

DECISION ON THE TOWN OF NANTUCKET'S  
REQUEST FOR APPROVAL  
OF THE  
NANTUCKET AND MADAKET MUNICIPAL HARBOR PLAN  
PURSUANT TO 301 CMR 23.00

December 21, 2009  
Commonwealth of Massachusetts  
Executive Office of Energy and Environmental Affairs  
Ian A. Bowles, Secretary

## I. INTRODUCTION

Today, as Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (EEA), I am approving, the Nantucket and Madaket Harbors Action Plan (“Plan”) dated May 2009. This Decision presents a synopsis of Plan content and my determinations on how the Plan complies with the standards for approval set forth in the Municipal Harbor Planning regulations at 301 CMR 23.00 et seq.

Pursuant to the review procedures contained therein, the Town of Nantucket (“Town”) submitted the Plan in June 2009. Following a review for completeness, a notice of public hearing and 30-day opportunity to comment was published in the *Environmental Monitor* dated June 11, 2009. Oral testimony was accepted during a public hearing held in the Town of Nantucket on June 22, 2009, and two written comment letters were received prior to the close of the public comment period on July 10, 2009. The review process led on my behalf by the Massachusetts Office of Coastal Zone Management (CZM), included consultation between staff of CZM, the Waterways Regulation Program of the Department of Environmental Protection (DEP), and the Steamship Authority (SSA). The SSA is a “state agency” as the term is defined in 301 CMR 23.03 and owns and operates the Nantucket ferry terminal on real property located within the harbor planning area. The Plan review followed the administrative procedures set forth at 301 CMR 23.04 and in accordance with the standards in 301 CMR 23.05. In reaching my approval decision, I have carefully considered the oral and written testimony submitted by the public during these respective comment periods.

As shown in Figures 1 and 2, the geographic area covered by the Plan includes all of the land and water areas of Nantucket and Madaket Harbors, and also extends to the west of Madaket Harbor to include the Tuckernuck and Muskeget islands. The planning area is extensive and includes a wide variety of natural resources along with areas of densely developed commercial and residential waterfront.

The Plan reflects significant effort on the part of the Town and many members of the public who participated in the public process. I would like to commend the efforts of the members of the Nantucket and Madaket Harbors Plan Review Committee, elected officials, community residents, and all others who volunteered their time and effort over the course of many meetings.

Figure 1. Nantucket Harbor Planning Area

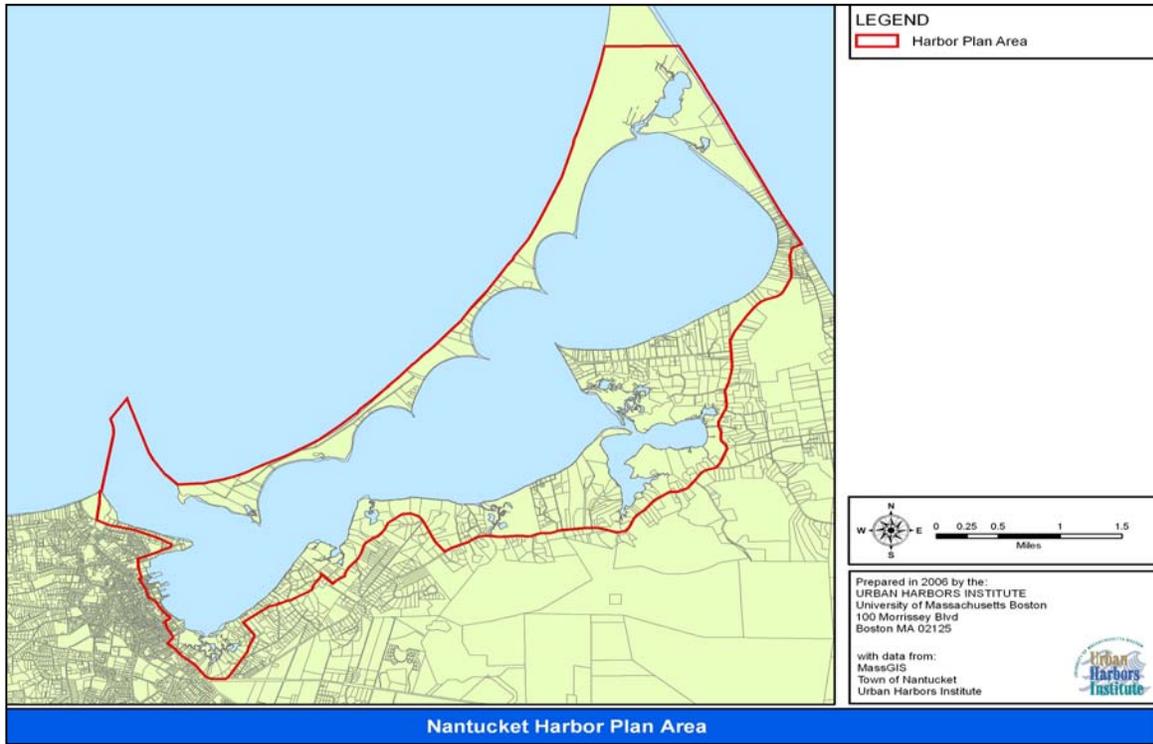
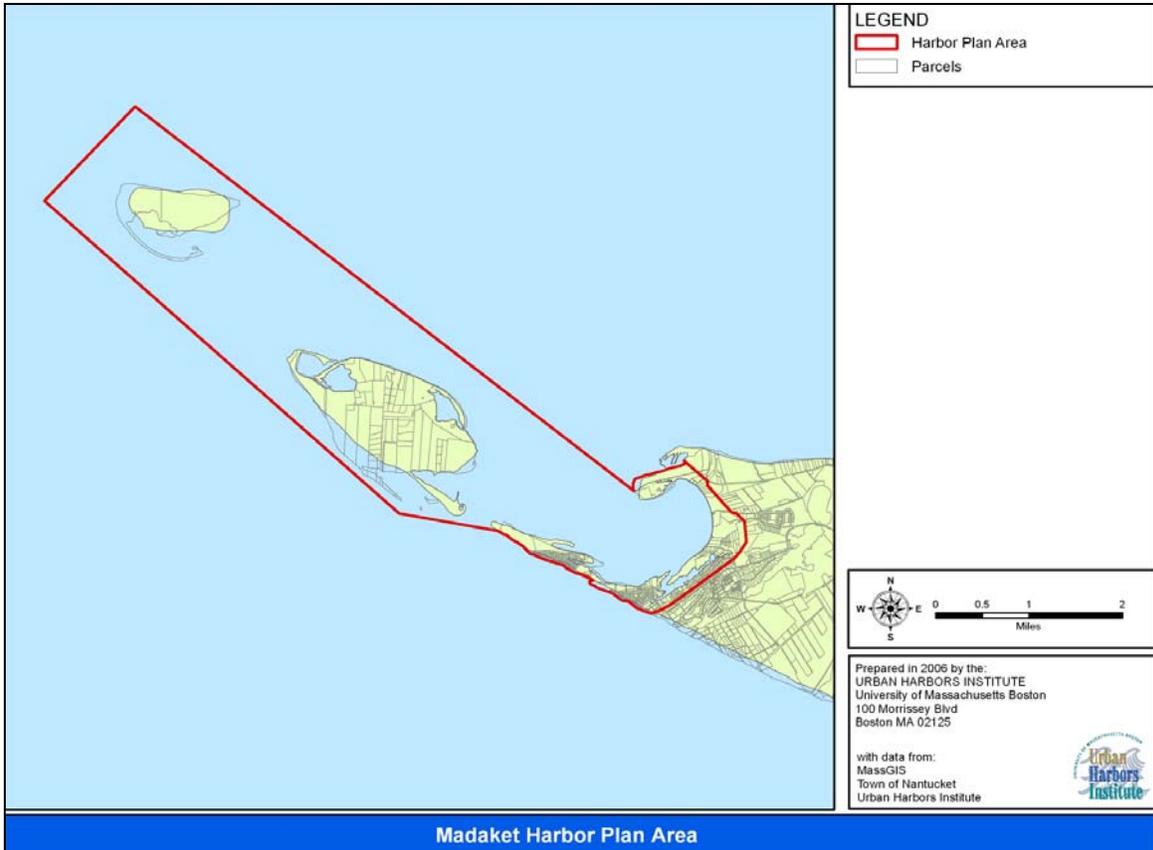


Figure 2. Madaket Harbor Planning Area



## II. PLAN CONTENT

The Municipal Harbor Planning Regulations (301 CMR 23.00 et seq.) establish a voluntary process under which cities and towns may develop and submit Municipal Harbor Plans to the EEA Secretary for approval. These plans serve to promote and implement a community's planning vision for their waterfront and to inform and guide state agency decisions necessary to implement such a vision. Specifically, approved Municipal Harbor Plans provide licensing guidance to DEP in making decisions pursuant to MGL Chapter 91 (c. 91) and the Waterways Regulations (310 CMR 9.00 et seq.). Approved harbor plans may establish alternative numerical and dimensional requirements (e.g., substitute provisions) to the requirements specified by the Waterways Regulations as well as specify provisions that amplify any of the discretionary requirements of these regulations.

On April 16, 2006, the Nantucket Board of Selectmen voted to prepare the Nantucket and Madaket Harbors Action Plan in accordance with procedures and requirements for approval of a municipal harbor plan as established in 301 CMR 23.00 et seq. The stated focus of the Plan was to identify the community's goals, objectives and recommendations for guiding public and private use of the land and water of its harbor areas and to establish an implementation program to achieve these objectives. The Plan was prepared under the auspices of the Nantucket Board of Selectmen and guided by the Nantucket and Madaket Harbors Plan Review Committee.

The Plan builds upon the first Harbors Action Plan, which was prepared in 1993 but was not submitted for review as a state approved Municipal Harbor Plan. The planning process began with a review of the 1993 Harbors Action Plan and an assessment of what had been accomplished in the succeeding years. Many of the goals and action items were successfully implemented, while others are ongoing and some were never implemented. The 2009 Nantucket and Madaket Harbors Action Plan carries forward a number of recommendations from the 1993 Harbors Action Plan that remain important and identifies new recommendations that have arisen in the intervening years.

The Plan focuses on the improvement of public access, maintaining and improving appropriate water-dependent uses within the harbors, and protection of natural resources and water quality as it relates to commercial and recreational shellfishing. The Plan includes a comprehensive inventory and analysis of harbor resources and uses, and identifies specific goals, objectives and recommendations for these three focus areas.

### III. STANDARDS FOR APPROVAL

The Plan contains the Town's planning vision and other specifics to provide guidance on use and development within the harbor planning area. It should be noted, however, that while these elements are commendable and important to the planning area, my approval today is bounded by the authority and standards as contained in 301 CMR 23.00 et seq. (Review and Approval of Municipal Harbor Plans) and is applicable only to those discretionary elements of the Chapter 91 Waterways regulations that are specifically noted in this Decision. This Decision does not supersede separate regulatory review requirements for any activity.

#### A. Consistency with CZM Program Policies and Management Principles

The federally-approved CZM Program Plan establishes 20 enforceable program policies and 9 management principles which embody coastal policy for the Commonwealth of Massachusetts. The following is a brief summary of the Policies and Management Principles applicable to the Plan:

- Water Quality Policy #1: Ensure that point-source discharges in or affecting the coastal zone are consistent with federally approved state effluent limitations and water quality standards.
- Water Quality Policy #2: Ensure that non-point pollution controls promote the attainment of state surface water quality standards in the coastal zone.
- Habitat Policy #2: Restore degraded or former wetland resources in coastal areas and ensure that activities in coastal areas do not further wetland degradation but instead take advantage of opportunities to engage in wetland restoration.
- Protected Areas Policy #3 – Ensure that proposed developments in or near designated or registered historic districts or sites respect the preservation intent of the designation and that potential adverse effects are minimized.
- Coastal Hazards Policy #1 – Preserve, protect, restore, and enhance the beneficial functions of storm damage prevention and flood control provided by natural coastal landforms, such as dunes, beaches, barrier beaches, coastal banks, land subject to coastal storm flowage, salt marshes, and land under the ocean.
- Coastal Hazards Policy #2 – Ensure construction in water bodies and contiguous land area will minimize interference with water circulation and sediment transport. Approve permits for flood or erosion control projects only when it has been determined that there will be no significant adverse effects on the project site or adjacent or downcoast areas.
- Ports Management Principle #1 – Encourage, through technical and financial assistance, expansion of water dependent uses in designated ports and developed harbors, re-development of urban waterfronts, and expansion of visual access.

- Public Access Policy #1 – Ensure that developments proposed near existing public recreation sites minimize their adverse effects.
- Public Access Management Principal #1 – Improve public access to coastal recreation facilities and alleviate auto traffic and parking problems through improvements in public transportation. Link existing coastal recreation sites to each other or to nearby coastal inland facilities via trails for bicyclists, hikers, and equestrians, and via rivers for boaters.
- Public Access Management Principal #2 – Increase capacity of existing recreation areas by facilitating multiple use and by improving management, maintenance, and public support facilities. Resolve conflicting uses whenever possible through improved management rather than through exclusion of uses.
- Public Access Management Principal #3 – Provide technical assistance to developers of private recreational facilities and sites that increase public access to the shoreline.
- Public Access Management Principal #4 – Expand existing recreation facilities and acquire and develop new public areas for coastal recreational activities. Give highest priority to expansions or new acquisitions in regions of high need or limited site availability. Assure that both transportation access and the recreational facilities are compatible with social and environmental characteristics of surrounding communities.
- Energy Management Principle #1 – Encourage energy conservation and the use of alternative sources such as solar and wind power in order to assist in meeting the energy needs of the Commonwealth.

The aforementioned policies are relevant to the major issues identified in the Plan: maintenance and improvement of water dependent uses; public access; and protection of natural resources and water quality. Based on review of the documentation provided by the Town, and affirmation by CZM of the Plan's consistency with the relevant policies, and as required by 301 CMR 23.05(1), I find the Plan has met this standard.

#### B. Consistency with Tidelands Policy Objectives

As required by 301 CMR 23.05(2), I must also find that the Plan is consistent with state tidelands policy objectives and associated regulatory principles set forth in the state Chapter 91 Waterways regulations of DEP (310 CMR 9.00 et seq.). As promulgated, the Waterways regulations provide a uniform statewide framework for regulating tidelands projects. Municipal Harbor Plans and associated amendments present communities with an opportunity to integrate their local planning goals into state c.91 licensing decisions by proposing modifications to these uniform standards through the amplification of the discretionary requirements of the Waterways regulations or through the adoption of provisions that, if approved, are intended to substitute for the minimum use limitations or numerical standards of 310 CMR 9.00. The approved substitute provisions of

Municipal Harbor Plans, in effect, allow DEP to waive specific use limitations and numerical standards affecting projects in tidelands in favor of the modified provisions specified in an approved Municipal Harbor Plan.

The Plan contains clear guidance that will have a direct bearing on DEP licensing decisions within the harbor planning area. Included in this guidance are:

- Provisions that amplify upon certain discretionary requirements of the Waterways regulations.

These provisions are each subject to the approval criteria under 301.CMR 23.05(2)(b)-(e), and as explained below, I find that all such criteria have been met.

#### Evaluation of Proposed Amplification Provisions

The Municipal Harbor Plan regulations at 301 CMR 23.05(2) (b) require me to find that any provision that amplifies a discretionary requirement of the Waterways regulations will complement the effect of the regulatory principle(s) underlying that requirement. Upon such a finding, DEP is committed to “adhere to the greatest reasonable extent” to the applicable guidance specified in such provisions, pursuant to 310 CMR 9.34(2)(b)(2). The Plan contains three provisions that will have significance to the Chapter 91 licensing process as an amplification, pursuant to 301 CMR 23.05(2)(b). My determination of the relationship of these proposed local amplification provisions to c.91 standards in accordance with the MHP regulatory guidance is discussed below. A summary of the proposed amplification provisions for the 2009 Plan is provided below in Table 1.

#### **Harbor Overlay District**

The c.91 standard at 310 CMR 9.51 states that “...a nonwater-dependent use project on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use”. The Plan proposes an amplification to this c.91 standard through the implementation of the standards and regulations set forth in Chapter 139-12 of the Nantucket Zoning Bylaw for the Harbor Overlay District. This District includes the downtown commercial waterfront area of Nantucket Harbor and was created to protect existing water-dependent uses and to ensure that these uses are not displaced by new nonwater-dependent uses. This zoning district was adopted by the town on April 8, 2008. Zoning regulations for the Harbor Overlay District require that any new non-water dependent use or extension of an existing non-water dependent use shall not: displace or significantly disrupt an existing water dependent use; unreasonably disrupt an

existing water-dependent use; unreasonably diminish the capacity of the site to accommodate future water-dependent uses; and impede or infringe upon existing public access. Additionally, Chapter 139-12,(i),(3) of the Nantucket Zoning Bylaw specifies commercial uses that are allowed within the Harbor Overlay District.

The proposed amplification will provide guidance to DEP when licensing projects in the Harbor Overlay District by ensuring that any licensed use is compatible with, supports, or otherwise does not interfere with the water-dependent uses on a site. I find the proposed amplification achieves local goals while complementing the underlying principles of the applicable c.91 regulatory standards.

### **Water-Dependent Uses not Consistent with Plan**

The c. 91 standards at 310 CMR 9.35(2) and 9.51(1) - (2) collectively and generally protect the navigational rights of the public and conserve areas for water-dependent uses. The Plan proposes an amplification to these c.91 standards through the implementation of the standards and regulations set forth in Ch 139-12,(i),(5) of the Nantucket Zoning Bylaw. In an effort to preserve and protect the island's traditional water-dependent commercial uses located within the Harbor Overlay District this zoning regulation includes a list of water-dependent uses that are not consistent with these traditional water based uses, and that have been prohibited. The uses were determined to conflict with the traditional and historic use and character of the Harbor Overlay District. This list of prohibited uses includes:

- Cruise ship terminals or support services;
- Personal watercraft rental; and
- New facilities of private tenancy.

These provisions reflect the Town's goals for the future development of the commercial waterfront within Nantucket Harbor and represent a long-term, comprehensive "vision" for protection of the historic character of this planning area. The proposed amplification will provide guidance to DEP when licensing projects by prohibiting specific uses, and I find that this provision complements the underlying principles of the applicable c.91 regulatory standards.

### **Private Dock Prohibition**

The c.91 standards at 310 CMR 9.35 (2) - (3) generally hold that potential projects must not obstruct or interfere with the public's fishing, fowling, or navigation rights, and contain provisions to protect traditional locations used extensively by the public. The Plan proposes an amplification

to these c.91 standards through the implementation of the standards and regulations set forth in Chapter 139-22 of the Nantucket Zoning Bylaw. This local bylaw contains a prohibition on all new private docks and piers but exempts certain public or commercial water-dependent dock and pier projects within the Harbor Overlay District. This prohibition serves to protect and enhance the ability of the public to access shellfishing areas along the shoreline, to navigate along the shoreline, to protect water-quality and natural resources, and to preserve the traditional community character. Shellfishing is an integral part of the Nantucket community, and its importance is reflected throughout many sections of the Plan. Commercial shellfishing is an important industry on the island with significant annual revenue. Recreational shellfishing is an historic pastime enjoyed by large numbers of families. The prohibition of private docks was developed out of concern that the construction of these docks would interfere with and negatively impact commercial and residential shellfishing activities. Most shellfishing occurs in shallow waters adjacent to the shoreline. A proliferation of private docks would make it difficult for shell fisherman to fish in and around these structures, and activities from the construction, footprint, and use of these structures has potential to impact the natural habitat and water quality in the area.

The town recognizes the importance of water access to private waterfront property owners, and while prohibiting private docks and piers, gives each property owner the right to two moorings for private recreational boat use. Moorings are the traditional vessel berthing arrangement on Nantucket and do not pose the same conflicts with shellfishing and shoreline access that docks and piers create. The town also recognizes the importance of docks and piers as integral part of commercial water-dependent activities and clearly distinguishes commercial dock and piers that support water-dependent uses from those that serve private recreational uses. The prohibition of private docks includes an exemption for the expansion of existing commercial docks and piers and those for governmental and public entity use located within the Harbor Overlay District. Additionally, multiple public boat ramps and landings are located within Nantucket and Madaket Harbors, and these facilities serve to ensure that public boating access is protected throughout the harbor planning area.

The Plan clearly stresses the importance of preserving these significant local water-dependent uses. The proposed amplification will provide guidance to DEP when licensing projects by prohibiting private docks or piers that may interfere with local shellfishing activities or navigation,

and I find that this provision adequately complements the underlying principle of the applicable c.91 regulatory standards.

Table 2 — Summary of Amplifications

Regulatory Provision	Chapter 91 Standard	Amplification
310 CMR 9.51(1)-(2)	<p>A nonwater-dependent use project on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use.</p> <p>Facilities of Private Tenancy must be developed in a manner that prevents significant conflicts in operation with water-dependent uses that can reasonably be expected to locate on or near the water.</p>	<p>The amplification of these requirements prohibits any new non-water dependent use, or extension of an existing non-water dependent use, that would:</p> <ol style="list-style-type: none"> <li>1. displace or significantly disrupt an existing water dependent use;</li> <li>2. unreasonably disrupt an existing water-dependent use;</li> <li>3. unreasonably diminish the capacity of the site to accommodate future water-dependent uses; and</li> <li>4. impede or infringe upon existing public access.</li> </ol>
310 CMR 9.51(1)-(2); and 310 CMR 9.35(2)(a)	<p>A nonwater-dependent use project on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use.</p> <p>Facilities of Private Tenancy must be developed in a manner that prevents significant conflicts in operation with water-dependent uses that can reasonably be expected to locate on or near the water.</p> <p>The project shall not significantly interfere with public rights of navigation.</p>	<p>The amplification of these requirements prohibits certain water-dependent uses determined in the Plan to conflict with the traditional and historic use and character of the Harbor Overlay District, including:</p> <ul style="list-style-type: none"> <li>• Cruise ship terminals or support services;</li> <li>• Personal watercraft rental; and</li> <li>• New facilities of private tenancy.</li> </ul>
310 CMR 9.35(3)(a)1 and 2  310 CMR 9.35(2)(a)	<p>The project shall not:</p> <ol style="list-style-type: none"> <li>1. pose a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site;</li> <li>2. result in the elimination of a traditional fishing or fowling location used extensively by the public; or</li> <li>3. interfere with public rights of navigation</li> </ol>	<p>The amplification of these requirements prohibits the construction of new private docks or piers but exempts certain public or commercial water-dependent dock and pier projects within the Harbor Overlay District.</p>

### C. Implementation Strategies

Pursuant to 301 CMR 23.05(4), the Plan must include enforceable implementation commitments to ensure that, among other things, all measures will be taken in a timely and coordinated manner to offset the effect of any plan requirement less restrictive than that contained in 310 CMR 9.00. The plan contains provisions that will be implemented through the recently adopted amendments to the underlying zoning. Based on the information provided in the Plan and as discussed above, I believe that no further implementation commitments on the part of the Town are necessary, and I find that this approval standard has been met.

### IV. EFFECTIVE DATE AND TERM OF APPROVAL

This Decision shall take effect immediately upon issuance on December 21, 2009. As requested by the Town of Nantucket, the Decision shall expire 10 years from this effective date unless a renewal request is filed prior to that date in accordance with the procedural provisions of 301 CMR 23.06. No later than 6 months prior to such expiration date, in addition to the notice from the Secretary to the City required under 301 CMR 23.06(2)(b), the Town shall notify the Secretary in writing of its intent to request a renewal and shall submit therewith a review of implementation experience relative to the promotion of state tidelands policy objectives.

### V. STATEMENT OF APPROVAL

Based on the planning information and public comment submitted to me pursuant to 301 CMR 23.04 and evaluated herein pursuant to the standards set forth in 301 CMR 23.05, I hereby approve the 2009 Nantucket & Madaket Harbor Action Plan as the Municipal Harbor Plan for the Town of Nantucket, subject to the following conditions:

1. In accordance with Chapter 139-12(3) of the Nantucket Zoning Bylaw, DEP shall not issue a license allowing a conversion of any currently licensed (as of the date of this decision) commercial water-dependent use to a new or expanded nonwater-dependent use in the Town's Harbor Overlay District.
2. In accordance with Chapter 139-22 of the Nantucket Zoning Bylaw, DEP shall not issue a license for a private dock or pier, except for those allowed under the exemptions specified for projects located within the Harbor Overlay District.
3. In accordance with Chapter 139-12, (i), (5) of the Nantucket Zoning Bylaw, DEP shall not issue a license for the following uses: cruise ship terminals or support services, personal

watercraft rental, and new facilities of private tenancy in the Town's Harbor Overlay District.

4. The City shall prepare a final, approved Nantucket Harbor Plan ("Approved Plan") to include:
  - a. The Plan dated June 2009 as amended during the consultation period; and
  - b. This Approval Decision.

Copies of the final, approved plan shall be provided to CZM and DEP's Waterways Program, kept on file at the Nantucket Town Clerk's office and Harbormaster Office, and made available to the public through the Town's website and copies at the public library. For Waterways licensing purposes, the Approved Plan shall not be construed to include any of the following:

1. Any subsequent addition, deletion, or other revision to the final Approved Plan, except as may be authorized in writing by the Secretary as a modification unrelated to the approval standards of 301 CMR 23.05 or as a plan amendment in accordance with 301 CMR 23.06(1); and
2. Any provision which, as applied to the project-specific circumstances of an individual license application, is determined by DEP to be inconsistent with the waterways regulations at 310 CMR 9.00 or with any qualification, limitation, or condition stated in this Approval Decision.

In a letter from the Waterways Program Chief dated December 10, 2009, DEP has expressed support for approval of the renewal Plan and stated that the Plan will become operational for waterways licensing for all applications upon the effective date of Plan approval and in accordance with the conditions above. Subsequent to Plan approval, a determination of conformance with the Plan will be required for all proposed projects in accordance with 310 CMR 9.34(2).

*Philip Liphth*

for Ian A. Bowles  
Secretary of Energy and Environmental Affairs

*December 21, 2009*

Date