

DRAFT not for public distribution  
June 5, 2017  
Special Review Procedure  
CWMP-TWMP-Nutrient Reduction Project

Pursuant to the Massachusetts Environmental Policy Act (M.G.L. c. 30, ss. 61-62H) and Section 11.09 of the MEPA regulations, I hereby establish a Special Review procedure to guide the MEPA review of plans or projects proposed by a public or quasi-public entity for managing wastewater, watersheds, water resources or water quality in Barnstable County.

Project Background and Description

The Cape Cod Commission (Commission) was designated by the Commonwealth of Massachusetts as the agency responsible for updating the 1978 Cape Cod Area Wide Water Quality Management Plan (the “208 Plan Update”). The 208 Plan Update includes the municipalities located within Barnstable County, including Barnstable, Brewster, Bourne, Chatham, Dennis, Eastham, Falmouth, Harwich, Mashpee, Orleans, Provincetown, Sandwich, Truro, Wellfleet, and Yarmouth (the “Cape municipality(ies)”). The 208 Plan Update was certified by the Commonwealth in June of 2015 and approved by the US EPA in September of 2015. The 208 Plan Update designates each Cape municipality as the Waste Treatment Management Agency (WMA) within town boundaries.

The Massachusetts Estuaries Project identified numerous nutrient sensitive watersheds and embayments within the Cape municipalities, leading to the development and adoption of Total Maximum Daily Loads (TMDLs) for many Cape Cod receiving water bodies. The 208 Plan Update provides policy direction and decision support tools for use by Cape municipalities and other interested parties to implement water quality remediation strategies to meet TMDLs.

Integrated Water Resources Management Plans, Comprehensive Wastewater Management Plans and similar local planning efforts (“CWMPs”) are typically subject to state environmental review under MEPA. MEPA review typically involves the filing of an ENF, Draft EIR and Final EIR prior to MEPA final certification and approval.

In some Cape municipalities, nutrient remediation projects and targeted watershed management plans may precede the development or implementation of full, municipality-wide CWMPs. The 208 Plan Update identifies Targeted Watershed Management Plans (“TWMPs”) as a new regulatory vehicle to promote watershed-based planning that is not dependent on the development of a full, municipality-wide CWMP. It is intended that through this Special Review Process, plans and projects developed, designed and constructed to more immediately remediate nutrient loading should be identified, elevated and expedited to promote timely water quality restoration. The goals in establishing this Special Review Procedure are to streamline permitting for water and wastewater management plans and projects and to allow for early commencement of a TWMP, nutrient remediation project, or portion of the CWMP in order to provide more immediate benefit to the environment, and to facilitate the coordination of MEPA review with the 208 Plan Update, consistent with 301 CMR 11.09.

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Also, consistent with the 208 Plan Update, this Special Review Process supports the use of non-traditional nutrient remediation technologies and an adaptive management approach to solving water quality problems on Cape Cod. Regulatory flexibility will allow Cape municipalities to pilot new approaches and technologies to achieve TMDLs more quickly and potentially at lower cost. Water quality monitoring of adaptive management approaches benefits all Cape municipalities by establishing pilot or example projects for the purpose of attempting to evidence the efficacy of currently unpermitted or unproven technologies to address nutrient remediation.

Prior MEPA permitting of nutrient reduction projects, and approval of plans adopting an adaptive management approach, have involved Phase 1 Waivers and requirements for filing of Notice of Project Change.

#### MEPA Jurisdiction and Required Permits

It is expected that CWMPs, and some TWMPs, will trigger ENF and one or more mandatory EIR thresholds. MEPA thresholds likely to trigger EIR review include but are not limited to: construction of a new wastewater treatment and/or disposal facility with a capacity of 2,500,000 or more gpd; new interbasin transfer of wastewater of 1,000,000 or more gpd or any amount determined significant by the Water Resource Commission; construction of one or more new sewer mains ten or more miles in length; new sewer service to a municipality or sewer district across a municipal boundary through new or existing pipelines; new discharge or expansion in discharge of any amount of sewage, industrial waste water or untreated stormwater directly to an outstanding resource water; new capacity or expansion in capacity for storage, treatment, combustion or disposal of 150 or more wet tpd of sewage sludge, sludge ash, grit, screenings, or other sewage sludge residual materials. Although the exact nature and extent of the content of local plans and nutrient remediation projects is unknown at this time, it is likely one or more thresholds will be exceeded. These local planning and construction activities typically require numerous state permits (Massachusetts Department of Environmental Protection (DEP) permits, Chapter 91 licenses, 401 Water Quality Certification, etc.) and most will receive funding from the Massachusetts Clean Water Trust through the State Revolving Fund loan program. Some projects may also require federal permitting. Finally, these projects often require permitting and funding at the municipal level.

In addition to wastewater and water quality plans, it is expected that nutrient remediation projects may trigger ENF thresholds and one or more mandatory EIR thresholds. MEPA thresholds likely to trigger EIR review include but are not limited to: alteration of designated state-listed species habitat; alteration of one or more acres of salt marsh or bordering vegetating wetlands.

#### SPECIAL REVIEW PROCEDURE

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The Commission has requested that I establish a Special Review Procedure (SRP) for the review of CWMPs, TWMPs, and nutrient remediation projects under MEPA. The MEPA regulations provide that a Special Review Procedure may be established to provide for “coordination or consolidation of MEPA review with other environmental or development review and permitting processes”. In addition, 301 CMR 11.09 states that “A Special Review Procedure may be appropriate, for example, for reviewing a proposed program, regulations, policy, or other Project in which there is more than one Proponent or more than one Participating Agency with a significant role, or a Project that is undefined or is expected to evolve during MEPA review, or a Project that may benefit the environment if there is early Commencement of a portion of the Project.”

A SRP will enable the MEPA process to better align nutrient remediation projects with the adaptive management principles supported in the 208 Plan Update. After considering the factors cited in Section 11.09 of the MEPA regulations, I hereby find that the review of CWMPs, TWMPs and nutrient remediation projects proposed by public or quasi-public entities in Barnstable County would benefit from the establishment of a SRP.

The purpose of this SRP is to expedite public and quasi-public water quality management plans and nutrient remediation projects within Barnstable County that are likely to provide benefits to water quality that outweigh potential environmental detriments. This SRP allows plans and projects to proceed with and complete MEPA review, notwithstanding that such projects might be proposed independent of a town’s CWMP, and might not fully address TMDL compliance. Under this SRP, such projects would be eligible for Certificates on ENF’s or EIR’s, Single EIR’s, Phase 1 Waivers, or Full Waivers.

*Coordination with Other Review Processes*

The SRP is largely for administrative convenience, designed to provide an opportunity for coordinated review and to consolidate the MEPA review with other environmental or development review and permitting processes, including the 208 Plan Update and DEP watershed permits. Other benefits include the advancement of projects that will benefit the environment, achieve earlier TMDL compliance, and may have the potential to lower costs.

The MEPA Office and the Commission have established a Joint Review Procedure to coordinate MEPA and Commission Development of Regional Impact (DRI) project review as well as 208 Plan Update consistency review. This consolidation and coordination allows the MEPA and DRI regulatory and public review processes to be conducted in such a way that the public will be able to provide both written and oral comments, within a single timeframe, under the various regional and state regulatory processes. It also promotes coordination and consistency between MEPA review and the Commission’s 208 Plan Update consistency review.

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*Citizens Advisory Committee*

The MEPA regulations at 310 CMR 11.09(3) allow for the establishment of a Citizen's Advisory Committee (CAC) to assist with public and agency review and comment. For CWMPs, TWMPs and nutrient reduction projects, I hereby designate the following:

- a. An elected official from each municipality/WMA that owns or controls land within the subject watershed(s);
- b. The Cape Cod Water Protection Collaborative representative from each municipality that owns or controls land within the subject watershed(s);
- c. A member of the municipal staff with appropriate subject matter knowledge, such as public administration, public works, natural resources protection, and water and wastewater facility management, from each municipality that owns or controls land within the subject watershed(s);
- d. A representative of the water quality management or similar local citizens' advisory committee of each municipality that owns or controls land within the subject watershed(s);
- e. Representatives of the Joint Base Cape Cod, the Wampanoag Tribe, or the Cape Cod National Seashore if applicable;
- f. A representative of the Cape Cod Commission.

The following representatives may be added to the CAC:

- a. A representative of the business community from one of the municipalities;
- b. A representative of the real estate industry from one of the municipalities;
- c. A representative of environmental advocacy community from one of the municipalities;
- d. A representative of natural resources, land acquisition, open space advocacy community from one of the municipalities;
- e. A representative of the technology alternatives community from one of the municipalities.

*Nutrient Remediation Project Review*

Determinations for Nutrient Remediation/ Water Quality Restoration Project Waiver. In the case of a waiver of a mandatory EIR review threshold that will allow the Proponent to proceed with a water quality restoration project prior to preparing a CWMP that evidences full compliance with TMDLs, the Secretary shall base the finding required in accordance with 301 CMR 11.11.(1)(b) on a determination that:

- a. The potential environmental benefits of the water quality restoration project outweigh the potential environmental detriments; and

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- b. The water quality restoration project is severable, such that it is not dependent upon the approval of the CWMP or TWMP; and
- c. The Commission has determined that the project is consistent with the 208 Plan Update, and
- d. The Agency Action on the water quality restoration project will contain terms such as a condition or restriction in a Permit, contract or other relevant document approving or allowing the Agency Action, or other evidence satisfactory to the Secretary, so as to ensure due compliance with MEPA and 301 CMR 11.00 prior to approval of the CWMP or TWMP; and/or -
- e. The project is consistent with a Commission-issued 208 Plan Update consistency determination or other legally binding agreement between the Commission and a municipality to expedite water quality improvement.

*Comprehensive and Targeted Watershed Management Plan Special Procedures*

Plan Preparation and Filing.

- a. The CWMP shall include and address all of the land within the municipality.
- b. The TWMP shall include and address all of the land within the targeted watershed.

In shared watersheds, the TWMP shall be filed jointly by all of the municipalities owning or controlling land within the shared watershed.

Plan Review and Decision.

- a. The CWMP/TWMP may propose a non-traditional technologies approach, including nitrogen remediation technologies that are not currently permitted, to achieve TMDL based on an adaptive management process.
- b. The Secretary may waive any and all provisions of the MEPA regulations at 310 CMR 11.00 for a CWMP or TWMP upon a determination that to do so will result in the commencement of a project that will benefit the environment or will result in better coordination with the 208 Plan update, consistent with 310 CMR 11.09, and that the CWMP/ TWMP is consistent with the following:
  - The potential environmental benefits of the water quality restoration project(s) recommended in the plan outweigh potential environmental detriments; and
  - The Commission has issued a 208 Plan Update consistency determination; and
  - The Agency Action on the CWMP/TWMP will contain terms such as a condition or restriction in a Permit, contract or other relevant document

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approving or allowing the Agency Action, or other evidence satisfactory to the Secretary, so as to ensure due compliance with MEPA and 301 CMR 11.00.; and/or

- The plan is consistent with a Commission-issued 208 Plan Update consistency determination or other legally binding agreement between the Commission and a municipality regarding the proposed watershed planning proposal(s).
- c. The Secretary and Commission may coordinate and issue determinations, decisions or certificates jointly or concurrently.
- d. Projects not granted such Waivers will nonetheless be allowed to prepare a single EIR, if mutually requested and agreed upon by the municipality/ies and Commission.

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## Appendix A

### Joint Review of Accepted Applications:

#### ENF Process

Once the town/s has opted for Joint Review and has submitted a Joint Review application, and the Commission has accepted such application, a public hearing/scoping session will be scheduled within 20 days of the publication of the ENF in the Environmental Monitor (published by the MEPA office). The public hearing /scoping session is intended to allow interested persons to comment on the project and is held during the required ENF comment period for the project. Commission staff generally prepares a Staff Report in advance of the public hearing/scoping session to provide comment on the project information submitted and contained in the ENF.

Following the public hearing/scoping session, and prior to the ENF comment period ending, the Commission will send a comment letter to MEPA that includes a recommended scope for the Joint Review process. It should be noted that the Commission's scope of review may be broader than MEPAs jurisdiction.

Following the close of the ENF comment period, the Secretary of Environmental Affairs (Secretary) will issue a certificate for the project. If the Secretary does not require an EIR, the joint Commission/MEPA process concludes.

#### Draft EIR Process

A Draft EIR is prepared and submitted to MEPA that responds to the scope of the Secretary's ENF certificate. The preparer should also submit an electronic copy of the Draft EIR to the Commission. The preparer of the Draft EIR should ensure that all materials required for the Commission's DRI review be included in the document based on the ENF scoping letter submitted by the Commission. During the public comment period on the Draft EIR, the Commission may hold a public hearing to receive input from the public on the document. Prior to the closing of the public comment period, the Commission will submit a letter to the MEPA office commenting on, among other things, whether the Draft EIR adequately responds to the EIR scope. Following the close of the Draft EIR comment period, the Secretary issues a certificate on the adequacy of the Draft EIR and either requires the preparation of a supplemental Draft EIR or a Final EIR.

#### Final EIR/ Single EIR Process

The proponent prepares a Final (or Single, as the context applies throughout this paragraph) EIR that may be limited to aspects of the project or issues that require further description of analysis. The Final EIR also contains a response to comments raised by the Commission and others. The preparer submits the Final EIR to MEPA and an electronic copy of the Final EIR to the Commission. During the public comment period for the Final EIR, the Commission may hold a public hearing to receive input from the public on the document. Prior to the closing of the public comment period, the Commission will

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submit a letter to MEPA including comment on whether the Final EIR is adequate. Following the close of the Final EIR comment period, the Secretary issues a certificate on the adequacy of the Final EIR, and either requires the preparation of a supplemental Final EIR, or determines the Final EIR to be adequate. Once the Secretary issues a certificate that determines the Final EIR to be adequate, the state environmental review process concludes and the Commission's statutory DRI time frame begins.

Section 12 of the Commission Act allows, at the Commission's discretion, DRI review for water quality improvement projects or wastewater/ watershed management plans to begin during final or single EIR review, if a municipality/ies has opted for Joint Review. Section 12 of the Commission Act also authorizes the Secretary and the Commission to issue decisions, determinations and certificates jointly or concurrently for water quality improvement projects or wastewater/ watershed management plans.

For a town/s that opt for Joint Review, the Commission may request extension of the MEPA comment/ hearing periods, such extension periods to be determined after consultation with the town/s.