

Guidance for Implementation of Act 46

I. Purpose

The purpose of this document is to provide guidance¹ to the Department of Environmental Protection (DEP), County Conservation Districts (CCD) and local agencies on implementing the law that became effective on July 6, 2010, that contains an extension period for certain types of permits and other approvals. *See* Act of April 9, 1929, (P.L.343, No. 176), known as the Fiscal Code, *added* July 6, 2010, (P.L. __, Act No. 46) (hereinafter “Act 46”). In addition, this guidance informs the public about DEP’s interpretation of Act 46, and plans for implementation.

II. General

Act 46 was a component of the budget legislation signed by Governor Rendell on July 6, 2010, and was effective upon his signing. DEP understands Act 46 as being aimed at providing some relief to the building industry impacted by the economic downturn and toward that end is focused on land development for residential and commercial purposes. It implicates several DEP programs, as well as some local approvals overseen by DEP such as on-lot systems by local sewage management agencies.

The scope of the permit extension provisions of Act 46 is evident from the statutory language, as well as the legislative history. For example, the definition of “approval” in the law is focused on development and construction. In addition, the list of laws cited in that definition are primarily laws authorizing local agencies to issue land development and construction approvals such as building permits. Moreover, the term “development” is used throughout Act 46, and its definition relates to traditional land development and construction activities. Finally, the permit extension provisions of Act 46 derive from two bills that were introduced in the legislature in 2009 and amended in 2010 – HB 1055 and SB 569. The legislative findings in both of those bills, contained in Appendix I, affirm this scope.

In addition, by its express terms, Act 46 does not apply to: (1) an approval issued to comply with federal law, the duration or terms of expiration of which is specified or determined by federal law, or (2) requirements that are necessary to retain federal delegation to, or assumption by, the Commonwealth of the authority to implement a federal law or program. For example, Act 46 does not extend any of the National Pollutant Discharge Elimination System (NPDES) permits administered by DEP or CCD’s, including those for construction activities, for both of those reasons.

¹ The policies and procedures outlined in this guidance are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements. The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of DEP to give the rules in these policies that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

III. Impacts on Permitting and Other Approvals

A. Expiration Dates. Act 46 automatically extends the expiration date of certain types of approvals, permits, decisions, agreements and other authorizations or decisions (hereinafter “approvals”) that were in effect, or issued, after December 31, 2008. The extension lasts until July 1, 2013. The types of approvals that are affected are described below under “Applicability.”

NPDES permits, which have a federally-mandated duration, are clearly not covered by Act 46. The NPDES program includes permitting of sewage facilities, industrial facilities, and stormwater discharges associated with construction activity.

B. New Requirements. Act 46 also precludes agencies from prohibiting or limiting an approval covered by Act 46, based on a new law, regulation or policy during the extension period. This Act 46 provision however, will not apply to NPDES permits issued or renewed under the new Chapter 102 regulations, which are expected to be published later in 2010. Act 46 does not apply to the NPDES program or delay the applicability of the Chapter 102 regulations to the NPDES stormwater construction program because such a delay would jeopardize delegation to DEP to administer that federal program.

IV. Applicability

A. Applicable Permits and Other Approvals. Act 46 applies to approvals that were in effect, or issued, after December 31, 2008, and that are related to land development for residential and commercial purposes. The approvals subject to the act are the following approvals or authorizations issued by DEP, CCDs or local agencies, when they are associated with land development and related construction, but subject to the exceptions listed in Section V below:

1. Dam, Water Obstruction and Encroachment permits, and General Permit authorizations, under *25 Pa. Code* Chapter 105.

According to the Army Corps of Engineers, the related Pennsylvania State Programmatic General Permit (SPGP) authorizations pursuant to Section 404 of the federal Clean Water Act will also be extended. Neither DEP nor any delegated CCDs or holder of such an authorization under Chapter 105 will have to take any action to effectuate this extension of any related SPGP authorization.

2. Water Quality Certifications under Section 401 of the federal Clean Water Act that are issued by DEP for General Permits issued under Chapter 105. The extension is for the same length of time that the applicable Chapter 105 coverage approval is extended.
3. Permits and General Permit authorizations issued for beneficial use of residual waste, under *25 Pa. Code* Chapter 287, that are listed in Appendix II.

4. Deadlines for commencement of construction in public water system construction permits issued under *25 Pa. Code* § 109.503.
5. Approvals for on-lot systems issued by local agencies under *25 Pa Code* Chapter 72.
6. Plan approvals under Act 167, 32 P.S. § 680.1 *et seq.*
7. Part II permits for construction of sewage treatment facilities under *25 Pa. Code* Chapter 91.

B. Exceptions. There are several exceptions to the applicability of Act 46. The act does not apply to the following types of approvals and circumstances:

1. An approval issued to comply with federal law, the duration or terms of expiration of which is specified or determined by federal law.
2. Requirements that are necessary to retain federal delegation to, or assumption by, the Commonwealth of the authority to implement a federal law or program.
3. Approvals where, after the approval and during the extension period, the surface waters became classified as High Quality pursuant to *25 Pa. Code* Section 93.1, 93.4b(A) or classified as Exceptional Value pursuant to *25 Pa. Code* 93.4b(B)(1).
4. An approval that was issued in connection with Exceptional Value surface waters pursuant to *25 Pa. Code* § 93.4b(B)(1).
5. An administrative consent order or other enforcement action relating to an approval that is subject to the extension period.
6. The revocation or modification of an approval or extension of an approval, when the approval authorizes the modification or revocation for cause.

C. Operating Under an Expired Approval. The act provides for a verification process, and DEP's implementation of that process is described below. Holders of approvals (e.g., permittees) should assume that an expiration date has not been extended under Act 46 unless it is listed in Section IV.A above, and the holder has received verification under the process described in Section V.

D. No Changes to Terms or Conditions. Except as stated in this guidance, Act 46 does not change conditions of any approvals issued under a program administered by DEP.

F. Noncompliance by Holders of Approvals. Under the express language of Act 46, DEP retains the authority to suspend or revoke an approval for noncompliance with a written condition of the approval. In addition, nothing in the act affects DEP's authority to enforce conditions of approvals.

V. Verification Process

Act 46 allows holders of approvals (e.g., permittees) to request a verification that: (1) an approval is still in existence, and (2) the expiration date has been extended. If the agency does not respond within 30 days, the law states that the existence of the approval and the extension of its expiration date shall be “deemed affirmed.”

DEP does not interpret this “deemed affirmation” language to either allow expired approvals to be reinstated, or to allow an approval’s expiration date to be extended, if that approval is not governed by Act 46. For example, if a request for verification is submitted for an expired NPDES permit, it cannot be “deemed” to be extended because DEP failed to respond within 30 days. This law does not reinstate that permit because NPDES permits are not subject to this law.

DEP’s verification process is as follows.

1. Holders of approvals who seek a verification from DEP must send the request to the office that issued the approval. A list of the relevant offices in DEP is contained in Appendix III.
2. The verification request will be date-stamped when it is received by the proper office in DEP.
 - a. If a verification request is received by a CCD regarding an approval of an Erosion and Sediment Control Plan pursuant to a delegation agreement with DEP, that request must be forwarded to the applicable regional office of DEP for a response.
 - b. Local agencies implementing the Sewage Facilities Act requirements for on-lot systems may handle verification requests without any interaction with DEP.
3. Upon receipt in the proper office, the verification request will be forwarded to the coordinator for each applicable office that issued the approval:
 - a. Regional offices: Assistant Regional Director.
 - b. Central Office programs: Bureau Director.
 - c. District Mining Offices: District Mining Manager.
4. The verification request must contain the following, or it is incomplete and cannot be processed by DEP under Act 46:

- a. A copy of the subject approval.
 - b. An explanation of how the approval is related to real property development.
 - c. An explanation of how the approval is governed by Act 46.
 - d. Payment of the applicable review fee (see below).
5. The coordinator will consult this guidance and prepare a written response. The coordinator may confer with Field Operations, Central Office programs or the Office of Chief Counsel before the response is sent, but that is not necessary.
 6. The response will be dated and postmarked no later than 30 days after receipt of the verification request by the proper office in DEP.
 7. DEP will respond to all verification requests.

A verification request is incomplete and not in accordance with Act 46 unless it contains the necessary information listed above and the appropriate fee.

Holders of approvals should NOT assume that an expiration date has been extended under Act 46 unless it is listed in Section IV.A above, AND the holder has received verification under the process described in this Section.

VI. Fees

Act 46 provides for a review fee for processing a verification request. It must accompany the request or the request will be returned. Fees must be paid by check, and made payable to “The Commonwealth of Pennsylvania.” There are two types of review fees:

- a. *Residential approvals*: \$100. An example of a residential approval is a Chapter 105 permit for a housing development.
- b. *Commercial approvals*: \$500. An example of a commercial approval is Chapter 105 permit for construction of a shopping center.

APPENDIX I

Legislative Findings From Prior Legislation (HB 1055 and SB 569)

The General Assembly finds and declares as follows:

(1) There exists a state of national recession, which has drastically affected various segments of the Commonwealth's economy including, but not limited to, the banking, real estate and construction sectors.

(2) As a result of the crisis in the real estate finance sector of the economy, real estate developers and redevelopers, including homebuilders and commercial, office and industrial developers, have experienced an industry-wide decline, including reduced demand, canceled orders, declining sales and rentals, price reductions, increased inventory, fewer buyers who qualify to purchase homes, layoffs and scaled-back growth plans.

(3) The process of obtaining planning board and zoning board approvals for subdivisions, site plans and variances can be difficult, time consuming and expensive, both for private applicants and government bodies.

(4) Due to the current inability of builders and their purchasers to obtain financing, under existing economic conditions, more and more once-approved permits and approvals are expiring or lapsing and, as these permits and approvals lapse, lenders must reappraise and thereafter substantially lower real estate valuations established in conjunction with approved projects, thereby requiring the reclassification of numerous loans, which in turn, affects the stability of the banking system and reduces the funds available for future lending, thus creating more severe restrictions on credit and leading to a vicious cycle of default.

(5) As a result of the continued downturn of the economy and the continued expiration of permits and approvals which were granted by the Commonwealth and its municipalities, it is possible that thousands of government actions will be undone by the passage of time.

(6) Obtaining an extension of a permit or an approval under existing statutory or regulatory provisions can be both costly in terms of time and financial resources and insufficient to cope with the extent of the present financial situation.

(7) It is the purpose of this act to prevent the wholesale abandonment of approved projects and activities due to the present unfavorable economic conditions by tolling the term of these permits and approvals for a period of time, thereby preventing a waste of public and private resources and continuing real property development projects which may help to eradicate previously blighted structures.

APPENDIX II

List of applicable permits for beneficial use of residual waste, under 25 Pa. Code Chapter 287, when it is used in a land development project:

WMGR065 - Beneficial use of the following types of residual wastes related to the manufacturing of iron and steel: refractories, foundry sands, slags, air emission control solids and the media associated with their excavation as construction fill at an Act 2 remediation site.

WMGR070 - Beneficial use of baghouse fines from air pollution devices generated at hot-mixed asphalt plants as a construction material or as levee core impermeable fill and pipe bedding.

WMGR072 - Beneficial use of dewatered dredge waste for use as a roadbed material in roadway construction.

WMGR079 - Processing and beneficial use of waste asphalt shingles as an aggregate in the production of hot mix asphalt paving material and as a sub-base for road and driveway construction.

WMGR082 - Processing and beneficial use of steel and iron slag and refractory bricks mined from an existing slag pile for use as a construction material.

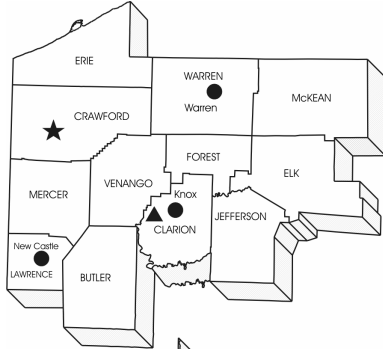
WMGR090 - Processing and beneficial use of reclaimed asphalt pavement (RAP) materials as roadway construction material.

APPENDIX III

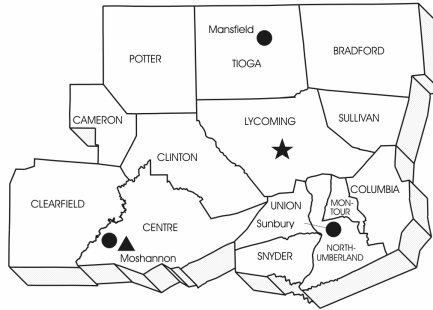
Department Offices for Verification Requests

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION REGIONAL, DISTRICT AND MINING OFFICES

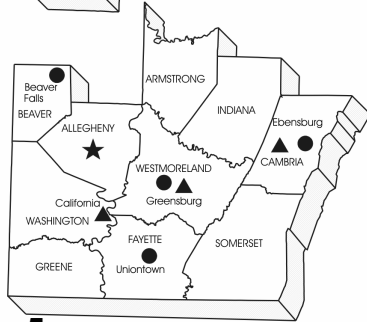
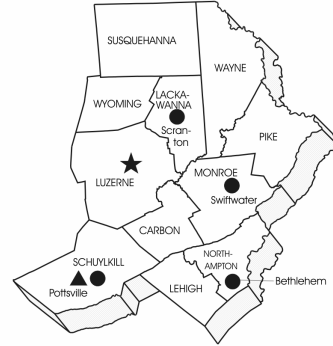
6 NORTHWEST REGION
230 Chestnut Street
Meadville, PA 16335
814-332-6984



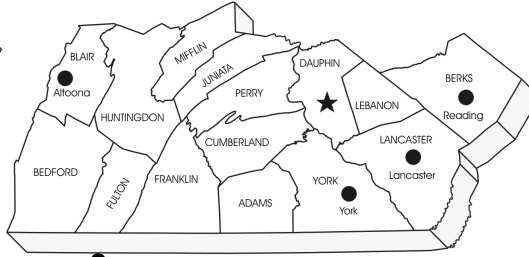
4 NORTHCENTRAL REGION
208 West Third Street, Suite 101
Williamsport, PA 17701-6448
570-327-3636



2 NORTHEAST REGION
2 Public Square
Wilkes-Barre, PA 18701-1915
570-826-2511



5 SOUTHWEST REGION
400 Waterfront Drive
Pittsburgh, PA 15222
412-442-4000



3 SOUTHCENTRAL REGION
909 Elmerton Avenue
Harrisburg, PA 17110
717-705-4700



1 SOUTHEAST REGION
2 East Main Street
Norristown, PA 19401
484-250-5970

LEGEND: ★ REGIONAL OFFICES ● DISTRICT OFFICES ▲ MINING OFFICES

DEP Central Office
400 Market Street
P.O. Box 8464
Harrisburg, PA 17105-8464
717-783-2300

**Bureau of District Mining Operations
District Headquarters**
Armbrust Professional Center
8205 Route 819
Greensburg, PA 15601-0982
Telephone: 724-925-5500

Pottsville District Mining Office
5 W. Laurel Blvd.
Pottsville, PA 17901-2454
Telephone: 570-621-3118

Counties Served: Berks, Bucks, Carbon, Chester, Columbia, Dauphin, Delaware, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Monroe, Montgomery, Montour, Northampton, Northumberland, Pike, Philadelphia, Schuylkill, Susquehanna, Wayne, Wyoming and York

Moshannon District Mining Office
186 Enterprise Drive
Philipsburg, PA 16866
Telephone: 814-342-8200
Counties Served: Bradford, Cameron, Centre, Clearfield, Clinton, Lycoming, Potter, Snyder, Sullivan, Tioga and Union

Cambria District Mining Office
286 Industrial Park Road
Ebensburg, PA 15931
Telephone: 814-472-1900
Counties Served: Adams, Bedford, Blair, Cambria, Cumberland, Franklin, Fulton, Huntingdon, Indiana, Juniata, Mifflin, Perry and Somerset

Greensburg District Mining Office
Armbrust Professional Center
8205 Route 819
Greensburg, PA 15601-0982
Telephone: 724-925-5500
Counties Served: Allegheny, Armstrong, Beaver, Fayette, Greene, Washington and Westmoreland

California District Mining Office
25 Technology Drive
California Technology Park
Coal Center, PA 15423
Telephone: 724-769-1100
Counties Served: All counties with underground bituminous mining and subsidence

Knox District Mining Office
White Memorial Building, PO Box 669
Knox, PA 16232-0669
Telephone: 814-797-1191
Counties Served: Butler, Clarion, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, McKean, Mercer, Venango and Warren