
Massachusetts Terminates PSD Permitting Agreement with EPA—What You Need to Know

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The Massachusetts Department of Environmental Protection (MADEP) has terminated its agreement with the United States Environmental Protection Agency (EPA) to implement the Prevention of Significant Deterioration (PSD) program, effective March 3, 2003. EPA announced this termination in a *Federal Register* notice dated June 17, 2003 (68 Fed. Reg. 35881). This *Environmental Alert* summarizes the termination and the practical impacts of MADEP's action.

Background

By an agreement dated June 30, 1982 (the 1982 Agreement), MADEP (then the Department of Environmental Quality and Engineering) and EPA agreed that MADEP would assume responsibility for implementing the Federal PSD program and the underlying regulations at 40 C.F.R. §52.21. From that date forward, MADEP served as the permitting authority for Federal PSD permits for facilities in Massachusetts; in addition, MADEP served as the lead enforcement agency for all PSD permits, including those issued by EPA prior to June 30, 1982. As the lead enforcement authority, MADEP took primary responsibility for conducting inspections, requiring and monitoring compliance testing and identifying facilities that are not in compliance with PSD requirements for potential enforcement action.

On December 31, 2002, EPA issued a series of revisions to the Federal PSD regulations for which MADEP served as the implementing authority (67 Fed. Reg. 80186). In a subsequent final rule published in the *Federal Register* on March 10, 2003, EPA revised state implementation plan provisions at 40 C.F.R. Part 52 to include the December 31, 2002 revisions in the Federal PSD regulations.

On February 27, 2003, MADEP notified EPA New England that it was terminating the 1982 Agreement and that it would no longer be the implementing authority of the Federal PSD program. The February 27th letter to EPA New England set March 3, 2003 as the effective date for termination of the 1982 Agreement.

Impact on PSD Sources in Massachusetts

As a result of the termination of the 1982 Agreement, any source that triggers PSD permitting

requirements from March 3, 2003 forward must seek a PSD permit from EPA New England, and construction on a new source or modification that triggers PSD cannot commence prior to obtaining the PSD permit from EPA. MADEP will no longer be issuing PSD permits pursuant to 40 C.F.R. §52.21. These permitting requirements apply to major sources and major modifications in Massachusetts; the thresholds for what constitutes a major source or major modification in the PSD context are set forth in 40 C.F.R. §52.21.

Companies that have a project that is currently subject to Federal PSD permitting requirements, or that becomes subject to these requirements, must also apply for and receive a state air permit from MADEP, pursuant to the state air pollution control permitting requirements set forth in 310 CMR 7.02. While this permit is separate from and additional to the Federal PSD permit that must be obtained from EPA, MADEP and EPA have agreed to coordinate the permitting process to minimize both duplicative requirements and resource burdens on the regulated community. Companies are advised to contact representatives of both EPA and MADEP early in the planning process to ensure maximum coordination between the agencies and to minimize duplication, which can delay the permitting process.

In addition to the impact on PSD permitting, the termination of the 1982 Agreement means that EPA has become the “preliminary” enforcement authority for the PSD program. As a result, EPA will now have the lead with respect to inspections of facilities with PSD permits (or that the Agency believes should have obtained PSD permits) and the initiation of enforcement proceedings against companies that have allegedly violated PSD permit requirements or terms and conditions of a PSD permit, regardless of whether the permit was issued by MADEP or EPA.

There is a more immediate impact on facilities in Massachusetts that are currently PSD permit holders (EPA identified 23 facilities that are currently operating under a PSD permit in the June 17th *Federal Register* notice). Effective March 3, 2003, these facilities (and any other facilities that are issued PSD permits from that date forward) must submit their emission data/compliance reports to EPA. This does not mean, however, that the facilities are no longer required to report this information to MADEP; permittees must examine their existing permits and state reporting obligations under the requirements at 310 CMR 7.02 regarding Plan Approvals issued by MADEP. It is likely that these regulations and permit provisions will contain an obligation to continue to report this information and data to MADEP for purposes of demonstrating compliance with the underlying requirements.

PSD Permitting and Compliance Strategy

While the termination of the 1982 Agreement alone does not substantively change the PSD permitting requirements, it does significantly change the manner in which such permits will be applied for, processed, issued and enforced. The substantive PSD permitting requirements were, however, significantly altered by the December 31, 2002 revisions to the PSD permitting requirements, and these changes are now effective in Massachusetts.

Facilities that are potentially subject to PSD permitting would be well advised to look closely at both the PSD regulations as revised and the existing MADEP Plan Approval requirements very early in the project planning process. To the extent that a project will be subject to both programs, early

interaction with both MADEP and EPA permitting officials will be a crucial element in securing timely permits while minimizing the need to perform duplicative tasks during the permitting process.

Facilities that are currently operating pursuant to a PSD permit must analyze their compliance and reporting systems to make sure that all required emission data reports and compliance reports are sent to the appropriate authorities. To the extent that certain data and reports must be submitted to demonstrate compliance with underlying PSD limits, those data/reports must now be submitted to EPA (and, in all likelihood, to MADEP as well). Once again, coordination with the EPA and MADEP officials responsible for overseeing compliance demonstrations and reporting obligations is advised to ensure that all information is appropriately submitted.

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