

January 10, 2020

Via email

Ivan Morales-Parra
DEP Waterways Regulation Program
One Winter Street, 5th Floor
Boston, MA 02108
ivan.morales@mass.gov

Re: MIT Pierce Boathouse – Waterways License Application Number W19-5673

Dear Mr. Morales-Parra:

Charles River Watershed Association (“CRWA”) submits the following comments on the waterways license application (number W19-5673) filed by the Massachusetts Institute of Technology (“MIT”) for renovations to the Pierce Boathouse located at 409 Memorial Drive in Cambridge (“the Boathouse”). MIT seeks authorization to maintain and renovate its existing two-story pile-supported Boathouse, including reconfiguration of second story accessory uses; reconstruct a 100-foot wide by 53-foot long pile-supported wood deck, including construction of a new ramp with handrail; reconfigure and increase 3 54-foot wide by 12-foot long pile-held docks; and maintain existing plastic support docks and moorings. The project is located entirely within Public Waterfront Act (Chapter 91) jurisdiction on filled and flowed tidelands of the Charles River.

The purposes of the Public Waterfront Act, G.L. c. 91, and its implementing waterways regulations, 310 CMR 9.00, include protecting and promoting the public’s interest in tidelands and non-tidal rivers and streams by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose; protecting the public health, safety, and general welfare as it may be affected by any project in tidelands and non-tidal rivers and streams; and fostering the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment. 310 CMR 9.01(2). Any project authorized pursuant to the Act and the waterways regulations must be consistent with these underlying purposes.

Public Access and Benefit

This project is water-dependent and is therefore presumed to serve a proper public purpose. 310 CMR 9.31(2)(a). The project must still comply with applicable provisions of the waterways regulations that protect public rights in tidelands. 310 CMR 9.35(1) (“The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands . . . and other waterways for lawful purposes; and shall preserve any public rights of access that are associated with such use.”).

The waterways regulations require compensation for any interference with public rights in Commonwealth tidelands. Section 9.35(4) of the regulations provides that:

[a]ny water-dependent use project which includes fill or structures for private use of Commonwealth tidelands . . . shall provide compensation to the public for interfering with its broad rights to use such lands for any lawful purpose. Such compensation shall be commensurate with the extent of interference caused, and shall take the form of measures deemed appropriate by the Department to promote public use and enjoyment of the water, at a location on or near the project site if feasible.

MIT is incorrect in asserting that the project will not interfere with any public rights and that compensation to the public is therefore not required. This project will interfere with the public's "broad rights to use such lands for any lawful purpose," including by interfering with the public's rights to freely access the part of the watersheet and navigate through the area where the Boathouse and docks are located. The regulations do not require any threshold to be met with respect to the extent of the interference in order for compensation to be required; they require compensation *commensurate with* the extent of interference caused. Therefore, even if the interference may be relatively minor, compensation to the public commensurate with such interference is required.

Under the regulations' "Use Standards for Recreational Boating Facilities," projects that include a public recreational boating facility located in whole or in part on Commonwealth tidelands must "include measures to ensure patronage of such facility by the general public." 310 CMR 9.38(1). The regulations also direct MassDEP to act in accordance with several provisions in applying this standard. *Id.* In its application, MIT states that provisions (a) through (c) are not applicable and that it will comply with provision (d) (all exterior pedestrian facilities on the project site shall be open to the general public, except where access restrictions are necessary in order to avoid significant interference with the operation of the facility or to maintain security). However, MIT never explains how it will comply with the underlying standard itself, namely, what affirmative measures it will take "to ensure patronage of such facility by the general public." Such measures should be required in the waterways license.

According to the ENF Certificate, "[t]he project will improve public access and provide public benefits, including interior and exterior Facilities of Public Accommodation (FPAs)." ENF Certificate at 3 (July 26, 2019). However, the license application does not mention any specific FPAs and contains only broad references to public programming and use at the Boathouse:

- "By implementing a number of public participation programs, the facility benefits the rights of the public in terms of using the area. The Boathouse regularly hosts a number of public and community rowing programs."
- "The Boathouse is consistent with the intent and purposes of the Waterways Regulations by encouraging water-dependent use of the area in a manner that enhances the public's access to, enjoyment of, and activities in the tidelands."

- “[T]he Project includes interior renovations to accommodate public use of the facility during open events.”
- “Exterior pedestrian facilities at the Boathouse are open to the public to the maximum extent allowable while still providing for security as well as the safety of staff and users, and the Boathouse itself provides many opportunities for public access to rowing.”

Application at 3, 11, 14, and 17.

To ensure that this project is consistent with the purposes of the Public Waterfront Act and the requirements of the waterways regulations, and as compensation for the project’s interference with public rights in tidelands, MassDEP should require specific measures promoting public use and activation at the Boathouse in the waterways license. The waterways license should also require MIT to prepare a management plan that provides additional details about when and how the public will be able to use the Boathouse, which programs and events are open to the public and when they will be held, and any other information that would be encourage and facilitate public use of the Boathouse and access to rowing.

Stormwater and Water Quality

In addition to protecting the public’s rights to access and use tidelands and waterfront areas, the Act and the waterways regulations protect the public’s interests in the attainment of water quality goals and the reduction of flood and erosion-related hazards on land subject to the 100-year storm event, especially those in damage-prone or natural buffer areas. As CRWA stated in its comments on the ENF for the project, given that construction will be taking place in and over the Charles River, project construction poses a significant threat to the river. The Secretary took notice of CRWA’s concerns, stating in the ENF Certificate that she “expect[s] the Proponent will consider the concerns expressed by CRWA regarding construction period impacts and its recommendations to avoid and minimize impacts.” ENF Certificate at 5.

Although MIT’s application includes an in-water boom with turbidity curtain surrounding the project during construction and certain limited measures to control stormwater in the work zone and construction staging area, a more rigorous construction period stormwater management plan is necessary. Such a plan must sufficiently address stormwater runoff from construction staging along the riverbank, as well as the potential for contaminated debris and particulates to be released from the project site into the river, including asbestos-containing materials present in the existing Boathouse. The application also does not sufficiently explain how MIT will ensure compliance with MassDEP’s stormwater management regulations during construction.

To address these deficiencies, we urge MassDEP to require in the waterways license that the following measures be implemented during project construction:

- Employ a double row of hay bales and silt fences as erosion control measures around the Boathouse building, as well as between the proposed laydown and storage container laydown areas and the river.

- Develop and implement a protocol for inspecting and ensuring the integrity of these erosion measures every day, including replacing the hay bales as they deteriorate.
- Set up the proposed laydown and storage container laydown areas to minimize bank impacts-non-essential construction vehicles should park more than 50 feet from the river, trucks should not be allowed to park on the river bank, and a parking area should be designated for all non-essential vehicles.
- Develop and implement a spill prevention plan and emergency flood control plan (and submit this plan to the Cambridge Conservation Commission for review within 10 days of beginning construction).
- Install netting and/or tarps under the Boathouse building and dock structures to assure that debris is not released into the river from work over water.
- Develop and implement a protective protocol to prevent construction debris falling into the river during construction/renovation.

Finally, we request that MassDEP require MIT to participate in CRWA's flagging program as a condition of its license. CRWA's flagging program notifies boaters of current river health during peak recreational season from Watertown to Boston.

Thank you for considering these comments. Please feel free to contact me with any questions at hmill@crwa.org or 781-788-0007 x 234.

Sincerely,



Heather Miller, Esq.
General Counsel & Policy Director