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

January 27, 2012

DRAFT RECORD OF DECISION

PROJECT NAME	: Town Creek Flood Hazard Mitigation and Wetland Restoration
PROJECT MUNICIPALITY	: Salisbury
PROJECT WATERSHED	: Merrimack River
EEA NUMBER	: 14835
PROJECT PROPONENT	: Town of Salisbury
DATE NOTICED IN MONITOR	: December 21, 2011

Pursuant to the Massachusetts Environmental Policy Act (M.G.L.c.30, ss. 61-62I) and Section 11.11 of the MEPA Regulations (301 CMR 11.00), I have reviewed this project and hereby **propose to grant a waiver** from the categorical requirement to prepare an Environmental Impact Report (EIR). In a separate Certificate also issued today, I have set forth the outstanding issues related to the project that will be addressed by the permitting agencies.

Project Description

As described in the Expanded Environmental Notification Form (EENF), the Town of Salisbury is proposing to replace an undersized four-foot by four-foot culvert and associated flap gate, which carries Town Creek beneath an existing railroad embankment, with two five-foot by five-foot culverts with modern adjustable tide gates. The project will also reconstruct the existing railroad embankment, and dredge approximately 9,700 square feet of outwash material from the creek bed. Town Creek is a tributary of the Merrimack River, and the marsh and creek in this location are crossed by both Route 1 and an abandoned railroad corridor. Currently, the undersized culvert in the railroad embankment restricts the discharge of flood flows, resulting in routine and severe flooding of the Route 1 corridor properties to the east of the embankment. Severe coastal storms in 2005 and 2007 caused significant flooding of these properties, and

overtopped the railroad embankment, causing severe erosion and sediment deposition into the creek. After the 2007 storm, the embankment was temporarily repaired with stone and sand bags. The existing culvert also severely restricts tidal exchange between the downstream and upstream reaches of the creek, resulting in a degraded wetland dominated by the invasive reed *Phragmites australis*. Functioning tide gates will allow the Town more control over the flow of water, preventing surges. Increasing the flow of salt water will help to alleviate the phragmites stands, which is strangling the salt marsh, thus helping restore the salt marsh to a more pristine condition.

The railroad embankment will be reconstructed with riprap armor stone. Also proposed is dredging of approximately 1,500 cubic yards of sediment from both the upstream and downstream of the culverts to improve water flow through the proposed culverts. Construction of the proposed culverts will be done in two phases in order to maintain flows during installation of the culverts. The southern culvert will be constructed during Phase I and the northern culvert will be constructed during Phase II.

The project has been developed through a cooperative effort between the Town of Salisbury, the Massachusetts Division of Ecological Restoration (DER), the U.S. Fish and Wildlife Service (USFWS), the National Oceanic and Atmospheric Administration (NOAA), the Gulf of Maine Council (GOMC), and the Federal Emergency Management Agency (FEMA).

Jurisdiction

The project requires a mandatory EIR and is undergoing review pursuant to 301 CMR 11.03 (3)(a)(1)(a) of the MEPA regulations because it requires a State Agency Action and includes the alteration of one or more acres of salt marsh. It will require a Chapter 91 Waterways License as a water-dependent use project and a Section 401 Water Quality Certificate from the Massachusetts Department of Environmental Protection (MassDEP) and review and a possible Conservation and Management Permit from the Division of Fisheries and Wildlife (DFW) Natural Heritage and Endangered Species Program (NHESP). The Town must also obtain a Massachusetts General Permit (Category II Authorization) under Section 404 of the Federal Clean Water Act from the United States Army Corps of Engineers (ACOE) and the project will require Federal Consistency review by the Massachusetts Office of Coastal Zone Management (MCZM). It will also require an Order of Conditions from the Salisbury Conservation Commission, and, on appeal only, a Superseding Order of Conditions from MassDEP.

Because the Town has received financial assistance from the Commonwealth for the project (Massachusetts Environmental Bond Fund), MEPA jurisdiction over this project is broad and extends to all aspects of the project that are likely, directly or indirectly, to cause Damage to the Environment, as defined in the MEPA regulations.

Summary of Potential Environmental Impacts

According to the EENF, the project would alter about 255 sf of salt marsh for embankment repairs and reconstruction, 47 acres of salt marsh for restoration, 12,170 sf of Land Under the Ocean (which includes 2,470 sf embankment repairs and culvert installation and 9,700

sf dredging), 140 linear feet of Coastal Bank, 10,925 sf of land subject to coastal storm flowage, and 10,925 sf of riverfront. Although the project site is within a Priority and Estimated Habitat (PH 1321, EH65), the Natural Heritage and Endangered Species Program has not raised concerns for any of the state listed species within the project area. The Town should follow the time-of-year restrictions indicated in Massachusetts Division of Marine Fisheries' comments to protect the spawning and forage habitat for several diadromous fish species.

The Salt Marsh and Land Under the Ocean to be altered for construction are located along the toe of the existing embankment in a disturbed area that is subject to wave action. Because the embankment will be restored to its original configuration, permanent adverse impacts are not anticipated.

In addition to filling impacts, a total of approximately 9,700 square feet LUO will be impacted by the proposed dredging that is necessary to improve flow within the upstream and downstream channel. A total of 1,500 cubic yards of sediment will be removed from Town Creek within the upstream approach channel and the area directly downstream of the outlet. There are no alternatives to dredging in these locations as the channel is currently obstructed by accumulated sediment and removal of these deposits is necessary in order to allow adequate flow through the proposed culverts.

Although survey data indicates that the top of the embankment is above the FEMA 100-year flood elevation, the FEMA flood map for the Project area indicates that the entire site is within 100-year floodplain, a Zone AE, and therefore within Land Subject to Coastal Storm Flow (LSCSF). The regulations of the Massachusetts Wetlands Protection Act do not include performance standards for work within LSCSF, and the Project is not anticipated to result in increased flood extent or duration. Rather, the proposed culvert improvements will provide significant mitigation for existing flooding conditions along Bridge Road.

According to the EENF, the entirety of the project outside of Town Creek is located within 200-foot Riverfront Area. Because this project constitutes maintenance of a structure in existence on August 7, 1996 and will require a Chapter 91 Waterways License, the work is exempt from the Rivers Protection Act Regulations per 310 CMR 10.58(6)(a) and (6)(i). The entire project area outside of the above-mentioned resource areas is located within the 100-foot buffer zone.

The project's limited project status under the Wetlands Protection Act will be determined by the Salisbury Conservation Commission. The EENF has presented an Alternatives Analysis in the EENF to demonstrate the project's limited status.

Summary of Proposed Mitigation Measures

The Town proposes to protect adjacent resource areas by implementing a sedimentation and erosion control program during and following construction activities until the soils have stabilized. The Town also provides a Tide Gate Operation and Maintenance Plan (O&M Plan) presented in the EENF that specifies the procedures, protocols and evaluation methods that will be applied to the operation, inspection, and maintenance of the proposed Town Creek culverts

and tide gates. The O&M Plan is intended to permit a consistent approach to implementing long-term, adaptive tidal management of the Town Creek marsh as well as to formalize the operation and maintenance of the water control structures for continued flood risk management. The O&M Plan also provides direction on controlling the high tide elevation to avoid flooding to low-lying properties. In addition, hydrodynamic modeling predicts that restoration of the marsh would be most effective with slide gate openings of three feet in both culverts during normal tidal conditions. To achieve an optimal flow for restoration, an adaptive management approach is planned to allow for a gradual increase in the tide gate openings and assessment of the impacts before further slide gate adjustments are made.

The O&M Plan identifies the Town of Salisbury Department of Public Works (DPW) as the entity responsible for operating the gates, monitoring the effects, and undertaking maintenance. The EENF states that an Advisory Committee, composed of Town staff, a Salisbury resident, as well as representatives from the Massachusetts Division of Ecological Restoration (DER), the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA) will review data and advise the DPW.

Waiver Request

The Proponent filed an Expanded Environmental Notification Form (EENF) with the MEPA Office on December 15, 2011 that was subsequently noticed in the December 21, 2011 Environmental Monitor. Upon review of the EENF, it was determined that the cumulative impact of the project exceeded a mandatory EIR threshold for the alteration of one or more acres of salt marsh. In the EENF, the proponent requested a full waiver from the preparation of a mandatory EIR. The information presented in the EENF, was sufficient to determine that the submission of the EENF met the MEPA regulations. An extended review period of 37 days was held for the project in accordance with 301 CMR 11.11. The waiver request was discussed at the MEPA consultation/scoping session for the project which was held on January 4, 2012.

Standards for All Waivers

The MEPA regulations at 301 CMR 11.11(1) state that I may waive any provision or requirement in 301 CMR 11.00 not specifically required by MEPA and may impose appropriate and relevant conditions or restrictions, provided that I find that strict compliance with the provision or requirement would:

(a) Result in an undue hardship for the proponent, unless based on delay in compliance by the proponent; and,
(b) Not serve to avoid or minimize Damage to the Environment.

Determinations for an EIR Waiver

The MEPA regulations at 301 CMR 11.11(3) state that, in the case of a waiver of a mandatory EIR review threshold, I shall at a minimum base the finding required in accordance with 301 CMR 11.11(1)(b) stated above on a determination that:

(a) The project is likely to cause no Damage to the Environment; and,

(b) Ample and unconstrained infrastructure facilities and services exist to support those aspects of the project within subject matter jurisdiction.

Findings

Based upon the information submitted by the Town and after consulting the relevant state agencies, I find that the waiver request has merit and that the Town has demonstrated that the proposed project meets the standards for all waivers at 301 CMR 11.11(1). I find that strict compliance with the requirement to prepare a mandatory EIR for the project would result in an undue hardship for the Town. As proposed the project will restore a more natural tidal flow to approximately 47-acres of salt marsh.

I also find that compliance with the requirement to prepare an EIR for the project would not serve to avoid or minimize Damage to the Environment. In accordance with 301 CMR 11.11(3), this finding is based on my determination that:

1. The project is not likely to cause Damage to the Environment:

- The project will not result in significant impacts to land, state-listed species, water, wastewater, transportation, energy, air, solid and hazardous waste, historical and /or archaeological resources, or areas of critical environmental concern.
- It does not trigger 310 CMR 11.03(3)(a)(2) (Wetlands Protection Act Variance) because the proposed alterations to salt marsh meet the performance standards under 310 CMR 10.32(5) (salt marsh restoration). However, these impacts will be mitigated and permitted through the Wetlands Protection Act review process. Finally, the mitigation for the proposed project will enhance the function and value of approximately 47-acres of tidal salt marsh.
- Pursuant to 301 CMR 13.02, I am declining to require an additional Public Benefit Review for the project. Furthermore, as a water-dependent use project, it is presumed that this project will provide adequate public benefit in accordance with 301 CMR 13.04. I am satisfied that the projects' impacts to tideland resources can be adequately addressed during the Chapter 91 Waterways permitting process.
- The Town of Salisbury is the project proponent and the entire project site is located on land controlled and maintained by the Town.
- The Town will be required to obtain permits from MassDEP (a Chapter 91 Waterways License and a Section 401 Water Quality Certificate) and the Army Corps (a Section 404 Clean Water Act Massachusetts General Permit (Category II Authorization)). It is anticipated that each of these permits will include conditions to ensure compliance with applicable regulations and standards.
- The Town will maintain the proposed culverts in the future.
- The proposed project will improve the tidal flushing of approximately 47-acres of tidal salt marsh.

2. Ample and unconstrained infrastructure facilities and services exist to support those aspects of the project within subject matter jurisdiction:

- The project does not require any new infrastructure facilities/services. It will result in critical upgrades to existing infrastructure that will help to ensure protection of environmental resources and public health and safety.
- There is a clearly identified Operator (the Town of Salisbury DPW) and Advisory Committee.
- There is a concise and robust Operation and Management Plan that exists to support the future operation of the project.

Conclusion

Based on these findings, I have determined that this waiver request has merit, and I am issuing this Draft Record of Decision (DROD), which will be published in the next edition of the Environmental Monitor on February 8, 2012, in accordance with 301 CMR 11.15(2), which begins the public comment period. The public comment period lasts for 14 days and will end on February 22, 2012. Based on the written comments received concerning the DROD, I shall issue a Final Record of Decision (FROD) or a Scope within seven days after the close of the public comment period, in accordance with 301 CMR 11.15(6).

January 27, 2012
Date

Richard K. Sullivan Jr.

Comments received:

01/11/2012	Senator Steven A. Baddour
01/12/2012	Representative Michael A. Costello
12/23/2012	Natural Heritage and Endangered Species Program
12/29/2012	Massachusetts Board of Underwater Archaeological Resources
01/10/2012	Eight Towns and the Bay
01/10/2012	Town of Salisbury Board of Selectmen
01/12/2012	Merrimack Valley Planning Commission
01/12/2012	David's Fish Market
01/18/2012	Massachusetts Office of Coastal Zone Management
01/20/2012	Massachusetts Division of Marine Fisheries
01/20/2012	Massachusetts Department of Environmental Protection, Northeast Region
01/20/2012	Salisbury Chamber of Commerce

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