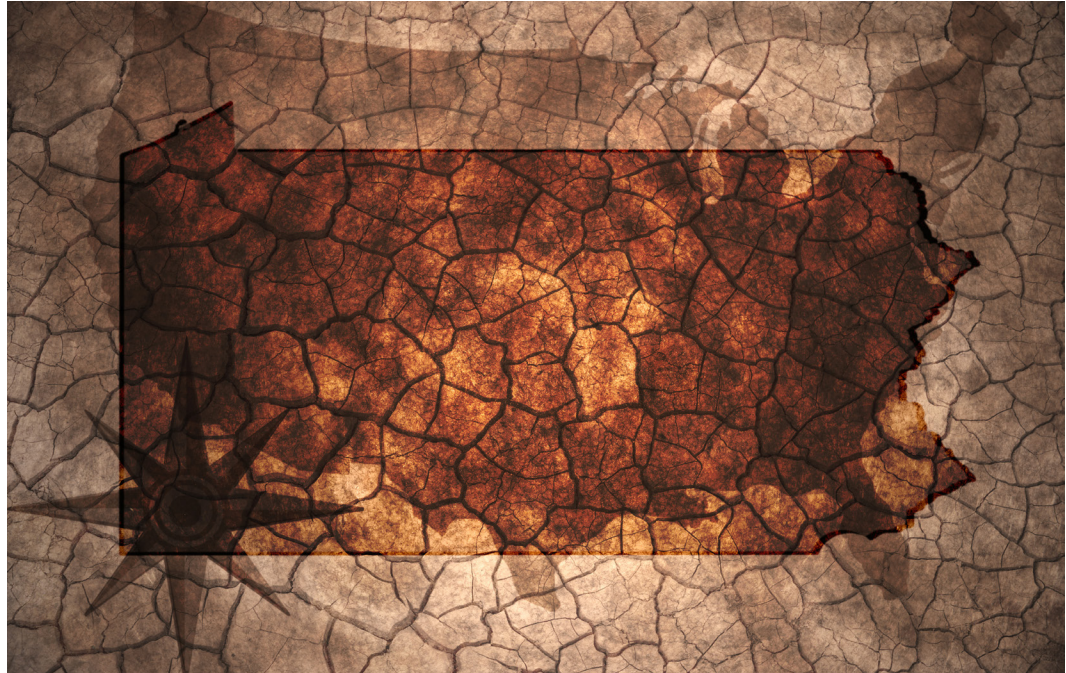


PA Environmental Compliance Considerations During COVID-19 Pandemic



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For good reason, health and safety issues surrounding COVID-19 have been at the core of agency messaging to the public and to the regulated community. How to keep workers safe. How to keep the elderly, the health-compromised, and health care workers safe. What constitutes acceptable social distancing. How the virus is transmitted. What chemicals have been proven to kill the virus. The safety of public drinking water. The list goes on and on ... and on.

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But what about a company's continuing obligations to comply with statutory and regulatory environmental requirements? Requirements surrounding site inspections, training, testing, monitoring, and reporting remain, despite the wide-reaching disruptions of COVID-19. A company's ability to meet these requirements is becoming increasingly difficult as employees work from home and companies operate with a skeleton staff. From disruptions to supply chains – which limit the ability to get replacement parts and equipment needed for compliance – to very limited access to testing laboratories and environmental consultants, companies are now facing numerous compliance obstacles. Below is a high-level overview of the current COVID-19 compliance landscape in Pennsylvania.

Governor Wolf directed all non-life-sustaining businesses in Pennsylvania to close their physical locations as of 8 p.m. March 19, 2020, to slow the spread of COVID-19. (A chart outlining what is and is not a life-sustaining business can be found here: <https://www.scribd.com/document/452553026/UPDATED-2-30pm-March-24-2020-Industry-Operation-Guidance>). Enforcement actions against businesses that did not close physical locations began on Monday, March 23, at 8 a.m. Additionally, as of the date of this article, residents in the following counties are subject to a stay-at-home-order, directing residents to stay at home except for certain essential activities: Allegheny, Bucks, Chester, Delaware, Erie, Lehigh, Monroe, Montgomery, Northampton and Philadelphia. More counties are expected to be subject to these restrictions in the coming days.

What does this mean for the regulated environmental community? A question-and-answer document issued by the Governor's office provides the following general guidance:

Q: May businesses which are required to suspend in-person operations maintain limited in-person essential personnel for security, maintaining good repair, processing of essential functions, or to maintain compliance with federal, state or local regulatory requirements?

A: Businesses suspending in-person operations must limit on-site personnel to maintain critical functions, and in all cases follow social distancing and COVID-19 mitigation guidance provided by the PA Department of Health and the CDC. Such building services do not require a waiver.

This guidance indicates that essential personnel needed to ensure compliance with environmental requirements can continue to work even if the business cannot conduct physical operations under the Governor's Order. Similarly, the chart linked above indicates that "facilities support services" and "waste management" services can continue, which can be read as supporting the continuation of activities necessary for environmental compliance at a given physical location.

Notably, the Pennsylvania Department of Environmental Protection on its website has made clear that the regulated community is *not* being relieved of its state environmental obligations. The agency recognizes that many industries have been ordered to suspend operations for the duration of the governor's emergency declaration, and encourages operations of businesses that are allowed to remain open to employ social distancing and limit activities to the extent possible. The Department makes clear, however, that *all* businesses are expected to continue to comply with their permits: "All permittees and operators are expected to meet all terms and conditions of their environmental permits, including conditions applicable to cessation of operations. DEP is committed to its mission of protecting public health and the environment and as such will continue to monitor these permitted facilities that have temporarily ceased operations." The agency calls out Chapter 102 earth disturbance permits and Chapter 105 encroachment permits specifically, directing permit holders to "refer to your permit terms and conditions, as they contain regulatory obligations and details regarding cessation or temporary stoppage of work."

With respect to its internal obligations, the Department is giving itself some flexibility. While the agency states that "DEP staff that are able are teleworking, and still fulfilling the mission of the department . . . [t]his includes reviewing permits, responding to complaints and environmental emergencies, and other work," the Department has suspended timeframes for permit decisions established in the *Policy for Implementing the Department of Environmental Protection Permit Review Process and Permit Decision Guarantee*, and states that permit decisions may be delayed.

So what can an entity regulated by DEP do in such times? In short, it should do everything it can to remain compliant, including:

- Fix outstanding noncompliance issues now, or as soon as possible
- Record events of noncompliance
- Track all permit-imposed deadlines and all other deadlines established in settlement agreements or consent decrees

- Discuss and set clear expectations for, and operational plans and contingencies involving, all key and back-up environmental personnel, including any consultants and contractors to make sure they are going to continue to provide services
- Maintain open communications with regulators – for example, if a compliance question or problem arises, reach out to the agency point of contact identified in your permit or permit-related correspondence (if one is not provided, a current DEP directory can be found here at: <https://www.dep.pa.gov/About/Contact/Pages/default.aspx>)
- Evaluate all possible legal defenses that may be available for noncompliance issues. A company may want to assess all available force majeure clauses, especially if regulators are not being flexible with respect to deadlines or other matters of noncompliance. In this context, it is key to ensure compliance with all notice provisions.

Please see the following related article written by our colleagues at Troutman Sanders: <https://www.environmentallawandpolicy.com/2020/03/environmental-compliance-in-the-wake-of-the-coronavirus/>.

See the COVID-19 Resource Center (available at: <http://covid19.troutman.com>) for additional resources to guide companies through this unprecedented global health challenge.