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VIA EMAIL ONLY

March 24, 2021

Tori Kim, Director
MEPA Office
100 Cambridge St., Suite 900, Boston, MA 02114
MEPA-regs@mass.gov

RE: MEPA Regulatory Review/Updates

Dear Ms. Kim:

McGregor & Legere, P.C. wishes to provide a suggestion for an update to the MEPA Regulations, 301 CMR 11.00, based on our over 45 years of experience in environmental and land use law and related litigation. We have represented both proponents and opponents of projects undergoing MEPA review, as well as municipalities where such projects have been proposed.

We strongly suggest revision to the “Wetlands, Waterways and Tidelands” threshold, 301 CMR 11.03(3), as it pertains to wetlands. In our view, the current language is ambiguous and confusing.

An ENF and Mandatory EIR are required when a project requires a Permit for “a. alteration of one or more acres of salt marsh or bordering vegetating wetlands; or b. alteration of ten or more acres of any other wetlands.” 301 CMR 11.03(3)(a) (emphasis added). An ENF and Other MEPA Review, if the Secretary so requires, are triggered if a project requires a Permit for alteration of a certain amount of “coastal dune, barrier beach or coastal bank . . . salt marsh, . . . bordering or isolated vegetated wetland, or “1/2 or more acres of any other wetland.” 301 CMR 11.03(3)(b) (emphasis added).

The MEPA Regulations say that “(a) wetlands, which is defined by the Wetlands Protection Act, M.G.L. c. 131 § 40, and its implementing regulations, 310 CMR 10.00, and 33 USC 1341 and 314 CMR 9.00 regarding Water Quality Certification, as well as other statutes, regulations, executive orders, or policy directives that govern wetlands issues.” 301 CMR 11.02(1).

The Wetlands Protection Act defines “coastal wetlands” and “freshwater wetlands”, and the Wetlands Regulations define Bordering Vegetated Wetlands, 310 CMR 10.55(2), but there is

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no explicit definition of just the generic term “wetland”. Instead, the Wetland Regulations refer to all the areas subject to protection under the Wetlands Protection Act as “Resource Areas”. See 310 CMR 10.04 (definition of “Resource Area”). “Resource Areas” cover more areas than those listed under “coastal wetlands” and “freshwater wetlands” defined in the Act.

The MEPA Regulations are unclear as to whether “other wetlands” means, more broadly, “other Resource Areas”, or, more narrowly, just other the remaining types of wetlands listed under “coastal wetlands” or “freshwater wetlands” in the Act, or something else, such as all other wetland Resource Areas except Riverfront Area.

Changing “any other wetland” in the MEPA thresholds to “any other wetland resource area”, if that’s what the MEPA Regulations intend, would bring more clarity and certainty to whether and when an ENF needs to be filed.

Leaving it vague like it is leads to potential disagreement, a waste of a lot of resources and time for all involved, and likely means some projects escape review and other projects are not reviewed as fully as they should be. We strongly recommend the “other wetland resources areas” wording.

Thank you for considering our suggestion.

Very truly yours,

Luke Legere

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Michael O’Neill

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