



## The Coronavirus May be a Basis to Invoke the Force Majeure Provision of Consent Orders and Consent Decrees in Pennsylvania

On March 6, 2020, Governor Tom Wolf issued a Proclamation of Disaster Emergency throughout the Commonwealth under the Pennsylvania Emergency Management Services Code in response to the expanding COVID-19 coronavirus pandemic. On March 13, President Donald Trump declared a state of national emergency. Many other states and local governments are following suit. These government actions may be a basis to invoke the force majeure clause of consent orders and consent decrees between regulated parties and the Pennsylvania Department of Environmental Protection, other state and local environmental regulatory agencies or the U.S. Environmental Protection Agency.

The standard force majeure provision of most PADEP consent order and agreements allows deadlines in the order to be extended if circumstances beyond the reasonable control of the regulated party prevent compliance with the order. Similar provisions are often found in consent agreements with USEPA and in consent decrees approved by federal and state courts. These force majeure provisions typically require the affected party to notify the agency of the force majeure event when the party becomes aware or reasonably should have become aware of the event impeding performance. For example, the model PADEP Consent Order and Agreement requires telephone notice within five working days and written notice, in some circumstances by notarized affidavit, within 10 working days describing the reasons for the delay, the expected duration of the delay, and the efforts being taken to mitigate the effects of the event and length of the delay. This model provision states that failure to comply with the timing and notice requirements invalidates a force majeure extension.

There are compelling reasons why the coronavirus pandemic, which is unlike any event experienced in this country, is beyond the contemplated scope of agency force majeure clauses such that strict adherence to the timing and notice provisions should be excused and extensions should be granted as necessary. If the pandemic is interfering or threatening to interfere with your ability to comply with requirements or deadlines in a consent order or consent agreement, because of a limited availability of employees, vendors, supplies or otherwise, consider potential options within the force majeure clause of the agreement. Also consider an application of force majeure principles to pandemic-related difficulties complying with environmental permits.

Babst Calland's [Environmental attorneys](#) are available to help you with your situation and recommend the best course of action for proceeding in these uncertain times. For more information, please contact Kevin J. Garber at (412) 394-5404 or [kgarber@babstcalland.com](mailto:kgarber@babstcalland.com), Sean M. McGovern at (412) 394-5439 or [smcgovern@babstcalland.com](mailto:smcgovern@babstcalland.com), or Jean M. Mosites at (412) 394-6468 or [jmosites@babstcalland.com](mailto:jmosites@babstcalland.com).

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