

07/28✓

# NOTIFY

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
No. 2084CV00151

Notice sent  
07.28.21 (NJ)  
- KPL/C.X.P., D.C.B.  
- OAG/P.O.C.  
- KW/B.P.F., D.S.R.

TOWN OF SUDBURY

vs.

KATHLEEN THEOHARIDES, in her capacity as SECRETARY OF THE EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS & another<sup>1</sup>

MEMORANDUM OF DECISION AND ORDER  
ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

The town of Sudbury ("Town") brings this action seeking a declaratory judgment, pursuant to G. L. c. 231A, that a certificate of compliance issued by the Secretary of the Executive Office of Energy and Environmental Affairs ("Secretary") to NSTAR Electric Company doing business as Eversource Energy ("Eversource") is invalid. The Secretary's certificate was issued in response to a final environmental impact report filed by Eversource to construct an underground electrical transmission line between electrical substations in Sudbury and Hudson. The Town challenges the adequacy of the environmental reviews conducted by Eversource pursuant to the Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62H and its implementing regulations at 301 Code Mass. Regs. § 11.14 et seq. This matter is now before the Court on the parties' cross-motions for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c). For the reasons that follow, the Town's motion shall be **DENIED** and the Secretary's and Eversource's motions shall be **ALLOWED**.

<sup>1</sup> NSTAR Electric Company d/b/a Eversource Energy

## BACKGROUND

### I. Massachusetts Environmental Policy Act

To put the factual background and the Town's claims in context, the Court begins with an overview of the Massachusetts Environmental Policy Act ("MEPA"), G. L. c. 30, §§ 61-62H, and its implementing regulations. Together, MEPA and the regulations promulgated thereunder "establish a process to ensure that State permitting agencies have adequate information on which to base their permitting decisions, and that environmental impacts of the project are avoided or minimized." *Brockton v. Energy Facilities Siting Board (No. 1)*, 469 Mass. 196, 201 n.12 (2014), citing G. L. c. 30, §§ 61, 62C, fourth par.; 301 Code Mass. Regs. § 11.00 (2013). "Although MEPA, by its terms, only applies to the actions of State agencies or other public bodies, private development '[p]roject[s]'. . . fall within the scope of MEPA's jurisdiction where any party 'seeks the provision of financial assistance by an agency, or requires the issuance of a permit by an agency.'" *Ten Persons of the Commonwealth v. Fellsway Dev. LLC*, 460 Mass. 366, 368-369 (2011), quoting G. L. c. 30, § 62.

"Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental review notification form (ENF) with the Secretary . . ." *Brockton*, 469 Mass. at 201 n.12, citing G. L. c. 30, § 62A; 301 Code Mass. Regs. § 11.06. "[T]he Secretary then analyzes the project to determine if it meets or exceeds any of several 'review thresholds' enumerated at 301 Code Mass. Regs. § 11.03." *Ten Persons of the Commonwealth*, 460 Mass. at 369. "There are two categories of review threshold: those that require the filing of an ENF and a mandatory [environmental impact report ("EIR")] (e.g., alteration of ten or more acres of wetlands; generation of 3,000 or more vehicle trips on an existing roadway to a single location), and those that require the filing of an ENF, and 'other MEPA review [only] if the Secretary so

requires' (e.g., disturbance to endangered species habitat; generation of 2,000 or more vehicle trips on an existing roadway to a single location)." *Id.*, quoting 301 Code Mass. Regs. § 11.03.

If the Secretary determines an EIR is required, she must "limit the scope of the report to those issues which by the nature and location of the project are likely to cause damage to the environment." *Allen v. Boston Redev. Auth.*, 450 Mass. 242, 246 (2007), quoting G. L. c. 30, § 62A. "Further, '[t]he secretary shall determine the form, content, level of detail and alternatives required for the report.'" *Id.*, quoting G. L. c. 30, § 62A. "In accordance with G. L. c. 30, § 62B, an EIR shall contain statements describing 'the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed project and their environmental consequences.'" *Id.*

"Once an EIR (draft or final) is submitted to the Secretary, public notice of the availability of the EIR is issued and a thirty-day review period begins." *Id.* at 246-247, citing G. L. c. 30, § 62C. "During this time, any person or reviewing agency can submit written comments on the EIR to the Secretary, which then become part of the public record." *Id.* at 247.

After reviewing a draft EIR ("DEIR"), the Secretary has three options: (1) she may "determine that the [DEIR] is adequate, even if certain aspects of the Project or issues require additional description or analysis in a final EIR, provided that the Secretary finds that the [DEIR] is generally responsive to the requirements of 301 CMR 11.07 and the Scope;" (2) she may "determine that no substantive issues remain to be addressed" and "publish notice in the next Environmental Monitor that the [DEIR] shall be reviewed as a final EIR"; or (3) she may "determine that the [DEIR] is inadequate and require the Proponent to file a supplemental

[DEIR] in accordance with 301 CMR 11.07.” 301 Code Mass. Regs. § 11.08(8)(b) (2018). The regulations give the Secretary two options following her review of a final EIR (“FEIR”). The Secretary may “determine that a[n] [FEIR] is adequate, even if certain aspects of the Project or issues require additional analysis of technical details . . . .” or “determine that the [FEIR] is inadequate and require the Proponent to file a supplemental [FEIR] in accordance with 301 CMR 11.07.” *Id.* § 11.08(c).

“The MEPA review process culminates with the Secretary’s certification of a[n] [FEIR].” *Allen*, 450 Mass. at 247. “Certification under MEPA, however, ‘does not constitute final approval or disapproval of a particular project, which ultimately is left to various permitting agencies.’” *Brockton*, 469 Mass. at 201 n.12, quoting *Allen*, 450 Mass. at 247. “Rather, the certificate signals that the Secretary, ‘a disinterested public official with expertise in environmental matters,’ has determined that the information-gathering process has been completed in accordance with MEPA.” *Allen*, 450 Mass. at 247, quoting *Cummings v. Secretary of Env’tl. Affairs*, 402 Mass. 611, 617 (1988). “Once the Secretary issues a certificate on a[n] [FEIR], those agencies, departments, boards, commissions, and authorities that are undertaking, funding, or permitting a proposed project use the information set forth in the EIR to assess the project’s impact on the environment and to prevent or minimize and consequential damage.” *Id.*, citing G. L. c. 30, § 61.

## **II. Factual Background**

On May 15, 2017, Eversource submitted an ENF to the Secretary concerning a proposed project to construct an approximately nine-mile underground electrical transmission line between its substations in Sudbury and Hudson aimed at increasing the reliability and capacity of the regional electric transmission system (the “Project”). The ENF indicated that the Project would

be constructed along an inactive railroad right-of-way (“ROW”) on land owned by the Massachusetts Bay Transportation Authority (“MBTA”), which abuts land owned by the Town.

In the ENF, Eversource indicated that the Project would meet or exceed a mandatory EIR threshold to the extent it would involve the temporary alteration of one or more acres of bordering vegetated wetland. See 301 Code Mass. Regs. § 11.03(3)(a)(1). In response to a prompt on the standardized ENF form that asked Eversource to “[d]escribe the on-site project alternatives (and alternative off-site locations, if applicable) . . . and the reasons that they were not selected as the preferred alternative,” Eversource wrote:

The Company reviewed a variety of existing linear corridors including transmission line, highway, railroad, and pipeline ROWs; however, other existing ROWs were found to be impractical alternatives because they were either overly circuitous in connecting the Sudbury Substation and Hudson Substation or of insufficient width to construct a new transmission line. No feasible alternative was identified that would be allowed under current zoning.

Eversource also considered several routing options along different roadways between the two substations, as well as construction of an overhead transmission line within the MBTA ROW. The overhead transmission line would require tree clearing along the full width of the ROW and result in significantly greater environmental impacts. Other roadway options, including routes located entirely on roadways, would result in greater impacts to the natural and/or developed environments than the proposed route. Through a detailed evaluation of the potential environmental impacts and cost of each route, the company determined that the proposed underground route will minimize environmental impacts while keeping the cost of the project as low as possible.

(Rec. Appx. Vol. I: 0008).

On June 12, 2017, Eversource submitted a corrected ENF after it determined that the “anticipated wetland alterations from the Project as presented in the ENF either [;] (1) incorrectly included buffer zones, causing an overrepresentation of the actual proposed wetland alterations, and/or (2) were presented in a manner that warrants clarification as to the extent of anticipated alterations.” (Rec. Appx. Vol. I: 0123). Eversource determined that as a result, the Project did

not meet or exceed a mandatory EIR threshold as it had initially indicated. Even so, in an effort “to be open and transparent” concerning the “potential environmental impacts of the Project,” Eversource opted to seek MEPA review of the Project through the EIR process on a voluntary basis. (Id.).

On July 14, 2017, the Secretary issued a certificate on Eversource’s ENF (“ENF Certificate”). In the ENF Certificate, the Secretary acknowledged that the Project was not required to file a mandatory EIR, but that Eversource was proceeding through the MEPA review process on a voluntary basis. The ENF Certificate also included a scope for a DEIR, which noted, *inter alia*, that Eversource had included a detailed alternatives analysis in a pending petition to the Energy Facilities Siting Board (“EFSB”) but did not include one in its ENF. The Secretary thus stated that the alternatives analysis in Eversource’s DEIR “should, at a minimum, analyze and include a supporting narrative” for certain alternatives to the Project. (Rec. Appx. Vol. I.:0231). The alternatives the Secretary identified included the No-Build Alternative, pursuant to which Eversource would not pursue any new facilities or resources but continue to rely on the existing system; the Non-Transmission Alternative, which would use alternative technologies, such as gas turbines and solar power, to provide additional energy at needed locations; the Alternative Transmission Solution, also known as the New England Power or “NEP” Alternative, which would consist of multiple projects constructed by National Grid doing business as New England Power Company; and alternative routes, including the “Noticed Alternative Route,” *viz.*, a 10.3 mile transmission line within public roadways, and the “Noticed Variation,” which would involve constructing an overhead, as opposed to underground, transmission line along the MBTA ROW.

With respect to each alternative, the Secretary stated that the “DEIR should identify the criteria used to select the Preferred Alternative, should document why various alternatives were dismissed, and should identify how the Preferred Alternative will avoid, minimize and mitigate Damage to the Environment in accordance with MEPA regulations.” (Id.). The Secretary further instructed Eversource to include in its DEIR, “a comparison of the environmental impacts associated” with the alternatives “and a summary table of anticipated wetlands, rare species, land alteration, public water supply protection areas, cold water fisheries, traffic, and construction period impacts.” (Id. at 0232).

Eversource submitted its DEIR on October 27, 2017. On December 15, 2017, the Secretary issued a certificate approving the DEIR (“DEIR Certificate”), finding that it “adequately and properly complie[d] with MEPA and its implementing regulations.” (Rec. Appx. Vol. IV: 2058). With respect to alternatives, the Secretary averred that the DEIR included an analysis of the alternatives cited in the ENF Certificate, finding that the No-Build, Non-Transmission, and Alternative Transmission Solution alternatives were dismissed because they would not provide sufficient reliability and/or have increased environmental impacts compared to the proposed Project. Turning to the DEIR’s analysis of alternative routes, the Secretary noted that a table in the DEIR “demonstrate[d] that the Noticed Alternative would reduce tree clearing, wetland, rare species, and coldwater fishery resource impacts compared to the [Project], . . . [but] would have greater construction period impacts, including traffic, to resident and commercial/industrial land uses, and would cost an addition \$19.4 million compared to the [Project].” (Id. at 2063). The Secretary additionally observed that “[t]he DEIR indicated that the Noticed Variation would cost \$46.8 million less to construct compared to the [Project] but would require increased wetland impacts and tree clearing compared to the [Project][.]” and that the

Project “was selected to achieve the best balance between cost and environmental impact while meeting the project’s need.” (Id. at 2064).

Last, the DEIR Certificate included a scope identifying additional information and analysis that should be provided in Eversource’s FEIR. Therein, the Secretary stated that the FEIR “should include a comprehensive analysis of the project that demonstrates that the [Project] includes all feasible means to avoid Damage to the Environment, or the extent that Damage to the Environment cannot be avoided, that it includes measures to minimize and mitigate Damage to the Environment to the maximum extent practicable.” (Id. at 2073). The Secretary also noted that it was “unclear why measures to avoid, minimize and mitigate wetland impacts were not specified commensurate with the level of project design achieved at this point.” (Id. at 2075). To that end, the Secretary instructed Eversource to include “additional evaluation of impacts to rare species and wetland resource areas and . . . a comprehensive mitigation program.” (Id. at 2059).

On July 26, 2018, Eversource submitted its FEIR. The FEIR included discussion of alternative construction methodologies and site design measures to further avoid and minimize Damage to the Environment, including reduction of the Project footprint in ways that would minimize environmental impacts (including impacts to wetland resource areas and vernal pools), reducing the limit of clearing, using a smaller construction platform, and using alternative construction equipment. The FEIR also stated that Eversource had consulted with experts who had determined the Project was not anticipated to result in impacts to coldwater fishery resources, and included an analysis of the potential for adverse effects to particular species and mitigation plans.



On September 14, 2018, the Secretary issued a certificate approving the FEIR (“FEIR Certificate”), finding that it adequately complied with MEPA and its implementing regulations and “may proceed to permitting.” (Rec. Appx. Vol. V: 2859). Even so, the Secretary noted that

Comments from State Agencies identify aspects and issues of the project that require additional analysis during permitting. Comments from State Agencies do not request additional MEPA review. State Agencies and local Conservation Commissions have sufficient regulatory authority to address outstanding issues that are identified in this Certificate and these processes will provide additional opportunities for public review and comment.

(Id. at 2859-2860).

The Secretary also stated that comment letters had been submitted

from legislators, municipal representatives, environmental advocacy groups, and residents which identify concerns regarding wetland resource and rare species impacts, soil and drinking water supply contamination, and impacts to historic/cultural resources. Many of these comment letters request additional consideration of the Noticed Alternative to avoid these impacts. I acknowledge and appreciate these concerns; however, the Scope for the FEIR did not require additional analysis of project alternatives and the purpose of MEPA review is to evaluate the environmental impacts of a proposed project in light of the Proponent’s objectives. Identification of a project’s purpose and need provides context for MEPA review and the alternatives analysis. MEPA requires that the Proponent identify environmental impacts, consider and analyze alternatives that could reduce environmental impacts and evaluate and adopt measures to avoid, minimize and mitigate Damage to the Environment. It does not prescribe to a Proponent what, where, or how a project should be designed or built.

(Id. at 2865).

The Secretary also briefly reviewed the alternatives analysis that had been set forth in the DEIR, reiterating that although the Noticed Alternative Route “would reduce tree clearing, wetland, rare species, and coldwater fishery resource impacts” compared to the Project, it would also “have greater construction period impacts, including traffic, to residents and commercial/industrial land uses, and would cost an additional \$19.4 million.” (Id. at 2864).

## DISCUSSION

### **I. Standard of Review**

“The Secretary has broad discretion under MEPA to facilitate environmental planning for proposed projects that will require action by Commonwealth agencies.” *Allen*, 450 Mass. at 254. “The ‘informal and informational public consultation’ permitted under EIR review and the Secretary’s certification are not adjudicatory proceedings.” *Id.*, quoting *Sierra Club v. Commissioner of the Dep’t of Env’tl. Mgmt.*, 439 Mass. 738, 747 (2003). “Nonetheless, ‘[t]he process by which the information is gathered, identified, and applied to the statutory standards under MEPA must be logical, and not arbitrary or capricious.’” *Id.*, quoting *Sierra Club*, 439 Mass. at 749. Therefore, the Court must consider whether the Secretary’s certification of the FEIR “had a rational basis.” *Id.* The Court is “mindful that appropriate deference must be given to the Secretary’s expertise in environmental matters.” *Id.*

### **II. Analysis**

The Town argues that the Secretary’s determination that the FEIR adequately complied with MEPA and its implementing regulations was arbitrary and capricious for three primary reasons. First, the Town argues that the FEIR failed to analyze the environmental consequences of any alternatives to the Project. Second, the Town contends that the Secretary improperly evaluated the cost of a feasible alternative as compared to its ability to avoid or minimize impact to the environment. Third, the Town argues that the FEIR Certificate lacks findings required by G. L. c. 30, § 61. The Court will address each of the Town’s arguments in turn.

#### **A. Environmental Consequences of Alternatives**

The Town first argues that Secretary improperly found that the FEIR was adequate because the FEIR did not analyze alternatives that would avoid/mitigate environmental damage,

including damage to protected wetlands resource areas, coldwater fishery resources, and adjacent vernal pool alternatives requirements. The Secretary and Eversource (together, “Defendants”) concede that the alternatives discussed in the FEIR, viewed in isolation, may appear to be inadequate, but argue that the FEIR must be read together with the DEIR, which provides a robust analysis of alternatives. The Court agrees with the Defendants.

MEPA regulations state that “[t]he Secretary may limit the Scope of the [FEIR] to aspects of the Project or issues that require further description or analysis and a response to comments, instead of requiring a stand-alone document that meets of the form and content requirements for an EIR . . . provided that the draft *and* final EIRs shall present a complete and definitive description and analysis of the Project and its alternatives, and assessment of its potential environmental impacts and mitigation measures . . . .” 301 Code Mass. Regs. § 11.07(4) (2018) (emphasis added). Accordingly, the Secretary has the authority to limit the information included in the FEIR and must consider the information in the DEIR *and* the FEIR to decide whether MEPA requirements have been met. See *Allen*, 450 Mass. at 259 (“It is left to the discretion of the Secretary to decide specifically what project alternatives are appropriate for inclusion in a particular EIR . . . .”); *Enos v. Secretary of Env'tl. Affairs*, 432 Mass. 132, 137 (2000) (“The record created during MEPA review (any draft and final EIRs, all public and agency comments, and the Secretary’s certification or, presumably, failure to certify) provides the information for the agency’s evaluation and subsequent § 61 findings.”); *Boston Preservation Alliance, Inc. v. Secretary of Env'tl. Affairs*, 396 Mass. 489, 494 (1986) (“General Laws c. 30, § 62A, specifically grants to the Secretary the authority to determine the form, content, and level of detail required in an EIR.”).

A fair reading of the DEIR at issue in this case reveals a robust analysis of each of the alternatives the Secretary identified in the ENF Certificate, including the mechanics of each alternative, associated cost, environmental impact, and why each alternative was ruled out, whether due to cost, reliability issues, logistical difficulties, and/or increased environmental harm. With respect to routing and design alternatives in particular, the DEIR stated that Eversource had initially identified twenty-one different route options that were subsequently narrowed down to twelve, and explained why it decided to remove nine of the initial twenty-one routes from consideration. The DEIR then demonstrated how Eversource evaluated and scored the twelve remaining routes based on environmental criteria, construction issues, reliability, and cost. Based on this analysis, the Preferred Alternative (the Project), Noticed Variation, and Noticed Alternative were identified as the best routes. The DEIR then compared the environmental impacts, abutting land uses, and costs associated with these three routes. The environmental impacts that were considered including tree clearing, wetland impacts, public water supplies, conservation lands, coldwater fishery resources crossings, rare species habitat, and the potential presence of contamination.

The Secretary found that the DEIR “adequately and properly” complied with MEPA, but issued a scope directing Eversource to produce an FEIR with a more comprehensive analysis of the Project establishing that Eversource would employ all feasible means to avoid and/or mitigate environmental harm, as well as additional evaluation of the Project’s impact on rare species and wetland resource areas, and a comprehensive mitigation program. Significantly, and as the Secretary expressly noted in the FEIR Certificate, the scope set forth in the DEIR Certificate did *not* require Eversource to revisit its analysis of Project alternatives.<sup>2</sup> See 301 Code

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<sup>2</sup> During oral argument on June 16, 2021, the Town argued that the DEIR Certificate required Eversource, “[a]t a minimum,” to conduct a more through alternatives analysis to “avoid and minimize Damage to the Environment.”

Mass. Regs. § 11.07(6) (Secretary may issue scope indicating that particular information “shall not be included in the EIR”). The FEIR addressed the issues cited in the scope and additionally explained how Eversource determined that the Project was not anticipated to result in impacts to coldwater fishery resources. Based on the foregoing, the Town has failed to demonstrate that the Secretary’s determination that the FEIR set forth a sufficient alternatives analysis was arbitrary and capricious. See *Allen*, 450 Mass. at 258, citing *Sierra Club*, 439 Mass. at 750 (MEPA does not require exhaustive search for alternatives); see also *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 303 (1997) (“A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support.”). Compare *Allen*, 450 Mass. at 259 (Secretary’s decision certifying FEIR was arbitrary and capricious where FEIR failed to consider alternatives that the Secretary had previously instructed project proponent to analyze).

**B. Cost of Feasible Alternatives**

The Town next argues that the Secretary inappropriately considered the costs of a project alternative to the extent the FEIR Certificate states that the Noticed Alternative Route would cost \$19.4 million more than the Project. The Town argues that this finding renders the Secretary’s determination arbitrary and capricious because it demonstrates the Secretary considered the costs of the Noticed Alternative to be more important than the mitigation of damage to the environment. This argument fails to persuade.

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By way of this argument, the Town sought to imply that the DEIR Certificate required Eversource to conduct a more thorough analysis of alternatives to the Project. However, the language in the DEIR Certificate instructing Eversource to conduct a more thorough alternatives analysis does not refer to alternatives to the Project, but instead “alternative construction methodologies and site design measures,” concerning the Project itself, including “additional reductions in roadway width and clearing, locating the majority of the duct bank within the footprint of the access road, jack-and-bore and/or horizontal drilling (HDD) at stream/culvert crossing, and use of smaller construction equipment to access clearing.” (Rec. Appx. Vol. IV: 2074). The FEIR addresses these alternatives in detail.

As set forth above, “[c]ertification under MEPA . . . ‘does not constitute final approval or disapproval of a particular project, which ultimately is left to various permitting agencies.’” *Brockton*, 469 Mass. at 201 n.12, quoting *Allen*, 450 Mass. at 247. “Rather, the certificate signals that the Secretary, ‘a disinterested public official with expertise in environmental matters,’ has determined that the information-gathering process has been completed in accordance with MEPA.” *Allen*, 450 Mass. at 247, quoting *Cummings*, 402 Mass. at 617. Accordingly, the Secretary could not have improperly weighed the cost of the Noticed Alternative Route because “weighing” the pros and cons of any project alternative fell outside the scope of her review. Rather, the Secretary’s analysis of the Noticed Alternative Route was limited to whether Eversource had given it the consideration due under MEPA. See 301 Code Mass. Regs. § 11.07(6)(f) (prescribing requirements for description and analysis of alternative projects in EIR). The Secretary merely referenced the cost of the Noticed Alternative Route in a section of the FEIR Certificate summarizing the alternatives analysis that appeared in the DEIR and the reasons *Eversource* had cited for choosing the Project over the Noticed Alternative Route, alongside additional considerations, such as the impacts on the environment and the surrounding community.

Further, although MEPA regulations require EIRs to analyze the primary differences between project alternatives with particular regard to “potential environmental impacts,” the regulations do not state that such analysis must focus *exclusively* on potential environmental impacts, and broadly require project proponents to discuss why particular alternatives are no longer under consideration. See 301 Code Mass. Regs § 11.07(6)(f). The Town does not cite any authority that indicates project proponents are prohibited from citing cost as reason an alternative is no longer under consideration, let alone authority that suggests the Secretary’s

reference to a project proponent's cost considerations in an FEIR certificate renders her decision arbitrary and capricious.

**C. Required Findings**

The Town last argues that the Secretary was required to make findings pursuant to G. L. c. 30, § 61, which “requires departments of the Commonwealth [to] ‘review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them’ and requires them to ‘use all practicable means and measures to minimize damage to the environment.’” *Sierra Club*, 439 Mass. at 752, quoting G. L. c. 30, § 61. The Town contends that the repercussions of the Secretary's failure to make Section 61 findings are exacerbated by her finding that there are “outstanding issues” with the Project that will require additional analysis during the permitting process. The Town's reliance on G. L. c. 30, § 61 is misplaced.

MEPA regulations explain that “[i]n accordance with M.G.L. c. 30, § 61, any Agency that takes Agency Action on a Project for which the Secretary required an EIR shall determine whether the Project is likely, directly or indirectly, to cause any Damage to the Environment and make a finding 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 Code Mass. Regs. § 11.12(5) (2018). The regulations define “agency” as “[a]ny agency, department, board, commission, or authority of the Commonwealth.” *Id.* § 11.02(2). “Agency action” is “any formal and final action taken by an Agency in accordance with applicable statutes and regulations that grants a Permit, provides Financial Assistance, or closes a Land Transfer.” *Id.* Since certification under MEPA “does not constitute final approval or disapproval of a particular project,” *Brockton*, 469 Mass. at 201 n.12, and therefore, does not result in the grant

of a permit, financial assistance, or a land transfer, the Secretary's issuance of an FEIR Certificate does not constitute an "agency action" for which Section 61 findings are required.<sup>3</sup>

Moreover, insofar as the Town takes issue with the Secretary's determination that the FEIR was adequate despite several outstanding issues, MEPA regulations expressly permit such a result. More particularly, upon review of an FEIR, the Secretary may "determine that a[n] FEIR is adequate, even if certain aspects of the Project or issues require additional analysis of technical details, provided that the secretary finds that the aspects and issues have been clearly described and their nature and general elements analyzed in the EIR or during MEPA review, that the aspects and issues can be fully analyzed prior to any Agency issuing its Section 61 Findings, and that there will be meaningful opportunities for public review of the additional analysis prior to any Agency taking agency action on the Project." 301 Code Mass. Regs. § 11.08(c)(1) (2018). In accordance with this regulation, the Secretary found that the outstanding issues concerning the Project had been sufficiently described to allow additional agency analysis and meaningful public review. See *Allen*, 450 Mass. at 254 (court must give appropriate deference to Secretary's expertise in environmental matters). Accordingly, the Secretary's failure to make Section 61 findings in the FEIR Certificate and determination that the FEIR was adequate despite outstanding issues, did not render her decision arbitrary and capricious.

In view of the foregoing, the Town has not met its burden of demonstrating that the Secretary acted arbitrarily and capriciously in certifying that the FEIR adequately and properly complies with MEPA.

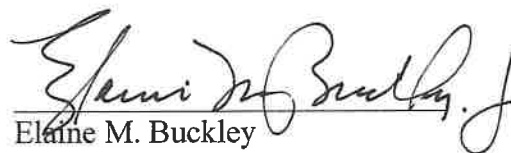
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<sup>3</sup> The Secretary demonstrated an understanding and awareness of the requirements of G. L. c. 30, § 61 in the ENF Certificate, which directed Eversource to include draft Section 61 findings for each anticipated State Agency action in its DEIR. The Secretary later found that "the draft Section 61 Findings will serve as the primary template for State Agency Permit conditions and should be revised, as necessary, in response to [the FEIR] Certificate and/or comment letters and provided to State Agencies to assist in the permitting process and issuance of final Section 61 Findings." (Rec. Appx. Vol. V: 2871).



**ORDER**

For the foregoing reasons, the Town's Motion for Judgment on the Pleadings is **DENIED**; the Secretary's Motion for Judgment on the Pleadings is **ALLOWED**; and Eversource's Motion for Judgment on the Pleadings is **ALLOWED**.



Elaine M. Buckley  
Justice of the Superior Court

*7th.*  
Dated: July 2, 2021