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August 14, 2009

Steven Davis  
Rackemann Strategic Consulting, Inc.  
160 Federal Street  
Boston, MA 02110

Re: Request for Advisory Opinion  
Periodic Opening of Oyster Pond – Edgartown

Dear Mr. Davis:

I am writing in response to your letter of July 13, 2009, in which you requested an Advisory Opinion as to whether review under the Massachusetts Environmental Policy Act (MEPA) is required for the project referenced above. Because your Request for an Advisory Opinion concerned a claim that the project should be categorized as "Routine Maintenance", publication of the request in the *Environmental Monitor* was required, and the request was subject to a public comment period of 20 days, in accordance with the MEPA regulations at 301 CMR 11.01(6)(c). Your request was noticed in the July 22, 2009 edition of the *Environmental Monitor* and the comment period closed on August 11, 2009. Comment letters were submitted by MassDEP, the Martha's Vineyard Commission and the Town of Edgartown Shellfish Department.

Based on information provided in your letter, the project entails the periodic opening of Oyster Pond to the Atlantic Ocean to reduce the water level of the pond and maintain its salinity. This activity has been conducted an average of four to five times annually for at least 100 years by the Pohognot Trust and its predecessors under the provisions of a Chapter 91 License issued by the Massachusetts Department of Public Works on October 28, 1930. According to your letter, this license remains in effect.

On May 21, 2009, the Trust received an Order of Conditions from the Edgartown Conservation Commission to continue the routine opening of the pond as a maintenance activity that shall be in effect for a period of five years from the date of issue. The Order, which references a letter dated April 2, 2009 from the Natural Heritage and Endangered Species Program (NHESP) set stringent conditions on the opening of the pond to protect wetland resources and endangered species. The Order was appealed by abutters to the Department of Environmental Protection (MassDEP).

The project exceeds the MEPA review threshold at 301 CMR 11.03(3)(b)(1) for the alteration of a coastal dune, barrier beach or coastal bank. Because the project requires a Superseding Order of Conditions from MassDEP, it ordinarily would be subject to MEPA review and, therefore, would require the submission of an Environmental Notification Form (ENF). However, your letter requested that I find that the project constitutes "Routine Maintenance", which is defined in the MEPA regulations as:

Any maintenance work or activity carried out on a regular or periodic basis in a manner that has no potential for Damage to the Environment or for which performance standards have been developed that avoid, minimize, or mitigate potential environmental impacts to the maximum extent practicable. (301 CMR 11.02).

Pursuant to 301 CMR 11.03, the review thresholds do not apply to projects that qualify as Routine Maintenance and no MEPA review is therefore required for such projects. Based on the information you submitted with your letter and comments received, I find that the proposed activity has been carried out on a regular or periodic basis. Moreover, I find that the activity, though it may have potential for Damage to the Environment, would be subject to stringent performance standards imposed by the Superseding Order of Conditions to be issued by MassDEP that will serve to avoid, minimize or mitigate potential environmental impacts. I am confident that MassDEP is capable of evaluating the proposed activity and attaching conditions thereto that would ensure that the interests of the Wetlands Protection Act are safeguarded. Therefore, I find that the activity meets the definition of Routine Maintenance and, as such, is not subject to review under MEPA. The submission of an ENF is not required and MassDEP may proceed with issuance of its Superseding Order of Conditions.

Please contact Richard Bourré, Assistant Director of the MEPA Office, at (617) 626-1130 if you have any questions regarding this matter.

Sincerely,



Alicia McDevitt  
Assistant Secretary

Cc: Elizabeth Kouloheras, MassDEP Southeastern Regional Office