

DEP will consider requests to temporarily suspend environmental requirements due to COVID-19

As businesses in Pennsylvania struggle to deal with significant disruptions and challenges to their operations caused by the COVID-19 pandemic, environmental agencies have recognized the challenges the pandemic presents to achieving compliance with environmental obligations. For example, on March 26 the U.S. Environmental Protection Agency issued a temporary policy for excusing COVID-19-related noncompliance (*see accompanying article*). Similarly, on March 31 the Pennsylvania Department of Environmental Protection issued an alert (www.dep.pa.gov/Pages/AlertDetails.aspx) announcing that it would consider requests to temporarily suspend certain regulatory, permit, and/or other legal requirements due to COVID-19. DEP also provided the form needed to make such a request.

This announcement reflects a thought change from DEP's previous assertion that COVID-19's impact on businesses in Pennsylvania would not excuse compliance with environmental laws, stating that "[a]ll permittees and operators are expected to meet all terms and conditions of their environmental permits, including conditions applicable to cessation of operations."

What is required to request a temporary suspension?

Unlike EPA's temporary policy, which does not require regulated entities to submit documentation regarding an inability to meet routine compliance obligations, DEP is requiring submittal of the request form. While DEP did not elaborate on how it will review requests for suspension, it will generally evaluate (1) the reasons for the request in light of the COVID-19 pandemic, and (2) the risk of harm to the environment or public health if the request is or is not granted.

Importantly, it will not be enough for entities to show that COVID-19 has restricted their ability to comply with regulatory, permit or other legal

requirements; entities must demonstrate that strict compliance would prevent, hinder or delay necessary action in coping with the COVID-19 emergency. This standard reflects the language of Governor Tom Wolf's March 6 Proclamation of Disaster Emergency and 35 Pa. C.S. § 7301, which DEP cited as authority for granting temporary suspensions.

The two-page request form asks 16 questions regarding topics including the following:

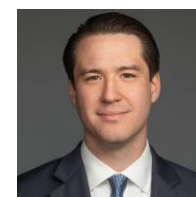
- Alternate compliance options that have been explored;
- Length of time the entity expects to be unable to comply and the necessary circumstances to return to compliance;
- Extent of risk of additional pollution and/or how such increased pollution will be avoided;
- Public health and safety benefits from granting the suspension; and
- Negative consequences to the entity's operations and the Commonwealth's response to the COVID-19 emergency if the suspension is not granted. Some of the more interesting, and potentially controversial, questions asked by DEP include the following:
 - Do you believe cost gouging or supply hoarding is negatively affecting your ability to comply?
 - Would you possess a unique advantage over your competitors, or others in the same industry, if a suspension is granted?

It is not clear whether DEP will be receptive to entities requesting suspensions from settlement agreement requirements using the request form, or whether the department will expect entities to rely primarily on the force majeure provisions typically provided in those agreements. However, the request form does allow entities to request suspension of regulatory, permit "or other requirement(s)," indicating that entities may be able to request suspension of settlement agreement requirements using this recently introduced process.

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When are suspensions expected to be granted?

DEP has not announced its expected time frame for responding to the likely large number of requests for suspension. The department also did not explain how it will evaluate and balance the factors outlined in the request form. April 2020 | The PIOGA Press 7
However, in multiple places the form emphasizes that the entity should provide detailed and specific responses. DEP stated that suspensions will initially not be granted beyond June 30, 2020.

We note that this procedure applies only to requests for suspension of state regulatory or permit requirements and requirements under federal programs delegated to Pennsylvania. Entities seeking relief from federal requirements, under only federal authority, are to contact EPA Region III and consult EPA's March 26 policy.

Additional guidance on conducting Chapter 102 earth disturbance activities

At the same time as providing the temporary suspension request form, DEP also issued COVID-19-related guidance for permittees and operators conducting permitted earth disturbance activities under Chapter 102 of the Pennsylvania regulations.

Entities considered "life-sustaining businesses" under Governor Wolf's March 19 order, which required all "non-life-sustaining businesses" to close their physical locations, may continue to conduct earth disturbance activities to the extent such activities are in support of the operation of the life-sustaining business.

However, "non-life-sustaining businesses" must cease earth disturbance activities. Upon doing so, the entity must implement temporary or permanent stabilization measures as required by the permit and applicable regulatory requirements. Once required stabilization measures are implemented, the entity is relieved from requirements to perform weekly routine inspections, but still must conduct other inspections required by the permit, such as Post-Storm Event and Corrective Action inspections. DEP stated that it considers such inspections to be critical operational functions and not in violation of the March 19 order.

Babst Calland's environmental attorneys are available to help you develop requests for temporary suspensions and guide you through the process. For more information, please contact Lisa M. Bruderly at 412-394-6495 or lbruderly@babstcalland.com or Daniel P. Hido at 412-394-6580 or dhido@babstcalland.com.