

DECISION ON THE JOINT
REQUEST FOR APPROVAL OF THE
NEW BEDFORD/FAIRHAVEN HARBOR PLAN
PURSUANT TO 301 CMR 23.00

September 24, 2002

Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Robert Durand, Secretary

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ATTACHMENTS: DEP LETTER OF ENDORSEMENT
DEM LETTER OF ENDORSEMENT

I. INTRODUCTION

Today I am pleased to approve the joint Harbor Plan for the City of New Bedford and Town of Fairhaven, dated August 2002 ("Plan"). This Decision presents a synopsis of Plan content, together with my determinations on how the Plan complies with the standards for approval set forth in the municipal harbor planning (MHP) regulations at 301 CMR 23.00.

The Plan has been reviewed in accordance with procedures contained in the MHP regulations, beginning with advance consultation to obtain submittal guidance from the Massachusetts Coastal Zone Management (CZM) Office and the Waterways Regulation Program of the Department of Environmental Protection (DEP). The Plan, together with a separate document addressing compliance with the plan approval standards¹ ("Compliance Statement"), was initially submitted on February 9, 2001. Following a review for completeness, CZM published a notice of public hearing and 30-day opportunity to comment in the Environmental Monitor dated February 24, 2001. A public hearing was held in New Bedford on March 15, 2001 and, prior to the close of the comment period on March 26, 2001, written comments were received from thirteen parties including four public agencies, seven private businesses, and two non-profit advocacy organizations. Based on this input and subsequent consultation with CZM, the City of New Bedford determined that certain minor modifications to the Plan were appropriate and a completed final version was submitted in August 2002. In reaching my approval decision, I have taken into account all oral and written testimony submitted by the public, together with responses from municipal representatives.²

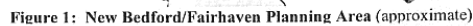
As shown in Figure 1, the harbor planning area encompasses the entire basin at the mouth of the Acushnet River, together with all adjacent shorelands and four sizable islands, bounded by the Coggeshall Street Bridge to the north and the Hurricane Barrier to the south. To the east and west, the landside boundary incorporates the arterial roadways closest to the shoreline, as well as portions of the downtown business districts in the immediate vicinity thereof. It is important to note that all of these waters and a high percentage of the lands -- the extensive areas created by previous filling -- are tidelands subject to state regulatory jurisdiction under M.G.L. c.91 (the Public Waterfront Act) and implementing regulations at 310 CMR 9.00.

Further, a significant majority of the lands and waters of the harbor planning area lie within the New Bedford/Fairhaven Designated Port Area (DPA), a working waterfront of special state significance that was first officially identified as such in 1978. The DPA portion of the harbor, which is uniformly industrial in character, has been home to seafaring activities for over 150 years. From its origins as the world center of the whaling industry, New Bedford today remains one of the nation's preeminent fishing ports. Routinely, it boasts the first- or second-highest value of landed product in the country, and has established a major seafood processing

¹ See "New Bedford/Fairhaven Harbor Plan: Compliance with Standards for Plan Approval, Including DPA Master Plan Approval Standards," enclosed with the plan submission letter of New Bedford Mayor Frederick M. Kalisz, Jr., dated February 9, 2001.

² See comment response letter from John A. Simpson, New Bedford Harbor Development Commission Director, dated December 10, 2001.

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sector with a cutting-edge reputation in both national and international circles. Fairhaven, for its part, has served for many years as one of the most important locations for vessel servicing and repair on the East Coast.

New Bedford and Fairhaven share a vision of the future that is built squarely on this longstanding success as a working port. As Mayor Fred Kalisz, Jr. of New Bedford has put it:³

This Plan...is firmly grounded in our traditional waterfront industries and activities such as fishing, water-borne freight and marine repair services. The plan also provides a framework within which emerging industries such as tourism and educational uses may develop in a fashion that complements and enhances our maritime heritage.

This avowed desire to maintain the harbor's tradition as a major port is certainly consistent with my high priority goal of community preservation, and is very much in keeping with the statewide public interest in maximizing the capacity of DPAs to accommodate water-dependent industry. In this respect, I also find myself in complete agreement with Mayor Kalisz when he writes that the New Bedford/Fairhaven Harbor Plan "unlocks the full potential" of such a document as a template for shaping both public and private development in the port. Indeed, I would go even further and say that the Plan is unquestionably the most progressive that has come before me to date, because it includes a master plan for the DPA that far exceeds the minimum approval requirements and all other reasonable expectations.

DPA master planning, as encouraged and assisted by my CZM Office, has two primary functions. The first is to identify a joint state/local strategy for stimulating water-dependent industrial development, the highest and best use of the Commonwealth's working waterfronts. The second role of a DPA Master Plan is to ensure that state and local regulatory programs are coordinated effectively to control non-maritime uses, in order to avoid excessive consumption of prime port space and incompatibilities that discourage marine enterprise. In a nutshell, a DPA Master Plan should serve as a guide for intergovernmental actions to both promote development that is appropriate for a working harbor and prevent that which is not.

The New Bedford/Fairhaven Harbor Plan excels on both counts. On the promotional front, it combines a \$12 million array of short-term (five-year) public initiatives — estimated to leverage \$60 million in private investment and the creation of 700-800 private sector jobs -- with a series of longer-term (10-year) initiatives designed to effect a significant expansion in harbor capacity for maritime commerce. On the regulatory front, the Plan combines an equally impressive array of controls to protect prime port properties with a first-of-its-kind program under which New Bedford allows tourism and other commercial activities only in selected and relatively few locations, in a manner that does not conflict with nearby maritime operations. Among the several inventive features of this regulatory scheme is a cross-subsidy mechanism, whereby developers of non-port projects are required to provide direct financial assistance to waterfront business owners. By strategically inserting such "supporting" uses into spaces not of primary importance in attracting maritime development, the Plan takes full constructive advantage of the flexibility in the Chapter 91 regulations. These DEP rules allow a significant amount of DPA land area to be used for general

³ See harbor plan submission letter from Mayor Frederick M. Kalisz, Jr., dated February 9, 2001.

commercial and industrial purposes in a mutually beneficial, synergistic relationship with maritime development that makes the port as productive an economic engine as possible.

In spearheading the preparation of this highly innovative DPA Master Plan, the City of New Bedford in particular has demonstrated a steadfast commitment to port promotion and protection that few if any harbor communities elsewhere in the Commonwealth can match. In devising a remarkable approach to expanding the visitor economy without compromising its aggressive program of port improvement, the City sets an example that other DPA communities would do well to follow. I truly applaud this pioneering effort, and pledge my strong support and the continued cooperation of all affected EOEA agencies to facilitate implementation of this exceptional Plan in the years ahead.

II. PLAN CONTENT

For planning purposes, the overall harbor was divided into six sub-areas, each with its own unique characteristics and issues. These include:

- the New Bedford Central Waterfront, consisting of several large piers (including State Pier) that are actively utilized by the fishing fleet and a variety of other commercial vessels, together with a major redevelopment parcel on the site of an abandoned power plant;
- the New Bedford North Terminal/Mills area, home to mill complexes, fish processing and cold storage facilities, marine terminals, and an extensive former rail yard;
- the New Bedford South Terminal/Hurricane Barrier area, the hub of the City's seafood processing industry and also including the large undeveloped Standard Times field and the Berkshire Hathaway mill complex;
- Route 6 Bridge/Popes Island/Fish Island, predominantly a marine industrial area but with some retail and a major marina/park on Popes Island;
- the Fairhaven Central Waterfront, dominated by significant marine repair, fishing, and marina operations but also including a public boat ramp and hotel; and
- the Fairhaven North/South Waterfront, predominantly residential and marine recreational areas but including the Fairhaven Shipyard in the southerly segment.

For each of these districts the Plan includes a separate section describing specific goals, proposed projects, and other planning initiatives. Also described separately are a number of projects and initiatives with harbor-wide significance, presented first to provide context for the discussion of each individual sub-area. At the outset the Plan also describes four overriding principles that translate into support for a wealth of discrete actions that the Plan recommends. For purposes of this summary the recommendations can be reviewed under two basic headings: mobilizing investment in the working port, and diversifying the harbor economy through tourism and environmental enhancement.

A. Mobilizing Investment in the Working Port

As a baseline improvement program with immediate benefits to all port users, the Plan first outlines a number of major steps to upgrade essential transportation infrastructure. On the waterside, the program calls for extensive maintenance dredging to restore all the federal channels in the harbor to authorized depths, and for additional dredging of driveways, anchorages, turning basins, and other berthing and maneuvering areas serving a multitude of public and private shorefront facilities. A related initiative involves substantial repair and improvement to public piers, including Union Wharf in Fairhaven and Homer's and Leonard's Wharf in New Bedford (where an improved pier fendering system and, ultimately, a seaward expansion is needed to provide adequate berthing for the harbor's main fishing fleet).

On the landside, two ambitious projects have been undertaken to achieve far more efficient circulation along and to the New Bedford waterfront than presently exists. First is development in the North Terminal area of a major Intermodal Transportation Center for commuter and freight rail, local/regional bus service, taxis, and waterfront trolley service (with expected future links to a nearby water transportation terminal). Second is the complete redesign and redevelopment of state Route 18, the major artery that connects New Bedford to the regional highway system but stands as a barrier between its waterfront and downtown business districts. This key project will greatly improve harbor access across-the-board, for commercial vehicles and pedestrians and even bicyclists, and has the added benefit of creating new development parcels that can serve to further reconnect the City to the port.

Coupled with these generic infrastructure enhancements are two additional public projects intended to capture market-driven opportunities that exist in water-borne freight and seafood processing. Projected to cost nearly \$5 million, these are:

- construction of a Roll On/Roll Off (Quick Start) Freight Ferry Terminal and associated repair to the north side of State Pier, in order to provide freight service to Martha's Vineyard and Nantucket as well as other East Coast ports; the wholesaling and distribution activity associated with the Quick Start Ferry Terminal is estimated in the Plan to be as high as \$50-75 million, supporting 125-150 full-time equivalent jobs; and
- development of the last major vacant parcel on the waterfront (Standard Times Field) into a Marine Industrial Park, containing approximately nine separate parcels suitable for both large and medium-sized businesses; the predominant use of the site would be seafood processing, a growing industry that is anticipated to require as much as 230,000 square feet of expansion space in the next five years (an amount that is well within the capacity of the proposed industrial park, which is as much as 500,000 sf at full build).

Apart from these centerpiece projects on behalf of maritime industry, the Plan identifies a number of lesser-scale initiatives, including further enhancements to State Pier to renew break bulk cargo activities (on an interim basis) and to provide new berthing opportunities for excursion, charter fishing, and visiting cruise vessels. Also significant is that the Plan calls for additional studies on pressing port-related issues, ranging from how to improve the operation of the Electronic Fish Auction in New Bedford, to the need for wharf extensions for fishing vessel berthing in Fairhaven, to whether the harbor has adequate capacity to absorb substantial expansion of recreational boating without significant detriment to commercial navigation.

As a result of the 5-year actions described above, it is anticipated that the harborlands south of Route 6 will approach full development. Foreseeing that space to accommodate future port growth will be in short supply in this segment of the harbor, the Plan calls for a second wave of major capital improvement to commence over a longer-term (i.e., 10-year) horizon, centered in the North Harbor area on the New Bedford side. Described as the "new frontier" for harbor development in the next century, North Harbor is served by the main deep-water channel and will soon experience two significant landside improvements: the restoration of freight rail service by the

Intermodal Transportation Center mentioned previously, and the nearby creation of new waterfront land (adjacent to the existing North Terminal).⁴ On the other hand, a major obstacle to intensified port activity is the obsolete design and unreliable operation of the Route 6 Bridge, which poses serious constraints on vessel access to the North Harbor waterfronts.

To remove this critical bottleneck, the Plan envisions wholesale relocation of the Route 6 crossing to a position considerably farther to the north, a “mega-project” that would open the door to still further land- and water-side improvements. These improvements would include:

- maintenance dredging of the main federal channel in this reach, together with additional improvement dredging of non-federal driveways and berthing areas;
- development of a Multimodal Freight Terminal for break bulk and/or container shipping on the westerly waterfront, on the proposed new fill and bulkhead known as New Harbor Terminal;
- further land creation on the easterly side of the main channel, through expansion of Popes Island with dredge disposal materials; and
- construction of a Freight Haul Road from Interstate 95 to provide designated truck access to the expanded port facilities at North Terminal.

While acknowledging that funding is uncertain, and that many design and permitting issues will need to be resolved as planning moves into greater detail, the Plan is unequivocal in stating the necessity of additional public investment in North Harbor as a cornerstone of the future harbor economy.

B. Diversifying the Harbor Economy Through Tourism

While New Bedford/Fairhaven harbor is a working port, first and foremost, it is also a visually attractive and culturally interesting waterway with great potential to become one of the premier tourist destinations in the region. The Plan sees this potential very clearly; indeed, it envisions a program of growth in visitor services and facilities that is, in some ways, nearly as ambitious as that contemplated for maritime industry. This is especially true for the New Bedford side of the harbor, which in recent years has established a strong base of cultural attractions within its downtown historic district, anchored by the renowned Whaling Museum and given additional impetus by the creation of the New Bedford Whaling National Historic Park in 1996. The nearby harbor is the next logical resource to be employed in attracting visitors to the City; the Plan estimates, in fact, that even a modest investment in waterfront facilities of public accommodation could result in a whopping 60% increase in annual visitation, with gross receipts close to \$4 million.

The visitor program, like the port program, begins with a focus on harbor-wide infrastructure on both water and land. On the waterside, the Plan supports expansion of recreational

⁴ The location of “New Harbor Terminal,” including its new land portion to be created with dredged material, is shown in Plan Figure 1.1.

boating slips and mooring fields outside the DPA, together with the establishment of cross-harbor water taxi/launch service linking the downtown waterfronts and the major marinas in New Bedford and Fairhaven. On the landside, the vision is to establish a network of major open space destinations, anchored by large “island parks” (again outside the DPA) at each of the harbor’s extremities (Marsh Island to the north and Palmer’s Island to the south). More central to the harbor will be two “gateway” areas intended to establish strong visual and pedestrian links between the downtown and central waterfront in each harbor community. In Fairhaven, this gateway will be established through extensive streetscape improvements along Main and Middle Streets; and in New Bedford, it will take the form of a major Harbor Promenade along the landside edge of the New Bedford fishing piers and the State Pier.

The Harbor Promenade, on the fringe of the New Bedford DPA and very close to the downtown historic district, will allow public observation of the waterfront at work without interfering with activity on the piers themselves. The Promenade will also serve to link a series of new recreational destinations sprinkled throughout the central waterfront. In particular, the Plan envisions that:

- a collection of historical structures will be adaptively reused predominantly for visitor services; these include the Wharfinger Building (previously a fish auction, to become an interpretive center on the past and present working waterfront), the Bourne Counting House (once used by a prominent whaling ship owner, now programmed for a mix of historical exhibits and contemporary maritime office/support space), and the former Twin Piers Restaurant (a traditional gathering place for fishermen, to be restored to this use with public patronage as well);
- the southwest corner of the State Pier, adjacent to the new floating dock for charter and excursion vessels and the proposed new location for the Commonwealth’s educational Schooner Ernestina, will be activated with water transportation support services, interpretive displays, and a seasonal open air market operating from temporary structures such as push carts; other nearby spaces on State Pier will be utilized more often for waterfront festivals and special events, to the extent compatible with the operations of Pier tenants under the terms of applicable lease agreements;⁵ and
- the massive, 83,347 sf former power plant currently owned by NSTAR Gas Company (NSTAR) will be redeveloped to house the New Bedford Oceanarium, consisting of numerous fish tanks and related displays together with extensive accessory spaces for research and education, staff offices and meeting/conference rooms, and public restaurants and retail/concession activities; the remainder of the NSTAR site, excluding the portion

⁵ The Plan makes specific reference to such lease conditions at the behest of the U.S. Coast Guard. See comment letter from Commander M.A. Frost dated March 26, 2001, and as further discussed in section III.D herein.

immediately adjacent to the water's edge,⁶ will be utilized for parking and ultimately for additional commercial uses related to the Oceanarium program (which may also include a hotel on a separate parcel being created just outside the DPA as a result of the Route 18 realignment project).

When the first two of these core program elements are completed, visitation to the New Bedford Central Waterfront is expected to increase significantly, to nearly 50,000 visits per year. And when the Oceanarium comes on line, as the crown jewel of the tourism enhancement program, the figure will rise even more dramatically to as many as one million annual visitations.⁷

As a corollary to these measures to enhance the visitor economy, the City has established a mechanism to ensure that the Oceanarium and other commercial development will play an important role in its campaign to improve the port as well. This mechanism is known as the Supporting DPA Use Eligibility Credit Program, and it is designed to function in a way roughly analogous to so-called "transfers of development rights." Basically, the program earmarks certain parcels (called "receiving zones") as being appropriate for non-port commercial uses and requires, as a condition of obtaining state and/or local permits, that developers purchase a "credit" costing \$2500 for every 1000 square feet of occupied surface area within the receiving zone. Credits are distributed initially, on a pro rated basis, only to the owners of properties devoted to water-dependent industrial uses (called "sending zones"), which are expected to benefit directly from the proceeds of credit sales. Based on the combined developable area of all receiving zones established by the Plan, at full buildout as much as \$4 million in financial assistance could flow into the port economy in conjunction with the development of tourism-related facilities in the DPA.

⁶ See Plan Appendix A (Maps CW-005 to CW-008) which requires the entire NSTAR waterfront to be dedicated to port uses, including the existing petroleum distribution facilities currently operated by Global Companies LLC (with minor relocation of certain existing accessory structures). For additional discussion see section III.C herein, as well as the Final Environmental Impact Report (FEIR), New Bedford Oceanarium Project (March 15, 2001). From the FEIR I understand the City is exploring the possibility of assuming responsibility for development of water-dependent industrial uses at the northerly end of this waterfront, and that one such use may be berthing of the restored vessel SS Nobska (as noted in the Plan at p. 71). Such berthing is allowable under the waterways regulations provided this historic vessel is returned to operation as a passenger ferry, pursuant to the stated intent of its owner. See comment letter from Judy Jordan, Business Director of the New England Steamship Foundation, dated March 23, 2001.

⁷ The City of New Bedford is keenly aware that this projected increase in tourist activity will be concentrated in one of the busiest areas of the working waterfront, and has been careful to ensure that no significant conflict will exist with present or future maritime operations. See Plan Appendix B, "DPA Compatibility Assessment," and as further discussed in section III.C herein.

III. COMPLIANCE WITH PLAN APPROVAL STANDARDS

A. Consistency with CZM Harbor Planning Guidelines

The manner in which the CZM “Harbor Planning Guidelines” (Revised, 1988) apply to New Bedford/Fairhaven was set forth in the Scope for the municipal harbor plan issued by the prior Secretary of Environmental Affairs on February 12, 1997. The Scope identified the geographic area to be covered by the plan and established a work program to address priority issues, based on an extensive prior study effort carried out during 1996 as an integral part of the scoping process, with the assistance of MIT consultants and CZM.⁸ The Scope also explained the make-up and role of the Harbor Planning Committee, and established guidelines for further public participation in each of the six major tasks to be carried out by the Committee’s planning consultant.

The record before me, including the separate Compliance Statement submitted in conjunction with the Plan, indicates that both the study program and the public participation process were carried out in a manner that adequately and properly complied with the Scope. The Plan is very comprehensive in both geographic coverage and scope of issues; and its substantive recommendations are coherent, detailed, and very well supported by technical analyses, ranging from extensive studies of economic feasibility to careful assessment of compatibility between port and tourism activities.⁹ Moreover, the Plan enjoys a broad base of support, attributable to a consensus-building style of work that involved extensive stakeholder participation at the municipal level as well as close collaboration with CZM and DEP.

Accordingly, I find that the Plan is consistent with the CZM “Harbor Planning Guidelines” as required by 301 CMR 23.05(1).

B. Consistency with CZM Policies

As required by the harbor plan approval regulations at 301 CMR 23.05(2), I further find the Plan to be consistent with all applicable CZM Policies. At the time the Request for Scope was submitted there were 27 separate Policies,¹⁰ of which the following were determined to be applicable to the New Bedford/Fairhaven Harbor Plan:

- Policy 1: protect ecologically significant resource areas
- Policy 3: support attainment of national water quality goals
- Policy 5: minimize adverse effects of dredging

⁸ See Massachusetts Institute of Technology, Department of Urban Studies and Planning, New Bedford/Fairhaven Harbor Study (June, 1996).

⁹ See Plan Appendix C, “Interim/Supporting Documents,” dated December 1999. This appendix was published under separate cover and submitted for background purposes only, and as such is not to be construed as part of the Plan I have approved with this Decision.

¹⁰ The current policy statements are set forth in EOE regulations at 301 CMR 21.98 (effective March 11, 1997). The prior policy statements were contained in 301 CMR 20.05(3). While the new policies were re-organized under categories and renumbered, changes in the policies applicable to this plan were minimal. The Plan is consistent with these policy revisions, contained in Water Quality Policies 1 and 2, Habitat Policy 1, Protected Area Policy 3, and Ports Policies 1-3.

- Policy 7: encourage location of maritime industry in DPAs
- Policy 12: minimize adverse impacts on historic districts/sites
- Policy 19: provide public benefit from channel dredging
- Policy 20: encourage water-dependent use of developed harbors

The substantive information contained in the very thorough Compliance Statement submitted with the Plan demonstrates that it embraces the spirit and intent of these Policies. Of particular note is that the Plan not only supports the continuation of existing marine industrial uses in the DPA, but also proposes significant expansion of multi-use terminal capacity within a ten-year timeframe. This is a vote of confidence in the long-term viability of the maritime economy of southeast Massachusetts, and it is a welcome addition to the state's dwindling supply of port infrastructure. Virtually all that remains of our once-extensive industrialized coast is the DPA system, which must be conserved in the same manner as any nonrenewable resource of high social and economic value.

C. Consistency with Tidelands Policy Objectives

In accordance with 301 CMR 23.05(3), I also find the Plan to be consistent with state tidelands policy objectives and associated regulatory principles, as set forth in the waterways regulations of DEP. Again, the Plan sections relating to this standard have been summarized effectively in the City's Compliance Statement, from which it is clear that the Plan contains a wealth of both generic and site-specific guidance that will have a direct bearing on DEP licensing decisions within the harbor planning area.¹¹ Included in this guidance are, in particular, a set of provisions that together comprise a Master Plan for the lands and waters within the New Bedford/Fairhaven DPA. The provisions of this DPA Master Plan are subject to a specific set of approval criteria under 301 CMR 23.05(3)(e), and I find that all such criteria have been met.

Foremost among the Plan's provisions that will be enforced through state waterways regulation is the Eligibility Credit Program (ECP), which governs the basic allocation of land uses within the New Bedford DPA.¹² This is accomplished by creating two mutually exclusive areas: Sending Zones and Receiving Zones. In Sending Zones, the Plan establishes a categorical prohibition on any further non-port use, except on a temporary basis; more precisely, the ECP stipulates that only Water-dependent Industrial Uses, Temporary Uses, and certain existing non-port uses shall be eligible for authorization on filled tidelands within such zones.¹³ With Sending Zones and other restricted areas comprising almost 7.9 million square feet of the total 9.3 million square feet of land within the New Bedford portion of the DPA, the effect of the Plan is that

¹¹ Note that any substantive guidance in the Plan related to development on tidelands is generally binding on the DEP regulatory process. Under 310 CMR 9.31(1)(c) and 9.34(2), no license or permit may be issued for a project unless it has been determined to conform to all applicable provisions of an approved municipal harbor plan. [A similar provision appears in New Bedford's Code of Ordinances, as discussed further in section III.E herein.] It should also be noted that, pursuant to 310 CMR 9.34(2)(a)(2), DEP generally will not make a finding of conformance if a proposed project "requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan. . ."

¹² See Plan Appendix A, "New Bedford Supporting DPA Use Eligibility Credit Program (ECP)."

¹³ Definitions for these allowable uses are found in the waterways regulations at 310 CMR 9.02. Note that the ECP further stipulates that Temporary Uses shall be allowed in Sending Zones only if reasonable efforts have been made to secure a marine industrial use for the parcel. See Plan Appendix A, at section 3.1.

approximately 85% of this land area will be reserved in the long run for water-dependent industry.¹⁴ With Fairhaven figures included, the reserved area across the entire DPA is slightly less (approximately 81%),¹⁵ but is still an “extensive amount” in full compliance with the regulations for approval of a DPA Master Plan.¹⁶

Receiving Zones, by contrast, are the relatively small collection of sites where new development for non-maritime purposes is allowable, in the form of commercial Supporting DPA Uses or Temporary Uses only.¹⁷ A total of 15 individual parcels are earmarked as Receiving Zones, comprising approximately 15% of the land area of the New Bedford DPA – again, well within the parameters set forth in the approval regulations.¹⁸ Apart from establishing these basic ground-rules for eligible use,¹⁹ the New Bedford ECP serves to “customize” the definition of Supporting DPA Use in two additional ways:

- direct financial support: the ECP stipulates that a project applicant must acquire sufficient Eligibility Credits to accommodate the combined footprint of all commercial Supporting DPA Uses and accessory uses thereto to be developed within the Receiving Zone in question;²⁰

¹⁴ See Compliance Statement, at page 2 of “DPA Master Plan Approval Standards.” Note that the quoted percentage also includes areas dedicated to maritime industry on certain Receiving Zone parcels, which add approximately 268,000 sf to the total reserved area. In practice, the area actually available for port activities will be somewhat reduced by the presence of existing non-conforming uses; on the other hand, some additional space is likely to be available where the waterways regulations require greater setbacks for new, nonwater-dependent uses than does the ECP.

¹⁵ Note that Fairhaven is not covered by the ECP, nor does the Town employ its zoning powers to reserve any lands specifically for water-dependent industrial use beyond the base amount protected under the waterways regulations. However, the Plan at p. 84 states a general intent that the Fairhaven portion of the DPA “will continue to serve as the heart of the community’s marine industrial waterfront with a strong commitment to preserving and strengthening existing marine industrial businesses,” and further stipulates that “any commercial or industrial supporting uses will be concentrated along Water Street away from the water’s edge.”

¹⁶ See 301 CMR 23.05(3)(e)(1).

¹⁷ Supporting DPA Uses are defined as commercial or industrial in the waterways regulations at 310 CMR 9.02, but general industrial uses are excluded under the provisions of the ECP. Note also that Marine Industrial Parks, which as defined in the waterways regulations may contain a substantial percentage (one-third) of general industrial use on tidelands, also are not allowable within ECP Receiving Zones. See Plan Appendix A, at section 4.4.

¹⁸ See 301 CMR 23.05(e)(2), requiring that commercial uses and any accessory uses thereto generally may not occupy more than 25% of the total land area covered by a DPA Master Plan. In this regard it should be noted that the City’s upper limit on commercial uses, stated in Plan Appendix A at section 5.1, shall not be construed to render commercial Supporting DPA Uses eligible for licensing on any parcel other than those specifically identified as Receiving Zones and mapped in Plan Appendix A.

¹⁹ I note that Plan Appendix A, section 2.15 indicates that Receiving Zone Specification Schedules may contain “planning justifications, allowed and excluded uses, use limitations and numerical standards,” but no such information is contained in the initial Schedules provided therein. Thus, only the categorical use statements in the text of the ECP shall be applicable for licensing purposes under this approval Decision, and any changes to such initial Schedules shall be considered a plan amendment subject to further review and approval pursuant to 301 CMR 23.06(1).

²⁰ See Plan Appendix A, at section 4.1. It should also be noted that no waterways license or permit will be issued by DEP until any options to acquire the necessary Eligibility Credits have been exercised with payment in full, an obligation that is implied but not expressly stated in the text of the ECP.

- maximum surface coverage: the ECP stipulates that commercial Supporting DPA Uses may occupy up to the entire footprint of the Receiving Zone, exclusive of any portion designated as a Harbor Management Plan (HMP) Setback Area²¹ and subject to all other applicable dimensional restrictions.²²

The ECP is also instructive in that it provides presumptive evidence of compatibility between commercial activity in the Receiving Zones and marine industrial operations nearby. Except in one significant case (the large power plant site where the Oceanarium complex is proposed), the Receiving Zones are interstitial sites where small nonwater-dependent businesses have functioned without detriment to the port for many years, and where no water-dependent industrial use is operating currently.²³ For the first phase of the Oceanarium project, the presumption of compatibility is based on a reassuring assessment that potential for conflict between projected pedestrian activity and nearby fishing and other maritime facilities is minor.²⁴

Beyond the Eligibility Credit Program, a regulatory highlight of New Bedford's DPA Master Plan is that it specifies locations for a series of public projects to enhance the capacity of the working port.²⁵ These site-specific projects include the Quick Start Ferry Terminal on the north side of State Pier and the floating dock for excursion/charter boats at its southwest corner; the pier extensions for fishing vessels at Leonard's and Homer's wharfs and the water taxi dock

²¹ See Plan Appendix A, section 2.8 and accompanying maps which identify HMP Setback Areas on 11 of the 15 Receiving Zones, in order to ensure that appropriate space on or near the waterfront of such zones will remain available only for water-dependent industry (or temporary uses).

²² In Receiving Zones the ECP allows commercial development to exceed the 25% site coverage cap that applies in the absence of a DPA Master Plan, as stipulated in the definition of Supporting DPA Use at 310 CMR 9.02. It should be noted, however, that the footprint of commercial uses might be constrained independently by other dimensional restrictions of the waterways regulations, none of which have been modified by the Plan and remain in full force and effect. These include the minimum requirement for open space surrounding buildings for nonwater-dependent use [at 310 CMR 9.51(3)(d)] and the minimum requirements for setback of parking facilities and new buildings/structures for nonwater-dependent use from a project shoreline [at 310 CMR 9.51(3)(c) and 9.36(5)(b)(2)].

²³ One of the Receiving Zones on the NSTAR property (CW-006) contains some accessory structures and accessways to the oil storage and distribution facility operated by Global Companies, LLC, but the New Bedford Oceanarium Corporation intends to relocate such facilities in a manner that avoids displacement of any component of Global operations, in accordance with the criteria set forth in 310 CMR 9.36(4). The Oceanarium Corporation has also stated a commitment to assume all costs associated with the proposed reconfiguration of the Global facility, including design and permitting as well as actual construction expenses. See Final Environmental Impact Report (FEIR), New Bedford Oceanarium Project (March 15, 2001), at pages 7 and 29-30.

²⁴ See Plan Appendix B, "DPA Compatibility Assessment," which concludes at page 15 that "the accumulated peak visitor use (Oceanarium plus other visitor facilities planned for the central waterfront) on the peak weekend day in the peak season would represent. . . a small fraction of the peak visitation level associated with a major festival such as Summerfest, and well within the attendance range of the smaller waterfront festivals." At the same time, I note this finding is described as preliminary and in need of verification as the overall development program continues to evolve, especially if further build-out of the site for retail and other corollary uses is proposed. Because such additional development will occur closer to the working piers and will substantially increase general visitation to the Central Waterfront, I will require further extensive analysis of potential tourism impacts on the DPA as an essential element of the MEPA review process at that time.

²⁵ Outside the DPA, the Plan calls for new recreational boating facilities in the form of a new marina and public boat ramp adjacent to the Hicks Logan Industrial Park, and two new mooring fields along the Fairhaven shoreline.

at Fisherman's Wharf; and the Marine Industrial Park at Standard Times Field.²⁶ Licensing of such worthwhile capital improvements can be facilitated by DEP, which can also take steps under the waterways regulations to maintain the availability of the designated sites by preventing development that would preempt or discourage the facilities stipulated in the DPA Master Plan.

An additional project, not yet on the drawing boards but worthy of mention on a cautious note, is the potential use of maintenance dredge material to create a new land area on the north side of Popes Island. This project would include a large new bulkhead along the westerly edge for commercial and fishing vessels, and as such is an approach to long-term dredge material disposal that also offers significant port-expansion advantages. Nevertheless, my approval Decision cannot be construed to include this element of the New Bedford/Fairhaven Harbor Plan, because the disposal site selection process is currently undergoing separate regulatory review under the auspices of CZM's Dredge Material Management Program (DMMP). With this review still pending, it would be inappropriate for me or any EOEa agency to endorse a particular outcome at this time.

Yet another prescriptive element of New Bedford's DPA Master Plan is that it maintains a surrounding land development pattern that provides an appropriate buffer between industrial uses in the DPA and community uses that might otherwise give rise to significant operational conflict. At the northern DPA periphery this is accomplished by dedicating one large non-DPA site to the Intermodal Transportation Center, and by stipulating that development at another bordering location -- the Hicks Logan Urban Industrial Park -- shall involve reuse of existing buildings with enhanced roadway capacity for truck operations and a corresponding prohibition on residential use. A similar scenario for revitalization is contemplated for the Berkshire Hathaway Mill Complex just outside the southerly border of the DPA, where the Plan calls for a focus on commercial and industrial uses. To the extent these use restrictions apply to filled tidelands subject to Chapter 91 jurisdiction, they will be enforceable by DEP in the course of licensing proposed projects on the sites in question.²⁷

Apart from the careful controls it imposes on non-port development, a final distinguishing feature of the New Bedford DPA Master Plan is that it is the first of its kind to regulate the intermingling of port-related uses as well. It does this by requiring certain types of water-borne freight activity to be confined to specific locations in the harbor, and by declaring that such designated locations shall be off-limits to all other permanent uses -- even other types of water-dependent industry.²⁸ The site-use pairings are as follows:

²⁶ See Plan at page 78, which stipulates (among other things) that the tidelands portion of the property will be reserved exclusively for water-dependent industry and/or temporary port-related support uses (like ferry terminal parking); and that commercial uses will not be allowed by the City on the upland portion of the property, which is reserved for industrial use.

²⁷ See Plan, at pages 76 and 79.

²⁸ See Plan, at page 60. Apart from Temporary Uses, the only new non-freight uses allowed at any of these designated locations is waterborne passenger service at New Harbor Terminal. Note also that "validly existing uses holding all necessary federal, state, and local permits and licenses are grandfathered from this restriction until there is a substantial change of use or increase in the intensity of the use or the renewal of a Chapter 91 License."

- Roll-On/Roll-Off Operations are limited to the Quick Start Ferry Terminal on State Pier and the proposed New Harbor Terminal;
- Container Operations are limited to Maritime Terminal, Bridge Terminal, and the east face of State Pier on a short-term basis, and to the proposed New Harbor Terminal on a long-term basis;
- Breakbulk Operations are limited to Maritime Terminal, Bridge Terminal, and the east face of State Pier;
- Fuel Handling Operations are limited to the sites of existing petroleum businesses generally located at the southeast corner of the NSTAR property (Global Oil site²⁹) and on the west side of Fish Island (north of Route 6); and
- Bulk Commodity and Marine Contractor Operations are limited to the side of Fish Island south of Route 6, the side of Popes Island north of Route 6 (excluding any Receiving Zones), and the site of the former Herman Melville Shipyard (on an interim basis only, until work is completed on the proposed filling and bulkhead expansion to create the New Harbor Terminal).

The rationale for such limitations is to facilitate an orderly, efficient, and equitable process of port management, and to protect prior and future public investments to accommodate freight operations. As the Plan states, “this approach provides a cohesive framework for long-term port planning . . . [that] ensures freight uses are accommodated in locations that are compatible with the needs of other DPA users [rather than] on an ad hoc basis.”³⁰

In principle I support this type of restriction, which is generally within the prerogative of a DPA municipality to identify reasonable priorities among maritime industrial uses that may be in competition for limited DPA resources. In practice, however, it is important to ensure that such restrictions are not so severe as to have a chilling effect on future prospects for port development, or violate any tidelands regulatory principles that afford protection to existing port activities.

In this respect I applaud the Plan for making a concerted effort to avoid undue negative impacts on the one maritime business most affected by the siting restrictions on freight-related activities -- Packer Marine Inc.(PMI), the largest carrier of aggregate, construction material/equipment, and other bulk commodities in the harbor. As a result of the EPA’s cleanup dredging project, PMI’s present site in North Terminal will be needed for a dewatering/transfer station, yet the opportunities are presently limited for PMI to be relocated to the primary area the

²⁹ For purposes of Chapter 91 licensing pursuant to this Decision, the earmarked site is the footprint occupied as of February 9, 2001 by all Global Companies LLC facilities such as docks, storage tanks, piping systems, and accessory uses (except for the oil blending house, truck filling station, and office building as proposed to be relocated in conjunction with the adjoining Oceanarium project).

³⁰ See Plan, at page 61.

Plan earmarks for bulk freight shipments, the north side of Popes Island.³¹ Recognizing the need for a transition strategy to deal constructively with this problem, the Plan allows for PMI to continue operations in the North Terminal area on an interim basis, at a nearby City-owned site (the former Herman Melville Shipyard) that is somewhat larger and otherwise has attributes that equal or surpass those of PMI's current location.

PMI confirms (with gratitude to the City) that the interim site is suitable for its needs, and advises me that constructive discussions have occurred on a detailed licensing agreement.³² At the same time, the company voices concern that some potential for inadvertent eviction from the DPA still exists: in the short run because a written agreement has not been finalized as yet, and in the longer term because the interim tenancy rights conceivably could expire before a suitable site for final relocation is available on Popes Island. To remove such timing uncertainties, PMI requests that I withhold approval of the Plan until a formal license agreement containing appropriate contingencies concerning Popes Island has been executed with the City.

While I appreciate the unease that delay in finalizing this agreement may cause, I am not persuaded that a concomitant delay on my part is necessary to achieve consistency with tidelands policy objectives. In fact, I believe the objective in question -- to prevent involuntary displacement of an existing water-dependent use -- will be well-served by this Decision operating in concert with the waterways regulations of DEP. As to the immediate relocation need, it is implicit in the City's commitment to provide PMI with space at the former shipyard property that the commitment will be fulfilled in a timely manner, relative to the schedule under which PMI will be required to vacate its present location.³³ My approval of the Plan's restrictions on bulk freight siting is based in part on this understanding, and such approval would become void if the interim site is not made available by the City within an appropriate timeframe. In that unlikely event, DEP could issue a Chapter 91 license to PMI for any site within the harbor that is otherwise available to general maritime industry, provided the site also meets all other applicable requirements of the approved Plan and the waterway regulations.

Likewise, as to the eventual PMI relocation from the interim site, I expect that any such proposal will be subject to DEP review for conformance with the applicable non-displacement provisions of the waterways regulations.³⁴ The Plan does not require PMI relocation to occur until the City's work on the fill and bulkhead construction at New Harbor Terminal has been

³¹ Apparently, there is no property on the present landmass of Popes Island that is both large enough to accommodate PMI operations and available for lease from the current owners. Also, by the Plan's own admission, expanding the island via dredged material disposal is a long-range proposition at best, with a number of planning and regulatory hurdles yet to be overcome.

³² See follow-up comment letter on behalf of PMI submitted by Robert L. Fultz, dated April 4, 2002. According to this letter, PMI has received EPA support for its relocation to the former Herman Melville shipyard and has agreed to make certain capital improvements to the site with EPA relocation funds.

³³ See comment response letter from John A. Simpson, at note 2 *supra*, which states (at page 11) that "the HDC will license space to Mr. Packer at the former Herman Melville Shipyard as a temporary use" (emphasis added). The letter also reflects a City awareness of possible timing complications but expresses optimism for a mutually agreeable resolution, pending timely EPA cleanup action to prepare the Herman Melville site for PMI occupancy.

³⁴ See 310 CMR 9.36(4).

“completed,” which presumably cannot be accomplished without prior Chapter 91 authorization.³⁵ A final salient point is that the timeframe for this ambitious project -- for which no funding has been secured to date -- may well exceed the Plan approval term of five years. If the issue of finding a suitable long-term location for PMI on Popes Island has not been resolved when my approval comes up for renewal, it can and should be revisited at that time.

Thus, I am satisfied that nothing in the Plan or this approval Decision will diminish any protection from displacement, either in the short- or long-term, for which PMI may be eligible under state tidelands law. I am also convinced that the City supports continuation of PMI operations within the New Bedford/Fairhaven DPA, and will make every reasonable effort to attain this important goal.

D. Relationship to State Agency Plans

The Compliance Statement submitted with the Plan asserts that it was developed in close consultation with state agencies owning real property or otherwise responsible for projects within the harbor planning area. Principally, these include the Massachusetts Highway Department (MassHighway), which is undertaking redevelopment of state Route 18; the Massachusetts Bay Transportation Authority (MBTA), developer of the proposed Intermodal Transportation Center as part of the larger New Bedford/Fall River Commuter Rail Improvement Project; and the Massachusetts Department of Environmental Management (DEM), which owns and operates the New Bedford State Pier. No significant conflicts or inconsistencies between the Plan and the planned activities of these agencies were identified during such consultation nor in any comments submitted to the record of my approval proceeding.³⁶

However, with respect to day-to-day operations on the State Pier, the potential for incompatibility remains. At this key port facility, New Bedford’s desire to intensify both water-dependent industry and water-related tourism will undoubtedly present DEM with occasional management challenges, arising in part from the need to honor contractual obligations with existing pier users -- most notably the United States Coast Guard, whose presence as a long-term tenant is highly valued by both DEM and the City. Among the factors DEM has identified as creating potential for user conflict are size and space constraints, structural integrity of the Pier and associated infrastructure, and competitive berthing needs. In this regard, the agency has articulated a basic management philosophy -- which is entirely appropriate for such a prime port property -- that

³⁵ I assume a license application from the City will be necessary because I understand that the bulkhead construction/land creation project will no longer be carried out by EPA under the exemption from state permitting established by federal Superfund legislation.

³⁶ Although not rising to the level of an inconsistency for Plan approval purposes, one noteworthy reservation was expressed in a comment letter from MassHighway District Director Bernard McCourt, dated March 26, 2001, stating that the agency “does not currently endorse the plan to relocate the Route 6 Bridge.” However, the letter also indicates that the current Regional Transportation Plan (RTP) covering New Bedford/Fairhaven recommends “a full feasibility and justification study be undertaken to evaluate the proposed bridge relocation.” This is precisely what the Harbor Plan contemplates during the 5-year term of this Decision, and such study is the only bridge-related action that can be construed to have received my approval. If the project is ready to advance beyond the conceptual stage when the approved Plan is submitted for renewal, any issues of compatibility with the MassHighway RTP can be addressed at that time.

festivals and other tourism/pedestrian uses should remain secondary to, and generally separated from, the maritime industrial clientele of the Pier. Furthermore, DEM has indicated that public safety concerns may affect the capacity of the Pier to accommodate multiple uses in some situations.³⁷

Despite such caveats, DEM has stated that “the various activities proposed for State Pier within New Bedford’s Harbor Plan are not incompatible with DEM plans for the pier.” As evidence to this effect, the agency cites the recent history of state/local cooperation to establish the Quick Start Ferry Terminal, to accommodate special uses in otherwise-leased areas of the Pier, and to facilitate federal dredging projects. Clearly, DEM shares the goal of maximizing the economic benefits of State Pier and is open to the Plan’s recommendations as to how such benefits might best be accomplished,³⁸ including even the eventual transfer of management responsibility to the City. For the foreseeable future, however, the agency states that the key to avoiding use conflicts is “to be brought in as early as possible into the City’s planning process” for Pier enhancement activities.

I have no doubt that the City will honor this request for early consultation, and am equally confident that the responsible officials both there and at DEM will make every effort to maintain a high standard of communication at all times. The track record for constructive collaboration has been generally solid to date, and it must continue for the sake of meaningful Plan implementation.

E. Implementation Strategy

The Plan devotes a separate chapter to the subject of implementation, featuring an extensive spreadsheet summarizing all proposed harbor improvement projects requiring public funding over both 5-year and 10-year timeframes. For each project, the spreadsheet indicates the activities to be funded, the estimated cost, the anticipated source of funds, and the current commitment status. A similar breakdown is also provided for additional planning studies that are recommended as a precursor to taking certain of the longer-term implementation actions.

Much to New Bedford’s credit, it is worth noting that several of the projects recommended for immediate action within its jurisdiction are well underway. One example is the proposed Marine Industrial Park at Standard Times Field, where acquisition and subdivision has occurred already and business tenants have purchased a number of lots for development. Another is the Quick-Start Ferry Terminal at State Pier, where construction was not only commenced but actually completed while the harbor plan was in the final stages of preparation.

On the subject of port governance, the Plan’s implementation strategy begins with the assignment of lead responsibility to existing entities in each community: the Harbor Development Commission (HDC) in New Bedford, and the Planning and Economic Development Department

³⁷ See comment letter from DEM Director of Waterways, Nancy Thornton, dated May 20, 2002. The only current limitation identified in the DEM letter, which I endorse, is that structural improvements must occur before large cruise ships can be allowed to use the south face of the pier.

³⁸ One illustration is the stated willingness of DEM to consider relocation of the Schooner Ernestina from its current berth on the northerly side of State Pier to a more visible location in the southwest corner, as contemplated by the Plan.

in Fairhaven (in conjunction with the Board of Selectmen).³⁹ Both have sufficient legislative authority for this purpose, but the New Bedford HDC as historically constituted has neither adequate funding nor staff for a much-expanded role in harbor development and management, as contemplated by the Plan. Accordingly, the Implementation chapter sets forth a prescription for organizational growth that would create four new key positions: Marine Superintendent, Senior Waterfront Planner/Development Manager, Market Development Officer, and Bookkeeper/Financial Oversight Officer. In addition, the Plan calls for the establishment of several Task Forces to continue the work of the advisory committee that helped produce the Plan, by providing input to HDC Commissioners in key areas of harbor development. Such areas include dredging, promotion of four specific sectors of maritime industry as well as recreational and community boating, and development in North Harbor and the Central Waterfront.

As another key institutional improvement, New Bedford has recently amended its Code of Ordinances to require all future development within its portion of the harbor planning area, as well as changes or “intensifications” of existing uses, to obtain a certificate of consistency with the Plan from the HDC.⁴⁰ The most consequential aspect of this general (non-zoning) ordinance is that it applies to the entire DPA land area, including the “upland” portion that is not on historic fill and thus is not subject to DEP licensing authority under M.G.L. c.91. Without this legal initiative, conformance to the approved Plan would be a binding requirement only on the approximately two-thirds of the DPA that consists of filled tidelands,⁴¹ leaving open the possibility that commercial or other non-conforming development of detriment to port interests could occur in the remainder, in violation of a key Plan approval standard.⁴² New Bedford’s new ordinance eliminates this potential flaw in Plan implementation and ensures that a unified state/local permitting system will control future land use everywhere within the New Bedford DPA. As the first municipality in the state to directly codify its approved harbor plan, the City has once again demonstrated it is a visionary leader in the field of DPA planning and regulation at the local level.

³⁹ Among the implementation responsibilities of these lead agencies is that of certifying conformance with the approved Plan for waterways licensing purposes, in accordance with 310 CMR 9.34(2)(a)(1).

⁴⁰ See “Harbor Master Plan Provisions,” Code of Ordinances of the City of New Bedford, Chapter 5, Section 5-7 (approved March 26, 2001).

⁴¹ See Compliance Statement, “DPA Master Plan Approval Standards,” at page 2.

⁴² See 301 CMR 23.05(2)(e)(1), stating that “the master plan shall further ensure that commercial uses and any accessory uses thereto will not, as a general rule, occupy more than 25% of the total DPA land area covered by the master plan.” My determination that this standard has been met relies significantly on the City’s ability to limit commercial development in the upland portions of the DPA, through the permitting process established by the new Ordinance. Accordingly, my approval of the Plan is contingent on the expectation that its implementation will not be prejudiced by any subsequent amendment to said Ordinance, or by any variance or similar form of exception thereto, that would allow an exceedence of the 25% cap noted above.

IV. 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 New Bedford/Fairhaven Harbor Plan as the municipal harbor plan for these respective municipalities, subject to any qualifications, limitations, or other conditions stated herein and to the general exclusions noted below. This Decision shall take effect on September 24, 2002 and shall expire on September 24, 2007, unless a renewal request is filed by New Bedford and Fairhaven prior to that date in accordance with 301 CMR 23.06(2)(a).

The Approved New Bedford/Fairhaven Harbor Plan ("Approved Plan") shall be the plan dated August 2002 (including the two appendices incorporated therein), as modified to incorporate this Approval Decision as a Foreword. Bound copies of the Approved Plan as defined above shall be kept on file by the New Bedford and Fairhaven Municipal Clerks, at CZM offices in Boston and Lakeville, and at the DEP/Waterways offices in Boston and Lakeville. A copy shall also be provided to DEM/Waterways in Hingham.

For waterways licensing purposes, the Approved Plan shall not be construed to include any of the following:

- (1) any subsequent addition, deletion, or other revision to the submitted plan dated August 2002, 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 applicable qualification, limitation, or condition stated in this Decision.

Further, this Decision shall not be construed to incorporate any determination by DEP, express or implied, as to the conformance of any project requiring authorization under M.G.L. c.91 with the applicable standards of the waterways regulations at 310 CMR 9.00. DEP retains full discretion to modify or condition any specific use program or layout/design proposal to achieve conformance with said standards on a case-by-case basis.

By letter from the Acting Program Chief of the Waterways Regulation Program, dated September 17, 2002, DEP has stated that the Approved Plan will become operational for waterways licensing purposes for all applications for which the effective date of Plan approval occurs prior to the close of the public comment period. Except for applications reviewed under the amnesty provisions of 310 CMR 9.28, a determination of conformance with the Approved Plan will be required for all proposed projects in accordance with the provisions of 310 CMR 9.34(2). In the case of amnesty projects, DEP has stated that it will adhere to the greatest reasonable extent to any applicable guidance specified in the Approved Plan.

Robert Durand
Secretary of Environmental Affairs

Date