Charles River Watershed Association

conservation law foundation

May 19, 2021

Via email

Michael Parker
Chair, City of Boston Conservation Commission
City Hall Room 709
Boston, MA 02201
cc@boston.gov

Re: City of Boston Local Wetlands Ordinance Implementation, Phase II Regulations (Isolated Vegetated Wetlands, Vernal Pools, Lands Subject to Coastal Storm Flowage)

Dear Chair Parker and Conservation Commissioners:

On behalf of Charles River Watershed Association and Conservation Law Foundation, we write to provide initial comments on the draft "Phase II" regulations implementing the Ordinance Protecting Local Wetlands and Promoting Climate Change Adaptation in the City of Boston. These regulations are focused on performance standards and other provisions governing isolated vegetated wetlands (IVWs), vernal pools (VPs), and lands subject to coastal storm flowage (LSCSF).

We are pleased to see the City moving forward with implementation of this important ordinance and we appreciate the opportunity to provide comments on the draft Phase II regulations. As the draft regulations were only recently published, we have performed an initial cursory review and are providing our initial thoughts for your consideration. We plan to submit more detailed comments on the draft regulations during the formal comment period.

Protection of Resource Areas vs Replication (IVWs and VPs)

IVWs and VPs are critical to biodiversity and overall climate resilience. In an already densely-developed city like Boston, these natural areas should be fully protected without exception. Alteration should not be allowed *even with* replacement, replication, or mitigation. Several years ago, the New England Center for Investigative Reporting found that in many cases, wetlands replication projects either 1) were never built; 2) ultimately failed due to reasons like of

lack of suitable hydrology or prevalence of invasive species; 3) were much smaller than initially proposed/required; or 4) became polluted and degraded by their surroundings.[1]

Given these challenges, in order to ensure the success of any wetlands replication projects, the Commission would need to be prepared to commit to ongoing monitoring and oversight, including site visits to observe conditions and confirm that replication requirements have been met. This is likely infeasible due to the Commission's limited resources; however, without such oversight, success of replication projects cannot be ensured. Lack of robust oversight would likely lead to an overall net loss of critical wetland resource areas throughout the City, which would undermine the intent of the ordinance. We strongly urge the Commission to protect these resource areas and not allow alteration in the first place.

Allowing work in IVWs without replication or restoration

We believe that the resource areas should be fully protected and replication/restoration should not be allowed as a way to gain approval for altering an IVW. In the event replication/restoration is allowed as a substitute measure, there should not be any circumstances in which work in IVWs is allowed *without* replication or restoration. Allowing alteration of small portions of IVWs without any corresponding compensation to the local environment could result in "death by a thousand cuts"—whereby many small alterations might cumulatively have a significant negative impact.

Exceptions where replication is not feasible (IVWs and VPs)

Again, we believe that the resource areas should be fully protected and replication should not be allowed as a way to gain approval for altering the resource area. That being said, we are particularly concerned about the language in the draft regulations that would allow applicants to demonstrate, and the Conservation Commission to determine, that replication is not feasible and therefore the applicant may restore or improve "those portions of the affected resource area that are not affected by the proposed activity or work." That standard is too ambiguous. There will be sites where no portion of the affected resource area is "not affected by the proposed activity or work"—on these sites, this standard could allow for destruction of valuable resource areas with no consequences. Similarly, if the resource area is already in good condition and does not require restoration or improvement, this provision would potentially let applicants off the hook entirely without any corresponding compensation to the local environment.

[1] Beth Daley and Jess Aloe, WGBH, *Failed projects and weak oversight lead to loss of state's wetlands* (Dec. 21, 2014), https://www.wgbh.org/news/2014/12/21/failed-projects-and-weak-oversight-lead-to-loss-of-states-wetlands.

LSCSF Definition

We strongly object to the use of FEMA maps in defining LSCSF. The ordinance does not require the use of FEMA maps and FEMA maps are not considered to be the best available data. FEMA maps are based solely on historical inundation and do not account for increased inundation as a result of climate change. "[T]he best available data provided by the City or the Commonwealth of Massachusetts on expected conditions due to climate change" should be the default standard that is used, not an option that is only available if the Conservation Commission determines FEMA data to be "outdated, inaccurate, or not reflective of current or reasonable anticipated conditions."

The City has already done the work to create 100-year storm maps based on data that take climate change into account.[2] Climate Ready Boston's data—which go out as far as 2070—should be used to determine the 100-year storm inundation boundaries in the near term, and this should be replaced by the Massachusetts Coastal Flood Risk Model data once it becomes publicly available. Many projects that are constructed in the City have an expected life span of fifty years or more, and many existing buildings in Boston are hundreds of years old. Flooding will impact new areas of the City and projects in these areas should be required to undergo the same review as projects in areas that currently flood.

When passed, this ordinance was heralded as an example of successfully incorporating consideration of climate change impacts into local planning and review processes. The use of FEMA maps as contemplated in the draft regulations would undermine the intent of the ordinance.

There is also an inconsistency in the regulations that should be resolved. Sea level rise is used to determine the base flood elevation within the resource area but is not used to determine the extent (the extent relies on FEMA maps instead).

Climate Change Analysis (IVWs, VPs, and LSCSF)

It is unclear from the current language whether applicants are required to also take into account the overall effect loss or alteration of the resource would have on climate resilience. The applicant should be required to provide that analysis (e.g., how will loss or alteration of the resource affect precipitation-based flooding, heat island, drought resilience, etc. onsite and in surrounding areas).

[2] The City of Boston regularly updates the Climate Ready Boston webpage with published reports. *See generally* City of Boston, *Preparing for Climate Change*, https://www.boston.gov/departments/environment/preparing-climate-change (last visited May 19, 2021).

Criteria for Allowing Work in Resource Areas (VPs and LSCSF)

The criteria listed in the draft regulations for when work will be allowed in resource areas are highly technical (e.g., not impair the capacity of the VP to provide wildlife habitat; not result in flood damage due to filling that causes lateral displacement of water; not result in any adverse effect on public/private water supply or groundwater supply; etc). The regulations should require that these determinations be made by a qualified expert; an assertion by the project proponent that the criteria will be met is not sufficient.

Additionally, the regulations should include a simple, streamlined process for approval of projects that are undertaken for the purpose of restoration and/or improving climate resilience, including things like wetlands restoration/construction and invasive species management.

Removal of Trees (IVWs and VPs)

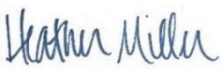
There should be stronger standards for maintaining mature trees that have six-inch or larger diameters at breast height; replacement of trees should be a last resort option available only when preservation of existing mature trees is not possible. If trees of any size are removed, replacement at the same or greater total diameters at breast height should be mandatory, not at the Commission's discretion.

Restoration Provisions

This section of the regulations should include language giving the Commission authority to require tree planting specifically.

Thank you for considering these comments and please do not hesitate to contact us with any questions. We look forward to hearing the Commission's perspective as we continue reviewing the draft Phase II regulations in greater detail.

Sincerely,



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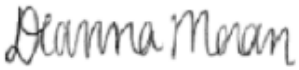

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