



FW: PRIVATE - RE: New Bedford Harbor State Enhanced Remedy Proposed South
Terminal Project Draft Deliverables Timeline
Davis, Gary (DCR)

to:

Carl Dierker

09/24/2012 12:22 PM

Cc:

"Eric Macaux", Chet Myers, "Jay Borkland"

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From: "Davis, Gary (DCR)" <gary.davis@state.ma.us>

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To: Carl Dierker/R1/USEPA/US@EPA

Cc: "Eric Macaux" <EMacaux@MassCEC.com>, Chet Myers <cmyers@apexcos.com>, "Jay Borkland" <jborkland@apexcos.com>

History: This message has been forwarded.

Dear Carl:

I would like to follow up on your September 19th email and, at the outset, express our collective appreciation for the time and resources EPA has devoted to review and develop the State Enhanced Remedy for the New Bedford Terminal and New Bedford Harbor. While we are generally in agreement about the conceptual framework outlined in your email below, the newly presented lead times presented in your email suggest that EPA is backing off of our goal of securing a final determination by the end of October. This concern is based on the following observations:

1. When Jay, Chet and I met with your team on August 29th, followed by the Secretary's meeting with Curt Spaulding on September 18th, EPA requested that EEA modify the delivery of a few of the deliverables contemplated in the enclosed schedule. It was my understanding that EPA needed more time to review the deliverables in order to meet the projected final determination issuance date at the end of October. The Commonwealth made it clear at both meetings that it was open to adjusting the schedule of deliverables to prioritize the development and delivery of the deliverables. However, at no time during our discussion on August 29th or September 18th did EPA indicate that it required 30 days after receipt of all information before it can make its determination. Please be advised that the schedule that we submitted was based, in large part, on the extraordinary amount and complexity of the information requested by EPA. As a result, we proposed a time schedule that contemplates the critical need to

secure a permit by the end of October. As we stated during our August 29th and September 18th discussions, EEA is open to discussing with EPA an adjustment of some of the deadlines. However, EEA sees no reason why EPA needs to hold to a hard and fast rule that all deliverables require a 30 day review process.

2. During our meeting on August 29th, EPA raised, for the first time, a request that the Commonwealth provide an explanation that any alternate method(s) of sub-tidal rock removal to be relied upon are both technologically feasible at the site and economically viable and that the Commonwealth intends to implement those methods, if the Commonwealth decides not to pursue blasting. Please be reminded that back in March, EEA shared with EPA the potential need to blast bedrock within the areas to be dredged in the New Bedford Harbor. The potential need to blast is based on the project objective of constructing a dredging navigational channel that can accommodate vessels carrying heavy wind turbine components. While we shared with EPA our strong preference not to blast, a blasting alternative may be necessary to avoid other bedrock removal techniques that may be quite expensive and time consuming. Consequently, MassCEC plans to issue bid documents that include a "No Blasting" scenario, but include a blasting scenario as an Add Alternate Bid. EEA and MassCEC further commit to EPA that we will not proceed with blasting until we secure approval from the Army Corp, NMFS and EPA. In so doing, this approach will ensure the issuance of a final decision from EPA prior to October 30th that prohibits blasting until such time as MassCEC/EEA provides the requisite modeling data and secures approval from the Army Corp and NMFS.
3. Your email also imposes new requirements upon the Commonwealth in relation to an expanded c. 21E Phase I assessment. Specifically, EPA now requests the Commonwealth to expand its assessment to the properties not included within the proposed Site Configuration. EPA is also requesting that we complete an environmental assessment on easement areas within the project site, but not owned by the Commonwealth. Neither of these two requests were previously requested or agreed upon. To impose these requirements on the Commonwealth at this late stage of the game ensures that we will not be able to provide EPA with the requested information in the remaining time allotted.
4. EPA further seeks 5 weeks to consult with NMFS on the Final Mitigation Plans. EPA is well aware that the acoustical modeling and Biological assessments it has requested be included in the Final Mitigation Plans, require consultants with specific skill sets and are labor intensive. EPA is also aware that there are very few consultants capable of providing the Commonwealth with these deliverables, in a form and manner satisfactory to EPA. In light of these constraints, the Commonwealth has committed to providing you with these studies by October 15th. For EPA to now require 5 weeks to review the plan and consult with NMFS, beyond the scheduled October 15th delivery date, ensures that we will not meet the October 30th deadline.
5. Finally, EPA requests the Commonwealth to provide an explanation that any alternate method(s) of sub-tidal rock removal is both technologically feasible at the site and economically viable. The Commonwealth is prepared to present evidence to EPA that sub-tidal rock removal is technologically feasible in order to show EPA that the project may be constructed without the use of blasting. However, the Commonwealth is unaware of any instance where EPA has imposed an "economically viable" requirement on any other project proponent, nor any past activity; nor does the Commonwealth understand why EPA would require the Commonwealth (which has taxation and bonding authority) to prove that any specific construction method was "economically viable." We are equally concerned about fashioning a reply responsive to this request that undermines our need to secure blasting approval after the issuance of the final determination, which we continue to regard as a measure of last resort. In light of these concerns, we ask you to provide us with the legal basis for this

requirement, instances where you have imposed this requirement on other projects, and methodologies accepted by EPA, which will enable the Commonwealth to respond to this requirement. Once we receive this information, we will be in a better position to respond to this request.

Based on the foregoing considerations, I remain open to meeting with you to discuss how best to provide EPA with the information it seeks, yet ensures that Commonwealth secures a final determination by the end of October. Thank you very much for your anticipated consideration and I look forward to speaking with you soon. /gd

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From: Carl Dierker [<mailto:Dierker.Carl@epamail.epa.gov>]
Sent: Wednesday, September 19, 2012 4:07 PM
To: Davis, Gary (ENV)
Cc: Jay Borkland; Chet Myers; Ann Williams; Cynthia Catri; Leann Jensen; Jackie Leclair; Carl Deloi; Elaine T. Stanley
Subject: New Bedford Harbor State Enhanced Remedy Proposed South Terminal Project Draft Deliverables Timeline

Hi Gary:

I wanted to follow up on our meeting last Wednesday, September 12, between EPA, you (by phone), and the Commonwealth's consultant, Apex. During that meeting, the Commonwealth, through Apex, provided EPA with a draft timeline of deliverables that the Commonwealth is planning to provide to EPA entitled, "South Terminal CDF – Deliverables for Final Determination (9/12/2012)". This draft timeline was created by the Commonwealth in response to information needs identified in EPA's draft determination, and a number of information gaps EPA identified to the Commonwealth in an email dated August 13, 2012 from Ann Williams, as well as subsequent meetings on August 14 and August 29.

We have worked cooperatively with you over the past several months to review the Commonwealth's proposed South Terminal project and issue a draft determination last July. Following the public comment period, we will now need to redouble our efforts to respond to the comments, fill in missing information and prepare a Final Determination for the proposed South Terminal Project. In order to accomplish that, EPA will need to review the requested information prior to issuing its determination. During the discussion on September 12, the group identified several missing deliverables that need to be added to the draft timeline and identified some critical path deliverables that EPA needs as soon as possible in order to facilitate its own review as well as to provide time for review by other federal agencies with whom EPA must consult as part of its regulatory obligations.

Assuming EPA receives the information identified below and the deliverables identified in the timeline, along with any other information requested in our August 13 email and meetings on August 14 and August 29, and assuming that the information received is complete and nothing further is required, EPA will need 30 days after receipt of that information to complete our review and any final consultations with other agencies before issuing its Final Determination.

Below is a summary of the additional deliverables and the critical path items.

Additional deliverables to be added to the timeline:

1. A detailed description of blasting methods and/or alternate non-blasting methods of subtidal rock removal (instead of blasting) and the impacts of blasting and/or alternate non-blasting methods on aquatic resources and on the New Bedford/Fairhaven hurricane barrier. If the Commonwealth decides not to pursue the blasting portion of its application, it needs to present in the submission an explanation that any alternate method(s) of sub-tidal rock removal to be relied upon are both technologically feasible at the site and economically viable and that the Commonwealth intends to implement those methods;
2. A Technical Report on the Atlantic Sturgeon, including background and other relevant information, that can provide EPA with a framework for writing a Biological Assessment for NMFS concurrence; and
3. A Phase 1 c. 21E assessment of the area of upland that is, or may be included, in the final terminal configuration (the area should coincide with the area identified by the Commonwealth for the archaeological assessment currently underway).

Timeline deliverables that need to be advanced to a critical path timeline:

1. No. 12: NHPA archaeological review report for entire site upland area – We received this deliverable yesterday and understand that it was also sent directly to the SHPO, THPO and MBUAR simultaneously. EPA will review that report and plans to make its determination on whether there are adverse effects and send that finding to the consulting parties by October 1. It should be noted that the Agency's finding must provide documentation in accordance with 36 CFR section 800.11(e). To ensure that this finding is provided to the consulting parties by the October 1 deadline, we request that the Commonwealth ask its NHPA consultant to provide us with a cross-walk table that links the documentation requirements of section 800.11(e) to its assessments of the upland, tidal and intertidal areas of the site. Once our letter is issued, the SHPO and THPOs have 30 days to review this finding before we may issue a final determination. [For questions on NHPA issues, feel free to contact Leann Jensen @ 617-918-1072.]
2. No. 20: Acoustical studies of pile driving/blasting on the Atlantic sturgeon/anadromous fish – the results of this study will inform EPA's review of a number of other items including the draft mitigation plans (Nos. 17 and 18), the biological assessment, and EPA's response to comments received from the National Marine Fisheries Service (NMFS).
3. Missing Deliverable to be Added: Technical Report on Atlantic Sturgeon – As noted above, EPA needs this information (along with the acoustical information) to prepare a Biological Assessment (BA) which will analyze whether the project may affect the species, and if so, whether the project will or will not likely have an adverse effect on the species. If EPA concludes the project will not likely have an adverse effect, it will submit the BA to NMFS, which has 30 days to indicate to EPA whether it concurs with EPA's finding. If EPA does not find that the project is not likely to adversely affect the species, or if NMFS does not concur with EPA's finding of no likely adverse effects, then EPA must enter formal consultation with NMFS.
4. Missing Deliverable to be Added: c. 21E Phase I assessment – Should the assessment reveal the presence of PCBs (or other hazardous substances), the Commonwealth must provide detailed remediation plans that will allow EPA to determine whether or not a risk-based determination pursuant to TSCA, is necessary.
5. No. 1: Map showing final configuration of NBMCT – the final identification of properties is vital to EPA's ability to determine the impacts to, and mitigation of, salt marsh and wetland resources. The Commonwealth must also determine whether or not the BMX property will be included in the final configuration and, if so, provide a justification for why that property is

necessary to the Proposed Project (if any wetlands are going to be filled). Related to this, we need confirmation that the Commonwealth has ownership or control over, or the authority and intent to take ownership or control over all parcels needed for the project before a Final Determination can be made.

6. Nos. 17 and 18: Draft Final Mitigation Plans – EPA must consult with NMFS on the mitigation plans. In order to provide sufficient time for review and consultation and to obtain a final plan that responds to all comments, EPA will need to receive the draft plans at least 5 weeks before it issues its Final Determination.

While EPA is awaiting this information we will continue to work on drafting a Responsiveness Summary to the public comments received on its Draft Determination. There are several comments that will require coordination with the Commonwealth when responding. Yesterday we received the public hearing transcript from the Commonwealth; EPA will, in the next few days, provide the Commonwealth with a CD containing the comments, along with the transcript and will contact you to coordinate completion of the Responsiveness Summary.

I hope you find this summary of our meeting helpful in planning the timeline for issuance of the Final Determination. Please call me if you have any questions or would like to discuss this matter. I look forward to continuing to work cooperatively with the Commonwealth in the weeks ahead to bring closure to this review process.

Regards,
Carl

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