

Massachusetts Environmental Justice Table Joint Comments

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Via Electronic Mail

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Subject: Joint Comments on Proposed Amendments to the Massachusetts Environmental Policy Act

Dear Secretary Beth Card and Director Tori Kim:

We write as the Massachusetts Environmental Justice Table to provide our comments regarding the [proposed amendments to the Massachusetts Environmental Policy Act \(“MEPA”\) Phase II Regulations](#). The following comments address the changes proposed in this phase of regulatory updates, and reinforce previous comments submitted by Conservation Law Foundation (“CLF”) and the Massachusetts Environmental Justice Table in March, April, and July of last year.

Proposed Changes to MEPA Review Thresholds

The signatories recognize the desire to streamline the MEPA review process by exempting minor projects that may not materially advance the goals of MEPA. We caution, however, that impacts which may seem small when considered individually may still result in damage to the environment when aggregated over time or within geographic proximity to each other. It is also crucial that projects of any size be assessed not just for the potential to cause damage to the environment damage, but also for how they may contribute to and be impacted by climate change impacts, and how they may impact environmental justice (“EJ”) populations. To that end, we offer the following recommendations regarding the proposed changes to the MEPA review thresholds:

- We recommend that the proposed language for 301 CMR 11.03(1)(b)(3) (“review thresholds pertaining to land”) be changed as follows: “...that the disposition or change in use is de minimis such that it is unlikely to cause Damage to the Environment and will not burden an Environmental Justice Population.” It is essential that MEPA review consider not just potential damage to land, water, air, or wildlife, but also to people. Additionally, given that there is not a strict definition of “de minimis” this criterion must be cautiously applied.
- We oppose the exemption of review for road widening in the case of bicycle or pedestrian accommodations (301 CMR 11.03(6) Transportation). We recognize that infrastructure for active and alternative transportation modes is important in reducing the

use of fossil fuel vehicles and contributing to the Commonwealth's greenhouse gas emission reduction targets. However, expansion of roads should always be reviewed and should only be implemented as a last resort. Such a project should be reviewed to determine that the planned bicycle or pedestrian infrastructure cannot safely be accommodated within the existing footprint of the road, such as by converting vehicle lanes to bike lanes or narrowing lanes or removing curbside parking. Research has shown that narrower lanes can slow traffic and reduce crashes.¹ We encourage avoiding the expansion of roads and the associated impervious surface wherever possible as this would minimize environmental impact, help slow traffic, and promote public safety.

- We recommend the removal of the proposed change to 301 CMR 11.03(11)(b) Areas of Critical Environmental Concern ("ACEC"), which triggers secretary review only of projects over one half-acre in size within an ACEC. ACECs are environmentally sensitive and important areas. Any project within such an area should be thoroughly reviewed and only proceed in the case that no environmental harm will result. For example, we are aware of a company operating an ash landfill in an ACEC that seeks to expand. Such an expansion in an ACEC should trigger MEPA review. The application of a half-acre threshold may allow multiple small projects to be approved without review, and small projects may still result in significant environmental damage in aggregate and over time. We also recommend that language be added which specifies secretary review for an expansion of any size to any existing project within an ACEC.

Additional comments on MEPA review thresholds

In addition to the above comments on the recently proposed MEPA review thresholds, we recommend the following changes to the MEPA review thresholds. We previously submitted some of these recommendations in a comment letter dated July 30, 2021, and we offer additional recommendations below.

- **Tree Removal:** We recommend the reporting of the removal of healthy mature trees due to a development, transportation, or other construction project. If trees are proposed to be removed, proponents should explain how they plan to replace trees on site or otherwise mitigate the loss of tree canopy and the benefits it provides to ensure improvement to the urban heat island effect. For locations with heat islands and limited tree canopy, tree preservation should be a priority and any loss of tree cover should warrant mandatory mitigation. Project proponents should also provide explanations on what trees and vegetation will be added to the site. Any local and/or state requirements that apply to the project related to tree removal (i.e., tree ordinance, bylaw, or regulations) should be cited by the proponent. The no tree loss option should be highly recommended to project proponents.
- **Impervious Surface:** We recommend that the impervious surface thresholds at 11.03(1)(a)(2) and 11.03(1)(b)(2) be lowered. We propose that these thresholds be

¹ Subha Ranjan Banerjee and Ben Welle, "Bigger Isn't Always Better: Narrow Traffic Lanes Make Cities Safer," World Resources Institute, 2016, Accessed November 4, 2022 at <https://www.wri.org/insights/bigger-isnt-always-better-narrow-traffic-lanes-make-cities-safer>.

changed to read “Creation of impervious surface covering more than 10 percent of the project area or ten acres, whichever results in a smaller area;” or “Creation of impervious surface covering more than 5 percent of the project area or five acres, whichever results in a smaller area;” respectively. We also suggest that 11.03(1)(a)(2) include a threshold pertaining to impervious surface in floodplains, which may read “Creation of impervious surface if any part of the project is within a floodplain, as identified by the municipality in which the project is located, using the best available flood data.”

- **Transportation:** We recommend that 301 CMR 11.03(6) be revised to lower the threshold triggering a mandatory Environmental Impact Report (“EIR”) for parking spaces to the construction of 500 parking spaces at a single location, rather than 1,000. We reiterate the health risks associated with transportation (air and water pollution) in addition to increased congestion and inequities. We recommend reviewing the existing threshold to reduce public transit service by an average of 10 percent, increasing transit fares at an average of two percent, changing highway lane designations that increase the number by average daily trips by the amount, suspension of bus, rail, rapid transit, commuter rail and ferry service more than ten percent if such suspensions will last longer than 30 days, and transportation of hazardous material by any mode of transportation.
- **Energy:** We recommend that 301 CMR 11.03(7) be revised to lower the threshold for review of the construction of a new electric generating facility to 35 or more MW, and that the threshold for review of the expansion of an existing facility be similarly lowered to 35 or more MW. We further recommend that an EIR be required for a proposed electrical substation or gas compressor station proposed for location in an EJ population.
- **Noise:** We recommend adding a threshold that addresses noise impacts. For EJ Populations, if a proposed project will increase background noise levels above a specific amount, that should trigger MEPA review.
- **Public Health:** We recommend adding a threshold that addresses public health impacts. While many projects affecting air quality also cause or contribute to public health impacts, an independent threshold for public health impacts should be added. Proponents should be required to use public health indicators to document impacts of the project on public health but should also indicate the public health baseline.
- **Combined Sewer Overflows (“CSO”):** We recommend a threshold be added to wastewater for any new proposed CSO control plan (EIR), any proposed water quality variance or change in water quality standard based on CSO discharges (EIR), and any proposed increase in flows to sewers that will increase CSO activations or flows (Environmental Notification Form (“ENF”)).

Ecological Restoration Projects

We support streamlining the filing process for “Ecological Restoration Projects,” as defined in the Massachusetts Wetlands Protection Act (“WPA”). Leveraging natural systems and nature-based solutions continues to be the preferred method of addressing climate impacts, especially in EJ populations that have long been burdened with hard-engineered solutions. Streamlining the filing process will make it easier and less costly for Proponents to pursue these alternatives.

The proposed revisions would allow a Project that qualifies in its entirety as an Ecological Restoration Project under the WPA to seek an exemption from MEPA review, provided that the Proponent is successful in securing a Restoration Order of Conditions under the WPA. This exemption is appropriate given the safeguards in place under the WPA for receiving a Restoration Order of Conditions and the additional requirement that these projects adhere to the EJ provisions of MEPA, including advance notification, set forth in 301 CMR 11.05(4). We recommend strengthening the language in the regulations to require specific contents in the Notice regarding potential impacts on an EJ population as indicated below:

- We recommend that Proponents of Ecological Restoration Projects be required to provide additional information in the Notice for the Environmental Monitor to ensure that the public has sufficient information to comment and the Secretary has adequate information to make a determination about whether a Project requires an Environmental Notification Form (“ENF”). While Ecological Restoration Projects typically have less associated environmental harms than other types of projects, this is not absolute. We request that Proponents seeking a MEPA exemption for an Ecological Restoration Project under the revised regulations be required to detail in the Notice the potential environmental impacts, any mitigation measures, whether the Project is reasonably likely to negatively affect an EJ Population, and what measures were taken to provide meaningful opportunities for public involvement by EJ populations. For projects impacting landlocked tidelands, the Notice should include the Project’s impact on the public’s right to access, use, and enjoy tidelands protected under Chapter 91. This language is similar to 301 CMR 11.05(5)(a) and (5)(b).
 - 301 CMR 11.05(5)(a) requires a description of, among other things, the Project’s potential environmental impacts, mitigation measures, and whether the Project is reasonably likely to negatively affect an Environmental Justice Population located within the Project’s Designated Geographic Area.
 - 301 CMR 11.05(5)(b) applies to Projects located in landlocked tidelands as defined in 310 CMR 9.02 and requires the Proponent to include an explanation of the Project’s impact on the public’s right to access, use, and enjoy tidelands protected under Chapter 91 and identify measures to avoid, minimize, or mitigate adverse impacts to those rights.
- For each of the above provisions, we recommend that the Proponent be required to file an abbreviated version of the required narrative and analysis as part of the Notice – not an ENF – to outline key issues. This would ensure that the Secretary has the necessary

MASSACHUSETTS ENVIRONMENTAL JUSTICE TABLE

information about the project's potential environmental impacts, including those negatively affecting an EJ Population, to determine whether the Project requires an ENF.

- These additional components of the Notice would be additive, not duplicative, because the requirement for other Agency Actions, including the Notice of Intent Requirements for a Restoration Order of Conditions under the WPA, do not require any similar analyses. Further, these additional requirements will not hinder the Commonwealth's efforts to streamline the filing process for Ecological Restoration Projects. They will only help ensure that Proponents have considered potentially adverse impacts on Environmental Justice Populations and that the Secretary can make an informed decision about whether a project requires an ENF.
- We support additional discussion in 2023 regarding other ecological restoration projects.

Other Changes Proposed to the MEPA Regulations

In addition to the changes to the review thresholds and changes addressing Ecological Restoration Projects addressed above, we offer the following comments and recommendations regarding proposed procedural changes in the MEPA regulations:

- We support the proposed changes to the definition of "Routine Maintenance" at 301 CMR 11.02. These changes strengthen and clarify this definition.
- We recommend removal of all proposed changes in clause (a) of the definition of "Replacement Project" as well as removal of the phrase "substantial (10% or more)" in clause (b). We recommend that the definition read "Any Project to repair, replace, or reconstruct a previously authorized use of or Project on a Project site that does not: (a) increase potential environmental impacts or need additional or changed environmental Permits; or (b) result in any Expansion of the use or Project, provided that the previous use or Project has not been discontinued for more than three years and that the Expansion does not meet or exceed any review thresholds."

MASSACHUSETTS ENVIRONMENTAL JUSTICE TABLE

- Regarding the requirements, scope, and filing of an EIR, including in Section 11.01 General Provisions and Section 11.07: EIR Preparation and Filing, we recommend explicit inclusion of language pertaining to climate change and adaptation, and EJ Populations, so that the EIR scope is in alignment with the requirements regarding Section 61 findings. For example, the Summary should include “5. A summary of potential environmental and public health impacts of the Project, including climate impacts and impacts to Environmental Justice Populations” and the section on Mitigation Measures should read as “The EIR shall specify in detail: the measures to be taken by the Proponent or any other Agency or Person to avoid, minimize, and mitigate potential environmental and public health impacts, including climate adaptation measures, and impacts on Environmental Justice Populations.”
- We recommend that clarifying language be added to 301 CMR 11.06(13), “Rollover EIR” to specify that only projects which qualify under 301 CMR 11.06(7)(b) – “projects within a Designated Geographic Area around an Environmental Justice Population” – may be considered for the Rollover EIR process. Language should also be added to include that Ecological Restoration Projects may qualify for the Rollover EIR process.
- We recommend updating the Fail-Safe Review Provision.
 - 11.04(1)(b)(1) Remove criterion about whether damage to the environment could not have reasonably been foreseen prior to when 301 CMR 11 was promulgated. With sections of the regs updated over time, especially now, this is a criterion that is meaningless without a clear standard of review.
 - 11.04(1)(b)(2) Consider whether to frame this more as a cumulative impact standard and/or add an EJ standard.
 - 11.04(1)(c)(2) Remove criterion about not resulting in an undue hardship for the proponent. It is difficult for a non-proponent petitioner to quantify what would be an undue hardship for the proponent. MEPA is about reviewing potential environmental impacts, detailing all means to avoid damage to the environment, and mitigating some damage. This fail-safe provision should be invoked to determine when MEPA review is needed to consider alternatives, impacts to EJ populations, and avoid, minimize, and mitigate.
- We recommend requiring proponents to include a summary paragraph or two at the top of the ENF explaining the project. Now that many of us are receiving additional notifications due to the EJ pre-filing and outreach requirements, we have observed that it takes reading through sometimes 20 pages to understand what the project is about.

MASSACHUSETTS ENVIRONMENTAL JUSTICE TABLE

- We recommend using the Special Review Procedures section to require proponents that filed due to the air, energy, transportation, or waste thresholds to submit an annual report for publication in the Environmental Monitor to describe how the project is being developed or operated and any changes from the ENF/EIR. This provision should be used for accountability purposes.

Thank you for your consideration of these comments. Please contact Staci Rubin (SRubin@clf.org) with questions. We look forward to continuing to work with EEA as it pursues MEPA regulatory updates.

Sincerely,

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