

Environmental Impacts Of A Government Shutdown

Law360, New York (August 2, 2011) -- State and federal environmental agencies play a critical role in the day-to-day operations of a wide range of business interests. The recent 20-day state government shutdown in Minnesota highlights what happens when these agencies essentially disappear. Minnesota Gov. Mark Dayton and state legislative leaders were unable to agree on a state budget by the start of the fiscal year on July 1, 2011.

Consequently, most state functions and services shutdown from July 1 until a full budget was finally signed into law on July 20, 2011. Although the Minnesota Pollution Control Agency (MPCA) and Minnesota Department of Natural Resources (DNR) collectively make up less than one percent of the state budget, the shutdown of these agencies had widespread consequences for businesses that rely on these agencies and their permitting functions.

An examination of what happened in Minnesota is useful to minimize potential interruptions to business operations during future shutdowns.

Environmental Permitting and Review under the Minnesota Shutdown

During the shutdown, the MPCA and DNR terminated the processing of all environmental permit applications or requests for modification. For example, the MPCA normally would have approved an estimated 240 construction stormwater permits during this period. Even though the general permit for construction stormwater discharges allows projects to start within seven days of mailing notification to the agency, the MPCA took the position that these construction projects could not proceed.

The DNR also notified permit holders that it had "suspended" a number of permits already issued, including:

- DNR surface water use permits (other than domestic water supply and power production);
- DNR public water and aquatic plant management permits (including permits for commercial mechanical plant control and work in public waters); and
- DNR general permits that require agency notification (including permits for temporary water appropriations and flood damage repair).

The DNR took the position that these permits could theoretically require some level of staff involvement and therefore could not continue during a shutdown. For example, the DNR “suspended” many surface water use permits because the volume of water appropriated could potentially be limited by the agency during low flow conditions and staff was not available to evaluate whether these conditions existed.

The DNR’s authority to “suspend” these existing permits was never specified. For example, the DNR has statutory authority to cancel or limit surface water use permits, under some circumstances, but only after affording the permit holder a hearing. The water statute does not mention “suspension” of permits.

In contrast, the MPCA and DNR asserted that other permits that had already been issued would remain valid, including:

- MPCA stormwater construction permits (if the application had been approved before the shutdown);
- MPCA air emission permits;
- DNR permit to mine;
- DNR groundwater use permits (including permits for mine dewatering); and
- DNR surface water use permits for domestic water supply and power production uses only (this does not include industrial or commercial uses).

All permit requirements were still enforceable whether or not state staff were inspecting facilities. Permit reporting requirements, such as discharge monitoring reports or annual reports, were still to be submitted to the MPCA and DNR on a timely basis.

Likewise, environmental review projects were generally discontinued during the shutdown and MPCA licenses, such as landfill and wastewater operator licenses, that expired during the shutdown were not renewed. Deadlines for public comment periods regarding pending permits and environmental review administered by the agencies were still observed even if the notice period ended during the shutdown.

Challenges to the Agencies’ Policies During the Shutdown

On June 29, 2011, as the state shutdown appeared imminent, Ramsey County District Judge Kathleen Gearin ordered the state to fund “critical core functions” of government. Judge Gearin ruled that the state and federal constitutions required this funding given the Minnesota Constitution’s mandate that constitutional officers perform certain tasks and the Supremacy Clause of the U.S. Constitution which requires that the state fund programs mandated by Congress. Judge Gearin’s order was focused on defining what constituted “critical core functions.”

Although the court generally adopted the governor's plan which recognized that government services needed to prevent “a severe and permanent negative financial impact to business” must be “reestablished within a few days,” the court did not specifically approve continued funding for the permitting functions of the MPCA or DNR. Judge Gearin also appointed retired Minnesota Supreme Court Chief Justice Kathleen Blatz as special master to hear and make recommendations to the court on petitions regarding the application of Judge Gearin's June 29 order.

Between June 29 and July 20, dozens of petitioners sought clarification from Special Master Blatz and Judge Gearin as to what constituted a “critical core function” of state government and the court issued a number of orders clarifying its June 29 order. These included a number of petitions challenging the state’s position regarding permitting and environmental review.

City of Minnetonka Beach

The City of Minnetonka Beach asked the court to allow the Minnesota Department of Health to review and approve a pending permit to allow the city to improve a water main. Although the city argued that a delay would constitute an imminent danger to the public, Special Master Blatz recommended that the petition be denied given that the need had existed for a number of years and “a several week delay should not exacerbate the pending harm or prevent the project from going forward this summer. Judge Gearin agreed and denied the petition while allowing the city to revive the issue “[i]f the shutdown continues beyond August 1, 2011[.]”

Port Authority of St. Paul

Upon the special master’s recommendation, Judge Gearin granted a petition brought by the Port Authority of St. Paul and ordered the DNR to no longer suspend a work in public waters permit and provide necessary staffing so the Port Authority could complete a routine maintenance dredge in the Mississippi River. The state had argued that “[t]he Port Authority’s dredging permit provides that a DNR hydrologist may inspect the Port Authority’s dredging operations.

Because of the shutdown, DNR hydrologists are unavailable to inspect the Port Authority’s dredging operations.” Despite this requirement, the special master found that “continuance of transportation safety functions and the protection of transport property” and “[p]rotection of waterways ... owned by the government” were critical core functions and given that the port terminal was in danger of becoming impassible without the necessary DNR permit, the DNR was authorized to provide the minimal staffing needed to allow the Port Authority to dredge the terminal.

Aquatic Petitioners

A number of “aquatic petitioners” received letters from the DNR suspending their permits to apply herbicides and algaecides to control weeds, swimmer’s itch and algae in Minnesota lakes and ponds and sought the court’s approval to continue applications under their permits.

The state argued, “[b]efore applying herbicides and algaecides to a Minnesota lake or pond pursuant to a previously authorized permit, the Aquatic Petitioners are required to notify the DNR by telephone or email. Because of the shutdown, applicable DNR employees are unavailable to monitor the activities of the Aquatic Petitioners or respond in the event of an unforeseen circumstance or citizen complaint.”

The state further argued that herbicide and algaecide applications were not critical core functions. Special Master Blatz disagreed and found that the notification requirement was more of a formality than part of an overall regulatory scheme and had never led to a response by the DNR in 34 years.

Special Master Blatz also found that the petitioners’ application of herbicides and algaecides was in furtherance of a critical core function, the maintenance and preservation of public property. Judge Gearin agreed and granted the request of the aquatic petitioners.

PolyMet

PolyMet, which is engaged in an extensive environmental review process related to the development of a nonferrous mine, requested that the DNR be allowed to continue its work on a supplemental draft environmental impact statement for PolyMet. PolyMet argued, in part, that the DNR activities related to the project are all paid for by PolyMet so there is no reason to suspend these activities when there is an independent source of revenue paying for it. The shutdown ended and the petition was deemed moot before the court could issue a ruling.

Georgia Pacific

Georgia Pacific filed a petition challenging the DNR's decision to suspend surface water appropriation permits which had led to suspension of a Georgia Pacific plant in Duluth, Minn.. Georgia Pacific argued that the DNR's suspension of these permits: (1) was not consistent with Minnesota statutes or rules, (2) violated the terms and conditions of the permit, (3) was not necessary because operation under the terms of the permit required no state funds or activity, (4) was arbitrary and inconsistent with other agency actions, and (5) continued suspension of the permit would have permanent and negative financial impacts on a Minnesota business.

Although Georgia Pacific presented the most comprehensive challenge to the DNR's "suspension" of permits, the shutdown ended and the petition was deemed moot before the court could rule on the petition.

Preparing for Future Government Shutdowns

Given increasing budget pressures, the use of temporary budget fixes, and increasing political gridlock, other government shutdowns are very possible. While each state and the federal government may define essential government services differently during a shutdown, the recent Minnesota experience presents a number of important lessons.

First, to the extent a permittee can argue that the shutdown of an issuing agency does not affect the execution of the permit or that the agency is enforcing permits in an arbitrary manner during a shutdown, the less likely operations under the permit will be hindered. The DNR and MPCA relied upon the most procedural or theoretical agency actions as reasons to unilaterally "suspend" categories of permits during the shutdown.

This approach was inconsistent as other types of environmental permits that were not suspended also had contingencies, which theoretically could have involved agency staff who might be absent during a shutdown. For example, National Pollutant Discharge Elimination System discharge permits with temperature limitations might have contingencies for reducing discharges during hot summer months. Yet in Minnesota the MPCA did not "suspend" those permits.

Second, if a government shutdown is looming, a business that relies on a permit or environmental review process may want to resolve any potential problems before the shutdown occurs by seeking clarification from the agency or declaratory relief from a court. In Minnesota, many permittees were blindsided by the DNR's position regarding the "suspension" of certain permits.

Permittees were notified of the “suspension” by letters that arrived days after the shutdown began when no DNR staff were available. Permittees who felt the DNR had no legal basis for its position were left to challenge the decision through an emergency judicial process and got in line behind dozens of petitioners seeking relief. To the extent these issues can be resolved administratively or otherwise before a shutdown begins, the less likely a permittee will face business interruptions.

Finally, any long-term planning involving projects that rely on agency interactions should take into account the reality of government shutdowns. The good news is that shutdowns are usually effective in creating political pressure and generally do not last long. At 20 days, the Minnesota shutdown was the longest in the United States in at least a decade.

If possible, it may be in a permittee’s interest to not schedule any necessary agency interaction at the start of a state or federal budget cycle or to develop contingency plans if the effect of a government shutdown is unavoidable. Contingency planning may include identifying alternative water sources, shifting operations to other facilities not subject to the shutdown, identifying and building relationships with key agency stakeholders, or preemptively working with industry or trade associations to develop collective strategies during a shutdown.

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