



For a thriving New England

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Via Electronic Mail

Tori T. Kim
Assistant Secretary/MEPA Director
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Subject: General Comments on the Massachusetts Environmental Policy Act
Regulatory Review

Dear Secretary Theoharides and Assistant Secretary and Massachusetts Environmental Policy Act Director Kim:

On behalf of the Conservation Law Foundation (“CLF”) and its members,¹ we provide our comments regarding the Massachusetts Environmental Policy Act (“MEPA”) Program Regulatory Review. These comments supplement those we submitted earlier this month on the draft MEPA Interim Protocol For Environmental Justice Outreach and the MEPA Interim Protocol on Climate Change Adaptation and Resiliency. We thank the MEPA Office for planning to conduct a regulatory review, which is necessary to integrate requirements from the newly enacted *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* (“Roadmap Law”),² Executive Order 569, and to modernize the MEPA procedures to adequately consider environmental justice (“EJ”), climate mitigation, and climate adaptation.

I. We Support the Key Themes For Regulatory Review and Propose Adding Cumulative Impact Assessment and Public Health.

The MEPA Office proposes the following key themes for regulatory review:

¹ CLF is a nonprofit, member-supported, regional environmental organization working to conserve natural resources, protect public health, and promote thriving communities for all in the New England region. CLF protects New England’s environment for the benefit of all people. We use the law, science and the market to create solutions that preserve our natural resources, build healthy communities, and sustain a vibrant economy.

² St. 2021, c. 8, §§ 55-60, 102A, 102B, 102C.

- Alignment with policy and planning efforts, including the Decarbonization study and roadmap, climate resilience planning, and environmental justice considerations; and
- Updates to thresholds and process, including updating thresholds and clarifying definitions and review procedures.

CLF supports these key areas. Alignment with policy and planning efforts must include implementation of the Roadmap Law. A key component of the Roadmap Law is a new requirement that an environmental impact report (“EIR”) should include an “assessment of any existing unfair or inequitable environmental burden and related public health consequences impacting the environmental justice population from any prior or current private, industrial, commercial, state, or municipal operation or project that has damaged the environment.”³ This assessment requires consideration of the cumulative impacts of multiple environmental burdens, the lack of environmental benefits, and public health consequences. Consequently, the MEPA regulatory review must establish the requirements of this assessment and integration of a public health impact framework.

The MEPA Office should develop amended regulations and guidelines to direct Proponents on how to quantify the unfair or inequitable environmental burden and related public health consequences to EJ populations. As part of this process, it is crucial for the MEPA Office to not rely solely on whether a proposed project will comply with existing environmental laws. There is sufficient public health literature concluding that the federal National Ambient Air Quality Standards, for example, are not sufficiently protective of public health.⁴ CLF recommends amending the MEPA regulations to detail these processes and encourages the MEPA Office to work with the Massachusetts Environmental Justice Table, of which CLF is a member, the EJ Advisory Council, and public health academics to develop these regulatory amendments.

II. MEPA Review Is Now Required to Explicitly Consider Impacts to EJ Populations.

a. New Regulations are Required to Implement the EJ Population Definition.

CLF is thrilled with the passage of the Roadmap Law, which appropriately updates several MEPA provisions to account for environmental justice populations. First, the Roadmap Law requires the integration of new definitions into MEPA provisions for “environmental benefits,” “environmental burdens,” “environmental justice population,” “environmental justice principles,” and “neighborhood.” The Roadmap Law contains a statutory definition for an EJ population and includes provisions for opting into and de-designating an EJ population designation. The opt-in process allows ten residents of a neighborhood that is not designated as an EJ population to petition the Executive Office of Energy and Environmental Affairs (“EEA”) Secretary to designate a portion of that neighborhood as an EJ population provided that it meets

³ St. 2021, c. 8, § 58.

⁴ X. Wu, D. Braun, J. Schwartz, M. A. Kioumourtzoglou, F. Dominici, “Evaluating the impact of long-term exposure to fine particulate matter on mortality among the elderly,” *Science Advances*, Vol. 6, No. 29 (Jul. 17, 2020), Available at: <https://advances.sciencemag.org/content/6/29/eaba5692>.

certain criteria.⁵ The EJ population definition further provides that the EEA Secretary may designate a portion of a neighborhood so that it is no longer an EJ population provided that it meets certain criteria. CLF recommends amending the MEPA regulations to detail these processes and encourages the MEPA Office to work with the Massachusetts Environmental Justice Table and the EJ Advisory Council, once formed, to develop the details to inform the regulatory amendments. Further, there is an opportunity for EEA to incorporate regulatory language that explicitly considers impacts to Indigenous peoples and requires collecting data to ensure there are protections and benefits for Indigenous peoples and tribes.

b. Environmental Impact Reports (“EIR”) Are Required to Address Short-Term and Long-Term Environmental and Public Health Consequences.

Following enactment of the Roadmap Law, an EIR now requires more details than before, including: “(i) statements describing the nature and extent of the proposed project and its environmental and public health impact as result of any development, alteration and operation of the project; (ii) studies to evaluate said impacts; (iii) all measures being utilized to minimize any anticipated environment and public health damage; (iv) any adverse short-term and long-term environmental and public health consequences that cannot be avoided should the project be undertaken; and (v) reasonable alternatives to the proposed project and their environmental consequences.”⁶

MEPA regulations are required to detail how EIRs should define adverse short-term or long-term environmental and public health consequences and the types of studies that would be appropriate to evaluate said impacts. CLF recommends amending the MEPA regulations to detail these processes and encourages the MEPA Office to work with the Department of Public Health, Massachusetts Environmental Justice Table, the EJ Advisory Council, and public health academics. CLF is happy to recommend public health academics to inform this discussion.

c. MEPA Review Thresholds Must Be Updated.

CLF supports updating the MEPA thresholds for rare species and lowering the threshold for species of special concern. We further support lowering the electric transmission EIR threshold from 230 kilovolts (“kv”) to 115 kv. Additional threshold amendments are necessary, specifically regarding transportation, land use, and energy.

Transportation projects have the potential to increase air and water pollution, congestion, and inequities. A new MEPA threshold is required for reducing public transit service by an average of 10 percent, increasing transit fares an average of two percent, changing highway lane designations that increase the number by average daily trips by any amount, suspension of bus, rail, rapid transit, commuter rail, and ferry service in excess of ten percent if such suspensions will last longer than 30 days, and transportation of hazardous material by any mode of transportation. Generation of 50 or more new parking spaces at a single location or to serve a single business should also trigger an EIR. EIRs that pertain to mobile sources should require

⁵ St. 2021, c. 8, § 56.

⁶ St. 2021, c. 8, § 57.

vehicle miles traveled and the associated greenhouse gas emissions for such projects. Further, such EIRs should also discuss opportunities to affect public transportation ridership and the associated greenhouse gas emissions as a result of those public transit impacts.

A land action that should trigger an EIR includes the removal of healthy mature trees that are scheduled for removal due to a development, transportation, or other construction project. If trees are proposed to be removed, Proponents should explain whether there is a plan to replace trees on site or otherwise mitigate the loss of tree canopy and the benefits it provides. A Proponent should also explain what trees and vegetation will be added to the site, for example, in landscaped areas. Any local and/or state requirements that apply to the project related to tree removal (e.g., tree ordinance, bylaw, or regulations) should be cited by the Proponent. The MEPA regulatory amendments should direct the Proponent to consider a no tree loss option.

For energy, we recommend a lower threshold for a mandatory EIR for a new electric generating facility, powered by fossil fuels, with a capacity of 35 or more megawatts (“MW”), or expanding an existing electric generating facility by 25MW or more.

III. The MEPA Regulatory Amendments Should Require Early and Continuous Community Engagement and Tailored Mitigation Measures.

There is an opportunity to improve the MEPA process to facilitate community engagement. EJ is “based on the principle that all people have a right to be protected from environmental hazards and to live in and enjoy a clean and healthful environment regardless of race, color, national origin, income, or English language proficiency.”⁷ It is the “equal protection and meaningful involvement of all people and communities with respect to the development implementation, and enforcement of energy, climate change, and environmental laws, regulations, and policies and the equitable distribution of energy and environmental benefits and burdens.”⁸ To achieve this principle, the MEPA Office must require early engagement with residents when a project potentially impacts EJ populations.

The purpose of early engagement is to allow residents of EJ populations the opportunity to comment on the design of a project prior to filing for environmental review. To conduct engagement in a meaningful way, the Proponent should be required to consult with the MEPA Office and EEA Director of EJ at least 60 days prior to filing. A 60-day advance notice period will allow time for a Proponent and the MEPA Office to develop an outreach strategy and then to allow time to conduct outreach prior to filing with the MEPA Office. Ideally, the MEPA Office and EEA Director of EJ will offer to facilitate discussions between a Proponent and potentially impacted residents. One way to engage residents is by conducting outreach to local elected and appointed officials, community-based organizations, tribes and Indigenous representatives.

As part of this outreach strategy, the Proponent should be required to develop a written project statement about the facility that includes detailed information about: the project need; public

⁷ Massachusetts Executive Office of Energy and Environmental Affairs, *Environmental Justice Policy*, at 3 (2017).

⁸ *Id.*

health, environmental, energy, economic, and climate risks and burdens; and public health, environmental, energy, economic, and climate benefits for potentially impacted communities. The project statement should include reasonable alternatives. The project statement shall be shared with the EEA Director of EJ and posted to a public website. If the project will potentially impact an EJ population that is designated on the basis of limited English proficiency, then the MEPA Office shall provide guidance about the language(s) in which the Proponent should translate the project statement.

Early engagement between a Proponent and the potentially impacted community prior to filing will likely require more time up front for a Proponent, but it could be an opportunity to improve a project and save time during the remainder of the environmental review. Regulations should require that within 30 days of submitting the project statement, the Proponent will invite community-based organizations, local elected and appointed officials, the EEA Director of EJ to a meeting to review the proposed project (“information meeting”). Based on guidance from the MEPA Office, the Proponent shall invite language interpreters, paid for by the Proponent, to ensure that information meeting attendees understand the terms of the project. During the information meeting, the Proponent shall review the project statement, answer questions, and listen to attendee concerns and ideas. Following an information meeting, the Proponent should be required to adjust the project to address community concerns or abandon plans to file with MEPA. The MEPA Office shall ensure that staff is available to support a Proponent during the early engagement period to make connections with potentially impacted EJ populations.

To the extent that EJ population residents express concerns or ideas about a project, the MEPA Office should consider requiring project changes and mitigation opportunities. The Secretary’s Certificate should include, when appropriate, specific mitigation requirements that are tailored to the potentially impacted EJ population needs and requests. These mitigation measures should reflect community ideas.

IV. MEPA Procedures Regarding Segmentation and Project Changes Should Be Clarified.

Proponents filing a notice of project change, especially for a project within one mile of an EJ population, should be required to have discussed the substance of the project change with potentially impacted residents, elected and appointed officials, community-based organizations, tribes and Indigenous representatives.

CLF recommends clarifying additional examples of work or activities that constitute one project and therefore should not be segmented for environmental review purposes. At present, the MEPA regulations do not provide sufficient specificity regarding the types of phases and segments that are prohibited in terms of evading or curtailing MEPA review. The regulatory review should result in additional clarity regarding the factors considered in determining whether work or activities constitutes a project requiring MEPA review and how those factors are applied when there is more than one Proponent, more than one parcel of land, and time interval between work.

Thank you for your consideration of these comments. We look forward to working with EEA as it pursues MEPA regulatory updates.

Sincerely,

A handwritten signature in dark ink, appearing to read "Staci K." followed by a horizontal flourish.

Staci Rubin, Senior Attorney