

MassDEP Releases Proposed Cumulative Impact Analysis Regulations for Air Permits

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The Massachusetts Department of Environmental Protection (MassDEP) is continuing its recent trend of more aggressively ramping up environmental justice (EJ) measures. On December 29, 2022, MassDEP released [draft regulations](#) requiring certain comprehensive plan applicants¹ to undertake a cumulative impact analysis for proposed facilities located in or near EJ communities. Critically, if adopted, this regulation would require MassDEP to deny a permit if the cumulative risk assessment reveals cancer and non-cancer risks exceeding certain specified thresholds.

Background

On March 26, 2021, Governor Baker signed Chapter 8 of the Acts of 2021 entitled “An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy,” which directed MassDEP to evaluate and seek public comment on—and ultimately to adopt—regulations requiring cumulative impact analyses for certain types of permits. Over the past eighteen months, the MassDEP conducted several stakeholder meetings on the draft cumulative impact analysis framework to support its draft regulations.

Cumulative Impact Analysis

The draft regulations require applicants for certain types of comprehensive plan applications to conduct a cumulative impact analysis, which involves providing advanced public notice and involvement, assessing existing community conditions, conducting air quality dispersion modeling of criteria pollutants and air toxics, characterizing the risks of air toxics, and evaluating proposed project cumulative impacts. The regulations specify a broad list of existing conditions project that applicants must assess as a part of this analysis, such as proximity to regulated facilities, air quality criteria, and nearby sensitive receptors.

If the regulations are finalized as drafted, the following types of proposed projects would be required to complete a cumulative impact analysis: (1) non-major comprehensive plan applications for projects located within one mile of an [“EJ population”](#) as defined by existing Massachusetts law, and (2) major comprehensive plan applications within five miles of an EJ population. “Proposed projects” include “construction, substantial reconstruction, alteration, or subsequent operation of a facility or emission unit for which a cumulative impact analysis is required.”

Applicants would submit the final cumulative impact analysis report to MassDEP and the permit application, both of which would be made available for public review. The public would be able to submit questions and informal comments to the applicant and MassDEP prior to the formal public comment period. MassDEP would then review the applicant’s cumulative impact analysis and comprehensive plan application and issue a proposed decision approving or denying the plan application. A 60-day formal public comment period would follow the proposed decision. After reviewing all public comments, MassDEP would issue a final decision approving or denying the application.

The regulations would prohibit MassDEP from approving permit applications subject to this rule where the proposed project poses: cumulative cancer risks that exceed a lifetime cancer risk of ten in one million; and/or cumulative non-cancer risks that exceed a hazard index equal to one.

National Framework for Cumulative Impact Analyses

Massachusetts joins other states, such as New York and New Jersey, that are beginning to require state environmental agencies to assess EJ considerations in permit issuance and renewal decisions. [New Jersey’s 2020 law](#) requires the New Jersey Department of Environmental Protection to evaluate certain facilities’ environmental and public health impacts on EJ communities based on an assessment of existing pollution burdens, while [New York enacted similar legislation in late 2022](#). Critically, all three pieces of legislation empower the state environmental agencies to make permitting decisions based entirely on a proposed activity’s potential impacts on EJ communities in light of all existing pollution burdens. At the same time, EPA is prioritizing research into cumulative impacts and released a [report](#) on cumulative impacts research in September 2022. [Federal legislation](#) requiring cumulative impact assessments for certain federal air and water permits was introduced in Congress in October 2022 but has gained little traction thus far.

Public Hearing and Comment

Regulated entities should review the proposed regulations carefully and consider [submitting feedback to MassDEP](#). Interested parties can participate in virtual public hearings, on Tuesday, March 7, at 10 am and 6 pm, and Thursday, March 9, at 1 pm and 6 pm, or submit written comments through April 7, 2023.

FOOTNOTES

1 A comprehensive plan application is required from any person prior to constructing, substantially reconstructing, altering or subsequently operating any facility or certain types of air pollutant-emitting equipment, as listed in 310 CMR 7.02 (5).

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