RETURN TO SER AR INDEX

South Terminal

Davis, Gary (DCR) to: ElaineT Stanley 08/21/2012 05:01 PM

Cc: "'Chet Myers'", "'Eric Macaux'", "Weinberg, Philip (DEP)"

1 attachment

20120821162854216.pdf

Good Afternoon Elaine. Enclosed please find the Commonwealth's comments to the draft determination for the State Enhanced Remedy associated with the New Bedford Marine Commerce Terminal. Thanks for your guidance and assistance and I look forward to speaking with you soon. /gd

Gary Davis, Jr.
General Counsel
Executive Office of Energy & Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114
office - 617-626-4983

SDMS Doc ID 523816

The Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

Deval L. Patrick
GOVERNOR

Timothy P. Murray
LIEUTENANT GOVERNOR

Richard K. Sullivan, Jr.
SECRETARY

Tel: (617) 626-1000
Fax: (617) 626-1181
http://www.mass.gov/envir

August 20, 2012

Elaine Stanley
EPA New England
5 Post Office Square, Suite 100
Mail Code OSRR07-4
Boston, MA 02109-3912

Re: Draft Determination for the Proposed South Terminal Project

Dear Ms. Stanley:

On behalf of the Commonwealth of Massachusetts, we would like to present the following comments for consideration by the United States Environmental Protection Agency (EPA) in association with the Proposed South Terminal Project. This Project represents a significant opportunity to realize a synergy of environmental and economic benefits by removing a substantial volume of contaminated soils from New Bedford Harbor, creating new resource areas for ecological improvements, and constructing a first-in-the-nation port facility capable of meeting the unique needs of our growing offshore wind industry. The Commonwealth thanks EPA for its efforts in producing the draft determination issued on July 16, 2012, and we appreciate the opportunity to submit these comments as part of EPA's development of a final determination.

Shellfish Mitigation

1. In its final submittal to EPA, the Commonwealth proposed to grow 9,817,121 shellfish seed to compensate for shellfish to be impacted in association with the Proposed South Terminal Project. This proposal is based on a seeding program that includes between 1,000,000 and 2,000,000 seed to be propagated and seeded annually over a 5 to 10 year period. The shellfish propagation, seeding, and monitoring program will be developed in consultation with the Massachusetts Division of Marine Fisheries The Commonwealth continues to believe that this approach is warranted in light of the following:

- The areas of New Bedford Harbor north of the Hurricane Barrier (in particular the area within the dredge footprint for the facility, the northern and southern mooring mitigation areas, the Gifford Street Boat ramp relocation area, the federal channel dredging area, and CAD Cell #3) represent areas that contain very high levels of shellfish particularly because the areas north of the New Bedford Hurricane Barrier are contaminated with PCBs and are closed to shellfishing. Consequently, shellfish are permitted to reproduce without the impact of shellfishing on their population.

- Both EPA and the Massachusetts Department of Public Health have forbidden consumption of the shellfish to be impacted by this project by humans, precisely due to their contamination with PCBs. EPA has forbidden the Commonwealth to relay these shellfish to locations outside of the Hurricane Barrier for precisely this reason (i.e. EPA does not want these shellfish to be introduced into the food supply). Nevertheless, EPA asserts that these shellfish represent a legitimate source of forage for winter flounder, even though humans may consume those same winter flounder, subsequent to the winter flounder consuming the impacted shellfish. The Commonwealth contends that either the shellfish are acceptable for introduction into the food supply through relaying (and are therefore an un-impacted resource), or they are not (and are an impacted, degraded resource).

- Although EPA has stated that these shellfish represent foraging habitat for winter flounder, the Commonwealth contends that these shellfish represent contaminated forage, due to the high PCB content of the shellfish. The Commonwealth has presented evidence to EPA that winter flounder appear to be negatively impacted by consumption of PCBs. Removal of these shellfish, while impacting the available food supply for winter flounder, also eliminate a significant source of contamination to winter founder. The Commonwealth believes that the degraded nature of the existing resource may be compensated by a reduced seeding program to compensate for the resource being lost.

- The Commonwealth's proposal for shellfish mitigation is not required for EPA, USACE, or State Enhanced Remedy projects. For instance, the U.S. Army Corps of Engineers would not be required to mitigate for shellfish impacts associated with dredging of the Federal Channel. The Commonwealth further notes that shellfish mitigation has not previously been mandated for navigational dredging by EPA or MassDEP. Nor has EPA conducted any shellfish mitigation in association with its remediation of the upper harbor.

In light of the foregoing, the Commonwealth maintains that a shellfish mitigation program that would yield between 1,000,000 to 2,000,000 seed annually over the next 5 to 10 years, in order to provide approximately 9,817,121 seed for this project, is a sufficient mitigation package to compensate for the lost shellfish resources associated with this project.

Air Monitoring

2. The air monitoring requirements for Airborne Particulates included within the Draft Decision do not appear to be in line with similar projects that have taken place within New Bedford Harbor. According to information on EPA's website, the Airborne Particulate standard utilized by EPA for the Aerovox Building demolition indicated that work could proceed at the site above 100 ug/m3 and the information indicates that work was not suspended until the Airborne Particulate levels reached at least 150 ug/m3. The Commonwealth carefully reviewed the standards utilized for the Aerovox Building demolition and adopted EPA's previously endorsed standards. However, for the South Terminal Project, EPA is requiring the Commonwealth to cease work immediately if Airborne Particulates exceed 100 ug/m3. This inconsistency is not explained within EPA's Draft Decision document; and is a departure from EPA's previously established position that 150 ug/m3is sufficiently protective of human health.

3. There is no current evidence of widespread presence of asbestos contamination onsite. EPA has added asbestos air monitoring as a requirement. The Commonwealth believes this actions should occur as a contingency (should bulk asbestos be located during work onsite), rather than as a requirement.

4. The Commonwealth requests information on how the 0.1 ug/m3 standard for Airborne PCBs compares with the airborne standard utilized by EPA during its dredging, dewatering, and other remediation work in the Upper Harbor, as well as the standard used by EPA during the Aerovox Building demolition.

Long-Term Monitoring Requirements

5. Although the Commonwealth recognizes the importance of long-term monitoring to ensure that the mitigation measures are implemented successfully and are protective of invasive species colonization, the Commonwealth believes that the long-term monitoring requirements imposed by EPA exceed those standards necessary to ensure long-term viability of the associated resource areas. In some cases, the monitoring requirements will be extremely difficult, if not impossible, to implement. In keeping with these concerns, the Commonwealth offers the following additional observations:

    a. The post-construction monitoring plan required by EPA will involve a team of divers, over several days. Most professional divers are not trained to recognize new invasive species; the Commonwealth would likely have to train a group of divers specifically for this task, which will only take place annually at this one location. Additionally, detection of new aquatic invasive species within New Bedford Harbor, which typically has extremely cloudy water, will be very difficult, if not impossible. The Commonwealth proposes to develop an invasive monitoring and control program through the Commonwealth's existing CZM Aquatic Invasive Species Program within the framework of the Massachusetts Aquatic Invasive Species Management. Additionally, this requirement appears to be indefinite, which is an unfair burden to the Commonwealth. Based on the

foregoing, the Commonwealth questions the monitoring program's long-term effectiveness at preventing aquatic invasive species in the United States.

b. The Commonwealth has agreed to monitor for invasive species within its compensatory wetland mitigation areas; however, the Commonwealth cannot be responsible for removal of invasive species on property not owned or controlled by the Commonwealth. Therefore, invasive species on the "periphery" of the restoration area (if on property not owned or controlled by the Commonwealth) is overly burdensome, even if it would be beneficial to the overall health of the restoration area.

Dredging Requirements

6. The Commonwealth cannot comply with EPA's requirement that all dredging be done using an environmental bucket. An environmental bucket may be utilized to dredge surficial silty or organic material (which is also the material that typically is impacted with anthropogenic material); however, denser "parent" material (material that underlies the organic silts and predates anthropogenic impacts) is typically too stiff to remove with an environmental bucket. Due to the density of the parent material, as well as the possible presence of obstructions such as rocks and other ocean bottom debris, the environmental bucket typically cannot effectively dredge parent material. In addition, since the parent material is not by definition, environmentally impacted and since parent material is predominantly coarser grained than the surficial silty material (and therefore will be less likely to contribute to increased turbidity), a clamshell or excavator is typically utilized to remove this material. EPA's requirement would prevent the Commonwealth from being able to complete this project. Based on the foregoing, the Commonwealth respectfully requests that this provision be revised to allow the use of environmental, clamshell, or excavator buckets depending on the substrate being excavated.

Site Configuration

7. The Commonwealth respectfully submits a revised site plan, at Attachment 1 (Configuration A2) that modifies the previously submitted site configuration detailed in Configuration A, as part of the Commonwealth's June 18, 2012 submission. The new site configuration proposes to:

   a. Include as part of the project site a certain parcel of property owned by NB Radio, Inc., comprised of 4.4 acres and identified by the New Bedford Assessor's Office as Map Number 31, Parcel Number 234, (the "Radio Tower Site"); and

   b. Remove from the project site the public boating area situated at the Gifford Street Boat Ramp, as the proposed terminal operations are likely to affect boating operations.

The inclusion of the Radio Tower Site and elimination of the Boat Ramp Site yields a total site configuration of 29.58 acres. For the following reasons, the Commonwealth

maintains that the inclusion of the Radio Tower Site does not present a significant project change and Configuration A2 enhances the overall operation utility of the proposed New Bedford Marine Commerce Terminal:

1. The addition of the Radio Tower Site, which is immediately adjacent to the parcels of land that would abut New Bedford Harbor:

    a. expands and enhances the operational utility of the site;
    b. allows direct roadway access to Potomska Street, which would shorten the amount of time future truck traffic would spend on local New Bedford roadways and minimizes the impact of commercial traffic on the residential communities; and
    c. is not anticipated to present additional impacts to resource areas, subject, however, to an environmental assessment[1].

2. Removing the Gifford Street boat ramp from the facility footprint eliminates potential impacts to recreational boating.

Blasting/Pile Driving - Time of Year Restrictions

8. EPA's restriction on blasting activities (that they only be conducted in the time period from November to February) would severely affect the Commonwealth's ability to complete the terminal within the time schedule allotted to it. The necessity to perform blasting cannot be definitively known in advance, but to the extent blasting is needed, that activity is on the critical path for construction of the facility. The shallow rock in the vicinity of the proposed bulkhead requires that any blasting that is needed be completed prior to driving sheet piling. Thus, any delay in blasting will result in delays to other critical and time-sensitive construction activities. In addition, blasting is not amenable to being moved earlier in the construction sequence because of a series of prerequisite activities that will take several months to complete. Prior to any potential blasting, some dredging is needed to allow blasting equipment to access the area. To dispose of those dredge spoils, CAD Cell #3 must already be constructed. Although the necessity of blasting cannot be definitively known in advance, it is known that restricting blasting to just four months per year could significantly impact the Commonwealth's ability to complete the project on a schedule that will allow the project to meet its stated goals.

    However, in order to demonstrate that blasting outside the proposed November to February timeframe will not adversely affect marine species such as Atlantic sturgeon, the Commonwealth is proceeding on completing an acoustic modeling study as requested by EPA. The Commonwealth looks forward to reviewing the modeling results with EPA so that the time of year restrictions can be eliminated from EPA's final determination. Eliminating the time of year restriction is necessary to allow the Commonwealth to undertake a workable construction schedule and complete the project.

---

[1] The Commonwealth also plans to undertake an archeological assessment of the Radio Tower Site; and work with the property owner to relocate the radio tower.

9. Similarly, EPA's consideration of restrictions on pile driving activities could severely impact the Commonwealth's construction schedule. Although blasting (if necessary) is only anticipated to take approximately two months (in accordance with the Commonwealth's schedule, submitted to EPA in June 2012), pile driving is anticipated to take approximately eight months. Therefore, restrictions on pile driving could result in significant additional project delays above and beyond those associated with the blasting restrictions. At present, the Commonwealth anticipates that any restrictions on pile driving would likely be a significant impediment to the project, and the Commonwealth requests that these restrictions also be removed in the final determination.

Sequencing

10. EPA is requiring that, to the maximum extent practicable, dredging be sequenced to avoid or minimize potential impacts to fish migration and spawning (February to June). If dredging is not completely stopped during this period, EPA has requested that it be restricted to deeper water to avoid winter flounder spawning habitat. Dredging is currently anticipated to take place for approximately 14 of the 22 months of construction (63% of construction). Therefore, at present, the Commonwealth anticipates that restrictions on dredging would likely have a significant impact on the construction schedule, and the Commonwealth therefore requests an opportunity to work with EPA to reduce the time of year and geographic restrictions to the minimum necessary to protect affected species.

Other Provisions

11. EPA included a requirement that booms and silt curtains would be utilized if the Performance Standards are not met. Typically, the SER has allowed the contractor to submit a Contingency Plan prior to the start of construction, which contains a number of alternative contingency measures that could be implemented successively to control turbidity. Those contingency measure include use of silt curtains and booms, as well as the halt of work, but may also include other measures that the Contractor could attempt prior to the use of silt curtains, booms or ceasing work. This methodology would be preferable, as multiple different measures are available to address this issue, including slowing the pace of work or other measures that the contractor may propose. .

Once again, thank you for the opportunity to comment on EPA's draft determination associated with the State Enhanced Remedy for the New Bedford Marine Commerce Terminal and please contact the undersigned if you have any questions.

Very truly yours,

Gary Davis Jr.

Gary Davis, Jr.