

**Additional EPA Comments on Draft Final Mitigation Plan and Appendices
Submitted on October 5 and 9, 2012**

Section 3.2.5 (page 20). Please remove *Rosa rugosa* from the proposed planting list. It is included in the list of Invasive and Unacceptable Plant Species contained in the Corps of Engineers New England District Compensatory Mitigation Guidance (Appendix D).

Section 3.28 (page 23). Please provide a more detailed description of the rotational shellfish planting and closure plan.

Section 4.2 (page 26) Legal Instrument – The Commonwealth proposes to preserve the River’s End mitigation site through a conservation restriction. Please explain in more detail how the conservation restriction works and how protective it is. Typically, as noted in the Corps’ mitigation guidance at page 17, “Deed restrictions are discouraged as they are difficult to enforce and may be easily changed.” Other forms of preservation, such as fee transfer to another entity such as a non-profit conservation organization or public agency with a conservation mandate, or an easement given to a non-profit conservation organization or public agency with a conservation mandate, are preferable. If one of these other forms of preservation is possible, it should be pursued. If not, please explain why and explain how the conservation restriction is sufficiently protective.

In addition, a template for the preservation document should be provided. Since the document will not be finally approved before EPA’s final determination, please include the following language in the plan:

The River’s End compensatory mitigation site to be set aside for conservation shall be protected in perpetuity from future development. Within 90 days of the date of EPA’s final determination and prior to initiation of work in aquatic resources, the Commonwealth shall submit to EPA a draft of the preservation document. Within 30 days of the date EPA approves this draft document in writing, the Commonwealth shall execute and record it with the Registry of Deeds for the City of New Bedford. A copy of the executed and recorded document must be sent to EPA within 120 days of the date EPA approves it. The preservation document shall enable the site to be protected in perpetuity from any future development. The document shall expressly allow for the creation, restoration, remediation and monitoring activities required by EPA’s final determination. It shall prohibit all other filling, clearing and other disturbances (including vehicle access) except for activities explicitly authorized by EPA.

Finally, please indicate whether any of the mitigation sites will be established as Article 97 Lands, who will be owner of the River's End Park site, and which State agency will be responsible for the winter flounder and the OU-3 capping sites?

Section 8.2 (page 45). Under the proposed maintenance plan for the Winter Flounder and OU-3 Mitigation Areas, following inspections that indicate winnowing or deposition is taking place, an assessment of data will be undertaken to determine if conditions warrant action by the Commonwealth. This assessment should be conducted in consultation with EPA.

Section 7.1 (pages 39-40) Overall Sequence of Construction Activity - Winter Flounder Mitigation Area. The construction of the winter flounder mitigation area should be conducted in

one single phase, using dredged material from the CAD cell #3, rather than being done over 2-3 different phases using the "Intermediate Dredge" and/or the "Bottom of Dredge" excavated material.

Section 8.3 (page 45). Under the proposed maintenance plan for the River's End Park Mitigation Areas, following inspections that indicate deficiencies from Performance Standards exist, an assessment of data will be undertaken to determine if conditions warrant action by the Commonwealth. This assessment should be conducted in consultation with EPA. It should be noted that if Performance Standards are not being met, it is very likely that corrective action will be required.

Please clarify the sentence "(t)he action is selected by the Commonwealth to address the noted deficiency, a solution will be implemented."

Section 8.4 (page 46). The results of any maintenance activities should be documented in annual reports that will be submitted to USEPA by December 15th of each year following the completion of the first maintenance activity. This should not be dependent upon requirements of Annual Reports generated as part of the LTMP.

Section 9.0 (page 46). Performance Standards for the River's End Mitigation site include a performance standard for erosion minimization that the mitigation area retains 80% of its land area over time. This standard should be revised to 95%.

Section 9.0 (page 46-47). Performance Standards for the River's End Mitigation site include a performance standard for elevation of planted area – subsidence and accretion, that allows a tolerance of 2/3 of the tidal throw as designed by (MHW-MLW). This standard should be replaced with a tolerance of 1.0 foot maximum subsidence or accretion. Furthermore, this standard does not alleviate the requirement to achieve appropriate plant distribution (e.g., low and high marsh species).

Section 9.0 (page 47). Performance Standards for the Winter Flounder Mitigation Area include a performance standard for erosion minimization that the mitigation area retains 80% of its area over time. This standard should be revised to 95%.

Section 9.0 (page 48). Performance Standards for the Winter Flounder Mitigation Area include a performance standard for habitat replication area that the area retains design elevation range of -16 to -18 feet MLLW with a tolerance of +/- 2 feet over 80 % of its total area. This should be replaced with a design elevation of -5.0 m +/- 0.5 m MLLW over 95% of its total area.

Section 9.0 (page 48). Performance Standards for the OU-3 Capping Area include a performance standard for erosion minimization that the mitigation area retains 90% of its area over time. This standard should be revised to 95%.

Section 9.0 (page 49). Performance Standards for the Winter Flounder Mitigation Area include a performance standard for the elevation of habitat replication area such that the area retains design elevation range within a tolerance of +/- 1 foot over 80 % of its total area. This standard should be revised to 95% of the total area.

Section 10.4 (page 51) Shellfish Survey. The plan should ensure that the shellfish resource is managed to ensure long term sustainability, similar to the permanent preservation of the River's End Park compensatory mitigation area.

Section 12.1 (page 56) and Appendix 9. There are statements in these sections that indicate that damage due to "catastrophic events" or "force majeure events" does not require corrective action. This is not consistent with the Mitigation Rule. As discussed in the preamble to the final rule, 73 Fed. Reg. 19593 (April 10, 2008), at page 19648, the regulatory agency (typically the Corps, but in this case EPA) retains the discretion to require corrective action even in the event of a natural disaster:

If a natural disaster causes deficiencies in a compensatory mitigation project, the district engineer will evaluate the circumstances and determine whether it would be appropriate and practicable to require measures to address those deficiencies. Additional monitoring may be required to assess how a compensatory mitigation project is responding to a natural disaster. District engineers will determine on a case-by-case basis whether flood events warrant taking action to repair compensatory mitigation projects. In cases where diseased plant stock may have been used at a compensatory mitigation project site, it may be appropriate either to require replanting, or to allow natural revegetation. It is appropriate for adaptive management plans to consider potential natural disasters that may occur, to the extent that they can be reasonably foreseen. Financial assurances may be used to provide alternative compensatory mitigation if the compensatory mitigation project fails as a result of a natural disaster that occurs before the monitoring period has ended.

Please modify the mitigation plan accordingly.

Section 13.6 Construction Security, 13.7 Performance Security, and 13.8 Endowment Fund (pages 61-62). Please identify the financial assurance instruments that will be relied upon in light of the fact that this will not be a mitigation bank.