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Comments on Proposed Revisions of 314 CMR 9.00 Dredging Regulations

Presented January 19, 2006 at Public Hearing, DEP Hdq., Boston, MA

The Neponset River Watershed Association (NepRWA) is dedicated to the protection and restoration of the Neponset River and its tributaries, as well as the Neponset River Estuary. A project of particular importance to us is the removal of the two most downstream dams on the River, the Baker Dam and the Tileston & Hollingsworth Dam. Removal of these dams would allow the restoration of the historic anadromous fish runs for herring, rainbow smelt, and American shad. It would also open the river up to non-anadromous fish, wildlife and recreational boating for a full 17 miles upriver of the Baker Dam. It is clear, however, that in order to remove these two dams, PCB-contaminated sediments in the river and especially behind the dams will have to be remediated. It is very likely that both dredging and capping will be needed as part of this remediation.

NepRWA is very supportive of the proposed addition of 314 CMR 9.07(1)(l), which permits projects such as dam removal as well as salt marsh and stream restoration to go ahead notwithstanding other restrictions imposed under section 9.07. We would note, however, that such projects would also need approval under Wetlands Protection Act Regulations. Both the inland and coastal Wetland Regulations give limited project status to activities undertaken pursuant to waste site cleanup, but only the inland regulations contain a limited project for "projects which will improve the natural capacity of a resource area(s) to protect the interests" identified in the Wetlands Protection Act (310 CMR 10.53(4)). However even this limited project does not include dam removal, saltmarsh restoration and stream restoration as examples of eligible projects. The Department should issue a policy, guidance, or revision of the Wetlands Protection Regulations explicitly naming such projects as resource improvement projects in inland wetlands, and should make this limited project applicable to coastal wetlands as well.

Another issue of concern to us is the standards applicable to two dredged material aquatic disposal options: Confined Aquatic Disposal and Confined Disposal Facilities (CAD and CDF). These disposal methods can be engineered to protect and enhance habitat, recreation, and the physical, chemical and biological integrity of the affected body of water, or they can be designed ignoring such concerns. We would like the restrictions that apply to "discharge of dredged or fill material" under 314 CMR 9.06(1)-(2) to apply to CAD and CDF, but are not sure whether this is the Department's intent. The definition of this term includes the "redeposit of dredged material within waters of the United States within the Commonwealth." This should be clarified in the final regulations to include CAD and CDF.

On a similar note, certain restrictions contained in 314 CMR 9.07(1) apply to "dredging" but not to "dredged material disposal." It is unclear from the proposed revision to the definition of "dredging", which includes the phrase "repositioning of sediment or other material from land

under water," whether CAD and CDF are included in the term and thus are subject to all the restrictions placed on dredging in section 9.07. The definition should be revised to make this clear. Assuming that it is *not* the Department's intention to include CAD and CDF within the "dredging" definition, we believe the following revisions should be made to section 9.07(1):

- Subsection (b) on alternative analysis should be clarified to specifically apply to dredged material disposal (aquatic and non-aquatic). The reference in section 9.07(1)(b) to 9.07(1)(a) (which applies only to dredging), renders the applicability of the former section unclear.

- Subsection (a) should require that CAD and CDF disposal be designed to minimize adverse impacts on the aquatic ecosystem and, to the extent that adverse impacts are unavoidable, mitigate those impacts.

- Subsection (j) on maintaining the physical, chemical and biological integrity of water bodies should apply to CAD and CDF.

NepRWA is also not clear which numerical standards are meant to apply to the various reuse and disposal options. In many cases, the standards and/or the projects to which such standards apply are named only by reference to other regulations. We would propose that 314 CMR 9.07(6) – (13) be clarified to specify relevant standards applying to each reuse and disposal option. At a minimum, the Department should give precise regulatory citations (including citation of all relevant subsections) to the applicable provisions of:

- 310 CMR 9.00 (Waterways) [referenced in 314 CMR 9.07(6) and 9.07(9)(a)]
- 310 CMR 10.00 (Wetlands) [referenced to in 314 CMR 9.07(6) and 9.07(9)(a)]
- 310 CMR 16.00 (Site Assignment for Solid Waste Facilities), 314 CMR 19.00 (Solid Waste Management), and "relevant Guidelines and Policies" under those regulations [referenced in 314 CMR 9.07(6), (9)(b)5., (9)(c)3.b., and (11)]
- 310 CMR 30.000 (Hazardous Waste) [referenced in 314 CMR 9.07(10)(c) and also referred to in the Solid Waste Regulations which are referenced in the sections of 314 CMR 9.00 listed directly above]
- Unconfined Open Ocean Disposal requirements and procedures of the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency [referenced to in 314 CMR 9.07(7)]
- 310 CMR 40.000 (MA Contingency Plan) and specifically those provisions containing s-1 soil standards [referenced in 314 CMR 9.07(9)(b)], or defining the condition of "Significant Risk" [referenced in 314 CMR 9.07(10)(c)5.]

Finally, NepRWA opposes the proposed addition of subsection (k) to 314 CMR 9.06(3). Enlargement of structures or facilities for water-dependent uses should not be permitted in any Outstanding Resource Area (ORW). Although we can support maintenance work on existing structures in ORWs, the proposed regulations include no definition of the words "(m)aintenance, repair, replacement or reconstruction." Would the revised regulations allow a major new water-dependent project to go forward if it were a "replacement" for a deteriorating and unused pile field? Under c. 91 Waterways Regulations, structures that "replace" existing but deteriorated pile-supported structures may be built below the high water mark" even for nonwater-dependent uses (see 310 CMR 9.32(1)(a)4.). The Water Quality Certification Regulations should make clear that term "maintenance, repair, replacement or reconstruction" in 314 CMR 9.09(3)(k) does not authorize the construction of water-dependent projects in ORWs where today only deteriorated pilings or similar non-functioning or abandoned structures exist.

ADDENDUM TO COMMENTS SUBMITTED TO DEP AT THE JANUARY 19, 2006 PUBLIC HEARINGS ON PROPOSED REGULATORY REVISIONS OF 314 CMR 9.00

The testimony submitted by the Neponset River Watershed (NepRWA) at the January 19, 2006 Hearing objected to proposed regulatory provisions for dredged material reuse or disposal that referred to other regulations without specific citation. The Hearing Officer asked me to provide her with examples of how these proposed provisions of 314 CMR 9.00 were problematic. The following examples, and questions related to the examples, apply to those provisions of 314 CMR 9.00 that refer to either the Solid Waste Regulations (310 CMR 16.00 and 19.00) or the Hazardous Waste Regulations (310 CMR 30.000). First I provide the relevant provision of 310 CMR 9.00, then I cite some relevant provisions of the referenced regulations (in italics), and finish with questions as to how these provisions, read together, are to be interpreted (in bold).

SOLID WASTE

Proposed Dredging Provision:

Section 9.07(6): dredged material used for beach nourishment shall not be solid waste and is not subject to 310 CMR 16.00 and 19.00.

Section 9.07(9)(b)5.: upland placement as fill or for other reuse activities allowed so long as Department has not determined that either because of the nature of the proposed activity, the amount of material, and/or the characteristics of the material that the material requires management as solid waste subject to provisions of 310 CMR 16.00 and/or 310 CMR 19.00.

Section 9.07(9)(c)3.d.: dredged material when managed in accordance with 314 CMR 9.07(9)(a) [shoreline placement and upland material reuse under a 401 Cert.] (b) [described above] or (c) [reuse under Dredged Material Reuse Decision at any upland area not authorized under 310 CMR 9.07(9)(a) or (b)] shall not be considered solid waste for the purposes of 310 CMR 16.00 or 19.000 allowed so long as Department has not determined that either because of the nature of the proposed activity, the amount of material, and/or the characteristics of the material that the material requires management as solid waste subject to provisions of 310 CMR 16.00 and/or 310 CMR 19.00.

Section 9.07(11): Dredged material placed at upland locations other than under 314 CMR 9.07(6) [described above], (9) [described above] and (10) [management of dredged material at disposal sites pursuant to the MCP] shall be managed subject to provisions of Solid Waste Regulations at 310 CMR 16.00 and 19.000 and relevant Guidelines and Policies.

Some Relevant Solid Waste Regulatory provisions:

310 CMR 16.00 (Site Assignment Regulations for Solid Waste Facilities) and 310 CMR 19.00 (Solid Waste Management) both define solid waste as follows (see 310 CMR 16.02 and 310 CMR 19.006):

"Solid Waste or Waste means useless, unwanted or discarded solid, liquid or contained gaseous material resulting from industrial, commercial, mining, agricultural, municipal or household activities that is abandoned by being disposed or incinerated … but does ***not*** *include:*

(a) Hazardous waste as defined (in) 310 CMR 30.00."[1]
[(b) through (i) include various types of sludge, septage, residuals, sewage, ash, materials found in irrigation return flows, certain nuclear materials, materials and by-products generated from and reused within an original manufacturing process, and compostable or recyclable materials not requiring site assignment.]

QUESTIONS:

- **What type of dredged material meets this definition of solid waste?**
- **How is it determined (and who determines) if dredged materials meet this definition?**
- **Are there other relevant portions of 310 CMR 16.00 and/or 19.00 that need to be considered in making this determination and, if so, what are they?**
- **310 CMR 9.07(9)(b)5. and 9.07(9)(c)3.d. state that certain disposal options are not subject to solid waste rules unless the Department determines that either because of the nature of the proposed activity, the amount of material, and/or the characteristics of the material that it must be treated as solid waste. What is the precise regulatory provision that gives DEP the authority to make this decision and what are the precise criteria DEP must use to make it?**
- **310 CMR 9.07(6) says beach nourishment may not be done with solid waste. 310 CMR 9.07(11) says any upland disposal except for beach nourishment (and other specified methods) shall be treated as solid waste disposal. This begs the question: what is solid waste?**
- **See also last question posed under "Hazardous Waste", below.**

[1] See next page for discussion of what constitutes hazardous waste.

HAZARDOUS WASTE

Proposed Dredging Provision:

Section 9.07(10)(c): dredged material containing OHM and that is not otherwise a hazardous waste may be brought from another location to a disposal site and utilized as part of a comprehensive remedial action pursuant to the MCP.

Some Relevant Hazardous Waste Regulatory provisions:

310 CMR 30.102(2): A waste is a hazardous waste subject to 310 CMR 30.000 if:

(a) The waste is listed in 310 CMR 30.130 through 30.136.

(b) The waste … exhibits any of the characteristics of hazardous waste identified in 310 CMR 30.120 through 30.125.

(c) The waste is a mixture of non-hazardous waste and hazardous waste(s).

(d) The waste is generated from the treatment, storage, disposal, or use of a hazardous waste, including any sludge, spill residue, ash emission control dust or leachate.

Examples of waste listed in 30.130 – 30.136:

30.133: Hazardous Wastes Which are Discarded Commercial Chemical Products or Off-specification Batches of Commercial Chemical Products or Spill Residues of Either…

(2) These hazardous wastes and their corresponding Hazardous Waste Numbers are:

Haz. Waste Number	*Chemical Abstracts Numbers*	*Substance*
U001	*75-07-0*	*Acetaldehyde (I)*
…		

QUESTIONS:

- **How is dredged material evaluated, and by whom at DEP, to determine if it is hazardous waste (e.g., whether under 310 CMR 30.113 it is a "discarded**

commercial chemical product of an off-specification batch of commercial chemical products of spill residues of either")?

- **Are there other relevant portions of 310 CMR 30.00 that need to be considered in making this determination and, if so, what are they?**
- **Since various disposal options (see 1st page) preclude solid waste, but hazardous waste is not solid waste, shouldn't these disposal options also preclude hazardous waste)?**