

MEPA AND THE MWPA: WHAT WETLAND SCIENTISTS NEED TO KNOW: PART ONE

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INTRODUCTION

The Massachusetts Environmental Policy Act (“MEPA”) requires that all Commonwealth agencies “... review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means and measures to minimize damage to the environment.” (M.G.L., c.30, §61) This general charge strictly applies only to the actions of agencies, not to the actions of the proponents of private projects. Even so, since permit decisions, funding decisions, and land transfers are among the actions to which it applies, many private projects find themselves subject to MEPA by virtue of required agency action. For the wetland scientist, it is worth noting that one of the agency actions that most frequently triggers the requirement for MEPA review is the requirement of a Superseding Order of Conditions (“SOC”) under the Massachusetts Wetlands Protection Act (“MWPA”). In addition, when MEPA review is triggered by another action – another permit, funding, or land transfer – the need for an SOC will establish MEPA jurisdiction over wetlands and related topics including land alteration, stormwater management, and wildlife habitat. Thus, while wetland scientists need not be experts in the MEPA process, they need to understand it as it applies to MWPA permits and in general as it applies more broadly.

The MEPA statute, available on-line at <https://www.mass.gov/info-details/mepa-statute>, is the basic legislative authorization for the MEPA review program. It is of interest to understand the basic aims of MEPA, the general process as envisioned by the legislature, and the powers of the Secretary of Energy and Environmental Affairs (“Secretary”). To understand the MEPA review process, however, it is the MEPA Regulations found at 301 CMR 11.00 that are of most importance. The Regulations were most recently amended in 2023, became effective on January 6, 2023, and are found at <https://www.mass.gov/regulations/301-CMR-1100-mepa-regulations>. An official copy of the Regulations also may be obtained from the Massachusetts State Bookstore.

This article lays out the operation of the Regulations from the perspective of a wetland scientist and more generally, focusing first on those areas where projects most often run afoul of MEPA in surprising ways. These comprise project definition, the concept of MEPA jurisdiction, and the MEPA thresholds. Part One of this article concludes with the first step in a typical

MEPA process, the Environmental Notification Form (“ENF”), the Secretary’s decision, and challenges. Part Two of this article, which will appear in the January 2025 issue of the AMWS Newsletter, will complete the typical MEPA process with a discussion of the Environmental Impact Report (“EIR”) to the Section 61 Findings, an often-overlooked step in the MEPA process. Finally, three more arcane topics are discussed: Special Review Procedures (“SRPs”), Notices of Project Change (“NPC”), and Waivers. These last topics do not affect most projects but can be of great interest in some circumstances.

PROJECT DEFINITION

Never file a project with a Roman numeral in its title. In defining a project for MEPA purposes, a proponent must include all parts of the project. If a project is called Davis Acres Phase II, it begs the question of what is Davis Acres Phase I and how is it related to Phase II? It also risks running afoul of a strict prohibition in the MEPA Regulations against segmentation, which is defined as follows:

“In determining whether a Project is subject to MEPA jurisdiction or meets or exceeds any review thresholds, and during MEPA review, the Proponent, any Participating Agency, and the Secretary shall consider the entirety of the Project, including any likely future Expansion, and not separate phases or segments thereof.” (301 CMR 11.01(2)(c))

Thus, while it is proper to develop Approval Not Required (“ANR”) lots along existing road frontage and then to seek approval for a subdivision road to allow further development of backland, it is asking for trouble to name the ANR lots Davis Acres Phase I and the subdivision Davis Acres Phase II. And it is improper to develop a single subdivision in small phases in the hopes of avoiding MEPA review. This is segmentation in its baldest form. It seldom works and always is risky. So, include all parts of the project, and do not name it so that it looks like there are other parts already built or waiting in the wings.

There also is an often-overlooked practice around land transfer at 301 CMR 11.01(2)(c)1, which has developed over time. In essence, if a proponent is granted a land transfer, holds the land

(Continued on page 5)

(Continued from page 4)

for a time, and then develops it, MEPA jurisdiction attaches unless more than five years have passed since the land transfer. So, if your client has purchased land from the Commonwealth, it is wise either to begin MEPA review immediately, if there are development plans afoot, or to wait at least five years before proceeding with planning, local approvals, and the like. Again, while it may be tempting, such segmentation in time seldom works and also is risky.

MEPA JURISDICTION

Now you have a well-defined project that avoids segmentation, so you are ready to file with MEPA. Not so fast. Remember that MEPA applies strictly only to Agency actions. Some projects that wetland scientists encounter are undertaken directly by Commonwealth agencies – MassDOT road improvements and Division of Conservation and Recreation boat ramps come to mind – and these clearly are subject to MEPA. Less clear are the projects undertaken by private proponents. They only are subject to MEPA if they require a Permit, occur on land transferred from an Agency, or use Agency funds. So, the next question about a private project after its definition is “Does it require any Agency action?” Note that the definition of “Agency” includes all of the expected Commonwealth agencies but it also includes municipal redevelopment authorities and other local authorities created by statute.

If the answer after close examination is “No,” then there is no MEPA jurisdiction and no requirement to file with MEPA, regardless of the size or environmental effect of the project. This point often frustrates project neighbors but is one of the defining features of MEPA; it only applies to projects over which there is some direct control by an Agency.

Further confusion often arises about the extent of MEPA jurisdiction when agency actions are required. Here, it is worth looking at the relevant sections of the MEPA Regulations closely:

“MEPA jurisdiction is broad when a Project is undertaken by an Agency or seeks the provision of Financial Assistance. Broad, or full scope, jurisdiction means that the Scope, if an EIR is required, shall extend to all aspects of a Project that are likely, directly or indirectly, to cause Damage to the Environment.” (301 CMR 11.01(2)(a)2.)

“MEPA jurisdiction is limited when a Project is undertaken by a Person and requires one or more Permits or involves a Land Transfer, but does not seek the provision of Financial Assistance. Limited, or subject matter, jurisdiction means that the Scope, if an

EIR is required, shall be limited to those aspects of the Project within the subject matter of any required Permit or within the area subject to a Land Transfer that are likely, directly or indirectly, to cause Damage to the Environment.” (301 CMR 11.01(2)(a)3.)

Two special notes are in order. First, Financial Assistance is broadly defined in the Regulations at 301 CMR 11.02 and includes far more than full, direct Agency funding. Commonwealth tax incentives, matching funds, loans, and even loan guarantees all are considered Financial Assistance. And remember, “In for a penny, in for a pound.” Even a small proportion of Commonwealth funding provides full MEPA jurisdiction over the entire project. If Commonwealth funding is the only Agency action and is a minor part of the overall project funding, it may be worth considering whether to apply for the funding. The cost and risk of MEPA review may not be worth the candle.

Second, for MEPA purposes, Permit means only a permit issued by an Agency. While an Order of Conditions (“Order”) is issued pursuant to a Commonwealth statute, the MWPA, it is issued by the local Conservation Commission and is not a Permit under MEPA. If, however, there is an appeal of the Order, the SOC is issued by the Massachusetts Department of Environmental Protection (“MassDEP”) which is a permit under MEPA. For the wetland scientist, this often means it is wise to seek the local Order early in the development process. If there is no appeal, then there is no MEPA jurisdiction over wetlands matters, nor do the wetlands thresholds apply. However, a downside to this approach is that late issues raised during the MEPA process could require design changes that may necessitate a return to the Conservation Commission for an Amended Order. The Proponent should consider these practical consequences when determining the timing and sequencing of permitting.

REVIEW THRESHOLDS

With a well-defined project and one or more Agency actions required, now you are ready to file with MEPA. Again, not so fast. Next, you must consult a long list of MEPA thresholds. If one or more of those thresholds is met, then you have at least to file with MEPA and, in some cases, to go through the full MEPA process or, as the Regulations put it:

“MEPA review is required when one or more review thresholds are met or exceeded and the subject matter of at least one review threshold is within MEPA jurisdiction. ... The subject matter of a review threshold is within MEPA jurisdiction when there is full-scope jurisdiction ... or when the subject matter of the review threshold is conceptually or physically related to the subject matter of one or more required Permits

(Continued on page 6)

(Continued from page 5)

(provided that the review thresholds for Land and Areas of Critical Environmental Concern shall be considered to be related to the subject matter of any required Permit) or the area subject to a Land Transfer.” (301 CMR 11.01(2)(b)2.)

Note that a small class of projects are exempted from MEPA review, as follows:

“The review thresholds do not apply to: a lawfully existing structure, facility or activity; Routine Maintenance; a Replacement Project; or a Project that is consistent with a Special Review Procedure review document. ...” (301 CMR 11.01(2)(b)3.)

In addition, under the recent amendments, an Ecological Restoration Project, but not an Ecological Restoration Limited Project under 310 CMR 10.24(8) and 10.53(4), can follow streamlined procedures under MEPA Regulations if several conditions described at 301 CMR 11.02(b)4. are met. Since many such projects involve the restoration of inland or coastal wetlands, wetland scientists should be aware of this possibility. It could come into play if your project is or may be eligible for a Restoration Order of Conditions under the MWPA Regulations at 310 CMR 10.13. The review process for these projects is found at <https://www.mass.gov/info-details/streamlined-process-for-ecological-restoration-projects>.

The complete list of MEPA thresholds can be found in the Regulations at 301 CMR 11.03. Some familiarity with all of them is useful for a wetland scientist. Detailed familiarity with a few is wise. Clearly, the wetlands, waterways, and tidelands thresholds are of prime importance, but the land thresholds, the state-listed or rare species thresholds, and the Area of Critical Environmental Concern (“ACEC”) threshold are also of importance. Finally, the effects of a fail-safe request, which is described below, should not be overlooked.

Wetlands, Waterways, and Tidelands Thresholds

Under the wetlands thresholds, as with most MEPA thresholds, there are two levels of consideration. First, there are those projects with presumed large effects on the environment, for which an ENF must be filed, and an EIR ordinarily must be prepared. Second, there are smaller thresholds, for which an ENF must be filed, but an EIR is required only by affirmative determination of the Secretary. One exception to this rule was set out in Section 58 of Chapter 8 of the Acts of 2021, An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy (“Climate Roadmap Act”), which required that any project that is “likely to cause Damage to the Environment” and is located within 1 or 5 miles of Environmental Justice (“EJ”) Populations is required to prepare a mandatory EIR.

The MEPA Office has interpreted this provision to mean that any project that exceeds any category of MEPA review threshold must prepare an EIR, if located within the required Designated Geographic Area (“DGA”) around EJ Populations. By statute, the DGA is set at one mile for all EJ projects and five miles for EJ projects affecting air quality, which is defined in MEPA Regulations as meeting certain air quality thresholds or generating 150 or more diesel vehicle trips per day.

The traditional mandatory EIR thresholds for wetlands, waterways, and tidelands at 301 CMR 11.03(3)(a) are:

- alteration of one or more acres of salt marsh or bordering vegetated wetlands;
- alteration of ten or more acres of any other wetlands (*i.e.*, land under water bodies and waterways, bordering land subject to flooding, and/or riverfront area);
- alteration requiring a variance in accordance with the MWPA;
- construction of a new dam or structural alteration of an existing dam that causes an expansion of 20% or any decrease in impoundment capacity; and
- new non-water dependent use or expansion of an existing non-water dependent structure, provided the use or structure occupies one or more acres of waterways or tidelands.

If one of these thresholds is met and the project requires an SOC, a Chapter 91 License, or a Section 401 Water Quality Certification (“WQC”) then an ENF is required, and it can be expected that, unless a waiver is granted, the project proponent will be required to prepare an EIR.

The traditional ENF thresholds for wetlands at 301 CMR 11.03(3)(b) are:

- alteration of coastal dune, barrier beach, or coastal bank;
- alteration of 500 or more linear feet of bank along a fish run or inland bank;
- alteration of 1,000 or more square feet (“sf”) of salt marsh or outstanding resource waters;
- alteration of 5,000 or more sf of bordering or isolated vegetated wetlands;
- new fill or structure or expansion of existing fill or structure, except a pile-supported structure, in a velocity zone or regulatory floodway;
- alteration of ½ or more acres of any other wetlands (*i.e.*, land under water bodies and waterways, bordering land subject to flooding, isolated land subject to flooding, and/or riverfront area);
- construction of a new roadway or bridge providing access to

(Continued on page 7)

(Continued from page 6)

a barrier beach or a new utility line providing service to a structure on a barrier beach;

- dredging of 10,000 or more cubic yards (“cy”) of materials;
- disposal of 10,000 or more cy of dredged material, unless at a designated in-water disposal site;
- new or existing unlicensed non-water dependent use of waterways or tidelands, unless the project is an overhead utility line, a structure of 1,000 or less sf base area accessory to a single-family dwelling, a temporary use in a designated port area, or an existing unlicensed structure in use prior to January 1, 1984; and
- construction, reconstruction, or expansion of an existing solid fill structure of 1,000 or more sf base area or of a pile-supported or bottom-anchored structure of 2,000 or more sf base area, except a seasonal, pile-held or bottom-anchored float, provided the structure occupies flowed tidelands or other waterways.

If one of these latter thresholds is met and the project requires an SOC, a Chapter 91 License, or a WQC then an ENF is required, and the Secretary will determine whether the project proponent will be required to prepare an EIR. As noted, an EIR is mandatory if the project is located in a DGA of an EJ Population.

There are three other threshold categories that also are of interest to wetland scientists: the land thresholds, the state-listed/rare species thresholds, and the ACEC threshold. The land thresholds are of interest because of a jurisdictional decision embodied in the MEPA Regulations that the land and ACEC thresholds are within the subject matter of any Permit. The rare species thresholds are of interest because rare species habitats often coincide with or include wetlands. Similarly, ACECs often include wetland resources.

Land Thresholds

An ENF and mandatory EIR can be expected for any project requiring a wetlands (or any other) permit from an Agency that results in:

- direct alteration of 50 or more acres of land; or
- creation of ten or more acres of impervious area. (301 CMR 11.03(1)(a))

Similarly, an ENF must be filed, and an EIR may be required by the Secretary for any project requiring a wetlands (or any other) permit from an Agency that results in, among other things:

- direct alteration of 25 or more acres of land;
- creation of five or more acres of impervious area;

- disposition of or change in use of land or interests in land subject to Article 97 of the Amendments to the Constitution of the Commonwealth;
- conversion of certain lands in active agricultural use to nonagricultural use; or
- release of an interest in land held for conservation, preservation or agricultural or watershed preservation purposes. (301 CMR 11.03(1)(b))

For the wetland scientist, it is important to note that, regardless of the scale of activity in wetlands, if one of these thresholds is met and an SOC, Chapter 91 License, or WQC (or any other permit) is required, then MEPA review is triggered.

This can be especially problematic for Article 97 lands where an alternatives analysis, approval by the Secretary, and a two-thirds vote of the Legislature, among other things, is required. The analysis most often is conducted as part of the MEPA process. Guidance on this can be found at <https://www.mass.gov/doc/article-97-land-disposition-policy/download>.

State-Listed/Rare Species Thresholds

There are no mandatory EIR thresholds for rare species. However, an ENF is required when a project results in:

- alteration of designated significant habitat [there are none]; or
- greater than two acres of disturbance of designated priority habitat ... that results in a take of a state-listed endangered or threatened species or species of special concern. (301 CMR 11.03(2)(b))

Either a “Take” letter under the Massachusetts Endangered Species Act (“MESA”) following a MESA Project Review Checklist or the requirement for a Conservation and Management Permit (“CMP”) can trigger the application of this threshold. Since most wetland scientists are keenly aware of the relevant Natural Heritage and Endangered Species Program (“NHESP”) maps and the related MESA Regulations, little more needs to be said. The best policy may be avoidance of habitat. Failing that, careful project design and early communications with the NHESP sometimes can lead to a “Conditioned No Take” or “No Take” decision, obviating these thresholds.

ACEC Threshold

The review threshold for a project in an ACEC is considered to be related to the subject matter of any required permit. There is no mandatory EIR threshold and only one ENF threshold:

(Continued on page 8)

(Continued from page 7)

- any project of 1/2 or more acres within a designated ACEC, unless the project consists solely of one single-family dwelling. (301 CMR 11.03(11)(b))

Any project other than a single-family house requiring any permit, land transfer, or financial assistance must file an ENF. The ACEC program is administered by the Department of Conservation and Recreation, and maps of the various ACECs can be viewed on-line at <https://www.mass.gov/info-details/acec-program-overview>. Check the map and designation document closely for the ACEC boundary description and, if necessary, contact ACEC Program Staff to avoid an unpleasant surprise.

Fail-Safe

Finally, there is one other situation in which small projects that otherwise would not meet thresholds can be required to file an ENF: the Fail-Safe provision of the MEPA Regulations at 301 CMR 11.04. Ten citizens or any agency may petition the Secretary to require an ENF for a project that does not meet thresholds. The Secretary may also make a Fail-Safe determination without such a petition. There must be some MEPA jurisdiction, and the proponent must be notified of such a petition or initiative of the Secretary. So, if Fail-Safe has been sought, you will know. It is rare, but it can be an unwelcome event. Note that there is a rigorous review process in the Regulations that allows the proponent to provide additional information during the consideration of a Fail-Safe request. It is imperative that the proponent respond to any request for information and participate in the Fail-Safe review, since it often is possible to forestall the request and convince the Secretary not to grant Fail-Safe.

Voluntarily Filed ENF

A proponent, with the consent of the Secretary, can file an ENF voluntarily for a project that does not meet or exceed any review threshold. This is rare but might be of use to resolve complex questions or where a MEPA Certificate is of benefit in other regulatory processes. If you choose this path, be certain of your decision. Such a voluntary ENF cannot be withdrawn unless the Secretary consents. (301 CMR 11.05(10))

ENVIRONMENTAL NOTIFICATION FORM

Now, at last, it is time to file an ENF. This is a relatively straightforward step in most cases. The MEPA Regulations provide a description of the contents of the ENF at 301 CMR 11.05(5), (6), and (7) and an electronic copy of the required form can be obtained on-line at <https://www.mass.gov/info-details/mepa-forms>. The MEPA website also contains guidance on preparation and filing of an ENF at

<https://www.mass.gov/guides/environmental-notification-form-enf-preparation-and-filing>.

There are special requirements for projects located in landlocked tidelands at 301 CMR 11.05(5)(b) and for projects in tidelands other than landlocked tidelands at 11.05(5)(c). Mandatory EIR projects proposed in tidelands require a Public Benefit Determination under M.G.L. c.91, §18B and 301 CMR 13.00. Many projects undertaken by coastal wetland scientists will be required to follow one or the other of these paths to achieve a Public Benefit Determination under 301 CMR 13.00.

Most wetland scientists have prepared parts or all of an ENF, so the steps of preparation will not be covered in detail here. A regular ENF is a relatively brief document – about 26 pages – and can be completed in several days. Take care to fill out all sections for which there is MEPA jurisdiction and to provide the existing and proposed conditions plans called for as attachments.

All proponents also are required to complete the Climate Change Adaptation and Resiliency Section and the Environmental Justice Section. Guidance for these two specialized topics can be found at <https://www.mass.gov/info-details/eea-policies-and-guidance>. These two sections often are prepared by a planning or permitting consultant, though the wetland scientist with suitable experience can prepare them.

Environmental Justice can be particularly daunting. The EJ Policy sets a DGA around EJ Populations of one mile for all EJ projects and five miles for EJ projects meeting certain air quality thresholds or producing 150 or more diesel vehicle trips per day. Resources for identifying EJ Populations and complying with the EJ Policy can be found at <https://www.mass.gov/guides/-/environmental-justice-protocols-and-resources>.

The Secretary can reject an incomplete ENF, though this seldom happens. Some time is required to contact the Massachusetts Historical Commission and the NHESP (suggested in the ENF but not required by the Regulations), but in all, less than a month is needed to prepare a “plain vanilla” ENF. A special case, however, may arise for some projects: the decision to file an Expanded ENF or an Expanded ENF and Proposed EIR.

Expanded ENF

The Regulations allow for the preparation in some cases of a Single EIR, instead of the more customary Draft and Final EIRs. The Regulations also allow for SRPs, as discussed below, for unusual, complex, multi-site, or phased projects. Finally, the Regulations allow a proponent to petition the Secretary for

(Continued on page 9)

(Continued from page 8)

a Waiver of all or part of the MEPA review for a project that meets one or more mandatory EIR thresholds. All three of the above require the filing of an Expanded ENF. (301 CMR 11.05(8))

In essence, an Expanded ENF is a combined ENF and supporting materials, prepared by the proponent at risk in the hope either of avoiding further MEPA review (in the case of a Waiver) or simplifying that review (in the case of a Single EIR or an SRP). If you chose to prepare one, a few notes on practice are useful.

First, while it is not clear in the Regulations, the MEPA Greenhouse Gas Policy and Protocol, available at <https://www.mass.gov/doc/greehouse-gas-emissions-policy-and-protocol/download>, requires that any Expanded ENF contain a Greenhouse Gas Analysis conforming to the Policy. Depending on the size of the project, this analysis can be quite costly, and its cost must be factored into the decision as to whether to seek relief through the preparation of an Expanded ENF.

Second, in filling out the ENF Form for an Expanded ENF, fill out all sections, whether the area is within MEPA jurisdiction or not. In this way, you can demonstrate that the proponent has considered all environmental effects and can show that they all are small and manageable. This will go far in convincing the Secretary to grant the relief that can be sought with an Expanded ENF.

Finally, prepare the Expanded ENF paying special attention to any area in which there is MEPA jurisdiction. Include a Greenhouse Gas Analysis, a thorough Environmental Justice Analysis, and a thoughtful Climate Change Adaptation and Resiliency Analysis. The purpose of the Expanded ENF is to demonstrate to the Secretary and other reviewers that enough is known about the project and that sufficient mitigation has been proposed to grant the requested relief.

Expanded ENF and Proposed EIR

As discussed above, the Climate Roadmap Act set new standards for the consideration of EJ in MEPA and other state programs. Of particular interest here is the requirement that all projects subject to MEPA that potentially affect EJ Populations must prepare an EIR. To simplify and streamline this process for projects that meet ENF thresholds but do not meet Mandatory EIR thresholds, the MEPA Regulations at 301 CMR 11.05(9) provide for the preparation and filing of a dual Expanded ENF and Proposed EIR along with a request that the Secretary allow the Proposed EIR be reviewed as a Final EIR under the Rollover EIR provision of the Regulations at 301 CMR 11.06(13). Ecological restoration projects that do not meet

the requirements for streamlined treatment under 301 CMR 11.01(2)(b)4 also may seek a Rollover EIR.

To make this request, the proponent must prepare a complete Expanded ENF and a separate Proposed EIR meeting the requirements of 301 CMR 11.07(6) with special attention to the EJ requirements at 301 CMR 11.07(6)(n). The Proposed EIR will be essentially a complete Draft EIR for the project.

ENF Circulation, Filing, and the Environmental Monitor

Once you have completed an ENF, an Expanded ENF, or an Expanded ENF and Proposed EIR, it is time to file it and circulate it. Not quite.

If the project is located within a DGA around an EJ Population, then advance notice must generally be provided to an EJ Reference List obtained from MEPA-EJ@mass.gov. This notice must include an EJ Screening Form in English and any other required languages, as found at <https://www.mass.gov/info-details/mepa-forms>, and must be provided no later than 45 days and no earlier than 90 days before filing. In practice, MEPA also strongly recommends the posting of EJ Fact Sheets (in English and other required languages) describing the project, detailing the upcoming review, and providing a point of contact for additional information, meeting requests, and request for interpretive services. EJ Fact Sheets generally should be posted at civic gathering places within the EJ communities potentially affected between a month and two weeks prior to a filing.

A well-formed filing with the Secretary consists of an electronic document containing the entire ENF and all required attachments. In practice, a cover letter is a good idea and can be used to frame the project favorably for review. Filing is best done by email to MEPA@mass.gov with an accessible link to download the document. This will start the MEPA clock on the next official filing date, which occurs twice each month, generally on the 15th and the last day of the month. These filing dates roll forward to the next business day if they fall on a Saturday, Sunday, or a legal holiday.

Circulation requirements are extensive and are listed in the Regulations at 301 CMR 11.16(2) and on-line at <https://www.mass.gov/guides/environmental-notification-form-enf-preparation-and-filing#-filing-and-circulation-requirements-> and include additional EJ recipients identified in the EJ Reference List. Electronic copies (via accessible link) of the ENF and supporting materials must be circulated by the proponent at the same time the ENF is filed with the Secretary. Do not neglect any of the required recipients. This will cause the Secretary to require additional circulation and will restart the MEPA clock.

(Continued on page 10)

(Continued from page 9)

In addition, you must publish a Public Notice of Environmental Review in a newspaper of local circulation, as described at 301 CMR 11.15(1). The form of the Notice is found on the MEPA website at <https://www.mass.gov/info-details/mepa-forms>. This notice must be published in appropriate languages at the proponent's expense no sooner than 30 days prior to and no later than the date of the publication of the ENF in the *Environmental Monitor* ("Monitor"). Failure of this, too, can cause the Secretary to restart the MEPA clock.

Finally, after the filing, the Secretary will publish notice of the filing of the ENF in the Monitor. The Monitor is an electronic publication, available at <https://eeaonline.eea.state.ma.us/EEA/MEPA-eMonitor/home>. It is the date of publication in the Monitor that starts the MEPA clock. The Monitor is published twice each month, about seven days after the close of each filing period, or around the 7th and 22nd of each month. Precise dates of publication and related review deadlines for the current year can be found on the MEPA website at <https://www.mass.gov/doc/2024-environmental-monitor-publication-schedule/download>.

ENF Review and Decision Schedule

Unlike most permit and review programs, MEPA follows strict timelines with constructive approval if they are not met. If MEPA fails to act on time, a decision favorable to the proponent is presumed. Do not expect this, however, since MEPA virtually always acts on time. The review period for an ordinary ENF, counting from the publication in the Monitor, lasts for 30 days. Comments are accepted for the first 20 days of this period, a public consultation meeting is held near the end of the 20-day comment period, and the MEPA Office drafts the decision for the Secretary in the final 10 days. For most ENFs, the entire period from filing to decision runs about 37 days.

The exceptions to this are for an Expanded ENFs, an Expanded ENF and Proposed EIR, and extended review periods. When you file an Expanded ENF or Expanded ENF and Proposed EIR, you automatically agree to a 30-day public comment period and a seven-day period for the Secretary to reach a decision, a total of 37 days from the date of publication. This slightly longer review period, the same as for an EIR, allows for more public comment and time for the MEPA Office to assess the Expanded ENF or Expanded ENF and Proposed EIR and reach a proposed decision. For Expanded ENFs, the entire period from filing to decision runs about 45 days.

Finally, the ENF review period can be extended by the Secretary with the consent of the proponent. Such a request might make sense if there is a single item or narrow range of items that, if resolved, would lead to a favorable decision. While there are no

limits on such extensions in the Regulations, the MEPA Office usually will extend by no more than one month.

Secretary's Decision on the ENF

At the end of the ENF review period, as it may be extended, the Secretary issues a decision, called a Certificate, on the ENF. Four kinds of decisions can be reached:

- No EIR – The decision that a project “does not require the preparation of an Environmental Impact Report” is a conclusion devoutly to be wished for by all project proponents. Prior to the implementation of the EJ requirements, it was reached for about 80% of ENF filings. Since the EJ requirements have gone into effect, at least 60% of new project filings (ENFs) require a mandatory EIR due to proximity to EJ Populations so only 40% (and possibly fewer) ENFs now receive a No EIR decision. When such a decision is reached, the MEPA process is effectively over, and approving Agencies can act on permits and the like immediately. As discussed below, it is unclear whether a decision *not* to require an EIR can be challenged.
- Single EIR – In the case of the review of an Expanded ENF, the Secretary can determine that further MEPA review is required and allow the preparation of a Single EIR. To do so, the Secretary must make the affirmative findings listed at 301 CMR 11.06(8) that the Expanded ENF analyzes all aspects of the project, that it provides an adequate baseline, and that it shows sound mitigation planning. In addition, for a project within the DGA of one or more EJ Populations, the Secretary must find that the Expanded ENF analyzes all potential effects on the EJ Populations, describes meaningful opportunities for public involvement prior to filing, and provides a detailed assessment of unfair or inequitable environmental or health effects to the EJ Population.
- Rollover EIR – For projects within the DGA of one or more EJ Populations, 301 CMR 11.06(13) allows the Secretary to allow a Rollover EIR, where the Proposed EIR (sometimes with a requirement for a response to comments) is noticed and reviewed as a Final EIR. To do so, the Secretary must find that the Proposed EIR is complete and definitive; demonstrates that there will be no unfair or inequitable environmental, health, or climate effects on EJ Populations; describes measures taken to reach out to EJ Populations; shows that any comments received raise no substantial issues; and shows that no substantive issues remain to be resolved.
- Draft and Final EIR – In most cases where an EIR is required, both a Draft and a Final EIR must be prepared. In the Certificate on the ENF, the Secretary will spell out the Scope to be followed in preparing the Draft EIR. Note that the Scope will be limited to subjects that are within MEPA

(Continued on page 11)

(Continued from page 10)

jurisdiction where the project is likely to cause damage to the environment. This subject matter limitation marks a key difference between MEPA and other environmental review programs, such as the federal National Environmental Policy Act (“NEPA”), where a full scope is required for all project reviews.

Challenge of an ENF Decision

An unusual feature of the MEPA statute is that it is not generally held to provide for challenges to a decision that no EIR is required. Thus, unless some other cause of action can be found by an opponent, projects receiving a “No EIR” decision are bullet resistant, if not bullet proof. For this reason, the MEPA Regulations allow agencies to act on private projects or commence their own projects immediately upon receiving a Certificate stating that no EIR is required. If, on the other hand, the Secretary decides that an EIR is required, this decision may be challenged. These challenges, as described at 301 CMR 11.14(1), require notice to the Secretary within 60 days of publication of notice of the decision in the Monitor and must commence between 30 and 60 days later (see 301 CMR 11.14(2)). Such challenges are exceedingly rare, since few proponents are willing to delay for the two years or so that such a suit requires. Usually, it is both quicker and less costly to prepare the EIR and move on. Note, as well, that the Superior Court did allow a challenge to a “No EIR” decision in *City of Quincy v. Matthew A. Beaton* (July 27, 2022) as a result of an NPC. Going forward, more such challenges may be seen.

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Editor’s Note: This article is a significant update to MEPA articles written by Steven C. Davis, PE for the July 2007, October 2007, and October 2009 issues of the AMWS Newsletter. The second part of this current comprehensive article on the MEPA process will appear in the January 2025 issue of the AMWS Newsletter. It will cover topics including Environmental Impact Reports, EIR Filing and Circulation, EIR Review and Decision Schedule, Secretary’s Decision, Challenge of an EIR Decision, Landlocked Tidelands Notification, Construction Notice, Timing of Agency Action, Section 61 Findings, Advanced MEPA Topics including Special Review Procedures, Notices of Project Change/Lapse of Time, and Waivers.

MEPA AND THE MWPA: WHAT WETLAND SCIENTISTS NEED TO KNOW: PART TWO

STEVEN C. DAVIS, PE

Now we are in the home stretch. As detailed in Part One of this Article, you have filed an Environmental Notification Form (“ENF”) and received the Certificate on the ENF from the Secretary. Some projects do not require an Environmental Impact Report (“EIR”), but your project has received a scope for an EIR. It is now time to prepare the EIR.

ENVIRONMENTAL IMPACT REPORTS

The general outline for an EIR is given at 301 CMR 11.07(6), which indicates that each EIR must contain:

- Title Page;
- Table of Contents;
- Secretary’s Certificates;
- Summary;
- Project Description;
- Alternatives to the Project;
- Existing Environment;
- Assessment of Impacts;
- Statutory and Regulatory Standards and Requirements;
- Mitigation Measures;
- Proposed Section 61 Findings;
- Response to Comments; and
- Appendices.

In addition, for projects within the Designated Geographic Area (“DGA”) of one or more Environmental Justice (“EJ”) Populations, an EIR must also contain with respect to the potentially affected EJ Populations:

- assessment of existing Environmental Burdens and public health consequences;
- assessment of Project Environmental Burdens and health consequences;
- alternatives and measures to avoid, minimize, and mitigate Environmental Burdens and health consequences;
- Proposed Section 61 Findings to address disproportionate effects, including climate change; and
- Response to Comments on disproportionate effects, including climate change.

the scope, the information required above must be provided for each. For this reason, most EIRs are organized topically, with a discussion of all matters related to a particular topic found in a single section of the report. This is allowed by the Regulations, as long as all of the required information is provided.

There are five kinds of EIRs: Draft, Final, Single, Rollover, and Supplemental. A Draft EIR is normally the first EIR prepared, and it usually is followed by a Final EIR. The exception to this is the Single EIR or Rollover EIR which, if allowed, is the only EIR usually needed to reach the end of the MEPA process as it stands in the place of a Final EIR. And occasionally, after review of any EIR, the Secretary may reach the dreaded decision that the EIR does not adequately and properly comply with MEPA. In this case, an additional EIR, called a Supplemental EIR, is required. These are rare but can cost much in the way of time and money. A project might be required to prepare a Draft EIR, a Supplemental Draft EIR, a Final EIR, and a Supplemental Final EIR, resulting in four trips through the EIR review process. Not unheard of is the occasional Second, Third, or even Fourth Supplemental Final EIR.

EIR Filing and Circulation

EIRs of all kinds are filed with the Secretary and circulated to all who commented on the ENF (or the preceding EIR), to the EJ Reference List, and to others as may be directed by the Secretary. The filing requirements are given at 301 CMR 11.16(3) and include one electronic copy for the Secretary, one electronic copy for each other designated recipient, and additional electronic and hard copies to be circulated upon request of any agency or person. As with the ENF, EIRs can be filed on the 15th or the last day of each month. Again, these filing dates roll forward to the next business day if they fall on a Saturday, Sunday, or a legal holiday. Notice of all EIRs filed appears in the next issue of the *Environmental Monitor* (“Monitor”), about seven days after the filing date.

EIR Review and Decision Schedule

Regardless of the kind of EIR, all are reviewed on the same schedule, spelled out at 301 CMR 11.08(1). After receiving the EIR, the Secretary publishes notice of the availability of the EIR

Detailed guidance on the scope for the EIR will be given in the Certificate on the ENF but no matter what topics are covered in

(Continued on page 7)

(Continued from page 6)

in the next Monitor, which starts the review clock. The review period for an EIR lasts for 37 days, the first 30 days of which are the public comment period and the last seven days of which are the Secretary's decision period. A word to the wise: if a project is likely to receive an adverse comment, check with the MEPA Office at the end of the comment period. It sometimes is possible to respond briefly to comments with errors during the remainder of the review period to good effect. There sometimes is a public meeting during the 30-day comment period, but this is usually only for Commonwealth projects and seldom is required for private projects. As with the ENF, care in circulation is wise since the review period can be extended by the Secretary if the proponent fails to meet the circulation requirements. The review period also can be extended with the consent of the proponent for a Draft EIR (but not for a Final EIR) or as part of a Special Review Procedure ("SRP").

Secretary's Decision on the EIR

At the end of the EIR review period, the Secretary must issue a Certificate on the document. This is a constructive deadline, with the EIR deemed to be adequate if the Secretary does not act. Again, don't hold your breath on this since the Secretary nearly always acts on time. The forms of decision depend upon the form of EIR under review and are set forth at 301 CMR 11.08(8).

For a Draft EIR (or a Supplemental Draft, if required), the Secretary can determine that:

- the Draft EIR is adequate, in which case the Certificate sets the scope of any additional work needed for the Final EIR (the usual outcome);
- the Draft EIR is adequate and leaves no remaining issues of substance, in which case the Draft EIR can be accepted and noticed as a Final EIR without further work (the best outcome, if it can be achieved); or
- the Draft EIR is inadequate, in which case a Supplemental Draft EIR is required (the worst outcome).

For a Final EIR or Rollover EIR, the Secretary can determine that:

- the Final EIR is adequate, ending the formal MEPA review, in which case the Certificate may provide guidance on predicates for agency action and Section 61 Findings (the usual outcome); or
- the Final EIR is inadequate, in which case a Supplemental Final EIR is required (again, the worse outcome).

For a Single EIR, if it has been allowed, the Secretary can determine that:

- the Single EIR is adequate, the equivalent of a Final EIR being found adequate (the best outcome);
- the Single EIR is adequate, but issues of substance require the preparation of a Final EIR (not a very good outcome); or
- the Single EIR is inadequate and a Supplemental Single EIR is required (again, the worst outcome).

Challenge of an EIR Decision

The MEPA statute allows challenges only on an adequate Final EIR or its equivalent: an adequate Single EIR or an adequate Supplemental Final EIR. In this case, notice must be given to the Secretary, the proponent, and the Attorney General within 60 days of publication of the notice of availability of the Final MEPA document in the Monitor. (301 CMR 11.14(1)) The timing here causes some confusion since the Final EIR review period and the challenge period both start with publication in the Monitor. In effect, the challenge period closes 23 days after the end of the 37-day Final EIR review period. The notice of intent to challenge also must identify with particularity the reasons why the decision is believed to be improper and the point during MEPA review at which the matter complained of was raised. This last is specified because 301 CMR 11.14(3) sets some limits on who may challenge and what they may challenge, based on required earlier participation in the MEPA process. The action must commence within 30 to 60 days later, depending on the circumstances. (301 CMR 11.14(2))

Landlocked Tidelands Notification

For a project located in Landlocked Tidelands, the proponent must notify the Massachusetts Department of Environmental Protection ("MassDEP") of an adequate Final, Single, or Rollover EIR decision within 30 days of Certificate issuance. This notice is made on a form provided by the MassDEP and the Certificate must be attached. (see 301 CMR 11.08(9))

Construction Notice

One little-known and often ignored requirement of the MEPA Regulations is found at 301 CMR 11.08(10), which requires the proponent to notify the Secretary upon commencement of construction for any project for which the Secretary required an EIR. This notice can be in the form of a simple letter to the Secretary and is good practice for all projects, but especially for more complex or controversial projects.

AGENCY ACTION AND SECTION 61 FINDINGS

Having reached the end of the formal MEPA process, you still are not done with responsibilities under MEPA but these

(Continued on page 8)

(Continued from page 7)

responsibilities now fall to the agencies issuing permits, providing funding assistance, or transferring land. For private projects, the majority of MEPA follow-up involves permits.

Timing of Agency Action

As described at 301 CMR 11.12(4)(a), the earliest time that an agency can act on a project is the end of the MEPA challenge period: 60 days after the notice of availability of the Final MEPA document is published in the Monitor. So, in the ordinary course of events, permits can be issued as soon as 23 days after the Secretary issues a Certificate determining that the Final MEPA document is adequate. In many cases, agencies will not be prepared to act so soon, but they can, unless a notice of intent to challenge has been filed. In that case, agency action is stayed until the matter is resolved in the courts.

The MEPA statute and Regulations at 301 CMR 11.12(4)(b) also require that agencies act timely on permits, as follows:

“Unless otherwise required by other applicable statutes or regulations, a Participating Agency shall take Agency Action by 90 days from the latest of:

1. the publication of the notice in the Environmental Monitor of the Secretary’s determination that an EIR is not required;
2. the publication of the notice of the availability of the single or final EIR in the Environmental Monitor; or
3. the filing of a complete application for a Permit or Financial Assistance.”

While this purports to require that most permits be issued within about 90 days from the filing of an application and the completion of the MEPA process, it is rarely followed. Most permits require at least this long and often much longer. Even so, it makes a nice argument with an agency if it is dragging its feet too much.

Section 61 Findings

The final agency step in the MEPA process is the issuance of its Section 61 Findings, as required by the MEPA statute at M.G.L. c.30, §61. A note on practice is in order here, since some believe that such Findings are required for all projects or for all projects that meet MEPA review thresholds. Not true. Section 61 Findings are required only for those projects for which the Secretary has required an EIR. In its Findings, the agency must “... determine whether the Project is likely, directly or indirectly, to cause any Damage to the Environment and makes findings describing the Damage to the Environment and confirming that all feasible measures have been taken to avoid or minimize the Damage to the Environment.” (301 CMR 11.12(5))

The Findings is not a free-form document. The Regulations require that:

“In all cases, the Agency shall base its Section 61 Findings on the EIR, including all studies, analyses and assessments contained therein regarding environmental and public health impacts and effects on Environmental Justice Populations, and shall specify in detail: all feasible measures to be taken by the Proponent or any other Agency or Person to avoid Damage to the Environment or, to the extent Damage to the Environment cannot be avoided, to minimize and mitigate Damage to the Environment to the maximum extent practicable; if applicable, any and all actions to reduce the potential for unfair or inequitable effects upon an Environmental Justice Population; an Agency or Person responsible for funding and implementing mitigation measures, if not the Proponent; and the anticipated implementation schedule that will ensure that mitigation measures shall be implemented prior to or when appropriate in relation to environmental impacts. In accordance with M.G.L. c.30, §61, the reasonably foreseeable climate change impacts of a project, including its additional GHG emissions, and effects, such as predicted sea level rise, are within the subject matter of any required Permit, Land Transfer or Financial Assistance.” (301 CMR 11.12(5)(a))

The Findings must be issued at the same time as the permit, financial assistance grant, or land transfer, and the agency must make it a part of the permit or record of other actions. (301 CMR 11.12(5)(b)) For private projects, the scope of the Section 61 Findings is limited to the extent of MEPA jurisdiction. (301 CMR 11.12(5)(c)) This last point may be of importance if, for instance, an agency might be tempted in its Section 61 Findings or in permit conditions to deal with topics of local concern that are not subject to Commonwealth oversight.

Finally, the proponent and the agency both are required to file a copy of all Section 61 Findings with the Secretary, who will publish notice of the availability of the Section 61 Findings in the next Monitor. (301 CMR 11.12(5)(e)) This is somewhat like the maximum time for agency action: it is honored more in the breach than in fact. Even so, the best practice is for the proponent to assure that each agency that acts on a project for which an EIR has been required makes Section 61 Findings and that the proponent then sends the Findings to the Secretary. These Findings, and the Construction Notice discussed above, effectively close out and perfect a MEPA file. Few file them, but it is a very good idea.

(Continued on page 9)

(Continued from page 8)

ADVANCED MEPA TOPICS

Now, having gone through the entire ordinary and extraordinary MEPA process, it is time to turn briefly to a few special topics. These include SRPs, Notices of Project Change (“NPCs”), and Waivers.

Special Review Procedures

In the Regulations, SRPs, described at 301 CMR 11.09, occupy the turf formerly held by terms like Generic EIRs, Major and Complicated Project Review, Coordinated Review, and Master Plan Review. The terms were changed to avoid pejoratives like “Major and Complicated” and to regularize processes that developed in practice like Master Plan Review. This one section assembles all the special kinds of processes that are available under MEPA and provides a consistent set of rules for making application for them. A request for an SRP normally is made in the ENF for the project, which must be an Expanded ENF if an SRP is sought. An NPC, as discussed below, also can be used to request an SRP for a project already reviewed and scoped, but this is less common. In either case, the cover letter with the filing should request an SRP, describe the requested procedure, and show how the requested procedure meets the terms of findings that the Secretary must make to grant the SRP. (301 CMR 11.09(2))

If the Secretary agrees, any one of five kinds of SRP can be allowed:

- **Programmatic Review** – This is one form of what used to be called a Generic EIR and deals with Commonwealth-wide management programs of various kinds, for which a periodic MEPA review and program guidelines around mitigation are appropriate. They usually are prepared by agencies and serve as MEPA review for large groups of similar activities or permits or funding for such activities. Several are in train, including Vegetation Management at Airports, Use of Road Salt, and Right-of-Way Vegetation Management, all of which may be of interest to wetland scientists. The most recent version of each such Programmatic Review is available from the MEPA Office, along with the most recent Certificate setting out mitigation guidance. (301 CMR 11.09(4)(a))
- **Area-Wide Review** – This term now encompasses part of what used to be called Generic EIRs and Master Plan EIRs. It is intended primarily to allow for the review of a project that occupies a large site or multiple sites and will be developed in phases over many years. Ongoing Area-Wide Reviews include Logan Airport and Hanscom Field. Past examples have included the Metropolitan Life Campus in Marlborough, and several smaller, phased projects. One good outcome of an Area-Wide Review can be the MEPA

clearance of an entire Master Plan, with limited filings (often NPCs) to show how each phase fits within and is properly analyzed in the Area-Wide EIR. Such a review can obviate the five-year refiling requirement discussed under NPC below. (301 CMR 11.09(4)(b))

- **Coordinated Review** – Coordinated review with federal, regional, and local agencies developed in practice over the years and is provided for specifically in the Regulations at 301 CMR 11.09(4)(c). This form of SRP is particularly useful when a project also requires federal review such as an Environmental Impact Statement under NEPA, regional review such as a Development of Regional Impact Review by the Cape Cod Commission, or local review such as the Article 80 process in the City of Boston. For such reviews, the Secretary can allow for joint scoping decisions, joint review documents, conformed review schedules, and coordinated decision periods to the extent that these do not conflict with provisions of the MEPA statute.
- **Prototype Projects** – This seldom-used provision allows the Secretary to create an SRP for projects that will be replicated in substantially similar format at one or more future times or locations. This might be useful, for instance, for similar power substations to be located at many sites over a number of years. I am not aware of any Prototype Project SRP to date.
- **Other Special Review** – This catch-all, at 301 CMR 11.09(4)(e), opens the possibility for SRPs that were not envisioned when the current Regulations were drafted. While most projects for which an SRP is appropriate probably will fall into one of the above four categories, this section allows for unique procedures of almost any sort, again so long as they do not conflict with statutory requirements.

Finally, it should be noted that fear of a Citizens Advisory Committee (“CAC”) need not discourage a proponent from seeking an SRP. The Regulations allow, but do not require, the formation of a CAC, and any SRP must be accepted by the proponent. Thus, the few private projects for which SRPs have been developed seldom involve the formation of a CAC. More usually, they are for long-term development of mixed-use projects, industrial parks, and the like. So, if there are good reasons to seek an SRP, do not be discouraged as procedural relief can be found without undue process.

Notice of Project Change and Lapse of Time

If your client has completed the MEPA process within three years, seeks and receives the needed permits, and builds the project within five years, well and good. MEPA is done when the Section 61 Findings and the Notice of Commencement of Construction are filed. Sometimes, however, the market or other factors overtake a project, and it is revised or delayed. In

(Continued on page 10)

(Continued from page 9)

such cases, an NPC may be required. The rule of thumb for an NPC is “When in doubt, file.” The NPC must be filed on a form provided at the MEPA website (www.mass.gov/envir/mepa/thirdlevelpages/npcinstructions.htm) and is circulated to all who earlier participated in the MEPA process. Most simple NPCs result in a favorable decision, “No Further Review,” and give great comfort to bank counsel, title insurance companies, and the like for projects that don’t look exactly like what was presented to MEPA or which have been delayed significantly.

The Regulations specify three cases for which an NPC must be filed: material change, lapse of three years between a scope and an EIR, and lapse of three years between a Final EIR and Commencement of Construction. These are described in some detail at 301 CMR 11.10(1) and (2). There also is one case, described at 301 CMR 11.10(3), in which an NPC is not allowed and a new ENF must be filed: a lapse of five years between a Final EIR and Commencement of Construction. Note that, in computing time periods, the time lost to appeals does not count and the clock stops until the appeal is resolved.

Three points of practice should be noted here. First, the proponent is obliged to file an NPC if any one of the triggers is met but agencies and others also may file an NPC if they believe that a trigger has been met. This is rare but can be a startling development when you receive an NPC on your project filed by someone else.

Second, the Regulations do provide a set of yardsticks for gauging project changes. Section 301 CMR 10.11(6) indicates that the following factors are to be considered by the Secretary in judging whether project changes will have environmental consequences that may warrant further review:

- expansion of the project, especially if the change is greater than ten percent of any project measurement originally reviewed by MEPA;
- generation of further impacts, especially if the increase is greater than 25 percent of any review threshold that applies to the project or if the increase causes the project to exceed a new threshold;
- change in expected project schedule;
- change in the project site;
- need for a new permit, new financial assistance, or new transfer of land;
- changes that prevent or delay the provision of committed mitigation; and
- changes in the ambient environment for lapse of time filings.

These factors are good to remember when you are crafting an NPC. They can help to frame it for the best chance of a “No Further Review” decision. They also are of use if someone else files an NPC on your project. They can help you to respond in a way that allows the Secretary either to refuse to accept the NPC or to reach a “No Further Review” decision.

Third, you are allowed to make a case in the NPC that the change is insignificant according to the above criteria. If you do, the Secretary has 10 days in which to disagree with you, or the changes are presumed to be insignificant, and the NPC is not published for external review. This provision, found in the last paragraph of 301 CMR 11.10(6), is seldom used but, if judiciously applied, can be successful. Effective January 6, 2023, proponents are also allowed to submit a request for advisory ruling, without a formal NPC filing, to seek a finding of insignificance. As with other requests for advisory rulings, the Secretary has discretion to publish the request for public comment.

Timing of the review on NPCs is also set in the Regulations. If the change is determined likely to be significant by the Secretary, notice of the NPC is published in the next Monitor and the review proceeds on the same schedule as an ENF: a 20-day comment period followed by a 10-day decision period. At the end of 30 days, the Secretary will decide either that “No Further Review” is required, that a new ENF must be filed, or that a Supplemental EIR is required, perhaps with a changed scope.

Waivers

I have saved the best for last. Unless a particular action is required by the MEPA statute, the Secretary can waive it. This means that, even though a project may meet one or more mandatory EIR thresholds, the Secretary can waive the requirement and allow the project to proceed without an EIR. While they are not mentioned in the Waiver section (301 CMR 11.11), two points are important. First, the Secretary cannot waive the filing of an ENF or the EIR requirement for a project within the DGA of one or more EJ Populations. Second, that ENF must be an Expanded ENF if a Waiver is requested (See 301 CMR 11.05(7)).

The request for a Waiver comprises an Expanded ENF as detailed above, which should be exceptionally thorough if a Waiver is requested, and a cover letter requesting a Waiver in writing and addressing the findings that the Secretary must make to grant a Waiver. Those findings concern standards for all Waivers, presumptions to be rebutted, determinations for an EIR Waiver, and determinations for a Phase I Waiver.

(Continued on page 11)

(Continued from page 10)

The standards for all Waivers (301 CMR 11.11(1)) require that the Secretary find that strict compliance would result in undue hardship for the proponent and would not serve to avoid or minimize damage to the environment. A solid showing should be made on each of these standards. In describing hardship, note that delay in compliance by the proponent is specifically ruled out of the hardship equation by the Regulations. This is to prevent a proponent from waiting until the last minute to file with MEPA and then claim hardship. Hardship can be based on unreasonable delay when a proponent is faced with deadlines not of its making, such as cleanup deadlines or limited duration public financing programs. And the case on avoiding damage to the environment can be made on an “equal service” theory by including sufficient mitigation in the project that the Secretary will find that it equals what could be achieved by a full MEPA review.

The presumptions to be rebutted for all EIR Waivers (301 CMR 11.11(2)) have to do with the Mandatory EIR thresholds. Each such threshold is presumed to represent the potential for significant environmental harm, and the EIR process is presumed to benefit the environment by assessing and leading to mitigation for such harm. The Waiver request should, and the Secretary must, overcome each of these presumptions. This amounts to a particularization of the “equal service” argument made above to each of the subjects for which the project meets a Mandatory EIR threshold. Thus, if wetlands thresholds are met, propose extra replication; if traffic thresholds are met, propose all needed intersection improvements, and add transportation demand management; and if a rare species threshold is met, propose a conservation restriction sufficient to satisfy mitigation requirements under the Massachusetts Endangered Species Act (“MESA”) Regulations for the rare species that occurs on the project site.

In addition to the standards for all Waivers and the rebuttal of presumptions, in the determination for an EIR Waiver (301 CMR 11.1(3)), the Secretary must also find that the project is “likely to cause no damage to the environment” and that “ample and unconstrained infrastructure facilities and services exist to support the project.” In the alternative, or in addition, the Secretary may find that, with the proposed mitigation, the project will lead to benefits to the environment greater than those that would result from the MEPA process. This means that, if you are seeking a Waiver, it is wise to propose appropriate mitigation in subject areas where there is no MEPA jurisdiction. An example might be proposing a public park on part of the site when the only jurisdiction is wetlands or proposing wetland restoration for a project meeting only traffic thresholds. The thrust should be to allow the Secretary to find that the Waiver creates some environmental good that could not be achieved without the Waiver.

Finally, there is a special class of Waivers, the Phase I Waiver, which allow for a modest first Phase of a larger project to go forward while an EIR is prepared for the remainder. Thus, a Phase I Waiver can be thought of as a limited form of the Area-Wide SRP described above. This is useful in cases, such as a large residential, industrial, or mixed-use development, where the proponent would like to proceed with front land development while studying a large back land development with a new access road. In this case, the Secretary must find that the impacts of Phase I alone are insignificant, ample and unconstrained infrastructure exists to support Phase I, the later phases are severable from Phase I, and that any agency action (*i.e.*, permit, funding, or land transfer) for Phase I will be conditioned to require completion of the MEPA process for the remainder of the project.

The review time for such a request is spelled out in the Regulations. This includes the extended review period for an Expanded ENF (37 days) required by 301 CMR 11.05(7) and the publication and review of a Draft Record of Decision (“ROD”), as called for at 301 CMR 11.11(6). The Draft ROD is published in the next available Monitor for a 14-day public comment period, followed by a seven-day decision period, for a total of 21 days, at the end of which the Secretary may rescind the Draft ROD or issue a Final ROD. Because the Monitor is only published twice a month, the total elapsed time from filing of an Expanded ENF to receiving a Final ROD usually is about 80 days, depending on where in the Monitor cycle the various decision dates fall. Even so, if you make a well-formed Waiver request for a well-conceived project, all or at least part of it can proceed without MEPA review. So, the extra time may be worthwhile.

Here ends the MEPA lesson. It is a complex, but predictable, process. A clear understanding of the Regulations and of practice can help wetland scientists to guide their clients to the fastest and best resolution.

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Editor’s Note: This article is a significant update to MEPA articles written by Steven C. Davis, PE for the July 2007, October 2007, and October 2009 issues of the AMWS Newsletter. The first part of this current comprehensive article on the MEPA process appeared in the October 2024 issue of the AMWS Newsletter. It covered topics including Project Definition, MEPA Jurisdiction, Review Thresholds, Fail-safe, Voluntarily Filed ENF, Environmental Notification Form, Expanded ENF with and without Proposed EIR, Circulation, ENF Review and Decision Schedule, Secretary’s Decision, and Challenge of an ENF Decision.