



# Commonwealth of Massachusetts

*Executive Office of Energy and  
Environmental Affairs*

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**Massachusetts Environmental Policy Act  
Mar. 18 & Apr. 1, 2022: MEPA Procedures**



# General Provisions (301 CMR 11.01)

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## Overview

- 11.01(1), (4): EJ and M.G.L. c. 30, s. 62K references added
- 11.01(2)(a): MEPA jurisdiction
- 11.01(2)(b): MEPA review thresholds and exemptions
- 11.01(2)(c): Segmentation
- 11.01(4): General procedure, s. 61 findings, advisory opinions

## Questions

- Clarify MEPA jurisdiction over “discrete” project components?
- Climate change impacts “deemed related” to Permits?
- Revise advisory ruling procedure (e.g., time period for issuance)?
- Other revisions?



# Fail Safe Provisions (301 CMR 11.04)

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## Overview

- 11.04(1): Standards
  - Dam to Environ either: 1. could not reasonably have been foreseen prior to or when 301 CMR 11.00 was promulgated; or 2. would be caused by a circumstance or combination of circumstances that individually would not ordinarily cause Damage to the Environment
  - will not result in an undue hardship for the Proponent
- 11.04(2)-(4): Procedures
  - 10-day notice to proponent; 20 days to respond after receive info

## Questions

- Revise standards for fail-safe review?
- Any procedural revisions (e.g., time period for issuance; publication)?
- Other revisions?



# ENF Content & Review (301 CMR 11.05-11.06)

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## Overview

- 11.05(1)-(3): Filing and circulation, timely filing
- 11.05(4)-(5), (9): EJ prefiling requirements and “dual filing” added
- 11.05(6)-(7): ENF form and content / attachments
  
- 11.06(1)-(4): ENF publication, public comment and agency review
- 11.06(7)-(9), (13): Decision on ENF & scope limitations; single and “rollover” EIR standards

## Questions

- Add completeness review as explicit step in review process?
- More detail on alternatives analysis?
- More detail on info needed for public benefit determination (PBD)?
- Other revisions?



# EIR Content & Review (301 CMR 11.07-11.08)

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## Overview

- 11.07(1)-(5): Filing and circulation, Draft/Final/Single EIR standards
- 11.07(6): EIR content (including EJ requirements in *new* (6)(n))
- 11.08(1)-(7): EIR publication, public comment and agency review
- 11.08(8): Decision on EIR

## Questions

- More detail on alternatives analysis?
- Other revisions?



# Special Review Procedures (301 CMR 11.09)

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## Overview

- 11.09(1): General provisions
- 11.09(3): Citizen Advisory Committee
- 11.09(4): Eligible projects

## Questions

- Explicitly allow for joint review of multiple projects with common elements (e.g., development along roadway corridor)?
- Add more types of programmatic reviews?
- Other revisions?



# NPC/Lapse of Time (301 CMR 11.10)

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## Overview

- 11.10(1): NPC for “material change”
- 11.10(2)-(3): NPC/new ENF for “lapse of time” (3 to 5 years with exceptions)
- 11.10(6): Insignificance standard
- 11.10(7)-(8): Circulation, public comment and review

## Questions

- Define “material change”? Distinct from “insignificant impact”?
- Revise exceptions for lapse of time (e.g., non-construction activity)?
- Should changes in ambient environment (e.g., climate change) be considered when assessing project changes?
- Any procedural changes (e.g., “request for finding of insignificance”)?
- Other revisions?



# Waivers (301 CMR 11.11)

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## Overview

- 11.11(1): Standard for all waivers, incl. “undue hardship”
- 11.11(3): Standard for EIR waiver, incl. “likely to have no Damage to Environment”
- 11.11(4): Standard for Phase 1 waiver, incl. severability and “insignificant” impacts when taken alone
- 11.11(5)-(6): Procedure to request; decisions (DROD/FROD)

## Questions

- Revise waiver standards? How should “undue hardship” be viewed?
- Should ecological restoration/resiliency projects be addressed here?
- Other revisions?





# Other Provisions (301 CMR 11.12-11.16)

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## Overview

- 11.12: Agency Responsibilities
- 11.13: Emergency Action
- 11.14: Legal Challenges
- 11.15-11.16: Publication and Circulations

## Questions

- Add notice to Massport and DOT Aeronautics for projects within certain geographical radius around airports?
- Add notice to Division of Conservation Services for art 97 issues?
- How to construe “affected municipality” for circulation?
- Other revisions?



# MEPA Advisory Committee Feedback

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## **General Provisions (301 CMR 11.01)**

- Advisory rulings should be published more frequently.
- MEPA office should advertise more widely advisory rulings that are intended to have precedential value for future projects.
- 11.01(1)(d) has existing language about review of agency programs, regulations and policies, which should be better reflected in reviews.
- Section 61 findings should be more meaningful.

## **Fail Safe Review (301 CMR 11.04)**

- Standard that an impact “could not reasonably have been foreseen prior to or when 301 CMR 11.00 was promulgated” is too strict.
- Broader standard would refer to any impact that is not addressed by thresholds; however, this may not provide enough parameters.



# MEPA Advisory Committee Feedback

## Fail Safe Review (301 CMR 11.04) (cont'd)

- Possible revision could be to allow for fail safe if project may cause “disproportionate adverse effects,” or where ambient conditions may raise climate change or environmental justice concerns.
- “Undue hardship” requirement is concerning. MEPA has interpreted the term strictly; originally intent was to balance private hardship against public interest.
- Another factor is whether environmental permitting process allows for alternatives analysis, if fail safe review were not granted.
- The phrase “ordinarily would not cause Damage to the Environment” was not meant just for truly extraordinary impacts, but also unanticipated impacts from site- specific circumstances.
- Could fail safe be used for programmatic reviews of agency policies and programs? E.g. solar siting



# MEPA Advisory Committee Feedback

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## **ENF Content and Review (301 CMR 11.05-11.06)**

- Language could be added regarding completeness review and alternative analyses to conform to current practice.
- MEPA review should acknowledge public comments related to public benefit determination.
- ENF and EIR should contain project summary. Regional and local bodies often operate with volunteers, so summary would be helpful.

## **EIR Content and Review (301 CMR 11.07-11.08)**

- Private sector should develop better guidance so that ENFs and EIRs can be drafted with simpler and clearer language.
- Regulations should acknowledge MEPA's ability to engage an outside consultant to verify technical claims made in EIR (e.g., BU Biolabs).



# MEPA Advisory Committee Feedback

## Special Review Procedures (301 CMR 11.09)

- Can MEPA require SRP without proponent's consent? Would depend on permitting agency's authority to do the same, for instance, to require cumulative impacts of multiple projects.
- SRP works well if agency engages in planning process (e.g., roadway corridor development) that can set parameters for future projects; also works well for long-term master planning by 1 developer.

## Notice of Project Change / Lapse of Time (301 CMR 11.10)

- Can "material change" be defined? Original intent was for term to be defined through advisory rulings.
- List of "significance" factors could be expanded to include EJ impacts.
- Finding of insignificance procedure could be eliminated.



# MEPA Advisory Committee Feedback

## Notice of Project Change / Lapse of Time (301 CMR 11.10) (cont'd)

- Significance factors for NPC should consider cumulative impact of change for the entire project, rather than incremental change only (e.g., incremental expansions of landfills, CSO control plans).
- NPCs cannot be filed once permits are in hand, as there is no longer any “Agency Action.”
- NPC form should include “request no further review” as an option.
- If NPC indicates a project change that itself exceeds EIR thresholds, these are presumptively viewed as requiring EIR though Secretary still retains discretion to require otherwise.



# MEPA Advisory Committee Feedback

## Waivers and Other Provisions [discussed on 4/29/22]

- MEPA review should be considered for agency review of its own “programs, regulations, and policies” (Sec 11.12).
- Consultation with Massport should be encouraged for projects near Logan and other Massport airports, though this may not require formal change to circulation requirements (Sec 11.16).