

**COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**Office of Appeals and Dispute Resolution**

In the Matter of	)	
	)	OADR Docket No. 2008-128
Boston Redevelopment Authority	)	DEP Waterways Application
	)	File # w07-2172N
	)	

**PRE-FILED TESTIMONY OF ANDREA LANGHAUSER**

**QUALIFICATIONS**

1. My name is Andrea Langhauser. I have been employed by the Department of Environmental Protection, BRP Division of Wetlands & Waterways, Waterways Regulation Program (the MassDEP) as a Regional Planner since October 1988, with the exception of the period from June 1998-April 2004. During that time I was employed as a Watershed Team Leader (Regional Planner V) by the Executive Office of Environmental Affairs and then by the MassDEP Division of Watershed Management. I returned to the MassDEP Waterways Regulation Program as a Regional Planner V in May, 2004.
  
2. I hold a Bachelor of Science degree in Environmental Biology from the State University of New York College of Environmental Science and Forestry in Syracuse (1981). Prior to working with the MassDEP, I was an Environmental Planner/Project Manager with the BSC Group/Cape Cod and the Conservation Commission Agent for the Town of Falmouth. I

have also volunteered on local development boards including eleven years with the Norfolk Planning Board (from 1993-1999, 2003 – Present). My resume is attached as Exhibit A.

3. My work at the Department includes administering and enforcing the Waterways Act, M.G.L. c. 91, and its implementing regulations at 310 CMR 9.00. In the performance of these duties I am required to review large and complex nonwater-dependent license applications, perform site inspections, and draft licensing decisions and enforcement actions. I assist in the policy development for the Program and conduct public presentations on c. 91 topics to outside audiences. As a Regional Planner V, I also am responsible for supervising the work of waterways staff to ensure programmatic and policy consistency in licensing recommendations. I was the primary author of the Written Determination issued for this project.

### ISSUES TO BE ADJUDICATED

**Issue 1: Whether the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2 ?**

#### Direct Testimony

4. The MassDEP determined in Finding #6 of the Written Determination for the project that the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b). Since the project proposes to use filled Commonwealth Tidelands for a restaurant purpose, the MassDEP processed the application as a nonwater-dependent use project in accordance with 310 CMR 9.12(1). In accordance with 310 CMR 9.31(2) and MGL c. 91, s. 18, no license can be issued until the MassDEP makes a written determination, following a public hearing, that said structures serve a proper public purpose and that said purpose provides a greater public benefit than public detriment to the rights of the public

in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management program. The public hearing for this application was held on January 31, 2008 and continued to February 25, 2008. The written determination, upon which this appeal is based, was issued on September 17, 2008.

5. MGL c.91 was amended in 1983 to require the MassDEP determine whether a project was a water-dependent use or nonwater-dependent use project and to make a finding of proper public purpose. The regulations promulgated in 1990 established performance standards that are used in making such a finding so decisions will be fair and consistent. According to 310 CMR 9.31(2)(b), a non water-dependent use project is presumed to meet the proper public purpose requirement if the performance standards of 9.51-9.54 have been met, as stated in 9.31(2)(b)1 and 2. These standards are:

- 9.51: Conservation of the Capacity for Water-Dependent Use
- 9.52: Utilization of Shoreline for Water-Dependent Purposes
- 9.53: Activation of Commonwealth Tidelands for Public Use; and
- 9.54: Consistency with Coastal Zone Management Policies

The standards governing non water-dependent infrastructure facilities, described in 310 CMR 9.31(2)(b)(3), do not apply to this project.

6. The MassDEP determined in Finding #5 of the Written Determination for the project that the project, as conditioned, complies with all applicable standards of the Waterways Regulations, including the special standards for nonwater-dependent use projects at 310 CMR 9.51-.953. Then in Finding #6, that the project was consistent with all applicable CZM policies in accordance with MGL c. 91, section 18 and 310 CMR 9.54. For the purposes of this appeal, I have summarized how the project as proposed and conditioned complies with the applicable regulatory standards.
7. The following sections of the Nonwater-dependent standards found in 310 CMR 9.00 are not applicable.

9.51(1) refers to structures used as Facilities of Private Tenancy

9.51(3)(a) – refers to new pile-supported structures. This project is on filled tidelands.

9.51(3)(b) refers to structures used as Facilities of Private Tenancy

9.51(4) and (5) refer to projects located on Great Ponds and in Designated Port Areas, respectively

9.52(2) is for projects not located directly on the water (or with no water dependent use zone).

9.53(1) no public agency submitted comments during the public comment period requesting the site be available for a water-dependent use.

9.53(2)(c) water-related benefits are provided on site so there was no need to look elsewhere in the harbor.

9.53(3) not applicable but addressed in Issue 2

9.53(4) refers to projects located in Great Ponds

9.55 refers to Infrastructure Projects

8. The project is in compliance with the following sections, although it is clearly stated which issues are being adjudicated and discussed in more detail below.

9.51(2) the project is in compliance with the building design standards. The petitioner's raised objections to 9.51(2)b, which relates to public views of the water. See discussion of Issue 5 below.

9.51(3)(c) refers to calculations for the water dependent use zone, see Issue 4.

9.51(3)(d) refers to the quantity of open space on a project site. The project exceeds the standard of 1 square foot of open space for every square foot of building footprint.

9.51(3)(e) refers to the height of the building. As a one story building the project complies with the 55 foot height limitation near the water.

9.52(1) for projects located directly on the waterfront; this is discussed in the rebuttal testimony to Issue 1 in the petitioner's Memorandum of Law.

9.53(2)(a) for projects located directly on the waterfront; this is discussed in the rebuttal testimony to Issue 1 in the petitioner's Memorandum of Law.

9.53(2) (b) the open spaces are well landscaped and all areas outside the footprint of the building are publicly accessible.

9.53(2)(c) the entire one story building is a Facility of Public Accommodation

9.53(d) considering the size of the project, management issues are addressed in Special Condition #5 rather than requiring a separate management plan.

9.54 Consistency with Coastal Zone Management Policies. The MassDEP made this determination in Finding #7 of the Written Determination. The CZM memo of September 11, 2008 stated all issues raised were addressed. The CZM memo is attached to the Written Determination so already part of the record.

#### Rebuttal Testimony

9. In Issue 1 of the Memorandum of Law, the petitioners state that the project fails to meet the provisions of 310 CMR 9.52. 310 CMR 9.52(1) requires that the project include "one or more facilities that generate water-dependent activity of a kind and degree appropriate for the project site given the nature of the project." As required by 9.52(1)(a), the project does include publicly accessible landscaped areas and the Harborwalk along the full perimeter of the wharf, which are "facilities that promote the active use of the project shoreline" and the BRA planning documents identify as having a "demonstrated need in the harbor." The Harborwalk is a pedestrian network envisioned by 9.52(1)(b) that is wider than the requisite 10 feet and connects to the public ways and Harborwalk on either side of the project site.
10. In Issue 1 of the Memorandum of Law, the petitioners further state that the proponent should contain a water-based facility. Since the project is on Commonwealth tidelands, 310 CMR 9.53(2)(a) requires at least one facility that must also promote water-based public activity. As discussed below, Long Wharf is a center for existing water-based activity including water transportation to points in the harbor, to the harbor islands, and to Provincetown among other water-based operations. At this project site, located at the seaward end of Long Wharf, piles have been installed to allow visiting vessels to berth, there are docks for a marina along one side, and docks for the harbor cruise vessels located along the other side. It was the MassDEP's opinion that under existing conditions the site was fully utilizing the water sheet along the project shoreline. In addition, the proposed restaurant use will draw greater numbers of people to the site in more seasons

of the year, which can promote a greater use of the publicly accessible landscaped areas, a water-dependent use, for longer periods of time.

**Issue 2: Whether the project provides reasonably direct public non water-related benefits in compliance with 310 CMR 9.53(3)(d)?**

Direct Testimony

11. The MassDEP determined in Finding #5 of the Written Determination for the project that the project complies with all applicable standards of the waterways regulations, including the special standards for nonwater-dependent use projects described in 310 CMR 9.53 to activate commonwealth tidelands for public use. Issue 2 relates specifically to subsection 9.53(3)(d).
  
12. 310 CMR 9.53(3) addresses “other development policies of the Commonwealth”. This regulatory provision isn’t applicable to the project because the application did not include any guidance from government agencies as described in 9.53(3)(a) or “an MOU or other written agreement” from any state Executive Office as described in 9.53(3)(b). If there were such guidance or written agreements, 9.53(3)(d) directs the MassDEP to only consider those public benefits that are reasonably direct. An example of a development policy of the Commonwealth that has been incorporated into licensing decisions in the past is the affordable housing policy of the Executive Office of Communities and Development from the late 1980s. A memo from the Executive Office of Communities and Development dated May 2, 1988 is attached as Exhibit B. This memo refers to a license amendment application for a residential development on filled tidelands that includes deed-restricted affordable housing units. The EOCD states, “in summary, the Point Gloria project continues to meet the public purpose requirements of Chapter 91 in two respects: (1) it achieves the highest degree of housing affordability on the site this is economically feasible; and (2) the affordability of this housing is preserved for a substantially longer period of time than required under the original SHARP proposal”.
  
13. The City of Boston Municipal Harbor Plan (MHP) is the closest document presented in this license application that would resemble those contemplated in 310 CMR 9.53(3).

However, an MHP is so integral to the review of c.91 license applications that it is explicitly addressed by the provisions of 310 CMR 9.34, Conformance with Municipal Zoning Law and Harbor Plans, rather than by 310 CMR 9.53(3).

14. That being said, the project does provide reasonably direct public non water-related benefits. A restaurant is a Facility of Public Accommodation which, as the term is defined at 310 CMR 9.02, provides services “made available directly to the transient public on a regular basis, at which advantages of use are otherwise open on essentially equal terms to the public at large (e.g. patrons of a public restaurant).”
15. Furthermore, the restaurant is designed to not interfere with the functions the structure has been performing for the MBTA subway system that runs underground – specifically, the ability to vent the tunnel and provide emergency egress. For further detail on the later issue, see the comments of the MBTA Safety Department addressed in an email chain from Michael Conlon dated July 21, 2008, attached as Exhibit C.

**Issue 3: Whether the project complies with Condition No. 5 of the EOEEA Secretary’s decision on the 1991 Boston Municipal Harbor Plan (MHP) because it will promote public use or other water-dependent activity on the seaward end of Long Wharf in a clearly superior manner?**

Direct Testimony

16. The MassDEP determined in Finding #5 of the Written Determination for the project that the project complies with Condition No. 5 of the EOEEA Secretary’s decision on the 1991 Boston Municipal Harborpark Plan (MHP) because it will promote public use or other water-dependent activity on the seaward end of Long Wharf in a clearly superior manner. A copy of the Secretary’s Decision is attached as Exhibit D.
17. Neither the Secretary’s decision on the MHP or the waterways regulations provides any guidance to define “a clearly superior manner”. Therefore, the MassDEP review relied on public comment received on the license application and on the planning objectives of the BRA, since they are the landowner and the city planning agency.

18. Of the twenty-two persons or groups who submitted comments during the public comment period, 9 stated their support and the North End Residents Association and 12 residents raised objections. Issues related to this appeal were raised specifically in 15 of these comment letters, including 4 that were supportive or neutral and the rest submitted by those persons that appealed the decision. Copies of the written comments received during the comment period are attached as Exhibit E. General support was expressed by the following person or groups:

- a) The owners of the abutting Custom Block House,
- b) MK Vaughn, a Boston resident whose business is located on Long Wharf (#66), who writes “this will be a wonderful amenity that will bring much needed life and activity to the water’s edge”
- c) The New England Aquarium, that “shares the goal of improving public access to the waterfront and believe that increasing the number of well-managed eating and drinking destinations along the waterfront will enhance the likelihood that people will actually use and enjoy the new opportunities available to them.”
- d) The Board of Managers for the Rowes Wharf Residences, who support “turning this beautiful wharf location into an area that will attract both local residents and visitors”... “equally important to the neighborhood is to have a use that will populate the area during both the daylight and the evening hours to make visitors feel more secure”
- e) The Boston Water Boat Marina, a water-dependent operator whose docks at the end of Long Wharf extend into the project site, who states that “hundreds of visitors a day walk out to the end of the dock and find no place to go once they are there. Additionally, there are no nearby facilities that cater to families or that provide breakfast.” I infer from this statement that boaters that frequent his marina and sleep overnight would appreciate family restaurants that serve breakfast.
- f) The Boston Harbor Association which “strongly supports the continued activation of this section of the waterfront, especially the end of Long Wharf, and believes that a restaurant can help activate the underutilized park end of Long Wharf.”



19. As stated in the written determination, the Department found that by establishing a restaurant use more people will be attracted to the end of Long Wharf over a longer period of the day and into the colder months of the year, thereby providing a more secure and attractive year-round destination without interfering with the important functions performed for the subway system that runs underground.
20. Given that there is no parking associated with the project, the restaurant will service only the pedestrian public and other persons utilizing the existing water-dependent operations on and along the edge of the wharf, such as the Harborwalk, public plaza, marina, water transportation to the Charlestown Navy Yard, Boston Harbor Islands, and Provincetown, and charter vessels and boats utilizing the adjacent mooring field.
21. In order to maintain the existing use of the pavilion, Special Condition #4 requires seating with views of the Harbor continue to be available to the general public, free of charge, on benches and as informal seating on the granite steps. The same special condition limits the area of outdoor restaurant seating and provides 18 shaded tables with accompanying chairs to be arranged so the general public (non-restaurant patrons) can enjoy the harbor vista in a manner that does not obstruct the view corridor from State Street.
22. Publicly accessible restrooms will be provided during regular business hours of the restaurant, as required by Special Condition #3.
23. Also, the restaurant operator is required, by Special Condition #5, to be an active steward of the surrounding open space, performing routine maintenance of the pedestrian amenities, including keeping the binoculars in good working order, picking up trash on a daily basis, limiting the hours of deliveries to avoid conflict with the pedestrian public, and clearing snow and ice in accordance with the MassDEP snow disposal guidance.

24. Requirement No. 5(c) of the EOEEA Secretary's decision on the 1991 MHP allows a reconfiguration of setback distances along the ends and sides of a pier or wharf only if the reconfiguration "will promote public use or other water-dependent activity in a clearly superior manner..." MassDEP determined that reconfiguration of the setback distances for this project will promote public use and other water dependent activity on the seaward end of Long Wharf in a clearly superior manner because it provides a larger setback distance than required by 310 CMR 9.51(3)(c) and it allows modest additions to be constructed on an existing structure to expand the public use and activation of the seaward end of Long Wharf. The total amount of the substitute setback area is approximately 3,135 square feet more area than required by 310 CMR 9.51(3)(c).

#### Rebuttal Testimony

25. In paragraph 9 of Mark P. Paul's direct testimony, he alleges that ... "enclosing the shade structure for the restaurant removes the structure from providing shade to non restaurant patrons during the hot summer months." As stated in paragraph 17, the MassDEP attempted to maintain this existing use by conditioning the decision to allow for the continued informal seating along the granite steps and the provision of additional tables and chairs for the non-restaurant patrons.

26. In Issue 3 of the Memorandum of Law, the petitioners state that ... enclosing the shade structure would "fragment the contiguous open space. The outdoor seating would reserve the best views of the harbor now available to all comers, for the restaurant patrons". The shade structure presently occupies approximately 3,430 square feet of the existing 33,155 square foot lease area at the end of Long Wharf (the project site). The four structural alterations add an additional 1,225 square feet to the building footprint, for a total of approximately 14% of the project site, and are designed to keep the open space as contiguous as possible. In special condition #4, the MassDEP limits the seasonal outdoor seating for the restaurant patrons to an area no greater than 2,586 square feet, and ensures all remaining area outside the building footprint be maintained as public open space. The amount of open space provided on the project site (25,915 square feet) is well in excess of the 50% open space requirement of 9.51(3)(d) and complies with the additional

standard for Commonwealth tidelands found at 9.53(2)(a). While views are discussed below in Issue 5, the use of outdoor restaurant seating minimizes the impact on harbor views that would be created by building a larger structure. The restaurant use is also set back from the water by at least 28' on all sides thereby maintaining the best views for the general public using the Harborwalk.

27. I would also like to rebut the statements of fact found in Issue 3 of the Memorandum of Law, which states "88 interior seats and 176 exterior spots for seating and standing. The result is formal restaurant accommodation for 264." According to page 2 of the response to comments prepared by Ken Fields of the BSC Group (Exhibit F), there will be interior seating for 60 people. The license plans identify 30 tables with 4 chairs each in the exterior dining area for an additional 120 seats. This results in formal restaurant accommodation for 180 persons.

28. I could not agree more with the petitioners when, in Issue 3 of the Memorandum of Law, they quote from the Secretary's decision on the MHP, on page 25, when stating that ... "I am also mindful that the accommodation of local private development objectives cannot become the primary purpose for the utilization of state tidelands, and must be kept in balance with the need to protect the broader public for whom such lands are held in trust by the Commonwealth. The waterways regulations make it clear that the threat of undue privatization of interior spaces at or near the water's edge is inimical to those interests." Using Commonwealth tidelands for restaurant purposes does not unduly privatize interior space. As a Facility of Public Accommodation it is the preferred use of interior space at and near the water's edge.

29. On a final note, in Issue 3 of the Memorandum of Law the petitioner's contend that the increased numbers of people, and the attendant management issues, will "drive away water-dependent users". This really points to the subjective nature of making a determination that one public use is clearly superior to another public use. From the public comment and BRA planning documents, I assume there are some people that would prefer a livelier atmosphere at the end of Long Wharf, may even prefer to have a

drink or a meal as they enjoy watching the boats come and go across the harbor or the sun moving across the horizon. When told about this project, one person quipped that she personally would have benefitted from the close proximity of public restrooms open late in the evening when she disembarked from a harbor cruise boat at the end of Long Wharf.

**Issue 4: Whether the project meets the requirements of 310 CMR 9.34(2)(b)1 and 310 CMR 9.51(3)(c)?**

**Direct Testimony**

30. The MassDEP determined in Finding #5 of the Written Determination for the project that the project complies with all applicable standards of the waterways regulations, which would include the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c). In addition, the Department determined that the project complies with all of the requirements, modifications, limitations, qualifications, and conditions set forth in the approved MHP.
31. The Long Wharf is located within an area of Boston that is covered by the City of Boston Municipal Harborpark Plan approved by the Secretary of Environmental Affairs on May 22, 1991. Therefore, the MassDEP had to make a finding, in accordance with 310 CMR 9.34(2), that the project conforms to the provisions of the MHP “to the degree applicable under the plan approval.”
32. Nonwater-dependent use buildings are not allowed to be constructed within a water-dependent use zone, as the term is defined in 310 CMR 9.02. 310 CMR 9.51(3)(c) determines how the WDUZ is calculated. However, 310 CMR 9.34(2)(b)(1) allows an approved MHP to provide a substitute calculation for the WDUZ.
33. According to 310 CMR 9.51(3)(c), the MassDEP shall waive how the water-dependent use zone is calculated if the Secretary’s decision “specifies alternative setback distances and other requirement which ensure that new buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, in order that sufficient space

along the water's edge will be devoted exclusively to water-dependent activity and public access associated therewith, as appropriate for the harbor in question." In Requirement 5 of the MHP approval, the Secretary stated that "DEP shall grant such waiver" if the project meets 4 alternative requirements for computing the minimum setback distances related to: the baseline for the calculation; a minimum setback distance; the size of the reconfigured area; and a "clearly superior" test. The MassDEP used the substitute provision from the MHP since it was found to meet the Secretary's requirements. They are applied to the project in the following manner.

- a) Since Long Wharf is not a new pile-supported structure, the baseline for measuring setbacks is the project shoreline. As the term is defined at 310 CMR 9.02, the project shoreline is the high water mark around the perimeter of the filled wharf.
- b) The setback distance is greater than the requisite 10 foot minimum distance from the side of the wharf. The proposed additions are aligned with the existing structure and no closer to the side of Long Wharf than approximately 28 feet.
- c) The total amount of the setback area is approximately 3,135 square feet more area than required by 310 CMR 9.51(3)(c).
- d) The "clearly superior" finding is addressed in Issue 3, above.

#### Rebuttal Testimony

34. In Issue 4 of the Memorandum of Law, the petitioners state that the project "fails to meet the requirements of the MHP because it fails the test of 310 CMR 9.34(2)(a)2" since it ... "required a variance to change the legal occupancy to a restaurant." The testimony of Victor Brogna raises the same issue on page 6 when he states that the BRA ... "sought variances from several sections of the Boston Zoning Code." First, let me state that 310 CMR 9.34(2)(a)2 was not raised as an issue to be adjudicated. Secondly, this testimony refers to variances of the zoning code. As required by the waterways regulations, the applicant submitted a Municipal Zoning Certification signed by Boston's Deputy Director for Zoning on December 17, 2007 and the Zoning Board of Appeals Decision (see Exhibit G). Therefore, the project complies with the provisions of 310 CMR 9.34(1).

310 CMR 9.34(2)(a)(2) speaks to “a variance or similar form of exemption from the substantive provisions of the MHP.” The Secretary’s decision identifies the substantive provisions of the MHP when it set forth provisions that modify, limit, qualify or condition how the waterways regulations should be applied in the planning area described in the MHP, an example of this is Requirement 5 of the Secretary’s MHP decision that provides a substitute provision of the water-dependent use zone.

35. In Issue 4 of the Memorandum of Law, the petitioners further state that ... “according to the MEPA certificate, the project requires compliance approval or variance from the Article 25 Flood Hazard District.” This issue is raised again in Issue 7 of the Memorandum of Law when they quote from the Secretary’s Certificate that the applicant provide “information regarding the adequacy of proposed flood mitigation in light of projected sea level rise in conjunction with 310 CMR 9.37(2)(b)2”. The MassDEP addressed this in Special Condition #2 of the Written Determination for the project when the Licensee was required to ... “install, on an as needed basis, removable threshold inserts (door stops) as detailed on *Draft* License Plan Sheet 6 of 6 to block flood waters from entering the building in accordance with 310 CMR 9.37(2)(b).” The MassDEP is not required to make a section 61 finding pursuant to MGL Chapter 30 section 61, the Massachusetts Environmental Policy Act, since the Secretary did not require filing of an Environmental Impact Report.

**Issue 5: Whether the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water?**

**Direct Testimony**

36. The MassDEP determined in Finding #5 of the Written Determination for the project that the project complies with all applicable standards of the waterways regulations, which would include the requirements of 310 CMR 9.51(2)(b) regarding public views of the water. The issue is specifically mentioned in Finding #6, where the MassDEP specifically states ... “the outdoor dining areas have been designed to retain the existing sight line emanating from State Street, the nearest public way.”

**Rebuttal Testimony**

37. In Issue 5 of the Memorandum of Law, the petitioners state that ... “the only viewshed considered ... was from State Street toward the water. No views on or from Long Wharf were considered. However, the regulations also expressly require considering sight lines from ‘other areas of concentrated public activity’ which includes the entire Harborwalk and pavilion at the end of Long Wharf.” The petitioners are correct that the view corridor down State Street is of primary importance to the MassDEP since unobstructed sight lines down public ways do help to draw the public down to the waterfront and, at the very least, remind people crossing the street a number of blocks inland just how close they are to the harbor. To protect the views from public ways, BRA has established a viewshed that, in this case, extends from the beginning of State Street to the end of Long Wharf. The MassDEP does consider the views of the public from the Harborwalk, which is one reason why buildings for non-water dependent use are set back from the waterfront and not allowed within the water dependent use zone. The Harborwalk is located around the full perimeter of the wharf, so the views from the Harborwalk at the seaward end of Long Wharf are completely unobstructed. However, the regulations also allow nonwater-dependent structures within tidelands. Therefore, these buildings will partially obstruct views along the entire length of the Harborwalk. The project was designed to mitigate its impact on the public’s view of the water by using extensive glass, designing small additions to the existing structure, and providing for outdoor seating during the seasons when the restaurant might be most busy.
38. The computer model described in the testimony of Sanjoy Mahajan raised a few points of confusion. As a composite drawing, it was unclear how views are obstructed from different vantage points. Surely, the view of the water from a seaward corner of the wharf would be unobstructed, whereas a person standing directly adjacent to the structure would have restricted views of the water. Secondly, it was unclear if the model considered the view at eye level since different structures cause varying obstructions to a person’s view when measured at eye level. For instance, a brick face of the structure would completely obstruct a person’s view, but a person looking toward water from behind a table with an umbrella and chairs would have little obstruction of the harbor view at eye level.

**Issue 6: Whether the project complies with the historic resource requirements of 310 CMR 9.33(1)(i)?**

**Direct Testimony**

39. The MassDEP determined in Finding #4 of the Written Determination for the project that the project complies with the historic resource requirements of 310 CMR 9.33(1)(i). The MassDEP relies on the judgment of the Massachusetts Historic Commission (MHC) to make such a determination. The MHC reviewed the Environmental Notification Form for the project submitted during the Massachusetts Environmental Policy Act (MEPA) review and provided a comment letter dated November 15, 2007. The Secretary's Certificate on the Environmental Notification Form, dated November 26, 2007 states: "Comments from the Massachusetts Historic Commission on the ENF state that the proposed project will not have an adverse effect on historic resources." The project did not substantively change from the description provided in the ENF. A copy of the MHC comment letter is attached as Exhibit H.

**Issue 7: Whether the petitioner has standing?**

MassDEP did not raise this as an issue for adjudication and does not address it in this testimony.

**Issue 8: Whether the project provides greater benefit than detriment to the rights of the public in tidelands in accordance with 310 CMR 9.31(2)(b)?**

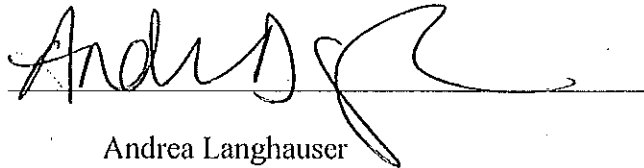
Please refer to testimony provided for Issue 1, above.



**CONCLUSIONS**

40. Based upon my preceding testimony, I conclude that the project as proposed and conditioned in the Written Determination issued September 17, 2008 is fully consistent with MGL c. 91 and its implementing regulations at 310 CMR 9.00.

Signed under the penalties of perjury

A handwritten signature in black ink, appearing to read "Andrea Langhauser", is written over a horizontal line.

Andrea Langhauser  
Regional Planner V  
MassDEP Waterways Regulation Program

Date : 10 Feb 2008