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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 20, 2024

In the Matter of
Algonquin Gas Transmission LLC

OADR Docket Nos. 2017-011, 012
Waterways Application No. W16-4600
Weymouth, MA

RECOMMENDED FINAL DECISION ON REMAND

INTRODUCTION

In these consolidated appeals, a Ten Residents Group comprised of Weymouth, Massachusetts residents ("the Residents") challenge a Remand Determination that the Waterways Program of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") has made pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 ("Chapter 91" or "c. 91"), and the Waterways Regulations at 310 CMR 9.00, following a Remand Order from the Norfolk Superior Court in Ten Residents Group v. Massachusetts Department of Environmental Protection, Norfolk Superior Court C.A. No. 1982-01503.[1] In its Remand Determination, MassDEP's Waterways Program affirmed its previous Original Determination pursuant to the Waterways Regulations at 310 CMR 9.02 and

[1] The Town of Weymouth ("Weymouth") also was a party in these consolidated appeals but later settled its claims in the appeals and is no longer a litigant in the appeals.

9.12(2)(d) authorizing MassDEP's issuance of a Chapter 91 license to Algonquin Gas Transmission LLC ("the Applicant") for its natural gas compressor station ("the Project" or "compressor station") in the Weymouth Fore River Designated Port Area ("DPA")[2] on filled tidelands of the Fore River at 6 & 50 Bridge Street in Weymouth ("the Project Site").[3]

The compressor station is one component of the Applicant's Atlantic Bridge Project ("AB" or "AB Project"), an interstate natural gas transmission project that the Federal Energy Regulatory Commission ("FERC") has authorized pursuant to the Natural Gas Act, 15 U.S.C. §§ 717 et seq. It consists of a natural gas-fired compressor unit, a 6,100-square-foot auxiliary building, parking spaces, internal roadways, underground utilities, a 6,200-square-foot stormwater basin, and 12,000 cubic yards of fill.[4] It is physically connected to a natural gas

[2] "DPAs are land and water areas with certain physical and operational features that have been identified to have state, regional, and national significance with respect to the promotion of water-dependent industrial uses and commercial activities that rely on marine transportation or the withdrawal or discharge of large volumes of water." https://www.mass.gov/service-details/czm-port-and-harbor-planning-program-designated-port-areas. "State policy seeks to preserve and enhance the capacity of the DPAs to accommodate water-dependent industrial uses and prevent the exclusion of such uses from tidelands within DPAs." Id. "This policy includes preserving extensive amounts of DPA land for existing and prospective water-dependent industrial uses, particularly on waterfront sites, and maintaining (preserving) the predominately marine industrial character of the DPA." Id. "While water-dependent industrial uses vary in scale and intensity, they all generally share a need for infrastructure with three essential components: 1) a waterway and associated waterfront that has been developed for some form of commercial navigation or other direct utilization of the water; 2) backland space that is conducive in both physical configuration and use character to the siting of industrial facilities and operations; and 3) land-based transportation and public utility services appropriate for general industrial purposes." Id.

[3] The consolidated appeals in this matter are pending before MassDEP's Office of Appeals and Dispute Resolution ("OADR"). OADR is an independent, neutral, quasi-judicial office within MassDEP whose Presiding Officers (senior environmental attorneys) are responsible for advising MassDEP's Commissioner in the adjudication of appeals filed with OADR. A more detailed description of OADR appears in Addendum No. 1, at p. 69 below.

[4] In the Matter of Algonquin Gas Transmission, LLC, OADR Docket Nos. 2017-011 and 2017-012, Recommended Interlocutory Decision (November 21, 2018) ("Algonquin RID"), at p. 19-41, adopted as Recommended Final Decision (October 16, 2019) and Final Decision (October 24, 2019), remanded by Ten Residents Group v. Massachusetts Department of Environmental Protection, Norfolk Superior Court C.A. No. 1982-01503, Memorandum of Decision and Order On [Parties' Cross-Motions] for Judgment on the Pleadings (May 2, 2022) ("Norfolk Superior Court Remand Decision"), at pp. 3-5.

pipeline known as I-10 pipeline or the HubLine and is intended to enable the flow of natural gas from the Applicant's existing natural gas pipeline network into and through the HubLine.[5]

In its Remand Determination, MassDEP's Waterways Program affirmed its previous Original Determination authorizing the issuance of a Chapter 91 License to the Applicant for the compressor station after determining that the compressor station was an ancillary structure to the HubLine, an infrastructure crossing facility, within the meaning of the Waterways Regulations at 310 CMR 9.02 and 9.12(2)(d).[6] The regulatory language in 310 CMR 9.02 governing MassDEP's determination is the following:

> [a]ny structure *which [1] is operationally related to* [an infrastructure] crossing facility *and [2] requires an adjacent location* [to the infrastructure crossing facility] shall be considered [by MassDEP as] an ancillary facility thereto."

(emphasis and numerical references supplied).

MassDEP's Waterways Program contends that its Remand Determination is based on: (1) the Norfolk Superior Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02 and (2) additional expert testimonial and documentary evidence that the Applicant presented to MassDEP supporting its finding that the compressor station is an ancillary structure to the HubLine.[7] Specifically, MassDEP's Waterways Program determined that "the compressor

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[5] Id.

[6] The provisions of these Regulations are discussed in detail below, at pp. 6-8.

[7] As explained in detail below, at pp. 16-18, on the Residents' appeal to the Court after the Original Determination was affirmed by MassDEP's then Commissioner, the Court vacated the Original Determination after ruling that MassDEP's Waterways Program had incorrectly interpreted the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02 in determining that the compressor station was an ancillary structure to the HubLine. As a result of its ruling, the Court remanded this matter to

station requires an adjacent location to the Hubline[,] [infrastructure crossing facility,] because construction of the [compressor station] at the [Project] Site results in the fewest impacts and potential [environmental] impacts to jurisdictional tidelands and other waterways subject to Chapter 91" and other environmentally sensitive areas than its construction in alternative locations.[8] MassDEP contends that "[these] impacts and potential impacts to Chapter 91 jurisdictional areas [would] resul[t] from the construction and operations of the suction and discharge pipelines that would [be] needed in order to locate the [compressor station] at any alternative site[.]"[9] MassDEP also contends that "[i]n addition to [these] impacts and potential impacts to Chapter 91 jurisdictional areas . . . significant additional impacts . . . would occur within the suction/discharge pipe footprint and project site within environmentally sensitive lands, including but not limited to resource areas subject to the [Massachusetts] Wetlands Protection Act, Areas of Critical Environmental Concern, [the] Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program Habitats, Surface Water and Groundwater Protection Areas, Outstanding Resource Waters, and 100-year Floodplain.[10]

The Residents do not accept the Program's Remand Determination and have appealed it to OADR contending that the Determination is erroneous and should be vacated. As

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MassDEP's Waterways Program to review again whether the compressor station was an ancillary structure to the HubLine within the meaning of 310 CMR 9.02 based on the Court's interpretation of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in the Regulation.

[8] MassDEP's Remand Determination, at p. 5 (Exhibit 2 to Pre-filed Testimony of Christine Hopps).

[9] MassDEP's Remand Determination, at p. 6 (Exhibit 2 to Pre-filed Testimony of Christine Hopps).

[10] Id.

explained below, at pp. 33-41, their principal contention claiming the Remand Determination is erroneous is their claim, through their expert witness, Dr. Sahu, that MassDEP may not consider the environmental impacts of locating a proposed ancillary structure in alternative locations in determining whether the proposed ancillary facility "requires an adjacent location" to a particular infrastructure crossing facility pursuant to 310 CMR 9.02. The Residents also assert Environmental Justice claims against MassDEP's Remand Determination contending that MassDEP should have required the Applicant to: (1) submit an Environmental Impact Report ("EIR") for the compressor station pursuant to sections 58 and 59 of the 2021 Climate Act (Ch. 8 of the Acts of 2021) and (2) engage in further enhanced public participation regarding the compressor station.[11]

I conducted an evidentiary adjudicatory hearing ("the Remand Determination Appeal Hearing" or "RDA Hearing") to adjudicate the Remand Determination's validity. At the RDA Hearing, the Parties presented expert witnesses who provided testimonial and documentary evidence in support of the Parties' respective positions on the issue. They supported those positions with legal memoranda applying the Court's definition of "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in in 310 CMR 9.02. For the reasons discussed in detail below, at pp. 33-55, based on a preponderance of the evidence presented by the Parties' respective expert witnesses at the RDA Hearing and the Court's definition of "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02, I find that MassDEP's

[11] Residents' Post-RDA Hearing Brief, at p. 39.

Remand Determination is correct and should be affirmed. Regarding the Residents' Environmental Justice claims against MassDEP's Remand Determination, I reject the claims because the Norfolk Superior Court's Remand Order did not require MassDEP to perform any further Environmental Justice review of the compressor station. See below, at pp. 55-66. I also reject the claims on the merits. Id. In sum, I recommend that MassDEP's Commissioner issue a Final Decision on Remand that affirms MassDEP's Remand Determination and directs MassDEP to issue a final c. 91 License to the Applicant for the compressor station.[12]

STATUTORY AND REGULATORY FRAMEWORK

Under the Waterways Regulations at 310 CMR 9.32(1)(b), generally only water-dependent industrial uses are allowed in a DPA.[13] Under 310 CMR 9.12(2)(d), MassDEP is required to find that a proposed facility is water-dependent if it is "an infrastructure crossing facility, *or any ancillary facility thereto* for which an [Environmental Impact Report ("EIR") has been submitted]" to the Secretary of the Executive Office Energy and Environmental Affairs ("EEA") pursuant to the Massachusetts Environmental Policy Act ("MEPA"), G.L. c. 30, §§ 61-62H, and the "Secretary has determined that [the proposed] facility cannot reasonably be located or operated away from tidal or inland waters, based on a comprehensive analysis of alternatives and other information analyzing measures that [could] be taken to avoid or minimize adverse impacts on the environment . . . ." (emphasis supplied). 310 CMR

[12] MassDEP's Commissioner or her designee is the Final Decision-Maker in all appeals adjudicated by OADR Presiding Officers. 310 CMR 1.01(14)(b); In the Matter of The Prysmian Group and Prysmian Cables & Systems USA, LLC, OADR Docket No. 2024-006, Recommended Final Decision (August 26, 2024), 2024 WL 4920921, *4, adopted as Final Decision (September 26, 2024), 2024 WL 4920920.

[13] See n. 2, at p. 2 above.

9.12(2)(d) also provides that "[i]f an EIR [has not been] submitted [for a proposed facility], [a] finding [of water-dependency] may be made by [MassDEP] based on information presented in the application and during the public comment period thereon."

310 CMR 9.02 defines an "infrastructure crossing facility as "a facility which produces, delivers, or otherwise provides electric, gas, water, sewage, transportation, or telecommunication services to the public." Undisputedly, the HubLine is an infrastructure crossing facility because it delivers or otherwise provides natural gas to the public and received a c. 91 License in 2002 as a water-dependent infrastructure crossing facility as discussed below, at p. 9.

The definition of an "infrastructure crossing facility" in 310 CMR 9.02 also includes "[a] pipeline, . . . which is located over or under the water and which connects existing or new infrastructure facilities located on the opposite banks of the waterway." The definition also provides that "*[a]ny structure which [1] is operationally related to* [an infrastructure] crossing facility and *[2] requires an adjacent location [to the infrastructure crossing facility] shall be considered an ancillary facility thereto*." (emphasis and numerical references supplied). In addition, 310 CMR 9.02 provides a non-exclusive list of examples of ancillary facilities, including;

> power transmission substations, gas meter stations, sewage headworks and pumping facilities, toll booths, tunnel ventilation buildings, drainage structures, and approaches, ramps, and interchanges which connect bridges or tunnels to adjacent highways or railroads.

As explained in the Background Section below, at pp. 8-26, prior to the filing of these consolidated appeals challenging MassDEP's Original Determination, the terms "*operationally related to*" and "*requires an adjacent location [to an infrastructure*

crossing facility]" as appearing in 310 CMR 9.02 in connection with determining whether a structure "*is operationally related*" to an infrastructure crossing facility and "*requires an adjacent location* [to the facility]" to be considered an "*ancillary facility*" under the Regulation had neither been defined by the Waterways Regulations, been interpreted in any prior Final Decisions of MassDEP's Commissioner in administrative appeals of MassDEP permits or enforcement orders, nor explained in any MassDEP guidance or policy.

BACKGROUND

I. THE APPLICANT'S PIPELINE NETWORK

The Applicant operates a natural gas pipeline which runs between Lambertville, New Jersey and Beverly, Massachusetts.[14] The pipeline includes two segments that interconnect in Weymouth: the I-9 and the I-10, which as discussed above, is also known as the HubLine.[15]

The I-9 runs between Weymouth and Braintree, beneath the Fore River, and connects on its southern end to the pipeline network running south into New Jersey.[16] The HubLine runs under the Fore River Basin, outer Boston Harbor, and Massachusetts Bay between Weymouth and Beverly, where it connects to a pipeline operated by Maritimes and Northeast.[17] There are three lateral pipelines connected to the HubLine.[18] Two of the lateral pipelines connect the

[14] Algonquin RID, at p. 10; Norfolk Superior Court Remand Decision, at p. 1.

[15] Algonquin RID, at p. 10; Norfolk Superior Court Remand Decision, at pp. 1-2.

[16] Id.

[17] Algonquin RID, at p. 10.

[18] Id.

HubLine to offshore liquefied natural gas ("LNG") ports and the Salem Lateral connects the HubLine to Footprint Power's Salem Harbor natural gas power plant.[19]

The HubLine is an approximately 30-mile long, 30" diameter pipeline.[20] In 2002, MassDEP issued a c. 91 license for the HubLine ("the HubLine Chapter 91 License"), authorizing its use as a "water-dependent infrastructure crossing facility for the transmission of natural gas in accordance with 310 CMR 9.12(2)(b)9 and 9.12(2)d and the Secretary of Environmental Affair's [sic] Certificate dated March 19, 2002."[21] Sections of the Applicant's pipeline network that ultimately connect into the HubLine in Weymouth, including the I-9, all have smaller diameter pipe size and lower Maximum Allowable Operating Pressures ("MAOP") than the HubLine.[22] The lower MAOPs range from 750 to 958 Pounds Per Square Inch Gauge ("PSIG").[23] The HubLine's MAOP is 1440 PSIG.[24] The I-9 normally operates within a range of 500-700 PSIG; the HubLine normally operates within a range of 900-1200 PSIG.[25] However, the HubLine has operated at a pressure as low at 750 PSIG during peak demand events.[26] Because of the different MAOPs in the Applicant's pipeline segments,

[19] Id., at pp. 10-11.

[20] Id., at p. 11.

[21] Id., at pp. 11-12; Norfolk Superior Court Remand Decision, at p. 2.

[22] Algonquin RID, at p. 12.

[23] Id.

[24] Id.

[25] Id.

[26] Id.

natural gas could not flow from the southern segments with lower pressures, most specifically the I-9, into the higher pressure HubLine, resulting in a "bottleneck" at the I-9/HubLine, interconnection in Weymouth.[27] The Applicant sought to remedy this issue as part of the AB Project, which as noted above, is a FERC approved interstate natural gas transmission project.[28]

II. MassDEP'S ORIGINAL DETERMINATION

To allow gas to flow south to north, the Applicant proposed and obtained approval, as part of the FERC permit review and approval process for the AB Project, the siting of the compressor station in Weymouth.[29] As a result, in December 2015, the Applicant applied to MassDEP for a c. 91 license to construct the compressor station in Weymouth's Fore River DPA on filled tidelands of the Fore River at 6 & 50 Bridge Street in Weymouth ("the Project Site").[30] In June 2017, MassDEP issued its Original Determination authorizing the issuance of this c. 91 license to the Applicant.[31] In the Original Determination, MassDEP found pursuant to the Waterways Regulations at 310 CMR 9.02 and 9.12(2)(d) that the compressor station would be an ancillary facility to the HubLine—a previously licensed water-dependent infrastructure crossing facility.[32]

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[27] Id.

[28] Id., at pp. 12-13.

[29] Id., at pp. 13-16; Norfolk Superior Court Remand Decision, at p. 2.

[30] December 8, 2015 Chapter 91 Waterways Application at p. 2-1; Algonquin RID, at pp. 19-41; Norfolk Superior Court Remand Decision, at pp. 3-5.

[31] Algonquin RID, at pp. 19-41; Norfolk Superior Court Remand Decision, at pp. 3-5.

[32] Id.

III. THE RESIDENTS' APPEAL WITH OADR CHALLENGING MassDEP'S ORIGINAL DETERMINATION

After MassDEP issued its Original Determination, the Residents Group filed its appeal with OADR challenging the Original Determination contending that it was erroneous and should be vacated. To adjudicate the Original Determination's validity, OADR Presiding Officer Jane A. Rothchild ("Presiding Officer Rothchild")[33] conducted a lengthy evidentiary adjudicatory hearing ("the Original Determination Appeal Hearing" or "ODA Hearing") at which the Parties' respective expert witnesses provided detailed testimonial and documentary evidence on that issue and were cross-examined at length on their testimony by opposing counsel.

Based on a preponderance of the testimonial and documentary evidence presented at the ODA Hearing by the Parties' respective expert witnesses and her interpretation of the terms "*operationally related to*" and "*requires an adjacent location [to an infrastructure crossing facility]*" as appearing in 310 CMR 9.02, Presiding Officer Rothchild ruled that MassDEP had properly determined that the compressor station was an ancillary facility to the Hubline, a water-dependent infrastructure crossing facility pursuant to 310 CMR 9.02 and 9.12(2)(d).[34] Presiding Officer Rothchild's ruling, which MassDEP's then Commissioner, Martin J. Suuberg

[33] Presiding Officer Rothchild has since retired from MassDEP. OADR thanks Presiding Officer Rothchild for her 25 years of distinguished service at MassDEP, including serving for nearly a decade as an OADR Presiding Officer. During her tenure as a Presiding Officer, she adjudicated nine appeals involving the compressor station: six consolidated air permit appeals, one wetlands permit appeal, and these two consolidated appeals c. 91 appeals. The Residents were appellants in the six consolidated air permit appeals and one wetlands permit appeal and failed to prevail in preventing MassDEP from issuing final permits (air and wetlands) in those appeals.

[34] Algonquin RID, at pp. 19-41; Norfolk Superior Court Remand Decision, at pp. 3-5.

("former Commissioner Suuberg"),[35] adopted as his Final Decision affirming MassDEP's Original Determination, was based on the following reasons.

As noted above, for a structure to be considered an ancillary facility to an infrastructure crossing facility under 310 CMR 9.02, the structure: "*[1]* [must be] *operationally related to* [the infrastructure] crossing facility and *[2] requires an adjacent location* [to the infrastructure crossing facility] . . . . " Because, as previously noted above, the terms "*operationally related to*" and "*requires an adjacent location [to an infrastructure crossing facility]*" had neither been defined by the Waterways Regulations, interpreted in any prior Final Decisions of MassDEP's Commissioner in administrative appeals of MassDEP permits or enforcement orders, nor explained in any MassDEP guidance or policy, Presiding Officer Rothchild relied on traditional rules of construction established by Massachusetts appellate courts to interpret the regulatory requirements in the context of the waterways licensing system.[36] These traditional rules of construction include that "[w]here [a regulation's] language is unclear, the regulation should be construed with regard to the 'objects sought to be obtained and the general structure of the [regulation] as a whole.'"[37]

On the first question of whether the compressor station would be "*operationally related to*" to the HubLine, an infrastructure crossing facility, Presiding Officer Rothchild found that

[35] Former Commissioner Suuberg served as MassDEP's Commissioner from January 2015 to January 2023.

[36] Algonquin RID, at pp. 20-21.

[37] Algonquin RID, at p. 21, citing, Haynes v. Grasso, 353 Mass. 731, 734 (1968); See also In the Matter of Blackinton Commons LLC, OADR Docket Nos. 2007-115 & 147, Recommended Final Decision (September 25, 2009), 2009 WL 3586267, adopted as Final Decision (January 27, 2010).

"[a] preponderance of the evidence presented at the [ODA Hearing] support[ed] a finding that the compressor station [would] be operationally related to the HubLine" because "[a]lthough the phrase ["*operationally related to*"] ha[d] not been interpreted before, the usual and ordinary meanings of the words [were] clear."[38] Relying on the Merriam-Webster Dictionary ("Webster Dictionary"), a well-known and respected dictionary setting forth the definitions of English words, Presiding Officer Rothchild found that the word "operationally" derived from the word "operation," defined as "the quality or state of being functional or operative."[39] She found that the word "related" derived from word "relation," defined by the Webster Dictionary as "an aspect or quality that connects two or more things or parts as being or belonging or working together or as being of the same kind."[40] She found that the Webster Dictionary defined the word "related" as "connected by reason of an established or discoverable relation," and as a result, "the plain meaning of the phrase 'operationally related' in 310 CMR 9.02 is that the proposed ancillary facility must be functionally connected to, or working together with, the operation of the infrastructure crossing facility."[41] She found "this meaning to be clear from the context and the examples of ancillary facilities included in the definition in 310 CMR 9.02," including "power transmission substations, gas meter stations, sewage headworks and pumping facilities, toll booths, tunnel ventilation buildings, drainage structures, and approaches, ramps,

[38] Algonquin RID, at p. 25.

[39] Id.

[40] Id.

[41] Id.

and interchanges which connect bridges or tunnels to adjacent highways or railroads."[42] She found that "[e]ach of those ancillary facilities is functionally connected to the operation of the infrastructure crossing facility," and as such, "[t]he compressor station [met the] definition [of "operationally related" to the HubLine]."[43]

On the second question of whether the compressor station "require[d] an adjacent location [to the HubLine]," to be considered an ancillary facility to the HubLine, the Residents contended that the compressor station did not require an adjacent location to the HubLine because "there [were purportedly] reasonable and feasible alternative locations where it [could] be built."[44] Presiding Officer Rothchild rejected the Residents' claim after determining that the compressor station "require[d] an adjacent location [to the HubLine]" by "looking to the meanings of the word 'require' found in [the Webster Dictionary] to discern the [word's] common meaning."[45]

The Webster Dictionary offered the following definitions for the word "require" for Presiding Rothchild to consider:

> 1.a.: to claim or ask for by right and authority;
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> 1.b.: archaic: REQUEST;
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> 2.a.: to call for as suitable or appropriate // the occasion *requires* formal dress;

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[42] Id.

[43] Id.

[44] Id., at p. 27.

[45] Id., at p. 33.

2.b.: to demand as necessary or essential: having a compelling need for // all living beings *require* food;

3.: to impose a compulsion or command on: COMPEL.[46]

After reviewing these possible definitions for the word "require", Presiding Officer Rothchild found that the best definition for the word "require" to apply to "ancillary facilities" for purposes of interpreting 310 CMR 9.02 was the definition "suitable or appropriate" taken from one of the Webster Dictionary's definitions for "require", specifically, the definition defining "require" as "to call for as suitable or appropriate."[47] Presiding Officer Rothchild "[made] this finding because [she] believe[d] that when evaluating an ancillary facility[,] . . . it ma[de] sense to evaluate the relationship of the ancillary facility to the existing water-dependent Infrastructure Crossing Facility in the context of the Applicant's larger project, and determine whether the use of tidelands for the ancillary use [was] appropriate under all the circumstances presented" in the case.[48]

Based on a preponderance of the testimonial and documentary evidence presented at the ODA Hearing by the Parties' respective expert witnesses and applying the definition "suitable or appropriate" to the word "requires" to determine whether the compressor station "require[d] an adjacent location [to the HubLine]" to be an ancillary facility to the HubLine pursuant to 310 CMR 9.02, Presiding Officer Rothchild found that the compressor station "require[d] an adjacent

[46] Id., at p. 33, n. 36.

[47] Id., at p. 33.

[48] Id.

location [to the HubLine]" within the meaning of the Regulation for the following sound reasons:

(1) the proposed location of the compressor station is where the pressure bottleneck exists between the I-9 and the HubLine as discussed above, and it is at that interconnection where compression is needed to enable natural gas to flow into the HubLine from pipeline segments to its south;

(2) construction of the compressor station at this site avoided the need to construct many miles of suction and discharge pipe to and from a distant compressor station, which would create greater environmental impacts;

(3) the Applicant presented several alternative locations for the compressor station that were not within tidelands, but all the alternatives had greater impacts to jurisdictional tidelands;

(4) although the Applicant's alternatives analysis did not distinguish between permanent and temporary environmental impacts, construction of the compressor station on a historically industrialized property presented fewer environmental impacts; and

(5) locating the compressor station within the Weymouth Fore River DPA was a permissible and suitable use in that area because in a DPA, uses are limited to water-dependent-industrial uses and ancillary facilities.[49]

IV. THE RESIDENTS' APPEAL WITH NORFOLK SUPERIOR COURT CHALLENGING MassDEP'S ORIGINAL DETERMINATION

Pursuant to G.L. c. 30A, § 14, the Residents filed an appeal with Norfolk Superior Court seeking judicial review of former Commissioner Suuberg's Final Decision adopting Presiding Officer Rothchild's decision affirming MassDEP's Original Determination.[50] After reviewing the Administrative Record of the Residents' appeal before OADR[51] and considering

[49] Id., at pp. 35-37; See also n. 2, at p. 2 above.

[50] See Ten Residents Group v. Massachusetts Department of Environmental Protection, Norfolk Superior Court C.A. No. 1982CV01503 ("Residents Group Superior Court Appeal").

[51] The Administrative Record included the testimony of the Parties' respective witnesses, including expert witnesses, who testified at the ODA Hearing that Presiding Officer Rothchild had conducted in the matter and all the documentary evidence that the Parties submitted at the hearing.

the legal arguments of the Parties' respective legal counsel, the Court (Leighton, J.) allowed the Residents' Motion for Judgment on the Pleadings, finding that the Final Decision was based on an error of law.

Specifically, the Court disagreed with Presiding Officer Rothchild's determination, as adopted by former Commissioner Suuberg in the Final Decision, that the best definition for the word "requires" in the phrase "requires an adjacent location" to apply to "ancillary facilities" in 310 CMR 9.02 is "suitable or appropriate" because in the Court's view, "[MassDEP] applied only part of this definition [of "requires" from the Webster Dictionary]," in particular, "suitable or appropriate" and "omitted the preceding language [in the definition] 'to call for as.'"[52] Citing to the Oxford English Dictionary, the Court ruled that "[t]he 'to call for' language" in question "means 'of a thing: to require, demand; to make necessary.'"[53] Thus, according to the Court, "'to call for as suitable or appropriate' means that something is *required*, *demanded*, or *made necessary* because it is suitable or appropriate, not that it is simply suitable or appropriate," and as a result, "[t]he Department's interpretation [of the word "requires" in 310 CMR 9.02] was therefore 'inconsistent with the plain terms of the regulation' [at issue] and an error of law."[54] For these reasons, the Court vacated former Commissioner Suuberg's Final Decision affirming

[52] Norfolk Superior Court Remand Decision, at pp. 6-7. The Residents' filing of their appeal of the Final Decision with the Norfolk Superior Court did not stay enforcement of the Final Decision because G.L. c. 30A, § 14(3) provides that "[t]he commencement of an action [for judicial review of an agency decision] shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper . . . ." Here, neither MassDEP nor the Norfolk Superior Court stayed enforcement of the Final Decision. I note this here because prior to the Court's issuance of its decision vacating the Final Decision, the Applicant had constructed the compressor station and it became operational.

[53] Norfolk Superior Court Remand Decision, at p. 7.

[54] Id. (emphasis in original).

MassDEP's Original Determination and remanded the proceedings to MassDEP "[to] reassess whether the Compressor Station is an ancillary facility to the Hubline" pursuant to 310 CMR 9.02 ("the Court's Remand Decision").[55]

V. FORMER COMMISSIONER SUUBERG'S FIRST REMAND ORDER AND PRESIDING OFFICER ROTHCHILD'S RECOMMENDED REMAND DECISION

In response to the Court's Remand Decision, on May 23, 2022, former Commissioner Suuberg remanded the proceedings in the Residents' appeal to OADR for Presiding Officer Rothchild to reassess whether the compressor Station was an ancillary facility to the HubLine pursuant to 310 CMR 9.02 by applying the definition of "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as determined by the Court in its Remand Decision and based on the evidentiary record of the ODA Hearing.[56] In compliance with former Commissioner Suuberg's Remand Order, Presiding Officer Rothchild conducted a status conference with the Parties on May 26, 2022 and directed them to file legal briefs addressing the issue that the Court had ordered MassDEP to address on remand.[57] After the Parties filed their respective legal briefs on the issue, on June 21, 2022, Presiding Officer Rothchild heard oral argument from the Parties' respective counsel setting forth the Parties' respective positions on the remand issue.[58]

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[55] Id., at pp. 7-8.

[56] Former Commissioner Suuberg's Remand Order at p. 3.

[57] In the Matter of Algonquin Gas Transmission, LLC, OADR Docket Nos. 2017-011 and 2017-012, Recommended Remand Decision Remanding Matter to MassDEP's Waterways Program for Further Permit Review (July 15, 2022) ("Recommended Remand Decision"), at p. 3.

[58] Id.

On July 15, 2022, after considering the oral arguments of the Parties' respective counsel, reviewing and re-evaluating the testimonial and documentary evidence presented by the Parties' respective expert witnesses in the ODA Hearing she had conducted to adjudicate the validity of MassDEP's Original Determination, and applying the Norfolk Superior Court's definition of "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in in 310 CMR 9.02, Presiding Officer Rothchild issued a Recommended Remand Decision ("RRD")[59] recommending that former Commissioner Suuberg issue a Remand Decision: (1) finding that the compressor station was not an ancillary facility pursuant to 310 CMR 9.02 and 310 CMR 9.12(2)(d); and (2) remanding the Applicant's Chapter 91 License application for the compressor station to the MassDEP's Waterways Program for further permit review of the Application, including the Program's consideration of the compressor station as a non-water dependent project.[60] Presiding Officer Rothchild made these recommendations after ruling that a preponderance of the testimonial and documentary evidence of the Parties' respective experts at ODA Hearing applying the definition of "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02 as ordered by the Norfolk Superior Court in its Remand Decision supported a finding that the compressor station did not require a location adjacent to the

[59] See n. 57, at p. 18 above.

[60] RRD, at pp. 3-4, 11-17. Presiding Officer Rothchild's second recommendation was based on the Parties' agreement at the pre-hearing conference that she had conducted in the Original Determination Appeal Hearing that the compressor station should be reviewed by MassDEP's Waterways Program as a non-water dependent project if it was determined in the adjudication of the Residents' appeal that the facility was not an ancillary facility pursuant to 310 CMR 9.02 or 310 CMR 9.12(2)(d). Id., at p. 4.

HubLine because it could be reasonably and feasibly be located in one of several alternative locations and it was not integral to the operation of the HubLine.[61]

In rendering her remand ruling, Presiding Officer Rothchild noted that her earlier ruling affirming MassDEP's Original Determination after finding that the Project Site "was a 'suitable' or 'appropriate' location for the compressor station . . . remain[ed] sound[,] [but] [that] findin[g] [did] not support a conclusion that the location [was] 'required' as the Court ha[d] directed that term be interpreted and applied" in its Remand Decision.[62] She supported her position with the following findings based on the evidentiary record of the ODA Hearing:

(1) "[t]he Applicant did not state . . . in [its] c. 91 license application [for the compressor station] that the location [of that facility] on the [Project Site] was required" but instead stated that the Project Site "[was [the Applicant's] preferred location";[63]

(2) the Applicant's "[c. 91 license] Application contained a statement that the [compressor station] would be ancillary to the HubLine" but "the Applicant [later] acknowledged" at the ODA Hearing "that this statement was conclusory";[64]

(3) "MassDEP accepted [the Applicant's] statement" that the compressor station would be ancillary to the HubLine "but did not analyze it further to conclude that it was accurate";[65]

(4) a staff member of MassDEP's Waterways Program who testified on MassDEP's behalf at the ODA Hearing "acknowledged [in his testimony] that the Department did not do an independent review of

[61] RRD, at pp. 3-4, 11-17.

[62] Id., at p. 11.

[63] RRD, at p. 11.

[64] Id.

[65] Id.

whether the compressor station require[d] an adjacent location [to the Hubline] but . . . simply accepted the Applicant's assertion [that it did because] . . . it [was] not within the Department's purview to question an interstate pipeline company whether a compressor station is required or not";[66] and

(5) two expert witnesses who testified on the Applicant's behalf at the ODA Hearing collectively testified that:

(a) "the project purpose of increasing pressure in the pipeline could be achieved by adding compression at a location other than adjacent to the HubLine";

(b) "[i]n its application for the c. 91 license, the Applicant presented seven alternative locations for the compressor station[,] . . .five of [which were] landlocked";

(c) "[e]ach of the alternative locations would require building the compressor station at a distant location and installing suction and discharge pipes to reach the south end of the HubLine" but "[e]ach of the alternative locations . . . [was] technically feasible . . . [and] reasonable";

(d) "a table [included with the testimony of one of the Applicant's expert witnesses] showing various impacts from each alternative, include[d] both permanent and temporary impacts without distinction, and that the permanent impacts [would] be smaller than the total impacts depicted in the table [but] . . . [did] not contain information quantifying the permanent impacts";

(e) "[a]fter considering the alternatives, the Applicant determined that the preferable location for the compressor station was on the [Project Site]"; and

(f) "[t]he Applicant admitted that from a technical perspective the compressor station at [Project Site] location [was] not essential to meeting the Applicant's precedent agreements with its customers and it could be located elsewhere and meet those agreements."[67]

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[66] Id., at p. 12.

[67] Id. Presiding Officer Rothchild's findings on remand were sound because they were supported by the evidentiary record before her from the ODA Hearing as set forth above, which revealed notable short comings in the testimony of the Applicant's and MassDEP's witnesses on the issue of whether the compressor station required an adjacent

VI. FORMER COMMISSIONER SUUBERG'S SECOND REMAND ORDER AND MassDEP'S REMAND DETERMINATION

After reviewing Presiding Officer Rothchild's RRD, on August 31, 2022, former Commissioner Suuberg issued an Interlocutory Remand Order (the "IRO") in which he "defer[ed] making a final decision regarding whether to adopt, modify, or reject [Presiding Officer Rothchild's] finding that the compressor station at issue . . . [was] not an ancillary facility pursuant to 310 CMR 9.02 or 310 CMR 9.12(2)(d) because [he desired] a complete record before [him] that include[d] the further review of the [Applicant's c. 91] Application that . . . Presiding Officer [Rothchild had] recommended that . . . MassDEP's Waterways Program [be ordered to] perform," but also "the Program's consideration of any other potentially relevant provisions of Chapter 91 regulations."[68] As a result, former Commissioner Suuberg directed MassDEP's Waterways Program, "to perform a further c. 91 license review based on the Program's consideration of the compressor station: (1) as a non-water dependent project; and (2) under any other potentially relevant provisions of the [Regulations.]"[69]

In his IRO, former Commissioner Suuberg established the procedure for MassDEP's Waterways Program to perform the further review of the Applicant's c. 91 License Application

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location to the HubLine within the meaning of 310 CMR 9.02. Accordingly, I reject the Applicant's assertions in its Post-RDA Hearing Brief, at pp. 30-33, that Presiding Officer Rothchild's remand ruling against MassDEP and the Applicant was erroneous. Moreover, my Decision here affirming MassDEP's Remand Determination that the compressor station is an ancillary structure to the HubLine within the meaning of 310 CMR 9.02 has the significant benefit of the additional evidence that the Applicant submitted to MassDEP in response to former Commissioner Suuberg's IRO which Presiding Officer Rothchild did not have when she made her remand ruling.

[68] IRO, ¶ 2.

[69] Id., ¶ 3.

for the compressor station ("the further license review procedure"). Under this procedure: (1) the Applicant would provide additional information to MassDEP's Waterways Program by way of sworn pre-filed testimony ("PFT") of expert witnesses and other information supporting the Applicant's claim that the compressor station was an ancillary facility to the HubLine under the Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02; (2) MassDEP's Waterways Program would review the Applicant's additional information and then make its Remand Determination supported by the PFT of Program Staff concurring with or rejecting the Applicant's claim; and (3) the Applicant and the Residents would have the right to appeal MassDEP's Remand Determination to OADR if they disagreed with the Determination.[70]

In accordance with the IRO's further license review procedure, on October 31, 2022, the Applicant submitted additional information to MassDEP's Waterways Program in support of the Applicant's claim that the compressor station was an ancillary facility to the HubLine under the Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02. This additional information consisted of: (1) a letter brief, (2) the PFT of two expert witnesses, Richard Paquette ("Mr. Paquette"),[71] and Michael Dirrane ("Mr. Dirrane"),[72] and (3) a Supplemental

[70] Id., ¶¶ 3.A-3.I.

[71] Mr. Paquette's PFT will be cited in this Decision as "Mr. Paquette's PFT." His credentials as an expert witness for the Applicant are set forth below, at pp. 30-31.

[72] Mr. Dirrane's PFT will be cited in this Decision as "Mr. Dirrane's PFT." His credentials as an expert witness for the Applicant are set forth below, at p. 31.

Alternatives Analysis prepared by Epsilon Associates, Inc. The Applicant asserted that this additional information demonstrated that the compressor station was an ancillary facility to the HubLine under 310 CMR 9.02 because it "require[d]" a location adjacent to the HubLine, within the Court's definition of "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in the Regulation because such a location was "*required, demanded, or made necessary* because it was suitable or appropriate."[73]

After reviewing the Applicant's additional information, on January 30, 2023, MassDEP's Waterways Program, in accordance with the IRO's further license review procedure, issued its Remand Determination finding that the compressor station was an ancillary facility to the HubLine under the Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02. In this Determination, which was supported by the PFT of Christine Hopps ("Ms. Hopps"), the Assistant Director of the MassDEP's Waterways Program,[74] and her Chapter 91 Waterways Review, MassDEP determined "that the [compressor station] is an ancillary facility to [the HubLine,] a water-dependent industrial Infrastructure Crossing Facility" within the meaning of 310 CMR 9.02 "because construction of the [compressor station] at the [Project] Site results in the fewest impacts and potential [environmental] impacts to jurisdictional tidelands and other

[73] Oct. 31, 2022 – Applicant's Letter at, p. 1; Norfolk Superior Court Remand Decision, at p. 7 (emphasis in original). On November 30, 2022, MassDEP requested that the Applicant also conduct a review based on consideration of the compressor station as a non-water dependent project. The Applicant provided the requested review on December 30, 2022, explaining that it is not aware of any provision of the Waterways Regulations at 310 CMR 9.00 other than those concerning ancillary facilities that would provide a basis for MassDEP to affirm the granting of the c. 91 license to the Applicant for compressor station.

[74] Ms. Hopps' PFT will be cited in this Decision as "Ms. Hopps' PFT"). Her credentials as an expert witness for MassDEP are set forth below, at pp. 31-33.

waterways subject to Chapter 91" and other environmentally sensitive areas than its construction in alternative locations.[75] MassDEP determined that "[these] impacts and potential impacts to Chapter 91 jurisdictional areas [would] resul[t] from the construction and operations of the suction and discharge pipelines that would [be] needed in order to locate the [compressor station] at any alternative site[.]"[76] MassDEP also determined that "[i]n addition to [these] impacts and potential impacts to Chapter 91 jurisdictional areas . . . significant additional impacts . . . would occur within the suction/discharge pipe footprint and project site within environmentally sensitive lands, including but not limited to resource areas subject to the [Massachusetts] Wetlands Protection Act, Areas of Critical Environmental Concern, [the] Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program Habitats, Surface Water and Groundwater Protection Areas, Outstanding Resource Waters, and 100-year Floodplain."[77]

VII. THE RESIDENTS' APPEAL WITH OADR CHALLENGING MassDEP'S REMAND DETERMINATION

In accordance with the IRO's further license review procedure, on March 1, 2023, the Residents filed an appeal with OADR contending that MassDEP's Remand Determination was erroneous and should be vacated. On March 31, 2023, the Residents supported their appeal with the PFT of their expert witness Dr. Ranajit Sahu ("Dr. Sahu")[78] and nine affidavits from

[75] MassDEP's Remand Determination, at p. 5 (Exhibit 2 to Ms. Hopps' PFT).

[76] MassDEP's Remand Determination, at p. 6 (Exhibit 2 to Ms. Hopps' PFT).

[77] Id.

[78] Dr. Sahu's PFT will be cited in this Decision as "Dr. Sahu's PFT"). His credentials as the Residents' expert witness are set forth below, at pp. 29-30.

local residents.[79] In response, the Applicant submitted the Rebuttal Pre-filed Testimony ("Rebuttal PFT") of its expert witness Mr. Paquette ("Mr. Paquette's Rebuttal PFT") and MassDEP submitted Ms. Hobbs' Rebuttal PFT. I then conducted the RDA Hearing to determine whether MassDEP's Remand Determination was valid.[80] As discussed in detail in the Discussion Section below, at pp. 26-41, based on a preponderance of the evidence presented at the RDA Hearing and the Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02, I have determined that MassDEP's Remand Determination was proper and should be affirmed.

DISCUSSION

MassDEP'S REMAND DETERMINATION SHOULD BE AFFIRMED BECAUSE MassDEP PROPERLY DETERMINED THAT THE COMPRESSOR STATION IS AN ANCILLARY FACILITY TO THE HUBLINE WITHIN THE MEANING OF 310 CMR 9.02

I. APPEAL ADJUDICATION PROCEDURE

The appeal adjudication procedure governing the RDA Hearing and my adjudication of the Remand Determination's validity is as follows.

A. The Residents' Burden of Proof

At the RDA Hearing, the Residents, as the Party challenging MassDEP's Remand Determination, had the burden of proof, specifically the burden of proving that MassDEP erred in making the Determination based on a preponderance of the evidence presented by the

[79] Six of the local residents were from Weymouth, Massachusetts; two were from Quincy, Massachusetts; and one was from Milton, Massachusetts.

[80] I assumed adjudicatory responsibility for the appeal after Presiding Officer Rothchild retired from State service.

Parties' respective expert witnesses at the RDA Hearing and the Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02. In the Matter of Brockton Power Co., LLC, ("BP"), OADR Docket Nos. 2011-025 and 2011-026, Recommended Final Decision (July 29, 2016), 2016 WL 8542559, *5, adopted by Interlocutory Decision [of MassDEP's Commissioner] (March 13, 2017), 2017 WL 1063662; In the Matter of The Prysmian Group and Prysmian Cables & Systems USA, LLC, OADR Docket No. 2024-006, Recommended Final Decision (August 26, 2024), 2024 WL 4920921, *3, adopted as Final Decision (September 26, 2024), 2024 WL 4920920. Regarding their burden of proof, the Residents were required to present competent and persuasive evidence at the Hearing from an expert witness(es) with sufficient expertise to testify on the technical issues presented by their claims that MassDEP improperly issued its Remand Determination. Id.; In the Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 WL 2616472, *4, adopted by Final Decision (February 19, 2020), 2020 WL 2616471 (internal citations omitted). The question of "sufficient expertise" turns on "whether the witness has sufficient education, training, experience, and familiarity with the subject matter of the testimony." Id.

B. Standard of Review

My review of MassDEP's factual and legal findings underlying its grounds for issuing its Remand Determination is *de novo*, meaning that my review is anew irrespective of MassDEP's prior findings in the matter. In the Matter of Kane Built, Inc., OADR Docket No. 2017-037,

Recommended Final Decision (December 18, 2018), 2017 WL 10924859, *5, adopted by Final Decision (January 17, 2019), 2019 WL 1122833; Prysmian, 2024 WL 4920921, *3.

Under the *de novo* standard of review, I owe no deference to MassDEP's prior factual findings in the matter because the Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(h) governing adjudication of the appeal provide that the "[t]he weight to be attached to any evidence in the record [of the appeal] will rest within the sound discretion of the Presiding Officer . . . ." Kane Built, 2017 WL 10924859, *5; Prysmian, 2024 WL 4920921, *3. This Rule also provides that "unless otherwise provided any law," the rules of evidence that Massachusetts courts follow "need not [be] observe[d]" in an evidentiary adjudicatory hearing "[except for] the rules of privilege recognized by law." This Rule also requires that "probative effect [be given to evidence] only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs."

My legal determinations in adjudicating the Remand Determination's validity are based on the governing legal requirements with deference to MassDEP's reasonable interpretation of environmental statutes, regulations, and policies it is responsible for enforcing, including c. 91 and the Waterways Regulations at 310 CMR 9.00, which in this appeal the focus is on the Regulations at 310 CMR 9.02 governing what constitutes an ancillary facility to an infrastructure crossing facility. In the Matter of Pioneer Valley Energy Center, LLC ("PVEC"), OADR Docket No. 2011-010, Recommended Final Decision (September 23, 2011), 2011 WL 6019097, *8, adopted by Final Decision (November 9, 2011), 2011 WL 6019096; Prysmian, 2024 WL 4920921, *3. However, no deference is due to MassDEP's interpretation or construction of a

statutory or regulatory requirement that is arbitrary, unreasonable, or inconsistent with the plain terms of the governing statutory and regulatory requirements. Arrowood Indemnity Company v. Workers' Compensation Trust Fund, 104 Mass. App. Ct. 419, 421 (2024); PVEC, 2011 WL 6019097, *8; Prysmian, 2024 WL 4920921, *3, citing, BP, 2016 WL 8542559, *8-10 (no deference due MassDEP's interpretation that OADR lacked jurisdiction to adjudicate federal Title VI discrimination claims in air permit appeal where MassDEP lacked a formal Title VI Grievance Policy required by Title VI Regulations of the U.S. Environmental Protection Agency ("USEPA") to review such claims).[81]

II. THE PARTIES' RESPECTIVE WITNESSES AT THE RDA HEARING

A. The Residents' Witnesses

At the RDA Hearing, nine local residents provided testimony on behalf the Residents by way of affidavits which were entered in the evidentiary record. Dr. Sahu testified on behalf of the Residents as their expert witness supporting their position that MassDEP erred in determining that the compressor station is ancillary structure to the HubLine under the Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure

[81] In BP, MassDEP's then-Commissioner noted that "MassDEP [was] in the process of developing a formal Title VI Complaint Policy for the Department" and until such time the Policy was adopted, Title VI discrimination claims could be asserted in an administrative appeal before OADR. BP, 2017 WL 1063662, *2 n.8. Specifically, MassDEP's then-Commissioner ruled that:

> anyone aggrieved by the Department's permit decisions or enforcement orders, based on purported Title VI violations [could in the absence of a formal MassDEP Title VI Grievance Policy] assert such claims in an administrative appeal with [OADR], as the Petitioners [had done] in [BP and] [a]s was also done in [that] case, the claims [would be] adjudicated by an OADR Presiding Officer based on the evidentiary record in the case, who [would] forward a Recommended Final Decision to the Department's Commissioner.

Id.

crossing facility]" as appearing in 310 CMR 9.02. Dr. Sahu is an environmental and energy consultant with more than 30 years of experience in the fields of environmental, mechanical, and chemical engineering, including regulatory permitting under the federal Clean Air Act and various state statutes and regulations. Dr. Sahu's PFT, ¶ 1. He has provided expert testimony on air permitting issues for the U.S. Environmental Protection Agency ("USEPA") and the U.S. Department of Justice. Id. He holds a Bachelor of Technology degree in Mechanical Engineering from the Indian Institute of Technology, and a Master of Science degree and Ph.D. from the California Institute of Technology. Id.

B. The Applicant's Witnesses

At the RDA Hearing, the Applicant presented two expert witnesses: Mr. Paquette and Mr. Dirrane in support of the Applicant's position that the compressor station is an ancillary facility to the HubLine under 310 CMR 9.02 because it "requires" a location adjacent to the HubLine, within the Court's definition of "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in the Regulation because such a location is "*required, demanded, or made necessary* because it is suitable or appropriate."[82]

Mr. Paquette is a Senior Consultant for Epsilon Associates, Inc. ("Epsilon") and an environmental permitting and regulatory expert with experience managing FERC regulated

[82] Oct. 31, 2022 – Applicant's Letter at, p. 1; Norfolk Superior Court Remand Decision, at p. 7 (emphasis in original). On November 30, 2022, MassDEP requested that the Applicant also conduct a review based on consideration of the compressor station as a non-water dependent project. The Applicant provided the requested review on December 30, 2022, explaining that it is not aware of any provision of the Waterways Regulations at 310 CMR 9.00 other than those concerning ancillary facilities that would provide a basis for MassDEP to affirm the granting of the c. 91 license to the Applicant for compressor station.

natural gas pipeline transmission projects in offshore and onshore locations.[83] His technical skills include wetlands science, rare species consultation, natural resource inventory, environmental regulatory analysis, environmental impact assessment, construction management, and site restoration.[84] He was previously employed as a Senior Project Manager at TRC Environmental Corporation ("TRC"), where he was a Senior Project Manager for the AB Project.[85] His responsibilities as a Senior Project Manager at TRC included planning and executing biological resource surveys, analyzing environmental impacts, and mitigation development.[86] He holds a Bachelor of Science in Wildlife Biology and a Master of Science in Environmental Studies.

Mr. Dirrane is a Senior Marketing Representative for Enbridge, Inc., responsible for Marketing and Business Development projects for Enbridge in the Northeast United States and for many of the Local Distribution Company accounts on the Algonquin Pipeline and Texas Eastern Pipeline.[87]

C. MassDEP's Witness

At the RDA Hearing, Ms. Hopps testified on behalf of MassDEP supporting its Remand Determination that the compressor station is an ancillary structure to the HubLine within the meaning of 310 CMR 9.02 because "the compressor station requires an adjacent

[83] Mr. Paquette's PFT, ¶ 1.

[84] Id.

[85] Id., ¶ 2.

[86] Id.

[87] Mr. Dirrane's PFT, ¶ 1.

location to the Hubline . . . because construction of the [compressor station] at the [Project] Site results in the fewest impacts and potential impacts to jurisdictional tidelands and other waterways subject to Chapter 91" and "environmentally sensitive lands [in the alternative locations], including but not limited to resource areas subject to the [Massachusetts] Wetlands Protection Act, Areas of Critical Environmental Concern, [the] Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program Habitats, Surface Water and Groundwater Protection Areas, Outstanding Resource Waters, and 100-year Floodplain."[88] She holds a Bachelor of Science degree in Marine Science from Long Island University (1997) and prior to joining MassDEP in November 2018, she was employed by the Miami-Dade County, Florida Division of Environmental Resource Management from 2002 through 2018 in varying capacities, with 10 years as the supervisor for the Coastal Resources Section permitting program.[89]

Since November 2018, she has served as the Assistant Director for MassDEP's Waterways Program.[90] As Assistant Director she is responsible for administering and enforcing Chapter 91 and the Waterways Regulations at 310 CMR 9.00.[91] She reviews Chapter 91 license applications to determine their compliance with Chapter 91 and the Waterways Regulations.[92]

[88] Ms. Hopps' PFT, Exhibit 2, at pp. 5-6.

[89] Ms. Hopps' PFT, ¶ 1.

[90] Id.

[91] Id.

[92] Id.

She also supervises Program Staff of the MassDEP's Waterways Program in their review of Chapter 91 License applications.[93]

Since mid-2019, Ms. Hopps has reviewed Chapter 91 applications for, and drafted or reviewed, approximately 250 applications for Chapter 91 Licenses/Permits for water-dependent and non-water-dependent projects that include private and commercial piers, marinas, seawalls, buildings, infrastructure facilities, and other structures within Chapter 91 jurisdiction, and dredging, & beach nourishment projects.[94] She also has reviewed and authored jurisdictional determinations and led compliance and enforcement activities.[95] Throughout her professional career she has reviewed approximately 3,600 applications for water-dependent and non-water-dependent licenses/permits.[96]

III. FINDINGS

A. Under Chapter 91, MassDEP Must Consider the Environmental Impacts of Locating a Proposed Ancillary Facility in Alternative Locations in Determining Whether the Proposed Ancillary Facility Requires an Adjacent Location to a Particular Infrastructure Crossing Facility

At the heart of the Parties' dispute here regarding the Remand Determination's validity is whether MassDEP properly applied the Court's definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02 in determining that the compressor station is an ancillary structure to the HubLine. Before I

[93] Id.

[94] Id., ¶ 2.

[95] Id.

[96] Id.

address that issue, it is important to resolve a major dispute between the Parties regarding whether the environmental impacts of locating a proposed ancillary facility in alternative locations can be considered as part of MassDEP's determination of whether the proposed ancillary facility "requires an adjacent location" to a particular infrastructure crossing facility pursuant to 310 CMR 9.02. This major dispute is up front and center here because, as discussed above, based on additional expert information it received from the Applicant, MassDEP determined that the compressor station constitutes an ancillary facility to the HubLine pursuant to 310 CMR 9.02 because "the compressor station requires an adjacent location to the HubLine because construction of the [compressor station] at the [Project] Site results in the fewest impacts and potential impacts to jurisdictional tidelands and other waterways subject to Chapter 91" and "environmentally sensitive lands [in the alternative locations], including but not limited to resource areas subject to the [Massachusetts] Wetlands Protection Act, Areas of Critical Environmental Concern, [the] Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program Habitats, Surface Water and Groundwater Protection Areas, Outstanding Resource Waters, and 100-year Floodplain."[97]

The Residents, through their expert witness, Dr. Sahu, contend that MassDEP's Remand Determination is invalid because the environmental impacts of locating a proposed ancillary facility in alternative locations cannot be part of MassDEP's determination of whether the proposed ancillary facility "requires an adjacent location" to a particular infrastructure

[97] MassDEP's Remand Determination, at pp. 5-6 (Exhibit 2 to Ms. Hopps' PFT).

crossing facility pursuant to 310 CMR 9.02. Specifically, Dr. Sahu testified that:

> [t]hat there may be claimed environmental benefits or cost advantages to locating the [compressor] [s]tation as proposed [adjacent to the HubLine], are not factors that are relevant to the engineering need or requirement that it be located adjacent to the HubLine for it to be functional. These are, in effect, "nice-to-have" as opposed to "must-have" factors. While it may be beneficial to minimize environmental impacts and it is doubtless beneficial to the operator [of the compressor station] to minimize costs, these virtues do not make it necessary that the Weymouth Compressor Station be located adjacent to the HubLine or the I-9 for that matter.

Dr. Sahu's PFT, ¶ 30. I reject Dr. Sahu's opinion and concur with the Applicant and MassDEP that under c. 91, MassDEP must consider the environmental impacts of locating a proposed ancillary facility in alternative locations in determining whether the proposed ancillary facility "requires an adjacent location" to a particular infrastructure crossing facility pursuant to 310 CMR 9.02. I do so for the following reasons.

First, as explained below, Dr. Sahu's opinion is not supported by the statutory and regulatory framework of Chapter 91 and the Waterways Regulations at 310 CMR 9.00 that authorizes MassDEP to consider the environmental impacts of locating a proposed ancillary facility in alternative locations as part of its determination of whether the proposed ancillary facility "requires an adjacent location" to a particular infrastructure crossing facility pursuant to 310 CMR 9.02. Moreover, as also explained below, Dr. Sahu's opinion has been rejected by the Commonwealth's highest court, the Massachusetts Supreme Judicial Court ("SJC"), in the recent case of Conservation Law Foundation v. Energy Facilities Siting Board, 494 Mass. 594 (2024) ("CLF v. EFSB").

On the first point above, it is MassDEP's statutory duty under Chapter 91 "[to] protec[t]

public trust rights in tidelands through the c. 91 licensing program",[98] and to that end, MassDEP must "ensur[e] that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose."[99] MassDEP must also determine, in accordance with the Waterways Regulations at 310 CMR 9.33, that a proposed project subject to c. 91 licensure "compl[ies] with [all] applicable environmental regulatory programs of the Commonwealth[.]" Several of these environmental regulatory programs, which Ms. Hopps cited in her testimony as being applicable to the c. 91 licensure of the compressor station and support MassDEP's Remand Determination that "the compressor station requires an adjacent location to the Hubline [within the meaning of 310 CMR 9.02] because construction of the [compressor station] at the [Project] Site results in the fewest impacts and potential impacts to jurisdictional tidelands and other waterways subject to Chapter 91" and "environmentally sensitive lands [in the alternative locations], include, but are not limited" to:

> (1) the Wetlands Protection Act, G.L. c. 131, § 40, and the Wetlands Regulations at 310 CMR 10.00;[100]
>
> (2) the Areas of Critical Environmental Concern, G.L. c. 21A, § 2(7) and St. 1974, c. 806, § 40(E), and the Areas of Critical Environmental

[98] Navy Yard Four Assocs., LLC v. Department of Environmental Protection, 88 Mass. App. Ct. 213, 218 (2015), citing, Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 678 (2010).

[99] Commercial Wharf East Condominium Association v. Boston Boat Basin, LLC, 93 Mass. App. Ct. 523 (2018).

[100] Wetlands are:

> an important feature in the protection of water resources in Massachusetts. [Wetlands] can help clean drinking water supplies[,] . . . prevent flooding and storm damage during storm events[,] . . . also support a huge variety of wildlife.

https://www.mass.gov/guides/wetlands-information.

Concern Regulations at 301 CMR 12.00;[101]

(3) the Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program Habitats;[102]

(4) Surface Water Protection Areas as reflected by the Surface Water Discharge Permit Program Regulations at 314 CMR 3.00 which were promulgated pursuant to the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26 through 53 ("MCWA");[103]

(5) Outstanding Resource Waters Protection as reflected by the Massachusetts Surface Water Quality Standards at 314 CMR 4.00, also promulgated pursuant to the MCWA;[104]

(6) Groundwater Protection Areas as reflected by the Ground Water

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[101] An Area of Critical Environmental Concern ("ACEC"):

> is a place in Massachusetts that receives special recognition because of the quality, uniqueness, and significance of its natural and cultural resources. Such an area is identified and nominated at the community level and is reviewed and designated by the [Commonwealth's] Secretary of [the Massachusetts Executive Office of] Energy and Environmental Affairs. The [Massachusetts] Department of Conservation and Recreation (DCR) administers the ACEC Program on behalf of the Secretary. Designation of an ACEC increases environmental oversight by increasing state permitting standards through elevated performance standards and lowering thresholds for review.

https://www.mass.gov/info-details/acec-program-overview.

[102] The Massachusetts Division of Fisheries and Wildlife ("MassWildlife") is an agency of the Commonwealth "responsible for the conservation of freshwater fish and wildlife in the Commonwealth, including endangered plants and animals." https://www.mass.gov/orgs/division-of-fisheries-and-wildlife. MassWildlife's Natural Heritage and Endangered Species Program "is responsible for protecting the [Commonwealth's] wide range of native biological diversity." https://www.mass.gov/orgs/masswildlifes-natural-heritage-endangered-species-program#:~:text=The%20Natural%20Heritage%20%26%20Endangered%20Species,that%20make%20up%20their%20habitats.

[103] The MCWA "[establishes] a comprehensive program for protection of the surface and groundwaters of the Commonwealth." Entergy Nuclear Generation Co. v. Department of Environmental Protection, 459 Mass. 319, 329 (2011). To that end, "the [MCWA] delegates to [MassDEP] the primary responsibility to 'enhance the quality and value of water resources' and authorizes [MassDEP] to achieve that goal by adopting 'rules and regulations which it deems necessary for the proper administration of the laws relative to ... the protection of the quality and value of water resources.'" Id. This includes "the [authority] to create regulations that will best preserve and also restore the quality of our waters." Id., at 329-30.

[104] Id.

Discharge Permit Program Regulations at 314 CMR 5.00, also promulgated pursuant to the MCWA;[105] and

(7) 100-year Floodplain.[106]

The SJC's recent decision in CLF v. EFSB also makes clear MassDEP's authority under c. 91 to consider the environmental impacts of locating a proposed ancillary facility in alternative locations as part of its determination of whether the proposed ancillary facility "requires an adjacent location" to a particular infrastructure crossing facility pursuant to 310 CMR 9.02. In CLF v. EFSB, the SJC held that it was lawful for MassDEP and the Energy Facilities Siting Board ("EFSB") to determine that an electric substation constituted an ancillary facility within the meaning of 310 CMR 9.02 to a preexisting electric transmission line, an infrastructure crossing facility, and required a location adjacent to that facility because it was the best option to meet the need for the electric substation "with minimum impact on the environment, at the lowest possible cost." CLF v. EFSB, 494 Mass. at 606. MassDEP's analysis here in determining that the compressor station is ancillary facility to the HubLine within the meaning of

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[105] Id.

[106] A 100-year Floodplain is:

> [t]he 1% annual flood[,] [meaning a flood that] has a 1 in 100 probability of being equaled or exceeded in any given year. Areas subject to the 1% annual chance flood are identified on the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps (FIRMs) and National Flood Hazard Layer . . . and are referred to as special flood hazard areas.

https://www.mass.gov/info-details/1-annual-chance-flood. Special flood hazard areas include:

> A Zones (A, AE, AH, and AO Zones) and Velocity Zones (V and VE Zones). The V Zones and Coastal A Zones are also referred to as coastal high hazard areas because they are subject to high-velocity wave action from storms. For flood zones, FIRMs typically indicate a Base Flood Elevation (BFE), which is the elevation the water is expected to reach in a 1% annual chance flood. . . .

Id.

310 CMR 9.02 is the same analysis that the SJC affirmed in CLF v. EFSB in upholding MassDEP's and the EFSB's determination that the electric substation at issue in that case constituted an ancillary facility and required a location adjacent to a preexisting electric transmission line.

The SJC's ruling in CLF v. EFSB came about because the appellants in that case ("the petitioners") requested the SJC's judicial review of the EFSB's decision to issue a certificate of environmental impact and public interest ("the certificate") to Eversource Energy ("Eversource") in connection with a proposed electric substation in East Boston. 494 Mass. at 595. When such a certificate is granted by the EFSB, it operates as "a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility" including a Chapter 91 license issued by MassDEP. G.L. c. 164, § 69K.

Before the EFSB issued its certificate, MassDEP had issued a draft Chapter 91 license authorizing Eversource's construction of the electric substation. CLF v. EFSB, 494 Mass. at 604-05. The draft Chapter 91 license identified the electric substation as "ancillary to [a preexisting electric transmission line,] a water-dependent industrial infrastructure crossing facility" and, accordingly, a water dependent use under 310 CMR 9.02 and 9.12(2)(d). Id. The EFSB adopted MassDEP's ancillary facility determination regarding the electric substation in its decision to issue its certificate to Eversource. Id. at 605. The petitioners challenged that determination in their appeal to the SJC. Id.

The petitioners failed in their challenge of the determination after the SJC ruled that

there was substantial support for the EFSB's determination that the electric substation was an ancillary facility to the pre-existing electric transmission line within the meaning of 310 CMR 9.02. Id. at 606. The SJC explained in its ruling that prior to making its determination the EFSB had scrutinized various alternative sites before concluding that there were no "readily available, superior sites in East Boston" and, following an extensive analysis of environmental impacts, concluded that the proposed site for the electric substation was the best option to meet the need for the substation "with minimum impact on the environment, at the lowest possible cost." Id. This finding is virtually indistinguishable from MassDEP's Remand Determination here that the compressor station is an ancillary facility to the HubLine, as supported by the expert testimony of the Applicant's witness, Mr. Paquette, and MassDEP's witness, Ms. Hopps.[107]

In upholding the EFSB's ancillary facility determination, the SJC rejected the petitioners' claim that the EFSB erred in concluding that the electric substation "require[d] an adjacent location" to the preexisting electric transmission line because, according to the petitioners, the term "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02 means "necessitates." CLF v. EFSB, 494 Mass. at 606 n.18. The petitioners argued that the existence of alternative potential sites for the proposed electric substation demonstrated that it was not "necessary" for the substation to be located where Eversource proposed, just like the Residents have argued here with respect to the compressor station. Id. In rejecting the petitioners' claim, the SJC ruled that that, even

[107] Below, at pp. 43-51, I discuss in detail Mr. Paquette's and Ms. Hopps' testimony supporting MassDEP's Remand Determination.

accepting the petitioners' definition of the word "requires" in the phrase "requires an adjacent location [to an infrastructure crossing facility]" as appearing in 310 CMR 9.02, the EFSB could permissibly find that the alternate potential sites were not feasible. Id.

In sum, contrary to the Residents' claim, as advanced by their expert witness, Dr. Sahu, under 310 CMR 9.02 MassDEP: (1) must consider the environmental impacts of locating a proposed ancillary facility in alternative locations in making its determination under 310 CMR 9.02 regarding whether a proposed ancillary facility requires an adjacent location to a particular infrastructure crossing facility and (2) based on the environmental impacts, make a finding that the proposed ancillary facility requires an adjacent location to the infrastructure crossing facility if locating the proposed ancillary facility in the alternative locations will result in greater environmental impacts. Accordingly, the question then becomes in the context of this case whether a preponderance of the evidence introduced at the RDA Hearing through the testimonial and documentary evidence of the Parties' respective expert witnesses supports MassDEP's Remand Determination that the compressor station requires an adjacent location to the HubLine because locating it in alternative locations will result in greater environmental impacts. As discussed in the next section, at pp. 41-55, the answer to that question is yes.

B. A Preponderance of the Evidence Introduced at the RDA Hearing Supports MassDEP's Remand Determination

1. Mr. Dirrane's and Mr. Paquette's Persuasive Testimony on Behalf of the Applicant Supporting MassDEP's Remand Determination

a. Mr. Dirrane's Testimony on Behalf of the Applicant

At the RDA Hearing, Mr. Dirrane provided persuasive testimony on behalf of the

Applicant demonstrating that that the compressor station is "operationally related" to the HubLine within the meaning of 310 CMR 9.02 because it is "essential to the current and anticipated purposes of the HubLine for the foreseeable future."[108] Specifically, he testified as follows.

When MassDEP issued a c. 91 License for the HubLine in 2002, the HubLine's primary purpose was to transport natural gas produced at two facilities offshore of Nova Scotia, the Sable Offshore Energy Project ("SOEP") and the Encana Deep Panuke ("Panuke"), in a north to south direction for customers located in the Northeastern United States.[109] Compression of natural gas in Weymouth was not needed for this original purpose (i.e., moving natural gas north to south).[110] However, SOEP and Panuke were permanently shut down in 2018[111] and the quantities of natural gas received from sources from the south and west of the Applicant's pipeline have considerably increased.[112] Consequently, the HubLine's primary purpose has changed, and it now mainly transports natural gas from sources in the south and west (e.g., Texas, the Gulf Coast, and the Appalachia Basin) to delivery points north of the connection between the I-9 and the HubLine.[113] Thus, the compression of natural gas in Weymouth—at

[108] Mr. Dirrane's PFT, ¶ 17.

[109] Id., ¶¶ 7-8.

[110] Id., ¶ 7.

[111] Id., ¶ 11.

[112] Id., ¶ 13.

[113] Id., ¶ 14.

the interconnection of the I-9 and the HubLine—is required for this purpose (i.e., moving natural gas south to north from the I-9 into the HubLine).[114]

In sum, the compression of natural gas at the connection between the I-9 and HubLine pipelines is required for natural gas to flow in a northerly direction from the I-9 pipeline into the HubLine.[115] The Applicant's construction of the compressor station has fulfilled that need because prior to the compressor station's construction, natural gas could not flow in a northerly direction from the I-9 pipeline into the HubLine on to the north.[116]

The Residents did not effectively refute Mr. Dirrane's testimony through the testimony of their expert witness, Dr. Sahu, and the testimony of the nine local residents who submitted affidavits supporting the Residents' claims in the RDA Hearing.

b. Mr. Paquette's Testimony on Behalf of the Applicant

At the RDA Hearing, Mr. Paquette provided persuasive testimony on behalf of the Applicant supported by the October 31, 2022 Supplemental Alternatives Analysis prepared by Epsilon ("the Epsilon Analysis") demonstrating that: (1) the compressor station "requires its location on the [Project] Site, adjacent to the HubLine, because construction on the [Project] Site avoids and minimizes adverse impacts on the environment compared to construction on each of the alternative sites" and (2) the compressor station, "with its suction and discharge

[114] Id., ¶ 16.

[115] Id., ¶ 16.

[116] Id., ¶ 15.

pipelines, cannot reasonably be located away from tidal or inland waters."[117]

Mr. Paquette testified that in response to former Commissioner Suuberg's IRO, the Applicant requested Epsilon provide the Applicant a supplemental study of impacts associated with the construction of the compressor station in eight locations, including the Project Site in Weymouth.[118] Epsilon performed that study and set forth the study's results in the Epsilon Analysis that the Applicant submitted to MassDEP's Waterways Program.[119]

The seven alternative sites that Epsilon studied were: (1) one site in Franklin, Massachusetts ("Alternative No. 1/Franklin"); (2) one site in Holbrook, Massachusetts ("Alternative No. 2/Holbrook"); (3) three sites in Weymouth ("Alternative No. 3/Weymouth", "Alternative No. 4/Weymouth", "Alternative No. 5/Weymouth"); (6) one site on Long Island[120] ("Alternative No. 6/Long Island"); and (7) one site on Children's Island[121] ("Alternative No. 7/Children's Island").[122] Epsilon assessed environmental impacts for construction of the compressor station on the Project Site and the seven alternative sites using the following

[117] Mr. Paquette's PFT, ¶ 12; Epsilon Analysis Sections 1.0 and 5.0.

[118] Mr. Paquette's PFT, ¶ 3; Epsilon Analysis Section 1.0; Figure 2-1.

[119] Mr. Paquette's PFT, ¶ 3.

[120] "Long Island is located in Boston Harbor and is part of the City of Boston." https://www.boston.gov/departments/public-works/long-island.

[121] "Children's Island [is] . . . a 25 acre island [] located [] off the entrance to Marblehead Harbor" in Marblehead, Massachusetts, a coastal community located 18 miles north of Boston. https://salempl.org/wiki/index.php?title=Children%27s_Island; https://northofboston.org/our-cities-and-towns/marblehead-ma/.

[122] Mr. Paquette's PFT, ¶ 6; Epsilon Analysis Sections 1.0, 4.0, and 5.0.

criteria:

(1) Tidelands;

(2) Wetlands, waterbodies, and vernal pools;

(3) Rare and endangered species;

(4) Water quality and water supply protection;

(5) Floodplain;

(6) Subsurface contamination;

(7) Noise;

(8) Site access and transportation impacts;

(9) Article 97 lands;

(11) Land use and zoning;

(12) Historic structures or districts and archaeological sites; and

(13) visual impacts.[123]

The Epsilon Analysis demonstrated that constructing the compressor station (including its suction and discharge pipes) on the Project Site would not cause any appreciable negative environmental impacts, and any impacts would be temporary and minimized during construction using appropriate mitigation measures and best management practices.[124] Specifically, the Epsilon Analysis determined that construction of the compressor station on the Project Site did not result in impacts to vegetated wetlands, waterbodies, vernal pools, forested

[123] Mr. Paquette's PFT, ¶¶ 8-9.

[124] Mr. Paquette's PFT, ¶¶ 13-14; Epsilon Analysis Sections 1.0; 5.1.1; Table 5-1.

lands, rare and endangered species and their habitats, surface water protection areas, groundwater wellhead protection areas, Outstanding Resource Waters Protection Areas, flood hazard areas, or flowed tidelands.[125]

In contrast, because of the need to construct significant lengths of new suction and discharge pipelines, construction of a compressor station and associated pipeline connections at any of the seven alternative sites would have resulted in demonstrably greater environmental impacts to many of the considered environmental resources.[126] These environmental impacts would be as "[a result of] the need to construct significant lengths of new suction and discharge pipelines across southeastern Massachusetts, or in the case of the two island alternatives, in the coastal waters of Boston Harbor and Massachusetts Bay to reach the HubLine interconnect location.[127] Regarding the five on-shore alternative sites, construction of the compressor station on those sites would involve installation of pipeline beneath flowed tidelands of the Fore River and filled tidelands at the North Weymouth landfall south and north of Bridge Street.[128] Construction of the compressor station on both offshore alternatives would also impact tidelands because the construction would require installation of pipeline in flowed tidelands of Boston Harbor and Massachusetts Bay as well as the construction of docking facilities in flowed tidelands to support the marine transport of workers, equipment, and

[125] Mr. Paquette's PFT, ¶ 14; Epsilon Analysis Sections 1.0; 5.1.1; Table 5-1.

[126] Mr. Paquette's PFT, ¶¶ 15-16; Epsilon Analysis Sections 1.0; 5.1.2-5.1.8; Table 5-1.

[127] Mr. Paquette's PFT, ¶ 15; Epsilon Analysis Sections 1.0; 5.1.2-5.1.8; Table 5-1.

[128] Mr. Paquette's PFT, ¶ 16; Epsilon Analysis Sections 1.0; 5.1.2-5.1.8; Table 5-1.

materials associated with the construction and operation of the compressor station.[129]

The Residents did not effectively refute Mr. Paquette's testimony about the greater environmental impacts related to the alternative sites as compared to the Project Site. As discussed above, the Residents expert witness, Dr. Sahu provided testimony that carried no weight on this issue because of his unsupported opinion that MassDEP could not consider the environmental impacts of locating the compressor station in alternative locations in determining whether the compressor station required an adjacent location to the HubLine.[130] Because of his unsupported opinion, Dr. Sahu did not conduct any analysis of the environmental benefits or impacts associated with locating the compressor station at Project Site or at the alternative sites.[131]

Although he contended without a reasonable basis that environmental impacts of constructing the compressor station in alternative locations is not a factor in MassDEP's determination of whether a proposed structure constitutes an ancillary facility to a particular infrastructure crossing facility under 310 CMR 9.02, Dr. Sahu nevertheless attempted to cast doubt on the Applicant's and/or Epsilon's choice of the seven alternative locations for a comparative study of environmental impacts. He did so by testifying that "more than half of [those] . . . locations . . . [were] not even connected to the HubLine, but rather, tie[d] in to

[129] Id.

[130] Dr. Sahu's PFT, ¶ 30.

[131] Transcript of Oct. 25, 2023 RDA Hearing Transcript ("RDA Hrg Tr.") at 55:7-56:13.

different pipelines located south of the HubLine."[132] Mr. Paquette effectively refuted Dr. Sahu's testimony by testifying that each of the southern and western alternative sites would include new discharge pipelines that would connect all the way the way back to the HubLine (as well as new suction pipelines that would connect to the Applicant's pipeline system south of the HubLine).[133]

2. Ms. Hopps' Persuasive Testimony on Behalf of MassDEP Supporting MassDEP's Remand Determination

At the RDA Hearing, Ms. Hopps provided persuasive testimony explaining in detail the basis for MassDEP's Determination that the compressor station is an ancillary facility to the HubLine within the meaning of 310 CMR 9.02. First, she corroborated Mr. Dirrane's testimony on behalf of the Applicant demonstrating that that the compressor station is "operationally related" to the HubLine within the meaning of 310 CMR 9.02 by testifying that "[the compressor station] connects to the HubLine to provide necessary compression of natural gas between the I-9 and HubLine pipelines in order for natural gas to flow in a northerly direction."[134] She also testified that "[t]he [c]ompressor [s]tation is essential to the current and anticipated purposes of the HubLine for the foreseeable future."[135]

Ms. Hobbs also corroborated Mr. Paquette's testimony on behalf of the Applicant that "the compressor station *requires* an adjacent location to the HubLine because construction of

[132] Dr. Sahu's PFT, ¶ 10.

[133] Mr. Paquette's Rebuttal PFT, ¶¶ 5-13.

[134] MassDEP's Remand Determination, at p. 5 (Exhibit 2 to Ms. Hobbs' PFT).

[135] Id.

the [compressor station] at the [Project] [S]ite results in the fewest [environmental] impacts and potential [environmental] impacts to jurisdictional tidelands and other waterways subject to Chapter 91" and other environmentally sensitive areas.[136] She testified that these environmental impacts would be caused as "[a] result of the new suction and discharge pipelines that would need to be constructed across southeastern Massachusetts, or in the case of the two island alternatives, in the coastal waters of Boston Harbor and Massachusetts Bay to reach the HubLine interconnect location."[137] She testified that the "[environmental] [i]mpacts associated with siting the [compressor station] at each alternative location [was set forth in] detai[l]ed in [the Epsilon Analysis] that Mr. Paquette discussed in his testimony.[138] She testified that "[a]voidance of those [environmental] impacts is achieved at the [Project] [S]ite, which did not result in appreciable impacts with respect to Chapter 91 or within other environmentally sensitive areas."[139]

Ms. Hopps also confirmed in her testimony that "[i]n making [its Remand] [D]etermination, [MassDEP's Waterways] Program [complied with the Norfolk Superior Court's Remand Decision by] appl[ying] the usual and accepted meaning of the word "require" as set forth in the dictionary, "to call for as suitable or appropriate."[140] She testified that "[t]he [compressor station] calls for as suitable or appropriate, a site where the construction and

[136] Id. (emphasis in original)

[137] Id.

[138] Id.

[139] Id.

[140] Id.

continued operation of the facility will avoid and minimize impacts to Chapter 91 jurisdictional tidelands" and other environmentally sensitive areas.[141] Ms. Hopps elaborated on her testimony as follows.

Ms. Hopps testified that "[f]or many of the alternative sites, the portion of the work within tidelands would be limited to installation of the pipelines to connect to the Hubline by the method of Horizontal Directional Drilling (HDD) beneath the benthic surface" but "even the installation of the pipelines embedded in the seafloor creates the possibility of impacts associated with construction and operation of the [compressor station]."[142] Ms. Hopps explained that "[p]otential impacts include frac-outs with discharge of drilling fluids to flowed tidelands and the corresponding potential need for in-water structures associated with repairs and remediation."[143] She also noted that there would be further impacts to the tidelands by "[f]uture maintenance activities for the pipelines [that] could include but [would] not [be] limited to placement of coffer dams, dredging, dewatering, and/or armoring of the submerged bottom."[144]

Ms. Hobbs also elaborated on her testimony regarding the environmental impacts on other environmentally sensitive areas caused by construction of the compressor station in the alternative locations.[145] She testified that "[i]n addition to the impacts and potential impacts to

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[141] Id.

[142] MassDEP's Remand Determination, at p. 6 (Exhibit 2 to Ms. Hobbs' PFT).

[143] Id.

[144] Id.

[145] Id.

Chapter 91 jurisdictional areas resulting from the construction and operations of the suction and discharge pipelines that would [be] needed in order to locate the [compressor station] at any alternative site, the [Epsilon Analysis] quantified significant additional impacts that would occur within the suction/discharge pipe footprint and [alternative location] site within environmentally sensitive lands, including but not limited to resource areas subject to the Wetlands Protection Act, Areas of Critical Environmental Concern, Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program Habitats, Surface Water and Groundwater Protection Areas, Outstanding Resource Waters, and 100-year Floodplain."[146]

3. The Lack of Probative Value of the Testimony of the Residents' Witnesses

As explained at the outset of this Discussion Section, the Residents had the burden of proving in their appeal of MassDEP's Remand Determination that MassDEP erred in making the Determination and that their burden of proof required them to present competent and persuasive evidence at the RDA Hearing from an expert witness(es) with sufficient expertise to testify on the technical issues presented by their claims that MassDEP improperly made the Determination. The Residents failed to meet their burden of proof by a wide margin for the following reasons.

a. The Deficiencies of Dr. Sahu's Expert Testimony

First, as discussed above, Dr. Sahu's opinion that MassDEP cannot consider the environmental impacts of locating a proposed ancillary facility in alternative locations in making its determination of whether the proposed ancillary facility "requires an adjacent

[146] Id.

location" to a particular infrastructure crossing facility pursuant to 310 CMR 9.02 carries no weight here because it has no reasonable basis under the c. 91 statutory and regulatory framework and was rejected by the SJC in its recent decision in CLF v. EFSB. That seriously flawed opinion alone would have provided me with a reasonable basis to accord little or no weight to his other testimony at RDA Hearing testimony regarding whether the compressor station is "operationally related" to the HubLine and "requires an adjacent location" to the HubLine to constitute an ancillary facility to the HubLine under 310 CMR 9.02. However, his admission on cross-examination at the RDA Hearing that he did not conduct any scientific or technical analysis to support his testimony provides me with an additional basis to accord little or no weight to his testimony.

Specifically, Dr. Sahu admitted on cross-examination that he did not conduct: (1) a hydraulic analysis of the Applicant's pipeline system;[147] (2) an analysis of the MAOP or the actual operating pressure of the pipelines in the Applicant's pipeline system;[148] (3) an analysis to determine exactly what methods to ship gas from south to north through the HubLine are presently available today;[149] and (4) no analysis of the environmental benefits or impacts associated with locating the compressor station at the Project Site as compared to any alternative site.[150] Simply stated, his testimony regarding whether the compressor station is

[147] RDA Hrg Tr., at 44:7-8.

[148] RDA Hrg Tr., at 44:16-45:12.

[149] RDA Hrg Tr., at 50:8-18.

[150] RDA Hrg Tr., at 55:7-56:13.

"operationally related" to the HubLine and "requires an adjacent location" to the HubLine was conclusory, and as a result, not probative.

b. The Deficiencies of the Affidavit Testimony of the Nine Local Residents

The affidavit testimony of the nine local residents who submitted affidavits at RDA Hearing purported to contain evidence of damage to the environment and the compressor station's interference with their use and enjoyment of the Chapter 91 Waterways area surrounding the compressor station.[151] This affidavit testimony of the nine local residents, which was presented in nine pre-printed form affidavits, has little or no probative value because it contains less than objective claims contending that the compressor station has damaged or will damage the environment and has interfered or will interfere with their use and enjoyment of the Chapter 91 Waterways area surrounding the compressor station. Additionally, the affidavit testimony of the nine local residents does not contain any scientific or technical analysis evidencing harm to the environment. It also does not offer any evidence demonstrating that the compressor station has caused or will cause damage to the Kings Cove conservation area in Weymouth and Lovell's Grove Park in Weymouth as the nine residents claim. Indeed, the evidence in the record, much of it from the Epsilon Analysis performed for the Applicant and not effectively refuted by the Residents,[152] demonstrates no harm for the following reasons.

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[151] Residents' Pre-RDA Hearing Brief (Oct. 23, 2023), at p. 18; Residents' Post-RDA Hearing Brief (Dec. 8, 2023), at p. 37.

[152] In his testimony on behalf of the Applicant at the RDA Hrg, Mr. Paquette cited this unrefuted evidence from the Epsilon Analysis in testifying "that construction of the [c]ompressor [s]taion on the [Project] Site (including its

First, no activities, structures, or operations related to the compressor station are located in waterways or flowed tidelands of the Fore River or Kings Cove in Weymouth.[153]

Second, the compressor station is set back from the shoreline at a significant distance and separated from it by the Kings Cove conservation area and Lovell's Grove Park.[154]

Third, the Kings Cove conservation area is the subject of a Conservation Restriction pursuant to G.L. c. 184, §§ 31-33 and the Lovell's Grove Park parcel, is a one-acre public open space located along the shore of the Weymouth Fore River south of Bridge Street. As a result, open spaces for active or passive recreation at or near the water's edge remain open and available to the public.[155]

Lastly, on-foot passage to waterfront open space facilities including the Kings Cove conservation area and its shoreline walking trails, public parking, and pedestrian access along the internal loop road, and Lovell's Grove, which includes a lawn, trees, vegetation, a walking path and water access for fishing and emergency access, remain available to the public.[156]

To sum up, contrary to the Residents' claims, the compressor station does not interfere with public rights to walk or otherwise pass freely on private tidelands for purposes of fishing, fowling, or navigation and the compressor station includes reasonable measures to provide on-

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suction and discharge pipes) had minimal human and community impacts, and most of those impacts were temporary and minimized during construction using appropriate mitigation measures." Mr. Paquette's PFT, ¶ 19, citing, Epsilon Analysis Sections 4.0, 5.2, 5.2.8.

[153] Mr. Paquette's PFT in the ODA Hearing, ¶ 12; RDA Hrg Tr. at 128:21-129:7.

[154] Epsilon Analysis Section 4.3.1; Fig. 2-2; Applicant's Chapter 91 Waterways Application at p. 5-3.

[155] Epsilon Analysis at Section 4.3.1; Fig. 2-2.

[156] Id.

foot passage for the public in the exercise of its rights. Mr. Paquette confirmed this in his testimony on behalf of the Applicant at the RDA Hearing by testifying "that construction of the [c]ompressor [s]taion on the [Project] Site (including its suction and discharge pipes) had minimal human and community impacts, and most of those impacts were temporary and minimized during construction using appropriate mitigation measures."[157] He also testified that "[t]he [c]ompressor [s]tation [located on the Project Site] is [] consistent with the industrial land use of the [Project] Site, and visual impacts [of the facility] were minimized by the design of the building, which matches the look and style of the nearby MWRA[158] sewer building, and vegetative screening."[159] He also confirmed in his testimony that "[c]onstruction of [the] compressor station (and associated pipeline connections) at any of the seven alternative sites would have resulted in greater human and community impacts . . . [caused by] the need to construct significant lengths of new suction and discharge pipelines across Southeastern Massachusetts, or in the case of the two island alternatives, in the coastal waters of Boston Harbor and Massachusetts Bay."[160]

C. The Norfolk Superior Court's Remand Decision Does Not Require MassDEP to Perform Another Environmental Justice Review of the Compressor Station

The Residents make Environmental Justice claims against MassDEP's Remand

[157] Mr. Paquette's PFT, ¶ 19, citing, Epsilon Analysis Sections 4.0, 5.2, 5.2.8.

[158] "MWRA" is the acronym for the Massachusetts Water Resources Authority, a public authority established by the Massachusetts Legislature in 1984 "to provide wholesale water and sewer services to 3.1 million people and more than 5,500 large industrial users in 61 metropolitan Boston communities." https://www.mwra.com/about-mwra.

[159] Mr. Paquette's PFT, ¶ 20, citing, Epsilon Analysis Section 5.2.8.

[160] Mr. Paquette's PFT, ¶ 21, citing, Epsilon Analysis Section 5.2.8.

Determination contending that MassDEP should have required the Applicant to: (1) submit an Environmental Impact Report ("EIR") for the compressor station pursuant to sections 58 and 59 of the 2021 Climate Act (Ch. 8 of the Acts of 2021) and (2) engage in further enhanced public participation regarding the compressor station.[161] I reject these Environmental Justice claims because the Norfolk Superior Court's Remand Decision did not require MassDEP to perform any further Environmental Justice review of the compressor station but instead was limited to ordering MassDEP to properly apply 310 CMR 9.02 in making its determination of whether the compressor station constituted an ancillary facility to the HubLine within the meaning of the Regulation.

D. The Residents' Environmental Justice Claims Lack Merit

Assuming only for the sake of argument that the Petitioners can assert their Environmental Justice claims against MassDEP's Remand Determination, the claims fail on the merits for the following reasons.

1. Sections 58 and 59 of the 2021 Climate Act Do Not Apply to the Compressor Station

The Massachusetts Environmental Policy Act ("MEPA"), as codified in G.L. c. 30, §§ 61-62L, sets forth a broad policy of environmental protection in [the] Commonwealth by directing [all State agencies] to 'review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize *damage to the environment*."' In the Matter of Palmer Renewable Energy, LLC, OADR Docket No. 2021-010 ("PRE"), Recommended Final

[161] Residents' Post-RDA Hearing Brief, at p. 39.

Decision (Sept. 30, 2022), 2022 WL 17479440, *49, adopted as Final Decision (Nov. 28, 2022), 2022 WL 17479443, citing, Ten Persons of the Commonwealth v. Fellsway Dev. LLC, 460 Mass. 366, 368 (2011) (emphasis supplied). MEPA defines ""damage to the environment" as:

> *any destruction, damage or impairment*, actual or probable, *to any of the natural resources of the commonwealth and shall include but not be limited to air pollution* . . . Damage to the environment[,] [however,] shall not be construed to include any insignificant damage to or impairment of such resources.

G.L. c. 30, § 61 (emphasis supplied).

MEPA and the MEPA Regulations at 301 CMR 11.00 "establish a process to ensure that State permitting agencies [such as MassDEP] have adequate information on which to base their permitting decisions, and that environmental impacts of the project are avoided or minimized." In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020, Recommended Final Decision (March 22, 2017), 2017 WL 165646, *18, n. 28, adopted as Final Decision (March 27, 2017), 2017 WL 1656460; PRE, 2022 WL 17479440, *49. "Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental notification form (ENF) with the [EEA] Secretary] . . . who determines whether the project meets the [MEPA] review threshold requiring an . . . [Environmental Impact Report ("EIR")]." Id. "If so, and after submission of a final environmental impact report (FEIR) and opportunity for review by the public, the [EEA] Secretary certifies whether the FEIR has complied with MEPA . . . ." Id. A Certification by the EEA Secretary that the FEIR complies with MEPA means that the project's proponent has adequately described the environmental impacts [of the proposed project] and addressed mitigation" as required by MEPA. Id. However, the

Certification "does not constitute final approval or disapproval of a particular project, which ultimately is left to [the] permitting agenc[y]." Id. The permitting agency "retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [[the] Project that is subject to MEPA review . . . ." Id.

The 2021 Climate Act made amendments to MEPA ("the MEPA Amendments") which included those in Sections 58 and 59 of the Act. Sections 58 and 59 made the following amendments to MEPA.

a. Section 58 of the 2021 Climate Act

Section 58 of the 2021 Climate Act ("Section 58") amended MEPA (G.L. c. 30, § 62B) by requiring the submittal of a MEPA environmental impact report:

> for any [proposed] project that *[1]* is likely to cause damage to the environment and *[2]* is located within a distance of 1 mile of an environmental justice population; provided, *[3]* that for a [proposed] project that impacts air quality, such environmental impact report [is] required if the project is likely to cause damage to the environment and is located within a distance of 5 miles of an environmental justice population. . . .

(numerical references supplied). Contrary to the Residents' claims, Section 58 does not apply to the compressor station because Section 102B of 2021 Climate Act provides that Section 58 only applies to "new projects filed under section 62A of chapter 30 of the General Laws on or after the effective date of regulations promulgated under section 102A." The compressor station is not a new project falling under the aegis of Section 58 because the Applicant submitted its Chapter 91 license application to MassDEP for the compressor station in 2015, well before the 2021 Climate Act was enacted in March 2021 and took effect on June 24, 2021,

and before EEA's Secretary promulgated regulations to implement Section 58 in December 2021.

Section 58 also does not apply to the compressor station because the proponent of a proposed project is only required to file an ENF for the project pursuant to G.L. c. 30, § 62A if the project "meets or exceeds one or more review thresholds or the [EEA] Secretary requires fail-safe review[.]" 301 CMR 11.01(4)(a). Here, a determination has already been made by a previous EEA Secretary that the compressor station is not subject to MEPA review because it does not meet or exceed any review thresholds. This determination was made eight years ago, in July 2016, by EEA's then Secretary, Matthew Beaton ("former Secretary Beaton").[162]

b. Section 59 of the 2021 Climate Act

Section 59 of the 2021 Climate Act ("Section 59") amended MEPA (G.L. c. 30, § 62E) by prohibiting an agency[163] from exempting from an EIR "any project that *[1]* is located in a neighborhood that has an environmental justice population and *[2]* is reasonably likely to cause damage to the environment, as defined in section 61." (numerical references supplied). As Section 59 makes clear, this amendment applies only to a project "*that is located in a neighborhood* that has an environmental justice population." (emphasis supplied). Geographically, this location requirement is far more restrictive than the location requirements of Section 58 discussed above which requires a proposed project to be located generally

[162] July 11, 2016 – Request for Advisory Opinion, Atlantic Bridge Project and Access Northeast Project - Weymouth; Ms. Hopps' Rebuttal PFT, ¶ 10.

[163] G.L. c. 30, § 62 defines "agency" as:

> an agency, department, board, commission or authority of the commonwealth, and any authority of any political subdivision which is specifically created as an authority under special or general law.

"within a distance of 1 mile of an environmental justice population," but "within a distance of 5 miles of an environmental justice population" if the proposed project impacts air quality. Although it is located near a neighborhood that has an environmental justice population, the compressor station *is not* located in a neighborhood that has such a population. Accordingly, Section 59 does not apply to the compressor station.

2. MassDEP Has Complied with Applicable Enhanced Public Participation Requirements Regarding the Compressor Station

The Residents claim that "[n]one of [MassDEP's] Environmental Justice 'additional outreach' for the compressor station conducted in March and April 2016 complies with the new and expanded requirements and protections set forth [in] the 2021 Climate Act[.]"[164] I reject this claim for the following reasons.

First, the Residents' claim is connected to their meritless claim discussed above that the compressor station requires an EIR under MEPA.

Second, notwithstanding their burden of proof in the appeal, the Residents have failed to identify any enhanced public participation measures that the Applicant should have performed and/or MassDEP should have performed or directed the Applicant to perform.

Third, MassDEP previously provided significant enhanced public participation for the compressor station by various means, including: (1) conducting a public hearing on the Applicant's Chapter 91 license application for the compressor station on March 28, 2016 ("March 2016 Public Hearing"), in the evening, at the Abigail Adams Middle School in

[164] Residents' Post-RDA Hearing Brief, at p. 36.

Weymouth; (2) providing translators in Spanish and two Chinese languages at the March 2016 Public Hearing; and (3) providing free transportation to and from the March 2016 Hearing from two locations in Quincy.[165] In addition, nearly 250 people submitted public comments on the compressor station.[166]

MassDEP's significant enhanced public participation for the compressor station is further reflected by the Health Impact Assessment Study ("HIA Study") that in July 2017, then Massachusetts Governor Charlie Baker ("former Governor Baker") directed MassDEP and the Massachusetts Department of Public Health ("MassDPH") to jointly perform of the compressor station.[167] Former Governor Baker ordered the HIA Study to be performed in response to concerns raised by the public about air quality and public health in Weymouth and the surrounding communities regarding the compressor station.[168]

"MDPH contracted with the Metropolitan Area Planning Council (MAPC)[169] to assist with the facilitation of the HIA [Study], the community engagement process, and the HIA

[165] March 9, 2016 – Notice of License Application.

[166] RDA Hrg Tr. at 191:4-11.

[167] https://www.mass.gov/doc/health-impact-assessment-weymouth-proposed-natural-gas-compressor-station-executive-summary/download

[168] Id.

[169] MAPC is a public regional planning agency created by the Massachusetts Legislature in 1963 that serves 101 cities and towns of Greater Boston. https://www.mapc.org/aboutus. Its mission is "[t]o promote smart growth and regional collaboration" as well as:

> sound municipal management, sustainable land use, protection of natural resources, efficient and affordable transportation, a diverse housing stock, public safety, economic development, clean energy, healthy communities, an informed public, and equity and opportunity among people of all backgrounds.

Id.

report."[170] "MDPH provided project management and reviewed and analyzed health surveillance data to assess existing conditions [and] MassDEP conducted air monitoring and assessed potential impacts to air quality to inform the HIA [Study]."[171]

The HIA Study of the compressor station was issued in January 2019 and found that the estimated air and sound emissions of the facility would not exceed regulatory emission limits.[172] As noted in the Study's executive summary:

> the [Study] was conducted as a systematic approach to determine: 1) the current health status of the local community, 2) current background air quality near the proposed project site, 3) the potential health effects of the proposed compressor station on residents of surrounding neighborhoods and municipalities and, 4) possible actions to protect and promote community health in the area. . . .[173]

As also noted in Study's executive summary:

> [the Study had been] preceded by multiple years of activities in opposition to the proposed compressor station and its siting in Weymouth along the Fore River. This prior engagement resulted in the formation of community groups and actions taken by these organizations as well as public officials and statewide groups to challenge the proposal. For example, residents conducted their own air monitoring and analysis, the town of Weymouth conducted independent noise monitoring, and residents connected with other groups in the state that [were] investigating the effects of natural gas infrastructure, including compressor stations. Many of these same residents and stakeholders provided their feedback through the HIA process, sharing the effects they [felt] the proposed station would have on residents, neighborhoods and the environment in the surrounding areas.[174]

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[170] https://www.mass.gov/doc/health-impact-assessment-weymouth-proposed-natural-gas-compressor-station-executive-summary/download, at p. 1.

[171] Id.

[172] Id.

[173] Id., at p. 1.

[174] Id., at p. 5

3. MassDEP Presented Undisputed Testimony from Ms. Hopps that MassDEP Properly Applied the Environmental Justice Principles of EEA's 2021 Environmental Justice Policy in Making Its Remand Determination

In addition to making the MEPA Amendments discussed above, the 2021 Climate Act also "codifie[d] foundational definitions for environmental justice principles and populations, as well as environmental benefits and burdens," which established a statutory environmental equity mandate requiring EEA agencies, including MassDEP, to promote environmental equity in the Commonwealth in the making of environmental policy decisions and in the development, implementation, and enforcement of all environmental laws, regulations, and policies. PRE, 2022 WL 17479440, *53. EEA reinforced this environmental equity mandate in the 2021 Environmental Justice Policy ("EEA's 2021 EJ Policy") it issued following the Massachusetts Legislature's enactment of the 2021 Climate Act. PRE, 2022 WL 17479440, *1, 49-56.

The environmental equity mandate of EEA's 2021 EJ Policy is reflected by the Policy's Statement of Purpose which provides that:

> *environmental justice principles shall be an integral consideration*, to the extent applicable and allowable by law, [by EEA and its agencies, including, the Department,] . . . *in the implementation of all* EEA programs, *including* but not limited to . . . *the* promulgation, implementation[,] and *enforcement of laws, regulations, and policies* . . . ."[175]

The Policy defines "Environmental Justice Principles" as:

> *principles that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color,* income, class, handicap, gender identity, sexual orientation, national origin,

[175] EEA's 2021 EJ Policy, at p. 4 (definition of "Environmental Justice Principles"); and p. 5 (Statement of Purpose) (emphasis supplied).

> ethnicity or ancestry, religious belief[,] or English language proficiency, *which includes:*
>
> *(i) the meaningful involvement of all people with respect to* the development, implementation, and *enforcement of environmental laws, regulations, and policies,* including climate change policies; and
>
> *(ii) the equitable distribution of* energy and *environmental benefits and environmental burdens*.[176]

At the RDA Hearing, Ms. Hopps testified that "[MassDEP also] fully considered the [compressor station] with respect to Chapter 91 and its regulations in the context of [EEA's 2021 EJ Policy], and found it to be consistent with the Environmental Justice Principles specified therein."[177] In support of that finding, Ms. Hopps testified that "[the c. 91 license] application process [for the compressor station] provided meaningful involvement, and given that the [c]ompressor [s]tation preserve[d] public access to waterfront open space, it [did] not result in Environmental Benefits or Burdens with respect to Chapter 91 interests."[178] In response, the Residents did not effectively refute Ms. Hopps' testimony.

4. The Federal D.C. Circuit Court of Appeals' Decision in City of Port Isabel Does Not Govern MassDEP's Remand Determination

The Residents contend that the recent decision of the federal D.C. Circuit Court of Appeals ("D.C. Circuit") in City of Port Isabel v. Federal Energy Regulatory Commission, 111 F.4th 1198 (D.C. Cir. 2024) ("City of Port Isabel") supports their claim that MassDEP's Remand Determination is improper. I reject the Residents' claim and agree with the Applicant

[176] EEA's 2021 Policy, at p. 4 (definition of "Environmental Justice Principles") (emphasis supplied).

[177] Ms. Hopps Rebuttal PFT, at p. 5.

[178] RDA Hrg Tr. at 191:12-15.

and MassDEP that the D.C. Circuit's decision in City of Port Isabel does not govern MassDEP's Remand Determination because the decision interpreted the federal National Environmental Policy Act ("NEPA") which imposes certain obligations on federal agencies but does not apply to state agencies such as MassDEP. 42 U.S.C. § 4332.

In City of Port Isabel, the D.C. Circuit ruled that FERC's orders authorizing the construction and operation of several natural gas projects were invalid under NEPA because FERC failed to adequately explain in the Environmental Impact Statement ("EIS") it published for each approved project its decision to examine environmental justice impacts within a two-mile radius of the projects when some environmental impacts of the projects could extend beyond that area. 111 F.4th at 1206-1207. The D.C. Circuit remanded the matter back to FERC, instructing it to either better explain its reasoning or analyze the projects' impacts within a different radius. Id.

On remand, FERC generated expanded environmental justice analyses for the projects and issued re-authorizations for the projects. Id. at 1207. The D.C. Circuit ruled that these re-authorizations of the projects also were also invalid under NEPA because FERC had failed to draft a formal supplemental EIS for each project and submit the draft for public comment prior to issuing a final re-authorization for a particular project. The D.C. Circuit ruled that NEPA required FERC to draft a formal Supplemental EIS for each re-authorized project because "[FERC had] issued an entirely new and significantly expanded environmental justice analysis" which "reached new conclusions." Id. at 1207-1210.

To sum up, the D.C. Circuit's decision in City of Port Isabel based on the federal NEPA

requirements has no application here regarding whether the Applicant's compressor station is an ancillary facility to the HubLine under a Massachusetts Waterways Regulation, 310 CMR 9.02, and/or complies with Massachusetts Environmental Justice requirements as set forth in the 2021 Climate Act and EEA's 2021 EJ Policy.

CONCLUSION

For the reasons set forth above, I recommend that MassDEP's Commissioner issue a Final Decision on Remand that affirms MassDEP's Remand Determination and directs MassDEP to issue a final c. 91 License to the Applicant for the compressor station.

Salvatore M. Giorlandino

Date: December 20, 2024

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to MassDEP's Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner and any member of the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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ADDENDUM NO. 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution ("OADR") is a quasi-judicial office within the Massachusetts Department of Environmental Protection ("the Department" or "MassDEP") which is responsible for advising the Department's Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 ("TGP"), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department's Commissioner and is separate and independent of the Department's program offices, Regional Offices, and Office of General Counsel ("OGC"). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise the Department's Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department's Commissioner to serve as neutral hearing officers, and are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and issuing Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner, as the agency's final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner's Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).