



MASSACHUSETTS WATER RESOURCES AUTHORITY

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November 14, 2022

Tori Kim
MEPA Office
100 Cambridge St, 10th Floor
Boston, MA 02114

RE: Proposed Amendments to 301 CMR 11.00: MEPA Regulations

Dear Ms. Kim:

The Massachusetts Water Resources Authority ("MWRA") has reviewed the Massachusetts Environmental Policy Act ("MEPA") Office's proposed amendments to 301 CMR 11.00 *et seq.* and the accompanying background documentation ("Proposed Amendments"). In accordance with the terms of the notice published in *The Massachusetts Register* on October 14, 2022, the MWRA respectfully submits its comments regarding the Proposed Amendments, which generally concern the following: (A) the changes to the definitions of "Replacement Project" and "Routine Maintenance;" (B) the addition of "de minimis" exemption to review thresholds requiring review for projects subject to Article 97 of the amendments to the Massachusetts Constitution ("Article 97"); (C) the elimination of the one-half-mile sewer main extension threshold as an independent trigger for MEPA review; and (D) the addition of one-half-acre minimum to review threshold for any work in an Area of Critical Environmental Concern ("ACEC").

MWRA appreciates the MEPA Office's efforts over the last year to work with stakeholders, through their Advisory Committee, to discuss revisions to the regulations that could improve the MEPA process following the 2021 revisions to the MEPA regulations. MWRA supports these efforts and looks forward to continuing these important discussions with the MEPA Office in the future.

1. MWRA Overview

MWRA was established by the Massachusetts Water Resources Authority Act, Chapter 372 of the Acts of 1984, as amended, wherein it is recognized as an independent public authority. The exercise by the MWRA of the powers conferred by this statute is deemed to be the performance of an essential public function. MWRA provides wholesale water and wastewater services to 3.1 million people and more than 5,500 businesses in 61 communities in eastern and central Massachusetts. MWRA maintains hundreds of miles of water and sewer pipes, many of which are over 100 years old, as well as dozens of facilities that regularly require maintenance,

upgrades, and/or replacement. In many cases, MWRA's existing infrastructure pre-dates current regulatory and permitting programs.

2. MWRA Comments

A. 301 CMR 11.02: Definitions of "Replacement Project" and "Routine Maintenance"

Under the current MEPA regulations, MWRA's "Replacement Projects" are often required to undergo MEPA review because a review threshold is exceeded and a new "Permit" is required, many times because that permit program did not exist when the infrastructure was first constructed. MWRA's "Replacement Projects" are often really rehabilitation projects, which are generally contained within the same footprint as the existing infrastructure--with limited environmental impacts--most of which are temporary in nature. The Proposed Amendments add language acknowledging previously authorized work and removes the relationship to a "new Permit." MWRA supports this change because "Replacement Projects" can be reviewed on the basis of their environmental impacts, rather than on whether a new "Permit" is required.

The proposed definition for "Routine Maintenance" allows work to take place "within substantially the same footprint, depth, or other relevant physical dimensions of the Project" to proceed without extensive MEPA review. Nevertheless, the addition of the stipulation that the project is conducted "using primarily the same method," may exclude some projects that would otherwise be defined as "Routine Maintenance" projects from claiming this exemption, as regulations, technologies, and other requirements change.

The MEPA Office is recommending these changes in order to add flexibility and make case-by-case determinations as to whether a project meets existing definitions of "Replacement Project" and "Routine Maintenance." Although MWRA supports the proposed changes, MWRA recommends that the MEPA Office consider continuing discussions around revisions to these two definitions. Ideally, these definitions would provide clarity to the proponents seeking to claim these exemptions for projects; rather than creating additional confusion in an attempt to add flexibility.

B. 301 CMR 11.03(1)(b)3. and (b)5. (Land)

The Proposed Amendments to 301 CMR 11.03(1)(b)3. and (b)5. would add a "de minimis" exception to review thresholds requiring review for projects subject to Article 97, or otherwise involving releases of interests in land held for conservation, preservation or agricultural or watershed preservation purposes. This "de minimis" determination is at the discretion of the Secretary upon a finding that the disposition or change in use is unlikely to cause damage to the environment. In terms of concept and substance, MWRA supports the Proposed Amendments.

The regional water and wastewater systems currently owned and/or operated by MWRA had their roots in the 1800's. The water and wastewater system has expanded exponentially since that time and the real property that MWRA's infrastructure sits beneath and/or on top of has seen equally significant changes. As a result, MWRA occasionally has projects subject to the review thresholds in 301 CMR 11.03(1)(b)3. and (b)5., simply due to the presence of existing MWRA infrastructure within public lands subject to Article 97. In many cases, the land in question will remain accessible to the public (or otherwise preserved for conservation purposes), however, due to the passage of time and/or processes of predecessor entities, MWRA may need to refresh or clarify easement and other real property rights in order to appropriately maintain access to its existing infrastructure.

The Proposed Amendments, however, are somewhat unclear as to the process by which an entity seeking a "de minimis" determination needs to place a request before the MEPA Office. For instance, the Proposed Amendments are in the section of the MEPA Regulations where an "ENF and Other MEPA Review if the Secretary So Requires," 301 CMR 11.03(1)(b), which suggests an ENF is the vehicle by which one requests a determination. This may, or may not be, the intent of the Proposed Amendments, if the request for a "de minimis" determination is to precede the filing of an ENF in order to secure a written determination from the Secretary. In this regard, the MEPA Office may wish to consider clarifying its intent so that entities have a clear procedural pathway for requesting a "de minimis" determination.

C. 301 CMR 11.03(5)(b)3.c. (Wastewater)

The Proposed Amendments to 301 CMR 11.03(5)(b)3. would eliminate the one-half-mile of new sewer main not located in an existing roadway threshold as an independent trigger for MEPA review. Maintaining the threshold of five-miles or more in length of new sewer main, 301 CMR 11.03(5)(b)3.b., also provides consistency with the comparable threshold for water main extensions, 301 CMR 11.03(4)(b)3. In MWRA's experience, all else being equal, there is little difference between extending a sewer main or water main for purposes of establishing review thresholds for these types of projects; it is an imminently reasonable step to ensure that these types of projects are more aligned. Accordingly, MWRA supports this revision to 301 CMR 11.03(5)(b)3.

D. 301 CMR 11.03(11)(b) (ACEC)

This Proposed Amendments would add a one-half-acre minimum to the threshold requiring review for any work in an ACEC, excluding projects proposing one single family dwelling. MWRA supports the proposed change. Similar to MWRA's work on Article 97 lands, MWRA has existing infrastructure within ACECs that MWRA must access and maintain. MWRA works closely with other state and local environmental agencies to limit impacts to ACECs when we are working in these areas of critical concern; in many cases, when existing infrastructure is within an ACEC, MWRA is unable to avoid work in that area. The Proposed Amendments appropriately acknowledge that a limited amount of work in an ACEC will not trigger MEPA review, while all necessary permitting still applies.

On behalf of the MWRA, thank you for the opportunity to provide comments on the proposed amendments. Please do not hesitate to contact Rebecca Weidman of my staff at (617) 305-5954 or via email at rebecca.weidman@mwra.com with any questions or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Coppes', with a horizontal line underneath.

David W. Coppes, P.E.
Chief Operating Officer

cc: Fred Laskey, MWRA
Joseph Favaloro, MWRA Advisory Committee