



17 January 2008

Commissioner Laurie Burt
MA Department of Environmental Protection
One Winter Street
Boston, MA 02108

Dear Commissioner Burt:

The Boston Harbor Association, a non-profit, public interest organization founded in 1973 by the League of Women Voters and the Boston Shipping Association to promote a clean, alive, and accessible Boston Harbor, appreciated the opportunity to participate in the Chapter 91 Work Group convened by the Department of Environmental Protection and the Executive Office of Energy and Environmental Affairs in 2007 to help improve the timeliness of licensing and permitting decisions.

We believe that a number of the proposed revisions will help make the regulatory process more efficient without adversely impacting environmental protection, and we commend the DEP and EOEEA staffs for their diligent and thoughtful efforts in working with the Chapter 91 Work Group towards this goal. In a few instances, additional work and revisions are necessary in order to ensure consistency with the public trust doctrine and/or other federal and state coastal requirements. Our comments follow:

Changes to 310 CMR 9.12 Determination of Water-Dependency:
Section 9.12 (2) (b) would add the following categories to water-dependent industrial use: 9.) offshore renewable energy infrastructures, including but not limited to ocean wave energy facilities, ocean current energy facilities, and tidal energy facilities; 10.) infrastructure used to

deliver electricity, natural gas, or telecommunications services from an offshore facility located outside of the Commonwealth.

The Boston Harbor Association served as a member of the Massachusetts Ocean Management Task Force convened by the Environmental Affairs Secretary, and strongly supports the inclusion of offshore renewable energy infrastructures as water-dependent industrial uses. Any offshore renewable energy infrastructure, however, should not impede established navigational channels nor impede the required setbacks from the channels of 30%, consistent with U.S. Army Corps of Engineers channel parameters.

With regards to the inclusion of infrastructure used to deliver telecommunications services from an offshore facility outside of the Commonwealth, we ask that language be added indicating that the infrastructure (i.e., telecommunications cable) is part of a facility which is on or attached to the sea floor in order to be considered water dependent.

A new section, Section 9.12 (2) (e) states that a wind turbine facility or ancillary facility for which an environmental impact report must be submitted is deemed water-dependent where the Energy and Environmental Affairs Secretary finds that it cannot reasonably be located or operated away from tidal or inland waters based on an analysis of alternatives and on information analyzing measures to avoid or minimize adverse environmental impacts. If an EIR is not required for a wind turbine proposal, the Department shall presume the project water-dependent, unless there is a clear showing that the proposed facility can be reasonably located or operated away from tidal or inland waters.

While we concur that wind resources are greatest offshore, wind energy is different than fish habitat, shellfish harvesting, or ship navigation which are all very clearly water-dependent uses in that these latter uses must have

access to the water and can not be located on land. Sustainable energy uses may need a separate definition category which differentiates between water-dependent and water-enhanced uses. Environmental impact assessments should clearly favor purely water-dependent uses which must have access to the harbor or ocean and which can not be located on land over water-enhanced uses such as wind turbines.

In the event that mitigation for the placement of wind resources is necessary, such mitigation should enhance navigation, such as but not limited to RACON, ranges, or AIS repeaters.

Change to 310 CMR 9.32 Categorical Restrictions on Fill and Structures: Conversely, a new section, 9.32 (1) (a) (7) allows for the licensing of fill or structures located below the high water mark for wind turbines found to be non-water-dependent, in accordance with mitigation and/or compensation measures.

This new section appears to contradict the immediate section above which states that wind turbines are deemed water-dependent, unless the Secretary or the Department determine that the facility can reasonably be located or operated away from tidal or inland waters. If the Secretary during the EIR process or the Department during the non-EIR review has determined that the wind turbine can be reasonably located or operated away from tidelands, it is not clear why this section would then allow for the filling of tidelands for a non-water-dependent wind turbine. This new section should be deleted, as it is inconsistent with the proposed new Section 9.12 (2) (e).

Change to 310 CMR 9.35 (4) Compensation for Interference with Public Rights in Commonwealth Tidelands and Great Ponds: Section 9.35 (4) (b) substitutes the phrase "private recreational berthing facility" with "private recreational boating facility." We suggest adding the words, "public pump out facility" to the existing phrase,

"examples of such benefits include construction of a public boat launching ramp, operation of an ongoing program of community sailing or boating instruction, dedication of a substantial number of berths to public transient use, and provision of public pedestrian facilities beyond those required elsewhere in 310 CMR 9.00", given the expanding number of "no discharge zones" in waters throughout the Commonwealth since the last revisions to the regulations.

Changes to 310 CMR 9.13 (2) Participation by CZM or DEM: A new section, Section 9.13 (2), proposes to limit the involvement of the Coastal Zone Management (CZM) Program in license or permit proceedings for non-water dependent projects subject to federal consistency review to only those instances when the Department requests CZM participation in writing, or when the Energy and Environmental Affairs Secretary specifies CZM participation during the MEPA process. Otherwise, in instances when the Department does not request CZM participation, the Department shall presume that a project is consistent with CZM policies, or in instances when CZM does not submit written comments during the public comment period.

It was not clear during the Chapter 91 Working Group deliberations why the revisions were needed, nor is it clear now why such a drastic curtailment of Coastal Zone Management's role in the permit and license proceedings is proposed.

There are two basic statutory standards for the licensing of non-water dependent uses in tidelands: 1.) Proper public purpose; and 2.) Consistency with CZM policies. Last year, the state's CZM program had its five-year federal review (state CZM program receives federal CZM dollars). We attended the public hearing and received the subsequent federal evaluation report which gave high marks to the state's program. TBHA's experience with the Coastal Zone Management program, from the agency's comment letters to its review of municipal harbor plans to its initiatives on coastal hazards and ocean planning to its annual

Coastsweep program, indicates a responsive, pro-active agency.

If there are specific concerns about the timing of CZM's comments, we would recommend that a timetable consistent with DEP's decision-making process be developed to take advantage of the expertise and available federal resources of the CZM program.

If there are other concerns regarding CZM's participation, it would be good to know what these concerns are so that appropriate language can be drafted to remedy the situation. Unfortunately, the language proposed in these revisions would appear to have the Department and/or the Secretary deciding whether the CZM program should review applications of non-water dependent uses for consistency with CZM coastal policies. The proposed language is inconsistent with CZM's federally-approved responsibilities to ensure coordination and consistency with management of the resources of the coastal zone, and we are concerned that the proposed revision, as presently written, may jeopardize a thorough review of impacts to coastal resources as well as jeopardize much-needed federal CZM funding to the Commonwealth without a clear public benefit.

Thank you for your consideration.

Sincerely,

Vivien Li
Executive Director