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Subject: South terminal -- EPA comments on final mitigation plan

Gary, Chet, and Jay --

Thank you for revising the compensatory mitigation plan in response to our 10/18/12 comment that the mitigation should be presented as a permittee-responsible mitigation rather than a mitigation bank. The 10/22/12 plan (with revisions of 10/25/12) does reflect that change; however there remain some features of the plan that are more appropriate for a mitigation bank and are not appropriate in this case. Below are our comments requesting changes related to this issue, as well as a few other corrections that are necessary. In a subsequent email, we will be sending additional comments, particularly on the sections of the Final Mitigation Plan describing the compensatory mitigation proposed at Rivers End Park. (We note that the Rivers End Park design is currently being revised by Beals and Thomas.) Please let me know if you have any questions.

Thanks,
Ann
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1. Section 4.1, *Legal Arrangement*, notes that the site protection instrument ("SPI") names EPA and the State Enhanced Remedy ("SER") Committee as the Interagency Review Team ("IRT") responsible for ensuring that the existing resources are adequately delineated, and the constructed mitigation meets the requirements of the approved mitigation design. Please amend this section and the SPI to eliminate any reference to the SER Committee. EPA is the sole entity responsible for reviewing and determining whether the mitigation that is constructed complies with the mitigation plan and any other requirements of the conditions established in EPA's Final Determination. The SER Committee will not play a role in this matter, nor is there any need for an IRT. Also please note that EPA is the only agency making the final determination and requiring mitigation, so please delete reference to the Corps here and in other sections (e.g., Section 3.2.5).
2. Section 5.1.1, *Resource Identification and Direct Impact Assessment*, refers on page 28 to the size of the freshwater wetland as being 0.109 acres. This should be corrected to read 0.106 acres. Also, somewhere in Section 5, it would be helpful to include a statement of the size of the existing salt marsh resource in addition to the size of the impacted area.

3. Section 6.0, *Determination of Mitigation Credit*, should be renamed to "Determination of Mitigation Ratios" to avoid confusion with the concept of mitigation credits in the mitigation banking context, and references to "credits" in the text should be changed to "ratios."

4. Section 8.2, *Maintenance Plan for the Winter Flounder and OU-3 Mitigation Areas*, please add, as was done for Section 8.3, that the assessment to be undertaken to determine if conditions warrant action by the Commonwealth will be conducted in consultation with EPA (we had requested this in our comments of 10/19/12)..

5. Section 12.2, *Methods for Inspection and Assessment*, states the following in the last bullet: "Consult with EPA and all appropriate regulatory agencies to determine any other safety, or construction practices that will be necessary moving forward for the selected remedy." This could be read to mean that the Commonwealth alone would determine the selected remedy and then EPA would be consulted on construction and safety practices. This should be amended to clarify that any remedy suggested by the Commonwealth is subject to EPA approval.

6. Section 13.7, *Performance Security*, refers to the "Transfer of the First Credit." This is a mitigation bank concept and is not relevant to permittee-responsible mitigation. In addition, the section describes the Commonwealth's intent to provide the Performance Security to the SER Committee Chairman, and that the full amount of the Performance Security would remain in effect "until the SER Committee Chairman determines that all of the Performance Standards have been met and all the remaining obligations of the Mitigation Plan have been concluded." Similar to the comment above, EPA does not see a role for the SER Committee in reviewing and ensuring compliance with the mitigation plans. Rather, EPA will be solely responsible for this oversight.

In addition, there is not authority under Section 404 of the Clean Water Act for EPA to be the recipient or holder of a performance bond or letter of credit. Therefore, a different approach for both the performance security and the construction security will be necessary. Attached below is an example of a performance bond which I obtained from the Corps, which is similarly constrained in its ability to be a direct recipient of a bond or letter of credit. In this case, the Commonwealth would be the principal, and it would need to find a surety that would hold the bond. The surety would either perform the mitigation work itself (if the Commonwealth fails to perform) or would specify an agent that would perform the work (in the example bond, the agent is Woodlot Alternatives, a consulting company with experience in constructing and maintaining wetland creation). EPA would be the obligee, meaning we would have the ability to determine whether there's been nonperformance and the funds should be obligated and the work performed by the surety or its agent, etc. I assume a similar approach could be taken with an irrevocable letter of credit. Although we do not need to have all details worked out before EPA's final determination, we do need a draft template similar to the draft conservation restriction so that we can review and approve or modify the chosen approach.

7. Section 13.8, *Endowment Fund*, states that the "Commonwealth shall notify each member of the SER Committee of each Endowment Deposit made...." Again, EPA does not believe the SER Committee has a role in this project. Please substitute "EPA" as the recipient of such notifications.

8. Figure 2 of the final mitigation plan still shows the drainage swale mitigation; it should be deleted.

9. Appendix 9, *Proposed Site Protection Instrument Template*, still seems to be much more applicable to a mitigation bank than to a permittee-responsible mitigation. Please either substitute a more straightforward description that reflects that this is a permittee-responsible mitigation (our strong preference), or substantially revise this template. If the template is revised, all references to the SER Committee and an IRT should be eliminated. Only the Commonwealth, the City, and EPA need be referenced. In addition, EPA does not anticipate being a "party" to any site control and management agreement. Some of the definitions in the SPI are relevant only to mitigation banks, not to the mitigation for South Terminal, e.g., "Site Establishment Date," "Interim Management Period," "Service Area," "Property Assessment and Warranty," etc. The template refers to sections that are not actually labeled in the

document. There are still residual references to mitigation credits (e.g., in the property assessment and warranty section, and the adaptive management plan section). Some sections are irrelevant or inappropriate (e.g., "Site Closure Plan," the "Termination" provisions, "Availability of Funds," some aspects of "Governing Laws") and should be deleted or amended.

Relevant to the salt marsh creation at River's End Park, the SPI states in the "Operation of Site" section that the property owner will implement long term management and monitoring of the property. The mitigation plan on page 28 states that the Commonwealth will maintain the mitigation area, but the discussion on page 67, regarding the endowment fund, suggests that the City will be responsible for long term maintenance. The draft conservation restriction is unclear on this point. Please clarify and reconcile all documents. Also, please clarify what agency will maintain long-term site control over the Winter Flounder Mitigation Area as well as the OU-3 Capping Area and how that control will be memorialized.

The force majeure provisions must be amended consistent with the point we made about this issue in our 10/19/12 comments. The mitigation plan was modified, but the SPI still in inconsistent with the final mitigation rule.

10. Appendix 13, *Draft Declaration of Restriction*, states: WHEREAS, the Commonwealth will be funding the creation of salt marsh, in concert with previously outlined plans of the Declarant to facilitate the construction of a park at the Property, to create and enhance wetlands and parkland within the City of New Bedford for beautification and recreational purposes to serve the Citizens of New Bedford...." It is important to include in this statement the *ecological* purposes of the salt marsh creation. Please amend accordingly. We will have additional comments on the draft conservation restriction after the Final Determination is issued.



Performance Bond.pdf