



December 12, 2012

Secretary Richard K. Sullivan, Jr.
Executive Office of Energy and Environmental Affairs
Attn: Deirdre Buckley, MEPA Office
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Via Email: deirdre.buckley@state.ma.us

Dear Secretary Sullivan:

On behalf of Mass Audubon, I submit the following comments on the proposed revisions to the Massachusetts Environmental Policy Act (MEPA) regulations 301 CMR 11.00. These changes are proposed primarily for the purpose of implementing a provision in the Global Warming Solutions Act (GWSA) of 2008 (Chapter 298 of the Acts of 2008, Section 7) that amended the MEPA statute:

Section 61 of chapter 30 of the General Laws is hereby amended by inserting after the first paragraph, as appearing in the 2006 Official Edition, the following paragraph:-

In considering and issuing permits, licenses and other administrative approvals and decisions, the respective agency, department, board, commission or authority shall also consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise.

Mass Audubon is very concerned regarding the impacts of a rapidly changing climate on people and wildlife. Current climate change expectations also create challenges for our economy and for public safety and health. The GWSA established a framework for Massachusetts to aggressively reduce its Green House Gas (GHG) emissions and play a leadership role in responding to climate change. Mass Audubon supports the goals of the GWSA and full implementation of all provisions of this important law.

The public notice for these regulatory changes also indicates that the changes are intended to codify practice under the existing MEPA Greenhouse Gas Policy and Protocol (GHG Policy). Mass Audubon supports this intent; however we are concerned that the proposed regulatory changes do not adequately and fully address either the applicable provision of the GWSA or the GHG policy. The following comments provide suggestions to address this concern.

The regulatory changes also include several unrelated revisions that clarify MEPA review processes and requirements. Mass Audubon supports these changes as noted below.

GHG Emissions Evaluation for all Agency Actions

The GWSA requires all agencies to consider GHG and climate change effects in the Section 61 Findings for all permits, approvals, and administrative decisions. The proposed regulations limit the applicability of this requirement in section 11.12(5)(c) to the extent that the climate change effects are “within subject matter jurisdiction” of the permit, land transfer, or financial assistance. There are two flaws in this proposed regulatory provision:

1. The provision should be a new and separate requirement under Section 61 Findings (11.12(5)), not part of subsection 11.12(5)(c) entitled “Subject Matter Jurisdiction on Section 61 Findings.”

2. The applicability of the requirement for agencies to consider climate change impacts should not be so limited.

The GWSA amendment to the MEPA statute requires that all agency decisions consider the climate change effects. It does not contain any qualifying language about subject matter jurisdiction.

We recognize that the statutory language in Section 62A limits the scope of MEPA jurisdiction:

In the case of a permit application to an agency from a private person for a project for which financial assistance is not sought the scope of said report and alternatives considered therein shall be limited to that part of the project which is within the subject matter jurisdiction of the permit. Any finding required by section sixty-one shall be limited to those matters which are within the scope of the environmental impact report, if any, required by this section.

However, the new provision in Section 61 clearly and unambiguously requires agencies to consider climate change impacts in all permits and decisions. The GWSA provision was inserted immediately after the first paragraph of Section 61, which states:

*All agencies, departments, boards, commissions and authorities of the commonwealth shall 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. **Unless a clear contrary intent is manifested, all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment.** Any determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact.*

Considering the chosen location for placement of the GWSA provision in the MEPA statute and the fact that this is the only provision in MEPA that mandates that all agency decisions consider certain factors (i.e. climate change), we do not believe that the corresponding regulatory provision should be placed under the section regarding limitations of subject matter jurisdiction nor should it be qualified or limited by that as proposed in the draft regulations.

The requirements for agency review of climate change impacts should be moved to section 11.12(5)(a) on “Contents of Section 61 Findings” and the qualifying clause on subject matter should be deleted. If the Secretary’s office holds a different legal interpretation, this should be clearly explained and included in GWSA action plan documents. Clarification should also be provided as to how the existing MEPA GHG Policy will be applied given the subject matter limitation. Agency plans pursuant to the GWSA should also include commitments to amend their regulatory and permitting programs to ensure that subject matter jurisdiction includes GHG emissions and climate change impacts to the fullest extent legally possible.

Consistency with GWSA Goals

The proposed regulation significantly restricts applicability of the new requirement and is not consistent with the language in the GWSA.

In order for the state to meet GWSA emissions reduction targets, the state will need to ensure that all projects subject to state approval, land transfers, or financing are required to review, avoid, minimize, and mitigate GHG emissions, including those associated with land clearing and resultant loss of forest carbon storage and sequestration capacity as well as ongoing emissions generated by the project over time. This was the legislature’s clear intent in amending the MEPA statute under the GWSA. By applying this provision so narrowly within the proposed regulations, many projects that require an Environmental Impact Report (EIR) will be able to escape GHG review by claiming that the applicable state permits are not related to the project’s climate change impacts.

For example, confusion and disputes are likely to ensue as to whether a project that requires a MassDOT curb cut permit needs to review the GHG emissions associated with clearing more than 50 acres of land, along with the construction and building operation related emissions of the project, in addition to the transportation related emissions. Other than projects requiring state financing or a land transfer, it may be unclear or difficult to link the required permit to all of the GHG emissions associated with the project.

Consistency with MEPA GHG Policy

It is difficult to reconcile such a narrowly construed MEPA provision with either the broad mandates of the GWSA or the existing MEPA GHG Policy, which states that all projects requiring an EIR must undertake a GHG evaluation. The public notice for the regulatory changes indicates that the MEPA GHG Policy will remain in effect, and that the changes to the MEPA regulations are intended to codify practice under that policy. Mass Audubon supports this intent. The Policy mandates reviews of emissions from direct and indirect emissions from the developed facilities and associated traffic generated by the project, and provides for optional review at the Secretary's discretion of projects with large (>300,000 gpd) water or wastewater use, land clearing over 50 acres, or large amounts of construction related trips.

We recommend that consideration be given to adding language to the 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. 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.

The final MEPA regulatory revisions should more closely track and include all the items covered in the GHG Policy as well as more fully upholding the broad intent of the GWSA amendment to the MEPA statute.

Agency Regulatory Changes

Pursuant to the GWSA, agencies are preparing plans for reducing GHG emissions associated with their work. This should include agencies' regulatory and permitting programs. If the proposed subject matter jurisdictional limits are promulgated, then numerous agencies need to modify their regulations in order to clarify which aspects of their permits are related to GHG emissions and climate change effects pursuant to GWSA.

The Department of Environmental Protection (DEP) is presently embarking on a major regulatory streamlining initiative in order to focus the agency's limited resources in line with significant budgetary and staffing constraints. Some of these proposed changes are likely to have unintended consequences in regard to MEPA jurisdiction and GHG emission reviews. **Of particular note is DEP's proposal to eliminate all sewer connection and extension permits. This would render moot several of the MEPA thresholds at 11.03(5) and also raises a question as to whether the wastewater associated provisions of the GHG Policy would be applicable if there is no associated state permit to provide MEPA jurisdiction.**

It is critically important that MEPA and state permitting agencies harmonize their regulations with the full intent of the GWSA. Any regulatory changes that would eliminate or reduce the applicability of MEPA and/or the GWSA to projects should require an Environmental Notification Form pursuant to section 11.03(12) of the MEPA regulations before the agency's regulatory revision can go into effect.

Forests and Land Clearing

Forests play critical roles in addressing climate change, both in terms of mitigation (reducing heat-trapping air pollutants) and adaptation to unavoidable climate changes already underway. Forests in Massachusetts:

- Sequester 12% (10.8 million metric tons CO₂e) of the state's annual carbon emissions annually;
- Store 85 tons of C on the average acre;

- Continue to increase both the rate and mass of carbon storage over time as the forests mature.
- Provide Green Infrastructure and resiliency that can contribute significantly to protection of people and nature from the impacts of climate change, including protection of water supplies and flood prevention.

See attached fact sheet for more details.

The MEPA GHG Policy provides that the Secretary has the option to require analysis of GHG emissions associated with land clearing for projects altering greater than 50 acres of land. This discretionary threshold was set in the Policy based on the mandatory EIR threshold for land clearing, which is 50 acres. However, other projects with lesser amounts of land clearing may also trigger an EIR, either because other review thresholds are triggered, or because the Secretary has the discretion to require an EIR on projects exceeding ENF thresholds.

Mass Audubon recommends that 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.

Solar Projects and Forestland Conversion

Mass Audubon supports the development of clean, renewable energy sources such as solar arrays. At the same time, siting considerations are important. Projects involving clearing of large swaths of forest for construction of solar arrays have impact the many functions and values provided by forests, including carbon storage and sequestration.

The Department of Energy Resource's (DOER) model local zoning bylaw for solar arrays encourages communities to avoid designating forested areas as districts where solar development may occur. However, communities without such a bylaw in place may not be able to prevent solar projects from forestland conversion, due to the solar exemption in the state Zoning Act. Meanwhile, projects are being proposed in rural forested settings where land is relatively inexpensive. Mass Audubon encourages the Executive Office of Environmental Affairs to work with DOER to better harmonize renewable energy facility development support programs and financing incentives with its forestland protection goals in order to guide solar siting to nonforested sites such as rooftops, parking area canopies, brownfields, and industrial sites. Solar projects that benefit from state financial incentives should be required to conduct a GHG emissions analysis under MEPA if forestland conversion is involved.

Cumulative Assessments are Needed

The GHG emissions reductions targets under the GWSA are ambitious – 25% reduction by 2020 and 80% by 2050. Every new source of emissions must be offset by further additional reductions elsewhere in order to not impede progress toward the goals. It is vital that all projects that require an EIR (with few exceptions, pursuant to the GHG Policy) provide an assessment of all aspects of direct and indirect GHG emissions and mitigation. MEPA should then also compile data from all EIRs annually in order to provide an overall cumulative assessment of new GHG emissions in order to assist in tracking of how new emissions are affecting overall progress toward the GHG reduction goals. Projects undergoing MEPA review will represent only a subset of all projects planned statewide, but data generated from the cumulative MEPA assessments will nonetheless provide important data that could be extrapolated to statewide development activity based on other information such as building permit activity levels.

Definitions

The proposed regulatory changes include changes to the section on Definitions: (301 CMR 11.02). “Damage to the environment” is amended to include “reduction in groundwater levels, impairment of water quality, increases in flooding or storm flows.” Mass Audubon supports this change, and notes that it is helpful for consideration of

water resources management issues above and beyond climate change impacts (e.g. pursuant to the Sustainable Water Management Initiative). Damage to the environment should also include increases of GHG's.

Definitions of GHG and Stationary Source are also added, and we support those changes.

Housekeeping Revisions

The proposed regulatory revisions include several changes unrelated to the GWSA that improve clarity and/or codify existing practice. These include provisions for electronic distribution of MEPA documents and requirements that project proponents allow the public to join in site visits except where there are issues of public safety or safeguarding of proprietary information. A section is added under 11.14 Legal Challenges clarifying procedures so that people filing a Notice of Intent to challenge a MEPA decision will receive timely notification of the issuance of agency actions and associated Section 61 Filings. Flexibility is also added for special review procedures for Prototype Projects. Mass Audubon supports all of these housekeeping changes provided there is a commitment to evaluate the results of the Prototype Project provision and consider further refinements if necessary.

Conclusion

Mass Audubon strongly supports the GWSA and revisions to the MEPA regulations to facilitate full implementation of that law and the existing MEPA GHG Policy. However, we are concerned that the proposed revisions fall short in several respects. We request clarification and further revisions to the regulations to more fully meet the intent expressed in the public notice.

We request that MEPA evaluate pending DEP regulatory changes to consider whether an ENF is required and the effects in relation to GWSA implementation, particularly in relation to proposed elimination of all DEP sewer connection and extension permits.

Mass Audubon supports the other "housekeeping" changes included in the regulatory package.

Thank you for considering these comments.

Sincerely,



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Senior Policy Analyst

cc: DEP Commissioner Ken Kimmell
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