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MassDEP Q&A on the Permit Extension Act Section 173 of Chapter 240 of the Acts of 2010, as amended by Sections 74 and 75 of Chapter 238 of the Acts of 2012

GENERAL ISSUES

Renewals

IF AN APPROVAL EXPIRED BEFORE THE TOLLING PERIOD AND WAS ADMINISTRATIVELY CONTINUED THROUGH THE TOLLING PERIOD PURSUANT TO A TIMELY REQUEST FOR RENEWAL, BUT MASSDEP HAS NOT MADE A DECISION ON THE RENEWAL, WHAT IS THE AFFECT OF THE ACT?

The Act has no effect on the expired approval because it expired before the tolling period. The administratively continued approval continues until the approval is renewed. MassDEP may issue (or deny) the renewed approval, but the renewed approval will not have the benefit of the Act.

IF AN APPROVAL THAT EXPIRED DURING THE TOLLING PERIOD HAS NOW BEEN REVIVED BY THE ACT, AND THE PERMITTEE FILED A TIMELY RENEWAL REQUEST BEFORE THE ACT WENT INTO EFFECT BUT MASSDEP HAS NOT ACTED ON THE REQUEST, CAN THE PERMITTEE ELECT TO CONTINUE OPERATING UNDER THE PRIOR APPROVAL UNTIL IT EXPIRES?

Yes. The substantive requirements of the approval, the authorizing statute and the applicable regulations were not changed by the Act. If permittees could request a “hold” on their renewal requests absent the Act, they can still do so. If permittees could withdraw their renewal requests absent the Act, they can still do so.

WHAT ACTIONS CAN MASSDEP TAKE WITH REGARD TO PENDING REQUESTS FOR RENEWAL OF PERMITS THAT HAVE NOW BEEN EXTENDED BY THE ACT?

MassDEP may exercise its discretion to deny renewal requests if the prior approval has been extended by the Act and if MassDEP is unable at the present time to make a decision on one or more legal standards relevant to the request. MassDEP may also exercise its discretion to place requests for renewal on hold until the prior approval expires. MassDEP regulations providing for presumptive approval of a request that is not acted upon within a specified time period are ineffective with regard to the original renewal request because the Act supersedes deadlines established by regulation.

Chapter 30A

WHAT IS THE SIGNIFICANCE OF THE INCLUSION OF CHAPTER 30A IN THE LIST OF STATUTES IN THE ACT?

If an approval that is otherwise covered by the Act was appealed and the Commissioner made a final decision on the approval during the tolling period, that approval has the benefit of the four year extension.

Enforcement

WHAT HAPPENS TO A PENDING ENFORCEMENT ACTION WHERE AT LEAST ONE OF THE VIOLATIONS IS BASED ON OPERATING WITHOUT A VALID APPROVAL (BECAUSE THE APPROVAL HAD EXPIRED) BUT THE APPROVAL HAS NOW BEEN EXTENDED BY THE ACT?

MassDEP will not take enforcement action against an approval holder on the basis that the approval holder was operating without a valid approval if the previously expired approval has now been extended by the Act.

Notifications and Certifications Filed by Outside Parties

DOES THE ACT APPLY TO “NOTIFICATIONS” (E.G., ASBESTOS NOTIFICATION FORMS) OR “CERTIFICATIONS” FILED BY OUTSIDE PARTIES WITH MASSDEP?

No. Although certifications are specifically noted as covered by the Permit Extension Act, the language of the Act covers only certifications “**from**” a “state governmental entity, including any agency, department, commission of other instrumentality of the ... state governmental entity....” Notifications are not included in the covered documents in the Act. Therefore, notifications and certifications **from** outside parties **to** the agency are not covered by the Act. This would exclude most Environmental Results Program certification programs and Asbestos notifications pursuant to 310 CMR 7.15.

Fees

UNDER WHAT CIRCUMSTANCES WILL MASSDEP REFUND A FEE PAID FOR RENEWAL OF AN APPROVAL WHERE THE PRIOR APPROVAL HAS BEEN EXTENDED BY THE ACT AND MASSDEP HAS NOT YET MADE A DETERMINATION ON THE RENEWAL APPLICATION?

For renewal applications withdrawn by the applicant, the requirements of 310 CMR 4.04(3)(d) below will continue in effect:

Withdrawal of Application.

- 1. If the applicant withdraws the permit application before the period for technical review has begun, the Department shall retain 50% of the permit application fee and shall refund the balance to the applicant.*
- 2. If the applicant withdraws the permit application during or after the period for technical review, the Department shall retain the entire permit application fee.*

The applicant may elect to continue with the review of the renewal application with no refund being issued. Alternatively, the applicant may request that MassDEP put the renewal application on hold until

such time as the prior approval, now extended by the Act, is due to expire. In that case, no refund will be issued.

For renewal applications where MassDEP determines that a renewal approval will not be issued at this time because the prior approval has been extended by the Act and the applicant does not wish to put the renewal application on hold, the requirements of 310 CMR 4.04(3)(e)(2) will continue in effect:

(e) Refund and Credit.

2. A Department determination during the administrative completeness review that no permit is required of the applicant shall result in a refund of 100% of the application fee paid. The determination made during the technical review period shall result in a 50% refund.

BUREAU OF RESOURCE PROTECTION ISSUES

Wetlands

MUST EXTENSIONS TO SUPERSEDING ORDERS OF CONDITIONS (SOCs) PURSUANT TO THE ACT BE RECORDED?

Yes. The Act does not alter the substantive provisions of an approval, its authorizing statute or its regulations. The Wetlands Protection Act regulations require that extensions to Superseding Orders of Conditions be recorded. Those holding a SOC that has been extended by the Act may choose to record a notice along the lines of the following:

On August 5, 2010, Section 173 of Chapter 240 of the Acts of 2010, also known as the “Permit Extension Act”, was signed into law. On August 7, 2012, the Permit Extension Act was amended by sections 74 and 75 of Chapter 238 of the Acts of 2012. As amended, the law states that “an approval in effect or existence during the tolling period shall be extended for a period of 4 years, in addition to the lawful term of the approval.” The Act defines the “tolling period” as “the period beginning August 15, 2008, and continuing through August 15, 2012,” and defines “approval” to include “order[s] ... issued or made under ... chapter 131.” This Superseding Order of Conditions, issued on [date] to [permittee] by the Massachusetts Department of Environmental Protection pursuant to its authority under Chapter 131, § 40, and 310 CMR 10.00, has been extended by operation of law until [new expiration date].

DOES THE ACT REVIVE SOCs FOR WHICH THE WORK WAS COMPLETED AND A CERTIFICATE OF COMPLIANCE HAS BEEN ISSUED AND RECORDED?

No. If a Certificate of Compliance was issued and recorded, the SOC is no longer “in effect or existence.”

HOW WILL A PENDING REQUEST FOR AN EXTENSION BE HANDLED FOR A SOC THAT HAS BEEN EXTENDED BY THE ACT?

MassDEP may exercise its discretion to either deny or hold pending requests for extensions in the manner described above for pending requests for renewal of approvals that have been extended by the Act.

DOES THE ACT APPLY TO SUPERSEDING DETERMINATIONS OF APPLICABILITY (SDAs) AND SUPERSEDING ORDERS OF RESOURCE AREA DELINEATION (SORADS)?

Yes. The Act expressly includes “order[s] ... [and] ... determination[s] ... concerning the use or development of real property ... issued or made under ... chapter 131.” SDAs and SORADs are issued by MassDEP pursuant to its authority under Chapter 131, § 40. These particular approvals "concern[] the use or development of real property" because they determine whether specific buildings or structures will be located in a resource area or will affect a resource area. SDAs and SORADs are not pre-development activities because they are undertaken within the context of a specific development project.

CAN A WETLAND RESOURCE DELINEATION WHICH HAS BEEN EXTENDED BY THE PERMIT EXTENSION ACT BE AMENDED?

Yes. Where the most recent governing wetlands approval (Superseding Determination of Applicability, Superseding Order of Resource Delineation or Superseding Order of Conditions) was extended by the Act, a property owner or the owner’s agent may file a request to amend the associated wetland delineation, provided that the request can only be submitted after the date the governing approval would have expired in the absence of the Act.

Aquatic Nuisance Control

DOES THE ACT APPLY TO AQUATIC NUISANCE CONTROL LICENSES AND SUPERSEDING ORDERS OF CONDITIONS FOR AQUATIC NUISANCE CONTROL?

No. Although these concern the use of real property they are not directly related to the use of buildings and structures on real property in accordance with the November 2010 “Frequently Asked Questions” issued by the Executive Office of Housing and Economic Development.

401 Water Quality Certifications

DOES THE ACT APPLY TO WATER QUALITY CERTIFICATIONS?

Maybe. If the expiration date of the certification is determined by federal law, the Act does not apply and the certification is not extended, in accordance with paragraph (b)(2)(i) of the Act. If the expiration date of the certification is determined by state law, the Act does apply and the certification is extended.

Water Pollution Permits

DOES THE ACT APPLY TO TITLE 5 INSPECTION REPORTS?

No. These reports are not issued by MassDEP.

DOES THE ACT APPLY TO TITLE 5 SYSTEM INSPECTOR APPROVALS, TITLE 5 SOIL EVALUATOR APPROVALS, OR WASTEWATER TREATMENT PLANT OPERATOR APPROVALS?

No. These approvals authorize a particular person to practice a trade and are not related to that person’s use and development of real property.

DOES THE ACT APPLY TO SEWER CONNECTION AND EXTENSION PERMITS?

Yes. The Act expressly includes approvals issued under Chapter 21 and this type of approval “concern[s] the use or development of real property” because these permits authorize the installation and operation of wastewater infrastructure systems integral to the use of buildings on real property.

DOES THE ACT APPLY TO APPROVALS UNDER THE LAND APPLICATION REGULATIONS?

No. Although these concern the use of real property (agriculture) they are not directly related to the use of buildings and structures on real property in accordance with the November 2010 “Frequently Asked Questions” issued by the Executive Office of Housing and Economic Development.

DOES THE ACT APPLY TO DISPOSAL WORKS CONSTRUCTION PERMITS ISSUED BY DEP?

Yes. The Act expressly includes approvals issued under Chapter 21A and this type of approval “concern[s] the use or development of real property” because these permits authorize the installation of wastewater infrastructure systems integral to the use of buildings on real property.

DOES THE ACT APPLY TO GROUNDWATER DISCHARGE PERMITS?

Yes. The Act expressly includes approvals issued under Chapter 21 and this type of approval “concern[s] the use or development of real property” because these permits generally authorize the installation and operation of wastewater services or other water infrastructure systems integral to the use of buildings on real property.

DOES THE ACT APPLY TO INNOVATIVE ALTERNATIVE VENDOR APPROVALS?

No. These approvals authorize a vendor to sell and/or install a proprietary treatment system within the Commonwealth of Massachusetts, but are not tied to a specific property or project.

IF A WATER POLLUTION PERMIT WAS ISSUED BEFORE OR DURING THE TOLLING PERIOD BUT WAS APPEALED AND THE FINAL DECISION OF THE COMMISSIONER WAS NOT ISSUED UNTIL AFTER THE TOLLING PERIOD, DOES THE ACT EXTEND THE TERM OF THE PERMIT?

Yes. Unless a stay was issued, the regulations at 314 CMR 2.08(2) say that the terms of a water pollution permit go into effect 30 days after issuance of the permit, regardless of appeal. Therefore, if no stay was issued, the terms of the permit were “in effect or existence during the tolling period” and the permit has been extended by the Act. At the conclusion of the appeal, MassDEP may issue a revised final permit which includes the deadline as extended by the Act.

IS MASSDEP REQUIRED TO NOTIFY THE HOLDERS OF APPROVALS THAT HAVE BEEN EXTENDED BY THE ACT THAT THE DEADLINE FOR SUBMITTING A RENEWAL APPLICATION HAS ALSO BEEN EXTENDED?

No. The Act does not require issuing agencies to provide any written notice of the statutory permit extension and permittees do not need written notice of extension. However, MassDEP may publicize general information about the effects of the Act on its website and may also exercise its discretion to send letters to certain approval holders advising them of the extension and requesting that they postpone submitting their renewal applications.

BUREAU OF WASTE PREVENTION ISSUES

Hazardous Waste

DOES THE ACT APPLY TO FACILITY PERMIT APPROVALS ISSUED BY MASSDEP UNDER THE HAZARDOUS WASTE REGULATIONS AT 310 CMR 30.000?

No. There is an exemption for federal permits in the Act, and pursuant to guidance issued by the Secretariats of Housing and Economic Development and Energy and Environmental Affairs; permits are exempt if they are “issued pursuant to federal law.” MassDEP issuance of facility permit approvals under the Massachusetts Hazardous Waste regulations at 310 CMR 30.000 is authorized by the federal government, the U.S. EPA, under Section 3006 of the federal Resource Conservation and Recovery Act, 42 U.S.C.A. 6921 et seq. (RCRA). Under RCRA, the State is “authorized to carry out such [authorized] program in lieu of the Federal program ... and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste...” 42 U.S.C.A. 6926(b). In addition, in subsection (d) of Section 3006 of RCRA, entitled “Effect of State permit,” the statute states that “[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [U.S. EPA] Administrator under this subtitle.” 42 U.S.C.A. 6926(d).

DOES THE ACT APPLY TO TRANSPORTER PERMIT APPROVALS ISSUED BY MASSDEP UNDER THE HAZARDOUS WASTE REGULATIONS AT 310 CMR 30.000?

No. The transport of hazardous waste does not relate to the use or development of real property.

DOES THE ACT APPLY TO PERMIT APPROVALS ISSUED BY MASSDEP UNDER THE HAZARDOUS WASTE REGULATIONS AT 310 CMR 30.000 FOR THE EMERGENCY TREATMENT OF HAZARDOUS WASTE?

No. The emergency treatment of hazardous waste does not relate to the use or development of real property.

Air Quality

DOES THE ACT APPLY TO PERMIT APPROVALS ISSUED BY MASSDEP PURSUANT TO THE STATE AIR POLLUTION REGULATIONS AT 310 CMR 7.00?

No, for two reasons. First, the vast majority of approvals issued under 310 CMR 7.00 are issued with indefinite terms. Therefore, there is no permit term to extend, and the Act does not apply. Second, pursuant to the Secretariat guidance, permits are exempt if they are “issued pursuant to federal law.” A large portion of the Massachusetts Air Emissions regulations at 310 CMR 7.00 are authorized by the federal government under Section 110 of the federal Clean Air Act, 42 U.S.C. 7410, as part of the Commonwealth’s State Implementation Plan to attain compliance with federal air emissions standards. Once regulations are submitted as part of the State Implementation Plan, the Commonwealth is obliged to enforce and abide by these regulations. 42 U.S.C. 7410(a)(1). They become enforceable by the federal government, and deviation from the regulations can result in sanctions by the federal government in the form of a revocation of federal delegation, reduced federal monies or other financial sanctions. 42 U.S.C. 7410(m). To the extent that there are deadlines for the terms of permits or interim deadlines, e.g., construction deadlines, in permits issued pursuant to 310 CMR 7.00, then such deadlines are issued “pursuant to federal law.” Therefore, the permits and approvals issued under 310 CMR 7.00 as authorized in the State Implementation Plan, including interim deadlines in such permits, are exempt from the Permit Extension Act.

DOES THE ACT APPLY TO ASBESTOS NOTIFICATIONS RECEIVED, WAIVER APPROVALS OR BLANKET WAIVER APPROVALS ISSUED BY MASSDEP PURSUANT TO 310 CMR 7.15?

Notifications: No. “Notifications” are not one of the listed items that are covered by the Permit Extension Act, furthermore, the asbestos notifications are **from** outside parties, not from the agency. For these reasons, Asbestos Notifications pursuant to 310 CMR 7.15(1)(b) are not covered by the Permit Extension Act.

Waiver Determinations: No. 310 CMR 7.15(1)(b) also provides that the Department can approve “waivers” of the notification requirement, and the Department sometimes issues approval of “blanket” waivers of notification requirements for specified periods of time. A “waiver” is a listed decision within the scope of the Act. However, waivers or blanket waivers of notification requirements are issued pursuant to the delegation by the federal government to Massachusetts of the authority to implement the federal Asbestos management program pursuant to the Clean Air Act, 42 U.S.C. 7401 et seq., and the federal NESHAPs regulations, 40 C.F.R. 61.000 et seq. The federal government requires that a state adopt regulations to implement the federal asbestos program standards. Massachusetts has done this with its regulations at 310 CMR 7.15. Therefore, any approvals issued pursuant to these regulations are done “pursuant to federal law” and are exempt from the Act.

UNDER 310 CMR 7.07(3)(A), THE DEPARTMENT ISSUES DETERMINATIONS THAT PRESCRIBED BURNS AT PARKLANDS ARE ACCEPTABLE FOR PURPOSES OF FIRE RESEARCH AND PRESERVATION OF ECOSYSTEMS AT CONSERVATION LANDS. ARE THESE PRESCRIBED BURN PERMIT APPROVALS EXEMPT FROM THE ACT?

Yes, because these permit approvals do not relate to the use and development of property but rather to its preservation and conservation.

Underground Storage Tank (UST) Program

DOES THE ACT APPLY TO UST REGISTRATIONS SUBMITTED BY OWNERS OR OPERATORS OF SUCH TANKS UNDER THE FEDERALLY APPROVED UST PROGRAM?

No. The UST program is a federal program and is being implemented in accordance with a federal mandate and delegation of federal authority. Therefore, UST registrations are exempt as being issued “pursuant to federal law.”

DOES THE ACT APPLY TO THIRD PARTY INSPECTOR REGISTRATIONS SUBMITTED UNDER THE FEDERALLY APPROVED UST PROGRAM?

No. The third party inspector registrations relate to the practice of a particular trade, not to the use or development of real property. In addition, the entire UST program is a federal program and is being implemented in accordance with a federal mandate and delegation of federal authority. Therefore, even if approvals covered by the Act were issued, they would be exempt as being issued “pursuant to federal law.”

Toxics Use Reduction Act (TURA)

DOES THE ACT APPLY TO SUBMITTALS OR APPROVALS UNDER THE TURA PROGRAM?

No for various reasons as detailed below:

TURA Reports: The reporting pursuant to 310 CMR 50.30-39 is from outside parties to MassDEP. MassDEP does not approve or respond to these reports. Therefore, these reports would fall outside the scope of the Act since they are not from the agency.

TURA Plan Submittals: The plan submission under 310 CMR 50.40-49 from outside parties to MassDEP. MassDEP does not approve or respond to these reports. Therefore, these reports would fall outside the scope of the Act since they are not from the agency.

TURA Planner Certification Approvals: The TURA Planner Certification approval authorizes a particular person to practice a trade and does not relate to the use or development of real property. Therefore, MassDEP certifications of TURA planners are outside the scope of the Act.

Mercury Management Program

DOES THE ACT APPLY TO MERCURY MANAGEMENT ACT CERTIFICATIONS?

No. The certifications filed with MassDEP under the Mercury program regulations are from outside parties and therefore fall outside the scope of regulation of the Act. In addition, these certifications relate to the status of mercury disposal and recycling with respect to product content; they do not relate to the use or development of real property. Therefore, these certifications are also outside the scope of the Act for that reason.

DOES THE ACT APPLY TO MASSDEP APPROVALS ISSUED PURSUANT TO THE MERCURY MANAGEMENT ACT?

No. At this time, the Department has issued no such approvals. Therefore, there were no approvals issued during the Tolling Period that would be eligible for coverage under the Act.

Industrial Wastewater (IWW) Holding Tanks

DOES THE ACT APPLY TO PRESUMPTIVE APPROVALS BY MASSDEP OF IWW HOLDING TANKS?

Under the terms of 314 CMR 18.10(1)(c), owners of IWW holding tanks are provided with a presumptive approval for their tanks, which would be considered an approval under the Act. However, since the term of the permits is indefinite, there is no term to extend. Therefore, the Act would have no effect on these permits.

Solid Waste

DOES THE ACT APPLY TO SOLID WASTE FACILITY PERMIT APPROVALS PURSUANT TO 310 CMR 19.000?

No as to MassDEP approvals for landfill permits. The Act exempts permit approvals that are issued “pursuant to federal law.” U.S. EPA has approved the landfill permitting portion of the Massachusetts Solid Waste permitting program pursuant to Section 4005(c)(1)(B) of RCRA. This includes authorizations to construct landfills, authorizations to operate landfills, landfill closure approvals and approvals for post-closure use of landfill properties.

Yes as to MassDEP approvals of permits for solid waste facilities that are not landfills. The permits issued pursuant to 310 CMR 19.000 for facilities -- other than landfills -- are not issued pursuant to

federal law. Nor does any other exception apply. Federal law is not comprehensive enough, nor is the U.S. EPA delegation of federal authority comprehensive enough to state that other Massachusetts Solid Waste permits are issued “pursuant to federal law.” Therefore, the Act does apply to MassDEP approvals for transfer stations, processors and other types of solid waste facilities. These permits are extended by four years if they were in existence during the Tolling Period and if they had definite terms.

Yes as to the Solid Waste MassDEP approvals for municipal waste combusters. It is important to note, however, that the MassDEP approvals issued to municipal waste combusters under the air pollution program regulations at 310 CMR 7.00 are not extended by the Act to the extent that they do not have definite terms.

DOES THE ACT APPLY TO CLOSURE PERMIT APPROVALS FOR SOLID WASTE FACILITIES THAT ARE NOT LANDFILLS (E.G., TRANSFER STATIONS, PROCESSORS)?

Yes. To the extent such permits have definite terms, then the Act would apply and extend the time for closure by four years. In addition, any Financial Assurance Mechanisms would also need to be extended by four years to assure adequate coverage.

DOES THE ACT APPLY TO POST-CLOSURE USE PERMIT APPROVALS FOR SOLID WASTE FACILITIES THAT ARE NOT LANDFILLS (E.G., TRANSFER STATIONS, PROCESSORS)?

Yes. To the extent such permits have fixed terms, then the Act would apply and extend the time for post-closure use for four years, and these four years would be added to the end of the post-closure term. In addition, any Financial Assurance Mechanisms would also need to be extended by four years to assure adequate coverage.

DOES THE ACT APPLY TO APPROVALS OF BENEFICIAL USE DETERMINATIONS (BUDS) ISSUED PURSUANT TO 310 CMR 19.000?

Yes to the extent that the subject matter of the BUDs relates to the use and development of real property. BUDs involve a determination about whether the use of a solid waste is sufficiently beneficial so that the solid waste can be deemed a product, not a waste. Such determinations do not involve the use or development of real property and are outside the scope of the Act. However, to the extent that a particular BUD may involve the use of a solid waste, e.g., crushed ABC, as a material in the use or development of property, the Act would apply if the BUD was issued during the Tolling Period for a definite term.

DOES THE ACT APPLY TO APPROVALS OF DETERMINATIONS OF NEEDS (DONs) ISSUED PURSUANT TO 310 CMR 16.00?

Yes, if they have fixed terms. To the extent that DONs have limits on their terms, and many do not, then the Act would apply because the DON is a determination with respect to a facility as to whether construction can proceed without site assignment under the Solid Waste Regulations. These permits therefore involve the use and development of real property.