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January 30, 2009

DRAFT RECORD OF DECISION

PROJECT NAME : Ten-Year Town-Wide Dredging and Beach Nourishment Plan  
PROJECT MUNICIPALITY : Yarmouth  
PROJECT WATERSHED : Cape Cod  
EOEEA NUMBER : 14354  
PROJECT PROPONENT : Town of Yarmouth  
DATE NOTICED IN MONITOR : December 24, 2008

Pursuant to the Massachusetts Environmental Policy Act (M.G.L.c.30, ss. 61-62I) and Section 11.11 of the MEPA Regulations (301 CMR 11.00), I have reviewed this project and hereby **propose to grant a waiver** from the categorical requirement to prepare an Environmental Impact Report (EIR). In a separate Certificate also issued today, I have set forth the outstanding issues related to the project that can be addressed by permitting agencies.

Project Description

As described in the Expanded Environmental Notification Form (EENF), the project consists of the implementation of the Town of Yarmouth's Ten-Year dredging and beach nourishment plan (the Plan). The Plan is a comprehensive effort to consolidate and manage 37 existing dredging or beach nourishment sites within the Town. Each of these 37 sites have already completed a full permit application and review process with the applicable local, State and Federal authorities on an individual basis. The project is designed to provide the Town with more effective ways to manage these ongoing maintenance beach nourishment and dredging activities.

The EENF includes a discussion of the following areas and sites, broken down into Critical Geographic Areas (CGA) and specific sites:

#### North and South Facing Beaches

- Bass Hole – Gray’s Beach (#1)
- Bay Road (#2)
- Bayview Street (#3)
- Baxter Avenue (#4)
- Berry Avenue (#5)
- Columbus Avenue (#6)
- Crosby Street (#7)
- Glenwood Street (#8)
- Grove Street (#9)
- Homer Avenue (#10)
- Malfa Road (#11)
- New Hampshire Avenue (#12)
- River Street (#13)
- **Short Wharf Creek Beach (#14)**
- Akin Avenue Town Landing (#15)
- Vermont Avenue (#16)
- Vernon Street (#17)
- Windmill Park (#18)
- Wilbur Park (#19)

#### Englewood Dredging

- *Pine Island Entrance Channel (#20)<sup>1</sup>*
- *Englewood Entrance Channel (#21)*
- *Englewood Basin (#22)*
- *Englewood Boat Ramp (#23)*

#### Bass River

- *Navigational Channel and Mooring Basins (#24)*
- West Dennis Beach (#25)
- South Middle Beach (#26)
- Bass River Beach (#27)

#### Parkers River

- *Parkers River Dredging (#28)*
- Seaview Beach (#29)
- Parkers River Beach (#30)
- Seagull Beach Dune (#31)
- Thatchers Beach (#32)

#### Mill Creek

- *Mill Creek Dredging (#33)*
- Mill Creek / Standish Way (#34)

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<sup>1</sup> Dredging projects are noted in *italics*. All other projects are classified as beach nourishment projects.

- Millway Beach (#34a)
- Colonial Acres Beach (#34b)

#### Inland Ponds

- Dennis Pond (#35)
- Little Sandy Pond (#36)
- Wings Grove Park at Long Pond (#37)

#### Jurisdiction

The project is undergoing review pursuant to Sections 11.03 (3)(a)(1)(b) and 11.03(3)(b)(3) because the project requires a State Agency action and the project has the potential to alter ten acres or more of other wetlands (e.g. Land Under Ocean and Land Containing Shellfish) and will require dredging of 10,000 or more cubic yards of material. The project will require a Chapter 91 (c.91) Waterways Dredge Permit and a Section 401 Water Quality Certificate from the Massachusetts Department of Environmental Protection (MassDEP). The project will be required to file under the provisions of the Massachusetts Endangered Species Act (MESA) with the Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program (NHESP). The proponent must also obtain approval from the United States Army Corps of Engineers (U.S. ACOE). The project will require an Order of Conditions from the Yarmouth Conservation Commission. The project may also be subject to Office of Coastal Zone Management (CZM) federal consistency review.

Because the proponent is not seeking financial assistance from the Commonwealth for the project, MEPA jurisdiction extends to those aspects of the project that are within the subject matter of required or potentially required state permits and that may cause Damage to the Environment as defined in the MEPA regulations. In this case, MEPA jurisdiction exists over wetlands, waterways, and tidelands, and rare species.

#### Waiver Request

The Proponent filed an Environmental Notification Form (ENF) with the MEPA office on December 15, 2008 that was subsequently noticed in the December 24, 2008 Environmental Monitor. Upon review of the ENF, it was determined that the cumulative impact of the consolidated projects exceeded a mandatory EIR threshold for potential wetland impacts. Subsequent to this discovery, the Proponent sought to request a full waiver from the preparation of a mandatory EIR through the preparation of supplemental information concerning the proposed activities. The Proponent filed and circulated additional supporting materials on January 16, 2009. These supporting documents, in addition to the materials presented in the ENF, were sufficient to deem the submission an Expanded ENF (EENF) in accordance with the MEPA regulations. An extended review period of 37 days was held for the project in accordance with 301 CMR 11.11. The waiver request was discussed at the MEPA consultation/scoping session for the project which was held on January 8, 2009.

### Standards for All Waivers

The MEPA regulations at 301 CMR 11.11(1) state that I may waive any provision or requirement in 301 CMR 11.00 not specifically required by MEPA and may impose appropriate and relevant conditions or restrictions, provided that I find that strict compliance with the provision or requirement would:

- (a) Result in an undue hardship for the Proponent, unless based on delay in compliance by the Proponent; and,
- (b) Not serve to avoid or minimize Damage to the Environment.

### Determinations for an EIR Waiver

The MEPA regulations at 301 CMR 11.11(3) state that, in the case of a waiver of a mandatory EIR review threshold, I shall at a minimum base the finding required in accordance with 301 CMR 11.11(1)(b) stated above on a determination that:

- (a) The project is likely to cause no Damage to the Environment; and,
- (b) Ample and unconstrained infrastructure facilities and services exist to support those aspects of the project within subject matter jurisdiction.

### Findings

Based upon the information submitted by the Proponent and after consultation with the relevant State agencies, I find that the waiver request has merit and that the Proponent has demonstrated that the proposed project meets the standards for all waivers at 301 CMR 11.11(1). I find that strict compliance with the requirement to prepare a Mandatory EIR for the project would result in undue hardship for the Proponent. The project includes the consolidation of seven (7) dredging projects and 30 beach nourishment projects into one ten-year comprehensive permit. Of particular relevance to this waiver is that each individual project has already been independently permitted by the appropriate local, State and federal authorities. Furthermore, those projects subject to this proposed comprehensive permitting process do not include improvement dredging or those projects that would require an Individual Permit from the U.S. ACOE.

I also find that compliance with the requirement to prepare an EIR for the project would not serve to avoid or minimize Damage to the Environment. In accordance with 301 CMR 11.11(3), this finding is based on my determination that:

1. The project is not likely to cause Damage to the Environment:

- Each of the project components have been historically approved through applicable local, State and federal environmental permitting processes.
- The project does not include any new improvement dredging or projects that would require an Individual Permit with the U.S. ACOE.
- The Town of Yarmouth is the project Proponent and each beach nourishment site is located on land controlled and maintained by the Town.
- The project does not include any improvements to existing beach structures such as jetties, groins, sinks, boat ramps, etc.
- The project will not include dredging of Mooring Basin 1 within the Bass River Navigational Channel. The Proponent will remove references to dredging of Mooring Basin 1 from future permitting applications.
- Several of the project sites are mapped as habitat for State-listed species, including species of birds, plants, turtles, and invertebrates such as dragonflies, in the 13<sup>th</sup> Edition of the Massachusetts Natural Heritage Atlas. Therefore, the project will require review through a direct filing with NHESP for compliance with MESA (321 CMR 10.00). The Proponent will work with NHESP during the MESA review process to address outstanding rare species concerns (notably impact to nesting sites for Piping Plovers (*Charadrius melodus*) and Least Terns (*Sternula antillarum*)).
- The Proponent will be required to obtain individual comprehensive permits from MassDEP (c.91 Permit and 401 Water Quality Certificate) and NHESP (MESA review). Individual permits will be prepared utilizing the guidance provided in comment letters submitted on the EENF provided by MassDEP, NHESP, and the Division of Marine Fisheries (*Marine Fisheries*). This guidance included a discussion of future data gathering requirements, the establishment of time-of-year (TOY) restrictions, and plan details. It is anticipated that each of these comprehensive permits will include conditions to ensure compliance with applicable regulations and standards.
- The Proponent will establish monitoring and reporting protocols for the dredging and beach nourishment activities. The Proponent will work with interested parties to determine how the protocols can be used to gauge overall project success and determine future dredging of beach nourishment requirements.

2. Ample and unconstrained infrastructure facilities and services exist to support those aspects of the project within subject matter jurisdiction:

- The project does not require any new infrastructure. It will result in a continuation of ongoing beach nourishment and maintenance dredging activities, which are intended to provide safe navigable boating channels and enhance beach areas.

Conclusion

Based on these findings, I have determined that this waiver request has merit, and am issuing this Draft Record of Decision (DROD), which will be published in the next edition of the Environmental Monitor on February 11, 2009 in accordance with 301 CMR 11.15(2), which begins the public comment period. The public comment period lasts for 14 days and will end on February 25, 2009. Based on written comments received concerning the DROD, I shall issue a Final Record of Decision (FROD) or a Scope within seven days after the close of the public comment period, in accordance with 301 CMR 11.15(6).

January 30, 2009

Date

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Ian A. Bowles, Secretary

## Comments received:

01/13/2009 Division of Fisheries and Wildlife – Natural Heritage and Endangered Species Program  
01/20/2009 Office of Coastal Zone Management  
01/22/2009 Division of Fisheries and Wildlife – Natural Heritage and Endangered Species Program (2<sup>nd</sup> letter)  
01/23/2009 Massachusetts Department of Environmental Protection – SERO  
01/23/2009 Cape Cod Commission  
01/23/2009 Division of Marine Fisheries

IAB/HSJ/hsj