



247 Station Drive
Westwood, MA 02090

Denise M. Bartone
Manager, Licensing & Permitting
denise.bartone@eversource.com
781-441-8174

November 14, 2022

Ms. Tori Kim, Director
MEPA Office
100 Cambridge Street, Suite 900
Boston, MA 02114

Re: Comments on Proposed MEPA Regulatory Amendments

Dear Director Kim:

Eversource Energy Service Company ("Eversource") appreciates the opportunity to submit comments in response to the proposed amendments to 301 CMR 11.00 (MEPA regulations) published in the Massachusetts Register on October 14, 2022. Eversource is New England's largest energy delivery company with approximately 4 million electric, natural gas and water customers in Connecticut, Massachusetts and New Hampshire and is dedicated to and values its role as an environmental steward.

Eversource takes its responsibility to ensure all required activities are carried out in accordance with federal, state, and local environmental regulations very seriously, including MEPA when applicable. In order to meet our obligation to provide vital public services, Eversource must conduct routine maintenance, replacement, and emergency repair of its systems to ensure reliability and safety are maintained in compliance with national, regional, and industry standards and regulatory policies. It is critical that our approach to operating and maintaining the systems fully supports and enables the electrification required to mitigate climate change. In furtherance of the Commonwealth's clean energy objectives, Eversource must proceed in a timely manner with maintenance and/or replacement of existing infrastructure to ensure its system can safely handle increased electrical loading as well as support proliferation of renewable generation and storage that will be an increasing part of the modern electrical grid. For years, Eversource has operated in full compliance with the MEPA regulations without jeopardizing its ability to meet project deadlines or affecting overall service costs to the ratepayers. As detailed further below, by adding unnecessary time and process, the proposed MEPA amendments will dramatically impact our ability to meet our obligations stated above and will have a detrimental impact on costs to rate payers and further impact our ability to fully support the implementation of the Commonwealth's very aggressive clean energy transition.

Changes to language in 310 CMR 11.03

Specifically, there are two changes to the existing MEPA regulations that are of immediate concern. First, are the modifications to the definitions of Replacement Project and Routine Maintenance, our concerns with

which are detailed below in the next section. Second, is the coupling of those changes to the definitions with additional changes in 310 CMR 11.03, by addition of the following language to the end of the first paragraph:

“The review thresholds do not apply to the placing, maintaining, repairing or relocating of poles, wires, conduits, cables, pipes and associated fixtures by public utility companies under Section 71 of Chapter 164 of the Massachusetts General Laws or Sections 21 and 22 of Chapter 166 of the Massachusetts General Laws, provided the Project meets the definition of a Replacement Project or Routine Maintenance under 301 CMR 11.02.”

Inclusion of the phrase “provided the Project meets the definition of a Replacement Project or Routine Maintenance under 301 CMR 11.02”, together with the definition changes, would result in more restrictive requirements for utility line projects than what is provided for in the statutory exemption at MGL Ch.30 § 62A. In that statute, the legislature provided this exemption without further qualification:

“This section shall not apply to the placing, maintaining, repairing or relocating of poles, wires, conduits, cables, pipes and associated fixtures by public utility companies under section seventy-one of chapter one hundred and sixty-four and sections twenty-one to twenty-two, inclusive, of chapter one hundred and sixty-six.”

This statutory exemption applies to activities beyond those defined as “routine maintenance or replacement projects” and includes the “placing” of new poles, wires, conduits, cables, pipes and associated fixtures. By including the proposed language in quotations above, the Secretary would be qualifying a statutory exemption in a manner that exceeds the regulatory authority of the MEPA Office. The statute clearly allows for the placement of new infrastructure as well as the replacement and maintenance of existing infrastructure and attempting to limit such a statutory exemption would be subject to a legal challenge based on the theory of “ultra vires.” Eversource strongly recommends that this change be deleted so that the clear existing statutory exemption that the legislature has provided for public utility work continues in full force and effect and without further qualification, clarification, or case-by-case determinations. If not removed, Eversource will be forced to consider appropriate legal action seeking a declaration that the proposed change exceeds the Secretary’s authority.

Definitions of “Replacement Project” and “Routine Maintenance”

A. Replacement Project

Eversource is concerned that the proposed changes to the definition of Replacement Project are highly subjective and will cause confusion and result in more requests for advisory opinions. These case-by-case advisory opinions will undermine our ability to effectively plan for and respond to our maintenance and replacement projects.

The elimination of the automatic trigger based solely on the need for permitting without regard for the actual impact of the project is a welcome change. The existing automatic trigger does not consider the review

thresholds established or otherwise consider that a replacement project will have little additional impacts and, in some circumstances, will result in less impact.

Despite this helpful change, the Secretary has proposed to only apply the new version of the Replacement Projects category where the existing uses or Projects being replaced were “previously authorized.” Eversource is very concerned that this change will focus the exemption on preexisting uses and projects/facilities that were issued specific permits and will not take account that historical placement of some utility structures in existing rights of way and other facilities predate permitting and environmental review laws and were established in accordance with more general legal authority provided by the legislature or common law at the time they were constructed. The replacement of these uses should still fall under the definition as they currently do. Eversource suggests removing the change so as not to further burden and lengthen the time required to make needed replacements or repairs.

The Agency’s current proposal is: “Any Project to repair, replace, or reconstruct a previously authorized use of or Project on a Project site that does not:” Eversource suggests the Agency restore the original language or utilize, as shown below, a reference already within section 11.03 to an “existing structure, facility or activity.”

In addition, Eversource would like to understand what the Secretary intended with the proposed addition of the term “materially” (which is itself not otherwise defined in 301 CMR 11.02) to the definition of Replacement Project. If the use or project is already established, it certainly makes sense that for a review to be triggered, there has to be more than just any increase in impact to trigger a review. However, there are technical and power outage limitations inherent with any utility construction that often prevent Eversource from replacing utility infrastructure in precisely the same location. These circumstances consequently require work in adjacent areas to place the replacement facility. There could be temporary impacts associated with the use of this adjacent location, but the overall permanent resource impact will be similar. Eversource expects that the need for review will be based on a material increase in permanent impacts associated with the existing structure, facility, or activity.

To address the concerns raised above, Eversource recommends that the changes read as follows:

Replacement Project. Any work to replace or reconstruct an existing structure, facility, or activity that meets one or more of the following conditions:

- (a) the work does not materially increase potential environmental impacts of the existing structure, facility, or activity; or
- (b) the work utilizes performance standards or best management practices that have been developed to avoid, minimize, or mitigate potential environmental impacts to the maximum extent practicable; or
- (c) the work does not result in any substantial (10% or more) Expansion of an existing structure, facility, or activity, provided that such an existing structure, facility, or activity has not been discontinued for more than three years and that the Expansion does not meet or exceed any review thresholds.

If such language cannot be adopted as requested, Eversource would recommend leaving the existing definition of “Replacement Project” unchanged yet open for further discussion.

B. Routine Maintenance

The proposed changes to the definition of Routine Maintenance will cause significant uncertainty with Eversource's ongoing efforts to improve reliability of its system while at the same time accounting for increased electrical loading related to the transition from fossil fuel use for heating and transportation and associated reduction in greenhouse gas emissions. The proposed definition shown below as drafted poses many issues for Eversource.

Routine Maintenance. Any maintenance work or activity for a previously authorized use of or Project on a Project site that:

(a) is carried out on a regular or periodic basis in a manner within substantially the same footprint, depth, or other relevant physical dimensions of the Project, using primarily the same methods; and

(b) ~~that~~ has no potential for Damage to the Environment or utilizes for which performance standards ~~that~~ have been developed and approved by regulatory agencies to ~~that~~ avoid, minimize, or mitigate potential environmental impacts to the maximum extent practicable.

First, Eversource has the same comment regarding use of the term “previously authorized” as it did for its use in the definition of “Replacement Project” and recommends its elimination or the addition of the more general language “existing structure, facility, or activity.” Second, Eversource recommends elimination of the added language that would require maintenance to occur “within substantially the same footprint, depth, or other relevant physical dimensions.” Proper maintenance of utility lines often requires use of improved structures and technology that are modern day industry-standard and that requires placement in different nearby locations, at different depths, or generally within similar alignments. All such work that involves a regulated activity will require applicable environmental permits. Review of any impact from such work can be conducted sufficiently through the regulatory permitting process and appropriate avoidance, minimization and mitigation measures can be incorporated into resulting permits. MEPA review of such work, which itself may be exempt from regulatory review under other statutory and regulatory provisions, would only represent an additional source of delay and cost to the rate payers and to the Commonwealth.

In order to meet regulatory, reliability and safety requirements throughout its distribution and transmission system and manage ratepayer cost escalation, Eversource must be able to conduct this work without a new requirement for review through the MEPA process. As an example, MEPA review should not be triggered simply because it is technically infeasible to place a new utility pole in the same place as a preexisting structure, to use a pole of the same dimension to carry modern day electric transmission lines or install replacement underground infrastructure within the same existing utility easement. The triggers for additional review should be based on meeting non-exempted existing thresholds and not be subject to the added and unnecessary case-by-case interpretations that would result from the proposed changes.

Finally, the requirement that applicable performance standards be developed and approved by regulatory agencies provides little flexibility to Eversource and other proponents to use updated best management practices offered by other recognized bodies such as non-governmental environmental stewardship

organizations or corporate entities in cooperation with local, state, and federal regulatory entities. Such a requirement could impose use of outdated policies and guidance documents that may not represent current science as regulatory agencies are often constrained from issuing timely updated standards and methods. Eversource continually examines construction practices for opportunities to lessen potential associated environmental impacts, improve efficiency, while potentially achieving overall cost savings for our rate payers. These innovative approaches are incorporated into projects as a result of interactions with regulatory agencies during the permitting process.

Therefore, Eversource recommends that the changes read as follows:

Routine Maintenance. Any maintenance work on an existing structure or facility performed on a regular or periodic basis that meets one or both of the following conditions:

- (a) the work does not materially increase potential environmental impacts of such existing structure or facility; or
- (b) the work is conducted in accordance with performance standards or construction best management practices that have been developed to avoid, minimize, or mitigate potential environmental impacts to the maximum extent practicable.

If such language cannot be adopted as requested above, Eversource would recommend leaving the existing definition of “Routine Maintenance” unchanged and is open to further discussion on appropriate changes.

Additional Changes to Review Thresholds

Eversource supports the proposed changes to review thresholds for Land and ACECs. Eversource often encounters circumstances where small areas of municipal or state-owned property are crossed by a public utility project or otherwise requires an easement through the Article 97 process to cross such property. These public utility projects are often underground and have little to no impact on current and future use of the property for its intended purposes. Most of these circumstances will likely fit into the proposed category of de minimis dispositions requiring no further review. Eversource would be willing to work with MEPA to develop a streamlined process for such review to ensure such determinations can be received in a timely manner.

Eversource agrees that an appropriate threshold should be used as a stand-alone trigger for review of work within an ACEC. It is appropriate to recognize that such smaller proposals will have little to no impact on such an area and any such impact can be appropriately reviewed during permitting.

Conclusion

Eversource requests that the current and ongoing needs for timely maintenance and replacement of existing utility infrastructure be carefully considered when making adjustments to the existing definitions of Replacement Project and Routine Maintenance. Eversource and National Grid have coordinated and agreed upon the suggested improvements to these definitions offered above to ensure you have a consistent approach to consider for inclusion in the final rule. Utilities carefully plan these activities to ensure that they can be conducted with minimal impact and in some cases timed to avoid impacts of concern to natural resource agencies. Undue delay in implementation of these projects as a result of unnecessary review could

lead to more emergency repair activity, which does not allow for such careful consideration as the immediacy of addressing a widespread outage or preventing an imminent one will become the priority. When Eversource project teams can plan replacement and maintenance activities, less impactful pole and foundation locations can be examined within improved design and engineering parameters as these activities are vetted with the appropriate permitting agency and properly conditioned as a result of that process.

In closing, Eversource appreciates the careful consideration of these comments and looks forward to continued cooperation with your office on its projects that are subject to MEPA review and as part of the working group on future regulatory changes related to greenhouse gases and environmental justice priorities.

Sincerely,

A handwritten signature in black ink, appearing to be 'DB' with a long horizontal stroke extending to the right.

Denise M. Bartone
Manager, Licensing & Permitting

Cc: Secretary Bethany A. Card, Executive Office of Energy & Environmental Affairs