NAIOP
COMMERCIAL REAL ESTATE DEVELOPMENT ASSOCIATION
MASSACHUSETTS

December 23, 2020

Tori Kim, Director
Massachusetts Environmental Policy Act Office
100 Cambridge Street, #900
Boston, MA 02114

RE: Comments on MEPA Regulations for Consideration in Upcoming Regulatory Review

Dear Director Kim,

NAIOP Massachusetts, The Commercial Real Estate Development Association greatly appreciates the opportunity to offer preliminary thoughts on potential revisions to the MEPA regulations.

NAIOP is also grateful for your invitation to participate in the revision effort, and we look forward to participating in a robust process. For this effort, we urge you to consider a review similar to the prior MEPA revisions in 1989 and 1998, which involved multiple iterative drafts reviewed publicly, and brought together an advisory committee comprised of a broad array of stakeholders. These prior processes ensured a transparent regulatory update that resulted in a practical, predictable program.

In anticipation of the regulatory review, NAIOP has received in-depth feedback over the course of several months from developers, attorneys, and consultants across the industry, and respectfully submits the below comments for your consideration.

I. ASSERTION OF JURISDICTION

NAIOP believes that clarification is needed in provisions that inform the MEPA Office's assertion of jurisdiction, including related to when a Permit is "required," when Financial Assistance is "involved," and segmentation.

Several recent areas of assertions of jurisdiction appear to be outside the statutory limit of MEPA's jurisdiction. *See* G.L. c. 30, s. 62 (definition of Project: "work, project, or activity … if undertaken by a person, which **seeks the provision of financial assistance** by an agency, or **requires the issuance of a permit** by an agency").

Examples of such assertions include areas related to:

a. "Financial Assistance" *for Private Projects & MassWorks Grants to Municipalitie*s
In one recent matter, the MEPA Office asserted full scope review over a project privately proposed and privately funded on private land because the public roadways

over which it was accessed had recently been improved with funding from a MassWorks grant awarded to the municipality.

NAIOP is concerned that this approach may be extended to other projects adjacent to, or simply near, MassWorks-funded municipal improvements, regardless of whether the private project sought or required the funding, and despite a lack of statutory jurisdiction. NAIOP believes that if the infrastructure work that is funded by the grant may result in potential damage to the environment, then the grant-funded infrastructure project itself may need to be analyzed under MEPA, but the grant should not constitute Financial Assistance for the private or other economic development project that may utilize the resulting infrastructure.

In any regulatory revisions, NAIOP urges MEPA to clarify the definition of "Financial Assistance" and address the additional concerns in clear terms consistent with the statutory requirements.

b. MBTA Zone of Influence Review

NAIOP does not believe that Design/Construction Review for Projects within the MBTA's "Zone of Influence" constitutes Agency Action under the current MEPA regulations, and any regulatory review should make that clear.

In essence, the MBTA Zone of Influence review is administrative, and akin to a Dig-Safe review taken to protect MBTA facilities. NAIOP does not believe that this MBTA review should be considered a State Agency Action that serves as a basis for MEPA jurisdiction. For a privately proposed and privately funded project, there are only two types of Agency Action – a Permit and a Land Transfer. 301 CMR 11.02(b) (definition of "Agency Action" for a privately proposed project). The statutory definition of "Permit" sets forth a list of actions, all of which are circumscribed by the catch-all, concluding phrase "or other entitlement for use." G.L. c. 30, s. 62 (definition of "Permit"). Furthermore, MEPA review is only required when a Permit is "required." 301 CMR 11.01(2)(a).

The Guidelines issued in November 2017 by the MBTA relating to the Zone of Influence licensing assert a new right to regulate private property for which we believe there is no statutory basis. *See Design/Construction Review for Projects within the MBTA's Zone of Influence: A Guide for Owners, Developers, and Contractors (ODCs)* pg. 1 n. 1 (ZOI is "the area in air-rights, adjacent to, or in close proximity … to existing MBTA property ….") Second, Zone of Influences licenses are not "required Permits" – they do not convey an entitlement for use, as the MBTA Review (itself unauthorized by statute) is neither triggered by, nor required for, any right to build or occupy the private project. *See id*. pg. 1 (setting forth expected,

informal notification upon request or inquiry).

c. MassDOT Non-Vehicular Access Permits

When MassDOT's issuance of a Non-Vehicular Access Permit (NVAP) for particular projects is consistent with its own regulations, this action might, in certain cases, constitute an entitlement for use, and thus a Permit for MEPA review purposes. But its issuance often will not constitute an entitlement for use, especially when the NVAP is issued purely to safeguard MassDOT assets from nearby construction projects, and the issuance of NVAPs rarely implicates any meaningful environmental issues.

The NVAP may constitute a Permit for MEPA review purposes when it involves "[c]onnection to or discharge to any MassHighway drainage system" or "[c]onstruction or repair of utilities" (*See* 720 CMR 13.02 - definition of Non-vehicular Access Permits, cl. (b)&(c)) and those activities trigger subject matter-related MEPA review thresholds on their own (e.g., land, wetlands, wastewater). At the same time, it likely does not constitute a MEPA Permit when it involves no "physical modifications" or only "[t]ree cutting or landscaping." *See* 720 CMR 13.02 (definition of Non-vehicular Access Permits, cl. (a)&(d)).

Notably, there appear to be no review thresholds within the subject matter of any NVAPs, unless roadway work is itself involved (in which instance, a Vehicular Access Permit might be required). *See* 301 CMR 11.03(6)(b)2. ("[c]onstruction, widening or maintenance of a road" that alters a stretch of bank or terrain, cuts a number of public shade trees, or eliminates a length of stone wall). As a consequence, there is a rarely a circumstance in which jurisdiction based on an NVAP triggers MEPA review.

While these permits may be State Agency Actions, they do not relate to roadway traffic and should not be used as a basis for asserting jurisdiction over traffic generally. Note that a similar concern has arisen around easements for pedestrian bridges. **NAIOP urges the MEPA Office to address these concerns through coordination with MassDOT to ensure that activities that may give rise to the issuance of NVAPs do not trigger the MEPA review process.**

d. MassDOT Section 54A Former RR ROW Consent

This MassDOT action may constitute an entitlement for use, as its authorizing statute explicitly makes Section 54A Consent a pre-requisite to building permit issuance. *See* G.L. c. 40 s. 54A. However, as with the NVAP, Section 54A Consent rarely implicates any meaningful environmental issues, especially as there is rarely any interest in maintaining the right of way for future rail service expansion or extension.

Additionally, there is a specific review threshold relating to rail assets within this action's subject matter jurisdiction, but only for limited circumstances. *See* 301 CMR 11.03(6)(b) ("[a]bandonment of a substantially intact rail or rapid transit right-of-way"). Traffic thresholds are not related to the subject matter of Section 54A Consents. In nearly all instances, these consents are ministerial and result in no actual regulation of a private project. These approvals, too, should not be considered State Agency Actions for the purposes of MEPA jurisdiction.

NAIOP suggests that clarification on these points (MBTA Zone of Influence review, NVAPs, and Section 54A Consent) should be addressed in any MEPA regulatory revisions, either through the revised regulations themselves or an advisory opinion addressing these specific issues.

e. MWRA Temporary Construction Dewatering Permits

NAIOP recommends that the revised regulations should clarify that issuance of a temporary MWRA construction dewatering permit is not an Agency Action. Setting aside for the moment whether this does indeed constitute an entitlement for use, it again relates to only a certain, specified review threshold. *See* 301 CMR 11.03(5)(b)4.a. This clarification is especially important to eliminate the possibility that this permit could be viewed as physically or conceptually related to either future wastewater flows generated by the built project or to a transportation-related threshold.

f. Other Review Processes Not Constituting Action

NAIOP respectfully suggests that certain, specified review undertaken by Agencies be listed as processes not constituting Agency Action for MEPA purposes. These may include the Natural Heritage & Endangered Species Program MESA Project Review Checklist, the Massachusetts Historical Commission Project Notification Form, and Cape Cod Commission Development of Regional Impact Review.

II. EXPANDING SCOPE AND EXTENDING REVIEW

In several recent matters, the MEPA Office has expanded the MEPA scope of review beyond applicable limits, by requiring responses to comments that are outside the project's subject matter jurisdiction or that are even beyond the issue of damage to the environment. These include conventional, local land-use issues (for which the question is admittedly sometimes a close call), aesthetic or economic concerns (which are unquestionably almost always outside MEPA's authority or expertise), and a host of other, sincerely raised but not MEPA-appropriate or relevant, questions and suggestions from citizens and others.

Expanding the scope in this way presents problems for the predictable process valued by proponents. It also allows others – often those who are less familiar with MEPA, as they deal with it only for a project located in their community or raising a specialized issue of concern - to expect attention and outcomes beyond the legal or practical ability of the MEPA Office or Section 61-issuing Agencies. The results can be disastrous, at least by elongating the process, and perhaps even by exacerbating problems. *See, e.g., Allen vs. Boston Redevelopment Authority*, 450 Mass. 242 (2007) (vacating the Secretary's Certificate after the FEIR failed to address "unlikely or remote contingencies" raised in comments [but not in the original scope] when the Secretary asked that these be addressed in response to comments).

NAIOP recognizes that ENF Certificates often expressly note that comments require response only within the project's subject matter jurisdiction. But, as many commenters encounter MEPA only periodically (as noted above) and, as the process proceeds, the resolve in that note can dissipate. NAIOP suggests that it may be appropriate to integrate a rebuttable presumption that issues raised in comments, but not initially scoped, must be addressed substantially and substantively only if a Certificate expressly says so, with a brief explanation of how and why the issues are within subject matter jurisdiction. In addition to restoring predictability for proponents, this would help ensure commenters' expectations are addressed in advance.

Further, acknowledging that the MEPA Office would like to engage with proponents early in the design process, there has been a massive increase in the extent of information and detail that is requested. This includes detailed design plans and stormwater reports, which are not necessary to evaluating environmental effects for MEPA purposes until and unless an EIR is required, and even then full design may not be necessary to appropriately evaluate environmental effects and obtain Agency and public input. Often, the information requested at the early stages by the MEPA Office can only be provided later in the design process.

When EIR-level thresholds are not exceeded, MEPA has nevertheless scoped projects for EIRs seemingly based solely on volume and tone of public comment, even if those comments are not related to impacts under MEPA's State Agency Action-related jurisdiction. In the past, MEPA review has pertained only to relevant subject matter directly related to the required State Agency permits. Given the recent shift, there is significant concern within the regulated community that this scope is being unfairly applied to projects who otherwise would not be brought into MEPA review.

While NAIOP understands the importance of MEPA review, given the increased and unpredictable scoping and information requirements in recent years, there have been concerns that the process has shifted towards a state-level site plan review agency. **NAIOP urges that any new regulations or guidance reflect and address the**

concerns raised in the comments above regarding the expansion of the MEPA process.

III. CLIMATE CHANGE POLICY

NAIOP views climate change as an economic development, public health, and environmental issue that affects every resident in the Commonwealth. However, we are concerned that MEPA has, for the past 5 years, relied on the incomplete and unclear Draft MEPA Climate Change Adaptation and Resiliency Policy.

The existing draft policy recommends pre-filing consultation with the MEPA staff, but provides no meaningful guidance on means and methods of essential analysis or criteria for, or characteristics of, meaningful mitigation.

To illustrate, here are some overarching issues on which more complete and clear guidance is needed in 2070, 2100, or other model years:

- baseline assumed precipitation frequency, volume, and intensity; and
- modeled coastal and other storm surge frequency, volume, and elevation.

Yet, despite the absence of this guidance, there have been several recent scopes that have proven costly and complicated on this topic, but appear not to have influenced decision-making by Section 61-issuing agencies nor to have informed understanding by the reviewing public. To illustrate, some scopes have asked for modeling of some extremely low probability events, even when other governmental regulators and reviewers (for site planning and building standards, at the municipal level; for incremental impact globally, at the international level) have not yet settled on meaningful standards for impact description, analysis, or mitigation.

As a consequence, most of the work done on this critically important topic is irrelevant. Especially for commercial, industrial, and residential projects, modeling flooding scenarios three to five decades in the future (or at geographically remote public facilities, such as those owned and operated by the MassDOT, the MBTA, or DCR) creates no meaningful opportunities for design choices (other than design relating to flood elevation, a building code concern) or operational measures.

NAIOP respectfully suggests that the Draft Climate Change Adaptation and Resiliency Policy be revised, refined, and officially promulgated so that there is complete and clear guidance for information sharing and data analysis, while maintaining an unwavering focus on actionable outcomes and environmental results.

IV. OTHER COMMENTS

a. Land Thresholds

NAIOP recommends the MEPA Office consider defining "direct alteration" as applying only to previously undeveloped land.

The general interpretation and application of the Land thresholds at 301 CMR 11.03(1) has been a recent source of inconsistency with the MEPA Office. It is our understanding – and long-standing precedent – that these thresholds are designed to address "greenfield" projects in the instances of 11.03(1)(a)(1) and (1)(b)(1) and "brownfield," "greyfield," or redevelopment projects in general in the instances of 11.03(1)(a)(2) and (1)(b)(2). (Of course, if 25-50 or more acres of direct alteration of undeveloped land is also proposed as part a redevelopment project, then those thresholds would apply.) The descriptions of the 11.03(1)(a)(1) and (1)(b)(1) thresholds themselves suggest that they are targeted for "greenfield" projects wherein they exempt "approved conservation farm plan or forest cutting plan or other similar generally accepted agricultural or forestry practices." In contrast, the nature of redevelopment projects often results in improvements to the existing conditions such as environmental remediation, stormwater management system upgrades, or reductions in impervious surface as a result of more efficient site planning.

NAIOP is unclear as to what is gained by MEPA review if the 11.03(1)(a)(1) and (1)(b)(1) thresholds are applied to such redevelopment projects. Clearly, the interests of MEPA review are served sufficiently by the impervious surface thresholds at 11.03(1)(a)(2) and (1)(b)(2) if such redevelopment projects cross those lines.

b. Wetlands Thresholds

NAIOP hopes the MEPA Office will consider changing terminology from "any other wetlands" to "wetland resource areas" in the wetlands thresholds, so it is clear that riverfront area (RFA) and floodplain are to be included in those thresholds. NAIOP also recommends excluding previously developed RFA from inclusion in the total area when calculating impacts; excluding Land Subject to Coastal Storm Flowage; and including only the portion of Bordering Land Subject to Flooding that is presumed significant to the protection of wildlife habitat per 310 CMR 10.57, since impacts (flood storage lost) are typically otherwise readily addressed.

c. ENF Contents

MEPA has recently provided guidance that municipal Open Space and Recreation Plans (OSRPs) should also be addressed in the "municipal comprehensive land use plan." While some OSRPs are incorporated into a municipality's Master Plan, not all are, nor are all formally adopted. It may be worthwhile to include only plans that have been adopted by the municipality. However, if moving forward all OSRPs must be addressed, an update to the ENF form would be warranted.

d. Notice of Project Change

NAIOP understands that MEPA is considering removing the "insignificant" procedures and determination on Notices of Project Change (NPC) from the regulations. If this change is adopted, NAIOP encourages the continuation of a category of changes that are deemed immaterial and not subject to any NPC filing. Ideally the regulations would keep the 10% threshold in place and clarify that a project change that would be deemed insignificant under this standard is not subject to an NPC filing in the new regulations.

e. NPC Lapse of Time for ENFs

NAIOP urges the MEPA Office to clarify when an ENF Certificate expires if there is no EIR required.

f. Circulation

NAIOP believes that clarification may be warranted that newspaper notice is not required for EIRs, and that EIRs are only distributed to the required distribution list and those who commented on previous filings.

The MEPA review is a mechanism for state agencies to convene at a common table on a project-by-project basis to ask appropriate questions, get appropriate answers, and step away from the table to make their own permit decisions based on their area of jurisdiction. Throughout its existence, it has been viewed as a predictable process for the real estate development industry and ensured environmental protection across the state. NAIOP is hopeful that with the suggested actions outlined here, MEPA review will continue to be an invaluable part of the development process.

NAIOP is grateful for the opportunity to provide comment on behalf of our more than 1700 members involved with the development, ownership, management, and financing of office, research & development, industrial, mixed use, multifamily, retail, and institutional space throughout the Commonwealth. We look forward to continuing to work with the MEPA Office throughout the regulatory review process commencing in 2021. Please contact me if you have any questions.

Sincerely,

Tamara C. Small
Chief Executive Officer
NAIOP Massachusetts, The Commercial Real Estate Development Association

CC: Secretary Kathleen Theoharides, Executive Office of Energy and Environmental Affairs