

MassDEP 401 Water Quality Certification Program

Agency

Department of Environmental Protection
(MassDEP) Bureau of Resource Protection and
Local Conservation Commissions

Program

Wetlands and Waterways Program
401 Water Quality Certification Program

Regulations

314 CMR 9.00: 401 Water Quality Certification
for Discharge of Dredged or Fill Material,
Dredging, and Dredged Material Disposal in
Waters of the United States within the
Commonwealth (see also Preface to the Revisions
of 314 CMR 9.00 401 Water Quality Certification
Regulations); 314 CMR 4.00 Massachusetts
Surface Water Quality Standards

Statute

M.G.L. c.21, ss.2, 4, 8, 14 & 26-53

Purpose

The purpose of the 401 Water Quality
Certification Regulations is to certify that
proposed discharges of dredged or fill material,
dredging, and dredged material disposal in waters
of the United States within the Commonwealth
will comply with the Surface Water Quality
Standards (314 CMR 4.00) and other appropriate
requirements of state law.

Summary

Section 401 of the Federal Clean Water Act
requires that anyone proposing any activity that
will result in a discharge to waters or wetlands
subject to federal jurisdiction is required to obtain
a state certification that the project will comply
with state water quality standards. Dredging is also
regulated under the State Clean Waters Act.
A Water Quality Certificate issued by the
Department of Environmental Protection
(MassDEP) is a determination that the proposed
activity will not violate the Massachusetts Surface
Water Quality standards (301 CMR 4.00).
The Surface Water Quality Standards designate
uses of the various state waters, prescribe
minimum criteria to sustain the designated uses,
and set forth requirements to achieve designated

uses and maintain existing water quality (see
Surface Water Quality Standards section below).
Filing requirements under the Water Quality
Certification regulations are dependent on the size
of the impact and the type of the resource to be
impacted. For projects with minor impacts
(i.e. <100 cubic yards of dredging), an Order of
Conditions (see *Wetlands Protection Act Regulations*
section above) serves as a Water Quality
Certification and project proponents are not
required to submit an application for certification.
However, for activities with large impacts (> 100
cubic yards of dredging) or discharges to
Outstanding Resource Waters or other sensitive
resources, proponents are required to submit an
application to MassDEP for Water Quality
Certification review. The criteria for evaluation of
applications are designed to avoid wetlands
impacts and to minimize and mitigate any
unavoidable impacts.

ACECs

ACECs include water bodies and wetlands subject
to classification under the Surface Water Quality
Standards, many of which have been designated
Outstanding Resource Waters (ORWs). Proposed
activities within ORWs require a 401 review and
certification from MassDEP, in addition to an
Order of Conditions pursuant to the Wetlands
Protection Regulations.

As a general rule discharges to certified vernal
pools and to areas within 400 feet of a public
water supply reservoir are prohibited without a
variance, regardless of whether those resources
(both classified as ORWs) are within an ACEC.
Discharges to other ORWs may be permitted
following an alternatives analysis and
minimization and mitigation of any adverse
impacts. Water-dependent facilities in ORWs that
are located within an ACEC may be enlarged if
the enlargement is consistent with a Resource
Management Plan locally adopted and approved
by the Secretary provided that any fill or structure
associated with the enlargement activity is located
entirely within an area of previously filled
tidelands [see 314 CMR 9.06(3)(k)]. Such
proposed enlargements may include improvement
dredging if the sole purpose is to provide fisheries
or wildlife enhancement as required by 314 CMR

9.07(1)(k)(5) and the Waterways regulations at 310 CMR 9.40(1).

Confined Aquatic Disposal (CAD - a subaqueous constructed cell or natural depression into which dredged sediment is placed and then isolated from the surrounding environment) or the siting of a Confined Disposal Facility (CDF - a facility created in open water or wetlands consisting of confinement walls or berms built up against or extending into existing land), within an ACEC is prohibited [see 314 CMR 9.07(8)(a)(2)]. Intermediate Facilities, sites or locations that are used, temporarily or permanently, to manage dredged material prior to its ultimate reuse or disposal (*e.g.*, barge unloading, stockpiling or storage, dewatering, processing or treatment, truck or train loading or unloading), where it will have a permanent adverse impact on an ACEC is prohibited [see 314 CMR 9.07(4)(d)(7)].

All ORWs, including those located within ACECs, are listed in the Surface Water Quality Standards at 314 CMR 4.00. A list of ORWs located within ACECs can also be obtained from ACEC Program staff.

Note: Within an ACEC, an application for Water Quality Certification requires the filing and review of an Environmental Notification Form (ENF) pursuant to the MEPA Regulations, before MassDEP can act on the Certificate (with the exception of projects that consist of one single-family dwelling –see *MEPA Regulations* section above).

Wetlands Protection Act

Regulations (310 CMR 10.00) require that no one shall remove, fill, dredge, or alter any of the coastal or inland (freshwater) wetland resource areas listed in the Wetlands Protection Act without filing a Notice of Intent (NOI) to do so with the local Conservation Commission. Conservation Commissions are required to issue an Order of Conditions (OOC) designed to protect the specific interests of the Act.

For coastal Resource Areas within ACECs, the performance standard is raised to "no adverse effect" on the interests of the Act, except

for maintenance dredging for navigational purposes of "Land Under the Ocean" (see section 10.24(5)(b)).

A higher performance standard also applies to the inland (freshwater) wetlands Resource Area known as "Bordering Vegetated Wetland (BVW)." Within an ACEC, potential projects are prohibited that would result in the loss of up to 5,000 square feet or, in some cases, in the loss of up to 500 square feet of BVW (310 CMR 10.55(4)(e)). This standard for BVW applies to all ACECs. Work affecting BVW may be permitted if it can be authorized under the "limited projects" section listed at 310 CMR 10.53(3).

However, ACEC designation does not prohibit work affecting BVW if such work can be authorized under any section of the Wetlands Protection Regulations, including if the presumption of significance can be rebutted, if the proposed project is for maintenance of permitted stormwater structures (310 CMR 10.55(4)(e)4), or if the proposed project can meet the specific performance standards for "limited projects" listed at 310 CMR 10.53(3). If a project in an ACEC qualifies as a limited project, alteration of BVW may be permitted under 310 CMR 10.53(3), although no limited project may have any adverse effect on specified habitat sites of rare species. For the specific "limited project" provision for the construction, reconstruction, operation, or maintenance of water-dependent projects (310 CMR 10.53(1)), the project must still meet performance standards for impacts to BVW (except the ACEC provision for no impairment, 310 CMR 10.55(4)(e)3). That is, a water-dependent limited project impacting BVW may not impact more than 5000 square feet with replication, or 500 square feet if a "finger-like" wetland. For all reviews of limited projects, Conservation Commissions' discretion in the evaluation of projects should be based on a balancing of the magnitude of the wetland impacts proposed against the significance of the particular wetland to the interests of the Wetlands Act, the availability of alternatives, minimizing of adverse impacts, and mitigation provided (310 CMR 10.53(3)).