

Mystic River Watershed Initiative Steering Committee
November 30, 2017

November 30, 2017 | 10:00am-12:00 pm
Arlington Town Hall, Arlington, MA
Meeting Summary
Prepared by the Consensus Building Institute

Present: Todd Borci (EPA), Kathy Bull (Medford resident), Bryan Carignan (Town of Winchester), Wayne Chouinard (Town of Arlington), Will Copithorne (Town of Arlington), Mel Coté (EPA), Ona Ferguson (CBI), Hamilton Hackney (Dain, Torpy, Le Ray, Wiest & Garner), Patrick Herron (MyRWA), Alicia Hunt (City of Medford), Marissa Liggiero (Town of Lexington), Lise Marx (MWRA), Ellen Mass (Friends of Alewife Reservation), Carole McCauley (Northeastern / MassBays), David Mendelsohn (FEMA Mitigation Division), Hillary Monahan (MWRA), Karen Peltó (EEA/MassDEP), Tony Rodolakis (Amec Foster Wheeler), Beth Rudolph (Town of Winchester), Matt Shuman (Watertown), Michael Sprague (Town of Lexington), Ivey St. John (Charlestown Waterfront Coalition), Matt Tessier (US Army Corps of Engineers), Caitlyn Whittle (EPA), Catherine Daly Woodbury (City of Cambridge).

Next Meetings: The next Steering Committee meetings will be held on March 15 and June 14.

Action Items

- Coordinating Team – Develop next meeting agenda. Suggested topics: EOEEA and MEMA’s new integrated climate mitigation and hazard planning process (federal and community perspectives). Malden River activities. MyRWA Mystic Phosphorous alternative TMDL. Invite the new EPA regional administrator to an upcoming meeting.
- Mel Cote
 - Distribute the report by the Army Corps on their modeling of sediment settling.
 - Circulate information on the new EPA Region 1 Administrator.
- Notify Caitlyn or Ona if you know of any conflict with the proposed 2018 Steering Committee dates (March 15, June 14, September 13 and November 29).
- Let Caitlyn Whittle know if you want to talk with Mitch Hartley (USFWS) about the upcoming RFP.

Welcome

Patrick Herron, Mystic River Watershed Association and Mystic River Watershed Initiative Steering Committee co-chair, welcomed participants and thanked the City of Arlington for hosting and providing refreshments. Presentation slides from this meeting can be found at: <https://mysticriver.org/epa-steering-committee>. The EPA project website is available at: <https://www.epa.gov/mysticriver/mystic-river-watershed-initiative#MeetingsEvents>

Regional Project: Boston Harbor Dredging

Matt Tessier, Project Manager, Army Corps of Engineers, New England District presented on the status of the Boston Harbor federal maintenance and improvement dredging projects, including the construction and use of a confined aquatic disposal (CAD) cell and future dredging plans.

Maintenance Dredging - The maintenance dredging project has two phases.

- (1) Construction of a CAD cell (completed fall 2017) just downstream of the confluence of the Mystic and Chelsea rivers. The Army Corps just finished using clamshell mechanical dredging (buckets on a barge) to remove 1M cubic yards (cy) of Boston blue clay, sand and gravel, and creating a 1.2M cy disposal area. The CAD cell is by the Little Mystic River and the Spaulding Rehab Center. The work was done by Great Lakes Dredge and Dock. It began in July 2017 and was completed in October. All the material (clean Boston blue clay left by glaciers) was placed in the north end of the Mass Bay Disposal site. They hit hard material between 65-100' depth. 65 feet was the depth of the more shallow portion of the CAD cell, the other portion was deeper. The CAD cell was constructed in dredge lanes approximately 80-100' wide. A participant asked if there was going to be a new CAD cell in the Chelsea River and Matt said no, but that there is an existing one with some volume still remaining.
- (2) Maintenance dredging (completed fall 2017). The project has conducted dredging from near Logan runways #4 and #27 up to the inner confluence of the Mystic and Chelsea rivers. The dredging restored the depths of the Boston Harbor Federal Navigation project to authorized depth. This sediment was disposed of in the CAD cell because it wasn't suitable for open ocean disposal. Once the sediment settles in the CAD cell (3-5 years from now), it will be capped with three feet of a granular material. All the dredged material is sediment from around the harbor and it has been removed and placed in the CAD cell. There are just a few final small pieces to be complete.

People often imagine that dredge material floats to the bottom and disperses. Matt described predictive modeling the Army Corps conducted of settling to determine how far sediments in Boston Harbor would potentially migrate from the cell. The model with real sampling shows that within an hour of releasing materials from a scow (the floating barge/dump truck that opens in the middle to dump materials), turbidity returns to near background levels. The fine sediment tends to sit together, and within an hour the water is clear again. The scow is actually dropping sediment at 25' deep, and the CAD cell is 40' deep, so there isn't that much distance for the sediment to fall. They moved approximately 700K cy of maintenance material within two months, which is four to five loads a day, a very high rate. One participant asked if Matt thought there was any reason to worry about suspended sediments for people who think about the health of the Mystic and Matt said no, the sediments they observed during the project material placement were contained by the CAD cell walls.

Deep Draft Improvement Dredging Project

Today cargo ships are landing in NYC and trucks are trucking goods up to New England from NYC. This deeper Boston port will take those trucks off the road, though likely more trucks driving out of the Boston to New England from the terminal. A participant noted that Boston won't get the bigger Panamax ships, it will get the smaller ships that were coming into New York that get squeezed out there. The Panamax ships cannot come into Boston because the cranes that unload them are so huge they interfere with Boston Logan flight paths.

The Army Corps is working to widen and deepen to 51' the main ship entrance channel that comes from offshore into the harbor and widen and deepen to 47' portions of the main ship channel, president roads anchorage and the reserved channel where the container ships come in to Massport's Conley Terminal. The purpose of the effort is to provide navigational improvements to Boston Harbor which matter economically due to cargo ships. They are using mechanical dredging. 12M cy of sediment will be moved and disposed of at the Mass Bay Disposal Site and the industrial waste site. Most of the 12M cy is

“ordinary material” – clays, silts, gravel and sands, and 1.2M is hard material (rock and till combined), plus 100K cy of “fast or hard rock,” which will require blasting to be removed. The current contract doesn’t allow for that blasting yet – it will require a huge excavator on a barge with hydraulic force, so through their phased contracting the Army Corps forced the contractors to remove as much rock mechanically as possible, which will then be followed with a blasting contract for the remaining rock material. The Army Corps was committed to blasting only where blasting was essential. Those areas are scattered around the area. A participant asked if blasting creates an explosion in the river and Matt replied that it is either that or hydraulic insertion of fluid to cause the rock to break off.

The disposal haul route is 25 miles offshore, leaving from near Deer Island. The sediments from this project will cap an old industrial waste site that is currently on the bottom of the harbor in/adjacent to the industrial disposal site. Per Mel Cote, there are trawl marks right across those barrels indicating interaction with fishing, so this new layer will provide some protection for fishermen from pulling up radioactive barrels.

Matt noted this list of constraints that shape the project: a very active navigation channel, the airport, times of year they can’t dredge (fish migration), other projects, environmental constraints, and other projects like Deer Island Cable work to Deer Isle. The partnership agreement was signed in September 2017 between the Army Corps and Massport. The mechanical dredging contract should be awarded in February 2018, with dredging beginning in summer 2018 and an end date of 2021 or so. The Army Corps is overseeing the work, and EPA is putting out a rule to encompass the extra area near the disposal site and determining suitability of the sediment for particular disposal locations.

Participants asked the following questions, with Matt’s answers in italics.

- What goes in the CAD cell versus out in the offshore area? *What is sitting now on the bottom of the harbor goes in the CAD cell. It is dark, loose, fine, easy to remove. Improvement material goes offshore and is grey, clay, light colored, parent material, easy to distinguish from maintenance material.*
- How often will maintenance dredging be required? *Boston doesn’t accrete fast – the late 1960s or early 1970s is the last time Army Corps had to do a big dredge.*
- What kind of impact will this have on the Mystic River Watershed? *Not much beyond users being asked to temporarily stay out of the way of the work. The result should be a cleaner harbor.*
- How long has the industrial waste “disposal area” been used? Mel Cote answered that it has been used for at least a century and was initially just a dump outside the harbor. He guesses it was in the 1950s when they started to take the waste further out (identifying the “foul” area so fishermen wouldn’t go there and foul their gear).

Massachusetts Small MS4 General Permit Litigation Update (Stormwater Permits)

Tony Rodolakis introduced Hamilton Hackney, attorney at Dain, Torpy, Le Ray, Wiest & Garner, P.C, a legal specialist in the field of environmental law on the Clean Water Act. Ham presented the various court cases and next steps on the Region 1 MS4 permit process. He reviewed the basis for the appeals and lawsuit, the potential manner in which they are likely to be handled by the Federal Court system and the role that MassDEP and EPA play in the process. See his slides at <https://mysticriver.org/epa-steering-committee> for full details.

Background of federal regulations of stormwater management – In 1975, USEPA promulgated regulations exempting stormwater discharges from NPDES permitting as long as those discharges were not contaminated by industrial or commercial activity. EPA has taken various action to regulate stormwater

discharges since then. In 1987, Congress amended the Clean Water Act with the Water Quality Act of 1987, clarifying who needs discharge permits when. This led to Phases I and II regulations from EPA in 1990 and 1999. 1999 was the first time towns with populations of under 100K residents were required to have MS4s.

MS4 Rulemaking Process in MA - In 2003, USEPA issued the first general permit to regulate cities and towns as well as federal and state agency MS4 operators in NH and MA. It expired in 2008. Today the 2003 permit remains in effect and will continue to regulate MS4 discharges until another rule goes into effect. USEPA initially proposed replacing the 2003 Small MS4 general permit with three separate ones. Draft permits were issued in 2010 and public comment taken through 2011. EPA then made revisions and reissued it in 2014. In 2016, the MA Small MS4 General Permit was signed to be effective as of July 1 2017. It covers ~260 municipalities in MA.

Related Litigation – USEPA’s efforts to regulate stormwater discharges over 40 years have triggered numerous lawsuits.

- *Fowler v. EPA* – In 2009, environmental advocacy groups sued USEPA for failing to adequately regulate stormwater discharges into the Chesapeake Bay. The settlement included EPA agreeing to develop national post-development stormwater regulations and incorporate them into the MS4 general permits. After four years, EPA abandoned the idea of developing a uniform regulation that would apply nationally as too complex, saying that promotion of green infrastructure could be a meaningful substitute for regulation.
- The Conservation Law Foundation (CLF) and CRWA (Charles River Watershed Association) filed two suits in RI and MA arguing that under the residual designation authority, USEPA had a non-discretionary duty to require permits for unregulated commercial, industrial and institutional stormwater dischargers. The case focused on TMDLs as creating triggers for USEPA’s non-discretionary duty. Both cases were dismissed and are on appeal.
- *Waterkeeper Alliance v. EPA* – in 2015, USEPA re-issued the multi-sector general permits for stormwater associated with industrial activities. Environmental advocacy groups filed petitions to review those Industrial Stormwater MSGPs. USEPA settled that case by agreeing to fund technical studies and propose revisions to the 2015 general permit for including more stringent requirements to benchmark monitoring exceedances (looking ahead to the 2020 revision).
- The 2017 Construction General permit was re-issued in January 2017. Both industry trade groups like the National Association of Homebuilders and environmental advocacy groups filed petitions for review.

What next – Groups can seek judicial review or apply for an individual permit then seek EAB administrative review of the individual permit. Under judicial review, there are 120 days to petition for review. The process looks like an appeal, not a trial, with judge making rulings based on what is in the record. Parties submit a statement of the issues. The court establishes a briefing schedule. Oral arguments are held once briefing is completed, and decisions are made typically by a three-judge panel. The court can compel an agency to act or set aside agency actions, findings and conclusions.

What happened here?

- (1) In DC circuit, beginning in 2016, the Center for Regulatory Reasonableness (CRR) filed the first petition for review (*Center for Regulatory Reasonableness v EPA*). CLF moved to intervene and was allowed to. CRR requested that the administrative record be supplemented.

- (2) Four petitions were then filed in the First Circuit (Boston) by the Mass. Coalition for Water Resources Stewardship, the National Association of Home Builders, the City of Lowell, and CLF. The Charles River Watershed Assn intervened to play some role but not as a party.
- (3) The petitions were moved to the DC circuit. More petitions for review have been filed. The NH MS4 permit has also been appealed and those cases have been consolidated with the MA MS4 appeals. As of June 29, 2017, CRR's request to delay the effective date of the MA Small MS4 general permit was granted, so the permits effective date is July 1 2018. USEPA intends to use alternative dispute resolution to resolve the competing issues without further litigation and to line up the effective date of the MA and NH small MS4 general permits. This extension was appealed (Mass Rivers Alliance v. EPA) and was joined by many watershed groups around Massachusetts.

What are the primary issues? There is concern that the MA general permit will become the model elsewhere. Concerns by different groups include:

- Issuance of the general permit exceeds USEPA's statutory authority
- Issuance of the general permit constitutes a de facto revision of 40 CFR Part 122 without proper notice and public comment
- Constitutional challenges – regulation based on location, not impairment, regulatory actions without a rational basis, action exceeding Commerce Clause power.
Water quality-based effluent limitations *in addition to* BMPs subject to the maximum extent practicable limitation. The statute can be read two ways: is it meant to indicate that all provisions are susceptible to the "maximum extent practicable," or can EPA undertake other provisions as they determine is appropriate for control of pollutants? Current MS4 permits say you have to use BMPs, but you aren't required to monitor what is coming out of your outfall to be sure the water quality is sufficient. The fear is that if municipalities don't hit their water quality number, they'll be sued by the agency or CLF, though they don't generate the pollutants they are discharging.
- CLF says that they're concerned there isn't sufficient support for LID/green infrastructure performance standards, they want tighter compliance timelines in the permit, and that there should be clearer and more enforceable requirements rather than permit flexibility.

So now what?

- The parties are engaged in up to 90 days of private mediation, and the litigation and the permit effective date is on hold. If the mediation is successful, EPA would likely revise both general permits and put them out for public comment. If the mediation isn't successful, then the one to three-year judicial process would begin again. People wonder what USEPA will do with the effective date of when the permit goes into effect. Another question is what role MassDEP will play as a co-signatory but not a party. MassDEP's jurisdiction over groundwater is much broader than that of EPA in MA.

Participants asked the following questions, with Ham's answers in italics.

- Does a mediated agreement set precedent? *The settlement agreement document wouldn't set precedent or be enforceable to anyone else, but it could include content that serves as a model for future permits.*
- Does the new DC Circuit judicial appointment matter? *There are many DC circuit judges and the judge on a given panel is determined by random draw.*
- Is it possible the permit would not go out for public comment again? *If everyone agreed to keep it as it is, that is possible, but it seems unlikely.*

Quick updates

- *MA statewide climate and hazard mitigation planning initiative* – Karen Pelto said MA is developing an integrated hazard mitigation and climate mitigation plan. The state is working to develop one plan to integrate those two priorities. In January, the state will hold several stakeholder workshops to get input on and develop goals and objectives. All are welcome. Karen pointed people toward resilientma.com.
- *EPA update* – Mel Cote reported that
 - A new Regional Administrator was just identified for Region 1: Alex Dunn. She has worked with national organizations representing state water quality agencies. She's well respected by our New England states. At Pace in 2010, she wrote an article about the importance of green infrastructure in environmental justice communities that Mel will distribute. She is aware of some issues that are very important to this group. She will begin in January.
 - EPA is awaiting word on the federal budget. The estimates in both house and senate look pretty level-funded for EPA's grant programs, but EPA staffing cuts of 4-8% are predicted. He noted R1 might do limited hiring because we are currently low on staffing.
- Caitlyn Whittle shared information about the NAWCA funding program that was provided to her by Mitch Hartley at USFWS. There is ongoing effort to simplify the application process in ways members from this group have suggested, but the final decisions have not yet been made. About \$1.5M will be available in 2018 (in February or later) following an Exxon Mobile oil spill. Mitch is willing to do a conference call with anyone who is interested.
- Ivey St. John expressed her deep concern that the Federal Historic Tax credit program, which makes it financially possible to rehabilitate old buildings, has been eliminated in both the house and senate tax reform.

Steering Committee Notes and Documents Update

- The previous meeting summary was distributed last week, let us know any edits within a week.
- The Steering Committee Mission & Priorities for 2018-19 has been finalized and is online.
- Mark your calendars for proposed 2018 Steering Committee meeting dates: March 15, June 14, September 13 and November 29.