GRID Project Consent Order and Agreement: What Data Center Developers Need to Know

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Data Center Development Alert

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Governor Josh Shapiro issued Executive Order 2026-05 (EO), "Protecting Pennsylvania Consumers from Data Center Impacts" on August 18, 2026. Among other provisions, the EO requires that developers execute a project-specific Consent Order and Agreement with Pennsylvania Department of Environmental Protection (DEP) in order to benefit from an expedited review track created by the EO. For a more thorough discussion on the EO in general, see our previous *Alert*, "Pennsylvania's New Data Center Executive Order: Two Tracks, One Choice" (Aug. 19, 2026).

On the same date, the Governor's Office released the form **Template GRID Project Consent Order and Agreement** (COA) that developers must execute to qualify to have DEP permits reviewed on a rolling basis. If the COA is not executed, the EO directs DEP not to begin reviewing any application until local approvals under the Municipalities Planning Code (MPC), Home Rule authority, as well as any required water withdrawal or wastewater discharge authorizations are complete and documented, and not to issue any permit until every application for the project has been received and reviewed by DEP. The incentive to execute is therefore significant, but so is the cost.

The COA runs 33 pages and is wide-ranging, establishing requirements relating to energy procurement and usage, community involvement, environmental obligations relating to air emissions and water consumption, and compliance reporting obligations. While the EO has been the primary focus of market participants, close attention should be paid to the COA itself. The COA contains expansive requirements, substantial penalties, and a broad waiver of rights to challenge its substance after execution. Below are highlights from the COA covering the most potentially impactful elements of the order, and practical items to keep in mind as developers engage with DEP and execute the COA.

Binding Estimates Required at Execution of the COA

The EO appears to require developers to execute the COA, or at a minimum commit to do so, before any new permit application is filed in order to qualify for the streamlined permitting process allowed by the EO. The COA findings section requires various project figures, including the project's peak electric demand at commencement of operations measured in megawatts, its potential future electric demand, the primary and backup sources of electricity to be generated for the project, the percentage of electricity expected to come from non-emitting sources, its expected average annual power usage effectiveness, and its water consumption and discharge volumes.

Because the COA must be submitted as a condition to the streamlined permitting process and long before any development work commences, these figures will necessarily be anticipated and estimated amounts. However, the COA provides that those figures become unchallengeable. Paragraph 2 provides that DEP may rely on the findings section and that the developer shall not challenge or deny the DEP's assertion of the truth, accuracy, or validity of those findings in any matter between the developer and DEP. Furthermore, upon executing the COA, the developer waives its right to appeal the COA and to challenge its content or validity. From a practical perspective, these provisions alone may require developers to delay permitting until further along in the development design process – a choice that could require increased up-front costs, both financial and temporal.

Clean Firm Energy Requirements and the Alternative Compliance Payment

The COA requires that developers build, bring, or buy sufficient "Incremental Capacity", as therein defined, to meet the project's peak power demand, drawn from capacity resources located within the same PJM Interconnection LLC (PJM) "Locational Deliverability Area" as the project, and must likewise build, bring, or buy sufficient "Incremental

Energy" to meet its full energy demand on an annual basis, again from resources within the same PJM Locational Deliverability Area. Where a capacity or energy resource lies outside that area, the developer must demonstrate that the resource is both deliverable to the project and incremental to existing supply, through firm transmission contracts or other verifiable means, consistent with PJM and utility tariff structures.

As a subset of its Incremental Energy supply requirements, the developer must build, bring, or buy "Clean Firm Energy" from resources located within Pennsylvania in an amount no less than the following share of the project's annual electricity consumption:

Period	Minimum Clean Firm Energy
Jan. 1, 2027 – Jan. 1, 2030	10%
Jan. 1, 2030 – Jan. 1, 2035	14.5%
Beginning Jan. 1, 2035	32%

The term "Clean Firm Energy" encompasses a defined set of sources and includes nuclear energy, hydroelectric power, including pumped storage, geothermal energy, fuel cells, solar energy, including solar energy paired with storage resources, wind energy, including wind energy paired with storage resources, "Clean Hydrogen-fueled Energy Generation", battery energy storage systems, distributed energy resource aggregations, and long-duration storage resources. It further requires each resource to satisfy PJM Effective Load Carrying Capability (ELCC) Class Ratings and to constitute Incremental Capacity, which generally means a new, uprated, or improved resource that has been placed in service on or after January 1, 2025.

If a developer fails to meet the minimum Clean Firm Energy obligations, it is required to make an Alternative Compliance Payment (ACP) to the Pennsylvania Energy Development Authority. The ACP obligation is a shortfall payment rather than a fixed fee and is calculated on the difference between the amount required and the amount actually procured. The ACP is assessed per megawatt-hour at the Alternative Compliance Payment Rate, which is reset annually to the estimated average levelized cost of unsubsidized solar photovoltaic generation.

Flow-Down and Transfer of COA Terms

The COA is drafted to follow the site and the project. In any contract, agreement, or assignment with a tenant, owner, or operator for the construction, occupancy, lease, or purchase of the data center, the site, or any part of it, the developer must bind that counterparty to the obligations of the COA as a successor or assign. In such contract, agreement, or assignment, the developer must retain the right to enforce the obligations of the COA against the tenant, owner, or operator. Every such contract, agreement or assignment must contain a condition stating that the DEP is a third party beneficiary in regard to the obligations of the COA that the owner or operator is obligated to perform.

At least 30 days before any transfer of an affected interest, the developer must serve a copy of the COA on the prospective transferee and notify the DEP. The developer must then report the counterparty's name to the DEP within five business days of signing.

The developer's own liability remains through any transfer. A transfer of any legal or equitable interest in the developer or the site will not modify, diminish, terminate, or otherwise alter the developer's duties and the developer remains liable for violations caused by its successors and assigns. While a developer may seek to have its duties and obligations under the COA modified or terminated upon a transfer of the project or site, DEP has sole discretion to do so. In keeping with the broad waiver of rights, the developer waives any right to challenge the DEP's decision of whether or not to modify or terminate the developer's rights and obligations on such a transfer.

Substantial Penalty Structure

The COA carries substantial penalties for noncompliance. For violations of energy-related items (including the Clean Firm Energy, ACP requirements, and other items contained in paragraph 4 of the COA), the penalty rate is between $25,000 and $100,000 per megawatt of the data center's rated capacity, per day, for each violation. This penalty range is bracketed in the template, suggesting the rate will be set project-by-project in each executed COA; how much room DEP will allow on the number remains to be seen. The COA also provides a flat $25,000 per day, for each violation not covered by the above.

These penalties operate automatically and without notice. Payment of the penalties further does not waive the developer's duty to meet the obligations under the COA nor preclude the DEP from commencing an action to compel compliance. Additionally, noncompliance may also result in the DEP removing the developer's permit or authorizations from the permitting process created by the EO. As mentioned above, the COA contains broad waivers of the right to appeal, which includes a waiver of the right to appeal to the Environmental Hearing Board any decision the DEP makes under the COA, including a notice that stipulated civil penalties are due.

One drafting point deserves particular attention. As mentioned, the penalty rate for violations of paragraph 4 applies per megawatt of the data center's "rated capacity," which is a term the template COA does not define and the findings section does not use. The findings instead describe the project's "peak electric demand" at commencement and in specified future years. For a project that ramps over several years, design capacity and actual demand can differ substantially, and so would the resulting penalty calculation. Developers negotiating a project-specific COA should define the penalty base expressly — for example, by tying it to energized capacity or actual peak demand at the time of the violation rather than full-buildout design capacity.

A Narrow Grandfather Class: Addendum A

The template includes an important carve-out for some projects currently under development. Under Addendum A, a project that, as of August 18, 2026, had both "(1) submitted a permit application to DEP and (2) executed a binding Electric Service Agreement or Transmission Security Agreement" receives softened energy obligations in place of the standard requirements. If the project qualifies, a developer must build, bring, or buy capacity located within or deliverable to the project's PJM Locational Deliverability Area, and it may demonstrate satisfaction of such obligations through: (i) a binding financial agreement with a capacity resource establishing exclusive claims to capacity matched to peak power demand using resources located within or deliverable to the same PJM Locational Deliverability Area; (ii) procurement of capacity through the PJM Reliability Backstop Procurement auction; or (iii) demonstrating that its added demand will not impose additional costs on other ratepayers. Developers with projects in motion should confirm early whether they qualify — the difference between the standard obligations and Addendum A obligations is substantial, and qualification turns on documents that existed (or did not) on August 18, 2026, the date the Governor signed the EO.

Practical Guidance

The anticipated and estimated figures inserted into the findings cannot later be challenged in any matter with the Department, regardless of whether the project turns out to have different specifications once completed (the COA expressly limits this preclusion to matters between the developer and DEP — the findings are not admissions usable by third parties). Developers should engage in discussions with the DEP as early as possible to discuss project specifications and numbers and to ensure enough time to be as accurate as possible. Once signed, these figures cannot be challenged and can be revised only with DEP's consent through a formal modification of the COA, so the findings warrant the same scrutiny as representations in a purchase agreement. The megawatt figures deserve particular care: the findings cannot later be challenged, and the penalty base for paragraph 4 violations (which is based on the undefined term "rated capacity") should be pinned down in negotiation rather than left to interpretation. If the megawatt figures in the findings do become the penalty base for paragraph 4 violations, then estimating too low or too high are both problematic. If the developer estimates too low, the project may outgrow its own findings; if the developer estimates too high, the base on which per-megawatt penalties are calculated becomes inflated. The goal is accuracy with modest headroom, not padding.

On a similar note, developers should wait to execute the COA as long as possible. There is significant value in executing the COA only once demand, capacity, and energy plans are as firm as possible. Of course, the COA is the gateway to the expedited permitting process under the EO, and so undue delay is not advised. Developers must strategically balance the timing of execution of the COA with firm project plans and movement towards permitting and development. However, a potentially unintended consequence of the EO is that it confirms a process that the majority of developers have pushed for – get your local permits first and state-level environmental permits later in the design process. Many municipalities have attempted to require evidence of DEP permits at the time of zoning or land development application. The EO makes that sequence unworkable for data center development because DEP will not issue permits until local approvals are complete and municipalities should therefore expect developers to arrive at the local stage without state permits in hand. Waiting to apply to DEP (and therefore to execute the COA) may be more palatable where a municipality cannot require evidence of a state-level permit prior to local land use application.

Finally, developers should be prepared to perform within the first 60 days. Several obligations come due within 60 days of execution, including a number of requirements that are not discussed in detail here (e.g., a schedule for a number of public information meetings, a Pennsylvania workforce hiring plan, an offer of a community benefit agreement to the host municipal and county governments, a Water Plan, etc.). Additionally, before the final operating permits are issued, developers must demonstrate they have secured sufficient Incremental Capacity, Incremental Energy, and Clean Firm Energy by submitting documentation of binding financial agreements with energy resources that establish exclusive claims to the proposed GRID project for a given increment of capacity or energy.

As mentioned above, the COA provides additional terms not highlighted here that may be relevant to any given project, so it is important to carefully consider the terms and conditions long before execution. The COA provides substantial penalties and waiver of rights to challenge, so due care must be taken to ensure the viability of a data center project subject to a COA.

Babst Calland attorneys are tracking the most pressing issues related to data center development. For questions or more information on topics addressed in this Alert, please contact Kate Cooper at (412) 394-6588 or **kcooper@babstcalland.com**; Ben Clapp at (202) 853-3488 or **bclapp@babstcalland.com**; Anna Skipper Jewart at (412) 253-8806 or **ajewart@babstcalland.com**; or Peter Landau at (412) 394-5672 or **plandau@babstcalland.com**.