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July 31, 2009

DRAFT RECORD OF DECISION

PROJECT NAME : West Island Beach Salt Marsh Restoration Project
PROJECT MUNICIPALITY : Fairhaven
PROJECT WATERSHED : Buzzards Bay
EOEEA NUMBER : 14432
PROJECT PROPONENT : Fairhaven Public Works Department
DATE NOTICED IN MONITOR : June 24, 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 restoration of approximately 6.5 acres of salt marsh near West Island Beach in Fairhaven. The project includes the replacement of an undersized 15-inch diameter culvert under Fir Street with a 3-foot by 5-foot box culvert to improve tidal flushing to the upper reaches of the marsh. The primary project goal is to enhance marsh health through increased tidal flushing without negatively impacting abutting residential. The project site is located adjacent to the Massachusetts Department of Conservation and Recreation's (DCR) West Island State Reservation.

Estimated project impacts include five square feet (sf) of permanent alteration and 108 sf of temporary impact to BVW, 135 sf of permanent alteration and 110 sf of temporary impact to salt marsh and 4,530 sf of temporary impact to Land Subject to Coastal Storm Flowage (LSCSF). Restoration of tidal hydrology is anticipated to impact approximately 283,000 sf (6.5 acres) of salt marsh.

It should be noted that MEPA typically uses the definition of “alter” for wetlands from the Massachusetts Department of Environmental Protection’s (MassDEP) Section 401 Water Quality regulations, and that definition only contemplates direct impacts from fill, etc. In contrast, the definition of “alter” from the Massachusetts Wetlands Protection Act (WPA) covers indirect alterations from hydrologic changes, such as those anticipated for this wetlands restoration project. Generally speaking, MEPA would not consider these indirect alterations, as defined in the WPA, when determining whether a project exceeds a mandatory EIR threshold, since the WPA is enforced through an Order of Conditions issued by the local permitting authority. However, since the Order of Conditions was appealed, and subsequently a Superseding Order of Conditions must be issued by MassDEP, MEPA’s definition of alter follows those of the WPA, and thus the restoration of tidal hydrology to approximately 6.5 acres of salt marsh exceeds a Mandatory EIR threshold.

Jurisdiction

The project is undergoing MEPA review pursuant to Section 11.03 (3)(a)(1)(a) because it requires a state permit and consists of alteration of one or more acres of salt marsh. The project will require a Superseding Order of Conditions, a Chapter 91 (c.91) License, and a Section 401 Water Quality Certificate (WQC) from MassDEP, a Section 404 Programmatic General Permit (PGP Category II) from the U.S. Army Corps of Engineers (ACOE), and may require a federal consistency review statement from the Massachusetts Office of Coastal Zone Management (CZM).

The project is being funded by the New Bedford Harbor Trustees Council. Because State funding is involved, MEPA jurisdiction for this project is broad and extends to all aspects of the project that are likely, directly or indirectly, to cause Damage to the Environment, as defined in the MEPA regulations.

Waiver Request

The proponent submitted an Expanded Environmental Notification Form (EENF) for the project with a request for a waiver from the requirement for the preparation of an EIR. The EENF described how the project proposes to meet the waiver criteria outlined in 301 CMR 11.11. The waiver request was discussed at the consultation/scoping session for the project which was held on July 7, 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 restoration of approximately 6.5 acres of salt marsh through enhanced tidal flushing that is presently restricted by an undersized culvert. This restoration project will improve wetlands habitat, the overall health of the wetland system and control the potential spread of invasive species. I note the positive support for the project and its goals by the numerous State agencies, the federal and local government, and environmental interest groups.

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 will have an overall positive impact on the environment. Benefits of the culvert replacement include improved tidal flushing, a reduction in the extent of *Phragmites australis*-dominated marsh, decreased culvert maintenance, and improved


- passage of marine life.
- The existing culvert provides minimal tidal exchange to and from the marsh, as noted by the presence of *Phragmites australis* and the inability of freshwater to exit the marsh during ebb tides.
 - The Proponent has gathered extensive amounts of field data and prepared hydrologic and hydraulic models to support the design of a project that minimizes impact to wetland resource areas and enhances habitat restoration efforts.
 - The project will result in an increase in the mean and spring tidal range of 0.2 feet to ensure that saline waters inundate the invasive species and restore the area to salt marsh. The hydrologic and hydraulic analyses demonstrate that this change in tidal range will not result in the conversion of wooded wetland areas, nor result in any increases to identified flood stages on adjacent properties.
 - The project will receive regulatory review pursuant to Ch.91 Waterways License Application, 401 Water Quality Certification, CZM Coastal Consistency Review, and Section 404 Clean Water Act Review by the U.S. ACOE.
 - Best Management Practices (BMPs) will be implemented during the construction period, including limiting work areas, use of cofferdams, dewatering, screening of pump intakes, and use of erosion and sedimentation controls. The construction period is expected to be brief and will be timed to avoid peak periods of recreational use at the adjacent public beach.
 - A post-construction monitoring program will be implemented in accordance with the Superseding Order of Conditions. Pre-construction monitoring has been undertaken to establish project baselines and includes tide heights, vegetation plots and transects. The monitoring program will continue for at least three years post-construction and will allow for the documentation of attainment of habitat restoration goals, identify the limits and extent of invasive plant populations, and identify measures to improve the efficiency, reduce cost, or improve effectiveness of future projects.
2. Ample and unconstrained infrastructure facilities and services exist to support those aspects of the project within subject matter jurisdiction:
- Beyond the placement of a new box culvert within the existing roadway layout in the approximately location of the existing 15-inch diameter culvert, the project does not require any new infrastructure facilities or services. It will result in the restoration of a 6.5-acre salt marsh through improved tidal flushing.

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 August 12, 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 26, 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).

July 31, 2009

Date


Ian A. Bowles

Comments Received:

07/08/2009 Office of Coastal Zone Management
07/08/2009 Division of Marine Fisheries
07/08/2009 United States Environmental Protection Agency
07/10/2009 Town of Fairhaven Board of Public Works
07/17/2009 Massachusetts Department of Environmental Protection - Boston
07/23/2009 The Coalition for Buzzards Bay
07/24/2009 Board of Underwater Archaeological Resources
07/24/2009 Department of Conservation and Recreation

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