

DECISION ON THE REQUEST FOR APPROVAL
OF THE
NEW BEDFORD/FAIRHAVEN MUNICIPAL HARBOR PLAN RENEWAL
AND
DESIGNATED PORT AREA MASTER PLAN
PURSUANT TO 301 CMR 23.00

June 14, 2010
Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
Ian A. Bowles, Secretary

I. INTRODUCTION

Today, as Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (EEA), I am approving a renewal to the New Bedford/Fairhaven Municipal Harbor Plan (“Plan”) dated May 26, 2010. The original Harbor Plan was approved by the EEA Secretary on September 25, 2002. This Decision on the Plan renewal presents a synopsis of the Plan’s content and my determinations on how the renewal Plan complies with the standards for approval set forth in the Review and Approval of Municipal Harbor Plan regulations at 301 CMR 23.00 *et seq.*

The Municipal Harbor Planning regulations establish a voluntary process under which cities and towns may develop and submit Municipal Harbor Plans 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 Municipal Harbor Plans can provide licensing guidance to Massachusetts Department of Environmental Protection (DEP) in making decisions pursuant to MGL Chapter 91: The Massachusetts Public Waterfront Act (“Chapter 91”) and the Waterways Regulations (310 CMR 9.00 *et seq.*). Approved harbor plans may include “substitute provisions” that establish certain numerical and dimensional requirements alternative to those stipulated in the Waterways Regulations, and may also specify provisions that “amplify” any of the discretionary requirements of the regulations.

Pursuant to the review procedures contained at 301 CMR 23.00 *et seq.*, the Plan renewal, along with a separate document addressing compliance with the plan approval standards (“Compliance Statement”), was submitted at the beginning of September 2009. Following a review for completeness, CZM published a notice of public hearing and 30-day opportunity to comment in the *Environmental Monitor* dated October 26, 2009. A public hearing was held in New Bedford on November 12, 2009 where oral testimony was accepted. Written comment was also received from two parties prior to the close of the public comment period on November 25, 2009: the U.S. Environmental Protection Agency (EPA) on November 25, 2009 and DEP on September 16, 2009. The review process was led on my behalf by the Massachusetts Office of Coastal Zone Management (CZM) and included formal consultation between CZM, DEP’s Waterways Program and Bureau of Waste Site Cleanup, the Massachusetts Department of Transportation-Massachusetts Bay Transportation Authority, the Massachusetts Department of Conservation and Recreation’s (DCR) Waterways Division, the City of New Bedford and Town of Fairhaven (“Municipalities”), and Fort

Point Associates (as consultants for the Municipalities). The Plan review followed the administrative procedures set forth at 301 CMR 23.04 and in accordance with the standards in 301 CMR 23.05. Based upon input and issues identified through the public comment period and consultation session, the Municipalities submitted an updated version of the plan on May 26, 2010.

The 2010 New Bedford/Fairhaven Harbor Plan Renewal reflects a significant effort on the part of the Municipalities, including the New Bedford Harbor Development Commission staff and the Fairhaven Planning Board staff, the 13 members of the Harbor Plan Renewal Committee, the 45 key waterfront harbor stakeholders who were interviewed for the plan, members of the public who attended the four focused workshops and the two general public meetings, and those who attended the public hearing on the plan and who participated in the process of plan development. I would like to applaud all of these organizations and individuals for their time and effort toward development of this Plan. In reaching my approval decision, I have carefully considered the oral and written testimony submitted during the public comment period; I have also accounted for the circumstances, challenges, and opportunities of the planning areas, including the Designated Port Area (DPA), local economic and development conditions, and the social and cultural characteristics of the neighborhood.

II. PLAN CONTENT

A. Overview

As shown in Figure 1 in Attachment A, the Harbor Planning Area includes a primary and a secondary district. The majority of the planning activities focused on the primary district that extends from the Wood Street Bridge which crosses the Acushnet River at the extreme northern end of the New Bedford/Fairhaven Harbor (“Harbor”) to the hurricane barrier which defines the entrance to the inner Harbor at the southern end of the Acushnet River, and includes the Northeastern shoreline of New Bedford’s Clarks Point Peninsula. This district includes the entire watershed and the land inland to the first major public street in most areas although further inland in a few areas to encompass those activities with direct or indirect ties to the waterfront. The primary planning district is also where almost all of the marine industrial activities occur. In addition to significant port-related marine industrial areas on either side of the Harbor, the primary harbor planning district encompasses the central downtown areas of both New Bedford and Fairhaven,

including a significant number of residential properties on the Fairhaven side of the Harbor. The incorporation of the downtown areas is an explicit recognition of the importance of waterfront activities to the economic and environmental health of these business, historic, and cultural centers. The secondary planning district includes the rest of the waterfront area of New Bedford, encompassing the shoreline bordering the Fort Rodman peninsula and Clarks Cove. Limited planning activities occurred in this area with the focus being on maintaining public access for swimming, parks and beaches, and other amenities that encourage public use to the water.

Since the 2002 harbor plan, there have been some notable changes in conditions and circumstances that have affected the Municipalities and planning area, including: the modification of fisheries management regulations that have led to a consolidation of full-service fishing ports like New Bedford; an increase in cruise ship visits to the port and opportunities to expand that industry; projected expansion of short sea shipping as a substitute for traditional trucking; authorization for offshore renewable energy projects and the need for onshore industrially-based support facilities; an expansion of import/export activities in the Harbor; and a strong local interest in increasing opportunities to serve as a service port for large yachts and increased recreational boating.

The local planning process identified four overriding community goals that served to guide the plan development. These included:

- Support Traditional Harbor Industries: Preserve and enhance the Port's traditional strengths in fishing, seafood processing, and their supporting industries.
- Rebuild and Add to the Harbor Infrastructure: Upgrade port infrastructure essential to the future economic vitality of both the working port and the region and to the public's use and enjoyment of the Harbor.
- Capture New Opportunities: Take advantage of new opportunities for the expansion of marine industry in the Port and other supporting industries (such as tourism, short sea shipping, recreational boating, import/export, and alternative energy) while ensuring that new activities do not conflict with the traditional working port.
- Enhance the Harbor Environment: Demonstrate leadership in Harbor cleanup, recycling and energy conservation under a "Green Port" initiative, with the goal of creating an environmentally healthy Harbor that will encourage a large variety of compatible uses.

The 2010 Plan lays out New Bedford's and Fairhaven's vision for the Harbor, reviews the existing conditions in and around the Harbor, and discusses the current land use and zoning in the planning area. The Plan also summarizes major initiatives taken in the Harbor since the approval of

the original plan in 2002. The Plan includes an economic analysis for both the Fairhaven side of the Harbor and the New Bedford side. This analysis estimates that port activities in the two municipalities account for approximately \$600 million of direct economic output and more than \$1 billion of economic output when economic multipliers are included. The analysis estimates that more than 5,000 jobs are directly or indirectly attributable to the port activities in the two communities. The Plan estimates that in New Bedford harbor industries make up 13% of the city's total economic output and 12% of the city's total employment. Opportunities identified in the Plan for future economic activities include niche waterfront uses such as refrigerated cargo and short sea shipping, and collaborations between the fishing and seafood processing industries with marine science and tourism. The economic analysis also highlights opportunities in emerging industries and waterfront tourism.

The New Bedford/Fairhaven Municipal Harbor Plan is somewhat unique from other harbor planning efforts in that it seeks to closely coordinate the harbor planning process with the EPA's Superfund cleanup and the State Enhanced Remedy (SER) provisions (that go beyond the cleanup levels used for the Superfund activities). While strongly supporting the ongoing Superfund and associated SER cleanup efforts, the Plan also encourages and supports EPA and DEP efforts to speed up the Superfund cleanup and expand the SER cleanup. The Plan articulates New Bedford's desire to ensure that strategies selected for expedited and expanded environmental cleanup result in appropriate marine industrial infrastructure improvements to the port. These improvements include: maintenance dredging, existing bulkhead reconstruction, and potential creation of new shoreline Confined Disposal Facilities (CDFs).

B. General Recommendations

The 2010 Plan includes an array of recommendations some of which are harbor-wide initiatives and others targeted to specific sub-areas within the Harbor. One key harbor-wide initiative is the ongoing and future dredging within the Harbor. This initiative includes the ongoing and proposed cleanup dredging being carried out under the EPA's Superfund initiative, the navigational maintenance dredging facilitating maritime commerce, and another category of dredging associated with the SER provision of the Superfund law. This SER provision allows a state to request that areas within a designated superfund site that are below the EPA's target levels for cleanup, but which still contain contaminants targeted in the overall cleanup, be added to the

Superfund remedy as long as the cost for the enhancement is covered by the state. Clean-up activities conducted under Superfund and SER—including navigational dredging in this case—are relieved of the need to request or receive formal permit or license from state and/or federal resource agencies. While the enhanced remedy dredging projects still must meet the substantive standards of the relevant permits and licenses, the formal permitting waiver serves to expedite project implementation. A cornerstone of the Harbor’s ongoing dredging initiative is the use of Confined Aquatic Disposal (CAD) cells for the disposal of the dredged material. Identification of the CAD strategy and potential CAD locations was included in the Dredge Material Management Plan Environmental Impact Report for New Bedford and Fairhaven developed and coordinated by CZM on behalf of the communities in April 2002.

A second key harbor-wide initiative is the rehabilitation of existing bulkheads and construction of new bulkheads in several places throughout the Harbor. In the Plan, the Municipalities underscore the importance of maintaining critical marine industrial use infrastructure in keeping ports viable and competitive. In particular, the Plan identifies the need for deepwater access adjacent to existing and new bulkheads to allow for maritime industry. Two areas are proposed for rehabilitation of existing bulkheads: (1) the New Bedford State Pier and (2) Fairhaven’s Union Wharf. Three key areas are proposed for new bulkhead construction: (1) an extension of the South Terminal Bulkhead, (2) an extension of the North Terminal Bulkhead, and (3) a new Popes Island Terminal Bulkhead. The South Terminal Bulkhead extension includes a 500 to 1000 foot extension off the southern tip of the existing bulkhead. The Plan targets this area as being highly suited to potential loading and offloading area for the construction of alternative energy infrastructure as well as for the long-term services of maintenance and testing. The North Terminal Bulkhead is proposed to take advantage of adjacent deepwater access as well as nearby road and rail infrastructure. New Bedford envisions this area as a potential location of a major intermodal transportation center focusing on the interconnection between freight transported via ship, rail, and truck.

A third harbor-wide initiative is the continued support of commercial fishing interests within the port. The Plan discusses the need for increased commercial fishing boat berthing space through a combination of expansion of fishing piers, better use of commercial moorings, dredging to increase the usefulness of existing piers, and more efficient management of commercial fishing

berths. The Plan also discusses the potential for installing electric and water utilities to selected fishing piers. The Plan mentions the importance of preserving and supporting the full range of services and facilities that are essential to maintaining a strong and economically viable commercial fishing fleet.

The Plan supports the improvement of freight operations through continued use and expansion of existing freight handling facilities and creation of new freight handling locations. Short sea shipping is one method the Plan proposed for freight expansion. The Plan recognizes that effective short sea shipping will not only require infrastructure on the waterfront for vessels, but also infrastructure for rail service and truck operations including a truck staging area away from the immediate waterfront. At this time the Plan does not identify a proposed location for a short sea shipping operation. However, as one of the Commonwealth's major industrialized ports with extensive deepwater access, numerous waterfront parcels suitable for marine industrial purposes, good road connections, and potential rail access, it is reasonable that a highly suitable location could be identified in the future.

Increased public appreciation of the Harbor is an overriding theme inherent to several initiatives included in the Plan, including a desire to increase public access throughout the waterfront while fully recognizing the challenges of allowing public access in the marine industrial portions of the Harbor. The Plan also supports continued development of a harbor-wide water shuttle service, the expansion of tourism activities—specifically those that present opportunities for people to observe an authentic working port—and efforts to integrate the arts community into the working waterfront through murals, sculpture, monuments, and artwork that celebrates and highlights the working port and help the community to better appreciate and support the port activities. Included in this effort is the continuation and expansion of events such as New Bedford's Working Waterfront Festival. Still another initiative that will positively impact the public's ability to appreciate the Harbor is the Municipalities' desire to establish a more proactive environmental stewardship program within the Harbor. This program would focus on a range of activities including elimination of stormwater and wastewater discharges to the Harbor, infrastructure for the collection and treatment of sewage discharges and oily bilge water discharges from commercial vessels, increased education of recreational boaters on discharge elimination, and a number of other

green port initiatives that will minimize the environmental impacts of port development and operations on the Harbor and surrounding areas.

An element of the Plan related to increased public appreciation is the Municipalities' desire for increased recreational boating facilities within the Harbor. The Plan supports the expansion of both recreational slips and moorings within the Harbor and targets existing marinas and areas "outside the main industrial parts of the harbor" typically not used by commercial vessels because of limited water depth. Three areas the Plan identifies as having potential for new marina development are: (1) the area near the Gifford Street boat ramp, (2) the shoreline in front of the Hicks-Logan planning area, and (3) the area near the Route I-195 and Coggeshall Street bridges. The Plan does recognize that the Gifford Street site is located within the DPA, and as such, opportunities for recreational boating facilities at this location are currently limited under the DPA provisions of Chapter 91 regulations.

C. Synergistic Relationship with the Port's Superfund Designation

One unique characteristic of the New Bedford/Fairhaven Harbor that significantly impacts its management and use is the designation of the entire Harbor as a Superfund site by EPA under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) because of the presence of sediments contaminated by polychlorinated biphenyl (PCB). An ongoing cleanup action has been underway for more than a decade and is expected to continue for an extended period (decades) because of limits in the federal funding schedule. The PCB contamination and associated cleanup activity affects most of the water-side infrastructure improvements either currently underway or proposed in the Plan.

In 1998 the EPA issued its Record of Decision (ROD) for the cleanup of the Harbor's Superfund site. The method of cleanup and disposal of the PCB contaminated sediments used by the EPA has been hydraulic dredging of the material followed by de-sanding, dewatering, and then rail shipment to a suitable landfill in Michigan. This approach has resulted in a protracted and expensive cleanup. Also included in the ROD was EPA's agreement to a request by the Commonwealth to allow the state to pursue certain enhancements to the EPA cleanup under the SER provisions of CERCLA. The SER has the added critical benefit of further cleaning up the Harbor by removing sediments with PCB concentrations below the EPA cleanup action level. The

SER was a key tool identified in the 2002 Plan to help speed up maintenance dredging in the Harbor while at the same time helping to clean the Harbor. To date three phases of navigational dredging have occurred in the Harbor aided by the provisions of the SER.

In an effort to reduce the costs and timeframe of final cleanup, EPA and the Municipalities are discussing the use of CAD cells within the Harbor for the permanent disposal of PCB contaminated sediments. EPA is currently preparing an Explanation of Significant Differences (ESD) outlining the differences and benefits between the originally proposed cleanup strategy and the future use of CADs as a key component of a modified cleanup strategy. DEP has requested that the ESD include an expansion of the SER currently used to facilitate navigational dredging in areas of the Harbor not planned for Superfund cleanup dredging. Included in the Commonwealth's proposed expansion of the SER is the ability to dispose of mostly clean sediments, and potentially some contaminated sediments, excavated during construction of the CADs into CDFs. Two of these CDFs are located adjacent to South Terminal and North Terminal. The CDFs would provide a seaward bulkhead allowing deepwater access, and material from the CADs would be disposed behind the bulkheads and then capped in a fashion that would facilitate marine industrial uses on the newly created land.

While the proposed harbor plan identifies six general CDF areas with 11 specific CDF locations, my approval today shall not be construed as an authorization of these or any other disposal projects, which will be reviewed in a process separate from the Municipal Harbor Plan decision. I anticipate that any CDF identified in the 2010 Plan and approved as part of an expanded SER would receive the benefit of streamlined permitting as afforded by inclusion in the CERCLA cleanup of the Harbor. Otherwise, I anticipate that any CDFs not approved as part of an expanded SER would require applicable local, state, and federal permits and licenses.

D. Designated Port Area Recommendations

The 2010 Plan includes a Designated Port Area Master Plan that revises the previous approach to the preservation and enhancement of the capacity of the DPA to accommodate water-dependent industry and prevent displacement of these activities by other nonwater-dependent uses. Figure 2 (in Attachment A) shows the approximate area of the DPA. The primary modification from the 2002 Plan is the elimination of the Eligibility Credit Program which previously served to

control certain aspects of siting “supporting” commercial and industrial uses (as defined in 310 CMR 9.02) within the DPA. The new Plan simplifies the local management of such uses by reverting back to the standards contained in the state’s Chapter 91 Waterways Regulations. This change eliminates the enhanced flexibility allowed for supporting commercial at some parcels as well as the more restrictive limitations for both supporting commercial and industrial uses imposed on other parcels and identified in the 2002 Plan. The Plan now will rely upon the standard limitations and flexibility provided in the Waterways Regulations for the management of any supporting DPA uses. In regards to this modification, I note that during the consultation process, DEP and CZM confirmed with City of New Bedford officials the presence of a few parcels where the current extent of “supporting” commercial use would not be able to be licensed at their current supporting use densities within the limits of flexibility provided by the Chapter 91 regulations. Specifically, it is understood that while the 2002 Plan Eligibility Credit Program provided an opportunity for these buildings, structures, and uses to obtain Chapter 91 licenses without a variance, this opportunity is no longer provided by the renewed Plan.

III. STANDARDS FOR PLAN APPROVAL

The 2010 Plan contains the New Bedford’s and Fairhaven’s planning vision and other specifics to guide use and development of the planning area. It is important to note that while this approval represents a general endorsement of the Municipalities’ Plan and associated recommendations, my Decision today is governed by the authority, standards, and provisions contained in the regulations at 301 CMR 23.00 (“Review and Approval of Municipal Harbor Plans”) and is applicable only to those discretionary elements of the Chapter 91 Waterways regulations that are specifically noted in this Decision. Other elements of the Plan provide important contextual guidance but do not serve as binding for state agency actions. Moreover, this Decision does not supersede separate regulatory review requirements for any project or activity contained in the Plan.

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 convey the formal coastal program policy of the Commonwealth. The policies and management principles applicable to the New Bedford/Fairhaven 2010 Harbor Plan Renewal are briefly summarized here:

- 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.
- Habitat Policy #1: Protect coastal resource areas including salt marshes, shellfish beds, dunes, beaches, barrier beaches, salt ponds, eelgrass beds, and fresh water wetlands for their important role as natural habitats.
- 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.
- Ports Policy #1: Ensure that dredging and disposal of dredged material minimize adverse effects on water quality, physical processes, marine productivity and public health.
- Ports Policy #2: Obtain the widest possible public benefit from channel dredging, ensuring that designated ports and developed harbors are given highest priority in the allocation of federal and state dredging funds. Ensure that this dredging is consistent with marine environment policies.
- Ports Policy #3: Preserve and enhance the capacity of Designated Port Areas (DPAs) to accommodate water-dependent industrial uses, and prevent the exclusion of such uses from tidelands and any other DPA lands over which a state agency exerts control by virtue of ownership, regulatory authority, or other legal jurisdiction.
- Ports Management Principle #1: Encourage, through technical and financial assistance, expansion of water-dependent uses in designated ports and developed harbors, re-development of urban waterfronts, and expansion of visual access.

The aforementioned policies are relevant to the major initiatives identified in the Plan renewal: continued navigational and cleanup dredging, rehabilitation and construction of existing and new bulkheads for expanded marine industrial uses, continued support and infrastructure enhancements for commercial fishing, expansion of existing and creation of new freight handling opportunities, and increased public use and appreciation of the Harbor through a range of activities, especially through expansion of recreational boating facilities in the Harbor. Based on the review of the Plan, its accompanying Compliance Statement, and the assessment of CZM, I find the Plan meets the intent of each relevant policy statement and, as required by 301 CMR 23.05(2), I conclude that the Plan is consistent with these policies and management principles. In its assessment, CZM noted that the Plan continues to view protection and expansion of water-dependent industry within the DPA as central to the long-term success of the waterfront, while simultaneously striving to

diversify the DPA use mix with compatible non-marine industrial port uses in select areas of the Harbor to increase the overall economic vitality of the area.

B. Consistency with Tidelands Policy Objectives

As required by 301 CMR 23.05(2), I also must find that the Plan renewal is consistent with state tidelands policy objectives and associated regulatory principles set forth in the state Waterways Regulations of DEP (310 CMR 9.00 *et seq.*). As promulgated, the Waterways Regulations provide a uniform statewide framework for regulating tidelands projects. Municipal Harbor Plans present communities with the opportunity to integrate their local planning goals into state Chapter 91 licensing decisions by proposing modifications to the Chapter 91 regulatory standards through either: 1) the amplification of the discretionary requirements of the Waterways Regulations; or 2) the adoption of provisions that—if approved—are intended to substitute for the minimum use limitations or numerical standards of 310 CMR 9.00 *et seq.* The approved substitution provisions of Municipal Harbor Plans, in effect, allow DEP to waive specific Chapter 91 use limitations and numerical standards affecting projects in tidelands, in favor of the modified provisions specified in an approved Municipal Harbor Plan.

While the Plan effectively articulates broad goals and principals and also discusses specific harbor-wide and site specific initiatives, in only one area—the standards associated with public access—does the Plan propose numeric substitutions intended to be binding guidance within the DEP’s Chapter 91 licensing process. For all other areas and specific initiatives, the Plan proposes to rely on the existing Chapter 91 standards contained in 310 CMR 9.00 *et seq.* The original 2002 Plan chose to decrease permitting flexibility in selected areas and increase permitting flexibility in other areas, primarily through a tool called the Eligibility Credit Program. In contrast, the current Plan chooses to use the provisions contained in the Chapter 91 regulations and to rely upon DEP to apply regulatory flexibility, as it is applicable under the rules, throughout all areas of the Harbor, and for all development initiatives proposed in the Plan, as well as other development initiatives that may not currently be envisioned by the Plan. This reliance upon the existing Chapter 91 regulatory standards simplifies the review necessary to determine the Plan’s consistency with tidelands policy objectives.

Evaluation of Proposed Substitute Provision

The framework for evaluating proposed substitution provisions to the Chapter 91 Waterways requirements is established in the Municipal Harbor Plan Regulations at 301 CMR 23.05(2)(c) and 301 CMR 23.05(2)(d). In effect, the regulations set forth a two-part analysis that must be applied individually to each proposed substitution in order to ensure that the intent of the Waterways requirements with respect to public rights in tidelands is preserved.

In the first part of the analysis, as per 301 CMR 23.05(2)(c), there can be no waiver of a Waterways requirement unless the Secretary determines that the requested alternative requirements or limitations ensure that certain conditions—applicable to each minimum use limitation or numerical standard—have been met. Part two of the analysis, 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 associated state tidelands policy objective.

The Plan provides detailed guidance regarding public access and the standards for utilization of the shoreline for water-dependent purposes as covered in 310 CMR 9.52(1)(b)(1). This section of the Waterways Regulations requires project sites that contain a water-dependent use zone to include a pedestrian access network consisting of “walkways and related facilities along the entire length of the water-dependent use zone...no less than ten feet in width...” As a substitution to the ten-foot standard in the regulations, the Plan proposes to establish a dedicated 20-foot wide public access walkway along the portion of New Bedford and Fairhaven shoreline that is located outside the DPA and within that portion of the Harbor bounded by the hurricane barrier on the South and the Rt. 195 bridge on the North. As required in the harbor plan approval standards [301 CMR 23.05(2)(c)(6)], this alternative width appears to be appropriate given that the minimum water-dependent use zone is typically 25 feet. In areas where the limit of Chapter 91 jurisdiction is less than the minimum 25 foot water-dependent use zone, DEP would uphold this substitute provision to the limit of jurisdiction and any other administration and enforcement would be the responsibility of the Municipalities. The Municipalities’ intent with this proposed extended width is to enhance the general public’s waterfront experience. Associated with the 20-foot wide public access walkway, the Plan also provides DEP guidance on the allowed uses within the walkway and guidance on how DEP should apply this standard when an existing building is within 20 feet of the shoreline. As required in the harbor plan approval standards [301 CMR 23.05(2)(c)], I find that the proposed

substitution to require a 20-foot wide pedestrian access walkway and the related guidance is “appropriate given...the size and configuration of the water-dependent use zone and the nature and extent of water-dependent activity and public uses that may be accommodated therein.”

As further required in the harbor plan approval standards [301 CMR 23.05(2)(d)], I find that the proposed substitution and related guidance “will promote, with comparable or greater effectiveness, the state tidelands policy objectives.” I have also determined that no offsetting measures are necessary because the proposed substitution serves to strengthen the standards and corresponding public benefits provided by 310 CMR 9.00. Accordingly, I hereby approve the proposed substitution including all related guidance associated therewith as explicitly set forth in the Plan.

Amplification Provisions

The Review and Approval of Municipal Harbor Plans regulations at 301 CMR 23.05(2)(b) require a finding 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 does not contain amplifications that will have significance to the Chapter 91 licensing process pursuant to 301 CMR 23.05(2)(b).

Evaluation of DPA Master Plan

The portion of the Plan that pertains to lands and waters of a DPA, serves as a DPA Master Plan. The approval criteria at 301 CMR 23.05(2)(e) requires a general finding that the DPA Master Plan “must preserve and enhance the capacity of the DPA to accommodate water-dependent industrial use, and must prevent substantial exclusion of such use by any other use eligible for licensing in a DPA pursuant to 310 CMR 9.32.” The Plan approval standards go on to present four criteria that must be met for DPA Master Plan approval.

The first approval criterion speaks to the need of reserving “extensive amount of DPA land in close proximity to the water” for water-dependent industrial uses and ensuring that commercial uses will not “occupy more than 25% of the total DPA land area.” The Plan and the accompanying

Compliance Statement discuss that these standards are met in two ways. Firstly, by virtue of ownership by the New Bedford Harbor Development Commission and long-term leases granted for occupancy by marine industrial users, extensive amounts of land near the water are reserved for water-dependent industrial uses. The Plan's Compliance Statement also states that the federal government and Commonwealth own seven percent of the DPA land area, primarily the State Pier and the EPA Superfund dewatering facility. The Compliance Statement also states that "over 30 percent of the DPA land is owned and actively used by privately held marine industrial companies and another ten percent is owned and used by warehousing and manufacturing companies, many with ties, or that are accessory, to the Port's water-dependent industries." The Compliance Statement further states that currently about ten percent of the DPA is occupied by commercial or residential uses. This level of commercial/residential use has remained steady since the development of the 2002 Plan. The information presented by the Plan and Compliance Statement present a convincing case that the high level of ownership and occupancy of marine industrial uses in conjunction with the low level and stable trend of commercial uses in the DPA, within the context of the Chapter 91 standards which limit the amount of supporting commercial use on each individual site to no more than 25%, will serve to ensure that no more than 25% of the DPA will be occupied by commercial uses within the expected approval period of this Plan.

The second approval criterion requires the Plan to prevent commitments of space that would "significantly discourage present and future water-dependent industrial activity". The Plan proposes to rely upon the Chapter 91 licensing process to ensure that supporting commercial uses do not exceed the 25% site coverage limit. Under this regulatory framework, 75% of each project site in jurisdiction will remain committed to water-dependent industrial uses. The Compliance Statement also discusses the historic long-term use and ownership of many waterfront sites by long established marine industrial users. As explained in the Plan and Compliance Statement, the combination of state licensing standards in conjunction with the long established use patterns of the Harbor will serve to avert uses and area that are needed to sustain present and future water-dependent industrial activity.

The third approval criterion requires the Plan to identify the industrial and commercial uses allowable under municipal zoning that shall qualify as supporting DPA uses. For this criteria the municipalities have chosen to take a broad inclusive perspective and allow all uses allowed by zoning

to qualify, with the exception of any uses which may be allowable under zoning but which are prohibited in DPA under 310 CMR 9.00.

The final approval criterion requires the Plan to identify a “strategy to guide... promotion of water-dependent industrial use.” This strategy shall include recommendations for capital improvements, for preserving and enhancing navigational channels and other transportation infrastructure, and commitments to maintain a surrounding land use and buffers to avoid operational conflicts between water-dependent industrial uses and other community uses. The Plan includes a robust strategy for promotion of water-dependent industrial uses including the following: recommendations for continued navigational and environmental cleanup dredging, proposals for new bulkheads to expand water-dependent industrial uses, expansion of berthing space for fishing vessels, expansion of waterborne freight infrastructure, and others.

Based on the information provided in the Plan and supporting documents as discussed above, I am satisfied that the DPA Master Plan components of the Plan are consistent with the requirements of 301 CMR 23.05(2)(e).

C. Relationship to State Agency Plans

The approval criteria at 301 CMR 23.05(3) requires the Plan to “achieve compatibility with the plans or planned activities of all state agencies owning real property...within the harbor planning area.” The only state-owned property abutting New Bedford Harbor is the State Pier, which is owned and operated by the Massachusetts Department of Conservation and Recreation (DCR). The Plan contains a wide range of recommendations and initiatives for the State Pier that include replacement of the pile supported portion of the pier with a solid-fill structure including a new bulkhead. The Plan calls for building improvements at different locations on State Pier. Generally the Plan’s proposed activities for State Pier include: continuing the ferry terminal operations, expanding warehouse and storage space, enhancing cargo and cruise ship utilization of the facility, and increasing use of the pier by harbor visitors through efforts such as a floating dock for excursion and charter boats, providing the Schooner Ernestina docking space, and using the pier for special events. DCR’s Office of Waterways has reviewed the actions proposed in the Plan for the State Pier and provided written support of the proposed Plan to CZM on February 2, 2010.

The Plan also covers an inland area currently proposed by the Massachusetts Department of Transportation (MassDOT) for a commuter rail station for service between New Bedford and Boston. MassDOT has been working closely with New Bedford officials for several years to ensure that the proposed project will meet the needs of both the City and MassDOT. MassDOT has reviewed the sections of the Plan that have implications for their site and project and have found the Plan compatible with their planned activities. MassDOT provided written comments to CZM on February 19, 2010, affirming that the Plan is compatible with their proposed plans and activities. The Plan also covers parts of the area included in MassDOT's redevelopment of Route 18. The Route 18 redevelopment project has been in the planning and design stages since the approval of the original harbor plan in 2002. The current Plan recognizes and continues to support this ongoing traffic calming project as one way to better connect New Bedford with its waterfront.

Based on the information described above, I find, as required in the harbor plan approval standards [23.05(3)], that the Plan achieves "compatibility with the plans...or activities of all state agencies...within the harbor planning area."

D. Implementation Strategy

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. The Plan includes a chapter on implementation which discusses significant projects and recommendations of the Plan including general time frames for completion, the stakeholder or authority primarily responsible for implementation, other interested stakeholders, and potential funding mechanisms. The Plan does not contain any requirements that are intended to be less restrictive than those contained in 310 CMR 9.00. Accordingly, I find that this approval standard is met.

IV. EFFECTIVE DATE AND TERM OF APPROVAL

This Decision shall take effect immediately upon issuance on June 14, 2010, except as may otherwise be provided in accordance with 301 CMR 23.04(5). As requested by New Bedford and Fairhaven, the Decision shall expire five (5) 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, or if the

Secretary extends the original expiration date in accordance with 301 CMR 23.06(2)(a). As required under 301 CMR 23.06(2)(b), no later than six months prior to the expiration date of the Plan the Secretary will notify the Municipalities of the need to renew the Plan. The notification may request the Municipalities review the Plan's effectiveness in promoting state tidelands policy objectives and public interests.

V. STATEMENT OF APPROVAL

Based on the Plan, its associated documents, public comments, and information from the consultation session submitted pursuant to 301 CMR 23.04 and evaluated herein pursuant to the standards set forth in 301 CMR 23.05, I hereby approve the 2010 Plan Renewal to the New Bedford/Fairhaven Harbor Plan as the Municipal Harbor Plan for these Municipalities, subject to the limitations and conditions included in this decision, particularly those outlined below.

The Approved New Bedford/Fairhaven Harbor Plan Renewal ("Approved Plan") shall be the revised Plan dated May 26, 2010, containing changes to both the Plan and Compliance Statement required by CZM and DEP during the consultation session, and shall also include a copy of this Approval Decision. Bound and electronic copies of the Approved Plan shall be provided by the Municipalities and kept on file at the New Bedford and Fairhaven Municipal Clerks Office, the New Bedford Harbor Development Commission Office, the Fairhaven Planning Board Office, the CZM Offices in Boston and in Wareham, the DEP/Waterways offices in Boston and in Lakeville, and the DCR Waterways Office in Hingham. Copies of the Approved Plan including the Compliance Statement and this Approval Decision shall be made available to the public via the New Bedford Harbor Development's website and at the libraries of both Municipalities.

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

- Any subsequent addition, deletion, or other revision to the submitted plan dated May 26, 2010, 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).
- 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.

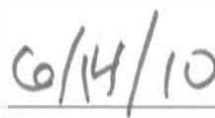
- Any plan conformance requirements that are binding pursuant to 310 CMR 9.34(2), with the exception of the approved substitute provision for 9.52(1)(b)(1).
- Eligibility of any properties for the 2002 Plan approved substitution allowing expanded supporting DPA uses. This substitution is no longer valid and previous licenses issued with such increased supporting DPA uses would not be renewable at the supporting use densities licensed under the approved substitute provision.

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. Chapter 91 with the applicable standards of the Waterways Regulations at 310 CMR 9.00. To achieve conformance to standards contained in Chapter 91 on a case by case basis DEP retains full discretion to condition the license of any proposed use program, layout, or design.

By letter from the Waterways Program Chief in Attachment B, DEP has expressed support for approval of the renewal Plan and stated that the Plan will become operational for Waterways licensing for all applications for which the effective date of the Plan approval occurs prior to the close of the application's public comment period. Subsequent to Plan approval, a determination of conformance with the Plan will be required for all proposed projects in accordance with 310 CMR 9.34(2).



Ian A. Bowles
Secretary of Energy and Environmental Affairs



Date

Attachment A: Figures

Figure 1 Aerial View of Planning Area

New Bedford / Fairhaven
Harbor Plan Update 2008
Planning Areas

- 2008 Primary Planning Area
- 2008 Secondary Planning Area
- 2002 Planning Area
- Municipal Boundary



Prepared by the
Urban Harbors Institute
of the University of Massachusetts Boston

For the
New Bedford / Fairhaven
Harbor Plan Renewal Committee

On behalf of
Fort Point Associates
Urban Harbors Institute
Apex Companies
and
FXM Associates

Data from
MassGIS
City of New Bedford
Town of Fairhaven
Urban Harbors Institute
Apex Companies

September 2008



Figure 2 Designated Port Area

New Bedford / Fairhaven
Harbor Plan Update 2008

*Approximate Chapter 91
Jurisdiction, Approximate
Designated Port Area and
Federal Channels, Turning
Basins and Anchorage*

- 2008 Planning Area
- Approximate Ch. 91 Jurisdiction
- ▨ Approximate Designated Port Area
- Federal Channels etc.



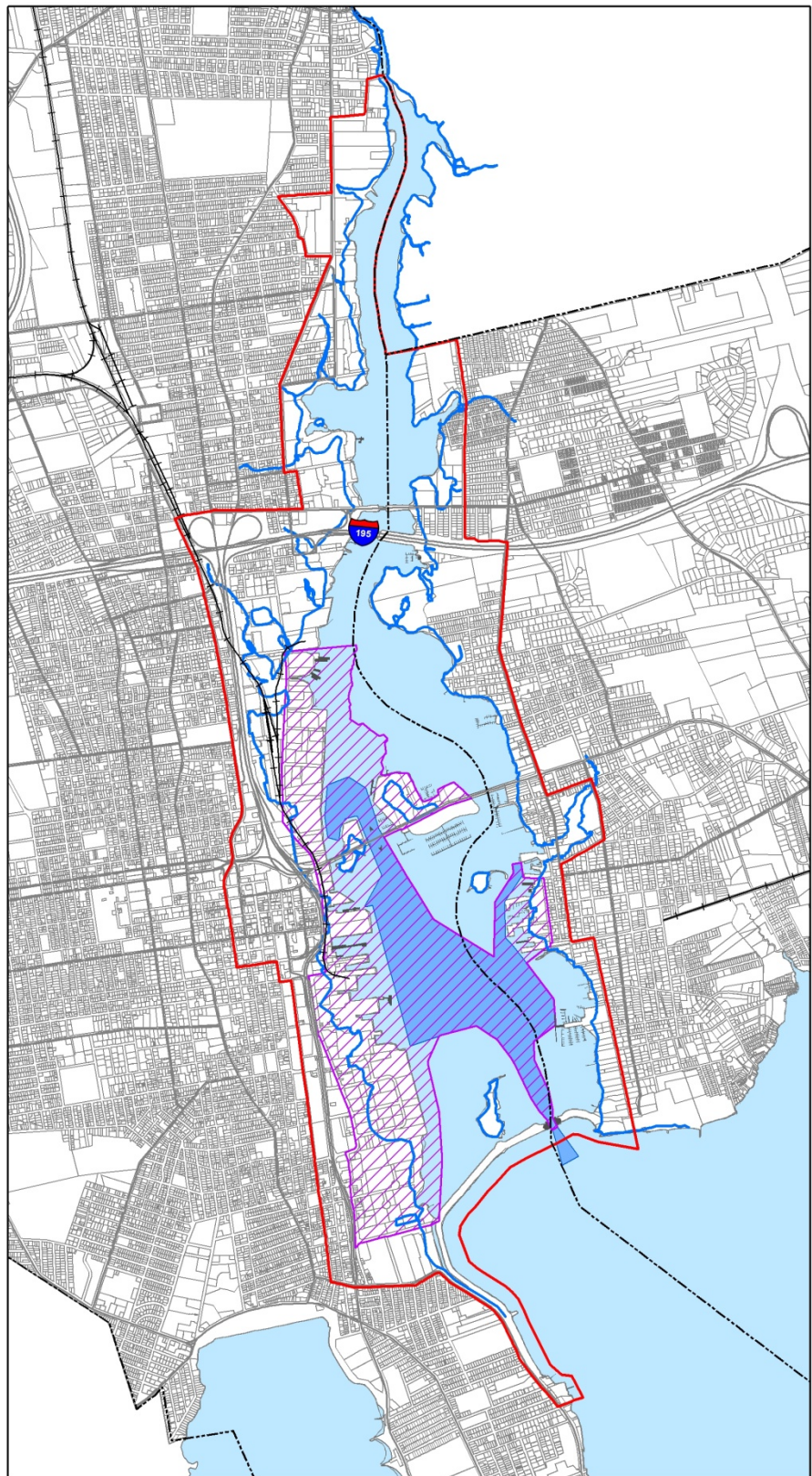
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Data from
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September 2008



Attachment B: Letter from DEP Waterways Chief



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

IAN A. BOWLES
Secretary

LAURIE BURT
Commissioner

June 8, 2010

Ian Bowles, Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street
Boston, MA 02114

RE: DEP Recommendation for the Approval of the New Bedford/Fairhaven Harbor Plan and Designated Port Area Master Plan Renewal, dated May 26, 2010.

Dear Secretary Bowles:

The Department of Environmental Protection, Waterways Regulation Program (MassDEP) has reviewed the New Bedford/Fairhaven Harbor Plan and Designated Port Area Master Plan Renewal ("Plan"), dated May 26, 2010. WRP staff members have worked closely with the Massachusetts Office of Coastal Zone Management (CZM) and representatives of New Bedford and Fairhaven throughout the planning process and our comments have been adequately addressed and incorporated into the final Plan. The WRP, 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).

In accordance with the provisions of 310 CMR 9.34(2), the MassDEP will require conformance with any applicable provisions of the approved Plan in the case of all waterways license applications submitted subsequent to the Plan renewal'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 renewal.

The MassDEP will adopt as binding guidance in all License application review any Substitute Provisions contained in the Plan. The only Substitution contained therein pertains to pedestrian waterfront access in certain limited areas of the Planning area. The Substitution increases the width of public pedestrian access ways along sections of the shoreline located *outside* of the Designated Port Area (DPA) jurisdiction. Pursuant to 310



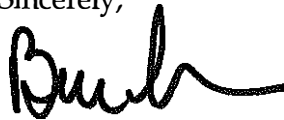
CMR 9.52(1), projects with water-dependent use zones (WDUZ) must provide a ten (10) foot wide pedestrian walkway the entire length of the WDUZ. This Substitution increases the standard to a twenty (20) foot width along the length of the subject project shorelines. If during the license application review process, the MassDEP determines that existing site constraints make it infeasible to provide a 20 foot wide walkway, the MassDEP will require the maximum width possible. I look forward to further guidance to be provided on this topic in the waterfront public access plan to be submitted in the future.

For projects identified in the Plan as Waterfront Development Shoreline Facilities (WDSFs) that do not qualify for the streamlined permitting processes pursuant to the State Enhanced Remedy (SER) provisions of the Superfund Act, the MassDEP will apply its conventional regulatory standards pursuant to 310 CMR 9.00, including but not limited to those found at 310 CMR 9.32(1)(b), 9.35 and 9.36(5)(b) for projects in the DPA.

For all DPA projects proposing to incorporate nonwater-dependent commercial or industrial Supporting Uses on their project sites, the MassDEP will employ the standards found at 310 CMR 9.02 in its review of such projects. On the filled tidelands portion of the project site only, that standard allows up to 25% of the land and pier area in jurisdiction to be devoted to Supporting Uses. In addition the uses must provide direct operational or economic support to the DPA, and must be compatible with activities characteristic of a working waterfront and its associated backlands. Any such proposed use shall also comply with applicable standards including, but not limited to, 310 CMR 9.36(5) and 9.51(3).

The MassDEP looks forward to continuing its work with CZM and the representatives of New Bedford and Fairhaven 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: Mayor Scott Lang, New Bedford
Kristin Decas, Executive Director, New Bedford HDC
Jeff Osuch, Executive Secretary Fairhaven
Bill Roth, Town Planner, Fairhaven
Deerin Babb-Brott, Director, CZM
Bruce Carlisle, Assistant Director, CZM
Dave Janik, South Coast Regional Coordinator, CZM
Andrea Langhauser, MassDEP