

## COVID-19 Emergency Mandates on Utility Construction Activities and Supplies

The COVID-19 (coronavirus) pandemic has led governors and state emergency management officials to impose very stringent mandates on construction-related activities and supply inventories of utilities — even though such utilities are providing essential public services. In this alert, the Utility & Energy Group of Cozen O’Connor summarizes the current status of such mandates in Pennsylvania and New Jersey and identifies issues about which utility management should be thinking during the state of emergency in order to protect their customers, personnel, and companies.

### Pennsylvania Restrictions on Construction Activities

Industry Operation Guidance issued by the Commonwealth of Pennsylvania on April 1, 2020, appeared to provide that, with few exceptions all construction projects must be shut down in the commonwealth. For the utility sector this could mean that any utility construction project, other than emergency repairs, would need a waiver on the basis that the particular project is essential for health and safety reasons. Although the guidance recognizes utilities as providing essential services, the guidance did not appear to provide automatic exemptions or waivers for all of their construction activities.

The guidance, set forth the restrictions by industry group, subsector, and North American Industry Classification System (NAICS) code. Under the industry group and subsector “Water, Sewage and other Systems” and NAICS code 2213, those systems may continue physical operations. Based on that, one might, at first glance, logically presume that also permits construction activities by those systems. However, under the industry group “Utility Subsystem Construction,” and the subsector “Heavy and Civil Engineering Construction,” and the NAICS code 2371, those systems may not continue physical operations, except for emergency repairs. Examples given under the NAICS code of “water and sewer line related structures construction” include, but are not limited to: water and sewer mains, fire hydrant installation, storm sewers, water and sewer pumping stations, storage tanks, towers reservoirs, and water treatment plants.

Efforts are underway in Pennsylvania to have the guidance revised, or waived, to allow construction projects to continue to operate, subject to certain mitigation measures. On April 6, 2020, House Bill 2400 was reported out of the Committee on State Government for a vote by the full House. The bill, if enacted, would provide a waiver to all public and private construction activities that can adhere to the social distancing practices and other mitigation measures defined by the CDC to protect workers and to mitigate the spread of COVID-19. Meanwhile, on April 5, 2020, the NUCA of Pennsylvania, which represents utility and excavation contractors, informed its contractor members that based on official information from the Governor’s Office, utility contractors can go to work, provided they utilize safety protocols, such as social distancing, sanitizing hands, and wearing face masks. The basis for the information is that contractors would be working for utility companies, and utility companies are life-sustaining. As of the date of this Alert, a revised guidance or waiver has not been released to reflect this interpretation. Utility service providers should expect inquiries from utility contractors about proceeding with work on utility projects.

### New Jersey Restrictions on Construction Activities

New Jersey’s state of emergency order (Executive Order No. 107) does not halt the construction industry’s physical operations. However, the order does direct businesses that cannot perform their function via telework to “reduce staff on site to the minimal number necessary to ensure that essential operations can continue.” As of Tuesday, March 31, 2020, New Jersey continued to consider the construction industry essential but the governor has indicated that the state is looking



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at the situation regularly.

## **New Jersey Authorizes Commandeering of Supplies Necessary for Health Care**

On April 2, 2020, New Jersey Governor Murphy signed Executive Order No. 113, in which the New Jersey state director of emergency management (who is the superintendent of state police) was authorized to commandeer personal services and/or real or personal property, including “medical resources” under the New Jersey Civilian Defense and Disaster Control Act (the Disaster Control Act) N.J.S.A. App. A:9-33 et seq.

Executive Order No. 113 is part of the state’s effort to match medical capacity and supplies with available resources and follows (i) Executive Order No. 109 (March 23, 2020), which, among other things, required all businesses and non-hospital health care facilities to submit to the state an inventory of personal protective equipment (PPE), ventilators, respirators, and anesthesia machines in their possession using a state-sponsored website, and (ii) Executive Order No. 111 (March 28, 2020), which, among other things, required health care facilities to report data concerning their capacity and supplies on a daily basis, including data relating to bed capacity, ventilators, and PPE.

Executive Order No. 113 recognizes that, in the face of the rising number of positive COVID-19 cases and related hospitalizations and despite the aggressive steps to “procure medical resources from the federal Strategic National Stockpile, FEMA, existing State caches of supplies, individual and corporate donations, and through traditional private sector purchasing ... there remains a critical shortage of medical resources in the State, particularly in hospitals, healthcare facilities, and emergency response agencies in the northern region of the State.” The order also directs that compensation shall be provided under applicable Disaster Control Act procedures, which, among other things, provide for compensation to be paid at the prevailing established rate for like or similar services. Among other things, the Disaster Control Act established emergency compensation boards in each New Jersey county to adjudicate any claims for just compensation whenever property is taken or used pursuant to the act. Claims for compensation under the Disaster Control Act are made by petition to an applicable county board. N.J.S.A. App.A:9-51.

## **Issues About Which Utility Management Should Be Thinking**

Is your company in compliance with the construction-related restrictions?

Are your third-party vendors in compliance with construction-related restrictions?

Are your employees and vendor employees following CDC and state health agencies’ guidelines for safe working conditions, such as safe distancing of employees and sanitizing of equipment and work areas?

Have you proactively coordinated with the state police and local law enforcement to ensure that they are aware that a particular project is exempt?

In the event that you face an enforcement action or audit, have you identified and properly documented projects that are necessary for “emergency service” or otherwise to maintain safe, adequate, and reliable utility service?

Are you continuing with projects that, if halted, could cause a public safety risk (such as fire hydrant installation and repair) and expose your company to other liabilities?

Have you provided your operations personnel with written proof that the project on which they are working is exempt from the restrictions?

Have you properly documented whether new service connections can be justified as an “emergency service”?

Have you sought waivers from the appropriate state agency for any construction activities that may be questionable?

Have you inventoried your equipment and supplies that could possibly be used by the health care industry? Are you prepared to justify why your company needs to maintain certain equipment and

supplies for the continued provision of essential public utility services?

Have you had your legal department examine the force majeure provisions of your construction contracts? Where appropriate, have you stopped or reduced payment on projects?

In Pennsylvania, have you reviewed your Long-Term Infrastructure Improvement Plan to determine what, if any, amendments may be necessary due to the restrictions on construction activities? Does your Distribution System Improvement Charge (DSIC) accurately reflect any changed circumstances?

Is your accounting department fully and accurately tracking COVID-19 related expenses for possible future rate recovery?

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**Please do not hesitate to contact a member of Cozen O'Connor's Utility & Energy Group with specific questions.**