

Notice to Reviewers – Proposed Open Space Act Regulations (310 CMR 52)

Background

In 1972, Massachusetts voters approved the adoption of [Article 97 of the Amendments of the Constitution of the Commonwealth](#), which states that the people shall have the right to the “natural, scenic, historic and esthetic qualities of their environment” and that public lands or interests in land acquired for the purposes of protecting the interests described in Article 97 can not be “used for other purposes or otherwise disposed of” without a two-thirds roll call vote of the legislature.

In 1998, the Executive Office of Energy and Environmental Affairs (EEA) recognized a need for a written policy to ensure that proposals to dispose or change the use of Article 97 land were appropriately considered and did not result in a reduction of Article 97 land over time. To that end, EEA issued its Article 97 Land Disposition Policy, commonly referred to today as the “No Net Loss” Policy. Among other things, the Policy provides that EEA will not undertake or support Article 97 legislation unless the responsible agency or municipality has avoided and minimized the disposition or change in use of Article 97 land and replacement land will be provided. As a result of this policy, Article 97 legislation has authorized a net increase of 486 acres of replacement land since 2015.

While the EEA Policy has been successful in preserving Article 97 land in the Commonwealth, the legislature recognized a need to formalize the Article 97 legislative process. To that end, in 2022 it enacted [An Act Preserving Open Space in the Commonwealth](#) (the “Open Space Act”, sometimes referred to as the “Public Lands Preservation Act” or “PLPA”), which is codified at Section 5A of Chapter 3 of the Massachusetts General Laws (M.G.L. c. 3, § 5A). The Open Space Act codified procedures for advancing Article 97 legislation, including provisions to ensure public notification, consideration of alternatives to the Article 97 action, and the provision of replacement land. It also directed the Secretary of Energy and Environmental Affairs to take specific actions in response to Article 97 proposals and to promulgate regulations in order to implement the provisions of the law.

EEA has now completed its draft regulations to implement the Open Space Act and is seeking comment on them, as described below. **The regulations do not amend Article 97**, which is a constitutional amendment and cannot be altered without a constitutional process. Rather, **EEA is required by the Open Space Act to issue these regulations**. The regulations interpret the Open Space Act to clarify how public entities can comply with the Act’s procedures and requirements, including those requiring public notice and engagement. The regulations also describe how EEA will carry out actions required by the Act, including waiver or modification of replacement land requirements, issuing findings regarding funding in lieu of replacement land and issuing natural resource value determinations. EEA’s actions are required by the Act to support the legislature in its consideration of Article 97 legislation. **The legislature has the sole responsibility for approving Article 97 legislation by way of a two-thirds majority roll call vote**. These regulations do not change this responsibility.

Public Comment

EEA posted the draft Open Space Act regulations for public comment on November 18, 2024 and held a public hearing on December 17, 2024. In response to public comments received seeking additional time to review the draft, EEA extended the comment period and held a second public hearing on January 16, 2025. This public comment period closed on January 22, 2025.

In its initial review of public comments, EEA recognized that a number of commenters indicated their comments were hampered by the length of the public comment period, timing of the public hearings, or lack of public awareness. EEA values public input as a critical component of the process of promulgating the Open Space Act regulations and wants to ensure ample opportunity for the public to provide feedback. To that end, EEA is reopening the public comment period and will hold a third public hearing on March 26, 2025.

EEA's initial review of public comments also identified certain issues on which additional public comment would be beneficial. EEA is interested in hearing more about these topics, in particular:

- (1) Notification: EEA is interested in specific feedback on where/how Public Entities must notify the public of a proposed Article 97 Action.
- (2) Natural Resource Value: EEA has designed an [online tool](#) to assist (supplemented by other information provided by the proponent, the public and gathered through field observation) in determining Natural Resource Value consistent with Section 52.08 of the draft regulations. EEA is looking for specific feedback on this tool and other information that could assist in the evaluation of Natural Resource Value for both EEA and the public.