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July 10, 2009

DRAFT RECORD OF DECISION

PROJECT NAME : Swan Pond River and West Dennis Beach
PROJECT MUNICIPALITY : Dennis
PROJECT WATERSHED : Cape Cod
EEA NUMBER : 14419
PROJECT PROPONENT : Town of Dennis
DATE NOTICED IN MONITOR : May 20, 2009

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 maintenance dredging of the Swan Pond River channel and beach and dune nourishment on a barrier beach in Dennis. The project includes the dredging of 20,000 cubic yards (cy) of material from an approximate area of 550,000 square feet (sf) within the channel. Dredged materials will be reused to create a dune on West Dennis Beach. The Proponent is also seeking to permit West Dennis Beach to receive dredged materials in the future for further beach nourishment. The project is proposed in the interests of safe navigation, improvement of tidal flow from flushing, and reuse of dredge spoils for beach nourishment.

The project proposes maintenance dredging to -4.0 feet below Mean Low Water (MLW) which is the original channel depth as dredged previously in 1996-1997. The Proponent has proposed to work closely with the Town of Dennis Natural Resource Department to schedule the harvesting and relocation of any viable shellfish in the area of the proposed dredge. Approximately 20,000 cy of beach compatible sand will be hydraulically pumped to West Dennis Beach along with 10,000 cy of upland material to create a dune. Once the dune form is created there will be an aggressive planting schedule in place to establish beach grass and native beach plum to help

stabilize the proposed dune. The project is proposed to enhance the sediment-starved beach and protect against continuous storm damage. In addition, endangered shorebird habitat will be enhanced. The project area is located on town-owned property; no beach nourishment is proposed on private property. Improvements to associated beach structures such as jetties, groins, sinks, boat ramps, etc., are not included as part of this project.

MEPA Jurisdiction and Required Permits

The project is undergoing review pursuant to Sections 11.03(3)(a)(1)(b) and 11.03(3)(b)(3) of the MEPA regulations because the project requires a State Agency Action and it has the potential to alter ten acres or more of other wetlands (Land Under Ocean) 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 (WQC) from the Massachusetts Department of Environmental Protection (MassDEP); filing 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); a Section 404 Programmatic General Permit (PGP) from the United States Army Corps of Engineers (U.S. ACOE); an Order of Conditions from the Dennis Conservation Commission (and, on appeal only, a Superseding Order of Conditions from MassDEP); and federal consistency review by the Office of Coastal Zone Management (CZM). The project may require a National Pollutant Discharge Elimination System (NPDES) Stormwater Permit for construction activities which disturb one acre or more of land.

The project is subject to the EEA Greenhouse Gas Policy and Protocol because it requires the preparation of a mandatory EIR. This is a dredging project that will not result in significant emissions of Greenhouse Gases (GHG) and therefore falls within the de minimis exception of the policy. The Proponent was not required to prepare an analysis of GHG emissions or identify measures to mitigate GHG emissions.

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, rare species and greenhouse gases.

Waiver Request

The Proponent has requested a waiver from the requirement to prepare an EIR. An EENF was submitted in conjunction with this request that identifies the environmental impacts of the project and describes measures to be undertaken by the proponents to avoid, minimize and mitigate project impacts.

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, when subject matter jurisdiction is broad in scope, or those aspects of the project within subject matter jurisdiction, when jurisdiction is limited to the subject matter of state agency permits.

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 because the project consists of the continuation of a previously permitted dredging and beach nourishment project.

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:

- The project has been previously approved through applicable local, State and federal environmental permitting processes.
- The Town of Dennis is the project Proponent and the beach nourishment site is located on land controlled and maintained by the Town. The creation of a dune at West Dennis Beach will enhance wildlife habitat and protect existing coastal resources.
- The project does not include any improvements to existing beach structures such as jetties, groins, sinks, boat ramps, etc.
- The Proponent will be required to submit a long term dredging and disposal plan to the MassDEP prior to the issuance of any comprehensive permit by MassDEP. No maintenance dredging of the channel is allowed until the plan is prepared.

2. Ample and unconstrained infrastructure facilities and services exist to support the project, or 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.
3. Agency Action on the project will contain such terms and conditions that will cause environmental benefits in excess of those that would result in the absence of the waiver.
- The project site is mapped as habitat for State-listed species, in the 13th 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). NHESP has already issued a letter outlining the conditions and restrictions that the Proponent must comply with to avoid a “take” of protected species. Those conditions include:
 - No beach nourishment from April 1 to August 31.
 - Dredged material placed along the beach shall be graded to a slope no steeper than 10:1 horizontal:vertical slope. No vegetation shall be planted and no sand fencing shall be erected on the area of beach nourishment.
 - The Proponent is responsible for protecting breeding Piping Plovers and Terns that may be attracted to the beach nourishment areas, as well as their eggs and unfledged chicks.
 - Each year, beginning April 1, a qualified shorebird monitor approved by NHESP shall determine whether territorial or nesting Piping Plovers or Terns are present at beach nourishment areas, and erect and maintain warning signs and symbolic fencing around beach nourishment placed above the mean high tide line. Monitoring shall occur at least 2 times per week until at least July 1. However, if plovers or terns are found to be using the site, then monitoring frequency shall be increased to at least 3 times per week, and shall continue until all nesting and brood-rearing activity has been completed.
 - The Proponent shall notify NHESP on or before March 1 each year as to what arrangements have been made for the aforementioned monitoring and site protection to occur. This notification shall include a written contract, memorandum of agreement, or some other formal written agreement with the individual(s) or organization that will undertake monitoring and protection efforts in the field.
 - A report shall be submitted to NHESP each year, on or before September 30, on standard census forms provided by NHESP, that summarizes the results of the state-listed species monitoring and site protection activities.
 - The Proponent will be required to obtain individual comprehensive permits from MassDEP (c.91 Permit and 401 Water Quality Certificate). Individual permits will be prepared utilizing the guidance provided in comment letters submitted on the EENF provided by MassDEP, NHESP, the Division of Marine Fisheries (*Marine Fisheries*), and the Cape Cod Commission. 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 protect sensitive birds, fish,

shellfish, and plant species, and to ensure compliance with applicable regulations and standards.

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 July 22, 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 August 5, 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). I hereby **propose to grant** the waiver requested for this project, subject to the above findings.

July 10, 2009
Date

Ian A. Bowles

Comments received:

- 06/08/2009 Massachusetts Division of Marine Fisheries
- 06/29/2009 Cape Cod Commission
- 06/29/2009 Natural Heritage and Endangered Species Program
- 06/30/2009 Massachusetts Board of Underwater Archaeological Resources
- 06/30/2009 Massachusetts Department of Environmental Protection – SERO

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