

**COMMONWEALTH OF MASSACHUSETTS  
ENERGY FACILITIES SITING BOARD**

Petition and Application of NSTAR Electric Company d/b/a Eversource Energy for a Certificate of Environmental Impact and Public Interest pursuant to G.L. c. 164, §§ 69K-69O

Docket No. EFSB 22-01

**CONSERVATION LAW FOUNDATION’S AND GREENROOTS, INC.’S  
COMMENTS ON THE TENTATIVE DECISION**

**I. Introduction**

If adopted, the Tentative Decision issued by the Energy Facilities Siting Board (“Siting Board”) will perpetuate environmental injustices in East Boston and preserve the unjust status quo concerning energy facilities siting in environmental justice populations in Massachusetts, in violation of An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, St. 2021, c. 8, §§ 56-60, M.G.L. c. 30, §§ 62, 62K (“Roadmap Law”). Despite clear evidence to the contrary, and despite continuing to operate without an environmental justice strategy (fifteen years after being required to develop one),<sup>1</sup> the Siting Board staff improperly concludes in the Tentative Decision that the energy and environmental benefits of the proposed substation outweigh the burdens. Throughout the Tentative Decision, the Siting Board relies heavily on its two prior decisions<sup>2</sup> concerning the proposed substation, but this reliance is misplaced because

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<sup>1</sup> At long last, EEA released its draft environmental justice strategy, including a chapter regarding the EFSB, on November 9, 2022, and is seeking public comments before finalizing the strategy. Comments are due by January 13, 2023. The draft environmental justice strategy is available at: <https://www.mass.gov/info-details/eeas-draft-environmental-justice-ej-strategy>.

<sup>2</sup> The Siting Board approved the substation in 2017 pursuant to M.G.L. c. 164, § 69J and directed the company to consider moving the location. NSTAR Electric Company, EFSB 14-04/D.P.U. 14-153/14-154, at 68-69 (2017) (“Eversource 2017 Final Decision”). The company sought to move the location to its current proposed location in the project change filing. NSTAR Electric Company, EFSB 14-04A/D.P.U. 14-153A/14-154A, at 97 (2021) (“Eversource 2021 Final Decision”).

the Roadmap Law was enacted after the issuance of those two prior decisions and before the application and petition pursuant to M.G.L. c. 164, §§ 69K-69O in this case. The Roadmap Law marks a clear shift away from the status quo for siting, yet the Tentative Decision reads as if there should be no change to the status quo. If Massachusetts is going to be a leader in ensuring a just energy transition, then the Siting Board must reject the Tentative Decision.

**II. The Board Should Delay Voting Until After Massachusetts Environmental Policy Act Review, the Comment Period Closes for the Environmental Justice Strategy, and the New Administration Assumes its Role.**

Voting on the Tentative Decision should be delayed until after Massachusetts Environmental Policy Act review, finalization of an environmental justice strategy, and Massachusetts' new administration is in place, which is set to occur in less than two months from the Siting Board meeting to discuss the proposed substation. As discussed in the initial brief of Conservation Law Foundation ("CLF") and GreenRoots, Inc. ("GreenRoots"), the proposed substation is subject to Massachusetts Environmental Policy Act ("MEPA") review and the Roadmap Law, which allow the secretary of the Executive Office of Environmental and Energy Affairs ("EEA") to require an environmental impact report, including assessment of impacts on environmental justice populations at any time.<sup>3</sup> M.G.L. c. 30, § 62B. As chair of the Siting Board and decider at the MEPA Office, the EEA Secretary should require MEPA review before the Siting Board votes. Further, just last week, EEA released a draft environmental justice strategy, including a Siting Board strategy, and is seeking public comments through January 13, 2023.

On November 8, 2022, Maura Healey became the Commonwealth's first elected female governor. Governor-elect Healey has expressed her concern about the proposed facility.<sup>4</sup> Upon her inauguration, Governor-elect Healey has the opportunity to appoint six of the nine members

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<sup>3</sup> CLF/GR Initial Brief at 31-34.

<sup>4</sup> See Maura Healey Tweet, TWITTER (Feb. 22, 2021), <https://twitter.com/massago/status/1364026672555708423>.

of the Siting Board. Historically in Massachusetts, Governors appoint new leaders to serve in agency leadership roles early in their administration. It is likely that the six public members of the Siting Board will be replaced in the immediate future: the secretary of the EEA, the two Department of Public Utilities Commissioners, the Massachusetts Department of Environmental Protection (“MassDEP”) Commissioner, the Department of Energy Resources Commissioner, and the secretary of the Executive Office of Housing and Economic Development. The current nine Siting Board members have not deliberated about this docket yet and will first consider the proposed substation and Certificate of Environmental Impact and Public Interest on November 29, 2022. However, weeks later, the Siting Board members will change after the new administration assumes its role. The vote should be stayed until the new Board Members are appointed.

It is illogical for the Siting Board to vote on the Tentative Decision until: (1) MEPA review is complete; (2) the EEA environmental justice strategy is complete and can be implemented in this docket; and (3) the new Siting Board members are appointed under the Healey-Driscoll Administration. Further, we disagree with the Siting Board staff’s Tentative Decision to not wait a few months for the Weymouth Compressor Station decision on what constitutes an ancillary facility.

### **III. If Adopted, the Tentative Decision would Perpetuate Environmental Injustice.**

Under the Roadmap Law, the Siting Board is statutorily obligated to consider and meaningfully address “environmental justice principles” defined as:

principles that support protection from environmental 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, 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.

M.G.L. c. 30, § 62. The Siting Board claims that this is the first time environmental justice (“EJ”) and language access have been central to reviewing a certificate request, yet it rejects straightforward and reasonable proposals from intervening parties to consider the EJ principles set forth in the Roadmap Law, including a cumulative impact assessment and other recommendations,<sup>5</sup> on the grounds that the proposals “are not mandatory,” and that none of the parties advocating for them “made any request of the Company of the Siting Board to obtain such studies.”<sup>6</sup> Given the significance of the Roadmap Law with respect to the law and policy of the Commonwealth concerning energy facility siting in environmental justice populations, the Siting Board’s rationale for not accepting any of these proposals is exceptionally unpersuasive and legally insufficient.

Without developing any process for weighing the benefits and burdens of the proposed substation under the Roadmap Law or further considering alternatives, a flawed analysis by the Siting Board was foreordained. In the Tentative Decision, the Siting Board engages in an ad hoc and improvised assessment of benefits and burdens, and finds that “considerations of the equitable distribution of energy and environmental benefits and environmental burdens strongly favor the Substation and are consistent with the environmental justice principles articulated in the Roadmap Act.”<sup>7</sup> Yet, the evidence presented in this proceeding clearly contradicts this finding and demonstrates that the environmental burdens outweigh the environmental benefits in

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<sup>5</sup> See, e.g., CLF/GR Initial Brief at 35-40.

<sup>6</sup> Tentative Decision at 157-158, n.141.

<sup>7</sup> *Id.* at 163.

violation of EJ principles and the Roadmap Law.<sup>8</sup> Environmental burdens associated with the proposed site include, but are not limited to, the following:

- The neighborhood has one of the lowest rates of tree canopy, subjecting the area to the urban heat island effect.
- East Boston is host to Logan Airport, a significant source of noise, pollution, and public health impacts.
- The neighborhood is at extreme risk for sea level rise and extreme precipitation.
- The substation is proposed to be located in close proximity to a dense residential neighborhood in a heavily industrial area occupied by a high percentage of renters and low- and moderate-income residents, in an area with a high likelihood for flooding during the life of the proposed substation.
- The proposed location has poor air quality, severe, frequent noise, and the negative health outcomes that accompany those environmental impacts.
- The substation would be adjacent to gas pumps at the newly built police station, and a few hundred feet from a large storage area for Logan Airport's jet fuel.
- The facility will produce electromagnetic radiation, magnetic fields, impact wetlands and tidelands, add to the noise and traffic, operate at high voltage, and prevent the use of that land for open space.
- The East Boston population is already disproportionately burdened with the negative health impacts of heavy industry like respiratory disease, heart disease, stroke, and cancer.
- The substation presents a risk of fire, explosion, electrical arcing, equipment failure, and worker impacts, based on these issues arising at the Newton Substation in June 2022, Scotia Street in 2012, and Andrew Square in 2018.<sup>9</sup> Other issues with Eversource transformers and substations have occurred at Bowdoin Street in Boston in July 2022,<sup>10</sup> at Lexington in August 2022,<sup>11</sup> and Waltham in October 2022.<sup>12</sup>

In the Tentative Decision, the Siting Board staff notes that the Roadmap Law does not define “energy benefits,” and adopts the Company’s suggestion that electric system reliability

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<sup>8</sup> CLF/GR Initial Brief at 28-40.

<sup>9</sup> *Id.* at 38-39.

<sup>10</sup> *Two Eversource workers hospitalized after transformer explosion in Boston*, WHDH 7 NEWS (July 12, 2022), <https://whdh.com/news/two-ever-source-workers-hospitalized-after-transformer-explosion-in-boston/>.

<sup>11</sup> *Transformer explosion in Lexington Center sparks large fire, forces street closures*, WCVB (Aug. 9, 2022), <https://www.wcvb.com/article/lexington-center-fire-massachusetts/40840349>; *see also* 3-alarm fire extinguished at Eversource Substation in Lexington, BOSTON GLOBE (Aug. 8, 2022), <https://www.bostonglobe.com/2022/08/08/metro/3-alarm-fire-extinguished-ever-source-substation-lexington/>.

<sup>12</sup> *Waltham Transformers Explode*, NBC (Oct. 15, 2022), <https://www.nbcboston.com/news/local/waltham-transformers-explode/2864004/>; *see also* ‘Abnormal voltage issue’ causes transformer fires, other problems in Waltham, Massachusetts, WCVB (Oct. 16, 2022), <https://www.wcvb.com/article/waltham-massachusetts-electrical-surgers-fires/41631568>.

should be an “energy benefit,” without citing any support in the legislation or legislative history for that interpretation. Moreover, the Tentative Decision ignores the plain reading of the statute that the definition of “environmental benefits” excludes electric reliability. Even considering reliability as an “energy benefit” under the Roadmap Law, the issue of whether the proposed substation is needed to ensure reliability is disputed, and the Tentative Decision fails to fully and adequately assess various viable and cost-effective technologies that reduce need, including distributed generation, battery storage, and electric vehicles as storage devices.<sup>13</sup> Further, even considering the facility is needed, energy reliability can be achieved while addressing environmental justice concerns by moving the location of the substation to the Massport property at Logan Airport, an analysis that was incomplete during the Eversource 2017 Final Decision and excluded from consideration during the Eversource 2021 Final Decision.<sup>14</sup>

The Siting Board staff’s assessment of “environmental benefits” in the Tentative Decision is flawed and illogical. The Tentative Decision ignores the testimony of numerous East Boston residents who articulate that the proposed substation is a burden. CLF and GreenRoots have argued that remediation of the proposed site that is paid for by ratepayers, including the residents of East Boston, cannot be considered a benefit.<sup>15</sup> The Siting Board summarily rejects this legitimate concern on the ground that “the Roadmap Act’s definitions of benefits are not contingent on which entity pays for the benefit.”<sup>16</sup> This reasoning simply defies logic—increased costs for those impacted by a project are a burden and cannot, by definition, be a benefit.

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<sup>13</sup> CLF/GR Initial Brief at 10-12. In several instances, the Siting Board appears to have begun to recognize the role these technologies can play in changing electricity demand. Rather than evaluating these technologies in this proceeding, however, the Siting Board inexplicably defers consideration of these factors to some future, unspecified case. Tentative Decision at 47-48, 77.

<sup>14</sup> This move is warranted because Massport’s Logan Airport “load is a large portion of the East Boston load and the single largest component of the East Boston load.” CLF/GR Initial Brief at 41.

<sup>15</sup> *Id.* at 40.

<sup>16</sup> Tentative Decision at 160.

The Siting Board staff’s flawed analysis of benefits and burdens also stems directly from its failure to develop its own EJ strategy. Since 2007, the Siting Board has been subject to the state’s Environmental Justice Policy, first executed in 2002 by the Secretary for the Executive Office of Environmental Affairs (now the EEA). For those fifteen years, the Siting Board has been subject to the requirements of the EJ Policy, including the requirement that it develop its own EJ strategy.<sup>17</sup> To date, the Siting Board does not have a final strategy. As a result, not only has the Siting Board violated the state’s environmental justice policy, it has also failed to equip itself to properly assess and make decisions about the siting of energy facilities in environmental justice populations.

In 2017 and 2021, the Environmental Justice Policy was updated and now includes sections—like those in the Roadmap Law—that define “environmental justice principles” (which require “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 the equitable distribution of energy and environmental benefits and environmental burdens”), and require that these principles “shall be an integral consideration to,” among other things, “making any determination or other action related to a project review.”<sup>18</sup> The Siting Board notes in the Tentative Decision that the 2021 EJ Policy contains “Secretariat-wide General Requirements provisions (Sections 13 and 15, in particular) that are applicable to the Siting Board,”<sup>19</sup> but fails to acknowledge the significant requirements concerning consideration of EJ principles and the equitable distribution of energy and environmental benefits and environmental burdens, which apply to the Siting Board.

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<sup>17</sup> 2002 EJ Policy at 7, Executive Office of Environmental Affairs, <https://www.mass.gov/files/documents/2017/11/29/ej%20policy%202002.pdf>.

<sup>18</sup> CLF/GR Initial Brief at 20 (*citing* 2021 EJ Policy at 4-5).

<sup>19</sup> Tentative Decision at 157.

The Siting Board staff boldly asserts in the Tentative Decision that the lack of a Siting Board EJ strategy does not require it to withhold a decision in this proceeding, and points to actions it believes justify that assertion, including implementation of “environmental justice-focused steps in its case-specific reviews,” though it does not attempt to explain what those steps were, and implementation of “several recommendations from EFSB-21-01,” though that proceeding is solely focused on procedural matters to improve public participation.<sup>20</sup> The idea that these actions could substitute for the EJ strategy required by the EJ Policy is without merit, and ignores the fact that the Siting Board’s strategy is fifteen years past due.

The Siting Board staff’s assessment of the proposed substation under the Roadmap Law and EJ Policy fails to account for environmental burdens fully and accurately, and thus the Tentative Decision’s weighing of benefits and burdens is fundamentally flawed. If adopted, the Tentative Decision would perpetuate environmental injustice in East Boston.

#### **IV. The Tentative Decision Fails to Properly Assess the Chapter 91 License Application.**

In the Tentative Decision, the Siting Board staff claims that MassDEP exercised its regulatory expertise in reviewing the Company’s application for a Chapter 91 license, and followed its regulatory requirements in processing the waterways application.<sup>21</sup> But these claims assume that the expertise was exercised properly, and ignore the pending appeal on the draft Chapter 91 license that asserts the license was improperly issued.<sup>22</sup> Similarly, the Siting Board states that “MassDEP has indicated that it properly issued the Draft License to Eversource for the

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<sup>20</sup> *Id.* at 158.

<sup>21</sup> *Id.* at 128.

<sup>22</sup> The Siting Board states that “CLF/GR argue that the granting of a Certificate including a Chapter 91 license would bypass their appeal rights under Chapter 91. The legislature has provided that if determined in a Certificate Proceeding before the Siting Board, Chapter 91 appeal rights should be expressed through the appeal procedure for Siting Board decisions. G.L. c. 164, § 69P.” *Id.* at 126, n.116. This mischaracterizes CLF’s and GreenRoots’ argument, which is not that a party’s appeal rights are bypassed, but that the standard of review and rights of the appealing party are different under M.G.L. c. 30A, § 14 (governing Chapter 91 appeals) than under M.G.L. c 25, § 5 and M.G.L. c. 164, § 69P (governing Certificate appeals).



Substation as an ancillary facility to an infrastructure crossing facility and therefore a water-dependent facility.”<sup>23</sup> This reasoning—that MassDEP’s determination was proper because MassDEP says it was proper—is deeply flawed. By completely deferring to MassDEP with respect to the Chapter 91 license, the Siting Board has failed to fulfill its obligations under M.G.L. c. 164, § 69O. Moreover, the Tentative Decision notes that the proposed substation “is required to be located adjacent to the Chelsea Creek Crossing because the New Site is the sole feasible location identified in the record and therefore cannot reasonably be located away from the Crossing.”<sup>24</sup> This conclusion is not properly made or supported in the record (*see, e.g.*, Section VI below), and does not meet the three required findings that the Siting Board must make as it fills MassDEP’s role. To license a project in tidelands, MassDEP, or the Siting Board in a Certificate proceeding, must make three findings set forth in Chapter 91, Section 18 as follows: (1) the structures or fill serve a proper public purpose; (2) the purpose provides greater public benefit than public detriment to the rights of the public in tidelands; and (3) the determination is consistent with the policies of the Massachusetts Coastal Zone Management Program. Neither MassDEP nor the Siting Board staff made these findings.

The Siting Board’s finding with respect to the regulatory changes underway in the context of the Weymouth substation rulings is also deeply flawed. Despite a recent Superior Court decision and MassDEP decision that clearly indicate that MassDEP’s interpretation and application of its waterways regulations are improper, the Siting Board suggests moving ahead with a Chapter 91 waterways license issued under the legally infirm framework. The only support the Siting Board provides for this decision is that there would be some delay associated

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<sup>23</sup> Tentative Decision at 128.

<sup>24</sup> *Id.* at 137.

with waiting for the outcome of those proceedings and that the outcome of those proceedings is unknown.<sup>25</sup> This baseless reasoning will not withstand judicial scrutiny.

**V. The Siting Board’s Analysis of Flooding Risks and Climate Adaptation is Flawed.**

The proposed substation location faces an excessive and unacceptable risk of flooding and is an inappropriate site. Yet again, the Siting Board relies on its prior flawed proceedings to state that there is “no compelling reasons to adopt the ‘worst case’ probabilistic scenario or a 2100 timeframe to estimate sea level rise.”<sup>26</sup> The failure to consider the 2022 Greater Boston Research Advisory Group (“GBRAG”) report as described by Dr. Marcos Luna as it pertains to the record, which indicates that Eversource is operating substations now that are 100 years of age, is a significant flaw of the Tentative Decision. Should a flooding event occur as described in the GBRAG report at the proposed substation, the host EJ population will be impacted first and worst. Condition Z in the Eversource 2021 Final Decision requires Eversource to periodically review information on sea level rise every five years, which is an insufficient method to address climate risks and prevent the Eagle Hill neighborhood of East Boston from becoming a sacrifice zone. A wait-and-see approach to climate impacts in general and flood risks specifically is not cost-effective, given that addressing the impacts will be exponentially more expensive in the future, and is insufficient from a planning and safety perspective, given the nature and scope of the potential effects. Ignoring climate change science in the record of this proceeding contributes to the environmental burdens faced by East Boston residents.

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<sup>25</sup> *Id.* at 130.

<sup>26</sup> *Id.* at 103.

**VI. The Tentative Decision Fails to Acknowledge that the Proposed Substation Location is Permissible Rather than Essential.**

The Siting Board claims that review of alternate locations is outside of the scope of the certificate process based on previous decisions. However, a comprehensive analysis of alternatives is necessary for any water-dependency determination, and, in the Eversource 2017 Final Decision, the Siting Board merely stated that “constructing the Substation in East Boston is preferred.”<sup>27</sup> Before finding that the proposed location is required, the Siting Board was required to conduct a comprehensive alternatives review. It failed to do so in this case. Furthermore, contrary to Eversource’s claims,<sup>28</sup> the Company has failed to demonstrate that alternative sites are neither available nor feasible in its analysis. Instead, the Siting Board relies on the location being a permissible location, rather than the essential location.

**VII. The Six-Month Timeline is Directory and Not Mandatory.**

The Siting Board declined to delay resolution of the proceeding based on the Legislature’s direction to issue a decision within six months and the need for the substation.<sup>29</sup> However, the Supreme Judicial Court has held that a similar timeline is directory and not mandatory.<sup>30</sup>

**VIII. Conclusion**

As drafted, the Tentative Decision fails to comply with the requirements of the Roadmap Law, and therefore will not withstand judicial scrutiny. Further, the Tentative Decision, if

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<sup>27</sup> Eversource 2017 Final Decision at 75.

<sup>28</sup> Tentative Decision at 123 (*citing* Company Supplemental Brief at 6-7).

<sup>29</sup> *Id.* at 23.

<sup>30</sup> *Box Pond Ass’n v. EFSB*, 435 Mass 408, 415, n.7 (2001). The Siting Board attempts to distinguish the 6-month timeline under M.G.L. c. 164, § 69O (“in no event later than six months from the date of filing of the petition for a certificate pursuant to section 69K, the board shall”) from the 12-month timeline under M.G.L. c. 164, § 69J (“the board shall within twelve months from the date of filing approve a petition”), Tentative Decision at 23, fn. 17, but this is a distinction without a difference as the Legislature used the word “shall” in establishing both timelines.

adopted, will perpetuate environmental injustice in East Boston. For these reasons, the Siting Board must reject the Tentative Decision.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 18th day of November 2022, I served true copies of the foregoing documents via electronic mail upon all parties and limited participants of record or their counsel of record in EFSB 22-01.



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