



Commonwealth of Massachusetts
Executive Office of Environmental Affairs

**Department of
Environmental Protection**
Metro Boston/Northeast Regional Office

William F. Weld
Governor

Trudy S. Cox
Secretary, EOE

Thomas B. Powers
Acting Commissioner

Mr. Aldo Ghirin
Parks and Recreation Department
1010 Mass. Avenue
Boston, MA 02118

WETLANDS/BOSTON
DEP File #6-577
Revocation of Local Emer-
gency Certification,
New Emergency Certifi-
cation

Dear Sir:

The Department of Environmental Protection, via this letter, clarifies its understanding of the Emergency Certification issued on July 20, 1994 by the Boston Conservation Commission regarding the above-referenced project, Phragmites control along the Muddy River in the City's Fens section, and hereby revokes that certification. This letter is issued after consultation with the Commission and other parties.

The Emergency Certification does not contain an allowed work description; instead, it twice states "(s)ee attachment." According to a July 21, 1994 telephone advisory of Christopher Kelly for the Conservation Commission, that attachment is the July 19, 1994 letter to him from Police Commissioner Paul F. Evans. In that letter, Commissioner Evans refers to an outlined area on "Plate F-2" as the area to be cut (treated). Although the Department is quite cognizant of public safety concerns in this area, we note that the indicated area encompasses a majority of the Phragmites to be treated. Our previous communications with the parties led us to understand that only a narrow "fringe," mostly along walkways, would be treated. Also, Commissioner Evans' letter advises, and the Conservation Commission's Emergency Certification apparently incorporates, the cutting of vegetation and the application of black plastic to a one-half acre "demonstration" area.

It is our opinion that an Emergency Certification for such a large area and poorly-defined activity is not truly justifiable. Therefore, as per MGL c. 131, s.40 and 310 CMR 10.06, the Department hereby revokes the Boston Conservation Commission's Emergency Certification for this project; in its place we issue the following Emergency Certification.

Cutting (no other form of treatment shall be allowed) shall not occur in any area subject to MGL c. 131, s.40 except as described below in this paragraph: All such treatment - of Phragmites only -shall be confined to within twenty (20) linear feet of existing paved walkways or within twenty (20) linear feet of the edge of the Phragmites nearest a paved walkway, whichever distance is greatest. The project area is shown on sheets two and three appended to the project's Notice of Intent, dated March 8, 1994 (postmark). In addition, the Department's intent is to review the work done under this new Emergency Certification within one (1) week of the postmark date of this letter, and to make any additions, deletions, corrections or other modifications to this Certification that the Department feels are warranted, and to issue in writing the modified Certification.

Please note that the Department is quite willing to meet with any of the involved parties, upon a mutually agreed-to date and representation, concerning this matter. It is our hope and anticipation that, by working together, we can reach a solution that is at once environmentally protective, legally responsible, and protective of public safety.

Please do not hesitate to contact myself or Ralph Perkins of my staff should you have any questions or comments.

Sincerely,



William P. Gaughan
Acting Regional Director
Northeast/Metropolitan Region

cc: Conservation Commission, City Hall, Boston, MA 02201

Lauren Dewey Platt, 41 Park Drive, Boston, MA 02215

Captain Charles J. Cellucci, Commander, District Four, Boston
Police Department, 1010 Mass. Avenue, Boston, MA 02118



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JUL 25 1994

Mr. Aldo Ghirin
Parks and Recreation Department
1010 Mass. Avenue
Boston, MA 02118

WETLANDS/BOSTON
DEP File #6-577
Modification of DEP
Emergency Certification

Dear Sir:

The Department of Environmental Protection, via this letter, modifies its Emergency Certification issued on July 22, 1994 regarding the above-referenced project, Phragmites control along the Muddy River in the City's Fens section. This letter is issued after a July 25, 1994 on-site inspection of the project site.

After investigating the site's Northern Basin, the Department is of the opinion that some of the conditions set forth in its July 22, 1994 Emergency Certificate are not entirely appropriate or clear; hence, this letter. The conditions which the Department now imposes upon the project applicant (the Boston Parks and Recreation Department, its employees, agents, assigns, etc.) are as follows.

Starting at the Boylston Street bridge over the Muddy River at the northern edge of the "Northern Basin" and proceeding counter-clockwise: (1) Phragmites may be cut from the existing "informal" footpath northwesterly toward Boylston Street, said cutting to stop at the 4-6 inch (dbh) Maple tree near the terminus of said pathway. (2) From this point southerly past the Victory Gardens to a large black willow tree near Park Drive, there shall be "corridors" or "windows" where all Phragmites, from open water to the Victory Gardens, of fifty feet width, measured parallel to the back (easternmost) Victory Garden fence. These fifty-foot "windows" shall alternate with fifty-foot wide areas of no cutting. However, two exceptions are noted: a) On the "landward" side of the Phragmites stands, cutting of a three- to five- foot wide margin of Phragmites, knotweed, bindweed and other plant species is permitted. b) Limited parts of this area contain Phragmites stands where the distance to open water is greater than fifty feet. Cutting may be fifty feet wide or this distance (open water to the mowed lawn), whichever is greater.

(3) On the South side of the River, this alternating pattern may continue to the large oak tree nearest to Agassiz Road where the River bends to the North. Please note, however, that all "windows" so cut shall be directly opposite (as measured perpendicular to the "thread" of the River) the "windows" created as per (2) above in this paragraph.

(4) From this large oak tree to a point directly riverward of the vehicle gate at the southwestern corner of the chain link fence behind the City fire station, no Phragmites shall be cut.

(5) From said point opposite the gate in (4) above, all Phragmites may be cut, to a point riverward of the northwestern corner of the jersey barrier fire station parking lot extension.

(6) From this point near the jersey barrier corner, the alternating fifty-foot pattern described in (2) above, may be repeated up to the Boylston Street bridge.

(7) All Phragmites in any area cut under this Emergency Certification shall be removed from any and all areas of the Act's (Wetlands Protection Act, MGL c. 131, s. 40) jurisdiction.

(8) "Cutting" described in this document shall refer to the mechanical cutting ONLY of Phragmites sp., and only in the "northern basin" of the Muddy River.

As our earlier Emergency Certification stated, please note that the Department continues to be willing to meet with any of the involved parties, upon a mutually agreed-to date and representation, concerning this matter.

Please do not hesitate to contact myself or Ralph Perkins of my staff should you have any questions or comments.

Sincerely,



William P. Gaughan
Acting Regional Director
Northeast/Metropolitan Region

cc: Conservation Commission, City Hall, Boston, MA 02201
Lauren Dewey Platt, 41 Park Drive, Boston, MA 02215
Captain Charles J. Cellucci, Commander, District Four, Boston
Police Department, 1010 Mass. Avenue, Boston, MA 02118
Thomas Powers, Acting Commissioner, DEP, 1 Winter Street,
Boston, MA 02108
Carl Dierker, Acting Director, DEP Wetlands and Waterways, 1
Winter Street, Boston, MA 02108



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Thomas B. Powers
Acting Commissioner

JUL 27 1994

Lauren Dewey Platt
41 Park Drive
Boston, MA 02215

RE: WETLANDS/BOSTON
DEP File #6-577
Acceptance of Appeal

Dear Madam:

The Department of Environmental Protection is in receipt of the appeal dated July 18, 1994 (hand delivery) regarding the above-referenced wetlands project, Phragmites control near the Muddy River. This appeal was signed by sixteen residents of Boston, and you were indicated as being the contact person.

Your appeal is accepted, and this Department, under the provisions of General Laws, Chapter 131, Section 40, will schedule in the near future a field investigation with you and all concerned parties, to determine if the area is significant to the interests of the Act and to informally discuss the relevant issues with parties to the appeal.

No activity, other than that specifically allowed under the Department's most recent Emergency Certification, may commence on any portion of the project subject to the jurisdiction of Chapter 131, Section 40 until the Department issues a Superseding Order of Conditions.

On a related matter, all parties are advised that, before a Superseding Order of Conditions may be issued, a MEPA (MGL c. 30, ss. 61-62H; 310 CMR 11.00 et seq.) final certificate must be obtained. Accordingly, it is the recommendation of this Department that the applicant (i.e., the Boston Parks and Recreation Department) should expeditiously contact the Commonwealth's MEPA Unit ((617) 727-5830).

Should you or any party have any questions relative to this matter, please contact Ralph Perkins at 935-2160.

Very truly yours,

James A. Sprague
James A. Sprague
Wetlands Section Chief

Copy List Attached

Copies Furnished

Conservation Commission, City Hall, Boston, MA 02201

Parks and Recreation Department, 1010 Mass. Avenue, Boston, MA
02118

Captain Charles Cellucci, Commander, District Four, Boston Police
Department, 154 Berkley Street, Boston, MA 02116

Thomas Powers, Acting Commissioner, Department of Environmental
Protection, 1 Winter Street, Boston, MA 02108

Carl Dierker, Acting Director, DEP Division of Wetlands and
Waterways, 1 Winter Street, Boston, MA 02108

Andrea Carneiro, DEP Public Affairs Office, 1 Winter Street,
Boston, MA 02108

Judy Barber, DEP Customer Service, 10 Commerce Way, Woburn, MA
01801



The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
100 Cambridge Street, Boston, 02202

March 16, 1995

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT GOVERNOR

TRUDY COXE
SECRETARY

Tel: (617) 727-9800
Fax: (617) 727-2754

FINAL RECORD OF DECISION

PROJECT NAME : Phragmites Control and
Park Restoration Program
PROJECT LOCATION : Back Bay Fens and Riverway,
Boston/Brookline
EOEA NUMBER : 10215
PROJECT PROPONENT : Boston Parks and Recreation
Department
DATE NOTICED IN MONITOR : December 7, 1994

Project Description

The Boston Parks and Recreation Department (BPRD) proposes a multi-phase program in the Back Bay Fens and Riverway to eliminate the growth of the Giant Reed (Phragmites australis), and to revegetate the area with plant species that are native to the area and that were part of the original park design. The goals of the project are to restore a historic landscape to its intended character; to protect public safety by removing the tall, dense Phragmites that can be used as cover by potential criminals; and to restore water flow and flood storage in the Muddy River.

The Back Bay Fens and Riverway are two components of the historic "Emerald Necklace" chain of parks designed by the prominent landscape architect, Frederick Law Olmsted, in the late nineteenth century. The Department of Environmental Management (DEM) Olmsted Landscape Preservation Program, in conjunction with the City of Boston, drafted a Master Plan for restoration of the Emerald Necklace in 1993.

Before the Charles River Dam was constructed in 1910, the Muddy River through this area was tidal, and salt marsh vegetation was dominant where the Phragmites presently grows. There is evidence that Phragmites has been present in the Fens since at least 1951; however, the extent of its growth has increased significantly in recent years.

A number of factors appear to foster the invasive growth of the Giant Reed, most particularly the disturbance of habitat. Because it is tolerant of a broad range of habitats, including brackish environments, it appears to have a competitive advantage over less tolerant plant species. Phragmites, which reproduces by rhizome, by sprouting, and by seed, typically forms very dense stands which can grow up to 20 feet tall.

As described in the Environmental Notification Form (ENF) dated November 21, 1994, there are four major elements in the Phragmites control program, of which the first three are termed a demonstration program:

- 1) Cutting or mowing of 5.2 acres of Phragmites;
- 2) Use of black plastic mulch on 0.5 acres of Phragmites for a minimum of two years, to evaluate its effectiveness in vegetation control;
- 3) Use of the herbicide glyphosate (Rodeo) on 0.5 acres of Phragmites, after the two-year black plastic mulch evaluation program, to evaluate the effectiveness of the herbicide in vegetation control;
- 4) Implementation of a full Phragmites control program using cutting, plastic mulch, or herbicide, with the selection of a method based on the results of the demonstration program.

An additional 1.3 acres of Phragmites located in the Riverway in Brookline may possibly be included in the full vegetation control program, for a total area of 7.0 acres. However, a Notice of Intent has not yet been filed with the Brookline Conservation Commission for that work.

The park restoration program will take place following the demonstration program. Low growing species will be planted in the areas where Phragmites has been removed. Turf areas will be planted with grass, and wetland plants will be placed at the water/upland interface. A maintenance program will then ensue, with regrowth of Phragmites controlled by reapplication of the method that was previously used.

Categorical Inclusion

More than one acre of bordering vegetated wetland will be altered by this project; therefore it is categorically included for the preparation of an Environmental Impact Report, pursuant

to 301 CMR 11.25:

"Projects of the following types and sizes, and needing any agency action or permits, require both an ENF and EIR...

(2) Any project resulting in the dredging, filling, alteration or removal of one or more acres of bordering vegetated wetland or salt marsh, or ten or more acres of any other resource area protected by the Wetlands Regulations (310 CMR 10.00) excluding the buffer zone."

Jurisdiction

This project is being reviewed by MEPA because the Department of Environmental Protection (DEP) must issue a Superseding Order of Conditions under the Wetlands Protection Act (M.G.L. c. 131, s. 40). The demonstration project received an Order of Conditions (OOC), dated July 2, 1995, from the Boston Conservation Commission. The issuance of that OOC was appealed to DEP by a group of 14 citizens. MEPA jurisdiction extends to those aspects of the project that are related to interests protected under the Wetlands Protection Act.

M.G.L. Chapter 91 and its implementing regulations (310 CMR 9.00) regulate activities in certain waterways and all non-landlocked filled tidelands. Although the proposed project is located on filled tidelands, the management of vegetation does not appear to require a Waterways license, based on an informal determination from the Waterways Program (dated December 23, 1994). That determination states, however, that if plant material or bottom sediments within the Muddy River are to be removed, a dredge permit may be needed. Issues related to interests protected under Chapter 91 will fall under MEPA jurisdiction for activities within the Muddy River that must receive Chapter 91 authorization.

Waiver Request

The BPRD has filed a multi-tiered request for a waiver from the requirement to prepare an EIR. The waiver request was discussed at the consultation session, held at the Back Bay Fens on December 20, 1994. It first presents a case for a full waiver, which would cover both the demonstration phases and the full vegetation management and revegetation program. If that waiver is not granted, it requests that a waiver be granted for the demonstration phase (Phase I) of the project (5.2 acres of

cutting/mowing, 0.5 acres of black plastic application, and 0.5 acres of herbicide application). The proponent's waiver request includes the following assertions:

- 1) The preparation of an EIR would create undue hardship, because of the cost to be borne by the City's taxpayers. In addition, an EIR is unnecessary because of the extensive information collected during the 1994 Boston Conservation Commission review. Further, preparation of an EIR will delay the implementation of actions necessary to protect public safety.
- 2) An EIR will not serve to minimize or avoid damage to the environment, because the project will improve wetland resource areas by replacing a monocultural stand of Phragmites with a more diverse planting of native wetland species. The project also will improve public safety and scenic values by replacing the tall Phragmites stands with low-growing plants.
- 3) The demonstration phase of the project (Phase I) will provide information needed for the full program implementation. This information, which would be presented to the Boston Conservation Commission, would address any issues that might be covered in an EIR scope. The Conservation Commission review of the Phase I information will serve to meet MEPA's goals of full disclosure and environmental impact reduction.
- 4) The impacts of the project will be insignificant, because they will be beneficial to the environment.

The BPRD makes four additional arguments that relate to the Phase I waiver request:

- 1) As a demonstration project, the first phase is temporary and does not require implementation of future phases or restrict future impact mitigation. If the full program is not implemented, adjacent Phragmites stands will re-colonize the demonstration plots.
- 2) The impacts of the demonstration project are temporary and insignificant in nature.
- 3) The proponent will commit to completion of an EIR for the future phases of the full program, as well as the demonstration phase impacts, in accordance with a schedule

mutually agreeable to the proponent and the Secretary.

4) The DEP Superseding Order of Conditions for the demonstration phases can include a special condition that no work on the project may proceed after the demonstration phase until both the EIR is submitted by the proponent and a MEPA final certificate is issued by the Secretary.

Criteria for Waiver

The MEPA Regulations (301 CMR 11.18) provide that a waiver may be granted when strict compliance with the regulations will lead to undue hardship and will not serve to minimize or avoid damage to the environment. For categorically included projects, this finding shall be based on one or more of the following circumstances:

- 1) the impacts of the project are insignificant;
- 2) the aspects of the project which cause it to be categorically included are not within the subject matter jurisdiction of MEPA;
- 3) ample and unconstrained infrastructure exists to support the project; and
- 4) the terms agreed to as a condition of the waiver will bring about benefits in excess of those that could be achieved in the absence of a waiver.

Further, when a proponent seeks to proceed with Phase I of a project pending the preparation of an Environmental Impact Report, Phase I must be severable and must not require the implementation of future phases or restrict the ways in which impacts of future phases may be mitigated and the impacts of Phase I, taken alone, must be insignificant.

Findings

My findings relative to the BPRD's request for a waiver for the full project are as follows:

- 1) The impacts of this project have not been demonstrated to be insignificant. Several areas that fall under the jurisdiction of the Wetlands Protection Act and its implementing regulations (310 CMR 10.00) will be altered,

either temporarily or permanently, by the project. These areas include bordering vegetated wetland, bank, and land under water. The proponent argues that the proposed project will qualify as a "resource improvement", as described in 310 CMR 10.53 (4), and therefore will not have to meet the performance standards that are specified for such areas. The DEP Northeast Regional Office, in its comment letter dated January 3, 1995, indicates that it does not have sufficient information at this time to support that position. In addition, comments and documentation that were submitted during the comment period indicate that the area may have significant wildlife habitat value¹.

2) MEPA has subject matter jurisdiction over the aspects of the proposed project that cause it to be categorically included.

3) The proponent has not proposed any terms as a condition of the waiver that will bring about benefits in excess of those that could be achieved in the absence of a waiver.

Based on the above findings, it is my judgment that the waiver request for the full project does not have merit, does not meet the tests established in 301 CMR 11.18, and does not serve to advance the interests of the Massachusetts Environmental Policy Act. Therefore, I do not propose to grant the full waiver that was requested.

The proponent also has requested that I consider the granting of a Phase I waiver for the demonstration phase(s), if I do not grant the waiver for the entire project. As the three elements of the demonstration project each have different potential impacts, and differ in their physical extent, I have examined the case for a Phase I waiver for each of them separately. My findings are as follows:

1) The impacts of the proposed 5.2 acres of Phragmites cutting have not been demonstrated to be insignificant. This area is, for all intents and purposes, the entire extent of

¹ I note that the wildlife habitat values provided by monotypic stands of Phragmites australis are generally held to be inferior to those provided by a more diverse flora. Accepting that changes to the flora of the Back Bay Fens might better achieve certain goals, however, is not inconsistent with accepting the value of the existing environment.

Phragmites growth under the City of Boston's jurisdiction. Any wetland function that the plants might be providing would be completely eliminated, at least in the short term, by the cutting program. However, I believe a case has been made for a lesser amount of cutting or mowing at the edge of the Phragmites stands and in areas near public pathways, to address the concerns of the Boston Police Department about public safety in the parks.

2) The use of black plastic over a 0.5 acre test plot is severable from any future phases, does not require the implementation of future phases, and does not restrict the ways in which impacts of future phases may be mitigated. Impacts of the test plot can be expected to be insignificant, as they are reversible, limited in scope, and confined to the actual test plot and its immediate vicinity.

3) The proponent has agreed to delay the use of the herbicide glyphosate for a minimum of two years. The granting of a Phase I waiver is intended to allow a proponent to proceed with certain parts of a project while an EIR is being prepared. Therefore, I find that the request for a Phase I waiver for a project element that will take place at least two years in the future is inappropriate, as the proponent should have ample time to prepare an impact document during that time.

Based on these findings, I find that the Phase I waiver requests for the following project elements have merit, meet the tests established in 301 CMR 11.18, and will serve to advance the interests of the Massachusetts Environmental Policy Act:

1) The cutting or mowing of Phragmites above the top of bank (as defined in 310 CMR 10.54 (2) (c)) of the Muddy River. Should public safety officials determine that additional mowing is necessary to provide sufficient visibility to deter crime, I am willing to consider, on a site specific basis, the advisability of extending the area subject to the Phase I waiver.

2) The application of black plastic mulch on a 0.5 acre test plot, to evaluate its effectiveness in vegetation control.

Therefore, I grant the Phase I waiver for these two project elements, for which the Department of Environmental Protection may now issue a Superseding Order of Conditions. A scope for an Environmental Impact Report for the remaining portions of the

proposed project will be issued shortly.

March 16, 1995
DATE

Trudy Cox
Trudy Cox

Comments Received on ENF Filing:

Citizens Against the Pesticide Spraying, 12/13/94
Ralph Tiner/EOEA, 12/14/94
Fenway Garden Society, 12/15/94
Boston Redevelopment Authority, 12/16/94
Environmental Diversity Forum, 12/19/94
Restore Olmsted's Waterway, 12/19/94, 1/23/95
Keith K. Davison, 12/20/94
John R. Elwood, 12/20/94
Kenneth Hudson, 12/21/94
DEP/Boston/Waterways, 12/23/94
EarthWorks Action, 12/26/94
DEP/NERO, 1/3/95
Sen. Lois G. Pines, 1/19/95
Brookline Conservation Commission, 1/20/95
Lauren Dewey Platt, 1/23/95
Citizens Against the Pesticide Spraying, 1/24/95
Clean Water Action, 1/24/95
Waterflowers, 1/24/95
Laura Richards, 1/25/95
Steven J. Wolf, 1/25/95
Maura Zlody, 1/26/95
Boston Environment Department, 1/26/95
Phyllis Andersen, 1/26/95
Joseph Barton, 1/26/95
Charles River Watershed Association, 1/26/95
Boston Natural Areas Fund, 1/27/95
Marcus Lisle, 1/27/95
Boston Water and Sewer Commission, 1/27/95
David A. Steinberg, 1/27/95
Fenway Civic Association, 1/27/95
Robert E. Cook, 1/28/95
Boston Parks and Recreation Dept., 1/30/95, 2/3/95
Bernstein, Cushner & Kimmell, 1/30/95
Friends of the Muddy River, 1/30/95
MACC, 1/30/95

Shary Page Berg, 1/30/95

Sen. Dianne Wilkerson, and Representatives Byron Rushing, Paul Demakis, John A. Businger, Charlotte Ritchie, Steven A. Tolman, Salvatore F. DiMasi, 1/30/95

MassPIRG, 1/30/95

Clean Up Hazardous Waste, 1/30/95

Conservation Law Foundation, 1/30/95

Andrew McLeod, 1/30/95

Late Comment:

Helen Cox, 2/10/95

Comments Received on the Draft Record of Decision:

Kenneth Hudson, 2/25/95

Boston Redevelopment Authority, 2/28/95

Brendan J. Donovan, 3/1/95

Boston Natural Areas Fund, 3/7/95

Brookline Conservation Commission, 3/7/95

Bernstein, Cushner & Kimmell, 3/7/95

Boston Parks and Recreation Department, 3/8/95

TC/JGH/jh