

Resolution of Wetland and Stormwater Permitting Issues at Brownfield Redevelopment Sites

**PRESENTED AT
CURRENT ISSUES IN STORM WATER
REGULATION IN PENNSYLVANIA**

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Prologue

At the risk of seeming presumptuous to have a prologue for a 25 page paper, there are several things I want to point out before you dive in. First, my co-author Carol DiPrinzio impressed me by grappling successfully with some complicated regulations and by contributing excellent writing in addition to editing the paper many times.

Second, we devote significant space to discussion of the different opinions issued in the Supreme Court Rapanos case on wetlands. The case is over six years old but merits detailed discussion because the Army Corps/EPA master guidance on wetland jurisdiction was issued in 2011 and is extremely focused on tracking the two opinions which define the jurisdiction tests adopted by the Corps. Therefore the ability to both understand and to critically examine the guidance are significantly enhanced by an understanding of its legal history.

Last, a number of wetland and stormwater guidance and permit application items have been revised in the last two years—particularly PA stormwater Chapter 102 regulations and guidance. Check the footnotes carefully to assure that copies you may already have on file are current.

I. Introduction

The redevelopment of Brownfield sites presents unique concerns pertaining to the regulation of stormwater and the protection of wetlands. Stormwater permitting, which is often focused primarily upon limiting erosion and sedimentation, assumes an additional water quality dimension because of the possibility of contaminated storm runoff. Moreover, the planning and regulatory approvals associated with runoff control infrastructure are also more complicated because of the possibility that construction of detention basins and drainage lines will encounter contaminated soils.

Wetland permitting is a potentially time consuming regulatory quagmire, worth avoiding whenever possible, at any development site. Brownfield sites can complicate wetland issues in several ways. First, there may be existing, non-permitted encroachment upon wetland areas, with limited site options for eliminating the encroachment. Second, there may be ongoing water quality impact to a wetland because of uncontrolled surface runoff or shallow contaminated groundwater. Third, necessary remediation of the site may itself present the potential for disturbance of a wetland area, either directly or indirectly.

In order to manage both stormwater and wetland regulatory concerns at Brownfield sites, it is critical for developers to undertake extensive site investigation early on. This strategy allows for the necessary strategy planning as well as providing the

data that will be necessary to successfully complete the permitting process with minimal delays.

It is also important for developers to manage the local land development approval process in a timely and effective manner. Brownfield sites often attract extensive public participation which can result in project delays and additional regulatory conditions imposed by local authorities.

II. WETLAND PERMITTING STRATEGIES

A. Overview of Wetland Regulations

Wetlands in Pennsylvania are regulated by three different government agencies. The United States Environmental Protection Agency (USEPA) has jurisdiction pursuant to Section 404 of the Clean Water Act (CWA).¹ Pursuant to this authority, EPA issues its 404(b) Guidelines² and oversees the issuance of permits applicable to “dredging or filling” of wetlands. The agency that actually administers the permit program at the federal level is the United States Army Corps of Engineers (U.S. Army Corps), which also implements authority under Sections 10 and 13 of the Rivers and Harbors Act,³ and Army Corps regulations at 33 CFR § 320.4. The Pennsylvania Department of Environmental Protection (PADEP) regulates wetlands pursuant to the Dam Safety and

¹ 33 U.S.C. § 1344.

² 40 CFR §§ 230–233.

³ 33 U.S.C. §§ 403, 407. (Section 407 is often referred to as the Refuse Act).

Encroachments Act⁴ and Chapter 105 of the Dam Safety and Waterways Management regulations.⁵

Individual site wetland construction permits can be an administratively complex and lengthy process, involving environmental impact review by multiple agencies.⁶ Thus, the first goal of the regulated party is to qualify, if possible, for a “nationwide permit” under Army Corps regulations.⁷ Another streamlined process is the statewide general permit administered jointly by the Army Corps and PADEP.

B. Federal Jurisdiction Issues—From *Rapanos* to EPA/Corps Guidance

1. Brief History of Jurisdiction Issue

Section 404 of the CWA authorizes federal regulation of “navigable waters,” which the Act defines as “waters of the United States.”⁸ There has been substantial litigation over the years regarding the definition of the phrase “waters of the United States,” and the limits, generally, of federal jurisdiction over wetlands.

In its 1985 decision in *United States v. Riverside Bayview Homes, Inc.*, the Court introduced what has become known as the “substantial nexus test,” holding that wetlands adjacent to a traditional navigable water constitute waters of the United States.⁹ In its 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the Court refused to uphold the government’s position that

⁴ 32 Pa. Stat. Ann. §§ 693.1–693.27.

⁵ 25 Pa. Admin. Code § 105. Wetland regulations are found at Sections 105.17–105.20a. DEP is also the lead agency for implementation of the federal Coastal Zone Management Act program. *See* Pa. Exec. Order No. 1980–20, 4 Pa. Admin. Code §§ 1.361–1.365.

⁶ *See, e.g.*, U.S. Army Corps of Eng’rs regulations at 33 CFR § 320.4.

⁷ *See* 33 CFR §§ 325, 330 (Corps Divisions or Districts may also issue “regional permits,” applicable only within their jurisdictions).

⁸ 33 U.S.C. §§ 1341, 1344.

⁹ 474 U.S. 121 (1985).

isolated, intrastate, non-navigable waters could be regulated under the CWA solely due to the presence of migratory birds that travel interstate.¹⁰

The Court's most recent attempt to clarify wetland jurisdiction was its 2006 decision in *Rapanos v. United States*,¹¹ which addressed the extent to which jurisdiction could extend to non-navigable tributaries of navigable waters. When the decision was published, many observers felt that wetland jurisdiction had become more obfuscated than clarified. Within the five-Justice plurality of this 5-4 decision were two distinct tests—one articulated by Justice Scalia on behalf of four justices, and one concurring opinion by Justice Kennedy.¹² Nevertheless, as discussed below, the decision triggered several subsequent circuit court opinions and policy guidance by EPA and the Army Corps, which resulted in the detailed jurisdictional rules under which we currently operate.

Justice Scalia, writing for the four justice plurality,¹³ reasoned that waters of the United States extend beyond traditional navigable waters to include “relatively permanent, standing or continuously flowing bodies of water,” excluding “channels through which water flows intermittently or ephemerally, or channels that periodically

¹⁰ 531 U.S. 159 (2001).

¹¹ 547 U.S. 715 (2006) (consolidating *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004) and *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004)).

¹² A brief note here for the non-lawyers—one of the important dynamics of the Supreme Court is that reaching a verdict is only one part of the process. The detailed rationale set forth in the majority or plurality opinion become the basis upon which future litigants in lower courts will either cite or distinguish the decision. In many cases, one or more Justices issue concurring opinions which agree with the result, but articulate different legal arguments. Concurring opinions are not officially considered to project binding legal precedent. Nevertheless, they can become important for measuring how the Court might rule in a future matter.

¹³ Three of the four dissenting justices joined in a dissenting opinion by Justice Stevens. Justice Steven's opinion expanded the tests proposed by the plurality and concurrence by focusing on ecological connections and only restricting regulatory authority where the term “navigable” would be rendered meaningless. *Id.* at 787–812.

provide drainage for rainfall.”¹⁴ Scalia declined to limit relatively permanent waters to exclude waters that dry up in extraordinary circumstances, such as seasonal rivers.¹⁵ According to the plurality, only a wetland with “a continuous surface connection” to other jurisdictional waters is considered adjacent and therefore jurisdictional, as is required by the earlier *Riverside Bayview* decision.¹⁶

Justice Kennedy concurred with the plurality’s conclusion, however he wrote separately to disagree with the plurality’s jurisdictional test. Under Kennedy’s test, wetlands are jurisdictional if there is a “significant nexus” to traditional waters, meaning the wetlands “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of the covered waters readily understood as ‘navigable.’”¹⁷ While the plurality requires a surface water connection to find jurisdiction, Kennedy’s concurrence requires a finding that the wetland significantly affects the chemical, physical, and biological integrity of jurisdictional waters, regardless of a surface water connection. Although Kennedy’s significant nexus test appears more stringent, it may render a wetland jurisdictional where the plurality’s relatively permanent test would not—in the case of a wetland that lacks a surface connection with other waters, but significantly affects the chemical, physical, and biological integrity of nearby jurisdictional water.

¹⁴ *Id.* at 739.

¹⁵ *Id.*

¹⁶ *Id.* at 742.

¹⁷ *Id.* at 752–87.

2. Defining the *Rapanos* Standard Splits Circuits

In the five years following *Rapanos*, federal courts grappled with the distinction between Scalia’s relatively permanent test and Kennedy’s significant nexus test, as well as the legal procedural issue of how much weight can be given to a concurring opinion.¹⁸ The First, Eighth, and Third Circuits will find jurisdiction over a wetland if either the Scalia or Kennedy test is met.¹⁹ Contrastly, the Seventh, Ninth, and Eleventh Circuits will only apply Kennedy’s test.²⁰ Other circuits have not expressly decided the issue.²¹ Within five years of *Rapanos*, there was a new split of authority among the circuit courts, with our own Third Circuit taking the position that the Scalia and Kennedy tests both apply.

The Seventh, Ninth, and Eleventh Circuits have concluded that Kennedy’s concurrence is the narrower of the two majority opinions, reasoning that a majority of Justices would have presumably assented to its application and therefore, it should control pursuant to the test set forth in *Marks v. United States*.²²

¹⁸ Specifically, the circuits disagree as to the correct application of the “Marks Rule,” articulated by the Supreme Court in *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the Supreme Court explained that in cases where a majority of the Court agrees only on the outcome, but not the grounds for that outcome, lower-court judges must follow the narrowest ground to which a majority of the Justices would have assented. *Marks*, 430 U.S. at 193.

¹⁹ *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009).

²⁰ *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006); *N. Cal. River v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

²¹ The Fourth, Fifth, and Sixth Circuits avoided the issue in ruling that both tests were met by the facts presented. *Precon Dev. Corp. v. United States Army Corps of Eng’rs*, 633 F.3d 278 (4th Cir. 2011); *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009). The Second and Tenth Circuits have not expressly weighed in on the appropriate jurisdictional standard, although the Second Circuit appears to apply Kennedy’s concurrence, without explicitly stating its intention to apply it as the exclusive jurisdictional test. *Cordiano v. Metacon Gun Club Inc.*, 575 F.3d 199 (2d Cir. 2009); *NRDC v. FAA*, 564 F.3d 549 (2d Cir. 2009).

²² *Gerke*, 464 F.3d at 724; *N. Cal. River*, 496 F.3d at 999–1000 (citing *Marks*, 430 U.S. at 188). Only the Eleventh Circuit addressed whether Kennedy’s test should be applied in the rare case in which Kennedy’s test may prohibit jurisdiction otherwise permitted by the plurality—cases where there is only a slight surface water connection between wetlands and a non-navigable tributary, but no biological connection—

The First, Third, and Eighth Circuits interpreted the Marks rule to require identification of a common principle that would incorporate both tests.²³ In so doing, they have disagreed with the Seventh, Ninth, and Eleventh Circuits' application of *Marks* and held that jurisdiction exists if either the test set forth by the plurality or Kennedy's concurrence is met.²⁴ As discussed below, the Army Corps and EPA have incorporated the dual test approach into detailed guidance issued in April 2011.²⁵

3. EPA and Army Corps Guidance on Wetland Jurisdiction

The following outlines how property owners can interpret the application of either test pursuant to the agencies' guidance. In addition to traditional navigable waters, interstate waters and certain tributaries, agencies will assert jurisdiction over waters with a significant nexus to traditional navigable waters or interstate waters. Although a hydrologic connection is not necessary, waters that trap sediment, recycle nutrients, trap and filter pollutants, retain flood waters, store runoff, or in other ways impact the aquatic habitat of traditional navigable waters or interstate waters will be considered to satisfy the

ruling that Kennedy's concurrence provides the exclusive test for determining the scope of jurisdiction, regardless of whether the plurality would have found jurisdiction existed. *Robison*, 505 F.3d at 1221.

²³ In so doing, the courts considered that the dissenting opinion in *Rapanos* explicitly endorsed both the plurality and concurring opinions' jurisdictional tests.

²⁴ *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009). Reasoning that Kennedy's test may find jurisdiction in some cases that do not satisfy the plurality's test, and vice versa, the First, Third, and Eighth Circuits have concluded that neither the plurality's test nor Kennedy's test provide narrower grounds and therefore, a strict application of *Marks* is not a workable framework for interpreting *Rapanos*.

²⁵ See U.S. Env'tl. Prot. Agency & U.S. Army Corps of Eng'rs, Memorandum, "Draft Guidance on Identifying Waters Protected by the Clean Water Act" (Apr. 27, 2011) (reasoning that jurisdiction should be found if either test is satisfied because a majority of Justices support either standard), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf. The previous guidance was issued December 2, 2008, revising an earlier guidance dated June 6, 2007, based on public comments.

significant nexus test. If the effects on the physical, chemical, or biological integrity of downstream traditional navigable waters are speculative or insubstantial, such waters are not jurisdictional. Thus, Kennedy’s significant nexus test requires a predictable or observable chemical, physical, or biological functional relationship between similarly situated waters and the traditional navigable water or interstate water. If a significant nexus is found for one water in the watershed, similarly situated waters will generally satisfy the substantial nexus test.

The agencies will also exert jurisdiction over adjacent wetlands. The guidance has defined *Rapanos* to mean that if a wetland is adjacent to a traditional navigable water or non-wetland interstate water, a finding of adjacency is sufficient in and of itself to demonstrate that the wetland is jurisdictional. However, a wetland adjacent to a jurisdictional water body other than a traditional navigable water or interstate water must demonstrate a significant nexus between the adjacent wetland and traditional navigable water or non-wetland interstate water.²⁶

In defining “adjacent,” the agencies recognize wetlands separated from other jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and “bordering, contiguous or neighboring” wetlands as adjacent. A bordering, contiguous or neighboring wetland can be identified by an unbroken surface or shallow sub-surface hydrologic connection between the wetland and jurisdictional water. A wetland is

²⁶ Under the *Rapanos* plurality, an adjacent wetland is jurisdictional when it is adjacent to a relatively permanent, non-navigable tributary that is connected to downstream water, and a continuous connection exists between the wetland and relatively permanent tributary where the wetland directly abuts the water. Justice Kennedy offered a different analysis, stating that an adjacent wetland is jurisdictional where such wetland meets the definition of “adjacent” as defined by the agencies’ regulations and is either (1) adjacent to a traditional navigable water or non-wetland interstate water; or (2) adjacent to a tributary, lake, reservoir, or other jurisdictional water (except a wetland) and alone or in combination with another adjacent wetland in the watershed, has a significant nexus to the nearest downstream traditional navigable or interstate water.

neighboring where its physical proximity to jurisdictional water is reasonably close, or there is a demonstrable ecological interconnection. A landscape where wetlands and non-wetland components are too numerous and closely associated to be appropriately delineated or mapped separately, known as a wetland mosaic, will ordinarily be considered collectively when determining adjacency because such areas generally act as one single ecological unit. Isolated, intrastate, non-navigable wetlands that do not meet the regulatory definition of adjacent are not jurisdictional waters.

As is evident, interpreting and applying EPA's regulations over wetlands may be complicated. Brownfield developers need to be wary of wetland areas which appear isolated, but may satisfy the significant nexus test, for example via groundwater or a series of drainage ditches. To resolve this uncertainty, an approved or preliminary jurisdictional determination (JD) may be requested from the Army Corps. An approved JD is an official Army Corps determination that jurisdictional waters of the United States are present or absent on a particular site and constitutes an official, written representation that jurisdictional findings are correct.²⁷ These findings can be relied on for five years and may be immediately repealed. In contrast, a preliminary JD is not a legally binding determination of jurisdiction.²⁸

4. Judicial Review of EPA Administrative Orders Requiring Wetland Permit for Construction Project already commenced

Prior to 2012, EPA maintained the option of issuing a Clean Water Act administrative order seeking wetland permit coverage, without having to defend the order in court prior to actual EPA enforcement of the order. This allowed EPA to exert

²⁷ U.S. Army Corps of Eng'rs, Regulatory Guidance Letter, No. 08-02, ¶ 2 (June 26, 2008), *available at* <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf>.

²⁸ *Id.* at ¶ 4.

significant pressure on a developer who had already commenced a project. Earlier this year, the Supreme Court affirmed a Ninth Circuit holding that such an order can in fact be challenged in court, at least with respect to the issue of jurisdiction over the wetland in question. The Court found that a complete preclusion of judicial review would violate constitutional due process protection.²⁹

C. Obtaining Necessary Permits for Jurisdictional Wetlands

1. PADEP State Permits

The DEP permit review is governed by the Section 105 regulations. The regulations provide for 16 permitting waiver exceptions.³⁰ There are also 15 State General Permits for minor impact activities, such as road crossings and utility crossings.³¹ However, if the affected wetlands are considered “exceptional value wetlands” pursuant to Section 105.17, the criteria of Section 105.18(a) are applied. In these cases, applicants must prove, among other things, water dependency, no practical alternative, and no adverse impact on the wetland, while implementing complete mitigation of any wetland loss. In general, as mentioned above, such permits will be difficult to obtain.

If a project does not qualify for a waiver or general permit, one can try to qualify for a “small project permit” having limited information submission requirements.

However, in most cases, a standard permit will be required in accordance with Section

²⁹ *Sackett v. EPA*, 520 U.S. 154 (2012). In *Sackett*, the only manner for plaintiffs to dispute a compliance order issued by the EPA was to seek a CWA wetlands permit, the cost of which may have exceeded the value of the property. The lower courts precluded the Sacketts from requesting judicial review of the order unless EPA filed an enforcement action, which it had not. The Supreme Court held that the property owners had a constitutional right to seek judicial review of the compliance order, rejecting EPA’s compliance procedures.

³⁰ 25 Pa. Code § 105.12.

³¹ See 25 Pa. Code § 105, Appx A-O.

105.13 to be reviewed against the criteria set forth in Section 105.14, including aquatic life, water quality, property rights downstream, and extent of water dependency.

The wetland delineation criteria applied by DEP are the same as those utilized by the Army Corps. 25 Pa. Code Section 105.451 incorporates by reference the Army Corps 1987 Wetland Delineation Manual and associated guidance.³²

2. Army Corps Nationwide Permits

There are 52 Nationwide Permits (NWP) administered by the Corps.³³ These permits apply generic requirements to various common construction scenarios, much like a state general permit would do. The nationwide permits most commonly applied to Brownfield redevelopment sites are NWP 12 (utility lines), NWP 29 (Residential Development) NWP 39 (Commercial and Institutional Developments), NWP 43 (Stormwater Management Facilities) and NWP 38 (Cleanup of Hazardous and Toxic Waste).

There are 31 “General Conditions” applicable to some or all NWPs. Some of the NWPs also include special Regional Conditions. This is in addition to the official Regional Conditions that may be included with specific NWPs. Moreover, there are some General Conditions that only apply in specific states.³⁴ NWPs generally only apply to projects disturbing ½ acre of wetland or less and less than 300 linear feet of stream. Some have smaller threshold requirements.

³² The regulation does not mention the 180 page Regional Supplement to the manual, issued in November 2010, but one should assume that it is included in the requirements.

³³ See Army Corps of Eng’rs, Special Public Notice No. 12-17 (July 31, 2012), *available at* <http://www.lrp.usace.army.mil/or/or-f/Documents/PNs2012/PN12-17rev.pdf>.

³⁴ See e.g., Baltimore District, Nationwide Permits Regional Conditions (2012), *available at* http://www.nap.usace.army.mil/Portals/39/docs/regulatory/nwp/2012_PA_reg_cond.pdf.

In order to determine the applicability and feasibility of a Nationwide Permit, the first question is whether the project is eligible for a Pennsylvania General Statewide Permit (PAGSP), issued in conjunction with the Army Corps (see discussion below). If so, a number of NWPs would be “suspended” by the PAGSP. NWP 12, 29, 39, and 43 referenced above would be potentially suspended, but not NWP 38.

Regardless of potential NWP suspension, it is important to assess the substantive requirements of an applicable NWP—“suspension” is primarily a way to consolidate review of permit conditions rather than a substantive change to the rules and conditions.

One of the general conditions to note is General Condition 27, which provides that all activity must comply with project specific regional conditions imposed by the Division Engineer. General Condition 31 also sets forth a detailed procedure for submitting Pre-Construction Notification (PCN). The Corp must respond to a PCN within 30 days, but they can withhold approval until they are satisfied with the information submitted, and construction may not commence until such approval is obtained. Approval is deemed granted if no response is received within 45 days.³⁵ PCNs typically require an evaluation of how wetland losses will be avoided or minimized and a compensatory proposal for any wetland losses. A NWP also requires a maintenance plan in conjunction with the PCN. Given the potential degree of subjectivity at this stage, and the risk of significant delays, it is wise to establish all District Engineer informational needs at a pre-application conference.

In light of these “General Conditions,” the NWP process can occasionally feel just like an individual site permit—particularly with respect to broad categories, such as residential or commercial and industrial development. In any event, it is important to

³⁵ U.S. Army Corps of Eng’rs, Issuance of Nationwide Permits, 77 *Fed Reg.* 10184 (Feb. 21, 2012)2).

remember that NWP's are only partial waivers of Army Corp authority, and that "having" such a permit is not an exemption from wetland regulations. Typical NWP's may have several pages of site specific conditions with plans and drawings incorporated by reference. The key advantage of a nationwide permit is the streamlined procedure.

3. Joint Applications for PADEP/U.S. Army Corps General Permits

Joint Agency applications for wetland permits allow formal collaboration and allocation of authority between the Army Corps and PADEP. The PA State Programmatic General Permit (PASPGP) codifies this process for qualifying "minimal impact" wetland projects of one acre or less. Every five years, the PASPGP is renewed (and/or amended). On July 1, 2011, the Army Corps issued PASPGP-4 (replacing the expired PASPGP-3).³⁶ PASPGP-4 is jointly sponsored by the Baltimore, Philadelphia, and Pittsburgh Districts, as well as PADEP. The Statewide Permit sets forth a variety of best management practices that must be followed and establishes categories of wetland impacts which correspond to escalating levels of agency review.

Overall, the PASPGP-4 is a continuation of the PASPGP-3 with the exception of a few changes, including expanding applicability of the permit to include portions of the Delaware and Schuylkill River, as well as the entire Lehigh River.

The purpose of the PASPGP is to establish a coordinated review process for minimal impact projects, whereby specific projects can avoid full Corps review (Category I) and others may get either discretionary (Category II) or mandatory

³⁶ PADEP, Pennsylvania State Programmatic General Permit-4 (PASPGP-4) (Rev. July 2011), *available at* www.nab.usace.army.mil/Wetlands%20Permits/permits.htm. General permits such as this typically must be renewed or amended every five years.

(Category III) Corps review.³⁷ If the PASPGP-4 is applicable, it is possible to essentially apply jointly for both an Army Corp Section 404 permit and a DEP Water Obstruction and Encroachment Permit under 25 Pa. Code Section 105.

The PASPGP process “suspends” many of the NWPs, including NWP 39 and 43. Unfortunately, this program only applies to **projects affecting less than one acre of wetlands**. Larger projects and those that are located on specifically designated water bodies, including portions of the Delaware, Allegheny and Youghiogheny Rivers, the entire Ohio River and all of Lake Erie, do **not qualify** for PASPGP-4.³⁸ Such projects must obtain a full individual permit from both DEP and the Corps of Engineers before commencement of construction.

a. What if a project can be designed in a manner which avoids impact to an otherwise regulated wetland area?

One cannot escape wetland regulation merely by making best efforts to avoid wetland impact and drawing appropriate plans reflecting this intent. PASPGP-4 provides that a wetland larger than 0.25 acres within a development construction area must be protected by a deed restriction. Model language is provided. Alternatively, the wetland area is deemed to be impacted and construction is subject to Corps review as a category III activity. A similar provision already exists in the Regional Conditions for NWP 39, which imposes a presumption of adverse impact in the absence of protective legal deed restrictions.³⁹

³⁷ In such cases, the applicant submits a joint permit application to DEP, which forwards the application to the Army Corps for simultaneous processing.

³⁸ *Id.* at 10.

³⁹ Regional Conditions, *supra* note 36, at 8.

b. Permit Procedure

Under PASPGP-4, a joint Army Corp/DEP permit application⁴⁰ is submitted to PADEP and the Department determines whether the project should be considered Category I, II, or III, or alternatively, whether it must obtain separate full federal wetlands permit and DEP Section 105 permit. Category I activities avoid Corp notification. A specific list of 20 Category I activities is set forth in the PASPGP. Category II activities are activities not listed as Category I and which will impact less than 1 acre of wetland and less than 250 linear feet of a river, stream, or jurisdictional watercourse. Category II activities are subject to discretionary Corps review. Category III activities receive mandatory Corps review (but still as a General Permit versus a full permit) and include wetland impacts greater than 250 linear feet of stream, as well as Category I activities impacting more than 0.25 acres of wetland.

4. Wetland Strategy Issues

There are both positive and negative aspects to wetland permitting at Brownfield sites. The good news is that a typical urban Brownfield site is less likely than a Greenfield site to contain wetlands which have become sacred to local environmental groups. On the other hand, there are numerous old industrial plants located on or near streams or poorly drained areas which qualify as wetlands. These facilities may have

⁴⁰ PADEP & Army Corps of Eng'rs, Joint Application for Pa. Water Obstruction and Encroachment Permit and U.S. Army Corps of Eng'rs Section 404 Permit, No. 3930-PM-WM0036A (Rev. June 2011), *available at* www.dep.state.pa.us.

been encroaching on wetland areas for decades, and/or degrading water quality via poorly managed stormwater runoff. A difficult wetland permitting process can interfere with Brownfield deal financing because of construction delays as well as just the need to represent to a lender that all permits have been obtained. The Army Corps is also quite willing to issue a stop work order if construction commences without obtaining a permit which the Corps believes was necessary. It is therefore crucial to perform an accurate technical and legal wetland evaluation at the outset of project design. Where there are such areas present, it is crucial to determine, as early as possible, whether or not it will be feasible to develop the site without filling wetland areas. If it is determined to be feasible, the next step is to determine if development can be reasonably planned in a manner which will not cause damage to the wetland via erosion or sedimentation. In order to carry out this evaluation, it is necessary for the developer to engage in a level of site planning and design which they might not normally reach until later in the transaction.

a. Advance Preparation, Effective Pre-application Meetings with the Agencies, and Impressive Permit Applications Are Critical to Success

Wetland permitting remains a highly subjective and resource intensive administrative process. Pre-application meetings can provide critical feedback on agency expectations. They can also create lasting impressions that the development team has done their homework and knows what to do. Conversely, poor preparation for pre-application meetings and/or submittal of a sub-standard permit application may have substantial negative repercussions with agency staff. DEP staff, in particular, have made a point of repeatedly criticizing “lazy permit applications.”

In addition to early site planning with respect to construction and land development, it is also essential to consider site remediation issues early on. The pre-application conference with DEP and the District Engineer should be a time for discussion of detailed Phase II investigation results which indicate the need for excavation of tanks or soils, installation of monitoring wells, and the potential presence of contaminated media in or proximate to wetland areas. The fact that NWP 38 may cover site remediation activity does not exempt an applicant from Corps and DEP review. It simply provides the opportunity to avoid the complication and delay of a full permit review if the applicant provides timely and detailed information to the Corps and has a reasonable plan for wetland protection.

b. Pennsylvania Water Quality Certification Conditions and Related Issues

Every state or federal wetland permit requires a “Water Quality Certification” (WQC) pursuant to Section 401 of the Clean Water Act. The state wetland permitting process is deemed to incorporate the certification. With respect to Army Corps permits, PADEP has “pre-certified” the NWPS and PASPGP-4 subject to five conditions⁴¹:

1. Obtaining all other necessary permits and approvals;
2. Wetland delineation in accordance with 25 Pa. Code 105.451;
3. Fill material cannot contain waste, as defined in the Solid Waste Management Act;
4. Reservation of the right to withdraw certification if deemed to adversely impact water quality;

⁴¹ 42 Pa. Bull. 2101, Certification under Section 401 of the Federal Clean Water Act, Doc. No. 12-658 (Apr. 14, 2012). Interestingly, the Army Corp’s description of these conditions does not include #4 and #5. See Public Notice No. 12-17, *supra* note 35.

5. Reservation of right to add or modify conditions in response to public comments.

Condition #5 is a reminder that WQC is an administrative process which requires public notice and comment. Community opposition can arise in some cases and failure to satisfy such opposition can lead to federal Clean Water Act citizen suits.

Condition #4 is a broad reservation of rights to withhold certification altogether if not satisfied with erosion and sedimentation controls on discharges to a wetland. This is one good reason for close coordination of stormwater and wetland permitting activity.

With respect to condition #3, PADEP's 2010 "Management of Fill" policy (Attached as Appendix A)⁴² establishes two categories of fill and maximum contaminant levels for each. Clean Fill is unrestricted and can be used at any site. Regulated Fill may only be used at non-residential sites and only pursuant to an approved Act 2 cleanup⁴³ or pursuant to General Permit WMGR096 (Beneficial Use of Residual Waste).⁴⁴ Regulated fill is therefore still considered to be "waste" material, even though it may be used for fill at a Brownfields site (or elsewhere).⁴⁵ Consequently, the above-referenced WQC condition would appear to not allow use of Regulated Fill in conjunction with wetland permits. There is no explanation of whether the prohibition applies to an entire property or only to areas that are proximate or hydraulically connected to a wetland. In light of the jurisdictional discussion earlier, the latter would presumably be the rule.

⁴² Management of Fill, Policy No. 258-2182-773 (Aug. 7, 2010), *available at* <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-81095/258-2182-773PO.pdf>.

⁴³ *Id.* at 3.

⁴⁴ PA DEP Bureau of Waste Mgmt., General Permit for Processing/Beneficial Use of Residual Waste, Permit No. WMGR096SE003 (Apr. 24, 2009), *available at* www.dep.state.pa.us (electronic library).

⁴⁵ Management of Fill Policy, *supra* note 46, at 3.

c. Overlap of Wetland and Stormwater Permitting

Wetland permits typically incorporate plans to minimize impact from erosion and sedimentation during construction activity. The Chapter 102 regulations provide that it is not necessary to duplicate such plans and permitting.⁴⁶ The language of the regulation suggests that the exemption might apply to an entire site; however the Comment and Response Document incorporated into the final regulation preamble clarifies that the exemption is limited to the actual wetland area.⁴⁷

III. STORMWATER PERMITTING ISSUES AND STRATEGIES

A. PADEP Permitting Requirements

Regulation of pre and post-construction stormwater runoff at Brownfield sites is accomplished primarily through the PADEP stormwater permit program, at 25 Pa. Code Section 102, and any applicable local land use or zoning ordinance. The basic state regulatory requirement is to apply “Best Management Practices” (BMP), as set forth in detail in PADEP guidance.⁴⁸ PADEP’s BMP guidance addresses Brownfields specifically as “Special Management Areas.”⁴⁹

According to PADEP’s BMP Guidance, a permit applicant for a Brownfield site is advised to provide full disclosure, including a description of the existing and previous land uses, a list of potential pollutants and a summary of sampling data, an indication of the source and location of potential pollutants on the Erosion and Sediment Control Plan

⁴⁶ 25 Pa. Code §102.5(g)

⁴⁷ See Comment and Response referenced at 40 Pa. Bull 4861 (Aug.21, 2010)

⁴⁸ DEP Erosion and Sediment Pollution Control Program Manual, No. 363-0300-002 (Dec. 2006), available at www.dep.state.pa.us (electronic library).

⁴⁹ *Id.* at § 7.1.

drawings, as well as proposed measures to manage and control discharges to nearby surface waters.⁵⁰ Applicants are advised to clearly identify “hot spot” areas known to exist as determined by project consultants and any associated remediation.

For projects having earth disturbance of one acre or more, , General Permit PAG-2 will apply.⁵¹ The General Permit application is in the form of a “Notice of Intent” (NOI)⁵². Like wetland permits, a general stormwater permit may include substantial site specific conditions while employing a streamlined administrative procedure.

If there is potential for discharge to a high quality stream, DEP will deny eligibility for the general permit regardless of documented site soil quality. A full NPDES permit can likewise be required for discharge to a standard stream if there is “potential” for discharge of hazardous pollutants. Refuting such a finding at a brownfield site is greatly facilitated by good up front data.

The risk of stormwater permit complications related to stream pollution concerns at Brownfield sites is significant and underscores the need for early site investigation and permitting strategy. Failure to submit comprehensive data on soil contaminants at the NOI stage may result in permitting delays or a presumption of impact and requirement for a full permit. The need for such data may require acceleration of site investigative activity which a developer was planning to save for future Act 2 submissions. For example, the PAG-02 NOI requires information about potentially contaminated site soils as well as an evaluation of any imported fill to be used. The fill evaluation must be

⁵⁰ *Id.* at § 7.2.

⁵¹ Approval of Coverage Under the General NPDES Permit for Stormwater Discharges Associated With Construction Activities PAG-02 (2012 Amendment), No.3150-PM-BWEW0280 (Rev. 11/2012)

⁵² Permit Application Notice of Intent for Coverage Under The General (PAG-02) NPDES Permit or Application for an Individual NPDES Permit for Stormwater Discharges Associated with Construction Activities, No. 3150-PM-BWEW0035 (11/2012).

done in accordance with the DEP Management of Fill Policy (Fill Policy)⁵³ and there must be notes included on site drawings of requirements to carry out due diligence evaluation and/or fill testing. The NOI also includes clean fill certification form FP-001, which is part of the Fill Policy.

In light of the above stormwater/clean fill cross-reference—some legal points to consider:

1. The Fill Policy is not a regulation and is therefore not legally binding. However DEP and regulated parties generally apply and comply with the policy as if it is binding.
2. The Clean Fill Certification form FP-001 (part of the Fill Policy) is not legally required and DEP does not enforce either the completion or accuracy of this form. Nevertheless, DEP requests that a copy be submitted for the file. DEP also requires submittal of FP-001 as part of the PAG-02 NOI. Once it is submitted to DEP, the certifications are subject to state law penalties of perjury. Thus, it is worthwhile to assure that certification is not made unless supported by first hand evaluation.
3. The Fill Policy does **not** automatically require testing of imported fill. One may conclude that fill is clean via detailed due diligence or by testing. If due diligence is relied upon, it must include review of available historic files (much like a Phase I site investigation). If testing is done, then results are compared to numerical clean fill standards in Tables GP-1a and FP-1a (organics) and GP-1b and FP-1b (inorganics).

⁵³ See PAG-02 Permit Instructions, Permit Summary Sheet for General (PAG-02) or Individual NPDES Permits for Stormwater Discharges Associated with Construction Activities, No. 3150-PM-BWEW0035 (11/2012) at 3)

If testing is performed, there are 3 possible outcomes:

1) The material exceeds Regulated Fill standards and must be disposed of as waste.

2) Material meets clean fill standards and can be used freely.

3) Material exceeds clean fill numbers, but meets Regulated Fill standards.

This can be used at non-residential Act 2 sites and can be used at other sites in conjunction with a general permit WMGR096⁵⁴. However, such material is still considered “waste.” Therefore, if wetland permitting is also required, there could be a Clean Water Act Section 401 Water Quality Certification problem because of the “waste” prohibition discussed earlier.

4. The Form FP-001 which is included in the Fill Policy is two pages long and includes certification by the contractor supplying the material, as well as a certification by the “person receiving the fill,” that development is occurring on the property. The contractor certification is reasonably interpreted as a certification of having followed the Policy rather than being a legal warranty that fill is clean. However, the FP-001 which is attached to the PAG-02 NOI application is actually a condensed version of the FP-001 in the Fill Policy and has unclear certification language. The reason for this discrepancy is unclear. To the extent that the owner often will insist on actual testing, the form discrepancy may not be of great import. However, it would seem beneficial to all parties if the developer substituted the correct form. In any event all parties should pay attention to which forms are being signed by

⁵⁴ See note 44, supra

whom and should assure consistency with any contractual understandings regarding responsibility for clean fill.

B. Post Construction Stormwater Management

DEP construction stormwater regulations also impose a requirement to include a post construction stormwater management (PCSM) plan in any construction related NPDES permit application.⁵⁵ The purpose of such plans is typically to assure acceptable long-term stormwater flow volume and rate utilizing various BMP features. At a Brownfield site, the PCSM Plan may carry increased importance because residual contamination often remains at the property pursuant to DEP Act 2 approval based on a “Site Specific” standard. Excessive post construction erosion and sedimentation may be viewed as a “pollution” threat, and an appropriate maintenance plan may very well already be a required institutional control in conjunction with the DEP Act 2 approval. In any event, the regulations require recording a deed covenant that references the PCSM Plan and assigns responsibility for its maintenance.⁵⁶

One can also expect heightened local interest in the zoning and land development approval process at a Brownfield site. In many cases, local authorities feel compelled to respond to resident pressure by imposing standards that are more stringent than state requirements. There is also more opportunity for local participation in the issuance of a construction stormwater NPDES permit than for other permits, because issuance

⁵⁵ 25 Pa. Code §102.8

⁵⁶ 25 Pa. Code § 102.8(m)(2).

authority is delegated to the county conservation districts. It is common to be working simultaneously with the Township on land development approval and the County on NPDES permit approval.

C. Stormwater Approval Strategies

Stormwater permitting, like wetland permitting, is all about early design planning and preconstruction coordination with regulatory agencies. This maximizes construction options and avoids costly surprises late in the game. At a Brownfield site, one must also incorporate early Phase II sampling efforts aimed at assuring soil quality in areas targeted for stormwater retention and detention facilities (both above and below ground) and the associated drainage piping infrastructure. Developers may be reluctant to make the soft cost investment early in the design phase; however the consequences of delaying such testing can be project-threatening. There is a risk of digging into contaminated soils while constructing stormwater facilities or pipes, compounded by a risk of not having viable alternative locations due to existing institutional controls or site grading.

D. Stormwater Management for Redevelopment in Philadelphia

Redevelopment projects in Philadelphia must comply with the City's specific regulations and guidance governing stormwater management, as well as any watershed-specific regulations. Successful developers will be cognizant of any exceptions that may apply to Brownfields or redevelopment projects.

Philadelphia stormwater management regulations are governed by the Philadelphia Water Department (PWD).⁵⁷ Interpreting these regulations, Philadelphia

⁵⁷ Philadelphia Water Department, Stormwater Management § 600.0 – 600.15, authorized by Chapter 14-1603.2 of the Philadelphia Code.

issued its second version of the Philadelphia Stormwater Guidance Manual (Guidance Manual).⁵⁸ Developers must always ensure compliance with the most recent version of the Guidance Manual.

Philadelphia regulates all development or redevelopment projects that cause an earth disturbance equal to or in excess of 15,000 square feet, although smaller projects are not exempt from all PWD oversight.⁵⁹ Requirements for both erosion and sediment (E&S) controls and post construction stormwater management are determined by the area of earth disturbance during the construction phase.⁶⁰ All projects that generate an earth disturbance of greater than 5,000 square feet must have their Building Permit signed by PWD before it will be issued. PWD will sign a Building Permit if the project meets its requirements for water quality, channel protection, flood control, non-structural project control, erosion and sediment pollution control, and post construction stormwater management plans.⁶¹ All projects that generate an earth disturbance of 15,000 square feet or greater may not commence until PWD approves an E&S plan.

1. Post Construction Stormwater Management

Developers are required to retain a professional engineer, licensed in the Commonwealth of Pennsylvania, to determine whether a site's soil is suitable for

⁵⁸ Philadelphia Water Department, Planning & Environmental Services Division, *Stormwater Management Guidance Manual* (Rev. Apr., 2011) (hereinafter "Guidance Manual").

⁵⁹ Stormwater Management, § 600.2. Earth disturbances include clearing, grubbing, grading, excavation, embankments, land development, agricultural plowing, tilling, timber, harvesting activities, road maintenance activities, mineral extraction and the moving, depositing, stockpiling or storing of soil, rock or earth minerals. *Id.* § 600.1(i).

⁶⁰ *Id.* § 600.2(a).

⁶¹ Development projects impacting less than 15,000 square feet are not subject to the requirements of the regulations, rather voluntary controls may be implemented. However, if the proposed development results in stormwater discharge that exceeds stormwater system capacity, causes a combined sewer overflow, or degrades receiving waters, the design specifications presented in the regulations may be applied to protect public health and safety. Guidance Manual, *supra* note 2, at 312.

infiltration and in so doing, conduct a hotspot investigation.⁶² The Guidance Manual outlines the investigation procedure for hotspots and identifies sites presumed to have hotspots.⁶³

When demonstrated that a portion or all of the water quality volume cannot be infiltrated onsite because of hotspots, the water must be treated for water quality.⁶⁴ Water quality treatment is attained differently in separate sewer areas than in combined sewer areas—separate sewer areas attain water quality treatment through approved stormwater management practices; combined sewer areas achieve water quality treatment by detaining and releasing stormwater at a rate specified by the Guidance Manual.⁶⁵

2. Watershed Specific Requirements

For projects impacting the Darby-Cobbs Creek Watershed and Wissahickon Watershed, developers must also comply with Philadelphia’s watershed specific regulations. Projects are required to meet the more stringent of the two requirements; therefore, watershed specific requirements may supersede the general stormwater regulations. Only two watersheds in Philadelphia are currently subject to specific regulations affecting the applicability of the stormwater regulations: Darby-Cobbs Creek Watershed⁶⁶ and Wissahickon Watershed.⁶⁷

3. Exceptions Available to Brownfield Redevelopment Sites

PWD recognizes that conditions may exist which reasonably prevent developers from implementing quality controls at a contaminated site. Redevelopment projects may

⁶² *Id.* § 600.5(a) (2) (A)–(C).

⁶³ Guidance Manual, *supra* note 2, at App. A.

⁶⁴ *Id.* (Step 3).

⁶⁵ *Id.* § 1.1.

⁶⁶ Darby & Cobbs Creek Watershed Act 167 Stormwater Management Plan.

⁶⁷ Environmental Controls for the Wissahickon Watershed, 14-1603.2 of the Philadelphia Code.

qualify for exemptions or alternative criteria for channel protection and flood control requirements.⁶⁸ Under special circumstances, PWD may exempt a site from the regulations altogether.⁶⁹

The special treatment for redevelopment projects varies depending on the amount of earth disturbance caused by the project.⁷⁰ Redevelopment projects causing less than one acre of earth disturbance are exempt from the channel protection requirements and may take advantage of alternate criteria to comply with the flood control requirements. For redevelopment projects causing more than one acre of earth disturbance, channel protection requirements and flood control requirements may be waived depending on post-development site conditions.

Additionally, a Brownfield may qualify for an exemption from the regulations altogether if onsite conditions reasonably prevent the developer from implementing the required water quality/quantity control practices onsite.⁷¹ To qualify for this exception, developers must send a written request to PWD to implement off-site stormwater management practices, such as retrofitting, stream restorations, or other practices that provide water quality/quantity control comparable to the required practices infeasible onsite.

⁶⁸ Guidance Manual, *supra* note 2, at 312.

⁶⁹ Stormwater Management, § 600.3(d) (exception for special circumstances).

⁷⁰ Guidance Manual, *supra* note 2, at 312.

⁷¹ Stormwater Management, § 600.3(d).

