



THE **WATER** NEWS

Volume 60 | No. 3 | Fall 2024

SOURCE

HOW COMMUNITY OUTREACH
AND PFAS GO HAND-IN-HAND

www.paawwa.org



Pennsylvania AWWA
American Water Works Association

Address Service Requested. PA-AWWA – 200 North Third St, 15th Fl, Harrisburg, PA 17101



PUBLIC WATER SYSTEMS AND EMINENT DOMAIN

By Michael Klein

The use of eminent domain to acquire property, including easements and rights of way, can be a significant challenge for public water systems (“water systems”). To provide readers with a clearer understanding of the eminent domain process in Pennsylvania, I have prepared this article.

The Pennsylvania Eminent Domain Code (the “Code”) regulates condemnations within the state. The Code defines “Condemn” as: “To take, injure or destroy property by authority of law for a public purpose.” While the Code itself does not grant Pennsylvania water systems the power of eminent domain, that power is conferred through various laws regulating investor-owned, authority-owned, and municipal-owned water systems. These water systems fall under the title of “Acquiring Agency,” defined in the Code as “Any entity, including the Commonwealth,

vested with the power of eminent domain by the laws of this Commonwealth.” These Acquiring Agencies are sometimes referred to herein as “condemnors.” Although the Code does not grant the power to condemn property, including easements and rights of way, Section 102(a) of the Code does provide “a complete and exclusive procedure to govern all condemnations of property for public purposes and the assessment of damages.”

Given that the facilities required to operate a Water System are often spread across large geographic areas, it is common for such systems to need to acquire ownership of parcels of land, as well as easements and rights of way across various properties. In many instances, water systems can acquire these parcels, easements, and rights of way through negotiation. However, when a landowner is unwilling to sell or

grant easements and rights of way, water systems may elect to become a condemnor and exercise the power of eminent domain to acquire the necessary properties for public use in the operation of the system. Water systems can take property, including easements and rights of way, through eminent domain in exchange for “Just Compensation.”

The condemnation process can be expensive, complicated, and lengthy, often involving court proceedings, expert witnesses, attorneys, boards of viewers, judges, and sometimes juries. The procedure for condemnation is outlined in Chapter 3 of the Code. Generally, a condemnation proceeding must be brought in the court of the county where the property is located or, if the property spans multiple counties, in the court of any one of those counties. To initiate the process, the condemnor must file a Declaration of Taking, along with the required security. The primary issue in most condemnation proceedings is determining the “Just Compensation” to which the property owner is entitled for the taking of their property.

After being served with a Declaration of Taking, the “condemnee” (property owner) has the right, under Section 306, to file preliminary objections within 30 days. These objections are limited to: (i) the power or right of the condemnor to appropriate the condemned property unless previously adjudicated; (ii) the sufficiency of the security; (iii) the Declaration of Taking; and, (iv) any other procedure followed by the condemnor. The condemnor acquires title to the condemned property on the date of filing the Declaration of Taking but does not gain possession until a court issues an order dismissing each of the condemnee’s preliminary objections, and the estimated just compensation determined by the condemnor is paid or



If you're trusted to protect public health and the environment, we can help.

Hazen all things water

hazenandsawyer.com

offered to the condemnee, as required by Section 307. The payment of estimated just compensation is made without prejudice to the rights of either party to pursue a final determination of Just Compensation. Either the condemnor or the condemnee may petition the court to appoint a board of viewers to determine damages and establish the final Just Compensation. The board of viewers' determination may be appealed to the court, and the appeal may include a demand for a jury trial. If no jury trial is demanded, the court will try the case without a jury.

Section 701 of the Code provides: "A condemnee shall be entitled to just compensation for the taking, injury, or destruction of the condemnee's property, determined as set forth in this chapter. Other damages shall also be paid or awarded as provided in this title." "Just Compensation" is defined in Section 701 as the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation (unaffected by the condemnation) and the fair market value of the property remaining immediately after the condemnation (as affected by the condemnation).

Section 703 of the Code outlines how fair market value is determined, considering factors such as:

- The present use of the property and its value for that use.
- The highest and best reasonably available use of the property and its value for that use.
- The machinery, equipment, and fixtures forming part of the real estate taken.
- Other relevant features, as provided by Chapter 11 (relating to evidence).

Section 1105 allows a qualified valuation expert to testify in detail about the valuation of the property on a comparable market value, reproduction cost, or capitalization basis, during direct or cross-examination.

Eminent domain cases that proceed to litigation can be complex, particularly those involving the condemnation of business or residential properties, where individuals and businesses are displaced. Water systems should consider engaging experienced engineers, real estate appraisers/valuation experts, accountants, other expert witnesses, and attorneys when litigating such cases. ♡



About the Author

Michael D. Klein is a Senior Counsel in the Harrisburg, PA, and Washington D.C. offices of Cozen O'Connor. He practices in the areas of utility and environmental law. He can be reached at mklein@cozen.com and 717-703-5903. This column is intended to be a discussion of legal issues in the water industry. It is not intended to be legal advice, or to establish any attorney-client relationships. Before making any legal decisions regarding anything discussed in this column you should always consult with an attorney.