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**Background Document on
Proposed Regulations by
Massachusetts Environmental Policy Act (MEPA) Office**

MEPA Regulations at 301 CMR 11.00 et seq.

September 2022

**Regulatory Authority:
M.G.L. c. 30, §§ 61 to 62L**

SUMMARY

The Massachusetts Environmental Policy Act (MEPA) Office within the Executive Office of Energy and Environmental Affairs (EEA) proposes to amend its regulations at 301 CMR 11.00 et seq. These amendments make modest changes to improve the administration of the MEPA program, and complement the regulatory amendments promulgated on December 24, 2021 to implement requirements imposed under Sections 55-60 of Chapter 8 of the Acts of 2021: *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* (the “Climate Roadmap Act” or “the Act”).

BACKGROUND

The MEPA program, originally enacted in 1972, requires projects for which action is needed by an “Agency” to undergo an environmental review process prior to the taking of such action. As stated in MEPA regulations, the purpose of the MEPA program is to “provide meaningful opportunities for public review of the potential environmental impacts of Projects for which Agency Action is required, and to assist each Agency in using (in addition to applying any other applicable statutory and regulatory standards and requirements) all feasible means to avoid Damage to the Environment or, to the extent Damage to the Environment cannot be avoided, to minimize and mitigate Damage to the Environment to the maximum extent practicable.” 301 CMR 11.01(1)(a); see also M.G.L. c. 30, § 61 (general purpose); id. §§ 61-62 & 301 CMR 11.02 (relevant definitions).

MEPA regulations establish certain “review thresholds,” which “identify categories of Projects or aspects thereof, of a nature, size or location that are likely, directly or indirectly, to cause Damage to the Environment.” 301 CMR 11.01(2)(b)1. Provided Agency Action is required, the review thresholds determine the level of review required as follows: (i) a project that meets or exceeds an “ENF” threshold must file an Environmental Notification Form (ENF) for public review, and must undergo additional review if the Secretary of EEA so requires in his or her discretion; and (ii) a project that meets or exceeds a “mandatory EIR” threshold must file an ENF for public review, and subsequently must file one or more mandatory Environmental Impact Reports (EIRs) for public review. An ENF filing undergoes 30-day review period (with 20 days for public comment), while each EIR is subject to a 37-day review period (with 30 days for public comment). See M.G.L. c. 30, §§ 62A-62C.

For projects undertaken by, or involving financial assistance from, an Agency, the Scope of EIR review is broad, and encompasses all aspects of the project that are likely, directly or indirectly, to cause Damage to the Environment. For projects undertaken by private proponents for which financial assistance is not sought, the Scope of EIR review is generally limited to the subject matter of required permits. See M.G.L. c. 30, § 62A; see also 301 CMR 11.01(2)(a)-(b).

On March 26, 2021, Governor Baker signed into law the Climate Roadmap Act, which enacted a new definition of “Environmental Justice Population” (hereinafter “EJ Population”) for purposes of enhancing public involvement and analysis of impacts during the MEPA review process. In particular, Section 58 of the Act requires the submission of an EIR for any project that is “likely to cause Damage to the Environment”—defined in MEPA regulations to mean categories of projects that meet or exceed “review thresholds,” as described above—and is located within 1 mile of an EJ Population (or 5 miles if the project impacts air quality). The Act required that the

Secretary of EEA promulgate regulations to implement Sections 57 and 58, and those regulations were promulgated on December 24, 2021.

Following the 2021 regulatory revisions, the MEPA Office launched a “Phase 2” regulatory review effort at the request of stakeholders to deliberate on additional changes that could be considered to improve the MEPA process in light of the approximately ten years of reviews that have occurred since 2013, when the MEPA regulations were last amended (prior to the 2021 updates). The MEPA Advisory Committee, consisting of over 20 stakeholder groups and key agency representatives, met on a biweekly to monthly basis in early 2022 to discuss the entirety of MEPA regulations and associated policies and protocols. A key topic of discussion focused on the fact that the extremely broad mandate of the Act—which requires every project subject to MEPA jurisdiction and located near EJ Populations to undertake a lengthy “EIR” review, regardless of the review thresholds exceeded—will cause unintended burden for minor projects for which an EIR review does not advance MEPA’s mandate to avoid or minimize environmental impacts. The proposed amendments described below make modest revisions to MEPA review thresholds to address this concern. They also address “Ecological Restoration Projects” as defined in Wetlands Protection Act (M.G.L. c. 131, § 40) regulations at 310 CMR 10.00, and propose other clarifying changes as described in more detail below.

The MEPA Office will continue to consider additional amendments to address more complex issues and concerns raised by stakeholders. Among other items, the MEPA Office is continuing to collaborate with the Massachusetts Department of Environmental Protection (MassDEP) on its effort to create a “cumulative impact analysis” (CIA) framework for air permitting, which was also mandated by the Climate Roadmap Act (St. 2021, c. 8, § 102C) and intersects with EJ-related initiatives by the MEPA Office. Additional revisions to MEPA regulations and protocols may be warranted in light of the MassDEP CIA effort.

DESCRIPTION OF PROPOSED AMENDMENTS

I. Amendments to MEPA Review Thresholds (301 CMR 11.03)

The following amendments make modest revisions to address review thresholds that lack any minimum criteria, or otherwise have triggered review for minor projects for which MEPA reviews have not materially advanced MEPA’s mandate to avoid or minimize environmental impacts. Given the new mandates of the Climate Roadmap Act, these projects are now required to undergo a full EIR process, whereas, previously, they would have made one ENF filing with an associated 30-day review period. With the following amendments, the categories of projects that qualify for exemptions would no longer be presumed to be “likely, directly or indirectly, to cause Damage to the Environment.” 301 CMR 11.01(2)(b)1. In turn, absent fail safe review, no MEPA review would be required for the project.

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

These proposed amendments would add a “de minimis” exception to review thresholds requiring review for projects subject to article 97 of the amendments to the Massachusetts constitution (“Article 97”), or otherwise involving releases of interests in land held for conservation, preservation or agricultural or watershed preservation purposes. Since February 2020, the MEPA Office has reviewed about 33 project filings that triggered one or both of these thresholds (15 of

which triggered only one or both thresholds).¹ This proposed amendment would affect a small subset of these filings that constitute “de minimis” projects, as determined in writing by the Secretary of EEA. Potential examples could include dispositions involving a small acreage of land with little to no conservation value, or nominal transfers of legal control between public entities without a change in use where the land remains protected by Article 97.

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

This proposed amendment would eliminate the one-half-mile sewer main extension threshold as an independent trigger for MEPA review. Since February 2020, the MEPA Office has reviewed 6 project filings that triggered this threshold (none of which triggered only this threshold). As MassDEP no longer issues sewer extension permits, MEPA reviews would not result in disclosures to support an associated permit process. Thus, a five-mile minimum (currently in 301 CMR 11.03(5)(b)3.b.) is a more reasonable threshold for triggering the need for MEPA review, and is consistent with the minimum for water main extensions (in 301 CMR 11.03(4)(b)3.).

➤ 301 CMR 11.03(6)(b)1.b. (Transportation)

This proposed amendment would revise the four-foot road widening threshold to exclude widening to add bicycle or pedestrian accommodations. Since February 2020, the MEPA Office has reviewed about 14 project filings that triggered this threshold (2 of which triggered only this threshold). This amendment would support Complete Streets² projects intended to promote multi-modal transportation options without increasing capacity for vehicular traffic. To the extent the project meets or exceeds other thresholds, such as the cutting of five or more living public shade trees of 14 or more inches in diameter at breast height (in 301 CMR 11.03(6)(b)2.b.), the project would continue to require MEPA review, provided Agency Action is required.

➤ 301 CMR 11.03(11)(b) (ACEC)

This proposed amendment would add a one-half-acre minimum to the threshold requiring review for any work in an Area of Critical Environmental Concern (ACEC), excluding projects proposing one single family dwelling. Since February 2020, the MEPA Office has reviewed about 51 project filings that triggered this threshold (18 of which triggered only this threshold). This proposed amendment would affect a small subset of these projects, where the proposed work covers less than one-half acre. This minimum mirrors the alteration of one-half-acre or more of “any other wetlands” in 301 CMR 11.03(3)(b)1.f., and sets a reasonable minimum for work proposed within the broadly designated ACECs across the state.³ To the extent state or local permits are required for the work, this proposed amendment would not exempt the project from such permitting.

¹ A search of projects filed with the MEPA Office in or after February 2020 is now available through the MEPA search page. See <https://eeaonline.eea.state.ma.us/EEA/MEPA-eMonitor/search>.

² <https://www.mass.gov/complete-streets-funding-program>

³ <https://www.mass.gov/lists/acec-designations>

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

“Ecological Restoration” projects as defined in Wetlands Protection Act (WPA) regulations, 310 CMR 10.00, refer to 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 [the WPA], when such interests have been degraded or destroyed by anthropogenic influences.” Because the purpose of these projects is to restore natural ecological functions and improve the environment, they must be designed so as to avoid “Damage to the Environment” as defined in MEPA. Through stakeholder discussions, it was disclosed that the development of a “Restoration Order of Conditions” in the WPA regulations in 2013 was intended to set forth prescriptive requirements intended to protect the environment; in turn, the projects would be exempt from MEPA review. This proposed amendment would accomplish this original intent by allowing for a streamlined notice to be filed with the MEPA Office prior to seeking a Restoration Order of Conditions from the local conservation commission. The notice would be subject to a 20-day comment period, after which the Secretary of EEA would retain discretion to require an ENF filing. If an ENF is not required, the project could apply for the Restoration Order of Conditions; however, if the Restoration Order of Conditions is not issued, the project would thereafter have to undergo MEPA review. Any Agency Actions required to obtain the Restoration Order of Conditions may be taken, provided they are deemed conditioned on the ultimate issuance of the Order. The project also would be required to comply with 301 CMR 11.05(4) and provide public involvement opportunities for any EJ Populations located within the “Designated Geographic Area” (defined in 301 CMR 11.02) around the project. This new procedure would not apply to Ecological Restoration Limited Projects under 310 CMR 10.24(8) or 10.53(4), which will continue to require MEPA review under normal procedures.

III. Other Clarifying Changes

The following technical amendments are intended to clarify MEPA procedures and ease administration of the MEPA program.

- 301 CMR 11.01(2)(a) & 11.06(9)(a): Add language to make clear that the Scope of an EIR should enable Agencies to fulfill Section 61 obligations.

Section 61 of MEPA, M.G.L. c. 30, § 61, requires Agencies to issue a finding at the conclusion of MEPA review certifying that the reviewed project will take “all feasible means” to avoid or minimize environmental impacts. Language added by the Global Warming Solutions Act of 2008 also requires agencies to consider climate change impacts and effects in making these findings. This proposed amendment makes clear that the Scope of EIRs should require analysis to enable agencies to make the requisite Section 61 findings. This is a technical change to conform with statutory requirements.

- 301 CMR 11.02: Amend definitions of “Replacement Project” and “Routine Maintenance” to allow for flexibility in determining whether projects qualify for these existing exemptions.

Current regulations contain language that has constrained the ability of the MEPA Office to make case-by-case determinations as to whether a project meets existing definitions of “Replacement Project” and “Routine Maintenance.” These proposed amendments add flexibility to these definitions to allow for case-by-case determinations as to whether a project would qualify for these exemptions from MEPA review.

In addition, M.G.L. c. 30, § 62A contains language addressing certain types of transmission projects. The proposed amendments add language in 301 CMR 11.03 to indicate that projects referenced in M.G.L. c. 30, § 62A are exempt from MEPA review, provided that they meet the revised definitions of “Replacement Project” or “Routine Maintenance.”

- 301 CMR 11.05(9): Clarify projects that qualify for new “rollover EIR” process.

The 2021 regulatory revisions added a “rollover EIR” process to allow projects that are required to undertake EIR review due to the new requirements of the Climate Roadmap Act to file a “Proposed EIR” together with an initial ENF filing; if all requirements are met, the Proposed EIR would be published as is (*i.e.*, “rolled over”) in the next Environmental Monitor after issuance of the Secretary’s Certificate. This proposed amendment makes clear that the rollover EIR process is available only to projects that do not exceed “mandatory EIR” thresholds and are required to undergo an EIR process solely due to the requirements of the Act. This aligns with the original intent of this provision and addresses current confusion among project proponents. However, Ecological Restoration and Ecological Restoration Limited Projects would continue to qualify.

- 301 CMR 11.10(6): Improve project change review procedures by replacing “insignificance finding” procedure with advisory rulings.

Under current regulations, every “material change” to a project requires a formal filing with MEPA, even if it reduces environmental impacts. While the regulations allow the Secretary of EEA to make a “finding of insignificance” within ten days without publishing the filing for public comment, this procedure still requires the filing of a Notice of Project Change (NPC) and circulation to all prior commenters. The procedure is also difficult to administer due to the tight time frame for issuing the finding. This proposed amendment allows the Secretary to make the same determination that a project change or lapse of time is insignificant in terms of environmental consequences such that MEPA review is not required through a simpler advisory ruling process. Consistent with 301 CMR 11.01(6)(c), the Secretary will retain discretion to publish a request for advisory ruling for comment.

- Various sections: Minor changes to capitalization and citations are made throughout the regulations. See 301 CMR 11.05(4)(b), 11.05(5)(c), 11.06(3), 11.06(7), 11.07(6)(g)12., 11.16(1).

IV. Transition Rules (301 CMR 11.17)

- This proposed amendment states that the changes included in this regulatory proposal shall apply to any new project for which an ENF (or expanded ENF) is filed following the effective date of the amendments. Specifically, all new projects filed on or after the January 4, 2023 deadline for publication in the Environmental Monitor, as established under 301 CMR 11.15(2)(b), will be subject to the new rules.

NOTE TO REVIEWERS

In addition to the proposed amendments described above, the MEPA Office is considering a change to the definition of “Project” in 301 CMR 11.02, which refers to “[a]ny work or activity” that, if undertaken by a Person (subsection (b)), “requires a Permit or involves Financial Assistance or a Land Transfer.” The MEPA Office is considering changing the word “involves”

as it relates to “Financial Assistance” to refer to actions that emphasize the role of the project proponent in seeking or applying for the financial aid. Under the current definition of “Financial Assistance,” the financial aid can be “direct or indirect” and must be provided by an Agency (typically through a discretionary selection process); it also includes all forms of financial aid referenced in regulation, including, but not limited to, “mortgage assistance, special taxing arrangements, grants, issuance of bonds, loans, loan guarantees, debt or equity assistance, and the allocation of Commonwealth or Federal funds” (such as allocation of legislative appropriations). Under anti-segmentation provisions in 301 CMR 11.01(2)(c), the Project may be construed to cover various work or activities that constitute “one Project,” when considering the totality of circumstances in a given situation, such as “whether the work or activities, taken together, comprise a common plan or independent undertakings, regardless of whether there is more than one Proponent; any time interval between the work or activities; and whether the environmental impacts caused by the work or activities are separable or cumulative.” *Id.* Thus, the entity seeking or applying for Financial Assistance may include the proponent of any of the related work or activities that are deemed to constitute one Project under anti-segmentation principles. The MEPA Office seeks public comment on what, if any, impact changing the word “involves” as related to Financial Assistance in the definition of “Project” in 301 CMR 11.02 would have on pending or future projects that may be reviewed under MEPA. We note that the phrase “involves Financial Assistance” or “involving Financial Assistance” also appears in various places throughout the regulation when referring to the scope of MEPA jurisdiction. *E.g.*, 301 CMR 11.01(2)(a)1.-2., 11.01(2)(b).2.

SMALL BUSINESS IMPACT

These proposed amendments to 301 CMR 11.00 are not anticipated to have an impact to small businesses, as the amendments are intended to streamline MEPA procedures and will exempt certain projects from review. Project proponents include small businesses undertaking various projects that are subject to MEPA review due to the presence of “Agency Actions.” A wide range of private entities engage in the MEPA process as project proponents, including real estate developers, nonprofit organizations, cannabis operations, and solid waste facilities. Many of these proponents may qualify as small businesses.

MUNICIPAL IMPACT

Municipalities participate as both project proponents and commenters in the MEPA review process. As with small businesses, these proposed amendments to 301 CMR 11.00 are not anticipated to have an impact to municipalities, as the amendments are intended to streamline MEPA procedures and will exempt certain projects from review.

PUBLIC PARTICIPATION

The MEPA regulatory review effort was launched in February 2021, and a MEPA Advisory Committee was formed in September 2021 to advise on this effort. As noted above, the MEPA Advisory Committee has continued to meet to deliberate on a “Phase 2” regulatory review effort following the promulgation of the 2021 regulatory revisions.

Remote (virtual) public hearings on this M.G.L. c. 30A regulatory package will be held via Zoom at the following dates and times:

- October 26, 2022, 10am-12noon (register at link below)
<https://zoom.us/meeting/register/tJwuc-GvrDgpHdPI4IRilbjUVSc6koreUsyg>
- October 26, 2022, 6:30-8:00pm (register at link below)
<https://zoom.us/meeting/register/tJEld-mppj8tH9MxtoURa3a9FhOZ3orCebn5>
- October 27, 2022, 10am-12noon (register at link below)
<https://zoom.us/meeting/register/tJMscu6vrTguHdMJHf0CThoE8zMvXB5-twG4>

Following public hearings, written comments will be accepted until **5:00pm on November 14, 2022** by email at MEPA-regs@mass.gov, or by mail to MEPA Office, Attn: Tori Kim, 100 Cambridge Street, 10th fl., Boston, MA 02114. A copy of the proposed regulations is available on the MEPA website at <https://www.mass.gov/service-details/information-about-upcoming-regulatory-updates>, or may be obtained by sending an email to MEPA-regs@mass.gov.

To request written language translation or oral interpretation at the public hearings, please contact MEPA-regs@mass.gov (insert “Language Translation Request” in subject line). For oral language interpretation, the request must be received at least three (3) business days prior to the public hearing date at which the interpretation is requested. To request other reasonable accommodations, please contact Melixza Esenyie, ADA and Diversity Manager at Melixza.Esenyie2@mass.gov or 617-626-1282.

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