THE COMMONWEALTH OF MASSACHUSETTS
Office of the Secretary of the Commonwealth

Regulation Filing *To be completed by filing agency*

CHAPTER NUMBER: 301 CMR 23.00

CHAPTER TITLE: Review and Approval of Municipal Harbor Plans

AGENCY: Executive Office of Environmental Affairs ("EOEA")

SUMMARY OF REGULATION

State the general requirements and purposes of this regulation:

Regulation establishes a voluntary procedure by which municipalities may obtain approval of municipal harbor plans from the Secretary of Environmental Affairs, in order that such plans may serve to inform and guide EOEA agency actions affecting the implementation of waterway management programs at the local level. In addition, the purpose of the regulation will serve to, among other things, promote comprehensive planning, management and protection of land and water resources.

REGULATORY AUTHORITY: G.L. c. 21A, §§ 2 and 4A

AGENCY CONTACT: Tom LaRosa PHONE: 617-626-1135

ADDRESS: 251 Causeway Street, Suite 900, Boston, MA 02114

Compliance with M.G.L. c. 30A

EMERGENCY ADOPTION

If this regulation is adopted as an emergency regulation, state the nature of the emergency.

N/A

PRIOR NOTIFICATION AND/OR APPROVAL

If prior notification to and/or approval of the Governor, legislature or others was required, list each notification, approval and date, including notice to the Local Government Advisory Commission:

Dept. of Housing and Community Development; Mass. Municipal Assoc.: 10/28/99
E.O. #384: 10/28/99

PUBLIC REVIEW

Was notice of the hearing or comment period filed with the Secretary of State published in appropriate newspapers and sent to persons to whom specific notice must be given at least 21 days prior to such hearing or comment period?

Yes [XX] Date of ~~public hearing~~ or comment period: 11/26/99 - 12/20/99

Public Hearings held: 12/6/99, 12/7/99, 12/8/99, 12/9/99

FISCAL EFFECT

Estimate the fiscal effect on the public and private sectors:

For the first and second years: N/A
For the first five years:
No fiscal effect:

SMALL BUSINESS IMPACT

State the impact of this regulation on small business. Include a description of reporting, record keeping and other compliance requirements as well as the appropriateness of performance versus design standards and whether this regulation duplicates or conflicts with any other regulation. If the purpose of this regulation is to set rates for the state this section does not apply.

None.

CODE OF MASSACHUSETTS REGULATIONS INDEX

List key subjects entries that are relevant to this regulation:

Wetlands and Waterways; Coastal Zone; Municipal Harbor Plans

PROMULGATION

State the action taken by this regulation and its effect on existing provisions of the Cc of Massachusetts Regulations (CMR) to repeal, replace or amend. List by CMR number:

Amends 301 CMR 23.00 to revise and streamline the State-approved Municipal Harbor Planning process.

ATTESTATION

The regulation described herein and attached hereto is a true copy of the regulation adopted by this agency. ATTEST:

Signature: _____ Date: 6/8/00

Publication *To be completed by the Regulations Division*

MASSACHUSETTS REGISTER NUMBER: 898 DATE: 6/23/00

EFFECTIVE DATE: 6/23/00

CODE OF MASSACHUSETTS REGULATIONS

Remove these pages: CMR: Vol.	*Insert these pages:*
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219 – 230	219 – 230

A TRUE COPY ATTEST

WILLIAM FRANCIS GALVIN
SECRETARY OF THE COMMONWEALTH

6/8/00 CLERK

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301 CMR 23.00: REVIEW AND APPROVAL OF MUNICIPAL HARBOR PLANS

Section

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23.01: Authority and Purpose

(1) Authority. Pursuant to the authority of M.G.L. c. 21A, §§ 2 and 4A, 301 CMR 23.00 is adopted by the Secretary as a means of fulfilling the statutory responsibility of the Executive Office of Environmental Affairs (EOEA) to serve as the primary agency of the Commonwealth for environmental planning, as set forth in M.G.L. c. 21A, §§ 2 and 4; and to implement the Massachusetts Coastal Zone Management (CZM) Program, established by M.G.L. c. 21A, § 4A for the purpose of securing for the inhabitants of the Commonwealth the objectives and benefits of the Federal Coastal Zone Management Act, 16 USC 1451 *et seq.* 301 CMR 23.00 forms part of the CZM Program and shall be interpreted and applied in a manner consistent with 301 CMR 20.00, as may be amended hereafter.

(2) Purpose. 301 CMR 23.00 establishes a voluntary procedure by which municipalities may obtain approval of municipal harbor plans from the Secretary, in order that such plans may serve to inform and guide EOEA agency actions affecting the implementation of waterway management programs at the local level. Specifically, approved plans will be of direct assistance to the Department of Environmental Protection (DEP) in making regulatory decisions pursuant to M.G.L. c. 91 that are responsive to municipal objectives and priorities, harbor-specific conditions, and other local and regional circumstances. The additional purposes served by the regulations are as follows:

(a) to promote long-term, comprehensive, municipally-based planning of harbors and other waterway areas that fully incorporates state policies governing stewardship of trust lands, as defined in 310 CMR 9.02; and that establishes, through early and continuing consultation, an effective partnership between the Commonwealth and its municipalities in such planning efforts;

(b) to carry out overall state environmental policy by, among other things, providing for the management of water and land resources to assure the protection and balanced utilization of such resources; promoting the best usage of land and water by encouraging and providing for, in cooperation with other appropriate state agencies, planned industrial, commercial, recreational, and community development; encouraging the restoration and reclamation of degraded or despoiled areas, including harbors and coastal waters; and assisting other state and regional agencies in developing programs and policies relating to land use planning and regulation in the Commonwealth;

(c) to comply with and implement national coastal policy as set forth in the Federal Coastal Zone Management Act of 1972, as amended, by encouraging the preparation of special area management plans that provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decision-making; and by encouraging the participation and cooperation of the public, state and local governments, and interstate, regional, and federal agencies in the preparation of such plans;

(d) to foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment under Article XCVII of the Massachusetts Constitution.

23.02: Definitions

Approved Plan means a Municipal Harbor Plan approved by the Secretary in accordance with 301 CMR 23.04 and as may be conditioned in accordance with 301 CMR 23.07.

23.02: continued

CZM means the Coastal Zone Management Office established within the Executive Office of Environmental Affairs pursuant to M.G.L. c. 21A, § 4A.

CZM Policies means the policies set forth in 301 CMR 21.98: *Policy Appendix* and as may be amended hereafter.

CZM Program means the CZM Policies and the impact statements, regulations, designations, memoranda of understanding, and other implementing actions associated therewith, as defined in 301 CMR 20.03. "CZM Plan" shall be synonymous with "CZM Program".

DEM means the Department of Environmental Management.

DEP means the Department of Environmental Protection.

Designated Port Area (DPA) means an area that has been so designated by CZM in accordance with 301 CMR 25.00, and as may be amended hereafter.

Director means the Director of the Coastal Zone Management Office as provided in M.G.L. c. 21A, § 4A, as amended in St. 1983, c. 589.

DPA Master Plan means the component of a municipal harbor plan pertaining to lands and waters of a DPA within the municipality. The DPA may be segmented for purposes of phasing the development of a master plan over time.

Environmental Monitor means the publication published by the Secretary and further described in 301 CMR 11.19.

Harbor Planning Area means the segment of a coastal or other waterway for which a Plan is developed. The harbor planning area should include all areas that are relevant to the functional use and management of the harbor or other waterway segment in question. Functional use refers to those activities that have the potential to promote or impair water-dependent activity or public use or enjoyment of waterways or shorelands. The landward boundary of any harbor planning area subject to 301CMR 23.00 shall encompass all filled tidelands subject to the jurisdiction of DEP pursuant to 310 CMR 9.04. The harbor planning area may be segmented for purposes of phasing the development of a Plan over a period of time.

Harbor Planning Group means a group designated by the municipal official for purposes of developing or overseeing development of a municipal harbor plan. The group should include individuals knowledgeable of the planning area in question, and must include a representative of the planning board.

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, and 301 CMR 11.00 and as may be amended hereafter.

Municipal Harbor Plan means a document (in words, maps, illustrations, and other media of communication) setting forth:

(a) a community's general goals and objectives for a harbor planning area, and a corresponding expression of the applied policies that have been established to guide development and other human activity in various sub-areas, in terms of its desired sequence, patterns, limits, and other characteristics;

(b) an implementation program that specifies the legal and institutional arrangements, financial strategies, and other measures that will govern public and private utilization of harbor waters and lands, in accordance with the applied policies the community has established for each sub-area;

(c) the Plan shall include the date on which the municipality proposes to submit the plan for renewal in accordance with 301 CMR 23.06(2);

(d) a planning analysis that synthesizes the technical data, community input, and other information that served as the basis for evaluating tradeoffs among alternatives and choosing preferred courses of action;

23.02: continued

(e) a review of the public participation process that contributed to the formulation of the substantive elements of the plan as described above; and

(f) h other elements as may be deemed appropriate by the Secretary to serve the purposes of 301 CMR 23.00.

Municipality means any city or town of the Commonwealth of Massachusetts.

Municipal Official means the mayor of a city, the board of selectmen of a town, or the council of a municipality having a manager-council form of government.

Notice to Proceed means a written statement issued in accordance with the provisions of 301 CMR 23.03

Plan means a Municipal Harbor Plan or amendment thereto submitted in accordance with 301 CMR 23.04.

Planning Representative means the person(s) designated by the municipal official to represent the municipality in all proceedings under 301 CMR 23.00.

Public Agency means any agency, department, district, commission, or authority of the Commonwealth or the United States, or of any municipality or other political subdivision of the Commonwealth.

Secretary means the Secretary of Environmental Affairs, or the Director of CZM as appropriate pursuant to 301 CMR 23.08(1).

State Agency means a public agency of the Commonwealth.

State Project means any work, action, conduct, alteration, change of use or other activity that is the subject of a license or permit application submitted to DEP, in accordance with the Waterways Regulations, by a state agency for the provision of facilities or services directly to the public (or to another public agency for such provision to the public) by the state agency or its contractor or agent.

Supporting DPA Use means a use so defined in accordance with 310 CMR 9.02.

Temporary Use means a use so defined in accordance with 310 CMR 9.02.

Tidelands means present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is farther landward, and the seaward limit of state jurisdiction. Tidelands include both flowed and filled tidelands as defined in 310 CMR 9.02.

Waterway means any area of water and associated submerged land or tidal flat, as defined in 310 CMR 9.02.

Waterways Regulations means the regulations established by DEP under M.G.L. c. 91, at 310 CMR 9.00 and as may be amended hereafter.

23.03: Notice to Proceed

(1) Submission Requirements. To request a Notice To Proceed and begin the process of developing a plan that is eligible for approval, a written description of the proposed planning program must be submitted to the Director of CZM, pursuant to 301 CMR 23.08(1), by the planning representative of the municipality, or of each municipality in the event two or more municipalities wish to prepare a joint plan for a shared harbor planning area. Advance consultation with CZM is encouraged in order to obtain guidance as to the information necessary to allow the public review of the proposed planning program to commence. At a minimum, such information shall include the following:

23.03: continued

(a) a description of the harbor planning group and any staff or consultants that will be available to such group; in the case of a harbor shared by more than one municipality, such description must identify any arrangements that have been made for collaborative or coordinated planning efforts;

(b) an appropriately-scaled map identifying the proposed harbor planning area;

(c) a concise historical narrative of land and water use and development in the harbor planning area, and the reasons for initiating the harbor planning process, including a summary of current problems, opportunities, and other harbor planning issues, together with a review of prior planning efforts as appropriate.

(d) a general description of a participation program that includes early and continuing interaction with the public; close coordination within municipal government and with boards, committees, and officials having jurisdiction over land and/or water resources affecting the harbor planning area, including those of neighboring municipalities as appropriate; and consultation with CZM, DEP, and other affected state, regional, and federal agencies, including those owning real property or otherwise responsible for the implementation of plans or projects in the harbor planning area; and

(e) a general description of a study program that identifies the planning analysis to be employed for developing goals, addressing potential issues, and assessing alternatives including any potential substitutions or amplifications to the Waterways Regulations pursuant to 301 CMR 23.05(2)(b) through (d).

(2) Public Notice and Distribution Requirements. After receiving a request for a Notice to Proceed pursuant to 301 CMR 23.03(1), the Director shall publish notice of the proposed planning program in the next available edition of the *Environmental Monitor*. The municipality shall, on or before the date of such publication:

(a) publish the notice in a local newspaper of general circulation, and provide a copy of the notice to all public agencies identified in 301 CMR 23.08(4)(a) and (b); and

(b) distribute copies of the proposed planning program in accordance with 301 CMR 23.08(4).

(3) Public Comment.

(a) For a period of 30 days after publication of the notice in the *Environmental Monitor*, the Secretary shall accept written public comments, and may convene a public meeting on the proposed planning program.

(4) Issuance of Notice to Proceed. No later than 30 days after the close of the comment period the Director, pursuant to 310 CMR 23.08(1), shall issue a Notice to Proceed on the proposed planning program. Notice of the issuance of such Notice to Proceed shall be published in the next available edition of the *Environmental Monitor*. The Notice to Proceed may include specifications as to the information and analysis, including consideration of alternatives, that will be necessary to determine whether the plan complies with all relevant standards for approval set forth in 301 CMR 23.05. If the harbor planning area appears to include filled tidelands subject to jurisdiction under 310 CMR 9.00, the Notice to Proceed shall indicate how the relevant boundaries of such tidelands should be estimated for planning purposes, based on best available information and any regulations and administrative guidelines for historic tideline delineation set forth by DEP.

23.04: Review Procedures

(1) Submission Requirements. The planning representative of the municipality shall submit a proposed plan to the Secretary within two years of the date of issuance of the Notice to Proceed, unless written approval is obtained from the Secretary for an extension of the submission deadline by an additional six months. The proposed plan shall be prepared in accordance with content and format instructions provided by CZM, with whom advance consultation is encouraged to obtain guidance as to the information necessary to allow the review process to commence. At a minimum such content shall include the following:

(a) text encompassing all basic elements of a plan as defined in 301 CMR 23.02; and addressing all matters discussed in the Notice To Proceed.

23.04: continued

(b) supporting documentation containing, among other things, the data and analysis establishing how the plan complies with the standards for approval set forth in 301 CMR 23.05.

(2) Public Notice and Distribution Requirements. Upon the submission of a proposed plan that meets the requirements of 301 CMR 23.04(1), the Secretary shall publish notice of the submission and of the location and date of the public hearing scheduled in accordance with 301 CMR 23.04(3)(b) in the next available edition of the *Environmental Monitor*. The municipality shall, on or before the date of such publication:

(a) publish the notice in a local newspaper of general circulation, and provide a copy of the notice to all public agencies and persons identified in 301 CMR 23.08(4)(a) and (b), and to all persons who submitted written comments on the proposed planning program; and

(b) distribute copies of the proposed plan in accordance with 301 CMR 23.08(4).

(3) Public Comment, Hearing, and Consultation with Municipality.

(a) For a period of 30 days after publication of the notice in the *Environmental Monitor*, the Secretary shall accept public comments on the proposed plan. The Secretary may extend the public comment period upon the request of any interested person, and shall publish notice of any such extension in the next available edition of the *Environmental Monitor*. Generally, extensions shall not exceed 30 days.

(b) A public hearing shall be held by the Secretary prior to the close of the public comment period and within the municipality submitting the proposed plan. In the case of a jointly submitted plan for a harbor shared by more than one municipality, a single hearing shall be held.

(c) Upon the close of the public comment period, the Secretary shall arrange a consultation session involving one or more meetings with the planning representative of the municipality and members of the harbor planning group, in order to obtain further input for purposes of developing a written decision by the Secretary on the proposed plan. As appropriate, such consultation shall involve other public agencies with legal jurisdiction or special expertise relative to the matters under consideration, including, but not limited to DEP, DEM, and state agencies owning real property or otherwise responsible for the implementation of plans or projects within the planning area. The consultation shall be completed within 60 days of the close of the public comment period, unless the period is extended at the request of the municipality or by the Secretary as necessary to review any additional information submitted by the municipality more than 30 days after the close of the comment period.

(4) Issuance of Written Decision. No later than 21 days after the close of the consultation session, or at such later time as the municipality may request, the Secretary shall issue a written decision on the proposed plan, and shall send a copy of such decision to the planning representative of the municipality and to all persons who submitted written comments during any comment period under 301 CMR 23.03 and 23.04. The written decision shall indicate whether the Secretary has approved the plan and shall set forth the basis for such determination, in accordance with the following provisions:

(a) no portion of a proposed plan shall be approved unless it meets the standards for approval set forth in 301 CMR 23.05, provided however that the Secretary may qualify, limit, or otherwise condition such approval in any manner that serves the purposes of 301 CMR 23.00; such conditions may govern both substantive and procedural matters, including but not limited to:

1. the effective date and duration of the approval;
2. the applicability of specified provisions of the plan to the review of license or permit applications under 310 CMR 9.00; and
3. the legislative, administrative, and other steps that must be taken by the municipality to fulfill any implementation commitments necessary for plan approval, in accordance with 301 CMR 23.05(4);

(b) notwithstanding any provision to the contrary in 301 CMR 23.04(4)(a), the Secretary shall renew the approval of any provisions of an existing Approved Plan submitted in accordance with 301 CMR 23.06(2), except upon a determination that:

1. the continued implementation of said provisions under the Secretary's existing approval would result in significant detriment to any water-related public interest protected by the standards set forth in 301 CMR 23.05; and

23.04: continued

2. such significant detriment cannot be avoided reasonably through sole reliance on further conditions to the Secretary's existing approval;

(c) if any portion of a proposed plan does not meet the standards for approval, the written decision shall identify the issues that have not been adequately addressed, shall indicate what modifications to the plan or the planning process would be appropriate to remedy the inadequacies noted, and shall provide such additional guidance as the Secretary deems appropriate; upon revision and resubmission, the proposed plan shall be reviewed in accordance with the procedures of 301 CMR 23.04;

(d) if the Secretary of any State Executive Office certifies in writing that incompatibility cannot be avoided between one or more provisions of the plan and the planned activities of any state agency under such Executive Office owning real property or otherwise responsible for the implementation of plans or projects within the harbor planning area, the Secretary shall determine that such incompatible provisions(s) are not applicable to the property or projects in question;

(e) in the event the Secretary decides not to renew the approval of an Approved Plan or portion thereof, pursuant to 301 CMR 23.06(2), the applicable provisions of said plan shall remain in full force and effect for any project for which a license or permit application was filed pursuant to 310 CMR 9.00 on or before the effective date of such decision.

(5) Reconsideration of Decision. The Secretary may reconsider the decision issued pursuant to 301 CMR 23.04(4), only if a compelling basis for such reconsideration is presented in a written petition submitted within 21 days of the Secretary's decision by the planning representative of the municipality, any state agency, or ten or more citizens of the Commonwealth. Such petition must include a clear and concise statement of the specific objections to the Secretary's decision and the relief sought, including specifically any changes that are proposed for consideration. The Secretary shall respond in writing to any such petition within 21 days of the close of the petition period, and shall set forth the basis for such response including the reasons for any modification of the decision. When the Secretary's decision is final, notice thereof shall be published in the next available edition of the *Environmental Monitor*.

(6) Effective Date of Approval. An Approved Plan or portion thereof shall be effective for purposes of 310 CMR 9.00 when the Secretary has determined that the municipality has met all relevant conditions of the approval decision, including but not limited to those related to implementation of any ordinances/bylaws, regulations, capital improvements, programmatic initiatives, or organizational measures. When such implementation requires adoption or other formal action by a municipal body, the Secretary shall make this determination only if the municipal clerk has certified in writing that all such actions have been taken and has submitted copies of the enactments in question to the Secretary. The Secretary's approval shall remain in effect until an amendment or renewal decision becomes effective in accordance with 301 CMR 23.06, except upon a clear showing that the municipality has not continued to meet all relevant conditions of such approval.

23.05: Standards for Plan Approval

A municipal harbor plan or portion thereof shall be approved only upon a written determination by the Secretary that the following standards have been met.

(1) The plan must be consistent with all CZM Policies, as applicable. In evaluating the plan for such consistency, the Secretary shall take into account all relevant guidance as to the interpretation and application of such Policies as may be available in documents comprising the CZM Plan and other policy-related materials issued by CZM, such as federal consistency determinations.

23.05: continued

(2) The plan must be consistent with state tidelands policy objectives and associated regulatory principles, as set forth in 310 CMR 9.00 of DEP. In evaluating the plan for such consistency the Secretary shall take into account all relevant guidance as to the interpretation and application of such regulations as may be available in written determinations, licensing decisions, and other administrative documents issued by the Waterways Regulatory Program, or as may otherwise be provided by DEP in accordance with the consultation procedures of 301 CMR 23.08(2). In addition, the Secretary shall act in accordance with the following provisions.

(a) As articulated in 310 CMR 9.00, the primary state tidelands policy objectives with which the plan must be consistent are as follows:

1. to ensure that development of all tidelands complies with other applicable environmental regulatory programs of the Commonwealth, and is especially protective of aquatic resources within coastal Areas of Critical Environmental Concern, as provided in 310 CMR 9.32(1)(e) and 9.33;

2. to preserve any rights held by the Commonwealth in trust for the public to use tidelands for lawful purposes, and to preserve any public rights of access that are associated with such use, as provided in 310 CMR 9.35;

3. to preserve the availability and suitability of tidelands that are in use for water-dependent purposes, or that are reserved primarily as locations for maritime industry or other specific types of water-dependent use, as provided in 310 CMR 9.32(1)(b) and 9.36;

4. to ensure that all licensed fill and structures are structurally sound and otherwise designed and built in a manner consistent with public health and safety and with responsible environmental engineering practice, especially in coastal high hazard zones and other areas subject to flooding or sea-level rise, as provided in 310 CMR 9.37;

5. to ensure patronage of public recreational boating facilities by the general public and to prevent undue privatization in the patronage of private recreational boating facilities, as provided in 310 CMR 9.38; and to ensure that fair and equitable methods are employed in the assignment of moorings to the general public by harbormasters, as provided in 310 CMR 9.07;

6. to ensure that marinas, boatyards, and boat launching ramps are developed in a manner that is consistent with sound engineering and design principles, and include such pumpout facilities and other mitigation measures as are appropriate to avoid or minimize adverse impacts on water quality, physical processes, marine productivity, and public health, as provided in 310 CMR 9.39;

7. to ensure that dredging and disposal of dredged material is conducted in a manner that avoids unnecessary disturbance of submerged lands and otherwise avoids or minimizes adverse effects on water quality, physical processes, marine productivity, and public health, as provided in 310 CMR 9.40;

8. to ensure that nonwater-dependent use projects do not unreasonably diminish the capacity of any tidelands to accommodate water-dependent use, as provided in 310 CMR 9.51;

9. to ensure that nonwater-dependent use projects on any tidelands devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in said lands, as provided in 310 CMR 9.52;

10. to ensure that nonwater-dependent use projects on Commonwealth tidelands, except in Designated Port Areas, promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and that ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes, as provided in 310 CMR 9.53.

(b) If the plan includes provisions that amplify upon any discretionary requirement of 310 CMR 9.00, such provisions must be complementary in effect with the regulatory principle(s) underlying such discretionary requirement. At a minimum, this determination shall be based upon a demonstration by the municipality that:

1. the provisions in question do not contradict the corresponding provisions of 310 CMR 9.00; for example, the plan may not require that which is prohibited nor prohibit that which is required in 310 CMR 9.00;

2. the provisions in question do not significantly alter the substantive nature of the requirement, narrow the range of factors that may be considered, or otherwise unreasonably affect the ability of DEP to exercise discretion in the interpretation and application of all relevant provisions of 310 CMR 9.00; and

23.05: continued

3. the provisions in question must be consistent with the provisions of any memoranda of understanding with other state agencies that, as provided in 310 CMR 9.00, and may govern the manner in which DEP licenses and permits will incorporate the requirements of other statutes and regulations that preserve public rights in waterways and otherwise promote state tidelands policy objectives.

(c) If the plan includes provisions that are intended to substitute for the minimum use limitations or numerical standards of 310 CMR 9.00 at 310 CMR 9.51(3)(a) through (e), 9.52(1)(b)(1), or 9.53(2)(b) and (c), the Secretary must determine that the following conditions have been met, as applicable:

1. as provided in 310 CMR 9.51(3)(a), governing pile-supported structures that extend beyond the footprint of existing, previously authorized pile-supported structures, the plan must specify alternative replacement requirements that ensure that no net loss of open water will occur for nonwater-dependent purposes, in order to maintain or improve the overall capacity of the state's waterways to accommodate public use in the exercise of water-related rights, as appropriate for the harbor in question;

2. as provided in 310 CMR 9.51(3)(b), governing the location of certain facilities of private tenancy, the plan must specify alternative limitations and other requirements that ensure that no significant privatization of waterfront areas immediately adjacent to the water-dependent use zone will occur for nonwater-dependent purposes, in order that such areas will be generally free of uses that conflict with, preempt, or otherwise discourage water-dependent activity or public use and enjoyment of the water-dependent use zone, as appropriate for the harbor in question;

3. as provided in 310 CMR 9.51(3)(c), governing the establishment of a water-dependent use zone, the plan must specify alternative setback distances and other requirements that ensure that new or expanded 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 use and public access associated therewith, as appropriate for the harbor in question;

4. as provided in 310 CMR 9.51(3)(d), governing the combined footprint of certain buildings, the plan must specify alternative site coverage ratios and other requirements that ensure that, in general, buildings for nonwater-dependent use will be relatively condensed in footprint, in order that an amount of open space commensurate with that occupied by such buildings will be available to accommodate water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

5. as provided in 310 CMR 9.51(3)(e), governing the height of certain buildings, the plan must specify alternative height limits and other requirements that ensure that, in general, new or expanded buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

6. as provided in 310 CMR 9.52(1)(b)1., governing the provision of a pedestrian access network, the plan may specify a minimum walkway width other than ten feet, provided that the alternative width is appropriate given, among other things, the size and configuration of the water-dependent use zone and the nature and extent of water-dependent activity and public uses that may be accommodated therein;

7. as provided in 310 CMR 9.53(2)(b) and (c), governing provision of water-related public benefits by certain nonwater-dependent use projects, the plan must specify alternative requirements for public outdoor recreation facilities and for interior facilities of public accommodation that will establish the project site as a year-round locus of public activity in a comparable and highly effective manner.

(d) In accordance with 310 CMR 9.51(3), any determination made pursuant to 301 CMR 23.05(2)(c), shall be based upon a demonstration by the municipality that the substitute provisions set forth in the plan will promote, with comparable or greater effectiveness, the state tidelands policy objectives stated in the corresponding provisions of 310 CMR 9.00. The substitute provisions may include alternative use limitations or numerical standards that are less restrictive than the Waterways requirements as applied in individual cases, provided that the plan includes other requirements that, considering the balance of effects on an areawide basis, will mitigate, compensate, or otherwise offset adverse effects on water-related public interests. In determining whether comparable or greater effectiveness has been achieved, the Secretary shall also act in accordance with the following provisions:

23.05: continued

1. the planning analysis and data presented therewith shall be organized in a manner that clearly identifies the substitute provisions proposed, and establishes the nature and extent of differential effects any less restrictive requirements will have with respect to the tidelands policy objectives in question; generally, the appropriate level of such analysis will depend on the degree to which the Waterways requirements are relaxed, the significance of benefits associated with proposed offsetting measures, and other relevant circumstances such as the characteristics of the built environment in the area in question;

2. generally, offsetting measures should be applied within reasonable proximity of the locus of adverse effects that need to be offset, in order to avoid or minimize inequity in the distribution of public benefits and detriments;

3. a special permit, site plan review, or design review process may be acceptable as a means of establishing the particulars of mitigation on a case-by-case basis, provided that the plan itself sufficiently defines the parameters within which such process will operate, so that a reasonable assessment of likely effects under varying circumstances can be made.

(e) If the plan includes a DPA master plan, such master plan must preserve and enhance the capacity of the DPA to accommodate water-dependent industrial use, and must prevent substantial exclusion of such use by any other use eligible for licensing in a DPA pursuant to 310 CMR 9.32. At a minimum, this determination shall be based upon a demonstration by the municipality that the following criteria are met:

1. the master plan shall ensure that an extensive amount of the total DPA land area in close proximity to the water will be reserved for water-dependent industrial uses, provided that temporary use may also be allowed on such reserved lands if the plan establishes guidelines for solicitation of a maritime industrial tenant as a pre-condition of the temporary occupancy; the master plan shall further ensure that commercial uses and any accessory uses thereto will not, as a general rule, occupy more than 25% of the total DPA land area covered by the master plan;

2. the master plan shall set forth reasonable arrangements, as required in 310 CMR 9.36, to prevent commitments of any space or facilities that would significantly discourage present or future water-dependent industrial activity, especially on waterfront sites; the arrangements shall include, but are not limited to, appropriate limits on the type, location, density, scale, duration, operation, or other relevant aspects of commercial uses, in order to ensure that such uses will mix compatibly with and not significantly alter the predominantly maritime industrial character of the DPA; the plan may also specify reasonable limitations on any uses in the DPA, if necessary to mitigate undue conflict with existing residential uses on properties abutting the DPA;

3. the master plan shall identify any industrial or commercial uses allowable under the municipal zoning code that shall qualify as a Supporting DPA Use, provided such uses comply with the provisions of the definition set forth in 310 CMR 9.02 and any associated written guidelines of DEP; and

4. the master plan shall set forth a strategy to guide the on-going promotion of water-dependent industrial use by appropriate municipal, state, and federal agencies; the strategy shall include, but is not limited to:

a. recommendations for capital improvements or other economic or operational benefits to be provided by projects involving Supporting DPA Uses, in accordance with municipal goals and priorities for development of water-dependent industrial uses on the project sites in question;

b. recommendations to preserve or enhance the infrastructure of navigation channels, truck routes and rail lines, and other transportation facilities providing user access to the working waterfront and its backlands from both the water and the land sides; and

c. commitments to maintain a surrounding land development pattern that provides an appropriate buffer between industrial uses in the DPA and community uses that require separation therefrom in order to avoid significant operational conflict.

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(3) The plan must include all feasible measures to achieve compatibility with the plans or planned activities of all state agencies owning real property or otherwise responsible for the implementation or development of plans or projects within the harbor planning area. This determination shall be made only if full consultation has occurred between the municipality and the relevant state agencies, wherein both parties have made every reasonable effort to maximize the compatibility of their respective plans.

(4) The plan must include enforceable implementation commitments to ensure that, among other things, all measures will be taken in a timely and coordinated manner to offset the effect of any plan requirement less restrictive than that contained in 310 CMR 9.00.

23.06: Amendment and Renewal Procedures

(1) Amendments. Upon written request by the planning representative of a municipality, accompanied by appropriate supporting material, the Secretary may approve an amendment to an Approved Plan. The proposed amendment shall be reviewed under the procedures of 301 CMR 23.04.

Notwithstanding such procedures, the Secretary may issue, at the request of the municipality, written clarification and corrections regarding any approval previously issued.

(2) Renewal.

(a) The approval of a plan shall expire on the date stipulated in the Secretary's approval decision, unless the planning representative of the municipality submits a written request to the Secretary to commence renewal of the approval or to extend the original expiration date. The Secretary may extend the original expiration date of the approval or portion thereof for a period not to exceed one year.

(b) No later than six months prior to the expiration date of the Secretary's approval of the plan, the Secretary shall notify the planning representative of the municipality of the above renewal requirement. The notification may include instructions as to the information necessary for the renewal process to commence, including but not limited to a review of the plan's effectiveness in promoting state tidelands policy objectives and other water-related public interests.

(c) All provisions of the existing Approved Plan and any proposed amendments, shall be reviewed in accordance with 301 CMR 23.04. Until the Secretary's final decision to renew the approval of an existing Approved Plan becomes effective, the Secretary's previous approval shall remain in full force and effect.

23.07: Applicability of Certain Provisions of an Approved Plan

If the Secretary of any State Executive Office certifies in writing, subsequent to the approval of a plan, that an incompatibility has arisen between a state project under such Executive Office and one or more provisions of the Approved Plan, the Secretary shall act in accordance with the following provisions:

(1) upon receipt of the written certification, the Secretary shall follow the notice, comment, and consultation procedures set forth in 301 CMR 23.04(2)(a) and (3), unless the project requires an Environmental Impact Report (EIR);

(2) reasonable arrangements shall be made by the state agency, in full consultation with the Secretary and the affected municipality, to evaluate alternatives to the proposed project in order to avoid or minimize incompatibility with the Approved Plan, and to evaluate the possibility of amending the Approved Plan pursuant to 301 CMR 23.06 if incompatibility cannot be reasonably reduced through other measures; if the project requires an Environmental Impact Report (EIR), the information and analysis required for such evaluation shall be limited to that provided in the final EIR prepared in accordance with MEPA; and

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(3) to the extent that incompatibility remains between the state project and the Approved Plan after reasonable effort has been made to minimize such incompatibility, in accordance with 301 CMR 23.07(2), the Secretary shall determine that the relevant provisions of the Approved Plan are no longer applicable to the project; this determination shall be made in the Secretary's Certificate on the final EIR, or, if an EIR is not required, within 21 days of the close of the consultation session provided for in 301 CMR 23.07(1).

23.08: Miscellaneous Administrative Procedures

(1) Administration and Delegation. The Coastal Zone Management Program shall administer 301 CMR 23.00 under the direction of the Director. The Secretary may delegate to the Director the authority to issue any written decision or other written statement pursuant to 301 CMR 23.00, exclusive of 301 CMR 23.07. Any such statement signed by the Director shall be deemed the valid and duly authorized statement of the Secretary.

(2) Consultation with DEP. If DEP files written notice with the Secretary during any public comment period, it shall be provided the opportunity to participate in any consultation session with the municipality and to co-chair the public hearing. DEP may also provide a written recommendation to the Secretary concerning the consistency of a proposed plan with state tidelands policy objectives and associated regulatory principles, as provided in 301 CMR 23.05(2), which shall be evaluated in accordance with the following procedures:

(a) if CZM concurs with the recommendation of DEP, such recommendation shall be included in the written decision on the proposed plan;

(b) if CZM disagrees with the recommendation of DEP and such disagreement cannot be resolved through routine consultation, the assistance and direction of the Secretary shall be sought in accordance with the provisions of M.G.L. c. 21A, § 4, governing mediation of administrative and jurisdictional conflicts within EOEA; if the disagreement is not eliminated through such mediation, the Secretary shall include in the written decision on the proposed plan an explanation of the specific basis for the final determination on consistency with state tidelands policy objectives and associated regulatory principles.

(3) Saturday, Sunday, Legal Holiday. When the last day for a Secretarial action falls on a Saturday, Sunday, or legal holiday, the Secretary may act on the next succeeding business day. When the last day of the receipt of comments or receipt of documents for publication in the *Environmental Monitor* falls on a Saturday, Sunday, or legal holiday, the Secretary shall accept such comments or documents until 5:00 P.M. on the next succeeding business day.

(4) Distribution of Documents.

(a) On or before the date on which any notice of request for a Notice To Proceed, proposed plan, or other submission under 301 CMR 23.00 is published in the *Environmental Monitor*, the municipality shall send a copy of such document(s) to the following:

1. Director, DEP, Division of Wetlands and Waterways Program (two copies);
2. DEP, Regional Director; for the region appropriate to the proposed planning program;
3. Commissioner, Department of Fisheries, Wildlife and Environmental Law Enforcement;
4. Commissioner, DEM;
5. Maritime Director, Massachusetts Port Authority, as applicable;
6. Regional planning agencies or land use commissions, as applicable; and
7. any other public agency or person designated by the Secretary or CZM in the Notice to Proceed or other written statement.

(b) Upon request, the municipality shall send a copy of any request for Notice to Proceed, proposed plan, or other submission under 301 CMR 23.00 to any other public agency, including but not limited to:

1. Massachusetts Historical Commission;
2. Division of Capital Asset Management;
3. Department of Food and Agriculture, if any portion of the harbor planning area has been used for agricultural purposes in the last five years;
4. the following state agencies responsible for the development or regulation of infrastructure facilities within the harbor planning area, as applicable;

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a. Massachusetts Water Resources Authority;
b. Executive Office of Transportation and Construction;
c. Department of Public Works;
d. Massachusetts Bay Transportation Authority;
e. Department of Public Utilities;
f. Energy Facilities Siting Council;
g. Massachusetts Aeronautics Commission; and
h. any other state or federal agency which may either permit or fund activities in the harbor planning area.

(c) The municipality shall make copies of any request for a Notice to Proceed, proposed plan, or other submission under 301 CMR 23.00 available to the public at the municipal library, city or town hall, and office of the harbormaster and harbor commission, if any. Copies of such documents shall also be made available to individuals, upon request and for a fee not to exceed the cost of printing and mailing. The municipality shall maintain a list of the names and addresses of all persons to whom documents are provided, indicating the dates on which the request was received and the documents sent.

(d) Undue delay in meeting the above distribution requirements may be cause for extension of any relevant public comment period by the Secretary.

23.09: Effective Date and Severability

(1) 301 CMR 23.00 shall take effect on June 23, 2000. 301 CMR 23.00 shall apply to any request for review and approval of a municipal harbor plan or amendment thereto filed on or after June 23, 2000, except that the prior regulations effective 12/15/94 shall remain in effect for any proposed plan prepared under a Scope issued by the Secretary pursuant to such prior regulations.

(2) Severability. If any provision of 301 CMR 23.00 or the application thereof is held to be invalid, such invalidity shall not affect any other provision of 301 CMR 23.00.

REGULATORY AUTHORITY

301 CMR 23.00: M.G.L. c. 21A, §§ 2 and 4A.