



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, NORTH ATLANTIC DIVISION
FORT HAMILTON MILITARY COMMUNITY
302 JOHN WARREN AVENUE
BROOKLYN, NY 11252-6700

CENAD-PD-P (800B-11-2-220a)

16 June 2022

MEMORANDUM FOR Chief, Civil Works Integration Division (Mr. Joseph Forcina)

SUBJECT: Integrated Draft Detailed Project Report and Environmental Assessment (DPR & EA) for Hix Bridge, Westport River, Westport, MA Section 206 Project (PWI 109060)

1. References:

- a. CENAD-PD-C Email dated 16 May 2022 transmitting the subject Hix Bridge Integrated Detailed Project Report package and requesting review.
- b. CENAE-PD-P Memorandum dated 16 May 2022 transmitting the draft DPR and EA for the Hix Bridge, Westport River, Westport, MA Section 206 Project.

2. The Policy & Legal Compliance Review (P&LCR) team led by the North Atlantic Division Planning and Policy Division (CENAD-PD-P) conducted a review of the integrated draft DPR and EA of May 2022 for the subject study (References 1a and 1b).

3. The P&LCR team has grave concerns that the recommended plan would cause significant impact to the Westport River oyster habitat, which is counter to the intent of the Section 206 Authority. This issue must be resolved for approval of the plan.

4. The P&LCR team enclosed the content-based and editorial comments for the District's action. The District should provide responses to all comments as well as a track changes version of document revisions to expedite backcheck.

4. Please direct any questions to Ms. Rena Weichenberg at (347) 370-4568, Environmental Team Lead or Mr. Young Kim, P.E., Planning Program/CAP Manager at (347) 370-4514.

JOSEPH R. VIETRI
Chief, Planning and Policy Division
Programs Directorate

Enclosure

CF: Christopher Ricciardi, Ph.D./CWID DST

Enclosure:

I. General Comments

1. There are grave concerns that the recommended plan, which includes placement of the stone debris in the scour holes, will result in significant damage to oyster habitat within the Westport River. In a 1 March 2022 letter from the Westport Conservation Commission the Shellfish Advisory Board characterized the scour holes as, "highly productive oyster habitat for both harvesting and as a spawning ground" and noted that, "Filling the scour holes may have a devastating effect on the oyster fishery one mile north and south of the debris field." A recommended plan which results in more habitat damage than restoration cannot be approved under the Section 206 Authority. This issue must be resolved, and the impacts described in the NEPA documentation before approval may be sought. It appears likely that a different plan may be recommended, which would require the re-release of a Draft integrated report.
2. The report does not provide sufficient evidence that the debris removal would result in the change in salinity to now support hard clam habitat. Meeting notes from the interagency meeting in 2011 contain the following, "The majority of the participants did not believe any significant changes in salinity upstream from removal of Debris." Evidence of this significant change is needed to support the debris removal. Additional descriptions of modelling efforts, and outcomes found that support a sustainable salinity increase with stone debris removal should be added to the report and appendix.

II. Plan Formulation

3. The plan formulation appears to have been for the most cost-effective removal of debris rather than habitat restoration. Clearly, the habitat value of placing the material, "in shallow areas to create additional rocky habitat", as per the description in the Executive Summary and 2018 communication with SHIPO (inclusive of a Hard Bottom Creation map), was ignored in the model used in the CE/ICA analysis as the same outputs were derived for all placement areas. District is directed to reformulate for habitat value. If the models used do not measure the rocky habitat created, and therefore do not distinguish between the alternatives, an additional model or metric is needed to ensure we have indeed chosen the most cost effective alternative. District is encouraged to consider the addition of alternatives that include complementary measures, such as the placement of spat or artificial substrate to increase oyster habitat, which should then be included in the CE/ICA.
4. Problems and Opportunities: District states in Section 4, Problems and Opportunities that ecosystem restoration benefits will be measured in terms of

acres of shellfish habitat restored in the system. Ecosystem restoration benefits are a function of both area and quality and measuring benefits in acreage only does not suffice. The metric chosen, acres of shellfish habitat, does not appear to measure all potential habitat improvement. Restoration benefits should be measured in a manner that quantifies both area and quality/function, and enables differentiation between alternatives.

5. Completeness: the completeness of the alternatives in creating shellfish habitat is unclear. Is placement of spat or other artificial substrate needed for successful set? Optimal set? District is advised to expand on substrate needs given the variable bottom in the study area.
6. OMR&R: No OMR&R is included as it is discussed solely in relation to the removal of the stone debris. OMR&R should be based upon the habitat created. District is advised to consider the potential operations, maintenance, rehabilitation associated with the creation and restoration of oyster and hard clam habitat.
7. Risk and Uncertainty: The removal of stone debris is described as resulting in the increase of salinity to 20 ppt, which is the minimum required by hard clam larvae, with a variable value of 0.2. It is unclear whether there may be seasonal fluctuations that would result in salinities below this minimal value. Habitat requirements for hard clam should be more fully fleshed out and the actual habitat model placed in an Appendix. The risk and uncertainty of the outcome should be captured and taken into consideration in the formulation.
8. Existing Conditions: Section 11.3.2 states that a “drastic change in salinity values on either side of the bridge had been attributed to the bridge.” However, the delta in salinity is 2 ppt, hardly a drastic change. Further expansion of the effects of the bridge on salinity is needed for a more complete understanding of existing and with project conditions as these form the basis for plan formulation.

III. Environmental Compliance

9. NEPA requires environmental impacts to be discussed for all alternatives. The environmental consequences section does not differentiate between the impacts (both positive and negative) associated with the different placement alternatives and as such is not fully NEPA compliant. An expanded environmental consequences section is needed. This expanded section should address the potential impacts to system wide oyster habitat and production associated with use of the scour holes as debris placement areas and positive impact associated with placement north and south of the bridge to create hard bottom habitat.

10. Inaccurate Environmental Consequences: Section 12.3.2 statement that the increased bottom salinity (to values of approximately 20 ppt) would allow for optimal habitat conditions for oysters and hard clam is inaccurate as the salinity variable is only increased to 0.2, and final score of 0.64. A more appropriate characterization of the level of improvement is needed.
11. Inadequate public notice: The Public Notice states that the alternatives include a no action alternative and an alternative to remove the stone debris and restore shellfish habitat. No description of the likely distinct alternatives based upon placement of the debris was provided which reduced the ability of the public to provide comments on the distinct alternatives. Should the reformulation support a different alternative the Public Notice should be re-released with a description of the placement alternatives.
12. Monitoring and Adaptive Management: In Section 16 District notes that the monitoring plan will be developed in the next (D&I) phase. This is not policy compliant. WRDA 2007, Section 2039 states, “when conducting a feasibility study for a project or component of a project for ecosystem restoration that the recommended projects include a plan for monitoring the success of the ecosystem restoration. Paragraph 2 of this WRDA Section explicitly states that the guidance applies to ecosystem restoration initiated under CAP. In addition, Section 24 of the revised Appendix F specifies the need for monitoring and adaptive management plans for Section 206 Studies. A monitoring and adaptive management plan, compliant with WRDA 2007, Section 2039 and Appendix F must be included in the final integrated report.
13. Cumulative Effects Analysis: The Draft EA does not include a distinct cumulative impacts analysis. District is reminded that Phase I of the revised NEPA Guidelines went into effect 20 May 2022. As these guidelines specify the inclusion of a cumulative impacts analysis, this must be included in the final integrated report.
14. FWCA Compliance: The report has inadequate documentation of compliance with the Fish and Wildlife Coordination Act as it is limited to the initial interagency meeting. A similar concern was raised during DQC and the commitment of use of IPAC was not met. District is asked to provide documentation of coordination which meets the level of FWCA compliance and a response from the Service that the FWCA requirements have been met.
15. Magnuson Stevens Act Compliance: The report lacks discrete documentation of compliance with the Magnuson Stevens Act. An EFH Assessment should be provided in an Appendix (as per the DQC comment and response,)

16. CZMA: Section 21 states that a CZM consistency determination, “shall be provided.” The CZM consistency determination must be provided in the final report.

IV. Engineering

17. It is a planning constrain to reduce the safety and stability of Hix Bridge. The vertical removal of up to 8 ft of material at the drilled shafts may result in bridge structural stability issues. Was there further engineering evaluation or coordination with Mass Highway to validate the assumption of “*is likely that removal of material around the piles to the proposed depth of -13 ft NAVD88 would have only minimal impact (if any) to lateral stability*”?

18. It is understood that velocities through the bridge opening are low (and further reduced in with project condition), nevertheless would the removal of material expose loose soils that might be prone to future erosion?

V. Office of Counsel

19. Costs: are listed inconsistently.

Table 7-1: costs of Hix Bridge Alternative: page 7

	Upriver Shallow Water	In-River Scour	Upland Disposal
Investment Cost	\$2,752,000	\$4,263,000	\$3,756,000

Table 9-6: on page 15

Project First Costs – October 2021 (FY22) Price Levels	Disposal in Scour Holes Above and Below the Bridge	Disposal in Upriver Shallow Waters	Upland Disposal
Investment Cost	\$2,752,000	\$4,263,000	\$3,756,000

The costs of the disposal in scour holes and the disposal upriver have been switched. I do not know which one is accurate, but the report uses the second as the basis for the recommended plan. This needs to be verified. If the first is correct, and the “upriver shallow water” disposal is the recommended plan, the EA should evaluate that as the recommended plan.

20. Real Estate Related Concern: The report indicates that the project footprint is within the Town of Westport’s jurisdiction. That is not correct, as the riverbed is owned by the state, and a permission or license from the State will be necessary. There is now an updated RE plan (sent yesterday from NAE), which addresses this issue and includes the correct jurisdictional information. This should be corrected in the Report with the update RE attached.

VI. Cost Engineering

21. Per environmental comment, if monitoring and adaptive management assumptions are not policy compliant, the district needs to provide a basis for the cost. However, this figure has been based on a percentage in the cost engineering guidance. Cost engineering needs to be provided guidance to correct if needed.

VII. Real Estate Plan

1. Chapter 91 Permit/License

Concern: The use of the state Chapter 91 permit is not adequately explained or sufficiently justified to satisfy the real estate requirement for the stone removal and placement.

Basis for Concern: Use of the state permit would be considered a nonstandard estate. For any proposed nonstandard estate, the REP must provide an explanation and justification as to why a standard estate does not meet the project requirements and why a nonstandard estate in the form of a permit must be acquired.

Further, paragraph 5 of the REP provides that “[s]tate approval for the recommended plan would be secured through the state’s issuance of the Chapter 91 permit or license, Water Quality Certification, and Coastal Zone Management Consistency Concurrence process.” The issuance of a Water Quality Certificate (WQC) and Coastal Zone Management Consistency Concurrence (CZMCC) are not the appropriate means to satisfy a project’s Lands, Easements, and Rights-of-Way (LER) requirements as that is a regulatory process and not a real estate action. Since it is not clear in the REP whether the Chapter 91 permit is akin to a regulatory permit or a real estate permit that provides the necessary real property rights to satisfy the project purpose, the use of the Chapter 91 permit to satisfy the project LER requirement is uncertain.

Significance of Concern: High.

Actions Needed to Resolve Concern:

- 1) The REP must include a nonstandard estate paragraph (as required by ER 405-1-12, section 12-16(c)4) that provides sufficient justification for the use of the Chapter 91 permit as a nonstandard estate in lieu of a standard estate. It must clearly explain what a Chapter 91 permit is, the application process and duration to complete, the proposed term of the permit, the parties to the permit, and all the conditions that must be met to apply for and successfully acquire the permit, including clarifying the “Order of Conditions” requirement identified in paragraph 14. The REP should further demonstrate that the District RE & OC have reviewed a draft

copy/sample/template of the permit and that it is legally sufficient for providing the necessary real estate rights and access to fulfill the project requirements. The REP should also state that the use of the permit will be coordinated with HQ USACE for approval as a nonstandard estate. Further, recommend adding the date in which the Chapter 91 permit will be acquired in the acquisition schedule.

- 2) Please provide a copy of the sample/template Chapter 91 permit to the review team.
- 3) The WQC and CZMCC is not a sufficient means to satisfy a project's LER requirement and any narrative in the REP should not allude to or suggest it. Recommend deleting all references to the issuance of the WQC and CZMCC from the REP.
- 4) Recommend revising the statement in paragraph 5 referencing state approval of the recommended plan as there is no requirement for a Federal Civil Works project to seek state approval for a study's recommended plan.
- 5) Revise the table provided in paragraph 4 referencing "none" as the required estate for "dredge and place material" and paragraph 14 wherein it states the recommended plan requires no acquisition of real estate. The REP presents the acquisition of a Chapter 91 permit as the estate to satisfy that project purpose.

2. Town of Westport, Landing Commission Authority

Concern: The REP is not clear on the role of the Landing Commission to providing the required non-Federal Sponsor owned LER for the project.

Basis for Concern: Paragraph 5 of the REP provides that the Landing Commission has the authority to grant licenses on property they manage. The REP provides for the acquisition of Temporary Work Area Easements on property of the Town of Westport. However, as the project non-Federal Sponsor, the REP should be clear on the Landing Commission's authority to provide, specifically, the required Authorization for Entry for Construction (AEC) to USACE for the project purpose.

Additionally, paragraph 8 of the REP states the "[t]here might be a cost to the NFS in obtaining the permission of the Landing Commission." If the Landing Commission is a governing board within the Town of Westport (the non-Federal Sponsor), it is not clear what cost the REP may be referring to and whether those costs are accounted for in the Baseline Cost Estimate for Real Estate (BCERE).

Significance of Concern: Low.

Actions Needed to Resolve Concern: Include in paragraph 8 a description of the Landing Commission and their role to providing the required non-Federal Sponsor owned LER to the project. Revise the REP so that it is clear the non-Federal Sponsor possesses the authority to provide the required AEC for the project purpose. Describe any cost that may be incurred by the non-Federal Sponsor and ensure those costs are included in the BCERE. Include a summary of the internal process and approximate duration for the Landing Commission to complete its internal process to authorize the use of the town lands for the project. See ER 405-1-12, paragraph 12-16(c)3 for additional information that should be included in paragraph 8 for non-Federal Sponsor owned lands.

3. Temporary Work Area Easement

Concern: The REP does not include the duration required for the Temporary Work Area Easement (TWAE) or acreage required over parcel 52-2-0

Basis for Concern: The REP must fully describe all the LER required for a proposed project.

Significance of Concern: Low.

Actions Needed to Resolve Concern: Include in the REP the approximate duration of each required TWAE and acreage needed over parcel 52-2-0.

4. Temporary Access Ramp

Concern: The REP does not identify the LER requirement for the temporary access ramp leading into Westport River.

Basis for Concern: The REP provides that the Westport River is under the ownership of the State of Massachusetts and only identifies the acquisition of the state Chapter 91 permit for the stone removal and placement. It is not clear if the Chapter 91 permit will also include the necessary property rights to construct, operate, and maintain the temporary access ramp or if another estate is required. The REP must clearly identify all the LER requirements for each project purpose and feature.

Significance of Concern: High.

Actions Needed to Resolve Concern: Include in the REP the estate that will be acquired from the state for the construction, operation, and maintenance of the temporary access ramp.

5. Debris Placement Sites

Concern: Possible conflict between the REP and Detailed Project Report (DPR) on the required debris placement site.

Basis for Concern: Paragraph 10 of the DPR (pg 15) provides the "...recommended plan is the removal of stone debris with placement of the stone in the deep scour holes located upstream and downstream of the bridge", which suggests the use of both locations on either side of the Bridge for the project. Figures C-3a and b of the REP (pg C-5) depict the placement sites on both sides of the bridge with a label reading "Potential Disposal Alternative (North)" and "Potential Disposal Alternative (South)", which may be interpreted as the use of either the north or south site for the debris placement. The REP must be consistent with the description of the recommended plan as provided in the DPR.

Significance of Concern: Low.

Actions Needed to Resolve Concern: Confirm whether it is the intent of the project to utilize both debris placement sites or just one of the sites and update the REP accordingly. If the study has yet to conclude which debris placement site will be utilize, revise the REP accordingly for clarification and identify what event or decision needs to occur to make the determination to the use of either site for the project.

6. Real Estate Maps

Concern: Insufficient real estate maps.

Basis for Concern: Real Estate Maps should be GIS based with color-coded graphics/symbols depicting all the estates required. A legend should be included defining the color-coded graphics/symbols.

Significance of Concern: Low.

Actions Needed to Resolve Concern: If schedule and funding permits, include in the REP appropriate GIS-based maps that includes the features described above and include them as a full page exhibit oppose to in the body of the REP.

7. LERRD Costs

Concern: The REP improperly references the non-Federal Sponsor LERRD costs.

Basis for Concern: Paragraph 11 of the REP includes a table showing the BCERE. The BCERE for a project consists of the Federal and non-Federal costs for all the project's incidental, land acquisition, and utility relocation costs. However, the narrative preceding the BCERE refers to the non-Federal Sponsor's LERRD costs, which include only the project's non-Federal cost that are creditable to the non-Federal Sponsor. It appears the REP alludes to, incorrectly, the non-Federal Sponsor LERRD cost and the BCERE as being one and the same, which they are not.

Significance of Concern: Low.

Actions Needed to Resolve Concern: Suggest revising the REP to delete the reference of the non-Federal Sponsor's LERRD cost.

8. Land Value Estimate.

Concern: The REP does not provide a land value estimate for the LER required for the project.

Basis for Concern: The project requires property rights on state lands and lands belonging to the non-Federal Sponsor. Although it may be the intent of the state and non-Federal Sponsor to provide their lands at no cost to the project (i.e., as a donation to the project) and the non-Federal Sponsor may want to provide the LER required without claiming credit, the value of all the LER required for the project that must be provided by the non-Federal sponsor must be included as part of the project costs with credit afforded to the non-Federal sponsor in such amount. The only exceptions where the non-Federal sponsor will not be afforded credit occurs when they have previously provided their lands as an item of cooperation, provided their lands using Federal funds, or acquired the lands from another Federal agency in which the acquisition was accomplished at no cost (other than incidental costs). See ER 405-1-12, section 12-37b and 12-38 respectively.

Significance of Concern: High.

Actions Needed to Resolve Concern: Confirm the BCERE includes the value of all the LER required for the project and include a paragraph summarizing the land value estimate conclusion.

9. Real Estate Acquisition Schedule

Concern: Short acquisition schedule without the concurrence of the non-Federal Sponsor.

Basis for Concern: According to the non-Federal Sponsor's Real Estate Acquisition Capability Assessment provided in REP, the two-month acquisition schedule provided in paragraph 16 is not supported by the non-Federal Sponsor. As the acquiring agency, the acquisition schedule must be agreed upon by the non-Federal Sponsor (to include Real Estate and the Project Manager) to ensure sufficient time is allotted for them to provide the LER they own and acquire the Chapter 91 permit in time for the solicitation of the first construction contract. Absent the non-Federal Sponsor's concurrence to the acquisition schedule, confidence in their ability to provide the required AEC for all the required LER within the project schedule is difficult to achieve.

Significance of Concern: High.

Actions Needed to Resolve Concern: Ensure the REP provides a reasonable preliminary acquisition schedule the non-Federal Sponsor can support with the schedule incorporated into the overall project schedule. Update the non-Federal Sponsor's Real Estate Acquisition Capability Assessment, question III(b), to show the non-Federal Sponsor approves the acquisition schedule.

10. Non-Federal Sponsor's Real Estate Acquisition Capability Assessment

Concern: Insufficient non-Federal Sponsor's Real Estate Acquisition Capability Assessment.

Basis for Concern: The non-Federal Sponsor's Real Estate Acquisition Capability Assessment provided in the REP does not satisfactorily address all assessment questions. Absence an accurate and satisfactory assessment, evaluating the non-Federal Sponsors ability to perform the project LER requirements within the proposed schedule is difficult to complete. Even when a project has no LERRD or acquisition requirements to perform, a full and complete assessment of the non-Federal Sponsors real estate acquisition capabilities is still necessary.

Significance of Concern: High.

Actions Needed to Resolve Concern: Reference the non-Federal Sponsor's Real Estate Acquisition Capability Assessment:

1. Reference question I(a). Include the state law and local charter if known.
2. Reference question I(b). Response cannot be "N/A". Respond either "yes" or "no". If yes, provide the local authority that provides the power of eminent domain.
3. Reference question I(c). Response cannot be "N/A". Respond either "yes" or "no". If yes, provide the local authority that provides quick-take authority.

4. Reference question I(e). Response cannot be “N/A” as there are state lands as part of the project’s LER requirement. It is unlikely the Town of Westport, as a local municipality, can condemn state lands. Update this response accordingly.
5. Reference question II(e). Response cannot be “N/A”. Respond either “yes” or “no”.
6. Reference question III(b). Providing an acquisition schedule that the non-Federal Sponsor does not support is unacceptable. Project milestones do not need to be approved to establish a preliminary acquisition schedule or the approximate duration to complete the acquisition tasks. The explanation provided is not sufficient as it conflicts with the acquisition schedule presented in the REP since the schedule does include dates. As the acquiring agency, the acquisition schedule must be agreed upon by the non-Federal Sponsor (to include Real Estate and the Project Manager) to ensure sufficient time is allotted for them to provide the LER they own and acquire the Chapter 91 permit in time for the solicitation of the first construction contract. Coordination must occur with the NFS and Project Manager to establish a mutually acceptable acquisition schedule.
7. The questionnaire is almost three years old and signed by an acting Chief of Real Estate who no longer serves in that role and who is different from that signing the REP. The questionnaire should be updated to be reasonably consistent with the timing of the REP to ensure the assessment occurred at a time that considers the most recent project information and recommended plan.

11. Ecosystem Restoration

Concern: No LER identified for ecosystem restoration.

Basis for Concern: The goal of the study is for ecosystem restoration. Ecosystem restoration projects are required to be sustainable with limitations to future development on those lands. Neither the REP nor the DPR appear to address ecosystem restoration sustainability, a monitoring plan, or OMRR&R requirements and any LER that may be required to support the project purpose.

Significance of Concern: High.

Actions Needed to Resolve Concern: Confirm if there is a LER requirement to secure the ecosystem restoration project purpose. If so determined, identify the appropriate interest the NFS must acquire for ecosystem restoration. Army policy requires fee acquisition for ecosystem restoration, with a lesser estate considered appropriate in certain circumstances (See ER 405-1-12, paragraph 12-9).

VIII. Editorial Comments

1. Section 7, last sentence refers to Section 7 for significance of resources. This should be revised to Section 8.
2. Section 6, Formulation of Plans, references planning constraints as previously identified in Section 2.3; this should be corrected to Section 5, Planning Objectives and Constraints
3. Section 7.4 notes habitat modelling as discussed in Section 8; this should be corrected to Section 9.
4. Section 18 notes construction could begin as early as Fall 2021. This should be updated to reflect present forecasts.

REP EDITORIAL COMMENTS

1. The REP does not follow the format and order of the discussion points (i.e., the 20 elements) provided in ER 405-1-12, section 12-16c. Revise the REP to be consistent with the regulation.
2. The REP offers information pertaining to plan formulation. The REP should minimize its plan formation content as it is not the intent of the REP to discuss the evaluation of alternatives or other plan formulation efforts leading to the selection of the recommended alternative. If needed, the REP can cite the appropriate section(s) of the DPR for plan formulation information. Where possible, minimize the plan formulation narrative and focus more on describing the Recommended Plan and its LERRD requirements.
3. Reference Paragraph 4. The table provided would be more appropriately placed in paragraph 5, "Recommended Estates." Recommend moving the table and narrative below the table to paragraph 5.
4. Reference paragraph 4. The table provided would benefit including an additional column titled "Purpose" to provide the purpose for the recommended estate to acquire.
5. Reference paragraph 4 of the REP. The table provided includes a column titled "Required Acres", but the data provided is square footage. Recommend converting the square footage to acres since acres is the common unit of measure for real estate.
6. Reference paragraph 5. Do not include standard estate language in the body of the REP. Either delete it from the REP or provide as an exhibit to the report.
7. Reference the Assessment of non-Federal Sponsor's Real Estate Acquisition Capability Assessment.
 - a) There is no need to repeat the same non-Federal Sponsor information on each page.
 - b) The Legal Authority section is missing its bullet point number "1".

- c) There is no need to include the acquisition milestones if no dates will be provided. Additionally, any schedule presented in the assessment should be consistent with the schedule provided in the REP.