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April 16, 2002

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PHASE ONE WAIVER
DRAFT RECORD OF DECISION

PROJECT NAME : Emerald Necklace Environmental Improvements Master Plan and Phase I Muddy River Flood Control, Water Quality, Habitat Enhancement, and Historic Preservation Project

PROJECT MUNICIPALITY : Boston and Brookline

PROJECT WATERSHED : Charles River

EOEA NUMBER : 11865

PROJECT PROPONENT : Boston Parks and Recreation Department and Town of Brookline

DATE NOTICED IN MONITOR : February 9, 2002

As Secretary of Environmental Affairs, I have reviewed this project pursuant to the Massachusetts Environmental Policy Act (M.G.L. c.30, ss. 61-62H) and Section 11.11 of the MEPA regulations (301 CMR 11.00), and hereby **propose to grant a Phase One Waiver** (as defined below), allowing the Charlesgate element of the project to proceed to the state permitting agencies pending completion of the Final Environmental Impact Report (FEIR) for the entire project. This proposed waiver is subject to the satisfaction of certain conditions, also contained in this Draft Record of Decision (DROD).

Project Description

This project involves a range of physical improvements and management practices that will produce flood control, water quality improvements, habitat enhancement, landscape restoration, pedestrian and automobile circulation improvements, and building and bridge restoration along the Muddy River. The project constitutes the first phase in the long-term restoration of the entire system of Emerald Necklace parks in Boston and Brookline. This MEPA review is proceeding under a Special Review Procedure (SRP), established in a certificate dated April 29, 1999. Pursuant to the SRP Certificate, a Citizens Advisory Committee

(CAC), representing the full range of stakeholders, has been created. The CAC has met regularly over the past three years, and it has reviewed in detail drafts of the DEIR document. The project is also subject to a Memorandum of Understanding (MOU) executed in November 1999, by and between the Executive Office of Environmental Affairs, the Department of Environmental Management, the Massachusetts Emergency Management Agency, the Boston Water and Sewer Commission, the Town of Brookline and the City of Boston.

The project will require a variance under the Wetlands Protection Act, a 401 Water Quality Certification, a Chapter 91 License, and a Special Waste Determination from the Department of Environmental Protection (DEP), and a Section 404 permit under the Federal Clean Water Act from the U.S. Army Corps of Engineers. Because the Emerald Necklace parks are listed on the National and State Registers of Historic Places, the project is subject to review by the Massachusetts Historical Commission, the Boston Landmarks Commission, and the Brookline Preservation Commission. The project is receiving financial assistance from the Commonwealth; therefore, MEPA jurisdiction is broad in scope, extending to all aspects of the project with potential impacts on the environment.

As described in the DEIR, the project is comprised of six geographic elements: Charlesgate, the Back Bay Fens, the Riverway, and the three ponds within Olmsted Park (Leverett, Willow, and Wards Ponds). For each element, the DEIR analyzes alternative strategies (including a no-build alternative) and selects a Preferred Alternative.

Phase One Waiver Request

The SRP and ENF certificates allowed the proponent to request that the Charlesgate element of the project be allowed to proceed, provided that the environmental impacts and mitigation measures associated with the Charlesgate element were adequately described in the Draft EIR, and provided that the regulatory standards for a Phase One Waiver had been met. The waiver request was presented within the Draft EIR, and it was a subject of the comments received. As described in the Draft EIR, the Preferred Alternative for the Charlesgate element includes the removal of waterway obstructions under Ipswich Street; dredging 3,300 cubic yards (c.y.) of sediment and debris; and landscape rehabilitation.

Section 11.11 of the MEPA regulations provides that the Secretary may waive any provision or requirement of the Regulations not specifically required by MEPA, and may impose appropriate and relevant conditions or restrictions, provided that the Secretary finds that strict compliance with the provision or requirement would: (a) result in 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.

In the case of a partial waiver of a mandatory EIR review threshold that will allow the proponent to proceed with Phase One of the project prior to preparing an EIR, the Secretary, at a minimum, must base this finding on determinations that: (a) the potential impacts of Phase One, taken alone, are insignificant; (b) ample and unconstrained infrastructure facilities and services exist to support Phase One; (c) the project is severable, such that Phase One does not require the implementation of any other future phase of the project or restrict the means by which potential environmental impacts from any other phase of the project may be avoided, minimized or mitigated; and (d) the agency action on Phase One will contain terms such as a condition or restriction in a permit, contract or other relevant document approving or allowing the agency action, or other evidence satisfactory to the Secretary, so as to ensure due compliance with MEPA and 301 CMR 11.00 prior to commencement of any other phase of the project. In this context, I particularly note Section 11.01(2)(d) of the MEPA Regulations, which provides that a project shall not be phased or segmented to evade, defer, or curtail MEPA review.

Discussion

Comments received from CAC members and others have focused on two concerns associated with expediting the Charlesgate element in advance of the rest of the project. First, there is the concern that without an adequate commitment to BMPs and other maintenance measures, the investment in Phase One will be undermined by continued sedimentation, thus shortening the useful life of the improvements. Second, there is the concern over potential project segmentation. Although the Charlesgate element has clear value for flood control purposes, it will not in itself solve the significant flooding risks still faced by institutions and property owners upstream of the Fens. Thus, allowing Charlesgate to proceed without adequate commitments to the

implementation of basin-wide BMPs and maintenance, the timing of future phases, and the creation of an effective independent oversight entity, raises serious questions of efficiency and fairness. Accordingly, I have conditioned this DROD as set forth in Finding 5 below.

Findings

I have carefully reviewed the Draft EIR, supporting documentation, and written comments received (most of which support the early completion of the Charlesgate element), and I make the following findings:

1. Provided that the conditions set out below can be satisfied, delaying the implementation of the Charlesgate element would result in an undue hardship, causing the loss of federal funds for the work, and delaying the implementation of the partial flood control benefits associated with this element.
2. The potential environmental impacts of the Charlesgate element, taken alone, are insignificant. The Charlesgate work does not independently meet any MEPA filing thresholds. The impacts are primarily short-term in nature and associated with the construction staging. The Charlesgate element involves a minimal amount of dredging, the impacts of which have been described in the Draft EIR and for which adequate mitigation can be developed during permitting. DEP has commented that the Charlesgate element appears to qualify for limited project status under the Wetlands Protection Act.
3. Construction equipment and materials may be transported on existing roadways; downstream flood storage capacity within the Charles River Basin is adequate; and upstream flood capacity will be adequate **provided that basin-wide BMPs are implemented**. Based on and subject to the foregoing, I find that ample and unconstrained infrastructure facilities and services exist to support the Charlesgate element.
4. Because construction of the Charlesgate element will not restrict the means by which potential impacts of future phases can be avoided, I find, therefore, that the Charlesgate element is severable from the remainder of the project within the limited meaning of Section 11.11(4)(c) of the MEPA regulations. I note, however, that concerns remain over project segmentation that must be addressed in the conditions below.

5. All mitigation commitments associated with the Charlesgate element shall be incorporated into the agencies' Section 61 Findings and the associated Agency Actions (i.e., Permits or agreements concerning Financial Assistance). In addition, to ensure full compliance with MEPA, pursuant to Sections 11.01(2)(c) and 11.11(4)(d) of the MEPA Regulations, the following conditions must be satisfied before I may execute the Final Record of Decision. Each of these conditions shall also be incorporated into the agencies' Section 61 Findings and other agency actions:

- a. Creation of a workplan and schedule for implementation and maintenance of basin-wide non-structural BMPs.
- b. The Draft EIR does not include detailed discussion of maintenance issues for the Charlesgate element. The workplan needs to expand upon the Draft EIR treatment of maintenance for the Charlesgate element, and address any permitting requirements of the Metropolitan District Commission.
- c. Commitment to completion of basin-wide evaluative studies for potential structural Best Management Practices (BMPs) during calendar year 2002, to ensure that the results of the studies will be fully reflected in the Final EIR.
- d. To maintain the project schedule described in the Draft EIR and prevent undue segmentation, the Final EIR needs to be submitted to EOEA no later than January 31, 2003. I note that this filing condition should not be considered unreasonable or burdensome, as it is consistent with the proponents' anticipated filing timeframe as mentioned in the Draft EIR.
- e. Creation of a dedicated funding source to support the levels of basin-wide BMP implementation and other maintenance measures required to prevent future degradation of the resource and the planned improvements. As suggested by the Town of Brookline, I suggest that the funding commitment be evidenced through amendment of the MOU.
- f. Implementation of a management structure, through the creation of a permanent independent oversight body, representing the full range of stakeholders. This body should contain at a minimum the following members: Boston and Brookline parks agencies; Metropolitan District Commission; EOEA; DEM; Emerald

Necklace CAC representatives from both communities; Boston and Brookline Greenspace Alliances; Massachusetts Historical Commission; Boston Landmarks Commission; Brookline Preservation Commission; Emerald Necklace Conservancy; Charles River Watershed Association; and Boston Society of Landscape Architects. The oversight body shall have an independent staff, funded by the proponents.

Based on the above findings and subject to the above conditions, it is my judgment that the waiver request has merit, meets the tests established in 301 CMR 11.11, and will serve to advance the interests of the Massachusetts Environmental Policy Act. Therefore, I propose to grant the Phase One Waiver for the Charlesgate work subject to the aforementioned findings and conditions. This Draft Record of Decision (DROD) shall be published in the next issue of the *Environmental Monitor* for a fourteen-day public review and comment period. Following the close of that comment period and consideration of the comments received, if I have received satisfactory written confirmation that the conditions have been met, I will consider executing a Final Record of Decision (FROD). The issuance of a FROD would allow the Charlesgate element to proceed to final permitting and implementation prior to submission of the Final EIR.

April 16, 2002

Date

Bob Durand

Comments received on the Draft EIR (continues on next page):

03/01/02 Natural Heritage and Endangered Species Program
03/07/02 Edward Cutler
03/08/02 Division of Marine Fisheries
03/21/02 Lisa Tucker-Kellogg
04/05/02 Town of Brookline Department of Public Works
04/08/02 Northeastern University
04/08/02 Medical Academic and Scientific Community Organization
04/08/02 Friends of the Muddy River
04/08/02 Frances Shedd-Fisher
04/08/02 Arleyn Levee
04/08/02 Fenway Studios, Inc.
04/08/02 Boston Greenspace Alliance

04/08/02 Emerald Necklace Citizens Advisory Committee
04/08/02 Brookline Greenspace Alliance
04/08/02 City of Boston Environment Department
04/08/02 Jeffrey Ferris
04/08/02 Charles Beveridge
04/08/02 Metropolitan District Commission
04/08/02 Charles River Watershed Association
04/08/02 The Emerald Necklace Conservancy
04/08/02 Precinct One Town Meeting Members, Town of Brookline
04/08/02 Roger Frymire
04/08/02 Department of Environmental Protection NERO
04/08/02 Department of Environmental Management
04/08/02 Town of Brookline Selectmen
04/09/02 Massachusetts Emergency Management Agency
04/09/02 U.S. Department of the Interior, National Park Service
04/09/02 Massachusetts Historical Commission
04/09/02 Town of Brookline Conservation Commission
04/09/02 Friends of the Carlton Street Footbridge
04/09/02 Town of Brookline Preservation Commission
04/09/02 Brookline Village Action Groups
04/09/02 High Street Hill Association
04/10/02 Museum of Fine Arts Boston
04/10/02 The Fenway Alliance
04/11/02 Boston Water and Sewer Commission
04/12/02 YMCA of Greater Boston
04/12/02 Massachusetts Historical Commission

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