



March 10, 2021

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

RE: Comments on MEPA Interim Climate Change Protocol

Dear Director Kim,

NAIOP Massachusetts, The Commercial Real Estate Development Association, appreciates the opportunity to comment on the draft Interim Climate Change Adaptation and Resiliency Protocol. NAIOP applauds EEA's efforts to provide better definition of, and a clearer process for, consideration of climate change impacts from, and effects on, projects subject to MEPA review.

NAIOP also recognizes that the present proposal builds on substantial work done by EEA and the MEPA Office over the last decade to formulate the Greenhouse Gas Emissions Policy and Protocol and over the last several years to implement the strategy established in Governor Baker's Executive Order (No. 569) for integrating Climate Change plans and actions within and across state agencies.

At the same time, NAIOP respectfully suggests that any MEPA protocol will be optimally useful and effective if it hews most closely to the 2010 climate change-related amendments to the MEPA statute and the continuing work of the Resilient Massachusetts Action Team on Climate Resilience Design Standards and Guidelines.

Scope of Applicability

The Global Warming Solutions Act's 2010 statutory amendment to MEPA adopted an approach to "reasonably foreseeable climate change impacts" that is distinct from MEPA's conventional approach to other potential "damage to the environment."

For environmental damage as conventionally defined, MEPA requires impact review, evaluation, and determination for private projects within long-understood subject matter jurisdictional limits.

But for climate change impacts, including related to greenhouse gas emissions and climate change impacts such as sea level rise, the standard is distinct: they shall simply be "consider[ed]" in permitting and other administrative decisions.

Most importantly, this means that, while the MEPA Office is empowered to require information and analysis of "reasonably foreseeable" climate change impacts and agencies to "consider [climate change] ... effects," subject matter jurisdiction is not broadened. Therefore, the resulting Section 61 obligation is not extended.

Thus, an agency is not required to "review, evaluate, and determine" impacts, or to issue a "finding that all feasible measures have been taken to avoid or minimize" damage to the environment simply because it is required to consider climate change effects before issuing a permit.

This statutory reality places a notable burden on the MEPA Office. While the Interim Protocol can require climate-related information for all projects exceeding ENF review thresholds, for a privately funded, privately proposed project on private land, the scope of an EIR cannot require more conventional impact analysis, and the final certificate on an EIR cannot require binding mitigation measures, unless its climate-related impacts occur within the subject matter of required permits.

As a consequence, NAIOP respectfully suggests that the Interim Protocol state explicitly the scope of its applicability to a project simply filing an ENF (consideration – unusually broad, *per* G.L. c. 30, § 61, ¶2) and to one undergoing permit-based EIR review (review, evaluation, and determination – conventionally narrow, *per* G.L. c. 30, § 61, ¶1). It will undoubtedly be prudent for the revised policy to include guidance on which permits encompass climate-related impacts within their subject matter.

Analysis of Impacts

As noted above, NAIOP certainly considers this initial draft of the Interim Protocol to be a thoughtful articulation of the types of considerations appropriate in an ENF. Even so, the proposed addendum presents a number of practical problems. This may reflect that the work of the Resilient Massachusetts Action Team remains in progress, not yet subject to stakeholder review or ready for formal adoption.

Several provisions in the addendum illustrate the problem:

- “anticipated useful life” - While the addendum does not ask for this until the fifth question (I.E.), it reflects a fundamental concern: commercial projects do not have a unified useful life; structural, functional, operational, and other components all have different useful, design, and service lives.
- Sea Level Rise Projections – The addendum applies the Massachusetts Coastal Flood Risk Model or Boston Planning and Development Agency data to ask for a year in which the 1%-annual-chance coastal flood area reaches any part of the project. But these two tools measure probability, not result; consequently, they have a much smaller joint-probability than a 1% annual exceedance. By designating a year, this section may result in misleading conclusions.
- Project Criticality – At least until the tools to be developed by the Resilient Massachusetts Action Team are ready, there are no standards for assessing criticality. The resulting narratives will be speculative at best, misleading at worst, and inconsistent at all times. Moreover, for commercial projects, ecosystem benefits are likely incidental, as their core purpose – unlike infrastructure or other publicly-proposed projects undergoing MEPA review – is to meet a market need, not to address other priorities.
- Adaptation Strategies – These questions are exceptionally problematic for private projects, whose location, size, configuration, and other key characteristics are driven by market conditions and regulatory constraints, each beyond the control (or, for the most part, even influence) of the proponent of an individual project.

- Floodwater Flows – While stormwater analyses have long been a staple of MEPA reviews for projects implicating changed pathways and velocities, this question asks a novel question about the “functioning of the floodplain.” The CZM/DEP Coastal Wetlands Manual referenced in the addendum provides no meaningful definition or guidance as it (a) reflects the absence of Wetlands Protection Act performance standards for Land Subject to Coastal Storm Flowage, and (b) lacks any attention to Bordering Land Subject to Flooding. Moreover, quantitative hydrographic or hydrologic analysis will take significant time and resources and produce data, but will not provide much useful analysis. Instead, it will provide much confusion given often conflicting municipal requirements.

Taken together, these few illustrations suggest that the addendum needs substantial time and attention before it can be used for projects filed under MEPA. NAIOP and its members welcome the opportunity to participate in a stakeholder process that can yield the most useful and effective tools for informing agency decisions on project permits and other actions.

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. Please contact me if you have any questions.

Sincerely,



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

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