MEMORANDUM

TO:	Board of Health
CC:	Thomas McKean, Director of Health Division
FROM:	Karen L. Nober, Town Attorney Thomas J. LaRosa, First Assistant Town Attorney
DATE:	September 10, 2024
SUBJECT:	Legal opinion on Board of Health jurisdiction regarding electric transmission projects falling under the jurisdiction of the state Energy Facilities Siting Board

---

BACKGROUND:

At its June 25, 2024 meeting, the Board of Health (the "Board") heard from Susanne Conley, who, on behalf of herself and a group of residents, asked that the Board conduct an examination of completed and proposed onshore electric infrastructure in connection with offshore renewable wind energy projects in the Town. Specifically, Ms. Conley asked that the Board examine electric substations and other infrastructure (consisting mainly of underground vaults at beach parking lots where wind farm export cables would come ashore, and duct banks under Town roadways in which onshore transmission cables would be housed) and require compliance with the federal Safe Drinking Water Act ("SDWA"), 42 U.S.C 300f, et seq. Ms. Conley asserted that the Board has broad authority to take an array of actions, including conditioning or prohibiting an electric infrastructure project, if the Board finds that a "public health adverse effect" exists. Ms. Conley's presentation was followed by a memorandum dated July 18, 2024, prepared by the group and shared with the Board. The memorandum likewise asserts that the Board has such authority and requests that the Board exercise that alleged authority to "halt any further onshore development activities involving future offshore wind projects, notably Park City Wind LLC and Commonwealth Wind LLC, until the Board concludes its threat assessment and reports the results [...]." The memorandum also requests that the Board engage in a Sole Source Aquifer review under the SDWA. Except for referring to the SDWA, the memorandum speaks in general terms and lacks reference to specific laws to support the group's request that the Board assert jurisdiction over these projects and halt or prohibit construction.

SHORT ANSWER:

We write to clarify the Board's legal authority. As discussed in more detail below, the Board does not have jurisdiction over the siting of electric transmission lines and substations, nor does the Board have any compliance or enforcement role under the SDWA, including no ability to engage in a Sole Source Aquifer review under the SDWA and make associated determinations. Finally, the Board has no authority to condition, prohibit or halt construction of electric transmission infrastructure if a "public health adverse effect" is alleged. In providing this legal opinion, we do not take a position on what the law should be or take issue with the general concerns expressed to the Board at its June 25th meeting or in the memorandum provided to the Board. Rather, we write to explain and clarify the law as it exists. Given the interest in this subject, please feel free to share this memorandum with the public.

DISCUSSION:

This request by the residents appears to be based on the premise that the Board has broad authority to examine, condition and prohibit electric transmission lines and facilities. We understand that the group was in large measure relying on and restating assertions made by Department of Environmental Protection ("MassDEP") Deputy Commissioner John Beling in a May 24, 2024 email he sent to a Town Councilor (the "Beling email" or the "May 24 email"). Although the Beling email referred to the SDWA and a Town ordinance adopted pursuant to MassDEP's Drinking Water Regulations, 310 CMR 22.00, the May 24 email did not cite to any specific statutory authority or legal standards upon which the Board could take such actions. Further, the Deputy Commissioner's assertions in the May 24 email are incorrect insofar as they concern a project within the jurisdiction of the Energy Facilities Siting Board ("EFSB") and the Department of Public Utilities ("DPU"), and are also incorrect concerning the SDWA, Sole Source Aquifer review, and the ability of the Board to condition or prohibit a substation or transmission line if the Board found the existence of a "public health adverse effect."

In a recent (undated) letter sent on July 31, 2024, Deputy Commissioner Beling apologized for the confusion created by his May 24 email and clarified that his statements were based on general authorities of, and actions taken by, other boards of health, and noted that "this does not mean these actions would be within the scope of the Barnstable Board of Health either generally or as to the electric substation project, particularly given the restrictions in the EFSB decision." In his July 31 letter, Deputy Commissioner Beling stated that he was not aware that Park City Wind had been approved by the ESFB, and he confirmed that MassDEP has sole authority to regulate public water suppliers. His letter notes that his May 24 email was not intended as legal advice and that any legal advice to the Board should come from the Town Attorney. Consistent with that observation, we turn to the Board's legal authority concerning the onshore electric infrastructure of offshore wind projects.

Public Drinking Water Resources and the Safe Drinking Water Act

As discussed below, the Board does not regulate public water supplies or public water suppliers. The Board cannot use the Town's zoning ordinances to attach conditions to the wind projects since local zoning was overridden by the EFSB in its decisions on the Park City Wind and Vineyard Wind projects. The Board has no authority under the SWDA and no ability to conduct a SSA review.

MassDEP does not regulate private drinking water wells. Instead, as you know, in the Town the Board regulates private drinking water wells, such as their siting, operation, maintenance and monitoring. The Board has adopted requirements for private wells under Chapter 397 of the Town Code. However, the Board does not regulate public water supplies or public water suppliers, as acknowledged by Deputy Commissioner Beling in his July 31 letter.[1]

MassDEP regulates public drinking water supplies, including public drinking water suppliers. MassDEP implements its role under specific authorizations from the Legislature and, in part,

[1] While the Board does not have jurisdiction over public water supplies, the Board, of course, implements a number of regulatory authorities that reduce pollution to benefit public water resources, such as septic system and solid waste requirements.

under the SDWA. MassDEP has established Drinking Water Regulations, 310 CMR 22.00, that are a significant part of the framework for protecting and regulating public drinking water sources and their use.

In order to implement MassDEP's requirements for protection of local drinking water resources in the Town, particularly groundwater, pursuant to 310 CMR 22.21 the Town, through a Town zoning ordinance, created a Groundwater Protection Overlay District under Section 240-35 of the Town Code. This ordinance established various overlay areas of protection, along with permitted and prohibited uses within those areas. The Beling email asserts that the Board could attach conditions to electric facilities and substations based on the ordinance. However, under G.L. c. 40A, § 3, as part of the Park City Wind and Vineyard Wind decisions, the EFSB granted both of these projects exemptions from local zoning, including in particular, the Groundwater Protection Overlay District ordinance. Having been overridden, the ordinance could not be used to attach conditions to the project. Mr. Beling acknowledged this and corrected his earlier statement in his July 31 letter.

In addition to state law requirements for public drinking water, MassDEP also exercises authority under the SDWA. The federal Environmental Protection Agency ("EPA") set standards for public drinking water under the SDWA. MassDEP applied to the EPA and was granted primary authority to implement provisions of the SDWA in Massachusetts. Both the EPA and MassDEP exercise their authority under the SDWA to protect public water supplies and ensure compliance by public water suppliers. The Board, however, has no authority under the SDWA, for example, because it is not the "State" within the meaning of the SDWA. Accordingly, the Board cannot administer the provisions of the SDWA.

Given the Board's lack of a statutory role or jurisdiction under the SDWA, the Board has no authority to undertake a Sole Source Aquifer (SSA) review under the SDWA and to make corresponding determinations, despite the suggestions to the contrary by Deputy Commissioner Beling in his May 24 email. Section 1424(e) of the SDWA (300 U.S.C 300h-3(e)) authorizes designation of an SSA and places that authority with the EPA. The EPA may also undertake a review of a project within an SSA under the SDWA, including its regulations at 40 CFR 149, only if the project involves a commitment of federal financial assistance. As you may be aware, residents requested that the EPA conduct an SSA review related to the onshore infrastructure of wind projects. The EPA declined the request and cited its determination that no commitment of federal financial assistance existed to permit the project review. The Board cannot undertake a SSA review and make determinations under the SDWA because it does not have that authority under federal law, nor can the Board step into the shoes of the EPA and exercise federal jurisdiction.

Siting and Review of Electric Transmission Infrastructure and Facilities

Under the state regulatory framework for public utilities, the Board has no authority to regulate the siting of electric infrastructure or issue orders to condition or halt a project approved already by the EFSB and DPU. The Supreme Judicial Court has consistently confirmed several key points: the manufacture and sale of electricity, which includes transmission, is governed by Chapter 164 of the General Laws; the statute represents the "State's regulatory scheme for public utilities"; and the Legislature "intended to preempt local entities from enacting local legislation in this area." See Boston Gas Co. v. City of Somerville, 420 Mass. 702, 703-4 (1995). Although the Board has authority unrelated to public utilities regarding public health, safety and welfare,

the Board cannot use that authority in manner that is inconsistent with state law or in a way "which has the practical effect of frustrating the fundamental state policy of ensuring uniform and efficient utility services to the public." See Boston Gas Co. v. City of Newton, 425 Mass. 697, 703 and 706 (1997). While the Town (not the Board) may have limited authorities under Chapter 164 of the General Laws unrelated to siting of electric facilities, the Court has been clear that even this "limited authority must yield to the broader grant of authority to the [DPU]." Id at 703.

Siting and approval authority to construct electric facilities, such as substations and transmission lines, for projects such as Vineyard Wind and Park City Wind is with the EFSB and DPU under M.G.L. c. 164, §§ 69J and 72. Section 69J requires that the EFSB implement the statute so as to provide a reliable energy supply with a minimum impact on the environment at the lowest possible cost. See Town of Sudbury v. Energy Facilities Siting Board, 487 Mass. 737, 745 (2021). The authority of the EFSB and DPU is broad, and both agencies have significant tools to accomplish their statutory goals and ensure projects will be constructed.[2] In reviewing their actions on appeal, Courts afford great deference to the EFSB's expertise and experience. Alliance to Protect Nantucket Sound, 448 Mass. 45, 51 (2006).

Under Section 69J, the Legislature has charged the EFSB with determining, among other things, that "new facilities are consistent with current health, environmental protection, and resource use and development policies as adopted by the Commonwealth." The Board is also charged with finding that the project "will or does serve the public convenience and is consistent with the public interest." See Town of Sudbury at 739. The EFSB addressed these considerations and made related determinations in its decision on Park City Wind, including regarding electromagnetic fields (EMF). More recently, a June 28, 2024 letter signed by both the Commissioner of the state Department of Public Health and the EEA Undersecretary addressed several concerns, including health and safety considerations of EMF. The letter also concurred with the project review by the EFSB and supported that the EFSB decision was consistent with the current health policies of the Commonwealth under section 69J. Again, these siting decisions are with the EFSB and DPU; those agencies have issued their decision on Park City Wind and the appeal period has expired. The Board does not have separate authority to regulate, prohibit or condition the siting of the electric infrastructure approved by these state agencies.

Finally, we note that although the Beling email referred to potential "public health adverse effects," Mr. Beling did not provide a citation to any legal authority for this standard or the possible actions he asserted the Board might take if the standard is exceeded. We believe he either may have meant "serious adverse health effects" under the SDWA or may have been referring to the Board's authority under provisions of G.L. c. 111 to address public nuisances, such as under section 122 of that Chapter of the Massachusetts General Laws. If the former, the

[2] For example, under G.L. c. 164, § 69K, the EFSB has the ability, if needed, to issue a Certificate of Environmental Impact and Public Interest, which effectively functions as a composite approval for all state or local permits, after which "no state agency or local government shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action which would delay or prevent the construction, operation or maintenance of such facility." Under G.L. c. 164, § 69R, a public utility may petition the DPU for state eminent domain power to secure rights for a project (including against a city or town, but not extending to park land, public spaces or public ways, which would need to be the subject of a separate special act of the Legislature). While section 69R does not allow the DPU to authorize takings of easements in a roadway, G.L. c. 166, § 28 allows the DPU to authorize grants of locations in public ways, which effectively confers rights on a private entity to use and occupy the public way.

Board has no jurisdiction under the SDWA. If the latter, because the EFSB is charged by the Legislature with permitting electric infrastructure, the Board would not be able to declare a project permitted by the EFSB under this charge as a public nuisance. See Town of Hull v. Massachusetts Port Authority, 441 Mass 508, 517 (2004). The EFSB and DPU are authorized by the Legislature to site and approve electric facilities and transmission infrastructure. Given that the EFSB and DPU are legislatively authorized to approve projects that they find serve the public convenience and are consistent with the public interest, the Board would not be able to issue an order finding the project to be a public nuisance.[3]

Memorandum from Susanne Conley (and unnamed others), dated September 8, 2024, and captioned "Follow up to June 25 Resident's Petition and Board Request"

We also reviewed the memorandum, dated September 8, 2024, from Susanne Conley (and unnamed others) (referred to collectively herein as the "group") to the Board and captioned "Follow up to June 25 Resident's Petition and Board Request." The memorandum refers to providing the specific statutory authority requested by former Board Chairman John Norman at the June Board meeting. The memorandum's cited authority includes: the SDWA; M.G.L. c. 111, §§ 5S(f), 31 and 122; MassDEP's Drinking Water Regulations, specifically 310 CMR 22.21(2); Sections 381-2 and 381-3 of Chapter 381 of the Town Code; Sections 108-6 and 108-12 of the Town Code; and Section 241-21 of Chapter 241 of the Town Code.

In earlier sections of our memorandum, we already addressed that: the Board has no jurisdiction under the SDWA; the local controls promulgated by the Town under 310 CMR 22.21 are inapplicable to both Park City Wind and Vineyard Wind due to those projects having been granted zoning exemptions by the EFSB and DPU pursuant to M.G.L. c. 40A, § 3; and the Board would not be able to find under Chapter 111 of the General Laws, including section 122, that either project is a public nuisance. That leaves for discussion M.G.L. 111, § 5S(f) and the cited sections of the Town Code in Chapters 381, 108 and 241.

M.G.L. 111, § 5S(f), states:

> A person may request that a local board of health conduct testing, monitoring and analysis of bathing waters when there is a reasonable basis to believe that an alleged violation of such minimum sanitation standards established by this section has occurred. Local boards of health shall promptly review such requests and determine whether any such testing, monitoring and analysis is necessary to ensure the public health and safety in bathing waters.

The memorandum requests that the Board review Vineyard Wind's dewatering activities at Covell's Beach, consider whether those activities were properly authorized and assess the "possible impact" on bathing beach water quality. We note that both projects included detailed discussion of dewatering activities in their environmental review and that an authorization is required under the National Pollutant Discharge Elimination System ("NPDES") Construction General Permit ("CGP") for Discharges from Construction Activities. The project prepared a Stormwater Pollution Prevention Plan ("SWPPP") under the NPDES CGP. If the group has

[3] If the project is constructed and the project proponent is operating outside its EFSB approval in a way that may cause a public nuisance injurious to health, then the Board could consider exercising its authority.

reason to believe that Vineyard Wind did not comply with its NPDES permitting obligations, they should raise their concerns with the EPA and the EFSB. While Section 5S(f) would not confer authority on the Board to assert jurisdiction over dewatering activities subject to a federal Environmental Protection Agency authorization , we note that, in other situations where this section would be relevant, before the Board could commence a review under this section, the group would first need to state their "reasonable basis to believe that an alleged violation of such minimum sanitation standards established by this section has occurred."

The memorandum from the group asks that the Board review the project's substation containment systems under Chapter 381 of the Town Code. Chapter 381 concerns the Board's regulations regarding "floor drains." I understand neither Park City Wind nor Vineyard Wind have floor drains and associated activities subject to regulation under Chapter 381. The substations for both projects have either constructed (Vineyard Wind) or planned (Park City Wind) containment sumps and systems (approved by the EFSB) intended to contain dielectric fluid within a spill or stormwater from a precipitation event. However, these would not be subject to Chapter 381.

The memorandum refers to Sections 108-6 and 108-12 of Chapter 108 of the Town Code but does not provide any discussion regarding why those sections may be relevant. We do not want to speculate further on the intent of the memorandum and only note, as discussed above already, the siting of electric infrastructure and substations is within the jurisdiction of the EFSB. Chapter 108 does not concern the siting of electric infrastructure and could not be the basis to challenge such siting approved by the EFSB.

Chapter 241 of the Town Code is known as the Administrative Code. As stated in Section 241-1, the Administrative Code "has the broad purpose of providing for the internal organization and administration of the Barnstable Town government" and the "intention and purpose […] is to provide for a legal, practical, and efficient plan of organization and administrative procedures which allows for and encourages the effective delivery of municipal services to the residents of Barnstable." Section 241-21 establishes the Board and outlines its responsibilities. However, Section 241-1 does not on its own create any regulatory authority that could be applied to any project, including wind projects. We are not saying that the Board could not choose to study an issue of interest to the Board that relates to its role as generally described in Section 241-1. It could. However, such studies could not be used by the Board to assert jurisdiction over either Park City Wind or Vineyard Wind, since both of those projects are fully permitted by the EFSB; but the Board could use such studies as the basis for comments it could submit to the EFSB on the Commonwealth Wind project, but only after the EFSB issues a Notice of Adjudication to commence the proceeding, which has not yet occurred. In choosing whether to study an issue, the Board would need outside consultants and financial resources. The Board would need to decide in that regard whether to study an issue of interest outside its regulatory jurisdiction.

For these reasons, the Board cannot assert jurisdiction over onshore components of the offshore wind projects that fall within the jurisdiction of, and have been approved in a written decision by, the EFSB and DPU.