fish and Wildlife Service is contacted as the “Jurisdictional Agency.”

If the endangered or threatened species may be impacted by a federal permit that the developer needs (such as a Section 404 Clean Water Act permit issued by the U.S. Army Corps of Engineers to discharge fill into a wetland), the “federal consultation” process under Section 7 of the Endangered Species Act is triggered. Section 7 requires all federal agencies conducting federal projects (such as the issuance of permits) that may adversely affect threatened or endangered species to consult with the Fish and Wildlife Service in order to ensure that the continued existence of the species is not jeopardized nor its critical habitat adversely modified. If consultation reveals that the species may be adversely affected, the Fish and Wildlife Service proceeds to prepare a Biological Opinion. If the Biological Opinion results in a “jeopardy” or “adverse modification” determination, the Opinion must identify any “reasonable and prudent alternatives” that would allow the project to move forward.

Development of the site may also result in the “take” (harass, harm, kill, significant habitat modification, etc.) of the species, which is illegal under Section 9 of the Endangered Species Act. In such a case, the developer may apply for an “incidental take

permit” under Section 10 of the Endangered Species Act. The application for an incidental take permit must be accompanied by a “Habitat Conservation Plan” designed to ensure that the effects of the incidental take are adequately minimized and mitigated.

Opportunity for public participation and comment. The Fish and Wildlife Service publishes notice of applications for incidental take permits in the *Federal Register* and provides an opportunity for public comment, generally 60 days.

Challenges to Endangered Species Act decisions. Challenges to decisions under the Endangered Species Act may be made by filing an action in federal district court pursuant to Section 11 of the Act (citizen suit provision).