

**DECISION ON THE TOWN OF PROVINCETOWN'S  
REQUEST FOR APPROVAL  
OF THE  
PROVINCETOWN HARBOR MANAGEMENT PLAN  
RENEWAL AND AMENDMENT 2019  
PURSUANT TO 301 CMR 23.00**

**April 10, 2019**

**Commonwealth of Massachusetts  
Executive Office of Energy and Environmental Affairs  
Matthew A. Beaton, Secretary**



## I. INTRODUCTION

Today, as Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (EEA), I am approving, subject to the conditions noted below, the Provincetown Harbor Management Plan Renewal and Amendment (“Plan”) dated August 2018. This Decision presents a synopsis of Plan content, together with findings on how the Plan complies with the standards for approval set forth in the Municipal Harbor Planning (“MHP”) regulations at 301 CMR 23.00 et seq. For the purposes of this Decision, the geographic scope of the Plan is the planning area as originally defined in the 1999 Provincetown Harbor Plan and confirmed in the 2012 Provincetown Harbor Plan Amendment and Update (Figure 1). The planning area includes two distinct areas; Hatches Harbor and the downtown Provincetown Harbor area. The Hatches Harbor area is delineated by the designated shellfish growing areas (MassGIS). The downtown Provincetown Harbor area encompasses the commercial streets of Provincetown adjacent to the harbor as well as the Provincetown Harbor watershed and water infrastructure including Fisherman’s Wharf and MacMillan Pier. This portion of the MHP planning area is generally bounded to the south by the municipal boundary with Truro, the west by Cape Cod Bay, to the north by Long Point, and to the east by Commercial Street.

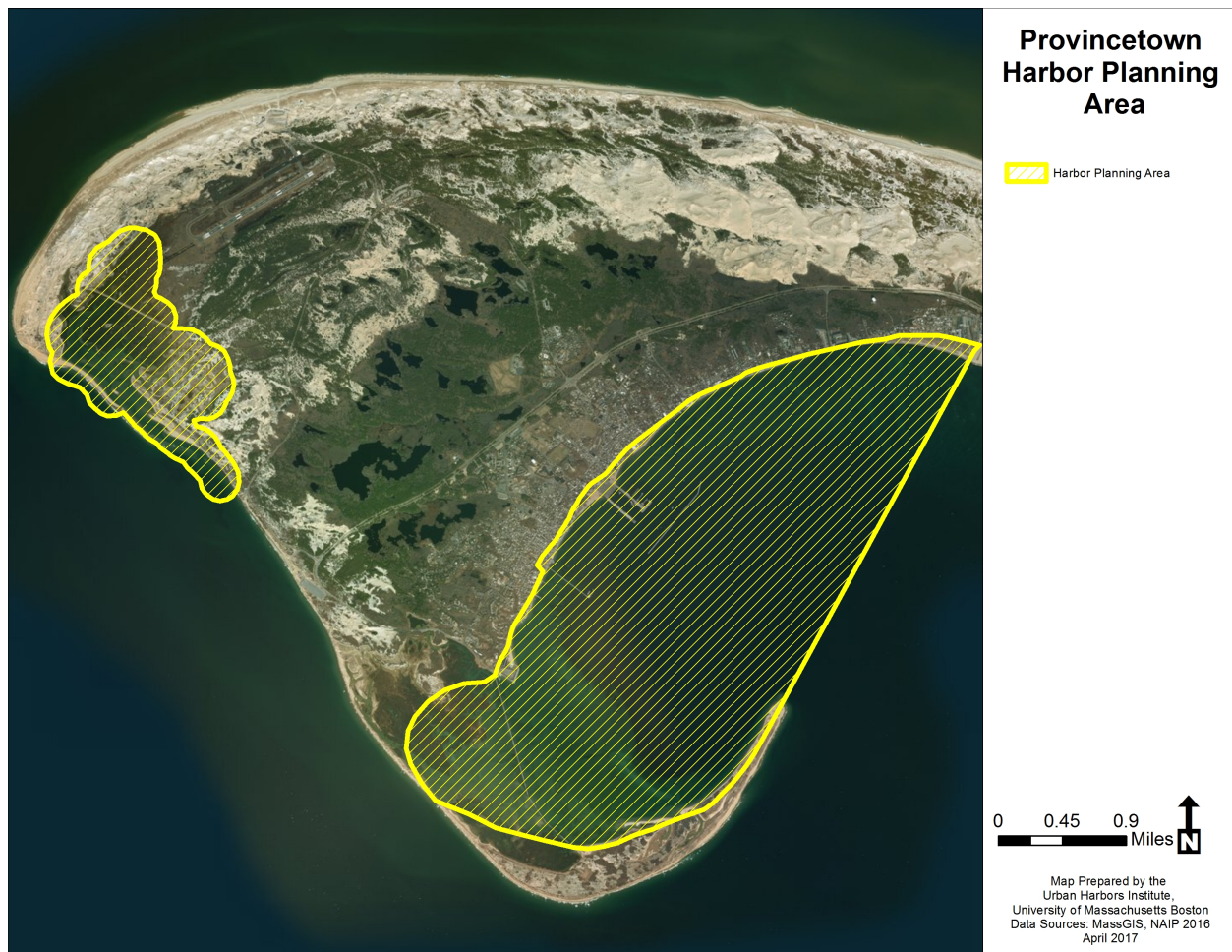
Pursuant to the review procedures at 301 CMR 23.00, the Town of Provincetown (“Town”) submitted the Plan on August 8, 2018. Following a review for completeness, CZM published a notice of public hearing and a 30-day opportunity to comment in the *Environmental Monitor* dated August 22, 2018. Oral testimony was accepted during a public hearing held in the Town of Provincetown on September 12, 2018, and 13 written comment letters were received prior to the close of the public comment period on September 21, 2018. The consultation period, which included two 60-day extensions, ended on March 20, 2019. The review and consultation process led by the Massachusetts Office of Coastal Zone Management (CZM), included consultation between staff of CZM, the Waterways Regulations Program of the Department of Environmental Protection (DEP), and Town of Provincetown staff.

All the written comments received during the comment period addressed a proposal from Sailing For All Provincetown (SFAP), a non-profit organization that seeks to develop and implement a one-design sailing program for both able-bodied and disabled adults of all sailing abilities. As part of the proposal, submitted to the Harbor Planning Committee during the MHP planning process, SFAP requested subsidized space for hoist, dockage, storage, and meeting facilities on MacMillan Pier. The comments received in support of the SFAP outlined the benefits of the

organization including opportunities for community involvement and providing water access and sailing for sailors of all abilities. Comments opposed to the SFAP proposal generally supported the mission of the organization but outlined a number of issues relating to the siting of the program on MacMillan Pier. Safety concerns from the fishing community specifically mentioned the potential conflicts between a learn-to-sail program and larger commercial fishing vessels. Comments received by the MacMillan Pier Corporation Board of Directors concluded that the proposed plan would have a negative impact on public safety, on pier finances, and on pier operations. At the public hearing on September 12, 2018, representatives from SFAP presented information on the SFAP strategic plan and requested that the proposal be included as a provision within the Plan. The majority of comments received at the public hearing supported the mission and goals of SFAP.

I support the laudable goals of improved community access to the water and making sailing accessible to all abilities. I also recognize the Town's management authority over MacMillan Pier. While MHPs can include a wide array of local planning goals and actions as well as site specific design guidelines for proposed developments, state review of MHPs is primarily limited to the formal evaluation and approval of proposed substitute provisions and amplifications to specific standards of the Chapter 91 Waterways Regulations. In this case, the Plan includes modest amendments or clarifications to prior provisions, or simply carries over and renews aspects of the 2012 Plan. These minor changes do not appear to warrant additional mitigation in other, unrelated areas of the Provincetown waterfront. Additionally, I note that Provincetown has an established entity, the MacMillan Pier Corporation, which oversees the management of MacMillan Pier as a vital piece of Provincetown's commercial waterfront. As long as consistency with state regulations is maintained, the overall management of MacMillan Pier including the selection of specific uses on the pier is left to the discretion of the MacMillan Pier Corporation and is not within the purview of this municipal harbor planning process.

In this second renewal to the Provincetown MHP, I applaud the Town for their commitment to the harbor planning process and the MHP as a vehicle to implement a community vision for the waterfront. This Plan reflects significant effort on the part of the Town and many members of the public who participated in the public process. I would like to commend the efforts of the members of the Provincetown Harbor Committee, elected officials, community residents, and all others who volunteered their time and effort over the course of the planning process.



**Figure 1. Provincetown Municipal Harbor Planning Area**

## **II. PLAN CONTENT**

The Municipal Harbor Planning Regulations (301 CMR 23.00 et seq.) establish a voluntary process under which cities and towns may develop and submit MHPs to the EEA Secretary for approval. These plans serve to promote and implement a community's planning vision for their waterfront and to inform and guide state agency decisions necessary to implement such a vision. Specifically, approved MHPs provide licensing guidance to DEP in making decisions pursuant to MGL Chapter 91 (c. 91) and the Waterways Regulations (310 CMR 9.00 et seq.). Approved harbor plans may establish alternative numerical and dimensional requirements (e.g., substitute provisions) to the requirements specified by the Waterways Regulations as well as specify provisions that amplify any of the discretionary requirements of these regulations.

This Plan renews and amends the Provincetown Municipal Harbor Plan, which was approved on May 4, 1999, and renewed and amended on February 29, 2012. The geographic area

covered by the Plan remains the same, and includes the downtown Provincetown Harbor area and Hatches Harbor. On February 14, 2107, the Secretary of EEA was notified that Provincetown was initiating a process to renew and update the Provincetown Harbor Plan, in accordance with procedures and requirements for approval of an MHP as established in 301 CMR 23.00 et seq.

This Plan renewal and amendment continues to set forth a vision that maintains the historic character of the harbor, while expanding public access and protection for the natural resources located within the harbor planning area. Since the original 1999 plan was approved, it has been utilized as a planning tool to provide guidance to DEP with respect to c.91 licensing of waterfront properties and to coordinate the efforts and actions of multiple local committees and departments. The original 1999 plan created the “Presumptive Historic High Water Line” which has been used by DEP to determine c. 91 jurisdiction within the planning area, as well as the Harbor Access Gift Fund, a dedicated fund for water access improvements. This Plan, as with the 2012 Plan, carries forward these objectives, while including new recommendations and provisions.

Focus areas of this Plan include public access, maintaining appropriate water-dependent uses within the harbors, and protection of natural resources and water quality as it relates to commercial and recreational shellfishing. The Plan includes specific goals, objectives and recommendations for a broad range of harbor resources and uses, including Water Quality, Public Access and Town Landings, Aquaculture, Commercial Fishing, Recreational Fishing, Beaches, Navigation and Dredging, Recreational Boating, Moorings and Anchorages, and Culture and Tourism. The Plan also includes specific guidance to DEP for c. 91 licensing. A new component in this Plan is discussion of potential climate change impacts upon the various goals, objectives and recommendations for the harbor planning area.

In the Plan, the Town has requested two proposed changes to c. 91 standards. First, the Plan seeks clarification relating to a substitute provision for Fisherman’s Wharf which was approved in the 2012 Plan. Second, the Plan requests one substitution for the 227R Commercial Street (“Rose’s Wharf”) parcel (Figure 2). The plan also maintains three amplifications included in the 2012 Plan. Through its local planning process, the Town has developed the Plan and the proposed substitute provisions and amplifications in a framework that the Town has determined to be the best alternative for this portion of the waterfront.



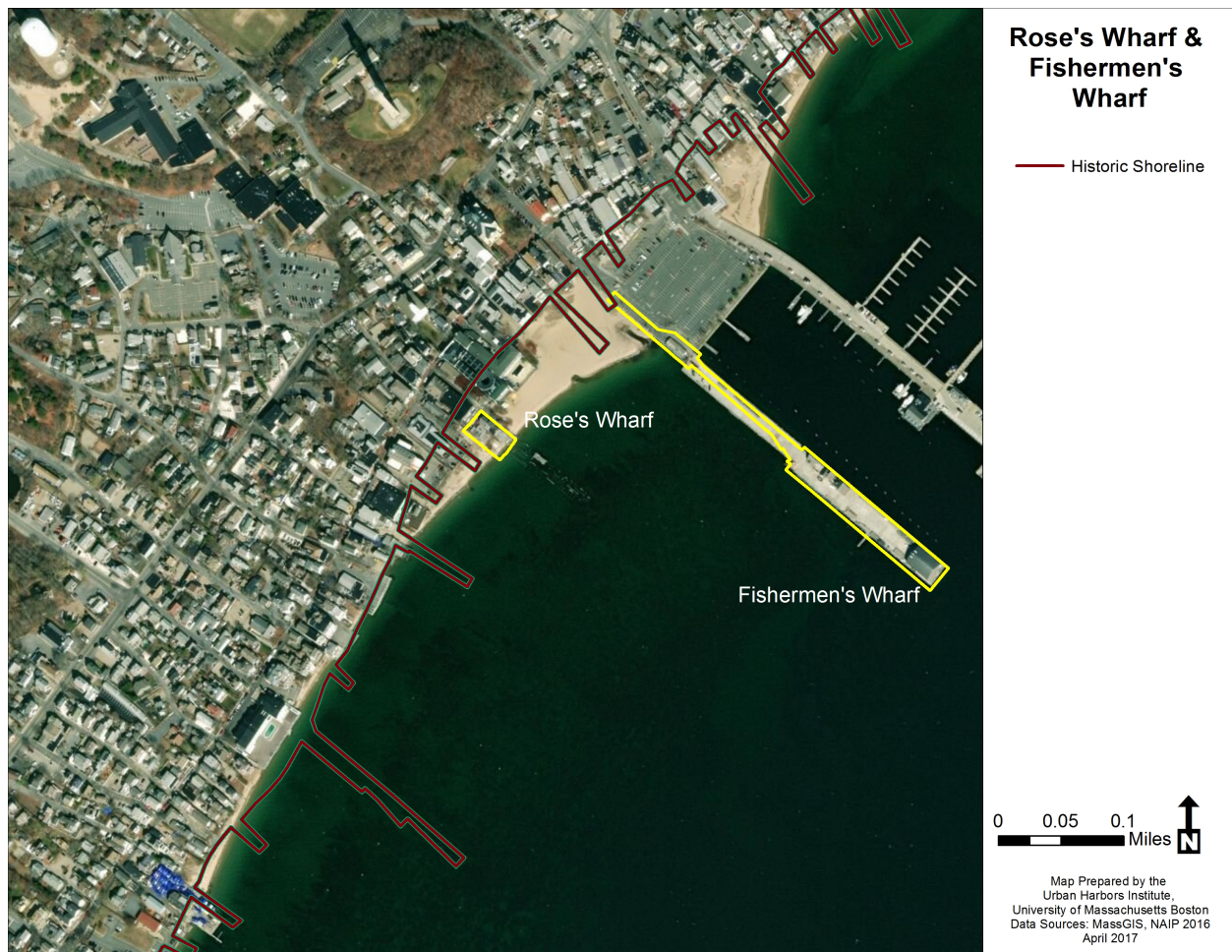


Figure 2. 227R Commercial St (Rose's Wharf) and Fisherman's Wharf

### III. STANDARDS FOR APPROVAL

The Plan contains the Town's planning vision, actions, and recommendations to guide the use and development of the Harbor planning area. It must be noted that while these elements are commendable and important to the planning and management of the harbor planning area, my approval today is bounded by the authority and standards as contained in 301 CMR 23.00 and is applicable only to those elements of the Waterways Regulations that are specifically noted in this Decision. Further, this Decision does not supersede separate regulatory review requirements for any activity.

#### **A. Consistency with CZM Program Policies and Management Principles**

The federally-approved CZM Program Plan establishes 20 enforceable program policies and nine management principles which embody coastal policy for the Commonwealth of Massachusetts.

The following is a brief summary of the Policies and Management Principles applicable to the Plan:

- Coastal Hazards Policy #1: Preserve, protect, restore, and enhance the beneficial functions of storm damage prevention and flood control provided by natural coastal landforms, such as dunes, beaches, barrier beaches, coastal banks, land subject to coastal storm flowage, salt marshes, and land under the ocean.
- Coastal Hazards Policy #2: Ensure construction in water bodies and contiguous land area will minimize interference with water circulation and sediment transport. Approve permits for flood or erosion control projects only when it has been determined that there will be no significant adverse effects on the project site or adjacent or downcoast areas.
- Coastal Hazards Policy #3: Ensure that state and federally funded public works projects proposed for location within the coastal zone will: not exacerbate existing hazards or damage natural buffers or other natural resources; be reasonably safe from flood and erosion-related damage; not promote growth and development in hazard-prone or buffer areas, especially in velocity zones and Areas of Critical Environmental Concern; and not be used on Coastal Barrier Resource Units for new or substantial reconstruction of structures in a manner inconsistent with the Coastal Barrier Resource/Improvement Acts.
- Growth Management Policy #1: Encourage sustainable development that is consistent with state, regional, and local plans and supports the quality and character of the community.
- Growth Management Policy #2: Ensure that state and federally funded infrastructure projects in the coastal zone primarily serve existing developed areas, assigning highest priority to projects that meet the needs of urban and community development centers.
- Growth Management Policy #3: Encourage the revitalization and enhancement of existing development centers in the coastal zone through technical assistance and financial support for residential, commercial, and industrial development.
- Habitat Policy #1: Protect coastal, estuarine, and marine habitats—including salt marshes, shellfish beds, submerged aquatic vegetation, dunes, beaches, barrier beaches, banks, salt ponds, eelgrass beds, tidal flats, rocky shores, bays, sounds, and other ocean habitats—and coastal freshwater streams, ponds, and wetlands to preserve critical wildlife habitat and other important functions and services including nutrient and sediment attenuation, wave and storm damage protection, and landform movement and processes.
- Habitat Policy #2: Restore degraded or former wetland resources in coastal areas and ensure that activities in coastal areas do not further wetland degradation but instead take advantage of opportunities to engage in wetland restoration.
- Ocean Resources Policy #1: Support the development of sustainable aquaculture, both for commercial and enhancement (public shellfish stocking) purposes. Ensure that the review



process regulating aquaculture facility sites (and access routes to those areas) protects significant ecological resources (salt marshes, dunes, beaches, barrier beaches, and salt ponds) and minimizes adverse effects on the coastal and marine environment and other water-dependent uses.

- Ocean Resources Policy #3: Accommodate offshore sand and gravel extraction needs in areas and in ways that will not adversely affect marine resources, navigation, or shoreline areas due to alteration of wave direction and dynamics. Extraction of sand and gravel, when and where permitted, will be primarily for the purpose of beach nourishment or shoreline stabilization.
- Ports and Harbors Policy #1: Ensure that dredging and disposal of dredged material minimize adverse effects on water quality, physical processes, marine productivity, and public health and take full advantage of opportunities for beneficial re-use.
- Ports and Harbors Policy #2: Obtain the widest possible public benefit from channel dredging and ensure that Designated Port Areas and developed harbors are given highest priority in the allocation of resources.
- Ports and Harbors Policy #4: For development on tidelands and other coastal waterways, preserve and enhance the immediate waterfront for vessel-related activities that require sufficient space and suitable facilities along the water's edge for operational purposes.
- Ports and Harbors Policy #5: Encourage, through technical and financial assistance, expansion of water-dependent uses in Designated Port Areas and developed harbors, re-development of urban waterfronts, and expansion of physical and visual access.
- Protected Areas Policy #3: Ensure that proposed developments in or near designated or registered historic districts or sites respect the preservation intent of the designation and that potential adverse effects are minimized.
- Public Access Policy #1: Ensure that developments proposed near existing public recreation sites minimize their adverse effects.
- Public Access Policy #2: Improve public access to existing coastal recreation facilities and alleviate auto traffic and parking problems through improvements in public transportation and trail links (land- or water-based) to other nearby facilities. Increase capacity of existing recreation areas by facilitating multiple use and by improving management, maintenance, and public support facilities. Ensure that the adverse impacts of developments proposed near existing public access and recreation sites are minimized.
- Public Access Policy #3: Expand existing recreation facilities and acquire and develop new public areas for coastal recreational activities, giving highest priority to regions of high need or limited site availability. Provide technical assistance to developers of both public and private recreation facilities and sites that increase public access to the shoreline to ensure that both transportation access and the recreation facilities are compatible with social and environmental characteristics of surrounding communities.

- Water Quality Policy #1: Ensure that point-source discharges in or affecting the coastal zone are consistent with federally approved state effluent limitations and water quality standards.
- Water Quality Policy #2: Ensure that non-point pollution controls promote the attainment of state surface water quality standards in the coastal zone.
- Water Quality Policy #3: Ensure that subsurface waste discharges conform to applicable standards, including the siting, construction, and maintenance requirements for on-site wastewater disposal systems, water quality standards, established Total Maximum Daily Load limits, and prohibitions on facilities in high-hazard areas.

The aforementioned policies are relevant to the major issues identified and discussed in detail in the Plan: Water Quality, Public Access and Town Landings, Aquaculture, Commercial Fishing, Recreational Fishing, Beaches, Navigation and Dredging, Recreational Boating, Moorings and Anchorages, and Culture and Tourism. The Plan describes progress made within each of these topic areas since the 2012 Plan and presents recommendations for action over the tenure of this Plan. The Plan includes an assessment of consistency with CZM Program Policies and Management Principles and based on review of the documentation provided by the Town and the assessment of CZM, I conclude that it meets the intent of each relevant policy statement and, as required by 301 CMR 23.05(1), I find the Plan consistent with CZM policies.

## **B. Consistency with Tidelands Policy Objectives**

As required by 301 CMR 23.05(2), I must also find that the Plan is consistent with state tidelands policy objectives and associated regulatory principles set forth in the Chapter 91 Waterways (“Waterways”) Regulations of DEP (310 CMR 9.00). As promulgated, the Waterways Regulations provide a uniform statewide framework for regulating tidelands projects. MHPs and associated amendments present cities and towns with an opportunity to propose modifications to these uniform standards through the amplification of the discretionary requirements of the Waterways Regulations or through the adoption of provisions that, if approved, are intended to substitute of MHPs for the minimum use limitations or numerical standards of 310 CMR 9.00. The substitute provisions of an MHP decision can reflect local planning goals involving the complex balancing of public rights in and private uses of tidelands and serve as the basis for a DEP waiver of specific use limitations and numerical standards affecting nonwater-dependent use projects, provided that other requirements are in place to mitigate, compensate, or otherwise offset adverse effects on water-related public interests.

The Plan contains guidance that will have a direct bearing on DEP licensing decisions within the harbor planning area. Included in this guidance are provisions that are intended to substitute for certain minimum use limitation and numerical standards in the regulations and provisions that amplify upon certain discretionary requirements of the waterways regulations. These provisions are each subject to the approval criteria under 301 CMR 23.05(2)(c),(d), and as explained below, I find that all of the applicable criteria have been met.

### **Evaluation of Requested Substitute Provisions**

The general framework for evaluating all proposed substitute provisions to the requirements of the Waterways Regulations is established in the MHP Regulations at 301 CMR 23.05(2)(c) and 301 CMR 23.05(2)(d). The regulations, in effect, set forth a two-part standard that must be applied individually to each proposed substitution in order to ensure that the intent of the requirements of the Waterways Regulations with respect to public rights in tidelands is preserved.

For the first part, in accordance with 301 CMR 23.05(2)(c), there can be no waiver of a Waterways Regulation requirement unless the Secretary determines that the requested alternative requirements or limitations ensure that certain conditions—specifically applicable to each minimum use limitation or numerical standard—have been met. For substitute provisions relative to the minimum use and numerical standards of 310 CMR 9.51(3)(a)–(e), any proposal must ensure that nonwater-dependent uses do not unreasonably diminish the capacity of tidelands to accommodate water-dependent uses. In addition, substitute provisions for nonwater-dependent uses that include fill or structures on any tidelands shall devote a reasonable portion of such lands to water-dependent use, including public access, as provided in 310 CMR 9.52.

The second standard, as specified in 301 CMR 23.05(2)(d), requires that the municipality demonstrate that a proposed substitution provision will promote, with comparable or greater effectiveness, the appropriate state tidelands policy objective. A municipality may propose alternative use limitations or numerical standards that are less restrictive than the Waterways requirements as applied in individual cases, provided that the plan includes other requirements that, considering the balance of effects on an area-wide basis, will mitigate, compensate for, or otherwise offset adverse effects on water-related public interests.

Table 1 at the end of this section contains a summary of the proposed offset and substitute provisions contained in the Plan and subject to this Decision.

### Clarification of Substitute Provision Approved in 2012 Plan for Parking on Fisherman's Wharf

The Plan includes a clarification to substitute provisions for Fisherman's Wharf, a privately-owned pile supported pier, which were approved under the 2012 Plan. As proposed in the 2012 Plan, these substitutions related to several Waterways Regulations. At 310 CMR 9.51(3)(c), the rules prohibit parking facilities within a water-dependent use zone and contain provisions for determining the minimum dimensions for the water-dependent use zones. At 310 CMR 9.51(3)(d), standards require the provision of open space at the project site at ground level on a one-one basis for every square foot of nonwater-dependent use. At 310 CMR 9.52(1)(b)(1), standards require that projects with nonwater-dependent uses that include fill or structures on any tidelands must devote a reasonable portion of the site to water-dependent use, including a pedestrian access network of a kind and to a degree that is appropriate for the project site and the facility(ies), provided that at a minimum, such network shall consist of walkways and related facilities along the entire length of the water-dependent use zone, and wherever feasible, such walkways shall be adjacent to the project shoreline and shall be no less than ten feet in width.

The 2012 Plan approved substitute provisions which waived the above applicable Waterways Regulations with an alternative requirement for a 10' wide walkway exclusively on the western side of Fisherman's Wharf, and for the walkway to be located outside of the existing pier deck footprint by use of cantilevered or pile-supported construction. As an offset to the recommended substitution, a payment of \$205,500 was to be made to the Harbor Access Gift Fund.

Since the 2012 Plan, the owners of Fisherman's Wharf have worked to obtain permits for a cantilevered and pile-supported 10' walkway along the western side of the wharf, as prescribed in the Decision for the 2012 Plan. However, federal regulatory agencies raised concerns during permitting due to potential impacts to eelgrass in the vicinity of portions of the walkway. As a result of these concerns, this renewal and amendment maintains all of the requirements of the 2012 Plan, while clarifying that the required 10' wide walkway may be located either within the limits of the existing pier or beyond the pier by cantilever or piles. The final alignment of the walkway including which portions will be located on the pier and which cantilevered or pile-supported will be determined through the permitting process.

The 2012 Plan presented a very strong case that the application of the above standards of the Waterways Regulations (related to provision of public access walkway, open space, and water dependent use zone) would result in a significant loss of parking spaces on Fishermen's Wharf. The Town indicated that it views Fishermen's Wharf as a key, centrally-located tourism and business

infrastructure facility that is critical to the interests of the Town, local businesses and residents, and the general public. In addition to supporting direct and easy access for water-dependent users, including commercial ferry service, a commercial whale watch operation, commercial charter fishing vessels, transient slips for visiting yachts and local recreational vessels, parking on Fishermen's Wharf provides a key point of entry to the Town's downtown commercial center. With its narrow streets and densely sited buildings, public parking in the Town is extremely limited.

As the result of my review, I find that the Plan has demonstrated that the proposed clarification to the substitute provision for Fishermen's Wharf as approved in the 2012 Plan will continue to promote, with comparable or greater effectiveness, the state tidelands policy objectives pertaining to public open space, water dependent use zones, and public access at the waterfront. I therefore approve this proposed clarification.

#### Analysis of Requested Substitute Provision for Water Dependent Use Zone - 227R Commercial St.

The Plan as submitted for approval originally included proposed substitute provisions for both Exterior Open Space Requirements, under 310 CMR 9.53(2)(b)(1), and Setback Requirements for Water Dependent Use Zones (WDUZ), under 310 CMR 9.51(3)(c). During the required consultation period with the CZM, DEP and the property owners, it was determined that the proposed substitute provision for Exterior Open Space pursuant to 310 CMR 9.51(3)(d) was not needed. As a result, through this Decision I am only reviewing the proposed substitution provision for the reconfiguration of the WDUZ on the 227R Commercial Street property.

To approve any substitute provision to the standard for WDUZ at 310 CMR 9.51(3)(c), I must first determine that the Plan specifies alternate distances and other requirements that ensure new or expanded buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, in order that sufficient space along the water's edge will be devoted exclusively to water-dependent use and public access associated therewith as appropriate for the area. Second, within the context of the Plan, the Town must demonstrate that the substitute provision will meet this standard with comparable or greater effectiveness (301 CMR 23.05(d)). My determination relative to whether or not these provisions promote this tideland policy with comparable or greater effectiveness is conducted in accordance with the MHP regulatory guidance discussed in detail below.

Although not finalized, development for the 227R Commercial Street property proposes continuous public access no less than 25 feet in width along the shoreline as well as point access

walkways that connect from Commercial Street to the water. Also, it is anticipated that the project will include the redevelopment of the dilapidated pier structure into a public amenity with opportunities for public access. As a water dependent use, the pier will not be accounted for within the WDUZ; however the structure will provide space for water dependent uses including tie ups for small watercraft and boat storage. The proposed redevelopment will enhance pedestrian access to and along the property's shoreline, connect to adjacent properties, including the busy Commercial Street and serve as a gateway to the proposed redeveloped pier. With the proposed reconfiguration of the WDUZ, the area of the WDUZ will be equal or greater than that required under the Waterways Regulations at 310 CMR 9.51(3)(c).

As a result of my review, I find that the Town has demonstrated that the reconfigured WDUZ will be no less than 25 feet in width, devoted exclusively to water-dependent uses and provides sufficient public access. I also find that the Plan has demonstrated that this proposed substitution will continue to promote, with comparable or greater effectiveness, the state tidelands policy objectives pertaining to water-dependent use zones and public access. I therefore approve this substitute provision. My approval of this substitute provision is conditioned that under no circumstances will there be a net loss of WDUZ area as a result of reconfiguration.

### **Evaluation of Requested Amplifications**

The MHP regulations at 301 CMR 23.05(2)(b) require me to find that any provision that amplifies a discretionary requirement of the Waterways Regulations will complement the effect of the regulatory principle(s) underlying that requirement. Upon such a finding, DEP is committed to "adhere to the greatest reasonable extent" to the applicable guidance specified in such provisions, pursuant to 310 CMR 9.34(2)(b)(2).

The Plan carries forward three provisions contained in the 2012 Plan (Table 2). These will have significance to the c.91 licensing process as an amplification, pursuant to 301 CMR 23.05(2)(b). As with the previous plan, my determination of the relationship of these proposed local amplification provisions to c.91 standards in accordance with the MHP regulatory guidance is discussed below.

The following amplifications are applicable to all properties, including those that fall under the amnesty program.

1. 310 CMR 9.16(2) Tidewater Displacement Fee. "Except as provided in 310 CMR 9.16(4), prior to issuance of a license . . . for any fill or structure that will displace tidewaters below the high



water mark, the applicant, or his or her heirs or assignees responsible for such displacement, shall, at the direction of [DEP]: ... (c)4. [make] a contribution to a special fund or other program managed by a public agency or non-profit organization in order to directly provide public harbor improvements."

The Plan requires that tidewater displacement fees levied by DEP be paid directly to the Harbor Access Gift Fund, as described in Appendix C.

2. 310 CMR 9.22(1) Maintenance and Repair of Fill and Structures. "No application for license or license amendment shall be required for [maintenance and repair] activity. Maintenance and repair include...(c) restoration to the original license specifications of licensed fill or structures that have been damaged by catastrophic events, provided that no change in use occurs and that: ...2. in the case of flood-related damage, the cost of such restoration does not exceed 50 percent of the cost of total replacement according to the original license specifications..."

The Plan calls for a strict enforcement of this requirement and for close coordination between DEP and the Provincetown Building Inspector, to determine when further licensing is required for structures that have been damaged beyond the 50% replacement cost limit.

3. 310 9.22(3) Minor Project Modifications. "The licensee may undertake minor modifications to a license project . . . without filing an application for license or license amendment. Such modifications are limited to...No such modifications shall be undertaken until the licensee has submitted written notice to [DEP] describing the proposed work in sufficient detail, with reference to any relevant license plans, for [DEP] to determine compliance with the above conditions."

The Plan calls for the strict enforcement of this requirement and for DEP to provide the Harbor Committee with the opportunity to review and comment upon any written notice of proposed minor project modification.

Throughout the Plan, there is considerable thought and rationale given to identifying the importance of preserving and improving local public access and supporting and enhancing water

dependent uses. The proposed amplifications provide reasonable local guidance to DEP when licensing projects, and I find that these provisions adequately complement the underlying principle of the applicable Waterway Regulation standards.

**Table 1. Summary of Substitute Provision and Clarification**

| Regulatory Provision   | Chapter 91 Standard   | Substitution/Clarification   | Offsetting Measures                |
|--|---|--|------------------------------------|
| <b>227R Commercial St</b>                                    |   |  |                                    |
| 310 CMR 9.51(3)(c): Water-Dependent Use Zone (WDUZ) setbacks | “New or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone”.             | <i>Substitution:</i> Any reconfigured WDUZ shall have an area that is equal to or greater than a compliant WDUZ; no less than 25 feet in width.                        | None                               |
| <b>Fisherman’s Wharf</b>                                     |   |  |                                    |
| 310 CMR 9.51(3)(c) Water-Dependent Use Zone (WDUZ) setback   | “... parking facilities at or above grade. . . shall not be located within a WDUZ”  | <i>Clarification of 2012 Plan:</i> Allow for public access along western side of Fisherman’s Wharf as cantilevered or pier supported structure or within existing pier | Payment to Harbor Access Gift Fund |
| 310 CMR 9.51(3)(d) Open Space Requirements                   | “at least one square foot of the project site at ground level. . . shall be reserved as open space for every square foot of tideland area. . . containing nonwater-dependent use” |  |                                    |
| 310 CMR 9.52(1)(b)(1) Pedestrian Access Network              | “such walkways shall be adjacent to the project shoreline and... shall be no less than ten feet in width”   |  |                                    |

**Table 2. Summary of Amplifications (applicable across Planning Area)**

| Regulatory Provision  | Chapter 91 Standard  | Amplification  |
|---|--|--|
| 310 CMR 9.16(2) Tidewater Displacement Fee                    | “For any fill or structure that will displace tidewaters below the high water mark, the applicant . . . shall, at the direction of [DEP]: ... [make] a contribution to directly provide public harbor improvements.” | Tidewater displacement fees levied by DEP shall be paid directly to the Harbor Access Gift Fund.   |
| 310 CMR 9.22(1) Maintenance and Repair of Fill and Structures | "No application for license or license amendment shall be required for [maintenance and repair] activity.”   | DEP shall coordinate with the Town to determine when further licensing is required for structures that have been damaged beyond 50% replacement cost |
| 310 9.22(3) Minor Project Modifications                       | “The licensee may undertake minor modifications to a license project . . . without filing an application for license or license amendment.”  | DEP shall allow the Town to review any applications for minor modification   |

### **C. Implementation Strategies**

Pursuant to 301 CMR 23.05(4), the Plan must include enforceable implementation commitments to ensure that, among other things, all measures will be taken in a timely and coordinated manner to offset the effect of any plan requirement less restrictive than that contained in 310 CMR 9.00. In Appendix 3, the Plan contains provisions that will be implemented through specific actions by specific town boards, committees and departments. The provisions are ranked by priority (high, medium and low) and include timelines for implementation. Based on the information provided in the Plan and as discussed above, I believe that no further implementation commitments on the part of the Town are necessary, and I find that this approval standard has been met.

### **IV. EFFECTIVE DATE AND TERM OF APPROVAL**

This Decision shall take effect immediately upon issuance on April 10, 2019. As requested by the Town, this Decision shall expire 10 years from the effective date unless a renewal request is filed prior to that date in accordance with the procedural provisions of 301 CMR 23.06. No later than six months prior to such expiration date, in addition to the notice from the Secretary to the Town required under 301 CMR 23.06(2)(b), the Town shall notify the Secretary in writing of its intent to request a renewal and shall submit therewith a review of implementation experience relative to the promotion of state tidelands policy objectives.

### **V. STATEMENT OF APPROVAL**

Based on the planning information and public comment submitted to me pursuant to 301 CMR 23.04 and evaluated herein pursuant to the standards set forth in 301 CMR 23.05, I hereby approve the Provincetown Harbor Plan Renewal and Amendment dated August 8, 2018 as the MHP for the Town of Provincetown, subject to the following conditions:

1. For licensing of Fisherman's Wharf under Waterways Regulations:
  - a. Any new or amended license submitted to DEP pursuant to this Decision, shall include plans that provide for a minimum of 10' unobstructed public access walkway/water dependent use zone as described above. Such public access walkway/water-dependent use zone may be located within or outside of the existing pier deck footprint on adjacent, contiguous space through cantilevered or pile-supported construction.

- b. Prior to, or at the time of the license application, the Town shall demonstrate that payment of the Harbor Access Gift Fund contribution has been received.
2. For licensing of 227R Commercial Street under Waterways Regulations:

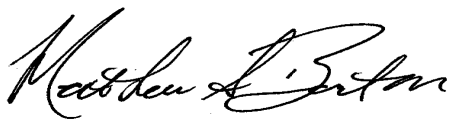
Any new or amended license submitted to DEP pursuant to this Decision for this property that provide for a reconfigured water dependent use zone shall ensure that the reconfiguration shall not result in a net loss of water dependent use zone area.

Copies of the final Approved Plan shall be provided to CZM and DEP's Waterways Program, kept on file at the Provincetown Town Clerk's office and Harbormaster Office, and made available to the public through the Town's website and copies at the public library. For Waterways licensing purposes, the Plan shall not be construed to include any of the following:

1. Any subsequent addition, deletion, or other revision to the final Plan, except as may be authorized in writing by the Secretary as a modification unrelated to the approval standards of 301 CMR 23.05 or as a plan amendment in accordance with 301 CMR 23.06(1); and
2. Any provision which, as applied to the project-specific circumstances of an individual license application, is determined by DEP to be inconsistent with the Waterways Regulations at 310 CMR 9.00 or with any qualification, limitation, or condition stated in this Decision.

This Decision and the Plan do not supersede separate regulatory review requirements for any activity.

In a letter dated April 4, 2019, the DEP Waterways Program Chief has expressed support for approval of the Plan and stated that in accordance with the provisions of 310 CMR 9.34(2) the Department will require conformance with any applicable provisions of the Plan in the case of all waterways license applications submitted subsequent to the Plan's effective date. It will apply as well to all pending applications for which no public hearing has occurred or where the required public comment period has not expired by the effective date of the approved Plan.

A handwritten signature in black ink, reading "Matthew A. Beaton". The signature is fluid and cursive, with the first name "Matthew" and last name "Beaton" clearly distinguishable.

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Matthew A. Beaton  
Secretary of Energy and Environmental Affairs

April 10<sup>th</sup>, 2019

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Date



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

# Department of Environmental Protection

One Winter Street Boston, MA 02108 • 617-292-5500

Charles D. Baker  
Governor

Karyn E. Polito  
Lieutenant Governor

Matthew A. Beaton  
Secretary

Martin Suuberg  
Commissioner

April 9, 2019

Matthew A. Beaton, Secretary  
Executive Office of Energy and Environmental Affairs  
100 Cambridge Street  
Boston, MA 02114

**RE: DEP Recommendation for the Approval of the Town of Provincetown's Municipal Harbor Plan, dated August, 2018.**

Dear Secretary Beaton:

The Department of Environmental Protection, Waterways Regulation Program ("the Department") has reviewed the Town of Provincetown's Municipal Harbor Plan ("the Plan"), dated August, 2018. The Department's staff has worked closely with the Massachusetts Office of Coastal Zone Management (CZM) and representatives of the Town throughout the planning process, and our comments have been addressed and incorporated into the Plan. The Department, therefore, recommends that you approve the Plan and make a finding that it is consistent with state tidelands policy objectives, as required by 301 CMR 23.05(3).

Pursuant to 310 CMR 9.34(2)(a), the Department will adopt as binding guidance in all License application reviews any Substitute Provisions contained in the Secretary's Final Decision on the Plan. The Plan describes a single Substitution that the Department has determined will adequately meet or exceed the protected interests pursuant to 310 CMR 9.00. The referenced Substitution will modify the dimensional standards pursuant to 310 CMR 9.51(3)(c), which governs allowable uses and setbacks in the Water-Dependent Use Zone (WDUZ). The Plan also describes certain Amplifications pursuant to: 310 CMR 9.16(2)(c), Tidewater Displacement Fee; 310 CMR 9.22(1) Maintenance and Repair of Fill and Structures; and, 310 CMR 9.22(3), Minor Project Modifications. Pursuant to 310 CMR 9.34(2)(b)2, the Department will adhere to the greatest reasonable extent to the guidance specified therein.

In accordance with the provisions of 310 CMR 9.34(2), the Department will require conformance with any applicable provision of the approved Plan for all waterways license applications submitted subsequent to the Plan's effective date and within the geographic scope of the Plan. It will apply as well

This information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-5751.

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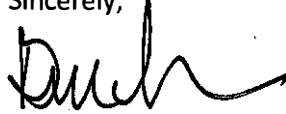
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to all pending applications for which no public hearing has occurred or where the required public comment period has not expired by the effective date of the Decision.

The Department looks forward to continuing its work with CZM and the representatives of the Town of Provincetown in the implementation of this important planning effort. Should you have any questions in regard to the foregoing, please contact me at (617)292-5615. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ben Lynch', with a stylized, flowing script.

Ben Lynch  
Program Chief  
Waterways Regulation Program

Cc: Lisa Engler, Director, Massachusetts Office of Coastal Zone Management ("CZM")  
Steve McKenna, Cape and Islands Regional Coordinator (CZM)  
Provincetown Harbor Committee  
Provincetown Town Manager David Panagore  
Provincetown Planning Board  
Provincetown Harbormaster Rex McKinsey  
DEP Project files