

Navigating Permitting Challenges: A Practical Guide for Data Center Development in Pennsylvania

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In this article, the authors focus on Pennsylvania's Environmental Rights Amendment, which has emerged as a favored vehicle for permitting challenges to data center development projects.

Data center development in Pennsylvania presents significant opportunities, though developers must navigate a range of permitting requirements. Non-governmental organizations (NGOs) have become increasingly active participants in the zoning and environmental permitting process. Developers who understand this landscape can better position their projects for success. This article focuses particularly on Pennsylvania's Pa. Const. Art. I, § 27 - the Environmental Rights Amendment - which has emerged as a favored vehicle for permitting challenges to development projects.

WHAT ARE NGOS?

NGOs refer to organized advocacy groups that monitor and legally challenge development activities they perceive as detrimental. These groups range from large, entrenched national "big green" non-profits to local concerned citizens' groups. They work to influence public policy and legislation, and advo-

cate for changes in how governments, corporations, and individuals operate, particularly with respect to environmental considerations. When it comes to data centers, NGOs typically make diverse allegations regarding data center development, such as higher electricity costs, excessive water and energy usage, environmental and climate impact, noise pollution, and local disruption (e.g., consuming green space or agricultural land). Ignoring or dismissing such allegations presents significant risks to development. NGOs can, and do, quickly mobilize strong public opposition - often through the widespread dissemination of unrebutted allegations. NGO mobilization has a documented history of killing or delaying development in Pennsylvania, despite many challenges not having been grounded in the law.

While NGOs frame their involvement as public interest advocacy, developers should recognize that many NGO interventions - particularly litigation - face substantial legal

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hurdles and frequently do not succeed on the merits. The primary impact of such challenges is often delay rather than substantive project changes. Well-prepared developers who conduct thorough due diligence and maintain strong permitting records routinely overcome these obstacles.

WHAT PERMITTING IS NECESSARY FOR DATA CENTER DEVELOPMENT?

The permitting pathway for a data center project is multifaceted, requiring developers to obtain an array of approvals, including air quality permits for stationary emission sources, National Pollutant Discharge Elimination System (NPDES) permits for managing storm-water runoff and industrial discharges, and a host of local entitlements addressing zoning, building codes, and site development standards.

PENNSYLVANIA'S ENVIRONMENTAL RIGHTS AMENDMENT: ARTICLE I, SECTION 27

Pennsylvania's Constitution includes a unique provision that has become a focal point for environmental litigation. Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA), provides that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Following the Pennsylvania Supreme Court's 2013 decision in *Robinson Township v. Commonwealth*,¹ the ERA has had a renaissance as an anti-development litigation tool. NGOs have frequently invoked the ERA to challenge permits for energy and infrastructure projects. However, data center developers should under-

stand several important limitations on these claims:

1. *Standing requirements*: Challengers must demonstrate a direct connection to the environmental resource allegedly affected.
2. *Deferential review*: The Environmental Hearing Board and courts generally afford substantial deference to agency permitting decisions supported by adequate records.
3. *Speculation is insufficient*: Challengers must demonstrate that unreasonable environmental harms are likely to occur and must present expert testimony to meet that burden. Speculation about harms or the fact that normal environmental impacts will occur is not sufficient.
4. *Remedy limitations*: Even successful ERA claims often result in remand for additional process rather than project termination.

Many ERA claims fail to clear these hurdles, and developers with robust environmental assessments and thorough permit applications are well-positioned to defend against such challenges.

In addition to claims asserting that the Pennsylvania Department of Environmental Protection (DEP) improperly issued environmental permits necessary for development projects, ERA claims may also be brought against municipalities with jurisdiction over the land use and zoning permits necessary for a project. Municipal ERA claims typically allege that zoning ordinances or land use approvals violate the ERA by failing to protect natural

resources. These cases often involve approval of development projects that allegedly threaten environmental resources, zoning text or map amendments that permit uses claimed to be incompatible with environmental protection, and failure to consider environmental impacts when granting variances or special exceptions.

Both the DEP and municipalities are creatures of statute deriving their authority solely from the powers conferred upon them by the General Assembly. As such, they are bound to act within the scope of their enabling legislation and must adhere to the applicable statutes and regulations governing their conduct. Accordingly, the ERA does not displace the statutes and regulations governing these bodies and their reviews of project development.

WHAT CHALLENGES DO NGOS INTERJECT INTO A DATA CENTER DEVELOPMENT PROJECT?

NGOs can introduce a variety of risks that affect development feasibility, including:

- *Timeline and delay risks.* NGOs frequently attempt to inject themselves into permitting processes by submitting detailed comment letters, requesting public hearings, or demanding additional environmental studies. These efforts can extend approval timelines, potentially disrupting project schedules.
- *Litigation risks and uncertainty.* Lawsuits may target the adequacy of environmental impact assessments, allege procedural or substantive deficiencies in the permitting process, or claim violations of water quality standards or environmental rights. Defending against such litigation can become costly and can place proj-

ects in limbo pending resolution should a developer decide against proceeding “at risk” while the litigation is pending. Notably, Pennsylvania environmental permits are not tolled during the course of litigation.

- *Increased project costs.* Beyond increased legal fees, developers may be asked to conduct supplemental environmental studies, implement additional mitigation measures, or redesign projects to address concerns raised during the permitting process.
- *Permit conditions and operational constraints.* NGO involvement may seek to include restrictive permit conditions, such as limits on operating hours, enhanced stormwater controls, emissions caps, or ongoing monitoring and reporting obligations that increase long-term operational costs.

WHAT CAN DEVELOPERS DO WITH RESPECT TO NGOS BEFORE COMMITTING TO A PROJECT?

Given the increasing scrutiny that data center projects face from NGOs, developers and investors should treat NGO risk as a core component of project due diligence - not an afterthought.

Early identification of potential opposition and proactive engagement strategies, including with regulators, can mean the difference between a project that moves forward on schedule and one that becomes mired in costly delays and litigation.

Developers are encouraged to conduct thorough environmental diligence, including the

identification of any potentially sensitive environmental or community resources. Assisting regulators with the development of a strong permitting record, including detailed, well-documented permit applications that leave little room for procedural challenges, is essential. Responding substantively to public comments to create a robust administrative record and conducting diligence on the existence of active NGO groups and their litigation histories is also recommended.

IN SUMMARY

- Developers should expect heightened involvement from national and local advocacy groups, whose challenges can delay projects even when the claims lack strong legal footing.

- The Environmental Rights Amendment is a favored tool for opposing development, but many of those claims fail due to standing requirements, deferential agency review, and the need for expert-supported evidence of actual environmental harm.
- Proactive due diligence and robust permitting records are critical, including early identification of opposition risks, strong environmental documentation, and meaningful engagement with regulators and communities to minimize delays and litigation exposure.

NOTES:

¹Robinson Tp., Washington County v. Com., 623 Pa. 564, 83 A.3d 901, 181 O.G.R. 102 (2013).