



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
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BOSTON, MASSACHUSETTS 02109

June 22, 2010

Mr. Gary Moran
Deputy Commissioner
Department of Environmental Protection
Executive Office of Energy and Environmental Affairs (EOEEA)
One Winter Street
Boston, MA 02108

RE: New Bedford Harbor Superfund Site
State Enhanced Remedy

Dear Mr. Moran:

Thank you for your submittal dated May 7, 2010 entitled "State Enhanced Remedy in New Bedford: South Terminal" that was provided to EPA as part of MassDEP's request to expand the State Enhanced Remedy (SER) included in the 1998 Record of Decision for New Bedford Harbor. EPA acknowledges and appreciates MassDEP's willingness to work cooperatively with EPA to ensure the request to include a Confined Disposal Facility (CDF) in the south terminal area of the harbor meets the substantive requirements that such a facility would need to meet if the CERCLA permit exemption did not apply to the SER work.

Following MassDEP's initial request dated January 25, 2010, representatives from both the federal and state government have participated in numerous discussions (and site visits) to identify the information EPA needs to reach a determination on that request, as modified to focus on construction of a CDF in the south terminal location.¹ During the course of these discussions, EPA has identified several federal statutes that would be included as Applicable or Relevant and Appropriate Requirements (ARARs) for this project. However, as was done for Phases 2 and 3 of the SER work, MassDEP is responsible for providing a work plan for resource agencies' review which includes a complete list of federal and state ARARs for each phase of the SER work. EPA understands that MassDEP is currently drafting the Phase 4 work plan, and that it will include the south terminal CDF work if EPA approves MassDEP's request. EPA expects that MassDEP will make that draft available for review by the resource agencies in the near future.²

¹ In addition to EPA, NOAA Fisheries has also participated in these discussions.

² See Sections IV and V.C.4. of the Memorandum of Agreement between EPA and MassDEP dated January 10, 2005 which requires MassDEP, as lead agency, to identify ARARs for the Resource Agencies' review and agreement. The Resource Agencies' consist of MassDEP, MassCZM, U.S. COE, NMFS, EPA, and other relevant state and federal regulatory programs.

In the meantime, EPA has identified some of the federal ARARs and has been discussing with MassDEP how best to meet the substantive requirements of those laws. Below is a list of the federal ARARs discussed to date, along with the current status of discussions, but, again, EPA awaits a comprehensive list of ARARs from MassDEP.

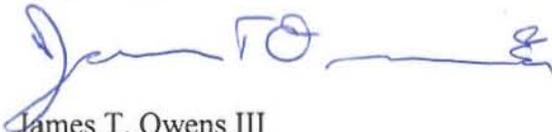
1. Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.*, in particular Sections 402 and 404 of the Act, and implementing regulations at 40 C.F.R. Parts 122-124 (NPDES regulations related to Section 402) and Part 230 (related to Section 404): Attached to this letter are EPA's comments on MassDEP's May 7, 2010 submittal with respect to compliance with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230). With respect to discharges subject to Section 402 of the Act (such as stormwater discharges associated with construction activities), MassDEP will need to provide information sufficient to demonstrate compliance with applicable NPDES regulations. EPA Contact: Matt Schweisberg (617) 918-1628.
2. Endangered Species Act, 16 U.S.C. §§ 1531 *et. seq.*, and implementing regulations at 50 C.F.R. Part 402: See comments that are included in the attachment. EPA Contact: Matt Schweisberg (617) 918-1628.
3. Magnuson-Stevens Act (related to Essential Fish Habitat), 16 U.S.C. §§ 1801, *et. seq.*, and implementing regulations at 50 C.F.R. Part 600: See comments that are included in the attachment. EPA Contact: Matt Schweisberg (617) 918-1628 (as liaison for NOAA/NMFS).
4. National Historic Preservation Act, 16 U.S.C. §§ 470 *et. seq.* A preliminary review of the report titled "Cultural Resources Background Study and Archeological Sensitivity Assessment; South Terminal Marine Infrastructure Park (Upland Portion)" is deemed reasonable based on the information provided. As we discussed, please send the SHPO and THPOs for each Wampanoag Tribe a copy of this report. EPA looks forward to reviewing the research design for the proposed underwater survey when it is available, and the reconnaissance report after the survey is concluded. EPA will continue to solicit input from the THPOs and SHPO as well as other appropriate consulting parties as necessary prior to rendering final determinations on these reports. EPA Contact: Lois Adams (617) 918-1591.
5. Toxic Substances Control Act, 15 U.S.C. §§ 2601, *et. seq.* and implementing regulations at 40 C.F.R. Part 750, in particular 40 C.F.R. 761.61(c): As discussed at our meeting on May 24, EPA indicated that a TSCA determination under this section will be necessary. Section 761.61(c) provides for approval of a risk-based method of disposal for PCB-remediation waste if the Regional Administrator (now delegated to the Director, Office of Remediation and Restoration), finds that the proposed method will not pose an unreasonable risk to health or the environment. Elements of this determination will include, among other things, a requirement for a water quality monitoring plan, capping requirements, and institutional controls. Once EPA has a basic understanding to the design and construction plans for the proposed CDF, a draft determination can be provided. EPA Contact: Cynthia Catri (617) 918-1888.

6. Clean Air Act, 42 U.S.C. §§ 7401, *et. seq.*, and implementing regulations at 40 C.F.R. Part 93. Please provide estimated air emissions from the construction phase of the project (using EPA guidance including, where applicable, AP-42 and "Current Methodologies in Preparing Mobile Source Port-Related Emission Inventories") on a per-calendar year basis, to assist EPA in determining whether the project will be subject to general conformity under 40 C.F.R. 93.153. EPA Contact: Ron Fein (617) 918-1040.

7. In addition to the ARARs identified above, we have discussed with MassDEP the need to provide EPA with information on landside impacts of its proposed project. This information should include a description of the nature and extent of environmental and community impacts landward of the marine terminal sites under consideration that may occur during construction and operation of the project, such as impacts (e.g., air pollution, noise) from vehicular traffic and construction/operation of access roads/rail to the site. EPA Contact: Betsy Higgins (617) 918-1051.

Once you've had an opportunity to review this letter and its attachment, please feel free to contact the EPA staff listed above with any questions.

Very truly yours,



James T. Owens III
Director, Office of Site Remediation and Restoration

Enc.

cc: Ken Kimmel, Mass EOEEA
Paul Craffey, MassDEP
Ira Leighton, EPA
Carl Dierker, EPA
Matt Schweisberg, EPA
Ann Williams, EPA
Lois Adams, EPA
Betsy Higgins, EPA
Cynthia Catri, EPA



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
5 Post Office Square, Suite 100
BOSTON, MA 02109

Memorandum

Date: June 22, 2010

Subject: MassDEP State Enhanced Remedy Request for New Bedford Harbor: CWA Section 404(b)(1) Guidelines Evaluation

From:  Stephen Perkins, Director, Office of Ecosystem Protection

To: James Owens, Director, Office of Site Remediation and Restoration

The comments that follow are based on a review of the State's May 7, 2010, report entitled "State Enhanced Remedy in New Bedford: South Terminal"; a meeting with the City of New Bedford and a site visit on April 12, 2010; and several meetings and conference calls with representatives of the Massachusetts Department of Environmental Protection (MassDEP) and the Massachusetts Executive Office of Energy and Environmental Affairs (EOEEA). As you know, the State's proposal is being reviewed for inclusion as part of the State Enhanced Remedy in the 1998 Record of Decision for the New Bedford Harbor Superfund Site and, if granted, would enjoy the benefit of the permit exemption in CERCLA section 121(e). However, while the proposal, if approved, would not need to obtain an actual permit from the Army Corps of Engineers, EPA must still evaluate the proposed project for substantive compliance with, among other requirements, the Clean Water Act section 404(b)(1) guidelines (40 C.F.R. Part 230), the environmental standards that must be satisfied under normal circumstances for a section 404 permit to issue. These comments represent EPA's position to date on substantive compliance with the guidelines. Also included are comments related to resources subject to the Essential Fish Habitat (EFH) requirements of the 1996 amendments to the Magnuson-Stevens Act, which we received from National Marine Fisheries Service (NMFS), and to the Endangered Species Act (ESA). Issues raised under these statutes are also relevant to the § 404(b)(1) guidelines evaluation because they involve impacts to the aquatic environment.

General Comments

1. In order for EPA to conduct an accurate § 404(b)(1) guidelines evaluation of alternatives, adverse impacts, and compensatory mitigation, the scope of the proposed project must be clear. The State needs to clarify what exactly is the subject of the State's request. Our understanding is that the State seeks EPA approval of the construction of one confined disposal facility (CDF), upon which would be built a marine terminal, and to place in the CDF 220,000 yd³ of clean sand that would result from the construction of one confined aquatic disposal cell (CAD). Most of the

State's report, however, appears to encompass a much broader request that EPA approve the disposal of 1.8 million yd³ of clean sand that would result from the construction of multiple CADs, and to approve construction of multiple (at least 3) CDFs upon which could be built one or more marine terminals. The document needs to clearly identify the scope of the project and amend the alternatives analysis accordingly. We recognize that the State has long term plans for navigational dredging and sediment disposal, but those future activities and needs are not the basis for evaluation of disposal options for sediment from the upcoming CAD construction.

In addition, while it is permissible to identify multiple purposes of a project, the report assumes that all of the goals of the project purpose need to be met by a single option. This is not necessarily the case, particularly where the various purposes are not inextricably linked in order to be achievable. The information in the document does not, at this time, fully support that assumption. The document must discuss combinations of various alternatives that would avoid and minimize environmental impacts, and still meet project goals.

2. In connection with the proposed project purpose, the relationship between the Superfund remedy and the State's proposal needs to be accurately characterized. Specifically, while the disposal portion of the proposal facilitates the "state enhanced remedy" (navigational dredging and disposal), which EPA previously determined was not in conflict with or inconsistent with the Superfund remedy, the Superfund remediation itself is not dependent on any part of the enhancement work. EPA has not yet determined that a CAD cell will be implemented for Superfund sediment disposal; any such inference would be pre-decisional. The Superfund remediation should not be used in any part of the 404 analysis to screen out alternatives. EPA agrees that the enhancement work could facilitate the Harbor remediation but the enhancement work never was and never will be "essential" to the Superfund remedy.

Specific Comments on Alternatives

1. The State needs to clarify the volume and type of sediment that would be disposed of at the proposed South Terminal CDF. We have seen various statements in the report and other documents that range in volume from 130,000 yd³ to 550,000 yd³, and include either clean sand or combinations of clean sand and contaminated sediment. Similar clarifications should be provided for any other alternative sites that are evaluated (e.g., North Terminal, Pope's Island, other locations within New Bedford Harbor).

2. We need clarification of the purpose of the marine terminal. The purpose and need statement, and several statements within the document, characterize it as a "multipurpose" marine terminal, yet the only purpose that is discussed in the report is a marine terminal to support offshore wind energy facilities. Furthermore, the report states (page 74), that 20 acres is the minimum terminal size for supporting offshore wind energy, so it is difficult to see how other purposes could be accommodated because the South Terminal site would be 20 acres. In addition, the "hard" criteria for such terminals that are described on page 12, including 24/7 operational availability and exclusive use of the staging facility, suggest that other purposes (e.g., sand storage) could be incompatible with the offshore renewable energy support purpose.

3. Quonset Point is identified as an existing terminal that can support offshore wind energy development (pages 12-13). Use of Quonset Point will not require filling waters of the U.S., and thus would appear to be less damaging to the aquatic ecosystem. Alternatives that are feasible but are not available to the applicant may be rejected as not practicable. The State should clarify its basis for rejecting Quonset Point. It appears to have been rejected based on the assertion that it is unlikely to have the capacity to serve, simultaneously, multiple offshore wind energy projects that are anticipated to be developed in the future (pages 13-14). However, the report does not provide any information about the potential for multiple offshore energy projects, including timing and location, nor is there supporting documentation for assertions that Quonset Point cannot support multiple facilities and that more than one facility will be needed in the region. It may well be true that more than one facility is needed, but the applicant has the burden of demonstrating this. Alternatively, as noted above, the facility may be rejected if it is demonstrated to be unavailable to the State.

4. There are several issues related to the analysis of New Bedford Harbor alternatives. First, it is not clear that all potential CDF sites have been investigated. In particular, although Appendix 2 identifies the State Pier as a potential option for developing a marine terminal to support offshore wind facilities, the actual information about the State Pier is omitted from the document.¹ The report must include a discussion of State Pier as an alternative. It must also explain whether there are any other potential CDF sites, and if so, why they were rejected as alternatives.

Second, the report does not provide an adequate basis for determining the least environmentally damaging practicable alternative (LEDPA) from among South Terminal, North Terminal, and Pope's Island. It is important to recognize that the test under 40 C.F.R. § 230.10(a) is not whether the applicant's preferred site is the "best" from its point of view, but rather whether it is the least environmentally damaging practicable alternative (i.e., available and capable of being done to fulfill the basic project purpose). It is the applicant's burden to demonstrate this clearly. This demonstration may be made either by showing that no other alternatives are practicable, by showing that no other alternatives are less damaging to the aquatic ecosystem, or both.

Based on information in the report, it appears that South Terminal is optimal compared to the other CDF sites that are discussed. However, the report does not demonstrate that the other sites are impracticable. While the report identifies concerns about the North Terminal and Pope's Island sites from the standpoint of timeliness of availability and constrained navigational access, it does not provide sufficient specific information to support assertions that these facilities would be impracticable (taking into consideration cost, existing technology, and logistics). For example, related to some of the issues identified on page 58, what is the nature of the vessel size constraints posed by the Route 6 swing bridge; how do those constraints relate to the size of vessel expected to utilize the marine terminal to support offshore energy development; and how does the dredging required to utilize the North Terminal site differ from the dredging required for South Terminal?

¹ Appendices 1, 2, and 3 are all partial excerpts from a single document prepared by the Clean Energy Center entitled "Port and Infrastructure Analysis for Offshore Wind Energy Development." We reiterate our request for the entire document.

As noted above, if there is more than one practicable alternative, we need to be able to compare the likely harm to the aquatic ecosystem that would result from each alternative in order to determine the LEDPA . The report includes some information about environmental resources and impacts associated with the South Terminal site, but it does not include such information about the other two sites. Therefore, no reasonable comparison can be made. Unless the State is able to demonstrate that South Terminal is the only practicable alternative, it must identify and fully describe/characterize the aquatic resources at North Terminal, Popes Island, and other potential locations for CDFs within New Bedford Harbor (see discussion below).²

5. The disposal alternatives are framed in terms of the need to dispose of 1.8 million yd³ of clean sand. As discussed above, our understanding is that the scope of the project for which approval is sought at present involves the need to dispose of clean sand from only one CAD. Therefore the alternatives analysis for disposal options needs to be changed accordingly. In addition, many statements within the discussions of alternatives are conclusory, speculative, and unsupported and are not persuasive bases for rejecting disposal alternatives. The environmental impacts associated with disposal of approximately 220,000 yd³ in a CDF need to be compared to a comparable amount of disposal at other alternatives. The National Marine Fisheries Service (NMFS) has informally advised us that loss of intertidal and shallow water habitats could be of greater environmental concern than disposal of material at Cape Cod Bay Disposal Site (CCBDS). Potential capacity issues at CCBDS should not automatically preclude disposal if it will result in less impacts than the proposed shoreline filling. In addition, we are unaware of any current capacity constraints at the CCBDS.

6. Page 74 states that the length of the bulkhead at South Terminal would be 800 feet, yet Figure 2 of Appendix 4 shows the length to be 821 feet. What is the explanation for this difference? If the length were 800 feet (or even less), could the destruction of the small salt marsh immediately to the south be avoided?

Specific Comments on Resource Characterization/Description and Adverse Impacts

1. The Report identifies the acreage impacts to aquatic resources based on categories under the Massachusetts Wetlands Protection Act. Different figures are reported in different parts of the report. On Page 58, the report states there would be impacts to 6.61 acres of state resource areas. The breakdown of these impacts is included on page 3 of Appendix 7. On page 68, the breakdown of impacts to resource areas includes areas not listed in Appendix 7 (salt marsh, coastal beach, and coastal bank) and the total is 7.47 acres. This discrepancy needs to be explained. In addition, the report needs to identify the acreage of impacts to waters under federal jurisdiction for purposes of the § 404(b)(1) guidelines evaluation. Further, it would be helpful to provide a clearer map that shows each of the resources with the project overlain (Figure 4 of Appendix 4 is not at all clear).

² Alternatively, if development of South Terminal would be the least damaging to the aquatic ecosystem, then the other alternatives could be rejected without further analysis of their practicability. Therefore the State may wish to focus on the environmental analyses and comparisons first.

2. The direct impacts of filling waters at South Terminal need to be clarified. Page 67 of the report (and repeated several other places) states that the subtidal and intertidal wetland resources around the proposed South Terminal CDF site are "severely impacted and will require remediation; therefore the resources will be impacted regardless of whether South terminal CDF construction is chosen as an alternative or not." This statement is misleading. The Superfund remedy does not include remediation of this area because PCB contamination in this area is below the Superfund action levels. In addition, we are unaware of any state remediation plan that would affect these resources. The area may still be providing important fisheries and shellfish habitat. The current level of contamination and its effects on aquatic habitat and the aquatic life need to be described so that the impacts associated with filling the area can be better understood. Regarding contamination levels, and as discussed during a conference call on June 4th, 2010, it would be best to first obtain all existing data at or nearby the site that would help characterize levels at the site. A similar analysis needs to be done for any of the alternative CDF sites that are not demonstrated to be impracticable. The analysis of impacts at all sites must include both direct and secondary effects (discussed below).

3. The report should provide a more complete description and characterization of the intertidal and shallow subtidal habitat areas, including physical and biological features, and a thorough characterization of the fish and wildlife habitat provided, especially for fish and shore birds. In particular, and for perspective, it would be helpful to have a sense of where in New Bedford Harbor other similar habitat exists and its extent. As discussed during the June 4th conference call, it is likely that the description and characterization can be developed from existing information. This type of description and characterization of aquatic resources also needs to be done for other potential CDF locations in NBH, including North Terminal and Pope's Island (unless they are clearly demonstrated to be impracticable).

4. The adverse secondary impacts on the aquatic ecosystem associated with the construction and operation of the marine terminal need to be evaluated for the proposed site and for the alternative sites (except for those clearly demonstrated to be impracticable). These impacts include effects from vessel traffic traveling to and from the CAD site to deliver sediment for filling behind the bulkhead; water quality impacts from storm water runoff during construction and operation of the terminal; and effects on water quality and habitat from prop wash/turbidity, sloughing of slopes in areas that adjoin the dredged berths, bilge water management, etc.

5. Page 2, section 2.1. EFH (NMFS). There is an incorrect assertion that, due to shallow water depths in the area of the proposed terminal, the impacts would be relatively small. Shallow water and intertidal areas serve as high value habitat for precisely that reason. These areas provide shelter and forage habitat for juvenile fishes and spawning habitat for winter flounder (shallow water habitat). The shallow water and intertidal areas at the South Terminal site, and similar areas at alternative locations, need to be better assessed in this context.

6. EFH (NMFS). The statement that a significant quantity of fish habitat would be created in front of the bulkhead for ship berths once dredging is completed is incorrect. In fact, the dredging would result in permanent losses to shallow water habitat and a permanent loss of winter flounder spawning habitat. The impacts associated with the proposed dredging of the

berths need to be described in more detail and added to the total impacts expected from the project.

7. EFH (NMFS). As NMFS stated at meetings with MassDEP, City of New Bedford and consultants (APEX) on 3/25/10 and 4/12/10, an expanded EFH assessment is required for this project. Currently the EFH assessment is not adequate. It should be noted that many of the resource impact assumptions in the EFH assessment are based on the project document and functions/values document. NMFS does not agree with many of the conclusions stated in these documents. An assessment should include a full description of all aspects of the proposed project, anticipated impacts to specific EFH species and life stages, as well as alternatives that could avoid and minimize adverse impacts to EFH. NMFS can provide further guidance if necessary. As discussed during a conference call on June 4, 2010, a comprehensive EFH assessment can be performed using existing information.

8. ESA. The Roseate Tern, which has been identified as using areas in the north harbor for feeding, is a federally endangered species. The intertidal and shallow water areas at the South Terminal location are otherwise suitable feeding habitat, within the daily flight radius (25km) of Bird Island (nearest breeding colony, 17 km away). This habitat must be characterized for its potential to serve as a feeding area and, if so identified, potential adverse impacts upon the species from loss of any feeding habitat must be described. Once accomplished, consultation with the U.S. Fish and Wildlife Service must occur.

Compensatory Mitigation

1. Several possible locations, projects, and activities are identified in the report that could serve as suitable compensation. The list is helpful. On the other hand, we must first identify the LEDPA and have a full accounting of all direct and secondary unavoidable adverse impacts before addressing the needs, types, and extent of compensatory mitigation.

2. Assuming the issues listed in #1 above are addressed adequately, a complete compensation plan will have to be developed by the State and reviewed by EPA before approval can be granted. A complete plan must identify or address, among other things:

- a complete description of the proposed compensation site(s) as it exists, including existing ecological functions provided and proximity to other protected land;
- how the compensatory mitigation would address the principal ecological functions of the affected aquatic resources;
- any constraints and risks (e.g., storm water discharges, remaining/continued disturbances, recontamination) associated with the compensation plan; and,
- a monitoring plan to assess short and long term success.