

**RESPONSE TO COMMENTS  
2013 REVISIONS TO MEPA REGULATIONS  
(301 CMR 11.00)**

Revisions to the Massachusetts Environmental Policy Act (MEPA) regulations (301 CMR 11.00) incorporate certain aspects of the MEPA Greenhouse Gas (GHG) Policy and Protocol (GHG Policy), including creation of a new MEPA threshold for GHG emissions. At the same time, relatively minor revisions were made to update the regulations and/or correct existing errors. These minor revisions address a variety of subjects, including addition of a threshold for fine particulate matter (PM 2.5) to establish consistency with state and federal air permitting regulations and a new mechanism for notice of permits in the context of legal challenges. Draft revisions were provided to the GHG Policy Working Group on March 28, 2011 to solicit comments prior to its distribution for broader public comment. Proposed revisions to the MEPA GHG Policy and draft revisions to the MEPA regulations to incorporate certain aspects of the GHG Policy were discussed with and reviewed by the Working Group. The revisions were released for public comment on October 12, 2012 and the comment period closed on December 12, 2012. A public hearing was held on November 14, 2012. Attendance at the public hearing consisted of a representative from the Conservation Law Foundation (CLF). Three comment letters were submitted by Shanna Cleveland, Conservation Law Foundation, Heidi Ricci, MassAudubon, and Doug Landry, VHB.

Comments support the objectives of the regulatory revisions, including the introduction of a MEPA threshold for GHG emissions. Comments identified several changes that have been incorporated into the final regulation to ensure consistency with the Global Warming Solutions Act (GWSA) and related MEPA jurisdiction. Some comments suggest additional changes that were not contemplated by the Working Group, such as a broader interpretation of the GWSA. The following identifies comments on the revisions and, after careful review and consideration, provides a response to specific comments. The Executive Office of Energy and Environmental Affairs (EEA) extends its appreciation to the organizations and individuals who provided comments on these revisions.

**SECTION 61 FINDINGS (11.12)**

**Comment:** *GWSA requires all agencies to consider climate change impacts and effects in considering and issuing Section 61 Findings. Addition of the clause at end of 11.12(5)(c) Subject Matter Jurisdiction Limitations on Section 61 Findings limits the applicability of this requirement. To ensure the language and jurisdiction are consistent with the GWSA, the comments request that the language be moved to section 11.12(5)(a) Contents of Section 61 Findings.*

**Response:** The requirement that “all agencies consider climate change impacts and effects in considering and issuing Section 61 Findings for all “permits, licenses and other administrative approvals and decisions.” has been moved to 11.12(5)(a) Contents of Section 61 Findings. The placement of the language was not intended to suggest that the consideration of climate change impacts and effects through the MEPA process were limited by the subject matter jurisdiction of the permit, Land Transfer or Financial Assistance nor has application of the GHG Policy limited consideration of climate change impacts in this way. For the purpose of MEPA review and

issuance of related Section 61 Findings, projects that are subject to an EIR, must include a GHG analysis of direct and indirect GHG emissions, regardless of the specific State Agency Action that is triggered (e.g. a development that requires a MassDOT Access Permit must include an analysis of all direct and indirect GHG emissions associated with the project, including stationary and mobile sources). To avoid confusion the language has been moved.

**Comment:** *Although the statutory language in Section 62A limits the scope of MEPA jurisdiction, the new provision in Section 61 clearly and unambiguously requires agencies to consider climate change impacts in all permits and decisions.*

**Response:** St. 2008, c. 298, § 7, which contains the new provision that requires agencies to consider climate change impacts, amended Section 61 of the Massachusetts Environmental Policy Act, G. L. c. 30, and obligated all state agencies, when considering and issuing permits, to consider “reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise.” Because St. 2008, c. 298, § 7, served to amend Section 61 of the MEPA Act, we are of the view that the new climate change provision must be construed in the context of the existing MEPA legislative scheme. See Old Colony Trust Co., Trustee v. Commissioner of Corporations and Taxation, 331 Mass. 329, 334 (1953) (“A general revision of statutes does not ordinarily change the effect of earlier provisions, but is to be construed as a continuation of them in the absence of some plain indication of a legislative intent to alter the law.” Id. at 334, quoting Byfield v. Newton, 247 Mass. 46, 56 (1923)).

Against this backdrop, we have historically construed the MEPA Act so as to require Section 61 findings for those projects that require an EIR. See MEPA Regulations at 301 CMR 11.12(5) (agencies are required to make Section 61 Findings only when the Secretary has required an EIR for any particular Project or Agency Action). See also, the MEPA GHG Policy, which expressly states that the requirements of the policy only apply to projects that require an EIR. This interpretation of Section 61 is in lock step with the Supreme Judicial Court who has long held the view that Section 61 should be read in conjunction with the MEPA environmental review process set forth in M.G.L. c. 30, §§ 61-62I, such that §61 findings must only be made in instances in which an EIR is required. City of Boston v. Massachusetts Port Auth., 364 Mass. 639, 660 (1974).

Finally, we note that had the legislature intended the climate change impact provision found at St. 2008, c. 298, § 7, to have broader application beyond its application in the MEPA Act, the legislature could have included broad language in Section 6 of the GWSA which created M.G.L. c. 21N, the Climate Protection Act.<sup>1</sup> Instead, it opted to include the language in the MEPA statute, thereby limiting the language to Section 61 findings within MEPA jurisdiction.

The proposed revisions that are associated with GWSA and the GHG Policy were predicated on the foregoing and, therefore, are only applicable to the development of Section 61 Findings for projects that are subject to preparation of an EIR.

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<sup>1</sup> The Climate Protection Act states that “in implementing its plan for statewide greenhouse gas emissions limits, the commonwealth and its agencies shall promulgate regulations that reduce energy use, increase efficiency and encourage renewable sources of energy in the sectors of energy generation, buildings and transportation.”

## **DEFINITIONS (11.02)**

**Comment:** *The agency reference under section 11.02(1)(b) should be to "...Massachusetts Department of Transportation Highway Division's..." (not "Massachusetts Department of Transportation's Department of Highways").*

**Response:** This reference has been corrected to Massachusetts Department of Transportation (MassDOT) Highway Division.

**Comment:** *The definition of Damage to Environment should be expanded to include "greenhouse gas emissions", "storm surge" and "storm tide".*

**Response:** The definition of Damage to the Environment was revised to include GHG emissions. Previous iterations of the regulatory revisions, including the draft submitted for public comment, reflect prior statutory amendments (*Section 2 and Section 3 of Chapter 168 of the Acts of 2007*) that added reference to "reduction of groundwater levels, impairment of water quality, increases in flooding or storm water flows." The definition of Damage to the Environment is sufficiently broad to address impacts associated with storm surge and storm tide.

## **THRESHOLDS (11.03)**

**Comment:** *Comment letters express support for the addition of a MEPA GHG threshold and for using thresholds established by the EPA Tailoring Rule as the threshold for submitting an EIR. CLF continues to advocate for establishment of an ENF threshold in connection with projects that will have lesser GHG emissions. CLF recommends that the MEPA Office establish a threshold under 11.03(8)(b) of 25,000 tons per year of CO<sub>2</sub>e for a new source and 5,000 tons per year of CO<sub>2</sub>e for a modification. Meeting the mandates of the GWSA will require Massachusetts to carefully assess the GHG emissions from all sources. Requiring smaller, yet material, sources of GHG emissions to file an ENF will help the project proponent, the public and the agency to ensure that every opportunity for meaningful reductions in GHGs is properly assessed and implemented.*

**Response:** Establishment of an ENF threshold for GHG emissions was considered by the GHG Working Group and addressed in previous responses to comments on the revisions. The Secretary has proposed to require the preparation of a mandatory EIR for any project that exceeds the thresholds specified in the Tailoring Rule because the existing MEPA GHG Policy applies to projects that are required to prepare an EIR. No changes have been proposed to this aspect of the Policy. Given the detailed nature of the information required under the GHG Policy, the Secretary believes that preparation of an EIR (rather than an Environmental Notification Form) is appropriate and that this requirement should not be applied to smaller projects at this time.

**Comment:** *Add language to MEPA thresholds for land, water, and wastewater (11.03 (1), (4), and (5)) and/or to the Environmental Notification Form (ENF) scoping and EIR preparation and review sections (11.06, 11.07, 11.08) that would codify provisions of the MEPA GHG Policy. The comment indicates that, even if MEPA construes the jurisdictional issue narrowly, provisions could be included to apply to projects requiring a land transfer or state financing where jurisdiction is always broad.*

**Response:** As noted previously, MEPA does not construe the jurisdictional issue narrowly. To ensure compliance with the GHG Policy, requirements for GHG analyses are applied to projects that exceed an EIR threshold, regardless of the specific State Agency Action.

**Comment:** *Propose revisions to Sections 11.05 and 11.07 regarding the contents of ENFs and EIRs to include a requirement that the project description also provide an assessment of potential effects of climate change on the project and any proposed mitigation measures. The purpose of the change is to provide additional clarity for project proponents, and spur planning that promotes resilience and sustainability. For an ENF, this language would need to be included at 11.05(4)(a). For EIRs, the language would need to be added in Sections 11.07(3), 11.07(4), and 11.07(5). In addition, a new section would need to be added as 11.07(6)(d)7 to require "a summary of potential effects of climate change on the project and a list of mitigation measures."*

**Response:** The EEA Adaptation Committee is developing guidance for addressing potential effects of climate change, including guidance for addressing effects of climate change on projects subject to MEPA review. In the interim, the effects of climate change are addressed through MEPA review on a case-by-case basis and have been incorporated into scoping documents for several projects.

#### **PROTOTYPE PROJECTS (11.09)**

**Comment:** *This provision, which allows the Secretary to establish a special review procedure for projects that "will be replicated in substantially similar form at one or more future times or locations", should be eliminated from the revisions. Although the components of a proposed project may be similar, the very fact that it will be proposed for a different location and different time frame has substantial and meaningful ramifications. A big box store proposed in a coastal location will have very different impacts than a big box store proposed on for an inland, urban community, or another proposed in a rural community. Among many other variables, the modes of transportation that serve a particular site are highly relevant to any MEPA analysis with respect to GHG emissions.*

**Response:** The GHG Policy Group discussed various alternatives for providing standards for prototype projects but the very nature of projects subject to MEPA review and, in particular, for projects filing under the SRP provisions of the MEPA regulations make such a process challenging. The purpose of this language is to encourage large retail projects, or other appropriate projects, to consider making significant commitments to stationary-source GHG reductions for prospective stores, the benefit of which will be to avoid additional GHG analysis that essentially replicates what has previously been done through MEPA review. Site specific issues, such as traffic congestion and access to transit, will not be covered by this provision.

#### **OTHER COMMENTS**

**Comment:** *To meet the mandates of the GWSA, every new source of emissions must be offset, and indeed eclipsed, by further additional reductions elsewhere in the Commonwealth. This lens must be applied to all MEPA reviews to ensure progress toward meeting the GWSA's ambitious but achievable GHG reduction requirements. It is therefore vital that all projects that require an*

*EIR or an ENF provide an assessment of all aspects of direct and indirect GHG emissions and mitigation. The MEPA Office should then compile data from all EIRs and ENFs annually in order to provide a cumulative assessment of new GHG emissions in order to assist in tracking how new emissions are affecting overall progress towards the GHG reduction goals.*

**Response:** MEPA is coordinating with EEA and other agencies regarding *Massachusetts Clean Energy and Climate Plan for 2020* implementation, including measures to track progress. Where GHG analysis has been required, direct and indirect GHG emissions and associated mitigation are identified in the Certificates issued on MEPA review documents. The Climate Plan does not include specific reduction targets associated with implementation of the MEPA GHG Policy and Protocol.

**Comment:** *GHG evaluations for land clearing impacts be required in the scope for all projects involving 50 acres or more of forest land clearing, and that the Secretary have at least discretionary authority to require GHG analysis for projects clearing between 25 and 50 acres of land.*

**Response:** This comment pertains to the GHG Policy, which was revised in May 2010 and is not under review at this time. EEA is developing a draft protocol for analyzing GHG emissions associated with alteration of more than 50 acres of land.

