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March 28, 2008

CERTIFICATE OF THE SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS
ON THE
NOTICE OF PROJECT CHANGE

PROJECT NAME: New Marlborough Hill Subdivision
PROJECT MUNICIPALITY: New Marlborough
PROJECT WATERSHED: Housatonic
EEA NUMBER: 13679
PROJECT PROPONENT: New Marlborough Hill, LLC
DATE NOTICED IN MONITOR: February 20, 2008

Pursuant to the Massachusetts Environmental Policy Act (M. G. L. c. 30, ss. 61-62H) and Section 11.10 of the MEPA regulations (301 CMR 11.00), I have reviewed the Notice of Project Change (NPC) submitted on this project and hereby determine that it **does not require** the preparation of an Environmental Impact Report (EIR). The project change involves changes to a Conservation Restriction (CR) proposed as mitigation for impacts to rare species. The CR is a component of a Natural Heritage and Endangered Species Program (NHESP) Conservation & Management Permit that was issued for the first phase of the project in June 2006.

Project Description

As outlined in the November 2005 Environmental Notification Form (ENF), the project involves construction of a two-phased residential development on a 348.5 +/- acre site in New Marlborough, MA. The project site is located to the north of New Marlborough Hill Road, to the east of Hartsville-Mill River Road and the Konkapot River, and to the west of Route 57/Hartsville Road. Phase 1 of the project involves dividing the 107 acres south of Anthony Brook into 10 residential lots ranging in size from 4.4 acres to 20.8 acres. Each lot is proposed to

contain a single-family residence, associated or common driveway, septic system, private well and selective clearing in the area surrounding the house.

Phase 2 of the project involves the construction of approximately 30, three-bedroom housing units, including some affordable units. This part of the development will be accessed by a common drive entering from Hartsville Road/Route 57. The cluster will be supplied by a public water supply well on site and will share a common subsurface disposal system. Conceptual details about this portion of the project were discussed during the ENF review. The Certificate on the ENF dated December 22, 2005 did not require an Environmental Impact Report (EIR) for the first phase of the project but required that the Proponent file a NPC when further detail about the second phase of the project is developed, to describe the cumulative impacts of both parts of the project. The cumulative impacts of both phases of the project did not meet any Mandatory EIR thresholds under MEPA, and as such the Proponent was not required to obtain a Phase 1 Waiver to proceed with development of the first ten lots. The NPC currently under review does not pertain to the Phase 2 development; I remind the Proponent that a second NPC for the second phase of the project is still required pursuant to the Certificate on the ENF. The project may undergo further environmental review at that time.

Jurisdiction

The project is subject to environmental review pursuant to the following sections of the MEPA regulations: 301 CMR 11.03(1)(b)(1) because the project will result in the alteration of more than 25 acres of land and 301 CMR 11.03(2)(b)(2) because the project will result in a "take" of an endangered, threatened or Species of Special Concern in accordance with the Massachusetts Endangered Species Act (M.G.L. c.131 a) and its implementing regulations (321 CMR 10.04).

The project requires a National Pollutant Discharge Elimination System (NPDES) Construction General Permit from the U.S. Environmental Protection Agency (EPA); a Superceding Order of Conditions (SOC), Wastewater Management Permits (BRP WP 57 and BRP WP 58B), and Water Supply Permits (BRP WS-15 and BRP WS-17) from the Department of Environmental Protection (MassDEP); a Conservation & Management Permit from NHESP; review from the Massachusetts Historical Commission (MHC); and Subdivision Approval from the New Marlborough Planning Board.

The Proponent is not seeking financial assistance from the Commonwealth. Therefore, MEPA jurisdiction applies to those aspects of the project within the subject matter of required state permits with the potential to cause damage to the environment. In this case, MEPA jurisdiction extends to rare species, wetlands, land alteration, stormwater, wastewater, water supply and historic resources.

Project Change Description

The project change involves modifications to the previously approved EEA Division of Conservation Services (DCS) CR that was developed as mitigation for impacts to rare species habitat. When the project was originally proposed to MEPA, two state-listed species were

present at the site. A portion of the project site occurs within Priority Habitat (PH 983) and Estimated Habitat (WH 1058) and the project is located within the actual habitat of the Wood Turtle (*Glyptemys insculpta*) and the Spotted Turtle (*Clemmys guttata*). Since the review of the ENF, the Spotted Turtle has been delisted pursuant to the Massachusetts Endangered Species Act (MESA); the Wood Turtle remains listed.

During the review of the ENF, NHESP made a determination that the project would result in a "prohibited take" of the Wood Turtle and a potential "take" of the Spotted Turtle. The Proponent coordinated with NHESP to develop a conservation and management plan to mitigate adverse impacts to these species and their habitat. The mitigation included the following elements:

- Establishment of a CR over approximately 124 acres of the project site;
- Creation of deed restrictions on portions of individual lots abutting Anthony Brook yielding approximately 15.4 acres of additional habitat protection. The deed restrictions included back sections of the roadside lots, creating a buffer between residential development and Anthony's Brook. The restricted portions of the lots would be owned by the single-lot owners, but the use of the land would be restricted;
- Installation of turtle barriers prior and during construction for Lots 1 through 8; and, Management of approximately 3.3 acres of forested habitat on-site as foraging habitat for the two turtle species.

As outlined in the NPC, the Proponent wishes to eliminate the deed restrictions on Lots 2-7 and add the same amount of acreage to the block of land under the CR. The deed restriction over Lot 1 has also been added to the CR land. The New England Forestry Foundation (NEFF) will now be the recipient of the CR for the land on the site.

Review of the NPC

NHESP states that the proposal to remove deed restrictions from Lots 2 through 7 in exchange for additional land being added to the CR parcel and the proposal to change the protected portion of Lot 1 from a deed restriction to a CR with an access easement is consistent with the MESA Conservation & Management Permit standards at 321 CMR 10.23. NHESP has indicated to the MEPA office that the upland acres to be protected under the CR are critical habitat for the wood turtle, and forest activities performed by NEFF will actually improve the site for the turtle, which utilizes early successional and brushy areas for foraging.

Commenters have expressed concern about the CR being held by the NEFF, an organization that does not have strong ties to the local community. NEFF is an entity qualified by EEA/DCS to hold the CR and will be required in the Conservation & Management Permit and CR to comply with management practices that are not harmful to the wood turtle and to maintain wood turtle habitat enhancement areas. Forestry activities at the site are being conducted under the Department of Conservation and Recreation's (DCR) review under 304 CMR 11.00. NHESP has review authority over the Forest Cutting Plan, which must comply with NHESP guidelines for wood turtle habitat. The Proponent and NHESP should note comments regarding potential

vernal pools present within the CR area. I support the suggestion that vernal pools be mapped and certified in the spring and noted in the CR before any forestry activities are conducted.

The Proponent has received a Superceding OOC (SOC) from MassDEP for work proposed on nine of the ten ANR lots, Lots 2 through 10. MassDEP has not submitted comments on the NPC based on the determination that the change to the CR does not require a modification of the SOC. MassDEP continues to have oversight over activities on Lots 2 – 7 since the issuance of the SOC, and has not yet issued a Certificate of Compliance for that portion of the project.

The SOC does not extend to potential activities on Lot 1. The 35-foot wide Access and Utility Easement over Lot 1 that was outlined in the ENF filing has been extended from the northerly edge of the restricted area on Lot 1 to the northerly boundary of Lot 1 to provide access from Hartsville Mill River Road to the remainder of the site via an existing logging road. The access easement was reviewed by NHESP as part of the Conservation & Management Permit, and proposed changes associated with Lot 1 will be incorporated into the amended permit. Any further activities on Lot 1 not related to the Forest Cutting Plan will require that a Notice of Intent be filed with the New Marlborough Conservation Commission, a copy of which must be sent to MassDEP and NHESP.

I acknowledge numerous comments submitted regarding the removal of the deed restrictions along the back portions of the lots and potential adverse impacts to habitat the Riverfront Area. I remind commenters that as a perennial stream, there is a 200-foot Riverfront Area extending from each bank of Anthony Brook, and that protection of wildlife habitat is one of the interests of the Wetlands Protection Act (WPA). Thus any activities in the Riverfront Area must be conducted under 310 CMR 10.58. Nonetheless, the Proponent should note that riparian habitat is extremely productive and sensitive, and both turtle species may use Anthony Brook for some portion of their life cycle. The Proponent should inform owners of the Phase 1 lots that the parcels support rare and other wildlife habitat, and that activities on the parcels are regulated pursuant to the WPA.

In its comments on the ENF, MHC stated that the Phase 1 project area is archaeologically sensitive and that there is a high potential for early historic period resources to be present in the area. The Certificate on the ENF directed the Proponent to conduct an intensive (locational) archaeological survey for the project per 950 CMR 70. The Proponent was also directed to submit current photographs of the barn mentioned in the ENF, keyed to project plans. In a March 16, 2006 letter to the MEPA office, MHC stated that it had reviewed the results of the intensive archaeological survey conducted by the Proponent and the photographs of the existing barn. The survey revealed one historic period site, the J. Hayes Site, which includes a late 19th-century house foundation. The existing barn was moved onto the house foundation at some time in the past, after the original farmhouse had been removed. MHC has determined that the barn is not historically significant and that the J. Hayes Site does not meet the criteria of eligibility for listing in the National Register of Historic Places. MHC has determined that no additional archaeological investigations are warranted. MHC's letter pertains only to the Phase 1 portion of the site; the NPC that is submitted for Phase 2 must also address potential impacts to historic and/or archaeological resources.

Conclusion

Based on a review of the information provided in the NPC, and after consultation with the relevant public agencies, I find that the potential impacts of this project change do not warrant further MEPA review. I remind reviewers that I cannot approve or deny this project through the MEPA process. MEPA is not a local zoning or review process, nor is it a permitting action. Rather, it is a process designed to ensure public participation in the state environmental permitting process and that state permitting agencies have adequate information on which to base their permit decisions and their Section 61 Findings. As outlined above, the proposed change does not require a modification to the MassDEP SOC, and the NHESP has stated that it supports the proposed change.

Again, I remind the Proponent that a NPC is required for Phase 2 of the project. I am confident that MassDEP and NHESP oversight of ongoing and future activities at the site will continue to be conducted on a regular basis. I direct the Proponent and its consultant to carefully review comments submitted on the NPC, and I strongly encourage the Proponent to work cooperatively with the public and local officials as the project moves forward.

March 28, 2008
Date



Ian A. Bowles

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Comments Received:

3/5/2008 Berkshire Regional Planning Commission
3/7/2008 Division of Fisheries & Wildlife, Natural Heritage and Endangered Species Program
3/15/2008 Harold F. Lewin
3/17/2008 Martha Bryan
3/17/2008 Joshua Levkov
3/17/2008 Alan V. Lombardi
3/18/2008 Joan Elmer
3/18/2008 Berkshire Environmental Action Team
3/19/2008 Debra Herman
3/20/2008 Charles H. Jones
3/20/2008 Tara Rae Miner
3/20/2008 Mary Richie Smith
3/21/2008 Martha Bryan
3/21/2008 Teresa Reed
3/21/2008 Joyce & Tom Sachs, Ann Coban, Alan Gewitzman

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