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CHANGES IN MEPA PRACTICE ON THE HORIZON

A recent Supreme Judicial Court decision may change the way project proponents comply with the Massachusetts Environmental Policy Act (MEPA).

In a case involving the proposed Biosafety Level 4 laboratory (Biolab) being constructed in Boston's South End, the SJC ruled that the certification by the Secretary of Environmental Affairs that the final environmental impact report (EIR) adequately and properly complied with MEPA was arbitrary and capricious. This conclusion turned in large part on how the project proponent, University Associates, fulfilled the regulatory mandate to respond to public comments received on the draft EIR.

Controversial projects often generate a significant amount of public comments during the MEPA process. Proponents typically use their discretion in fashioning responses to the comments, often categorizing them (e.g., traffic, noise) and providing summary responses. In the Biolab case, the Secretary specifically informed University Associates that its final EIR should respond to public comments received on the draft EIR, particularly the detailed letter submitted by Alternatives for Community & Environment (ACE). The letter from ACE emphasized that University Associates should analyze alternative locations for the Biolab. University Associates did not address this issue in its final EIR, however, not even to explain that alternative locations would not be feasible. Because University Associates failed to consider alternative locations for the Biolab in response to comments from ACE, as directed by the Secretary, the final EIR did not adequately and properly comply with MEPA. Therefore, the Court held, the Secretary's certificate finding that the final EIR did comply with MEPA was arbitrary and capricious.

The Biolab case involved a unique project and the SJC decision may have been result-oriented. Many, including Justice Robert Cordy, who issued a separate concurring opinion, hope that the decision is not construed more broadly than the facts of the case require. Nonetheless, the decision seems to require a closer look at how project proponents respond to comments on MEPA documents. The decision should not be construed as automatically expanding the scope of an EIR to address public comments. In the Biolab case, for example, one wonders if the Secretary really intended to have University Associates consider alternative locations for the Biolab when she generically directed the proponent to respond to ACE's comments.

As a result of the Court's decision, and in order to minimize confusion over this issue, MEPA certificates will now specify whether the Secretary is expanding the scope of an EIR when directing a project proponent to respond to specific comments. A recent certificate calling for a supplemental final EIR directed the proponent to include a response to comments in the SFEIR and stated "This directive is not intended to, and shall not be construed to, enlarge the scope of the SFEIR beyond what has been expressly identified in the initial scoping certificate or this certificate."

The adequacy of a proponent's responses to comments will continue to be a key component of the Secretary's review of EIRs. The SJC decision in the Biolab case may have added another level of scrutiny to that review.

For more information on the Biolab case or its aftermath, please contact Michelle N. O'Brien.