

**DECISION ON PROVINCETOWN'S  
REQUEST FOR APPROVAL  
OF THE  
PROVINCETOWN HARBOR PLAN  
RENEWAL PURSUANT TO 301 CMR 23.00**

**February 29, 2012**

**Commonwealth of Massachusetts  
Executive Office of Energy and Environmental Affairs  
Richard K. Sullivan Jr., Secretary**

## I. INTRODUCTION

Today, as Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (EEA), I am approving, subject to the conditions noted below, the Provincetown Harbor Plan Amendment and Update (“Plan”) dated December 20, 2011. This Decision presents a synopsis of Plan content, together with determinations on the Plan’s compliance with the standards for approval set forth in the Municipal Harbor Planning Regulations at 301 CMR 23.00 *et seq.*

Pursuant to the review procedures at 301 CMR 23.00, the Plan was submitted by the Town of Provincetown (“Town”), and following a review for completeness, the Massachusetts Office of Coastal Zone Management (CZM) published a notice of public hearing and 30-day opportunity to comment in the *Environmental Monitor* on April 20, 2011, and the 30-day public comment period closed on May 20, 2011. Written comment letters were received prior to the close of the public comment period and oral testimony was accepted during a public hearing held in the Town on May 12, 2011. In reaching my approval decision I have taken into account the oral and written testimony submitted by the public during the public comment period.

After the closing of public comment period, consultation sessions were held with representatives from CZM, the Department of Environmental Protection (DEP), and the Town to obtain further input and discussion on the Plan. As a result of the consultations, the Town submitted a revised Plan on December 20, 2011. CZM published a notice of a 14-day opportunity to comment on the revised Plan in the *Environmental Monitor* on January 11, 2012. No comments were received. The consultation period concluded on February 1, 2012.

The Plan reflects significant effort on the part of the Town and many members of the public who participated in the public process. I would like to commend the efforts of the members of the Provincetown Harbor Committee, elected officials, community residents, and all others who volunteered their time and effort over the course of many meetings.

## II. PLAN CONTENT

The Municipal Harbor Planning Regulations (301 CMR 23.00 *et seq.*) establish a voluntary process under which cities and towns may develop and submit 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. Approved municipal harbor plans provide licensing guidance to DEP in making decisions pursuant to Chapter 91 of the Massachusetts General Laws ("c. 91") and the Waterways Regulations at 310 CMR 9.00 *et seq.* An approved municipal harbor plan may establish alternative numerical and dimensional requirements (e.g., substitute provisions) to the requirements specified by the Waterways Regulations—such as increased building heights and footprints, modifications to interior and exterior public space requirements, and the location and amount and scale of public and private facilities—provided that adverse effects to public rights along the waterfront are mitigated with appropriate offsetting measures. Approved municipal harbor plans may also specify provisions that amplify certain discretionary requirements of these regulations

The Plan amends and updates the first Provincetown Municipal Harbor Plan, approved May 4, 1999. Among other purposes, the 1999 plan sought to establish a consistent regulatory approach to tidelands subject to Commonwealth jurisdiction. Since the original 1999 plan was approved, it has been utilized as a planning tool to provide guidance to DEP with respect to c. 91 licensing of waterfront properties and to coordinate the efforts and actions of multiple local committees and departments.

In 2005, the Harbor Committee initiated work on reviewing the 1999 plan for amendment and update. Throughout the multi-year review and amendment process, the Provincetown Harbor Committee sought broad public consensus and agreement with the affected parties to develop a document that best serves as a guide to resource protection, planning and development ideas and recommendations contained in the Plan. Many of the recommendations and objectives of the original 1999 plan were completed over the intervening years, and the 2011 Plan amendment recognizes and builds on those accomplishments and contains a series of updated recommendations. The 2011 Plan sets forth a vision for the harbor that maintains the historic character of the harbor, while expanding public access and protecting the natural resources located within the harbor planning area. As stated in the Plan, its overall objective is to enhance the Provincetown Harbor

planning area (“Harbor”) through better management and by accomplishing a list of coordinated improvements. The Plan envisions a future Harbor with substantially greater access and a more pleasant character along the waterfront for all of its users. The Plan is comprised of a series of both general and specific planning actions and recommendations that reflect the strengths of the planning alternatives studied and respond to current conditions in the Harbor area as well as the directions of the town's citizens as expressed in public meetings and through the Harbor Planning Committee. The Plan’s actions and recommendations address issues of Land Use (including stormwater management, beach maintenance and nourishment, public facilities, and town landings) and Water Use (including commercial fishing, aquaculture, commercial, and recreational boating, moorings, navigation and dredging, and water quality). The Plan contains several general recommendations in regard to water-dependent uses and public access:

1. Protect and maintain existing water-dependent uses, especially in areas of the waterfront that retain the greatest concentration of water-dependent uses.
2. Ensure that new non water-dependent development does not impede or interfere with the operations or viability of water-dependent uses. The Plan seeks to balance the needs of commercial and recreational boaters with the rights of bathers and strollers to enjoy clean beaches and clean water.
3. Encourage new water-dependent facilities whenever appropriate in response to expressed need.
4. Increase public access to the waterfront wherever possible.
5. Assist the maintenance and revitalization of water dependent commercial properties. The Plan supports the use of substitutions and offsets to help keep existing water dependent commercial properties in good condition and financially viable.

The Plan also contains more specific recommendations as guidance to DEP for their use in the review and licensing of structures and uses within c. 91 jurisdiction. As described below, these proposed substitutions and amplifications seek to bring local goals and objectives into the Commonwealth’s decisions pursuant to c. 91 and the Waterways Regulations. The Plan also includes recommendations for direct public improvements through investments, enhancements, and expenditures through the Harbor Access Gift Fund, a dedicated fund for water access improvements (described below).

### **III. STANDARDS FOR APPROVAL**

The 2011 Plan contains the Town of Provincetown's planning vision, actions, and recommendations to guide the use and development of the Harbor planning area. It must be noted that while these elements are commendable and important to the planning and management of the Harbor area, my approval today is bounded by the authority and standards as contained in 301 CMR 23.00 and is applicable only to those discretionary elements of the c. 91 Waterways Regulations that are specifically noted in this Decision. This Decision does not supersede separate regulatory review requirements for any activity.

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

In 1972, the U.S. Congress passed the Coastal Zone Management Act (CZMA), which gives states the opportunity to develop their own coastal management programs and federal funds to support such management. The CZMA also gives states the authority to review federal projects, federally financed projects, and projects receiving federal licenses and permits (including those activities described in detail in Outer Continental Shelf plans), to ensure that they abide by state defined enforceable coastal policies. The federally-approved Massachusetts Coastal Management program, administered by CZM, includes coastal policies that provide the legal frame of reference for all project review activities undertaken by CZM and also play an important role in informing non-regulatory aspects of other programs. In addition to the federal consistency review conducted under the authority of the CZMA, the state's coastal policies are also directly applied within other state statutory and regulatory authorities, including the Municipal Harbor Plan Regulations. As part of the standards for approval, 301 CMR 23.05(1) requires that all municipal harbor plans be consistent with all CZM policies, as applicable. The following are the summary statements of the policies applicable to the Plan:

- Coastal Hazards Policy #1 - Preserve, protect, restore, and enhance the beneficial functions of storm damage prevention and flood control provided by natural coastal landforms, such as dunes, beaches, barrier beaches, coastal banks, land subject to coastal storm flowage, salt marshes, and land under the ocean.
- Habitat Policy #1 - Protect coastal, estuarine, and marine habitats—including salt marshes, shellfish beds, submerged aquatic vegetation, dunes, beaches, barrier beaches, banks, salt ponds, eelgrass beds, tidal flats, rocky shores, bays, sounds, and other ocean habitats—and coastal freshwater streams, ponds, and wetlands to preserve critical wildlife habitat and other important functions and services including nutrient and sediment attenuation, wave and storm damage protection, and landform movement and processes.

- Ports and Harbors Policy #1 - Ensure that dredging and disposal of dredged material minimize adverse effects on water quality, physical processes, marine productivity, and public health and take full advantage of opportunities for beneficial re-use.
- Ports and Harbors Policy #2 - Obtain the widest possible public benefit from channel dredging and ensure that Designated Port Areas and developed harbors are given highest priority in the allocation of resources.
- Ports and Harbors Policy #4 - For development on tidelands and other coastal waterways, preserve and enhance the immediate waterfront for vessel-related activities that require sufficient space and suitable facilities along the water's edge for operational purposes.
- Public Access Policy #1 - Ensure that development (both water-dependent and nonwater-dependent) of coastal sites subject to state waterways regulation will promote general public use and enjoyment of the water's edge, to an extent commensurate with the Commonwealth's interests in flowed and filled tidelands under the Public Trust Doctrine.
- Public Access Policy #2 - Improve public access to existing coastal recreation facilities and alleviate auto traffic and parking problems through improvements in public transportation and trail links (land- or water-based) to other nearby facilities. Increase capacity of existing recreation areas by facilitating multiple use and by improving management, maintenance, and public support facilities. Ensure that the adverse impacts of developments proposed near existing public access and recreation sites are minimized.
- Public Access Policy #3 - Expand existing recreation facilities and acquire and develop new public areas for coastal recreational activities, giving highest priority to regions of high need or limited site availability. Provide technical assistance to developers of both public and private recreation facilities and sites that increase public access to the shoreline to ensure that both transportation access and the recreation facilities are compatible with social and environmental characteristics of surrounding communities.
- Water Quality Policy #1 - Ensure that point-source discharges and withdrawals in or affecting the coastal zone do not compromise water quality standards and protect designated uses and other interests.
- Water Quality Policy #2 - Ensure the implementation of nonpoint source pollution controls to promote the attainment of water quality standards and protect designated uses and other interests.
- Water Quality Policy #3 - Ensure that subsurface waste discharges conform to applicable standards, including the siting, construction, and maintenance requirements for on-site wastewater disposal systems, water quality standards, established Total Maximum Daily Load limits, and prohibitions on facilities in high-hazard areas.

The above policies are relevant to the major land use and water use issues identified in the Plan. Based on review of the documentation provided by the Town and the assessment of CZM, I conclude that the Plan meets the intent of each relevant policy statement and, as required by 301 CMR 23.05(1), I find it consistent with CZM policies.

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

As required by 301 CMR 23.05(2), I must also find that the Plan is consistent with state tidelands policy objectives and associated regulatory principles set forth in the c. 91 Waterways Regulations. As promulgated, the Waterways Regulations provide a uniform statewide framework for regulating tidelands projects. Municipal Harbor Plans and associated amendments present communities with an opportunity to propose modifications to these uniform standards through the amplification of the discretionary requirements of the Waterways Regulations or through the adoption of provisions that, if approved, are intended to substitute for the minimum use limitations or numerical standards of 310 CMR 9.00. The substitution provisions of an approved municipal harbor plan, in effect, serve as the basis for a DEP waiver of specific use limitations and numerical standards affecting nonwater-dependent use projects, and thereby reflect local planning goals in decisions involving the complex balancing of public rights in and private uses of tidelands.

The Plan contains recommended guidance that will have a direct bearing on DEP licensing decisions within the harbor planning area. Included in this guidance are:

- provisions that are intended to substitute for certain minimum numerical standards in the regulations; and
- provisions that amplify upon certain discretionary requirements of the waterways regulations.

These provisions are each subject to the approval criteria under 301.CMR 23.05(2), and as explained below, I find that all of the applicable criteria have been met.

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

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

For the first part, in accordance with 301 CMR 23.05(2)(c), there can be no waiver of a Waterways Regulation requirement unless the Secretary determines that the requested alternative requirements or limitations ensure that certain conditions—specifically applicable to each minimum use limitation or numerical standard—have been met. The second standard, as specified in 301 CMR 23.05(2)(d), requires that the municipality demonstrate that a proposed substitution provision will promote, with comparable or greater effectiveness, the appropriate state tidelands policy objective.

A municipality may propose alternative use limitations or numerical standards that are less restrictive than the Waterways requirements as applied in individual cases, provided that the plan includes other requirements that, considering the balance of effects on an area-wide basis, will mitigate, compensate for, or otherwise offset adverse effects on water-related public interests.

For substitution provisions relative to the minimum use and numerical standards of 310 CMR 9.51(3)(a) through (e), 310 CMR 9.52(1)(b)(1), or 310 CMR 9.52(2)(b) and (c), any proposal must ensure that nonwater-dependent uses do not unreasonably diminish the capacity of tidelands to accommodate water-dependent uses. Similarly, substitute provisions for nonwater-dependent projects on Commonwealth Tidelands must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes, as provided in 310 CMR 9.53.

#### 463 Commercial Street

Under current waterways regulations at 310 CMR 9.51(3)(b), nonwater-dependent use of existing pile-supported structures is allowed only for facilities of public accommodation, such as restaurants, shops, passenger vessel operations, and other commercial establishments. Residential use, unless authorized under DEP's c. 91 Amnesty Licensing, is thus generally prohibited over the waters of Provincetown Harbor, unless the prohibition is waived in favor of "substitute" requirements set forth in an approved municipal harbor plan that mitigate, compensate, or otherwise offset the adverse effects on water-related public interests.

The Plan proposes a substitution to the limitation at 310 CMR 9.51(3)(b) on locating nonwater-dependent facilities of private tenancy on pile-supported structures over flowed tidelands

or at the ground level of any filled tidelands within 100 feet of a project shoreline. At 463 Commercial Street, the seaward portion of an historic structure is located on Commonwealth tidelands within the jurisdiction of c. 91. For many years, the property was the site of the Flagship Restaurant, but the restaurant use was discontinued in 2005 and the current owner seeks to license as a private residence the pile-supported section of the structure. The Plan recommends a substitution that would allow the licensing of a residential use at 463 Commercial Street. For offset purposes the Plan proposes two elements:

1. Public access easement: The licensee shall provide a perpetual easement for 24-hour public access, 3.5 feet wide and running from Commercial Street to the beach along the westerly boundary line of 463 Commercial Street. Within said easement area, the licensee shall construct a pathway at least 3.5 feet wide running from Commercial Street to the beach, together with stairs to access the beach. Such pathway shall be constructed at the property owner's sole expense, using grades and materials sufficient to provide safe, year round, pedestrian access at all times and for all lawful purposes. The property owner and his successors and assigns shall be permanently responsible for walkway maintenance, repair and reconstruction as needed.
2. Payment to Harbor Access Gift Fund: In addition to the easement, a payment shall be made to the Harbor Access Gift Fund. The Harbor Access Gift Fund was established by the Provincetown Board of Selectman in 1996 for the purpose of receiving c. 91 Waterways-related public benefit and mitigation funds, as well as other contributions, to be used to enhance public access and use and enjoyment of the shoreline and waters of Provincetown Harbor. The types of projects supported by the Harbor Access Gift Fund include, but are not limited to, maintenance and improvements of town landings, beaches, and other public properties for water dependent use. All contributions and disbursements from the Harbor Access Gift Fund are publicly reported annually. The gift totals approximately \$68,000, and the amount was determined based on a methodology contained in Appendix C of the Plan that is analogous to the amnesty-eligible projects in the 1999 plan, as modified for purposes of estimating the heightened level of compensation that would be required if the non-compliant use were to be authorized through the issuance of a waterways variance under current regulations. The exact amount will be confirmed by DEP during c. 91 licensing. The

first payment of the gift shall be made prior to the issuance of the new license. The balance may thereafter be paid in annual installments over a period determined by the Town Treasurer in accordance with the governing provisions of the fund.

The Plan provides convincing rationale supporting the proposed substitution and corresponding offsets. The Plan states that the Town does not support an increase in commercial activity in the segment of the harbor planning area (Region F: 345 Commercial Street to Howland Street) of the proposed substitution. In this heavily residential area, the Town indicates that it strongly supports expanded public access to the beach from the back-lying neighborhood. The desire of the Town to maintain the predominately residential character of this area is manifested in the Zoning By-Law, which includes 463 Commercial Street in Residence Zone 3. The Town also presents information that supports the need and desire for pedestrian facilities providing public access to the waterfront. The Plan states that in the entire East End area, there is only one town landing (at Kendall Lane), within a nearly two mile section of shoreline, and in the immediate vicinity of the 463 Commercial Street, there is no public access to the beach. Because the proposed new access will begin near the foot of a cross-street (Bang Street) that extends inland for a considerable distance, it will provide a strong connection to the surrounding neighborhood. The Plan also references the Town's opinion that there will be limited opportunities to obtain additional on-site public access benefits elsewhere in the East End, because of the limited amount of filled tideland subject to c. 91 jurisdiction. Based on this assessment and rationale, the Town has determined that the provision of a safe public walkway to the beach, open year-round and at all times, will provide an important community benefit at this location.

As a result of my review, I find that the City has demonstrated that the proposed substitute provision and its accompanying offsets will sufficiently compensate for the presence of private facilities over flowed tidelands.

#### Fishermen's Wharf

The Plan also recommends a substitution for the Fishermen's Wharf, a privately-owned pile-supported pier located southwest of the Town's Macmillan Wharf. The proposed substitution implicates several c. 91 Waterways Regulations. At 310 CMR 9.51(3)(c), the rules prohibit parking facilities within a water-dependent use zone and contain provisions for determining the minimum

dimensions for the water-dependent use zone. At 310 CMR 9.51(3)(d), standards require the provision of open space at the project site at ground level on a one-one basis for every square foot of nonwater-dependent use. At 310 CMR 9.52(1)(b)(1), standards require that projects with a nonwater-dependent use that includes fill or structures on any tidelands must devote a reasonable portion of the site to water-dependent use, including a pedestrian access network of a kind and to a degree that is appropriate for the project site and the facility(ies), provided that at a minimum, such network shall consist of walkways and related facilities along the entire length of the water-dependent use zone and, wherever feasible, such walkways shall be adjacent to the project shoreline and shall be no less than ten feet in width.

In 2006, DEP enforced against the owners of Fisherman's Wharf for operating an unauthorized parking lot on the wharf, and in 2007, the owners signed an Administrative Consent Order and Penalty with DEP, in which they agreed to bring the site into full compliance. Because the parking is public, it is allowable under the c. 91 Waterways Regulations, subject to certain constraints governing allowable density and location of the parking. In 2009, the owners submitted a license application to DEP to authorize a compliant parking configuration. The c. 91 compliant application would convert approximately half of the pier to pedestrian open space—including a 10' wide public walkway on each side of the pier, and a 100' setback at the seaward end of the pier—and substantially reduce the parking capacity, as all the current parking is now located in the water-dependent use zone. The water-dependent use zone is a variable "setback" area associated with nonwater-dependent projects which runs around the perimeter to allow for water-dependent activity and public access. For Fishermen's Wharf, the water-dependent use zone is calculated to be roughly 10' minimum along the sides and 100' minimum at the ends. During DEP's public comment period and at the hearing for the license application, there was wide and strong sentiment expressed by Town officials, businesses, and residents that such a reduction in parking capacity would have a negative impact on the visitor-based economy of the Town. In 2010, DEP, CZM, and the Town began discussions through the municipal harbor planning process underway in an effort to address the situation.

In the initial submission to EEA, the Plan proposed a substitution whereby the current configuration of Fishermen's Wharf, with approximately 188 parking spaces and no dedicated water-dependent use zone or waterside public access way, would remain and the owner would make a

contribution of \$200,000 to the Harbor Access Gift Fund. During the public comment period, DEP submitted a letter to me detailing their finding that the proposed substitution for Fishermen's Wharf was not consistent with the applicable tidelands policy objectives of the Waterways Regulations and not eligible for waiver of specific regulatory standards (at 310 CMR 9.51(3)(c), 9.51(3)(d), and 9.52(1)(b) and detailed below) via a substitution under the Municipal Harbor Planning regulations at 301 CMR 23.00. A similar determination was also conveyed to me by CZM. During the consultation period, CZM, DEP, and the Town, with input from the Fishermen's Wharf property owner, engaged in deliberations to seek resolution on a substitute provision and offset that would meet the approvability criteria of the Municipal Harbor Planning regulations and optimize public access, water-dependent use zone and public parking on the pier. A revised Plan was submitted on December 20, 2011 which contained a modified substitution request for Fishermen's Wharf.

The revised substitution proposes a waiver of the above applicable Waterways Regulation standards with an alternative requirement that would allow for a 10' wide walkway on the western side of Fishermen's Wharf, and, in order to maximize the existing footprint of the Wharf for public parking, the substitution would allow for the walkway to be located outside of the existing pier deck footprint by use of cantilevered or pile-supported construction. As an offset to the recommended substitutions, the Plan proposes a payment of \$205,500 be made to the Harbor Access Gift Fund. As described above, the Harbor Access Gift Fund was established by the Town for the purpose of receiving c. 91 Waterways-related public benefit and mitigation funds, as well as other contributions, to be used to enhance public access and use and enjoyment of the shoreline and waters of Provincetown Harbor. The types of projects supported by the Harbor Access Gift Fund include, but are not limited to, maintenance and improvements of town landings, beaches, and other public properties for water dependent use. The amount was determined by DEP based on the methodology contained in Appendix C.

The Plan presents a very strong case that the application of the above referenced standards of the Waterways Regulations (related to provision of public access walkway, open space, and water dependent use zone) would result in a significant loss of parking spaces on Fishermen's Wharf. The Town indicates that it views Fishermen's Wharf as a key, centrally-located tourism and business infrastructure facility that is critical to the interests of the Town, local businesses and residents, and

the general public. In addition to supporting direct and easy access for water-dependent users, including recreational boating and fishing and their respective support services, commercial excursion operations, periodic ferry landings, and various community and civic activities throughout Provincetown's active summer season, parking on Fishermen's Wharf provides a key point of entry to the Town's downtown commercial center. With its narrow streets and tightly spaced buildings, public parking in the Town is extremely limited. As the Town indicates in its Plan, the limitation in the available parking that would be required to meet the regulatory standards does not satisfy the Town's goals for this section of the Harbor, and that on the basis of such planning considerations, the Town believes it is appropriate to give somewhat greater emphasis to public parking when determining the balance between pedestrian and vehicular activity on Fishermen's Wharf. I note that the Town's position and rationale was strongly supported by substantial testimony during the public hearing and written statements during the public comment period.

As the result of my review, I find that the Plan has demonstrated that the proposed substitute provision for Fishermen's Wharf will promote, with comparable or greater effectiveness, the state tidelands policy objectives pertaining to public open space, including the need to provide adequate parking facilities for users of both exterior and interior facilities of public accommodation at the waterfront.

### ***Evaluation of Requested Amplifications***

The Municipal Harbor Plan regulations at 301 CMR 23.05(2)(b) require me to find that any provision that amplifies a discretionary requirement of the c. 91 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 contains two provisions that will have significance to the c. 91 licensing process as an amplification, pursuant to 301 CMR 23.05(2)(b). My determination of the relationship of these proposed local amplification provisions to c. 91 standards in accordance with the MHP regulatory guidance is discussed below

In the Plan, the Town identifies two amplifications of c. 91 regulatory standards requiring close scrutiny during license application and review:

1. Under the Waterways regulations provisions for the Tidewater Displacement Fee, which allow DEP, prior to issuance of a license for any fill or structure that will displace tidewaters below the high water mark, to consider allocating the fee to a special fund or other program managed by a public agency or non-profit organization in order to directly provide public harbor improvements. The Plan requires that Tidewater Displacement Fees levied by DEP be paid directly to the Provincetown Harbor Access Gift Fund, as described in Appendix C of the Plan.
2. The c. 91 rules concerning the maintenance and repair of fill and structures allow for the maintenance and repair of licensed fill or structures without application for a license amendment, including the restoration to the original license specifications of licensed fill or structures that have been damaged by catastrophic events; provided, however that no change in use occurs and that, in the case of flood-related damage, the cost of such restoration does not exceed 50 percent of the cost of total replacement according to the original license specifications. The Plan calls for a strict enforcement of this requirement and for close coordination between DEP and the Provincetown Building Inspector, to determine when further licensing may be required for structures and fill that have been damaged beyond the 50 percent replacement cost limit.

Throughout the Plan, there is considerable thought and rationale given to identifying the importance of preserving and improving local public access and supporting and enhancing water-dependent uses. The proposed amplifications provide reasonable local guidance to DEP when licensing projects, and I find that this provision adequately complements the underlying principle of the applicable c. 91 regulatory standards.

### **C. Implementation Strategies**

Pursuant to 301 CMR 23.05(4), the Plan must include enforceable implementation commitments to ensure that, among other things, all measures will be taken in a timely and coordinated manner to offset the effect of any plan requirement less restrictive than that contained in 310 CMR 9.00. The Plan contains provisions that will be implemented through specific actions by specific parties, including identified offices and departments of local government. These implementation strategies are summarized in the matrix at the end of the Plan. Based on the

information provided in the Plan and as discussed above, I believe that no further implementation commitments on the part of the Town are necessary, and I find that this approval standard has been met.

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

This Decision shall take effect immediately upon issuance. As requested by the Town, the Decision shall expire 5 years from this effective date unless a renewal request is filed prior to that date in accordance with the procedural provisions of 301 CMR 23.06. No later than 6 months prior to such expiration date, in addition to the notice from the Secretary to the Town required under 301 CMR 23.06(2)(b), the Town shall notify the Secretary in writing of its intent to request a renewal and shall submit therewith a review of implementation experience relative to the promotion of state tidelands policy objectives.

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

Based on the planning information and public comment submitted to me pursuant to 301 CMR 23.04 and evaluated herein pursuant to the standards set forth in 301 CMR 23.05, I hereby approve the Provincetown Harbor Plan Amendment and Update dated December 20, 2011 as the Municipal Harbor Plan for the Town of Provincetown, subject to the following conditions:

1. For c. 91 Waterways licensing of 463 Commercial Street:
  - a. As a condition of and prior to issuance of the final c.91 License (“License”), Licensee shall grant to an appropriate governmental entity, or other entity authorized to hold and effectuate the purpose of the easement, a perpetual access easement for the benefit of the general public for purposes of passing and re-passing, by foot alone, from Commercial Street to the Atlantic Ocean (“Easement”) over and across that certain portion of Licensee’s land being shown as “Public Access Easement Area” on a plan of land entitled, “Site Plan of Land in Provincetown Made for Peter J. Petas Showing Proposed Pedestrian Easements,” prepared by Slade Associates, Inc., and dated October 22, 2010, as revised to comply with this provision (“Easement Plan”). Under the terms of said Easement, Licensee agrees to construct and maintain said Easement Area, which includes a stairway. Said Easement and Easement Plan are subject to the prior written

approval of the Massachusetts Department of Environmental Protection (“Department”). Licensee shall record or register said Department approved Easement and Easement Plan with the Barnstable Registry of Deeds or Land Registration Office, as the case may be, and shall forward to the Department copies of said Easement and Easement Plan including respective recordation and/or registration information.

- b. Prior to, or at the time of the license application, Town shall demonstrate that the first payment, or the entire sum, of the Harbor Access Gift Fund contribution has been received.
  - c. Any license issued by DEP pursuant to this Decision shall include the condition that no residential use other than a single-family residence shall be authorized.
2. For c. 91 Waterways licensing of Fishermen’s Wharf:
- a. Any new or amended license submitted to DEP pursuant to this Decision, shall include plans that provide for a minimum 10’ public access walkway / water-dependent use zone as described above. Such public access walkway / water-dependent use zone may be located outside of the existing pier deck footprint on adjacent, contiguous space through cantilevered or pile-supported construction.
  - b. Prior to, or at the time of the license application, Town shall demonstrate that the first payment, or the entire sum, of the Harbor Access Gift Fund contribution has been received.

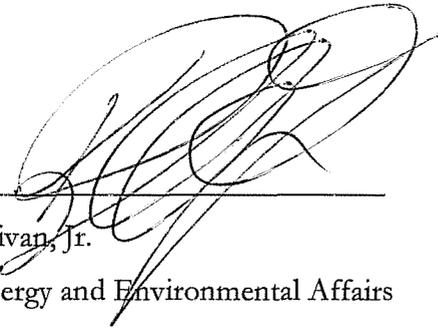
Copies of the final, approved plan shall be provided to CZM and DEP’s Waterways Program, kept on file at the Provincetown Town Clerk’s office and Harbormaster Office, and made available to the public through the Town’s website and copies at the public library.

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

1. Any subsequent addition, deletion, or other revision to the final Approved Plan, except as may be authorized in writing by the Secretary as a modification unrelated to the approval standards of 301 CMR 23.05 or as a plan amendment in accordance with 301 CMR 23.06(1); and

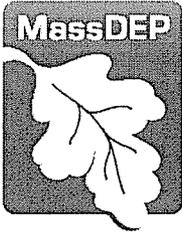
2. Any provision which, as applied to the project-specific circumstances of an individual license application, is determined by DEP to be inconsistent with the waterways regulations at 310 CMR 9.00 or with any qualification, limitation, or condition stated in this Approval Decision.

In a letter from the Waterways Program Chief dated February 15, 2012, DEP has expressed support for approval of the renewal Plan and stated that the Plan will become operational for waterways licensing for all applications upon the effective date of Plan approval and in accordance with the conditions above. 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).



Richard K. Sullivan, Jr.  
Secretary of Energy and Environmental Affairs

2/29/12  
Date



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  
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Secretary

KENNETH L. KIMMELL  
Commissioner

February 15, 2012

Richard K. Sullivan, Secretary  
Executive Office of Energy and Environmental Affairs  
100 Cambridge Street, Suite 900  
Boston, MA 02114

**Re: December 20, 2011 Town of Provincetown Municipal Harbor Plan (MHP) Amendment and Update ("Plan") Approval.**

Dear Secretary Sullivan:

The Department of Environmental Protection, Waterways Regulation Program (WRP) has reviewed the Town of Provincetown Municipal Harbor Plan (MHP) Amendment and Update ("Plan") dated December 20, 2011. WRP staff has worked closely with the Town of Provincetown's Harbor Committee, Harbormaster, and its Board of Selectmen, and the Massachusetts Office of Coastal Zone Management (CZM) 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 Department will require conformance with any applicable provisions of the approved Plan in the case of all waterways license applications submitted subsequent to the MHP'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 MHP.

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

Sincerely,

Ben Lynch  
Program Chief  
Waterways Regulation Program