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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1884CV03629

CITY OF QUINCY

vs.

MATTHEW A. BEATON, in his official capacity as
SECRETARY OF THE EXECUTIVE OFFICE OF ENERGY AND
ENVIRONMENTAL AFFAIRS,¹ and CITY OF BOSTON
PUBLIC WORKS DEPARTMENT

Notice sent
7/28/22
(7)DC

MEMORANDUM OF DECISION AND ORDER ON PARTIES'
CROSS MOTIONS FOR SUMMARY JUDGMENT AS TO
COUNTS II AND IV AND JUDGMENT ON THE
PLEADINGS AS TO COUNT V

In 1951, the City of Boston ("Boston") built the Long Island Bridge ("Bridge") spanning Boston Harbor between Moon Island in Quincy and Long Island in Boston. Over time, Long Island became home to a campus of approximately fourteen buildings that offered public health services to some of Boston's vulnerable residents, such as shelter to the homeless, substance abuse treatment facilities to the addicted, and treatment facilities to those suffering from acute mental health issues.

In October 2014, Boston closed the Bridge to vehicular and pedestrian traffic after the structure was found to be dangerously unsafe for the traveling public. Shortly thereafter, pursuant to the Massachusetts Environmental Policy Act ("MEPA"), G.L. c. 30, § 61, et seq., Boston's Public Works Department filed an Environmental Notification Form ("ENF") for

¹ Since the commencement of this action, Secretary Beaton has left his post and Beth Card is the current Secretary. No one has filed a motion to make this change in the caption of the case (or previously when Katheen A. Theoharides was the Secretary) and thus, the court uses the original caption in its decision. However, inasmuch as this is a claim against the Secretary in his official capacity, it presumed to be an action against the person in that position.

demolition of the Bridge. In 2015, the Secretary of the Executive Office of Energy and Environmental Affairs (“Secretary”), issued a Certificate authorizing Boston to demolish the Bridge, which Boston did. Approximately three years later, Boston filed a Notice of Project Change (“NPC”) with MEPA seeking to replace the Bridge and reestablish access to Long Island. On September 21, 2018, the Secretary issued a Certificate on the NPC (“2018 Certificate”) and determined that the Bridge replacement project did not require Boston to prepare an Environmental Impact Report (“EIR”) and did not require further MEPA review.

Perhaps in other circumstances, building a bridge between two communities would be welcomed. However, here instead of bridging a divide, the structure itself is the source of the divide. The City of Boston wants to rebuild the bridge and the City of Quincy believes it will bear the brunt of that decision because all roads to Long Island must pass through the City of Quincy. Rather than connecting common interests and purposes, unfortunately the Long Island Bridge has become a sore point between Boston and Quincy.

Quincy filed this action against the Secretary and Boston challenging the 2018 Certificate In November 2018.² Quincy objects to Boston’s proposal on various grounds and to the

² In a separate action, Boston instituted suit challenging the Conservation Commission of Quincy’s (“Commission”) denial of Boston’s petition to rebuild the Bridge. The Commission denied Boston’s petition pursuant to the State Wetlands Protection Act and Quincy’s local wetlands ordinance because it claimed Boston had failed to provide an adequate mitigation plan for the impacts of repairing the piers and the access road to the Bridge. Boston thereafter sought a superseding order of conditions from the Massachusetts Department of Environmental Protection (“DEP”), which has jurisdiction as to that portion of the Commission’s decision premised on state law. DEP issued the superseding order. Boston also sought certiorari review in Superior Court as to the Commission’s application of the local ordinance. The Superior Court concluded that the project would be governed by the DEP’s superseding order of conditions. The Supreme Judicial Court transferred the case to the SJC. The SJC recently affirmed the Superior Court’s judgment, holding, *inter alia*, that the DEP’s “order supersedes that of the commission because the commission did not rest its determination on more stringent local provisions.” *City of Boston v. Conservation Commission of Quincy*, SJC-13244 (Sup. Jud. Ct.

Secretary's approval of the proposal without further MEPA review. Quincy brought the following claims: appeal under MEPA, G.L. c. 30, § 62H (Count I), violation of G.L. c. 214, § 7A (Count II), certiorari review pursuant to G.L. c. 249, § 4 (Count III), misrepresentations in the NPC (Count IV), and a declaratory judgment, pursuant to G.L. c. 231A, that the 2018 Certificate violated MEPA (Count V).³ On July 31, 2019, the court (Tochka, J.) allowed Defendants' motion to dismiss Counts I and III in their entirety and Count II as against the Secretary.

Now before the court are Boston's and Quincy's cross motions for summary judgment as to Counts II and IV and cross motions for judgment on the pleadings as to Count V and the Secretary's cross motion for judgment on the pleadings⁴ as to Count V.⁵ After review and hearing, the court **ALLOWS** Boston's and the Secretary's Motions for Judgment on the Pleadings on Count V and Boston's Motion for Summary Judgment as to Counts II and IV for the reasons explained below. The court therefore **DENIES** the Plaintiff's cross motions on Counts II, IV and V.

July 25, 2022), slip op. at 3. It further held that DEP's superseding order preempts the Commission's determination. *Id.* at slip op. 8.

³ On July 16, 2019, the Chaubunagungamaug Nipmuck Tribe moved to intervene to protect Indian burial ground sites on Long Island. On February 24, 2020, the court (Ullmann, J.) denied the motion. On August 3, 2020, the Tribe moved for reconsideration of the denial, which was denied on August 18, 2020. On February 23, 2021, the Tribe moved for permission from the Appeals Court to file a late notice of appeal. On February 26, 2021, a single justice of the Appeals Court denied the motion. See 2021-J-0064. On March 12, 2021, the Tribe appealed. On May 6, 2022, the full court affirmed the single justice's decision. See 2021-P-0280. The Tribe has sought further appellate review. See FAR-28871.

⁴ The Secretary did not affirmatively move for judgment on the pleadings. Superior Court Rule I-96, however, provides that an agency's opposition to a motion for judgment on the pleadings is deemed a cross motion.

⁵ The parties agree that Count V will proceed on the administrative record.

BACKGROUND

I. Statutory and Regulatory Background

The court begins with a brief overview of MEPA and the regulations promulgated thereunder, so as to put the proceedings here in context. MEPA sets forth a broad policy of environmental protection in the Commonwealth. See *Allen v. Boston Redev. Auth.*, 450 Mass. 242, 254 (2007). The substantive concerns of MEPA are to “identify and mitigate environmental effects of a project prior to its implementation.” *Enos v. Secretary of Env'tl. Affairs*, 432 Mass. 132, 137 (2000).

The Legislature revised MEPA in 1978 to delegate responsibility for supervision of the review process under MEPA to the Secretary. *Id.*, citing St. 1977, c. 947. The purpose of the revisions was to “immediately expedite environmental approvals ... under the laws regulating environmental policy in the commonwealth.” Preamble to St. 1977, c. 947; *Enos*, 432 Mass. at 137. With the revision, “the Legislature unmistakably intended that the MEPA review process expedite action on these matters, by placing final EIR determinations in the hands of a disinterested public official with expertise in environmental matters.” *Enos*, 432 Mass. at 137 (quotations and citation omitted). Thus, the Secretary has broad discretion under MEPA to facilitate environmental planning for proposed projects. *Allen*, 450 Mass. at 254, citing 301 Code Mass. Regs. § 11.01(1)(d).

MEPA consists of two complementary provisions. “General Laws c. 30, § 61, establishes the official policy of environmental protection for the Commonwealth, and §§ 62-62H establish the process by which the potential environmental impact of certain projects is considered.” *Hull v. Massachusetts Port Auth.*, 441 Mass. 508, 513 (2004). The MEPA review process is “concerned with ensuring that relevant information [about potential environmental damage] is

gathered before a project is allowed to proceed [to the permitting stage].” *Enos*, 432 Mass. at 139.⁶ Thus, during the MEPA process, agencies are prohibited from granting permits until the MEPA process is completed. See *Canton v. Commissioner of the Mass. Highway Dep’t*, 455 Mass. 783, 785 (2010), citing G.L. c. 30, §§ 62A-62C.

The review of a project under MEPA begins when the project’s proponent files an environmental notification form (ENF) to inform the Secretary of the nature of the project and its potential environmental impacts. See G.L. c. 30, § 62A; 301 Code Mass. Regs. § 11.05(1). “The ENF shall include a concise but accurate description of the Project and its alternatives, identify any review thresholds the Project may meet or exceed and any Agency Action it may require, present the Proponent’s initial assessment of potential environmental impacts, [and] propose mitigation measures....” 301 Code Mass. Regs. 11.05(4)(a). After a thirty-day review period, during which the Secretary consults with the project proponent and other interested parties, the Secretary issues a written certificate stating whether an EIR is required and, if so, the form, scope, content, and level of detail of the EIR. See G.L. c. 30, § 62A; 301 Code Mass. Regs. § 11.06(7).

If the Secretary requires an EIR, after it is filed, the Secretary issues public notice of the availability of the report, which initiates a thirty-day public and agency review period. G.L. c. 30, § 62C. Within seven days of the completion of the public comment period, the Secretary issues a final statement, indicating whether the EIR “in his judgment ... adequately and properly

⁶ The Legislature defines “damage to the environment” as “any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth ...” although “[d]amage to the environment shall not be construed to include any insignificant damage to or impairment of such resources.” G.L. c. 30, § 61; 301 Code Mass. Regs. § 11.02(2); see *Allen*, 450 Mass. at 246 n.9 (stating that Legislature had given phrase “damage to the environment” a broad scope).

complies with the [the review procedures of MEPA].” *Id.* This certification does not constitute approval or disapproval of a particular project, which ultimately is left to various permitting agencies. See G. L. c. 30, § 62C; *Enos*, 432 Mass. at 137. Rather, the certification signals that the Secretary has determined that the information-gathering process has been completed in compliance with MEPA. See *Cummings v. Secretary of the Executive Office of Env'tl. Affairs*, 402 Mass. 611, 617 (1988). The permitting agencies then use the information gathered during the MEPA process to assess the project’s impact on the environment, to prevent or minimize any consequential damage, and ultimately to approve or disapprove a project. See *Allen*, 450 Mass. at 247; G.L. c. 30, § 61.

The Secretary’s MEPA regulations address each of these steps.⁷ For example, once it is determined that a private project meets one of the triggers for MEPA jurisdiction (e.g., requires a permit or financial assistance), the Secretary analyzes the project to determine if it meets or exceeds any of several “review thresholds” enumerated at 301 Code Mass. Regs. § 11.03. There are two categories of review threshold: those that require the filing of an ENF and a mandatory EIR (e.g., alteration of ten or more acres of wetlands; generation of 3,000 or more vehicle trips on an existing roadway to a single location), and those that require the filing of an ENF and “other MEPA review [only] if the Secretary so requires” (e.g., disturbance to endangered species habitat; generation of 2,000 or more vehicle trips on an existing roadway to a single location). 301 Code Mass. Regs. § 11.03.

⁷ All cited portions of 301 Code Mass. Regs. 11.00, et seq. in the decision are those that were in effect until December 23, 2021.

Importantly, under anti-segmentation regulations, the proponent of a project “may not phase or segment a Project to evade, defer or curtail MEPA review.” 301 Code Mass. Regs. § 11.01(2)(c). Instead,

[i]n determining whether a Project is subject to MEPA jurisdiction or meets or exceeds any review thresholds, and during MEPA review, the Proponent, any Participating Agency, and the Secretary shall consider the entirety of the Project, including any likely future Expansion, and not separate phases or segments thereof.... The Proponent, any Participating Agency, and the Secretary shall consider all circumstances as to whether various work or activities constitute one Project including, but not limited to, whether the work or activities, taken together, comprise a common plan or independent undertakings, regardless of whether there is more than one Proponent; any time interval between the work or activities; and whether the environmental impacts caused by the work or activities are separable or cumulative.

301 Code Mass. Regs. § 11.01(2)(c). Expansion” is defined as “[a]ny material increase in Capacity, demand on infrastructure, or physical dimensions of a Project or frequency of activity associated with the Project.” 301 Code Mass. Regs. § 11.02(2).

II. Factual and Procedural Background

The Bridge connects Moon Island⁸ in Quincy with Long Island, a Boston Harbor Island that is part of Boston. Administrative Record (hereinafter “AR”) 123. The Bridge provides the only vehicular access to Long Island and prior to 2014, carried the sole water, electric, and telecommunications services for Long Island and Spectacle Island. *Id.* Prior to 2014, Boston operated several public health services on Long Island, including a homeless shelter, a juvenile stabilization program, and mental health and substance use disorder programs. AR 56, 2072, 2440. Seasonally, Boston ran (and still runs) a summer camp for 900+ underserved children from Boston, Camp Harborview. AR 1992A. In October 2014, Boston had to close the Bridge,

⁸ Moon Island is located in Quincy, but its surface area is owned by Boston, which uses it as a shooting range for the Boston Police and a training facility for Boston Firefighters. AR 1992, 1992C.

because of safety concerns about the structural integrity of the Bridge. AR 56. Without a bridge, Long Island can only be accessed by ferry service. AR 62. Consequently, Long Island's public health services campus had to be shuttered due to the inaccessibility of Long Island.

In 2014, Boston filed an Environmental Notification Form ("ENF") requesting emergency authorization to demolish the Bridge and remove the utilities located on the Bridge. AR 13. Boston's plan also included relocation of the Bridge's utilities to a permanent utility corridor within a submarine trench in Boston Harbor. AR 13. On December 31, 2014, the Secretary granted the requested emergency authorization for the Bridge demolition and utility removal project, pursuant to 301 Code Mass. Regs. § 11.13. AR 13.

After Boston had to change its proposed demolition method because of safety issues, on February 6, 2015, the Secretary revised its emergency authorization to reflect that change. AR 38. The Secretary authorized actions necessary to demolish the bridge superstructure and maintain the substructure in a safe and sound condition, and to provide temporary electric power to Spectacle Island and Long Island. AR 14. Specifically, all elements of the superstructure were to be removed, including the bridge deck and rails, structural elements, trusses, bearings, joints, and utilities. AR 13. The piers, abutments, and other substructural elements were not to be demolished because "[p]ending a future inspection and technical evaluation showing that the substructure is sound, these elements are proposed to be incorporated into the replacement bridge." AR 13. That decision was integral to the plan for the initial ENF. As a condition of the emergency authorization, the Secretary required Boston to file an Amended ENF that addresses the demolition activities and utility relocation in more detail, including identifying the impacts associated with demolition of the Bridge and utilities and describing measures taken to avoid, minimize, and mitigate environmental impacts. AR 14, 20.

On April 7, 2015, Boston filed an Amended ENF. AR 38. On April 30, 2015, the Secretary issued a "Certificate" on the Amended ENF (the "2015 Certificate"). AR 36. In part, the 2015 Certificate stated:

The project review does not include the replacement of the Long Island Bridge. The City has indicated that it will reconstruct the Bridge; however, at this time, efforts are focused on the immediate safety concern and permanent re-connection of utilities to Long Island and Spectacle Island. I expect that the City will address the replacement of the bridge through a subsequent Notice of Project Change (NPC) when sufficient information is available to provide a constructive review of the project.

AR 38. The Secretary determined that the potential environmental impacts associated with the Bridge demolition and utility relocation did not require submission of an EIR. AR 36. Removal of the Bridge superstructure was completed in 2015.

On July 31, 2018, Boston filed a Notice of Project Change ("NPC") with MEPA for replacement of the Bridge. AR 1. Boston proposed a "design solution and a construction approach that will utilize the existing bridge piers and will require only very limited work in, or affecting, waters of Boston Harbor and Quincy Bay." AR 56. The proposed bridge is dimensionally similar to the original bridge: the original bridge was 34 feet and six inches wide with two twelve-foot travel lanes and one six-foot sidewalk and berm and the proposed bridge will be 33 feet wide, including two twelve-foot travel lanes and one six-foot sidewalk. AR 57, 90, 2097; Joint Appendix 24.

The Secretary published the NPC for public comment. On September 11, 2018, Quincy submitted its comments. In part, Quincy stated that "the NPC does not even indicate how much of the 225 acre island will be altered by the entire project. Without this information it is impossible to quantify the impacts from the NPC. In order to assess the full environmental impacts of the project, additional information and assessment is needed of the bridge impacts and

the impacts from the larger project that the bridge supports: the redevelopment of Long Island.” AR 156. Quincy contended that the project as limited by the NPC violates the anti-segmentation provision” and MPEA should require a full EIR. AR 156-158.⁹

On September 21, 2018, the Secretary issued a Notice of Project Change Certificate (the “2018 Certificate”) for the Bridge and determined that Boston did not have to file an EIR for the project and that no further MEPA review was required. AR 122. The Secretary summarized the project change as follows:

The NPC describes the proposed design and construction methodology for replacement of the Long Island Bridge superstructure. Existing piers will be reused, with the exception of Pier 1 which will be used for temporary support and then abandoned or removed. Bridge spans will be floated in and installed onto piers by barge at high tide. The replacement will include demolition and reconstruction work to the top portion of the piers (above Mean High Water (MHW)), and repointing of the granite facing (above Mean Low Water (MLW)).

The proposed superstructure replacement includes a hybrid design that includes a “Delta Frame Girder” (Delta Frame) design that maintains the original bridge footprint and dimensions including roadway width and elevation. The bridge will include two 12-foot travel lanes and a six-foot sidewalk....

The project is proposed by [Boston] to replace access to essential public health services on Long Island. Facilities on Long Island have provided services to vulnerable populations in the Boston region. Access to these services was eliminated when the bridge was closed due to public safety concerns. The City proposes to construct the bridge on an expedited basis to support re-opening of the public health facilities on Long Island.

AR 122-123. Further, the Secretary addressed Quincy’s concern about anti-segmentation and stated:

Comments from the City of Quincy on the NPC assert that the bridge replacement is being segmented from future expansion of the public health facilities on Long Island. The MEPA regulations include provisions at 301 CMR 11.01(2)(c) to

⁹ Quincy also argued that the structural integrity of the original Bridge’s still-standing underwater piers was substantially worse than what Boston had said and would require more environmentally invasive repairs. AR 159-161, 164-170.

ensure that a project is not phased or segmented to evade, defer or curtail MEPA review. In determining whether a project is subject to MEPA jurisdiction or meets or exceeds any review thresholds, and during MEPA review, the entirety of the project is considered, including any likely future expansion, and not separate phases or segments thereof.

From the outset of MEPA review, the City has indicated its intention to reconstruct the bridge and restore use of public health facilities on the island. The April 30, 2015 Certificate on the Amended ENF directed the City to submit an NPC to describe the bridge superstructure replacement and its associated impacts. The bridge is proposed to replace its prior function and is not designed to expand capacity compared to the original structure.

The City has indicated that it intends to restore prior public health uses located in existing buildings. The City has also indicated that it has initiated planning for a long term recovery center. This planning is in its early stages and includes research and data collection and public meetings to identify needs and potential programming. The City intends to hire an outside consultant to support development of a plan. If the City does develop a plan within the next five years that proposes to increase uses and infrastructure on Long Island that would result in increased environmental impacts, the City must consult with the MEPA Office regarding the need for additional MEPA review in the form of a NPC or an ENF.

AR 124. The Secretary concluded:

The NPC has sufficiently defined the nature and general elements of the project change for the purposes of MEPA review and demonstrated that the project's environmental impacts will be avoided, minimized and/or mitigated to the extent practicable. The NPC addresses the criteria for Insignificance which provides guidance in determining whether a change in a project might significantly increase environmental consequences (301 CMR 11.10) and informs a determination regarding whether additional MEPA review is warranted in the form of an EIR. The reconstruction of the superstructure will not expand the project or change the project site. It will require new Agency Action and it will result in relatively minor increases in environmental impacts compared to the Original Project; however, the City is reconstructing the bridge within the footprint of the previous bridge and the NPC includes sufficient information regarding the change, potential impacts and associated mitigation.

Based on a review of the NPC and after consultation with State Agencies, I hereby determine that no further MEPA review is required. Outstanding issues will be addressed during State, local and federal permitting.

AR 130.

DISCUSSION

Here, Quincy sued Boston and the Secretary contending, as to the Secretary, that by issuing the 2018 Certificate, without requiring further MEPA review on the restoration of one of more uses of Long Island (or the development of new uses), the Secretary violated MEPA's anti-segmentation provision. And further, as to Boston, Quincy argues that Boston (1) violated the anti-segmentation provision by focusing only on the Bridge in its NPC and omitting the future uses of Long Island; (2) misrepresented the environmental impact of the project in its NPC by providing traffic information that was not representative of the projected impacts from reconstruction of the Bridge and by not adequately presenting the scope of the work required to rehabilitate the concrete piers supporting the Bridge; and (3) violated G.L. c. 214, § 7A by attempting to evade meaningful environmental consideration of its overall plan for Long Island. The court addresses each argument in turn.

I. Judgment on the Pleadings as to Count V for Declaratory Judgment that the Secretary's Issuance of the 2018 Certificate violated MEPA¹⁰

Considering Quincy's arguments on the issuance of the 2018 certificate, the court must afford proper deference to the Secretary who "has broad discretion under MEPA to facilitate environmental planning for proposed projects that will require action by Commonwealth agencies." *Allen*, 450 Mass. at 254, citing 301 Code Mass. Regs. § 11.01(1)(d). The court is also mindful that the standard of review established by the Supreme Judicial Court in review of MEPA decisions is the arbitrary or capricious standard, that is, whether the Secretary's exercise

¹⁰ The Secretary and Boston argue that the court should dismiss this claim as untimely because Quincy did not serve its motion for judgment on the pleading within thirty days after Judge Tochka resolved Boston's motion to dismiss on August 8, 2019; instead filing more two years later and only after Boston moved first. See Superior Court Standing Order 1-96. As it is the policy of the law to have every case tried on its merits, see *Adoption of Eugene*, 415 Mass. 431, 437 (1993), the court will address the merits of the parties' arguments.

of her discretion lacked a rational basis. *Sierra Club v. Commissioner of the Dep't of Env'tl. Mgt.*, 439 Mass. 738, 748 (2003); see *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 662 (1974) (quotations and citation omitted) (“Determinations as to impact on the environment made by a public body under § 61 usually would not directly affect the rights of private parties. Such determinations, then, are not of the type as to which a reviewing court should search the factual and legal basis or require an explanatory statement which ... [it] can examine and [criticize].”). As further explained in *Sierra Club*, “[t]he process by which the information is gathered, identified, and applied to the statutory standards under MEPA must be logical, and not arbitrary or capricious.” 439 Mass. at 749.

Quincy contends that the Secretary violated MEPA’s anti-segmentation provision because “the entirety of the Project,” that is, replacement of the Bridge, necessarily includes the future use(s) of Long Island after the Bridge’s replacement. According to Quincy, it follows that the Secretary’s issuance of the 2018 Certificate without consideration of the future uses on Long Island and without further MEPA review on the future uses was arbitrary, capricious, and lacked a rational basis. The court disagrees.

The Secretary specifically addressed Quincy’s assertion that Boston was improperly segmenting the Bridge replacement from future expansion of the public health facilities on Long Island. The Secretary pointed out that Boston had acknowledged its intention to restore use of public health facilities on the island. The Secretary stated that Boston planned to “restore prior public health uses located in existing buildings” on the Island. Indeed, the Secretary has noted from the beginning of this process that Boston wanted to keep the existing substructure, including the piers, because it was anticipated and contemplated that the bridge would be rebuilt and access to these services would be restored. The Secretary also stated that Boston had

initiated planning for a long term recovery center although this planning was in its early stages. The Secretary required Boston to consult with MEPA regarding the need for additional MEPA review if Boston's plan for Long Island "increase[d] uses and development on Long Island that would result in increased environmental impacts."¹¹

Considering the "express purpose of [MEPA is] to immediately expedite environmental approvals," *Enos*, 432 Mass. at 137 (emphasis added), the court concludes here that the Secretary's decision not to include any environmental impacts caused by undetermined future increased uses and development on Long Island along with the environmental impacts of the Bridge replacement to service existing public services did not lack a rational basis. See 301 Code Mass. Regs. § 11.01(2)(c) (Secretary "shall consider all circumstances as to whether various work or activities constitute one Project including, but not limited to, whether the work or activities, taken together, comprise a common plan or independent undertakings, ...; any time interval between the work or activities; and whether the environmental impacts caused by the work or activities are separable or cumulative"). The restoration of the Bridge to access Long Island's public services has been fully contemplated from the outset of this process. Waiting to see if Boston develops additional plans for future use(s) of Long Island would run counter to the stated purpose of expediting environmental approval. This is particularly so when Boston was

¹¹ The NPC proposed to replace the Bridge's prior function and not expand capacity as compared to the original structure. Thus, the Secretary did not consider traffic impacts from the Bridge because the specific MEPA review threshold for traffic volume addresses projects that "generate" traffic, such as the proposed development on Long Island rather than replacement of the Bridge which is simply a means to access any development. See 301 Code Mass. Regs. § 11.03(6)(a) (establishing MEPA review thresholds for "transportation," including that EIR is required if the project will generate 3,000 or more new average daily trips on roadways providing access to a single location); see also 301 Code Mass. Regs. § 11.02(2) ("[n]ew" does not include activity that is "... generated by a previous, actual or permitted use of the Project site").

transparent about its intentions and the Secretary was aware of Quincy's concerns and required Boston to return for further MEPA review if Boston's plans for Long Island proposed to increase uses and infrastructure on Long Island that would result in increased environmental impacts. Thus, the court concludes that the Secretary's issuance of the 2018 Certificate did not violate MEPA and the court allows Boston's Motion for Judgment on the Pleadings (and the Secretary's cross motion) and denies Quincy's cross motion as to Count V.

II. Summary Judgment

Summary judgment is appropriate if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). It is the moving party's burden to demonstrate the absence of a triable issue, and that the summary judgment record entitles it to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of the case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Summary judgment will be denied if there are genuine issues of material fact. *Golub v. Milpo, Inc.*, 402 Mass. 397, 400 (1988).

A. G.L. c. 214, § 7A (Count II)

General Laws c. 214, § 7A,¹² an environmental citizen suit provision, confers subject matter jurisdiction on the Superior Court to hear claims for declaratory and injunctive relief

¹² In relevant part, G.L. c. 214, § 7A, provides:

where (1) “ten persons domiciled within the commonwealth are joined as plaintiffs”; (2) a person is causing or about to cause “damage to the environment”; and (3) “the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.” G.L. c. 214, § 7A. See *Miramar Park Association, Inc. v. Dennis*, 480 Mass. 366, 367-368 (2018); *Cummings*, 402 Mass. at 614. “Damage to the environment,” however, does not include “any insignificant destruction, damage or impairment to such natural resources.” G.L. c. 214, § 7A.

As the purpose of MEPA is to protect the environment, an allegation of a violation of one of its statutory or regulatory provisions may qualify “as a claim that damage to the environment is occurring or is about to occur” for purposes of an action brought under G.L. c. 214, § 7A. See *Ten Persons of the Commonwealth v. Fellsway Dev., LLC*, 460 Mass. 366, 378 (2011), citing *Cummings*, 402 Mass. at 614-615 (discussing G.L. c. 214, § 10A (repealed), the predecessor to G.L. c. 214, § 7A). But the court has no authority to grant relief under §7A unless “damage to the environment [is] either occurring or [is] about to occur.” *Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 118 (1984).

Here, Quincy contends that Boston’s alleged improper segmentation, in violation of 301 Code Mass. Regs. § 11.01(2)(c), a regulation the “major purpose” of which is the prevention or

The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

minimization of damage to the environment, will cause environmental damage. Quincy, however, has not pointed to evidence in the record showing that damage to the environment is occurring or is about to occur as a result of the MEPA process.¹³

In the 2018 Certificate, the Secretary stated that because the Bridge replacement exceeds an ENF review threshold pursuant to 301 Code Mass. Regs. § 11.03(3)(b)(1)(a) for alteration of a Coastal Bank, it will require a G.L. c. 91 License and Superseding Order of Conditions from the Massachusetts Department of Environmental Protection and “Federal Consistency Review” from the Coastal Zone Management Office. It will also require a “Bridge Permit Amendment” from the United States Coast Guard, a “Preconstruction Notification General Permit” from the United States Army Corp of Engineers, and an Order of Conditions from the Quincy Conservation Commission. It is not disputed that certain permits have not issued and that the project still needs agency review.¹⁴ Thus, the court concludes that Quincy has not shown that damage to the environment is about to occur. Cf. *Enos*, 432 Mass. at 139 (MEPA review process ensures that relevant information is gathered before a project is allowed to proceed; plaintiffs, “whose injuries flow from the ultimate construction of the project by the town rather than from the Secretary’s certification,” cannot challenge Secretary’s action). This is particularly so considering that if there is a “material change in [the] Project prior to the taking of all Agency

¹³ Indeed, counsel for Quincy acknowledged at the hearing that no active damage to the environment is taking place at this moment.

¹⁴ To the extent that agency review has happened, that process has given Quincy ample opportunity to voice its legitimate concerns and have the appropriate authorities consider those concerns. Specifically, as noted earlier, the Supreme Judicial Court has recently affirmed a judgment of the Superior Court that determined that the DEP’s superseding order of conditions preempted the Quincy Conservation Commission’s denial of a petition from Boston for replacement of the Bridge. The DEP allowed the project to proceed after consideration of the environmental impacts from work on the concrete piers and on the road providing access to the Bridge. See *City of Boston v. Conservation Commission of Quincy*, SJC-13244 (Sup. Jud. Ct. July 25, 2022).

Actions for the Project,” Boston must file an NPC with the Secretary who then assesses whether the change “may have significant environmental consequences.” 301 Code Mass. Regs. § 11.10(1) and (6). Therefore, the court allows Boston’s motion for summary judgment and denies Quincy’s cross motion as to Count II.

B. Misrepresentations in the NPC (Count IV)

Quincy contends that by improperly segmenting the project, underrepresenting the traffic impacts, and failing to adequately test the concrete piers, Boston misrepresented the environmental impacts of the project in its NPC filing to MEPA. The problem with this claim lies in the remedy. Specifically, the Legislature addressed misrepresentations during the MEPA process in G.L. c. 30, § 62H, which provides:

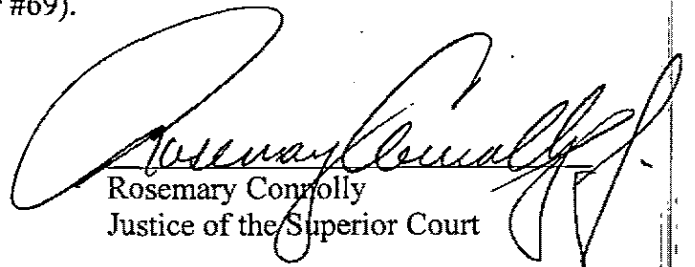
If a court determines that [a] project [proponent] has knowingly concealed a material fact or knowingly submitted false information in any form or report required under sections sixty-two to sixty-two H, inclusive, ... the secretary of environmental affairs may require the preparation and review of such forms or reports as may be necessary to correct any deficient form or report.

G.L. c. 30, § 62H; see also 301 Code Mass. Regs. § 11.10(5) (“If the Secretary determines that a Proponent has, either knowingly or inadvertently, concealed a material fact or submitted false information during MEPA review, or has segmented the Project, the Secretary may consider the determination to be a Notice of Project Change.”). Thus, any remedy for Quincy’s claim concerning misrepresentations would be to bring the matter to the Secretary’s attention. Here, the Secretary has acknowledged the alleged misrepresentations and has indicated that she will not require any additional MEPA filings or corrections. Accordingly, even if the court determined that Boston made misrepresentations in its submission to MEPA, Quincy has no remedy as the remedy for these misrepresentations lies with the Secretary who has declined to act. Cf. *Hull*, 441 Mass. at 516 (“The plain language of § 62H, fourth par., offers the following

remedy if a court finds such concealment: 'the [Secretary] may require the preparation and review of such forms or reports as may be necessary to correct any deficient form or report.' Given this language, it is illogical to allow a party that has already brought allegations of concealment and false submissions to the attention of the Secretary to invoke a statutory provision that offers as a remedy, in essence, bringing the allegations to the attention of the Secretary for consideration and action."'). Thus, the court allows Boston's motion for summary judgment and denies Quincy's cross motion as to Count IV.

ORDER

For the reasons discussed above, it is hereby **ORDERED** that Boston's Motion for Judgment on the Pleadings and Motion for Summary Judgment (Paper #64) is **ALLOWED**, Quincy's Cross Motion for Judgment on the Pleadings (Paper #66) is **DENIED**, Quincy's Cross Motion for Summary Judgment (Paper #67) is **DENIED**, and the Secretary's Cross Motion for Judgment on the Pleadings is **ALLOWED** (Paper #69).


Rosemary Conolly
Justice of the Superior Court

Date: July 27, 2022