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**Response to Comments on
Draft Regulatory Amendments Proposed by the
Massachusetts Environmental Policy Act (MEPA) Office**

MEPA Regulations at 301 CMR 11.00 et seq.

December 2022

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

Background

On October 14, 2022, notice was published in the Massachusetts Register of proposed amendments to regulations of the Massachusetts Environmental Policy Act (MEPA) Office at 301 CMR 11.00. 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 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”).

The MEPA Office held public hearings and solicited comments on the proposed 2022 amendments in accordance with M.G.L. Chapter 30A. On September 30, 2022, the MEPA Office published notice of public hearings and public comment period in the Boston Globe, Worcester Gazette, and Cape Cod Times; an additional notice was published in the Springfield Republican on October 3, 2022. The MEPA Office also notified a wide range of stakeholders through its email distribution lists and additional outreach. Three public hearings were held via Zoom on October 26-27, 2022, where clarifying questions were asked by members of the public; no affirmative statement or testimony was provided by attendees. The public comment period closed on November 14, 2022.

A 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. The MEPA Office appreciates the input provided by the MEPA Advisory Committee.¹

Response to Comments on Regulatory Amendments

The MEPA Office appreciates the comments received on the draft regulatory amendments published in the Massachusetts Register on October 14, 2022. Written comments were received from the following individuals and organizations:²

Amy Sutherland
Anca Vlasopolos
Andrew Falender
Angela Ellis
Association to Preserve Cape Cod
Betsey Jackson
Buzzards Bay Coalition
Daniel Bello
DFG In-Lieu Fee Program
Elaine Abrams
Eversource Energy
Gwen Shipley
Heidi Meyer
Kerisa Perazella
Massachusetts Department of Transportation

¹ Members of the MEPA Advisory Committee and summaries of past meetings can be viewed at <https://www.mass.gov/info-details/mepa-advisory-committee>.

² Written comments are posted at <https://www.mass.gov/lists/public-comments-received-on-proposed-amendments-to-mepa-regulations-at-301-cmr-1100#comments-received-on-2022-regulatory-proposal-under-m.g.l.-c.30a->.

Massachusetts Environmental Justice Table
Massachusetts Port Authority
Massachusetts Water Resources Authority
Massachusetts Water Works Association
MassAudubon (on behalf of 6 organizations)
Massachusetts Rivers Alliance (on behalf of 34 organizations)
Mike Boss
Municipal Electric Association of Massachusetts
NAIOP
Nanci Worthington
National Grid
Sarah Ferguson
Virginia Welles

Comments Related to Ecological Restoration Projects

1. **Comment:** Numerous comments expressed support for the proposal to streamline review of Ecological Restoration Projects, as defined in the Wetlands Protection Act (WPA) regulations at 310 CMR 10.00. Some comments urged the MEPA Office to expand the streamlined procedures to include additional types of ecological restoration activities beyond those defined as an “Ecological Restoration Project” under the WPA regulations. One comment requested that the Notice of Project required to be filed with the MEPA Office contain sufficient details about the project, including information about potential impacts to environmental justice (EJ) populations, so as to allow a meaningful consideration by the Secretary as to whether to require the filing of an Environmental Notification Form (ENF). Additional input from state agencies provided to the MEPA Office suggested specific details to include in the Notice of Project.

Response: The MEPA Office appreciates the robust feedback received from stakeholders on this topic. We agree that the streamlined process allows for expedited delivery of these beneficial projects, while affording an opportunity for the Secretary, after review of the Notice of Project and consideration of public comments, to require MEPA review in appropriate circumstances—for instance, where the Notice of Project does not demonstrate compliance with the eligibility criteria for Ecological Restoration Projects set forth in 310 CMR 10.13. In order to facilitate a meaningful review of the Notice of Project, the final regulations include additional required details for the Notice of Project in a format prescribed by the Secretary, including a scope of work for the proposed restoration activities, an estimate of the nature and extent of wetlands alteration, and a statement that the Project will meet the eligibility criteria for a Restoration Order of Conditions under 310 CMR 10.13, together with identification of the project type and a list of documentation to be provided to the issuing authority. Any Project that is located within a Designated Geographic Area around one or more EJ populations must also include in the Notice of Project a description of measures taken to enhance public involvement opportunities by the identified EJ populations, and a description of any Environmental Burdens or Environmental Benefits that may result for the EJ populations by reason of the Project. The final regulations require the Notice of Project to be submitted at least 60 days (lengthened from 14 days in the draft regulations) prior to filing a Notice of Intent with a conservation commission, so as to allow sufficient time for review.

Comments Related to MEPA Review Thresholds

2. **Comment:** Several comments addressed the proposed changes to 301 CMR 11.03(1)(b)3. and (b)5., which proposed to add a “de minimis” exception to review thresholds requiring review of 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. The comments requested more clarity as to how the Secretary would determine whether a disposition or change in use would be considered “de minimis,” and one comment noted that the standards reflected in the recently enacted St. 2022, c. 274, *An Act Preserving Open Space in the Commonwealth* could be considered. Another comment suggested that the word “de minimis” could be construed consistently with a similar standard applied under Section 4(f) of the U.S. Department of Transportation Act of 1966.

Response: As noted, since the MEPA Office issued this proposed regulatory amendment for comment, Governor Baker signed into law St. 2022, c. 274, *An Act Preserving Open Space in the Commonwealth*. Under the newly enacted M.G.L. c. 3, § 5A, any public entity seeking to use for another purpose or otherwise dispose of land, an easement or other real property interest subject to Article 97 will be required to notify EEA and follow other procedures, including identifying replacement land or an interest in land of equal or greater natural resource value. Under new M.G.L. c. 3, § 5A(a), the Secretary may waive or modify the replacement land requirement “if: (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.” Because the waiver provision in M.G.L. c. 3, § 5A(a) effectively serves the same purpose as the “de minimis” exception contemplated in the MEPA regulatory proposal, the final MEPA regulations reflect revisions to indicate that a project will be exempt from review under 301 CMR 11.03(1)(b)3. and (b)5., if the Secretary has waived or modified the replacement land requirement for Article 97 transactions under M.G.L. c. 3, § 5A and its implementing regulations.

3. **Comment:** Several comments expressed support for the proposed changes to review thresholds at 301 CMR 11.03(5)(b)3.c. (Wastewater), 301 CMR 11.03(6)(b)1.b. (Transportation), and 301 CMR 11.03(11)(b) (ACEC). These proposed changes would, respectively, eliminate the one-half-mile sewer main extension threshold; revise the four-foot road widening threshold to exclude widening to add bicycle or pedestrian accommodations; and 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. One comment expressed opposition to the proposals related to road widening and ACECs, indicating that road widening should be pursued only as a “last resort” and that adding an acreage minimum to the ACEC threshold could result in large projects located in ACECs to be segmented to avoid the need for MEPA review.

Response: The final regulations continue to include the proposed changes to the above thresholds without change. While we acknowledge the desire for more public transparency in project reviews, projects designed to facilitate multi-modal forms of transportation serve an independent public purpose of reducing dependence on vehicular travel and supporting the Commonwealth’s greenhouse gas (GHG) emissions reduction goals. The Massachusetts Department of Transportation

(MassDOT)'s Healthy Transportation Policy Directive³ requires all state transportation projects to increase biking, transit, and walking options, and it incorporates design guidelines that encourage the implementation of multi-modal facilities within the existing roadway geometry where feasible. As for the ACEC threshold, MEPA regulations at 301 CMR 11.01(2)(c) already prohibit the segmentation of projects to avoid MEPA review. The landfill project referenced in the comment letter (EEA #15525) was previously reviewed and involved work over 34 acres, which is higher than the proposed ½-acre minimum. Previously reviewed projects in ACECs closer to a ½ acre include playground repairs proposed by the Massachusetts Department of Conservation and Recreation (DCR) (#16253) and the Town of Hull (#16620).⁴

Comments Related to MEPA Review Procedures and Definitions

4. Comment: Several comments expressed concern for the proposed changes to the definitions of “Replacement Project” and “Routine Maintenance” in 301 CMR 11.02. While some comments acknowledge the need for flexibility in determining the circumstances in which replacement and maintenance work would qualify for an exemption from MEPA review, comments criticize the proposed “materially increase” standard as lacking clear guidelines for making this determination. Comments from electric utilities, in particular, note that increased impacts are sometimes necessitated by changes in industry standards, and that critical upgrades to electric transmission infrastructure should be allowed to proceed without MEPA review, so long as industry-based best management standards have been developed to avoid or minimize environmental impacts. Other comments, however, express concern that projects involving significant new impacts requiring environmental permitting could be exempt from MEPA review, if they are proposed as part of a larger project to replace existing infrastructure.

Response: In light of the diverse comments received on this topic, the MEPA Office agrees with several comments that the proposed changes to these definitions should be deferred for further discussion with stakeholders. The final regulations reflect the corresponding revisions to remove the proposed changes to existing language. The MEPA Office notes that some comments suggested that these proposed changes conflict with the language of M.G.L. c. 30, § 62A. In removing this proposed change to existing language, the MEPA Office is not adopting that viewpoint.

5. Comment: Several comments expressed support for other proposed changes to MEPA procedures, including the proposal to simplify the procedure in 301 CMR 11.10(6) for obtaining a finding that impacts associated with a project change are “insignificant” such that MEPA review is not required. Another comment responded to the “Note to Reviewers” section of the MEPA Background Document issued on September 30, 2022, which solicited comment on a potential change to 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 financial aid from an Agency. The comment supported this change as a relatively minor refinement that would provide needed clarification to project proponents.

Response: In light of comments received, the final regulations continue to include all proposed changes to MEPA procedures without change. In light of the support for revising the description of

³ <https://www.mass.gov/doc/healthy-transportation-policy-directive/download>.

⁴ 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>. The corresponding certificates can be viewed by clicking on the appropriate link on the search results page.

“Financial Assistance” in MEPA regulations, the final regulations change the word “involves” to “seeks the provision of” when describing Financial Assistance as a basis for MEPA jurisdiction. We note that this phrasing better aligns with statutory language at M.G.L. c. 30, § 62 (definition of “Project”).⁵

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Based on the responses to comments above, the following changes have been made in the final regulations, as compared to the draft regulations.

11.01: General Provisions

- 301 CMR 11.01(2)(b)4.: Additional detail has been added to this section related to Ecological Restoration Projects to clarify requirements for the Notice of Project, which the proponent must submit with the MEPA Office for publication and public comment prior to filing a Notice of Intent (NOI) with the conservation commission. Under the final regulation, the Notice of Project must be submitted at least 60 days prior to filing the NOI.
- 301 CMR 11.01(6) & throughout: Technical changes, such as a correction of the citation to M.G.L. c. 30 (changed to c. 30A), are made throughout the final regulations. Additional technical changes were made to 301 CMR 11.02 (definitions), 11.07(6) (typographical error), and 11.16(2) (circulation).

11.02: Definitions

- The proposed changes to the definitions of “Replacement Project” and “Routine Maintenance” have been deleted and existing language retained.
- The definition of “Project” has been revised to change the phrase “involves Financial Assistance” to “seeks the provision of Financial Assistance.” Conforming changes were made to 301 CMR 11.01(2)(a)-(b), 11.03, 11.05(2), 11.06(9), 11.11(3), and 11.12(5).

11.03: Review Thresholds

- 301 CMR 11.03(1)(b)3. and (b)5.: These thresholds have been revised to replace references to “de minimis” projects with the standard for a waiver under newly enacted M.G.L. c. 3, § 5A. Under that section, the Secretary may waive or modify the land replacement requirement in certain circumstances for any disposition or change in use subject to Article 97.

11.17: Transition Rules

- This section was revised to reflect the effective date of January 6, 2023 for the final regulations. Consistent with St. 2021, c. 8, § 102B, the provisions of 301 CMR 11.00 required by sections 57 and 58 of the Climate Roadmap Act continue to apply to any new Project for which an ENF or expanded ENF is filed on or after January 1, 2022.

⁵ We note that revisions to project change procedures in 301 CMR 11.10(6) will also require amendments to the Notice of Project Change (NPC) form. The amended NPC form was published in the December 23, 2022 Environmental Monitor in advance of the effective date of January 6, 2023.