



June 11, 2019

Kathleen Theoharides, Secretary of Energy and Environmental Affairs
Executive Office of Energy and Environmental Affairs (EEA)
Attn: MEPA Office, Erin Flaherty, EEA# 16014
100 Cambridge Street, Suite 900
Boston MA 02114

RE: EEA# 16014: Happy Valley Ventures ENF

Dear Secretary Theoharides:

We are writing to comment on the Environmental Notification Form (ENF) filed by HVV East Boston, LLC for the Happy Valley Ventures project at 220 William F. McClellan Highway, East Boston, MA. The proponent seeks to establish and operate a retail marijuana dispensary on filled tidelands near Chelsea Creek. The site lies within the Chelsea Creek Designated Port Area (DPA) and is subject to severe restrictions on nonwater-dependent commercial use.

The Mystic River Watershed Association (MyRWA) is a nonprofit corporation working to protect and restore the Mystic River, its tributaries and watershed lands for the benefit of present and future generations. In pursuit of our mission, we advocate for the wise use and proper management of natural resources throughout the Mystic River watershed, including tidelands subject to the Massachusetts Public Waterfront Act, M.G.L. c. 91. As a watchdog for the public interest under Chapter 91, MyRWA is attuned to how proposed development projects may promote or impair the water-dependent use of filled tidelands within our highly urbanized watershed communities, as well as their potential to conserve, restore, or cause further damage to urban tidelands and adjacent waterways.

Adequacy of MEPA Review

The Happy Valley Ventures project involves the renovation of an existing building, parking improvements and landscaping on approximately one acre of filled tidelands for a new nonwater-dependent use. This requires a Chapter 91 waterways license, to be issued by the Department of Environmental Protection (MassDEP) under regulatory standards contained in 310 CMR 9.00. The proponent seeks to qualify the project as a supporting DPA use, as defined in 310 CMR 9.02. The proposal is therefore subject to MEPA review under 301 CMR 11.03(3)(b)5.

MassDEP will make its licensing decision pursuant to a process that includes a public hearing and an opportunity to submit written comments. 310 CMR 9.13(3) and (4). MassDEP will issue a written determination that includes a finding as to "whether the project serves a proper public purpose which provides greater benefits than detriments to the public rights in tidelands." 310 CMR 9.14(1) and (3); see *a/so* 310 CMR 9.31(2).

MyRWA has identified a number of critical issues, outlined below, that preclude the issuance of a Chapter 91 license for the project in its current form. Very substantial project modifications are needed. Although additional description and analysis of the project will clearly be necessary before MassDEP can take favorable agency action, we believe—with one caveat—that MassDEP’s Chapter 91 licensing procedures will be adequate to avoid damage to the environment and that further MEPA review is not necessary. For reasons discussed below, however, we recommend that the Secretary consider directing the Coastal Zone Management Office (CZM) to participate in the Chapter 91 licensing proceeding, pursuant to 310 CMR 9.13(2).

Failure to Meet Regulatory Standards for Commercial Projects within a DPA

1. The project does not provide direct economic support to water-dependent industrial use within the DPA

The use of filled tidelands within a DPA is generally limited to (a) water-dependent industrial use and accessory uses thereto; (b) supporting DPA uses; (c) pedestrian access for the exercise of water-related public rights; and (d) temporary use. 310 CMR 9.32(1)(b). **A retail marijuana dispensary does not qualify as a water-dependent industrial, accessory, or temporary use, and this project includes no water-related public access facilities. It can qualify as a supporting DPA use only by providing “water-dependent industrial use in the DPA with direct economic or operational support, to an extent that adequately compensates for the reduced amount of tidelands on the project site that will be available for water-dependent industrial use during the term of the license.”**

The Happy Valley Ventures project provides no operational support to water-dependent industrial uses. The proponent argues that the enterprise, if successful, may provide “economic support” to some future water-dependent industrial use, by enabling the proponent to offer the unused portions of the site at a rent low enough to attract a water-dependent industrial user. We submit that this is not what is meant by “economic support” to water-dependent industrial use, and it certainly does not constitute “direct” economic support.¹

In a supplemental filing, the proponent has identified a prospective user of the site that may qualify as water-dependent industrial and proposes to lease a portion of the site to that user for a limited period of time (up to three years), at a rate so low as to suggest that the prospective tenant has little need for the site and will not derive much value from its use. These arrangements are insufficient to ensure that an adequate level of direct economic support will be effectively provided to water-dependent-industrial users, as required by 310 CMR 9.36(5)(b).

¹ Should the project be modified to provide direct economic support to water-dependent industrial use in the DPA, it will be necessary to consider whether the extent of the support provided “adequately compensates for the reduced amount of tidelands on the project site that will be available for water-dependent industrial use during the term of the license.” 310 CMR 9.02 (definition of supporting DPA use).

2. The marijuana dispensary will occupy more than 25% of the project site

The regulations provide that “the amount of tidelands occupied by Supporting DPA Uses and any accessory uses thereto shall not exceed 25% of the area of the project site . . . , so that the remainder of the project site will continue to be available exclusively for water-dependent industrial or temporary use.” 310 CMR 9.02 (definition of supporting DPA use); see also 310 CMR 9.32(1)(b)3. The site plans submitted by the proponent indicate that the combined area of the portions of the building and 15 parking spaces reserved for nonwater-dependent commercial use narrowly exceeds 25% of the area of the project site. Significantly, the proponent excludes from the calculation a great deal of exterior space that will be used by employees, customers, and suppliers of the facility, such as areas of road surface leading to the parking spaces, loading dock and adjacent walkways. These areas, together with the newly landscaped areas contiguous to them, are at least accessory uses and should be included in the numerator. If a water-dependent industrial use is found for the site, these exterior areas will exist for *shared* use, rather than *exclusively* for water-dependent industrial (or temporary) use as required by the regulations.

3. The marijuana dispensary largely preempts water-dependent industrial use of the project site and diminishes its capacity to accommodate any water-dependent use

The regulations require that tidelands within a DPA be reserved primarily for maritime industry. 310 CMR 9.36(1). Fill and structures for nonwater-dependent use must not preempt water-dependent industrial use. 310 CMR 9.36(5). To avoid this, “reasonable arrangements shall be made to prevent commitments of space or facilities that would significantly discourage present or future water-dependent-industrial activity on the project site” 310 CMR 9.36(5)(b).

We believe that the establishment of a marijuana dispensary in a commercial building at the center of this one-acre site, with nearly all of the exterior space comprising roadway, parking spaces, walkways, and landscaped areas designed to accommodate customers, suppliers, and employees, will effectively preclude significant marine industrial use of the site for the foreseeable future. The site is already separated from the shoreline by two intervening parcels. The areas in the building reserved for marine industrial use consist of an isolated truck bay and a handful of offices on the other side of the building, with second floor space above. The site plans include parking improvements and 38 marked parking spaces (only 15 of which are designated for use by the dispensary). The dispensary will dominate the site, and the remainder of the facilities will appeal more to commercial and nonwater-dependent users than to water-dependent industrial users. Certainly, the landscaped corners and edges of this renovated parcel will provide no useable space for any significant water-dependent industrial activity.

More generally, a nonwater-dependent use project must not “unreasonably diminish” the capacity of tidelands to accommodate water-dependent use. 310 CMR 9.51. As a commercial site, the project is subject to the open space requirements in 310 CMR 9.51(3)(d):

at least one square foot of the project site at ground level . . . shall be reserved as open space for every square foot of tideland area within the combined footprint of buildings

containing nonwater-dependent use on the project site; in the event this requirement cannot be met by a project involving only the renovation or reuse of existing buildings, ground level open space shall be provided to the maximum reasonable extent

The project evidently fails to meet this standard. The building occupies approximately 25% of the project site, while the proponent states that the project will create only 12% “open space.” Most, if not all, of this “open space” is in the portion of the site reserved exclusively for water-dependent industrial use.

In addition, portions of the ground-floor building space used for commercial purposes, including a loading dock and other secure facilities, lie within 100 feet of the project shoreline. Normally only facilities of public accommodation, and not facilities of private tenancy, may be located in such areas. 310 CMR 9.51(3)(b). The proponent has not explained how this standard will be met.

4. The project fails to provide public pedestrian access to tidelands bordering Chelsea Creek and thus unduly interferes with water-related rights protected by the public trust doctrine

Regulations require that a project such as this “shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes; and shall preserve any public rights of access that are associated with such use.” 310 CMR 9.35(1). In particular, a project “shall not significantly interfere with public rights to walk or otherwise pass freely on private tidelands for purposes of fishing, fowling, navigation, and the natural derivatives thereof” 310 CMR 9.35 (3)(b). To meet this standard, a project on filled tidelands “shall include reasonable measures to provide on-foot passage on such lands for the public in the exercise of its rights therein” 310 CMR 9.35(3)(b)2. The project “shall provide for long-term management of such areas which achieves effective public use and enjoyment while minimizing conflict with other legitimate interests” 310 CMR 9.35(5).

Under 310 CMR 9.52, a nonwater-dependent use project on tidelands “shall devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands.” The site plans indicate that the project site does not include a water-dependent use zone, as defined in regulations. But the parcels lying between the project site and Chelsea Creek clearly do. At a minimum, the project “shall provide connecting public walkways or other public pedestrian facilities as necessary to ensure that sites containing water-dependent use zones will not be isolated from, or poorly linked with, public ways or other public access facilities to which any tidelands on the project site are adjacent.” 310 CMR 9.52(2).

The project as designed utterly fails to address or meet any of the above standards.

Proponent May Ask CZM to Exclude Project Site from DPA

In a supplemental filing, the proponent states its intention to petition CZM for a boundary review and designation that excludes the project site from the Chelsea Creek DPA. At the same time, the proponent includes a letter of intent with a lobster company to lease the unused portion of the site for up to three annual periods, at a low rent. This arrangement is offered to show that the marijuana dispensary will provide economic support for water-dependent industrial use. We note the contradiction between securing a water-dependent industrial tenant, to qualify the venture as a supporting DPA use, while also seeking a DPA boundary review, on the grounds that the area is not suitable for water-dependent industrial use. In view of the proponent's dual track approach to the commercial development of these tidelands, implicating CZM's particular areas of concern, we suggest that the Secretary specify in his final MEPA certificate that CZM shall participate in the Chapter 91 licensing process. 310 CMR 9.12(2).

We look forward to carefully reviewing the proponent's evolving project plans in the Chapter 91 licensing proceeding.

Thank you for the opportunity to comment on this proposal.

Sincerely,



Patrick Herron
Mystic River Watershed Association