

8 Overview of Federal, State, Regional, and Local Environmental Compliance

8.1 Federal Agency Reviews and Authorizations

8.1.1 National Environmental Policy Act (NEPA)

The *National Environmental Policy Act* (NEPA) requires federal agencies to integrate environmental values into their decision making processes. The two cornerstones of NEPA are public involvement, and evaluating the environmental impacts of alternative approaches before deciding on a course of action. Federal agencies facilitate public involvement and document NEPA compliance through preparation of an Environmental Assessment (EA) to determine if the project will result in significant environmental impacts. If the EA demonstrates that the project will not result in significant impacts, the agency concludes the EA process by issuing a Finding of No Significant Impact (FONSI). If the EA indicates that the project will result in significant impacts, the agency proceeds with a more in-depth analysis of alternatives and impacts -- this more in-depth process is documented in an Environmental Impact Statement (EIS). When an agency knows that significant impacts are likely, or when there is a significant level of controversy, the agency will often go directly into the EIS process rather than prepare an EA first. When an EIS is finalized, the agency's decision is documented in a Record of Decision (ROD).

Comments from other federal agencies, state and local agencies, and the public-at-large are considered throughout the NEPA process. When multiple Federal agencies are involved in a project, a single EIS should be developed cooperatively. Integrating NEPA with other compliance processes is encouraged where ever feasible and efficient (e.g., Army Corps of Engineers permitting; state, regional and local consultation). The major steps for the EIS process are summarized below:

- Publish a Notice of Intent (NOI) to prepare an EIS
- Request public input on all aspects of the proposed analysis (types of impacts to assess, information to consider, alternatives to consider, etc)
- Evaluate alternatives
- Submit Draft EIS (DEIS)
- Finalize the EIS based on public comments received on the DEIS
- Issue a ROD

Is NEPA Permitting required for the Herring River project?

Yes, as the project includes Federal action through the CCNS and/or other Federal agency involvement and/or funding.

8.1.2 Clean Water Act Section 404 / Rivers and Harbor Act Section 10

CWA § 404 regulates discharge of dredged and fill material to waters of the United States, including wetlands under federal jurisdiction. RHA § 10 regulates activities along navigable rivers and waterways. Both are simultaneously administered by the Army Corps of Engineers.

Types of §404 / §10 Permits include the Individual Permit and the State Programmatic General Permit (PGP). In Massachusetts, there are two types of PGPs:

Category One -- Non-reporting. Eligible without screening (provided authorizations are obtained),

Category Two -- Requires screening and a written determination of eligibility under the General Permit by the Corps after coordination with the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, National Marine Fisheries Service, and the Massachusetts Coastal Zone Management (CZM) Office.

The Corps reviews all complete applications for Category Two projects at interagency screening meetings (or “joint processing” meetings) with the State and Federal resource agencies to determine whether such activities may be authorized under the PGP.

Is CWA § 404/ §10 Permitting required for the Herring River project?

Yes, as fill in jurisdictional wetlands will be required for new tidal crossings, and a change in tidegate configuration is being proposed. As a pro-active (non-compensatory) saltmarsh restoration project, one or more PGP Category 2 permits are likely to be required.

8.2 State Agency Reviews and Authorizations

8.2.1 Massachusetts Environmental Policy Act (MEPA)

Massachusetts Environmental Policy Act (MEPA) is the state equivalent of NEPA. The purpose of MEPA is to provide meaningful opportunities for public review of the potential environmental impacts of projects for which state agency action is required, and to assist each agency in using (in addition to applying any other applicable statutory and regulatory standards and requirements) all feasible means to avoid damage to the environment or, to the extent damage to the environment cannot be avoided, to minimize and mitigate damage to the environment to the maximum extent practicable.

MEPA considers projects which may impact land, rare species, wetlands, waterways, and tidelands, water, wastewater, transportation, energy, air, solid and hazardous waste, historic and archeological resources, Areas of Critical Environmental Concern, and new, or modifications to existing, environmental regulations. MEPA is a multi-tiered process:

The Environmental Notification Form (ENF) provides basic information on the project. The ENF process usually includes on-site “Scoping Session” to solicit public and agency

comments. Less complex or environmentally benign projects can receive a Certification from the Secretary of Environmental Affairs that MEPA compliance is adequate after this step.

MEPA Regulations include specific thresholds that can trigger the need for an ENF or Environmental Impact Report (EIR) (i.e., creation of more than ten acres of impervious surface area requires an EIR; creation of five to ten acres requires an ENF and, upon ENF review, an EIR is at the Secretary of Environmental Affairs Discretion).

Draft Environmental Impact Report (DEIR): The EOEA Secretary's Certificate will contain a "Scope" for the DEIR. Based on agency and public comments, the Scope will identify areas that were not adequately described in the ENF and require specific studies and details.

Final Environmental Impact Report (FEIR): Following the public comment period on the DEIS, the applicant incorporates information required by Secretary's Certificate and agency/public comments. Before final compliance, additional comments and requests for further information may be made; depending on complexity a Supplemental EIR may be required.

The ENF to FEIR Process can be lengthy (1-2 years or longer), complex, and expensive.

Is MEPA Review required for the Herring River project?

Yes, as the project includes State funding, other state permits and work within the Wellfleet Harbor Area of Critical Environmental Concern.

8.2.2 Massachusetts Waterways Licensing Program – (M.G.L. c. 91)

The Massachusetts Waterways Licensing Program (Chapter 91) is the Commonwealth's primary tool for protection and promotion of public use of its tidelands and other waterways. The Commonwealth formally established the program in 1866, but the philosophy behind Chapter 91 dates back to the earliest days of the Massachusetts Bay Colony, most notably in the Colonial Ordinances of 1641-1647. The Colonial Ordinances codified the "public trust doctrine," a legal principle that dates back nearly 2000 years, which holds that the air, the sea and the shore belong not to any one person, but rather to the public at large. The oldest program of its kind in the nation, Chapter 91 regulates activities on both coastal and inland waterways, including construction, dredging and filling in tidelands, great ponds and certain rivers and streams.

Is Chapter 91 review required for the Herring River project?

Yes, due to new structures (culverts) over tidelands, and modifications to previously licensed or unlicensed structures.

8.2.3 Water Quality Certification

Clean Water Act 401 Water Quality Certification (WQC) is required under federal law for certain activities in wetlands and waters. This law gives states the authority to review projects that must obtain federal licenses or permits and that result in a discharge to state waters. The purpose of state 401 review is to ensure that a project will comply with state water quality standards and other appropriate requirements of state law. WQC is required for any project that also requires an Army Corps § 404 wetland permit.

Is WQC Permitting required for the Herring River project?

Yes, as a §404 permit is required.

8.2.4 CZM Consistency Review

While the Massachusetts Office of Coastal Zone Management (CZM) is not a permitting agency, it does have the authority to review federal activities in the Massachusetts coastal zone to ensure that they are consistent with CZM program policies. Consequently, any coastal project that requires a federal license, is implemented by a federal agency, or is carried out with federal funds must be approved by CZM before the federal activity can take place. Overall, CZM's Federal Consistency Review gives the Commonwealth the power to ensure that federal actions meet state standards.

Is CZM Consistency Review required for the Herring River project?

Yes, as a federal activity, the project needs to be certified as consistent with MA Coastal Zone policies.

8.2.5 Massachusetts Wetlands Protection Act (M.G.L. c. 131 § 40)

The Massachusetts Wetlands Protection Act (WPA) is the state equivalent of federal Clean Water Act S. 404. Jurisdiction is with MA Department of Environmental Protection (DEP) and is administered by local Conservation Commissions. The WPA Identifies Inland and Coastal jurisdictional resource areas and specific wetland functions that are to be protected for the public benefit. The application process includes:

- Applicant files a Notice of Intent – Includes detailed delineation of wetland resource areas, quantified impacts to wetland resource areas, and plans for mitigating unavoidable impacts.
- The Conservation Commission holds a Public Hearing(s).
- At its discretion, the Conservation Commission or its Agent may schedule a Site Visit.
- Following the completion of review, the Conservation Commission issues an Order of Conditions approving or denying the work.

- The Order of Conditions may be appealed, and DEP may issue Superseding Orders.

Is WPA Permitting required for the Herring River project?

Yes, due to probable unavoidable impacts to state wetlands associated with fill for tidal crossings, dike reconstruction, and other alterations.

8.2.6 Massachusetts Endangered Species Act (M.G.L. c. 131A)

The *Massachusetts Endangered Species Act* (M.G.L. c.131A and regulations 321 CMR 10.00) protect rare species and their habitats by prohibiting the "Taking" of any plant or animal species listed as endangered, threatened or species of concern by the MA Division of Fisheries & Wildlife. Taking includes the harassing, killing, trapping, collecting of species as well as the disruption of nesting, breeding, feeding or migratory activity, including habitat modification or destruction. There are three types of filings under MESA that are coordinated through the Natural Heritage and Endangered Species Program (NHESP) at DFW: 1) MESA Information Request for rare species information, 2) MESA Project Review, and 3) the Conservation and Management Permit Application. Projects resulting in a "take" of state-listed rare species may be eligible for a Conservation and Management Permit (321 CMR 10.23). Rare Species Habitat assessment or survey may be required as part of the CMP process.

Is MESA Permitting required for the Herring River project?

Yes, as the project overlaps with Priority and Estimated Habitats mapped by the NHESP.

8.3 Cape Cod Commission: Development of Regional Impact

The Cape Cod Commission is a regional land use planning and regulatory agency created by an Act of the Massachusetts General Court in 1990. The Commission reviews projects that present regional issues identified in the Act, including water quality, traffic flow, historic values, affordable housing, open space, natural resources, and economic development.

DRI review is required by law if a project exceeds a specific threshold. Examples of projects that need to go through mandatory DRI review by the Cape Cod Commission are those involving:

- subdivisions of 30 acres or more;
- development of 30 or more residential lots or dwelling units;
- development of ten or more business, office, or industrial lots;
- commercial development or change of use for buildings greater than 10,000 square feet;

- transportation facilities for passage to or from Barnstable County;
- demolition or major changes to some national- or state-recognized historic structures;
- bridge, ramp, or road construction providing access to several types of water bodies and wetlands;
- new construction or change of use involving outdoor commercial space greater than 40,000 square feet; construction of any wireless communication tower exceeding 35 feet in height;
- site alterations or site disturbance greater than two acres without a valid local permit;
- mixed use residential and non-residential developments with a floor area greater than 20,000 square feet

DRI review may also be required for projects that do not meet a threshold but are forwarded to the Cape Cod Commission from the town in which they are located. The Commission must first vote to accept this type of referral as a development that has regional impacts.

Projects requiring review under MEPA may also require DRI review. An applicant may request a joint review process with the state and the Cape Cod Commission. For an informal opinion on whether a project qualifies as a DRI, an applicant may contact a Commission staff member. In addition, the applicant or town may request a "jurisdictional determination" from the Commission; this entails a 21-day process in which the Commission will determine whether or not a project qualifies as a DRI.

8.4 State and Federal Historic Reviews

8.4.1 Federal Review

Any projects that require funding, licenses, or permits from federal agencies must be reviewed in compliance with Section 106 of the National Historic Preservation Act of 1966. Section 106 requires federal agencies to take into account the effects of their actions on historic properties. "Section 106 review," follows a specific process, which is guided by federal regulations (36 CFR 800). These regulations have created a series of steps by which federal agencies identify and evaluate historic properties that may be affected by their undertakings, assess adverse effects to those properties, and take prudent and feasible measures to avoid, minimize, or mitigate those effects. In Massachusetts, these steps are taken in consultation with the Massachusetts State Historic Preservation Officer (SHPO). The MA Historical Commission is the office of the SHPO. Other interested parties such as local historical commissions or Indian Tribes are also consulted.

8.4.2 State Review

Any projects that require funding, licenses, or permits from any state agency must be reviewed by MHC in compliance with Massachusetts General Laws Chapter 9, sections 26-27C. This law creates the MHC, the office of the State Archaeologist, and the State Register of Historic Places among other historic preservation programs. It provides for MHC review of state projects, State Archaeologist's Permits, the protection of archaeological sites on public land from unauthorized digging, and the protection of unmarked burials. These regulations set up a process that mirrors the federal "Section 106" regulations: identification of historic properties; assessment of effect; and consultation among interested parties to avoid, minimize, or mitigate any adverse effects.

Is MA Historical Commission review required for the Herring River project?

Yes, because of federal and state agency involvement, a Project Notification Form will be required to initiate formal MHC review.

8.5 Wellfleet Environmental Protection Bylaw

The Wellfleet Environmental Protection Regulations were promulgated by the Town of Wellfleet Conservation Commission pursuant to the authority granted under the Wellfleet Environmental Protection Bylaw as approved on April 28, 1986 at Town Meeting. These Regulations set forth a public review and decision-making process by which activities affecting Areas Subject to Protection under the Bylaw are to be regulated in order to contribute to the following public interests and values:

- protection of public and private water supply;
- protection of ground water quality and supply;
- flood control;
- erosion and sedimentation control;
- storm damage prevention;
- prevention of pollution;
- protection of land containing shellfish;
- protection of fisheries;
- protection of wildlife habitat

The following Wetland Resource Areas are subject to protection under the Bylaw and Regulations:

- Any freshwater wetland, inland bank, coastal wetland, coastal bank, beach, dune, flat, marsh, wet meadow, bog or swamp;
- Any estuary, creek, river, stream, pond, lake and lands under these bodies of water; land under the ocean;
- Land subject to tidal action, land subject to coastal storm flowage, bordering land subject to flooding, isolated land subject to flooding; and
- All land within 100 (200' for rivers, streams, and fresh creeks) feet of any freshwater wetland, inland bank, coastal wetland, coastal bank, beach, dune, flat, marsh, wet meadow, bog, swamp, estuary, creek, river, stream, pond, lake, and lands under these bodies of water, and land under the ocean.

Is Wellfleet Environmental Permitting required for the Herring River project?

Yes, due to probable unavoidable impacts to state wetlands associated with fill for tidal crossings, dike reconstruction, and other alterations.