



November 14, 2022

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

Via Email: [MEPA-regs@mass.gov](mailto:MEPA-regs@mass.gov)

Re: **Proposed revisions to the MEPA Regulations, 301 CMR 11.00**

Dear Director Kim:

On behalf of Mass Audubon, Appalachian Mountain Club, Charles River Watershed Association, Massachusetts Association of Conservation Commissions, Massachusetts Rivers Alliance, and The Trustees, we submit the following comments on the proposed amendments to the Massachusetts Environmental Policy Act (MEPA) regulations at 301 CMR 11.00. Several of us participated in the MEPA Regulatory Review Advisory Committee and previous rounds of MEPA regulatory reviews. The current process has provided extensive opportunity for input and discussion with a wide range of stakeholders. The currently proposed revisions are relatively narrow and focused on areas where changes would make the MEPA process more efficient without substantively reducing environmental protections.

We support most of the proposed changes, with the exception of requesting further tightening and clarification of the following items:

- the proposed de minimis exemption under the Land threshold for change in use of lands protected under Article 97 of the state constitution, and
- the proposed changes to the definitions of Replacement Project.

We enthusiastically support the proposed changes that will exempt from MEPA review projects qualifying for the Ecological Restoration Notice of Intent under the Wetlands Protection Regulations (310 CMR 10.00). We look forward to continuing discussions about potential further revisions to streamline review of other wetlands/ecological restoration projects that do not qualify for this new, narrowly defined, exemption.

**Specific comments and further clarifying amendments requested:**

**Amendments to MEPA Review Threshold for Land (301 CMR 11.03(1)(b)3 and (b)5**

We request the addition of a quantifiable upper limit of 2,500 square feet for the proposed new “de minimis” provision under the Land thresholds. Currently the threshold for review of projects involving a change in use or disposition of land protected under Article 97 of the state Constitution is zero, i.e. all such projects require review. The proposed changes would add a “de minimis” provision giving the Secretary of Energy and Environmental Affairs the discretion to exempt some projects with a written determination that it is unlikely to cause Damage to the Environment. This standard is too vague and grants broad discretion to the Secretary without quantifiable limits or safeguards for these precious lands. Article 97 lands are permanently protected

and changes in use or disposition can only occur following 2/3 roll call approval of both chambers of the Legislature. MEPA review prior to these decisions is essential in order to ensure that there is an alternative analysis and that all measures are taken to avoid, minimize, and mitigate impacts to these public interest lands. On November 10, 2022, the Legislature passed H.5381, *An Act Preserving Open Space in the Commonwealth*. This law includes two de minimis exemptions, allowing the Secretary to waive land replacement requirements:

*(A) the disposition involves only the transfer of legal control between public entities as described in this subsection and does not involve any other change, including, but not limited to, a change allowing the land to be used for another purpose; or (B) the transfer is of a parcel that is of insignificant natural resource and recreation value and is less than 2,500 square feet in area and the transfer serves a significant public interest.*

We urge that the final MEPA regulations include a specific upper limit on the size of a parcel where the de minimis MEPA threshold exemption can apply, and we recommend that this track with the recently adopted legislation, i.e. 2,500 square feet or transfer between agencies with no change in use. We oppose a de minimis provision that has no quantifiable upper boundary for changes in use, as that would convey unlimited discretion to future Secretaries in eliminating public review through MEPA of dispositions of public lands.

### **Ecological Restoration Projects (New 301 CMR 11.01(2)(b)4.)**

Massachusetts has long been a leader in wetlands protection and, more recently in wetlands restoration, under the leadership and innovation of the Division of Ecological Restoration in cooperation with many other public and private partners. Historically, Massachusetts lost 28% of its wetlands<sup>1</sup>. Today, coastal and inland wetlands and river systems continue to suffer from fragmentation and degradation and face imminent threats from climate change impacts. Hundreds of millions of dollars are now available through new and expanded federal and state programs to restore wetlands, and local, state and nonprofit partners hope to leverage these public dollars for critical nature-based, wetland restoration projects of statewide significance. This work is particularly urgent in Environmental Justice communities that have disproportionately suffered from environmental degradation and face capacity challenges to leverage public investments in wetland protection and restoration. As such, it is vital that the state's environmental review and permitting systems be modernized to support and streamline restoration projects, especially those focused on nature-based climate solutions, while ensuring they are conducted using the best available science and in accordance with protective guidelines and standards.

We support proposed changes that would exempt certain wetlands restoration projects from MEPA review. In 2013, the Wetlands Protection Regulations were amended to support and streamline permitting for wetlands restoration projects meeting a definition of Ecological Restoration that is projects "whose primary purpose is to restore or otherwise improve the natural capacity of a Resource Area(s) to protect and sustain the interests identified in MGL c. 131, S. 40 [the Wetlands Protection Act], when such interests have been degraded or destroyed by anthropogenic influences."

A subset of these projects is those that qualify for the Ecological Restoration Notice of Intent (ER NOI) under the Wetlands Protection Regulations. Those projects must comply with a lengthy list of specific conditions designed to ensure resource protection and positive results. When these provisions were incorporated into the Wetlands Protection Regulations in 2013, the intent was to exempt those projects from MEPA, but until now the MEPA regulations were never updated to incorporate that exemption. We strongly support this proposed change. The revised regulations will still provide for the Environmental Justice notification and public involvement procedures to be followed, with an opportunity for public comment, so that the Secretary can consider recapturing for review a restoration project where there are concerns about impacts.

We also encourage the MEPA Office to consider additional streamlining for other categories of wetlands restoration projects that do not meet the ER NOI requirements but that can be permitted through the Limited Project provisions of the Wetlands Protection Regulations. We look forward to continuing those discussions in another round of MEPA regulatory review in 2023.

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<sup>1</sup> Dahl, T E. *Wetlands losses in the United States, 1780's to 1980's. Report to the Congress*. United States.

### **301 CMR 11.02: Amend definitions of “Replacement Project” and “Routine Maintenance”**

Changes are proposed to these definitions. The background information does not describe what types of projects or circumstances these are intended to cover, but it appears that it may be primarily for public agency and utility projects. **We oppose the Replacement Projects definition change as proposed and support the revised definition of Routine Maintenance.**

For Replacement Projects the definition would replace a standard of not requiring additional environmental permits with one of previous authorization. This could allow replacement projects with substantial environmental impacts to escape MEPA review simply because the original facility was constructed before various environmental permits existed. Examples include replacement of a state agency structure or a utility replacing transmission towers and poles with new equipment. In both of these examples, the project could meet the proposed definition of being a “previously authorized use or Project” and the Secretary would have broad discretion to decide that it would not “materially increase potential environmental impacts” without ever reviewing detailed plans or the environmental permits required under current laws. This could potentially allow linear replacement projects along utility corridors, roads and highways, and railroads to escape MEPA review despite extensive impacts requiring multiple state environmental permits.

The proposed changes to Routine Maintenance, on the other hand, appear to tighten the definition in a positive way. A phrase is added that limits this exemption to work within substantially same physical dimensions and using primarily the same methods. This would address concerns that have been raised in recent years where large, mature trees have been removed across long linear distances within the Rights of Ways (ROW) of highways, railroads, and utility corridors. The revised definition would make it clear that these areas, which may have always been part of the ROW but were never actively managed, are not exempt from MEPA review if clearing of the mature trees is proposed.

Thank you for considering these comments.

Sincerely,



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