March 1, 2022

Daniel J. Padien
Waterways Program Chief
Massachusetts Department of Environmental Protection
1 Winter Street, 5th Floor
Boston, MA 02108
DEP.Waterways@mass.gov (submitted via email)

RE: Chapter 91 / Resiliency

Dear Mr. Padien,
Buzzards Bay Coalition (BBC) is a membership-supported organization dedicated to improving the health of the Buzzards Bay ecosystem for all through education, research, advocacy, and conservation, including the restoration of natural resources. BBC hereby submits comments on potential changes to the Waterways Regulations related to climate resiliency for near-term and longer-term approaches. BBC participated in the February 9 discussion and understand that these comments will be used to help the DEP Waterways draft climate resiliency regulations to be released this spring for public comment, with final regulations to be issued this fall. We applaud DEP's efforts to incorporate stakeholder input into draft regulations and urge you to consider how DEP can better support restoration projects specifically designed to improve ecological function and resilience.

Buzzards Bay Coalition is very active in promoting nature-based coastal resilience through implementing restoration projects that directly restore impaired wetland functions on the landscape and through direct permanent protection of natural lands. Restoring wetland function improves the ability of our watersheds and coastal ecosystems to provide important ecosystem services (including assimilating pollution, tempering storm floods, and providing fish and wildlife habitat) that are being strained by a rapidly changing climate. However, having experienced the permitting process first hand on several restoration projects, the Chapter 91 permit and license process takes a long time (typically the longest review time out of all Executive Office of Energy and Environmental Affairs (EEA) agencies), adds a significant amount of work because of the unusual permit plan size required, and does not result in additional benefit to the resource. The duplicative, slow and expensive process inhibits important restoration work being completed. Therefore, we strongly urge EEA and DEP Wetlands & Waterways to adopt regulations that reduce permitting hurdles for ecological restoration projects (e.g., salt marsh, freshwater wetland and stream restoration).

There is particular urgency for addressing the permitting hurdles for marsh restoration projects because salt marsh loss in Massachusetts is accelerating at a rapid pace due to sea level rise coupled with historic alteration of these wetlands. The restoration community in the northeast has been working together to implement and monitor nature-based solutions (e.g., ditch remediation, runnels) that revert or slow the rapid loss of marsh we are observing. BBC, in cooperation with several partners, has been at the forefront of implementing and monitoring the use of runnels as a climate adaptation tool in the Buzzards Bay estuary. The risk of doing nothing to save our rapidly drowning marshes is very high, as we are actively seeing large acreages of salt marsh disappear, and salt marsh loss is accelerating with

increasing sea level rise. Comparatively, the risk of implementing thoughtful restoration approaches led by restoration experts in an adaptive management approach re-establishes marsh resiliency and is low risk. However, the lengthy and duplicative DEP review process across multiple EEA Agencies (MEPA, DEP Wetlands, Coastal Zone Management, MassWildlife, DEP Chapter 91 Waterways) each with their own submission requirements, adds a multitude of permit hurdles, significant time and cost that inhibit more restoration projects moving forward. Permit streamlining is needed for coastal restoration projects that help these systems adapt more quickly.

BBC suggests streamlining Ch. 91 review of restoration projects to include notification of Ch. 91 staff, but **allowing permit and license exemptions for "Ecological Restoration Projects" and Ecological Restoration Limited Projects"** as defined in 310 CMR 10.04. This includes the following types of restoration projects:

- Low impact or nature-based marsh restoration techniques (e.g., runnels, ditch filling with biodegradeable materials such as hay, etc.);
- Fish passage and channel restoration improvements (e.g., dam removals, nature-like fishways, culvert replacements, etc.), including associated public access improvements (e.g., overlooks, canoe launches); and
- Restoration of natural wetlands within formerly farmed cranberry bog complexes.

Additionally, we encourage EEA and DEP to consider allowing placement of thin layers of sediment on salt marsh as an additional marsh restoration practice that would help these wetland resources maintain elevations that support marsh vegetation with impending sea level rise.

We thank you for the opportunity to provide you with these comments and recommendations.

Sincerely,

Sara N. da Silva Quintal
Restoration Ecologist
Buzzards Bay Coalition

BOSTON HARBOR NOW
Are you on board?

15 State Street Suite 1100
Boston, MA 02109
617 223 8667
bostonharbornow.org

February 25, 2022

MassDEP Waterways Program
Attn: Chapter 91/Resiliency
1 Winter Street, 5th Floor
Boston, MA 02108

Via email: DEP.Waterways@mass.gov

Re: Chapter 91 / Resiliency

Dear Mr. Padien and the Waterways team,

Thank you for the opportunity to comment on Resiliency Regulatory Updates proposed for Chapter 91. Boston Harbor Now's mission is to ensure that Boston's waterfront, harbor, and islands are accessible and inclusive and that these assets are **properly adapted to the risks of climate change.** We do this in order to realize our vision of a vibrant, welcoming, and **resilient Boston Harbor, Waterfront, and Islands** for the benefit of everyone. We are encouraged by DEP's willingness to work with us and a range of stakeholders to update the Public Waterfront Act (G.L. c. 91, §§ 1, 2, 14 & 18) to address the coastal impacts of climate change and the need to build new resilience and adaptation measures. We hope that these changes will help to advance climate prepared designs in the same way that the regulations have historically ensured greater public access.

Boston Harbor Now, and our predecessor organization The Boston Harbor Association, has historically used the Chapter 91 comment process at the Massachusetts Department of Environmental Protection (MassDEP) to ensure that private and public property owners provide a Harborwalk along the shoreline, facilities of public accommodations, and other amenities when they develop or modify property with non-water-dependent uses. Recognizing that the risks of coastal flooding are increasing as a result of sea level rise and that the existing Chapter 91 regulations do not reference resilience, we have expanded our commenting process considerably beyond Chapter 91 to other regulatory processes ensure that projects are prepared for the anticipated impacts of climate change. We look forward to having new regulatory tools within Chapter 91 that better define the expectations for future projects and ensure that public benefits created today are not underwater in 2070 or 2100.

Engineering and Constructions Standards – 9.37

We agree with the use of future sea level projections rather than historic flood data in reviewing projects and believe that projects need to show how they will address future sea level rise. The Boston Planning and Development Agency

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(BPDA) has established *Coastal Flood Resilience Guidelines & Zoning Overlay District*, which have expanded the geography of the areas projected to be subject to future flooding and established safe elevations to above the anticipated water levels of a flood with a 1% chance storm event in 2070 with 40-inches of sea level rise. This serves as a model for clear regulatory guidance for project review.

MassDEP should establish a methodology for collecting and sharing consistent projections and projection-related standards that applies across state agencies. The design flood elevations and the scope of anticipated flooding should extend beyond the historic flood maps and incorporate sea level rise models to anticipate the future realities of climate change. Specific requirements should be differentiated by use and location as non-water-dependent uses have different considerations than docks, piers, and other water-dependent uses, which may also need to adapt to higher tide levels.

Finally, the process for establishing and updating the projected elevations is also critical. Regular MassDEP reviews of the relevant climate science, observed trends in sea level rise, and other parameters should be conducted on a regular basis, perhaps at five year intervals. As an example, the original Boston Research Advisory Group projections that provided the foundation for the Climate Ready Boston work in Boston are now being updated, with a new report on the most recent five-year update expected shortly. The City of New York has a similar process in place.

Building Height Provisions – 9.51

MassDEP should clarify how building heights are to be measured—specifying that they should be measured from a standardized design flood elevation (DFE) rather than from the existing grade. The BPDA's new Waterfront Zoning Overlay does a good job of clarifying the impacts of needed resiliency improvements and providing elevations. Other state and municipal zoning may need to be updated to include such a number and establish a new resiliency height standard.

In preparation for flood risks, an increased number of building owners and developers are moving mechanical systems to the upper floors of the building rather than installing them in basements and on the ground floor. Since building heights are measured to the highest occupiable floor, there is not a need for MassDEP to provide additional height allowances to accommodate these design changes in new buildings, though collaboration with municipalities can allow for changes in existing buildings.

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Expiration and Renewal – 9.25

Every license renewal should consider projected sea level rise. Given the uncertainty of sea level rise and other climate projections, licenses should be consistent with the design life of the project, and the design should reflect plans to adapt over time if necessary. There should be clear consequences for non-renewal and non-compliance as well as clear public processes for changes. Projects that need to be adapted to meet the new standards defined above should be informed of these changes and have a clear community process for renewing the license.

Extended Term Licenses – 9.15

New projects and those subject to renewal will need to go through a process that demonstrates that both the structures and the corresponding public amenities will remain accessible during future persistent flood events. For example, new Harborwalk segments along the water's edge should be elevated above future high tides while alternate pedestrian routes and indoor amenities should be accessible during storms. The 30-year license term is appropriate for projects designed to address 2070 climate change projections; however, extended term licenses should require that sea level rise be considered intentionally and proactively.

Proponents requesting longer license terms should demonstrate that they have taken more forward looking flood projections into account and that public benefits will still be usable in the extended term, which may not be a consideration in the typical zoning or municipal review process. There may be compelling reasons to grant a 65-year license, but without clear climate change projections beyond 2100, we are concerned about the issuance of long term licenses.

We also support the recommendation of the Conservation Law Foundation that proponents requesting extended term licenses put funding into escrow accounts to cover the cost of additional climate change adaptations and site modifications.

Minor Project Modification – 9.22

Modifications to projects that address sea level rise should be allowed under the new regulations. Nevertheless, all modifications and minor modifications should include a public process. In particular, while relocating building systems from the ground floor for flood resilience may be a minor change, any new ground floor spaces available in non-water-dependent structures on Commonwealth tidelands should be redesigned with the community. Where flood risks or persistent flooding threaten existing ground floor and outdoor public spaces, the scope,

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scale, and intent of Facilities of Public Accommodation may need to be physically changed and must be maintained during the term of the license and or design life of the project in order to address climate change impacts.

Definitions (Coastal High Hazard) – 9.02

We support changes to clarify definitions so that "Coastal High Hazard" is replaced with "Velocity Zone" for consistency with Wetland Regulations. We also recommend de-designating dilapidated pile fields from "existing" piles, consistent with MassDEP's 2017 decision in the North End.

Long Term Considerations

MassDEP has an opportunity and obligation to work within the agency and across other state environmental offices to find ways to encourage nature based solutions for shoreline protection and flood control. By tracking existing and proposed projects with living shorelines, such as Clippership Wharf, Encore, and Stone Living Lab research, regulations for these adaptation measures can be improved and more consistently permitted.

MassDEP has the potential to do for climate resiliency what it has done for public access through the process of updating these regulations. We look forward to further opportunities to comment on the forthcoming draft regulations and to the next conversation about longer term changes to Chapter 91. We appreciate the opportunity to work in partnership with MassDEP and other federal, state, and municipal agencies, as well as the private sector, to provide input into these regulatory changes in order to create the accessible and resilient waterfronts that are envisioned by the public trust doctrine and codified in the Public Waterfront Act.

Thank you for your consideration of these comments. We look forward to continuing to be involved in the process as changes are considered.

Sincerely,

Katherine F. Abbott
President and CEO
Boston Harbor Now

February 25, 2022

Commissioner Martin Suuberg
Daniel Padien, Waterways Program Chief
MA Department of Environmental Protection
1 Winter Street
Boston, MA 02108

RE: A Better City's Formal Comments on Chapter 91/Resiliency

Dear Commissioner Suuberg and Chief Padien:

On behalf of A Better City's membership representing 130 of Boston's business leaders across multiple sectors of the economy, thank you for the opportunity to provide feedback on the proposed updates to Chapter 91 regulations (310 CMR 9.00) in response to the effects of a changing climate, including sea level rise, increased precipitation, and intensifying storms.

Thank you also for the opportunity to participate in the February 9th stakeholder advisory panel. We are grateful for the Commonwealth's continued climate leadership and for your proactive engagement with the business community. We are committed to working with you and the DEP team to ensure the successful implementation of the Chapter 91 regulations statewide and on Boston's waterfront.

We understand the need for resilience-focused regulatory updates to Chapter 91, however A Better City's members continue to have comments and concerns around: 1) defining climate resiliency in Ch. 91 regulations; 2) promoting district-wide and regional approaches to resiliency; 3) clarifying technical and timing aspects of implementation; 4) ensuring consistency, predictability, and policy alignment; and 5) defining waterfront accessibility for all. Comments, based on this feedback, are enclosed below.

We look forward to continued dialogue and collaboration in the months ahead and thank the Commonwealth for their leadership.

Sincerely,

Rick Dimino
President & CEO, A Better City

Enclosures: 1

ATTACHMENT A: DETAILED FORMAL COMMENTS ON ANTICIPATED UPDATES TO CHAPTER 91 CONCERNING CLIMATE RESILIENCY

A Better City strongly supports the Commonwealth's leadership in promoting science-based policies that help to keep our waterfronts and their communities resilient and safe in the face of climate change. As the Commonwealth continues to develop and implement the policies needed to achieve this goal, we recognize and appreciate its continued engagement with the business community.

Many of A Better City's members are property owners or developers on the Boston waterfront and are familiar with the current implications of Chapter 91 regulations. We look forward to ongoing collaboration with the DEP team on Chapter 91 (Ch. 91) updates and include a series of comments and recommendations for your consideration below.

1. DEFINING CLIMATE RESILIENCY IN CH. 91 REGULATIONS

A Better City recommends including a comprehensive definition of climate resiliency in Ch. 91 regulations that incorporates the impacts of extreme heat and extreme precipitation as well as sea level rise and coastal flooding, which will all be detrimental to the waterfont and watersheet. Including a more comprehensive definition of climate resiliency in the Ch. 91 process would also be consistent with other definitions of climate resiliency in existing city- and state-level climate policy and regulatory processes.

Recommendation: A Better City recommends including a comprehensive definition of climate resiliency in Ch. 91 regulations that incorporates extreme heat and extreme precipitation.

2. PROMOTING DISTRICT-WIDE AND REGIONAL APPROACHES TO RESILIENCY

A. District-Wide Vulnerability Analyses

When considering how to incorporate climate resiliency into Ch. 91, ABC supports district-wide vulnerability analyses and approaches to resiliency. This will help to enable climate resilient infrastructure implementation and financing, like the suggestions made in Climate Ready Boston.

B. Leveraging Existing License Fees at a District-Scale

A Better City members suggest exploring opportunities for leveraging existing license fees to fund resiliency measures at a district-scale that would help to protect the Commonwealth's waterfront and its surrounding communities. While we do not recommend increasing license fees, ABC suggests looking into existing license fees as a possible financing mechanism for district-scale and regional resilient climate infrastructure solutions, if possible.

C. Regional Approaches to Resiliency Governance and Implementation

A Better City recommends DEP consider district-wide and regional approaches to resiliency as they relate to the Commonwealth's waterfront, and to coordinate resilient infrastructure needs across local, state, and federal regulatory agencies with jurisdiction in land subject to Ch. 91 regulations. Pursuing a district-scale and regional approach to resiliency could also help DEP consider how to better enforce standards required by the regulations.

Recommendation: A Better City recommends promoting district-wide approaches to vulnerability analyses, and suggests considering the regional governance, financing, and implementation of climate resilient infrastructure solutions along the waterfront.

3. CLARIFYING TECHNICAL AND TIMING ASPECTS OF IMPLEMENTATION

A. Long-term Licenses, License Renewals and Terms, and Operations Management Organizations

A Better City understands and supports the need to incorporate sea level rise projections and best-available science into long-term licenses of 30 or more years. While we agree with the need for flexible implementation to respond to updates in sea level rise projections over time, it was reassuring that DEP shared in a recent stakeholder advisory panel on February 9th that there is no intent to overturn the issuance of extended term licenses within Ch. 91. A Better City believes that long-term license options are vital for the financing of private development and economic investment in the Commonwealth's waterfront.

As DEP considers updates to Ch. 91 regulations, we recommend providing enough regulatory flexibility to adapt to changing environmental and development market conditions that can lead to innovative resilient waterfront outcomes. We also recommend matching the length of license terms to the reasonable lifespan of built assets to provide more certainty for license holders and their investors, banks, insurance companies, and other stakeholders.

To help facilitate the flexible implementation of long-term licenses over time, we recommend exploring the role of operations management organizations to help address updates to sea level rise projections and their implications on projects with long-term licenses, as an alternative to full license renewal. We also recommend DEP consider how maintenance and operations issues should be addressed in licenses and/or license renewals.

B. Building Height and Elevation

A Better City supports the effort to continue to allow for additional building height and elevation to help accommodate rentable square footage lost due to the climate resilient re-location of building equipment that is susceptible to flooding. This action may be appropriately considered under minor modifications within Ch. 91 regulations.

C. Implementing Resilient Infrastructure Solutions

As DEP implements resilient infrastructure solutions along the waterfront, A Better City suggests that DEP and EEA be more proactive to help expedite localized and district-scale resilient infrastructure solutions, and to explore opportunities that relate to a resilient water's edge within Ch. 91's regulatory purview. We support the consideration of resilient infrastructure solutions that extend land or sea walls into the watersheet as needed, if other solutions are not determined to be effective, in coordination with the regulatory processes and standards of other city, state, and federal agencies impacting the waterfront. A Better City recommends that the regulatory framework for Ch. 91 consider how to expedite localized and district-scale resiliency intervention done by both the private and public sector, given that many of the suggestions for resilient waterfront solutions require fill, sea walls, and other resilient physical infrastructure components in the watersheet that are currently not allowed under existing regulations.

Recommendation: A Better City recommends that long-term licenses are continually provided in the Ch. 91 regulatory process. We suggest that DEP explore the role of operations management organizations to help implement changes in waterfront resiliency needs in long-term licenses, and to consider how maintenance and operations should be addressed in licenses and/or license renewals. We also recommend that DEP expedite localized and district-scale resilient infrastructure solutions along the water's edge, and ensure that regulatory language does not preclude the development of resilient infrastructure solutions.

4. ENSURING CONSISTENCY, PREDICTABILITY, AND POLICY ALIGNMENT

A. Ensure Regulatory Consistency and Predictable Policy Across Jurisdictions

As DEP implements Ch. 91 regulatory updates, A Better City recommends aligning such updates with existing parallel policies within the Commonwealth to ensure more effective policy implementation, as well as predictability and consistency for the developer community. The need for regulatory certainty and consistency will be ever more crucial as we seek to revitalize the waterfront in COVID-19 pandemic recovery efforts, and will help to protect Boston's economic vitality and global competitiveness as developers seek to invest in the City and Commonwealth.

B. Align Sea Level Rise and Flood Projections with Parallel Resiliency Policies Impacting the Waterfront

A Better City agrees with DEP's interest in updating sea level rise projections in Ch. 91 to reflect the best-available science, and would recommend providing more clarity on which sea level rise projections will be used, how often they will be updated, and the implications of these updates on Ch. 91 regulations. A key priority for alignment with parallel policy processes is a need for consistency across coastal flood projection maps and flood inundation data, to ensure that climate resilient solutions along the waterfront are coordinated and operating using the best-available science. A Better City recommends Ch. 91 align climate resiliency efforts and flood projections with Land Subject to Coastal Storm Flowage (LSCSF) regulated by the Boston Wetlands Ordinance, referenced in phase II of the regulations recently passed by the Conservation Commission, as well as with the Coastal Flood Resilience Overlay District, overseen by the Boston Planning and Development Agency. For extreme precipitation projections, we also recommend coordinating with the Boston Water and Sewer Commission on their flood inundation map data projections.

C. Consider How Ch. 91 Regulations Enable or Preclude Waterfront Resilient Infrastructure

A Better City suggests that DEP consider to what extent do Ch. 91 regulations enable or preclude building the climate resilient infrastructure solutions suggested within Climate Ready Boston. As mentioned previously, our members have raised concerns around possible need for seawall construction and maintenance, the use of fill, and incorporating a district-scale approach to a resilient waterfront – many climate resilient solutions would not be allowed under current regulations.

Recommendation: A Better City recommends providing more clarity on which sea level rise projections will be used in Ch. 91 resiliency implementation, how often they will be updated, and the implications of such updates on Ch. 91 regulations. We also recommend coordinating updates to Ch. 91 resiliency with climate resiliency components of the Boston Wetlands Ordinance, the Coastal Flood Resiliency Overlay District, and Climate Ready Boston, and considering the need to update Ch. 91 regulatory language to allow for climate resilient infrastructure along the water's edge. Consistency, coordination, and alignment with local government agencies, as well as with parallel policy and regulatory processes, will be vital for effective implementation.

5. DEFINING WATERFRONT ACCESSIBILTY FOR ALL

A Better City supports the Commonwealth's efforts to amend Ch. 91 to consider climate resilience, and also suggests exploring what Ch. 91 defines as waterfront accessibility and how it can be prioritized as a core component of a climate resilient waterfront. A Better City recommends considering a community resilience approach to waterfront accessibility, in which resiliency strategies ensure equitable accessibility to the waterfront and its associated benefits for all communities in Greater Boston and the Commonwealth. We remain committed to working with DEP and the City of Boston to enhance equity in the built environment as we shape the public, open, and civic spaces along the waterfront, and believe that equitable accessibility to the waterfront is important to consider in Ch. 91 resilience updates.

Recommendation: A Better City recommends defining waterfront accessibility as it relates to a climate resilient waterfront within Ch. 91, and ensuring equitable access to the waterfront as a core component of climate resiliency along the water's edge.

From: Chris Busch
To: Waterways, DEP (DEP)
Cc: Richard McGuinness; Joe Christo
Subject: Chapter 91 / Resiliency
Date: Thursday, March 3, 2022 2:47:25 PM

Thank you for the opportunity to provide comment on the Chapter 91 regulatory updates. The BPDA supports the Waterways Program's efforts to ensure Chapter 91 is more responsive to the challenges that climate change poses to our coastal communities, waterfront access and maritime uses. We look forward to working further with Waterways Program staff on this important initiative.

MassDEP Chapter 91: Resiliency Regulatory Updates

BPDA Comments:

Near Term Amendments

310 CMR 9.37 - Update Reference to Sea Level Rise Existing regulation
• Historic Sea Level Rise Proposed amendments
• Reference projected sea level rise (municipal or state government)
• Construction in floodplain - rely on building code

> Comment: 9.37(2)(b)2, only references the incorporation of projects sea level rise during the design life of buildings. This provision should be expanded to also include public access facilities, Harborwalk, publicly accessible open space and interior space, and any mechanical or utility systems necessary for building operations and life safety. The reference to historic rates of sea level rise must be revised to address future elevations of sea level rise and storm surge. At a minimum, projects must respond to elevations of sea level rise and storm surge expected over the project's design life or license term. Future extents of sea level rise and storm surge should be based upon data from either the Massachusetts Coastal Flood Risk Model, regional modeling that has been utilized in the development of municipal or town climate policy, such as the Boston Harbor Flood Risk Model, or where this data is not available/applicable, data from www.resilientma.org. Modeled elevations should be based upon the IPCC high emissions scenario and the 1% annual exceedance probability flood event associated with the design life or license term. If the design life or license term does not correlate with an established sea level rise extent represented in modeling or local climate policy, the sea level rise/storm surge elevation should extend to a later, and more conservative measure represented in

modeling or local policy.

Building Height 310 CMR 9.51 - Modify Height Provisions Existing Regulation:
• Building height defined by local zoning Proposed Amendment:
• Facilitate building Systems relocation above ground floor

Comment: DEP should continue to defer to local zoning in determining building height. Regulations should provide an exemption for the location or relocation of mechanical systems to building roof areas, without these areas considered as part of a building's overall height.

Through Boston's Coastal Flood Resilience Zoning Overlay District (Article 25A), project's within the overlay, and subject to Chapter 91 jurisdiction, must respond to a Sea Level Rise Design Flood Elevation (DFE), which is based upon a 1% chance storm event in 2070 with 40-inches of Sea Level Rise. To limit damage and displacement from current and future coastal storm events, the DFE establishes the height of the first occupiable floor for residential uses and a floodproofing elevation for non-residential uses. Building height within the overlay is also measured from the Sea Level Rise Base Flood Elevation with an additional two feet of freeboard, rather than measuring from grade, to facilitate the elevation of occupiable space and critical building mechanical systems.

Expiration and Renewal 310 CMR 9.25 – Clarification SLR / License Renewal Proposed Clarification
• License renewals must consider projected sea level rise

Comment: For properties to receive an extension or renewal of their license they should provide an evaluation of publicly accessible exterior and interior spaces and how they will make modifications within a specific time frame to ensure they are resilient to future sea level rise and coastal storm events. Extents of sea level rise should be based upon the parameters specified in the comments related to 9.37 above.

Simplified Licenses 310 CMR 9.10 – Modifications to Address SLR Existing Regulation:
• Modifications subject to license terms and structural alteration provisions Proposed Amendment:
• Allow modifications in response to SLR

Comment: Provide for simplified review for modifications related to sea level rise and coastal storm resilience. Simplified procedures should also be considered for coastal resilient infrastructure projects consistent with a city or town approved coastal resilience plan.

Extended Term Licenses 310 CMR 9.15 – Clarify Requirements for Extended Terms
Existing Regulation:
• DEP may consider “other relevant factors” for extended terms Proposed Amendment:
• License terms exceeding 30 years must consider projected sea level rise.

Comment: see comments related to 9.37 and 9.25

Minor Modifications 310 CMR 9.22 – Facilitate Building System Relocation Existing Regulation: • Limited to insignificant change in use / structural alterations Proposed Amendment:
• When relocation of building systems includes newly available spaces on the ground floor, consider minor project modification to allow for reprogramming of freed-up space.

> Comment: In many cases building systems are located in vulnerable basement or subgrade areas and need to be elevated. Where preference is for the relocation of these systems is to the roof, in some cases they may need to be relocated to the first floor or to a new, exterior structure. DEP should have flexibility in the regulations to facilitate resilience through the relocation of these systems and evaluate impacts on ground floor FPA space, building footprint and open space requirements.
>
> Minor Modifications should also allow for deployable flood prevention systems and provisions for temporary interruption of public access and use of publicly accessible areas of a property for the deployment and removal of such systems in advance and during storm events.
>
> Maintenance provisions under 9.22 should include upgrades and repairs to structures and fill necessary to contend with sea level rise and coastal storm events to ensure public access and maritime uses are not impaired.

Definitions CMR 9.02 – Improve Definition Consistency
• Replace: “Coastal High Hazard” with “Velocity Zone” for consistency with Wetland Regulations

Other Considerations:

We understand that the current resilience regulatory updates are for near term actions. With the anticipated evaluation of long term actions, the provisions under Categorical Restrictions on Fill 9.32 and Engineering and Construction Standards 9.37, must review the placement of fill below the high water mark associated with coastal flood prevention infrastructure necessary to limit damage from sea level rise and coastal storms. Such structures must be consistent with local or regional coastal flood resilient plans and function to provide some level of protection to the project site and the broader neighborhood or

community. These structures must also advance and support Chapter 91 policy priorities of public access and water dependent uses.

Additionally, Chapter 91 Waterways policies also need to be evaluated to ensure they are supporting and facilitating building, open space, and water dependent structure's resilience to climate change. For example, the existing policy requiring that open space be open to the sky may need to be modified to allow for temporary shade structures during summer months to manage and mitigate extreme heat events.

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Chris H. Busch, AICP
Assistant Deputy Director for Climate Change & Environmental Planning
617-918-4451
chris.busch@boston.gov

From: Harborfront Neighborhood Alliance
To: Waterways, DEP (DEP)
Subject: Chapter 91 / Resiliency
Date: Tuesday, March 1, 2022 3:00:11 PM

Dear Waterways Team,

Please accept this email as my initial thoughts on Chapter 91 resiliency regulation revisions and my apologies for not submitting it on time.

I appreciate MassDEP's consideration of regulatory revisions in response to the effects of climate change and the expressed intention to include sea level rise, increased precipitation, and intensifying storms. It is a question and situation that has been weighing on my mind for a while.

Adding projected sea level rise is a critical first step. A reference of the latest State and/or municipal climate data or modeling might be helpful. I would like to understand better how the proposed changes take into account projected stormwater inundation with sea level rise in combined flood events, particularly storm surge that may flood facilities of public accommodation, open space and the Harborwalk on both the licensee's property and adjacent properties, especially if they are also subject to Chapter 91. There is a critical need for neighborhood / district wide and even regional scale solutions, which MassDEP could play a contributing role.

Building Height & Design Flood Elevation: In the City of Boston, new construction in a flood zone or a projected flood zone is being elevated as a resilient solution. The current zoning uses the raised elevation as the base elevation and therefore, is not included in the height of the building. With the inundation of Life Sciences, we are seeing 35-50' feet rooftop mechanicals that are also excluded from the measurement of building height in zoning. These changes are resulting in significant additional height and shadow along the water and inland parcels subject to Chapter 91, and are creating a wall (barrier) between the neighborhood and the water.

Extended License Term & License Renewals: All licenses (not only those exceeding 30 years) must be subject to SLR, increased precipitation and intensifying storms including storm surge, particularly any license terms that extend beyond available science data (i.e. beyond 2070, just 48 years away) whether this be defined periodic engineering valuations that demonstrate to MassDEP the licensee's capability to adapt and ensure shoreline and FPA access or a license amendment at those critical junctures.

Facilitate Building System Relocation: For existing buildings, it is in their best interest to relocate mechanicals to an upper level for long term survival and obviously to protect their asset from flooding. While replacing mechanical space with additional FPA space is exciting, it is important that the additional FPA space also be flood resilient. Any changes to the ground floor that may impact FPA is troubling without public review, which is not available through a minor modification.

I look forward to learning more about how shifts in climate impacts standard measurements and categories such as the high water mark, water dependent use zone, landlocked tidelands, flood zones, etc…

Overall, the concern and the challenge is how existing and new public access (Harborwalk, open space, etc…) and public benefits (FPA, water transportation & activation, etc…) will be protected and viable for public use under future climate conditions and under additional considerations such as climate impacts on environmental justice communities.

If you have any questions or if I can be of any assistance, please let me know. Thank you for your consideration.

Sincerely,

Sara
Sara McCammond
Harborfront Neighborhood Alliance
@HarborfrontBOS
617-608-8825

clf
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For a thriving New England

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February 25, 2022

Chief Daniel Padien
Department of Environmental Protection
One Winter Street
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RE: Comments on Proposed Amendments to 310 CMR 9.00 for Climate Resiliency

Dear Chief Padien:

Conservation Law Foundation (CLF) submits these comments to inform proposed amendments to 310 CMR 9.00: Waterways ("Waterways Regulations") for climate resiliency. We are supportive of the Massachusetts Department of Environmental Protection's ("the Department") goals to amend the Waterways Regulations to promote and facilitate climate resilience through tidelands licensing.

CLF is uniquely qualified to provide input on these proposed amendments. CLF has worked extensively on implementing and improving the Public Waterfront Act, G.L. c. 91, §§ 1, 2, 14 & 18 ("Public Waterfront Act" or "Chapter 91"), and this work has become a core component of CLF's mission. Since 1979, CLF has been considered an integral stakeholder on public tidelands issues in Massachusetts through its direct participation in proposed public waterfront legislation, public waterfront rulemaking processes, and commenting on numerous Chapter 91 licenses in Boston Harbor and elsewhere. In 2019, CLF published a report examining potential changes to the Waterways Regulations that would enable the Department and individual property owners on tidelands to more fully consider and address the impacts of climate change.

In addition to our comments on the proposed changes presented by the Department at the public stakeholder meeting on February 9, 2022, we propose several additional changes that should be under consideration either for this proposed rulemaking or a future one. Finally, in addition to summarizing our proposed amendments in the body of this comment letter, we have attached as an appendix our proposed redlines to the regulatory language for your convenience.

I. Chapter 91 and Climate Resilience Context

To address the growing threat of climate change along the Massachusetts coast, the Commonwealth must update its laws and regulations to reflect changing climate conditions such as projected sea level rise and increased frequency and severity of extreme weather events. Like many of the Commonwealth's law and regulations, the Waterways Regulations do not explicitly account for climate risk. The prevailing practice in coastal development and tidelands licensing has been and continues to be to design and license structures according to climate patterns of the past, rather than those observed in the present or anticipated in the imminent future. This backward-looking orientation has implications not only for public health and safety, but also the resilience of our economy and the ability of the public to access tidelands for recreation and other purposes to which it is entitled.

The Waterways Regulations ensure that all coastal tidelands development serves proper public purposes and does not impede the rights of the public to access and use tidelands. In order to remain effective and consistent with the Commonwealth's public trust obligations, and to conform with other state efforts to incorporate climate risk into statutory and regulatory frameworks, the Waterways Regulations must account for and be designed to accommodate climate change without compromising the public's rights in those tidelands.

II. Engineering and Construction Standards

Setting appropriate engineering and construction standards for development on tidelands is critical not only for maintaining public health and safety, but for retaining public interest in trust rights and public benefits long-term. Engineering and construction standards for all fill and structures on tidelands are set forth in 310 CMR 9.37. These standards do not currently address climate change impacts. The provision requires that projects located within "a flood zone" that include "new buildings for nonwater-dependent use intended for human occupancy" be constructed to withstand "wind and wave forces associated with the statistical 100-year frequency storm event; and…incorporate projected sea level rise during the design life of the buildings." However, the regulations merely require that sea level rise projections be based on "historical rates of increase in sea level rise in New England coastal areas." Further, the standards do not require consideration of sea level rise for projects located outside of a flood zone.

There is scientific consensus that the historical rate of sea level rise is no longer an accurate predictor of future sea level rise due to climate change. To ensure that nonwater-dependent structures can withstand future conditions, the Waterways Regulations must require consideration of projected sea level rise based on the best available climate science. These requirements should apply to structures in both the current and future floodplain. While "flood zone" is not currently defined in the Waterways Regulations, in practice these standards have only been applied to the Federal Emergency Management Agency's (FEMA) Special Flood

Hazard Areas (SFHA) as depicted on its Flood Insurance Rate Maps (FIRM) also colloquially referred to as the "FEMA 100-year floodplain."

There are three issues with the current engineering and construction standards: (1) only projects within the FEMA 100-year floodplain must consider sea level rise, (2) only nonwater-dependent structures intended for human occupancy must consider sea level rise, and (3) only the historical rate of sea level rise must be considered. These standards overlook a substantial number of projects that are or will be at flood risk and are not currently required to conduct any kind of sea level rise analysis. Merely removing the reference to historical rates of sea level rise will be insufficient to address this gap. To ensure that all projects licensed under the Waterways Regulations are required to analyze and address projected sea level rise based on the best available climate science, we propose the following amendments:

- Remove the requirement in 310 CMR 9.37 that only projects within "a flood zone" are required to analyze projected sea level rise. As discussed above, the flood zone is currently interpreted as the FEMA 100-year floodplain, which is widely acknowledged to underestimate current and future flood risks. Requiring all projects to assess projected sea level rise will eliminate the need to define "a flood zone" in the regulations or otherwise trying to differentiate between the current and future floodplain. This is the simplest approach for ensuring that all projects facing current or future flood risk are adequately planning for sea level rise, not just those that fall within the FEMA 100-year floodplain.

- Remove the requirement in 310 CMR 9.37 that only nonwater-dependent structures intended for human occupancy must consider sea level rise. As the Department has demonstrated in its other proposed amendments, all projects should consider the potential impacts of sea level rise. All types of projects, including water-dependent projects like docks and piers, will be affected by sea level rise. While the appropriate adaptation measures may differ among water-dependent and nonwater-dependent projects, all projects should nonetheless be required to conduct the risk analysis.

- Amend the text of 310 CMR 9.37 to reflect the requirement that sea level rise projections be based on the best available climate science, not historic averages.

- Add a definition to 310 CMR 9.02 defining "sea level rise." Because long-term sea level rise projections are inextricably tied to our ability to reduce greenhouse gas emissions, they are not static. As these efforts and the climate science evolve, sea level rise estimates are likely to change. We recommend that the Department avoid prescribing a specific level or number of feet of sea level rise; rather, the regulations should require the use of the best available climate data and the Department should explicitly retain discretion to determine the adequacy of such data or provide separate guidance on assessing sea level rise impacts. Rather than being prescriptive about the source of such data in the regulations, the Department should consider issuing

separate guidance about what sources are acceptable and under what circumstances. For instance, the Department might require a license applicant to comply either with state-level or city- or town-level sea level rise projections, whichever is greater or based on more recent climate science.

- Add a requirement to 310 CMR 9.37 that requires applicants for nonwater-dependent structures to obtain certification from a licensed engineer that the project plans have been prepared in accordance with "good engineering practice" and that any foreseeable climate-related risks to the site, based on best available climate data, have been fully disclosed. This provision could be modeled after section 112.3(d) of the federal Clean Water Act and would be consistent with MassDEP's statutory authority to "prescribe the terms for construction" of structures below the high water mark.[1]

III. Building Height Provisions

The Waterways Regulations currently do not define "building height" or provide guidance on how building height is calculated for the purpose of complying with the program's height requirements. In practice, the Department's policy has been to calculate height based on local zoning rules for the municipality where the project is located. The Department has suggested that building height may be a barrier to relocating building systems above the ground floor to reduce flood vulnerability. However, calculation of building height may also be problematic for new structures attempting to address flood risk with freeboard. Each of these challenges requires a unique solution.

While there is no building height definition in the regulations, there is a definition for "base flood elevation" defined as "the maximum elevation of flood water, including wave heights if any, which will theoretically result from the statistical 100-year frequency storm." This definition also explicitly refers to "the most recently available flood profile data prepared for the municipality within which the work is proposed under the National Flood Insurance Program, currently administered by FEMA" as the appropriate source of data for determining base flood elevation. As discussed previously, FEMA FIRMs do not incorporate climate risk and base flood elevations therefore do not reflect rising sea levels. This is an issue not just for the Waterways Regulations but for other state and local codes and regulations as well.

The state building code and many municipal zoning codes provide for freeboard above the base flood elevation for the purposes of calculating height. This measurement, often referred to as the "design flood elevation" can give project proponents the flexibility they need to make their project work while addressing flood risk on the ground floor of a structure. The Waterways Regulations could benefit from adding a building height definition and a design flood elevation definition that reflect a similar freeboard allowance.

[1] G.L. c. 91, § 14.

Separately, existing structures may require relocation of mechanical and building systems above the ground floor to reduce vulnerability to flooding. These systems are often relocated to a higher floor of the structure or to the roof. Municipalities often measure building height to the highest occupiable floor, which typically excludes any additional height added by rooftop mechanicals. In this scenario, the project proponent would not be at risk of violating the maximum height requirements under the Waterways Regulations if mechanicals were relocated above the highest occupiable floor. However, if the project proponent chooses to relocate (or locate for new construction) mechanical systems on a higher *occupiable* floor, the proponent may lose rentable square footage as a result.

While we agree that the Department should provide clarity on the calculation of building height in the first scenario, we do not believe that any revision is needed to address the second scenario. Locating building mechanicals to an upper floor to avoid flood risk has an inherent benefit for the project proponent who will avoid damage to those systems from flooding. We do not believe the Department should reward project proponents with additional building height or square footage to compensate them for the potential loss of square footage due to mechanical relocation. The Department's goal should be to eliminate regulatory *barriers* to relocating building systems, not provide regulatory incentives to do so.

We propose the following amendments:

- Add definition for "design flood elevation" or equivalent. To determine the design flood elevation, the Department could either refer to the regulatory flood elevation adopted by the municipality, determine its own freeboard allowance, or adopt the freeboard allowance set out in the state building code. To avoid inconsistency with local zoning, it may be better for the Department to defer to the municipal design flood elevation or freeboard requirements of the state building code, whichever is greater. For example, the City of Boston recently adopted a Flood Resilience Overlay District that includes definitions for "Sea Level Rise – Base Flood Elevation" (SLR-BFE), which is FEMA base flood elevation plus 40 inches of projected sea level rise and "Minimum Sea Level Rise – Design Flood Elevation" (SLR-DFE), which is between one and two feet above the SLR-BFE. Calculating building height from the SLR-DFE for projects in Boston would mean giving project proponents about five additional feet in height above what would otherwise be required.

- Add a definition for "building height" that explicitly refers to the design flood elevation or an equivalent as the starting point for the calculation. As stated above, the definition for building height could simply put forth a calculation that allows for design flood elevation to be substituted for base flood elevation but defer the specific freeboard requirements to the state or municipality.

IV. Expiration and Renewal

Many Waterways licenses are expiring and coming up for renewal in the next several years. The Department wants to ensure that the regulations are clear that renewed licenses will be required to comply with the climate-related provisions, including consideration of sea level rise. The provisions for expiration and renewal are set forth in 310 CMR 9.25. This section states, "a renewal may be granted for a term of years not to exceed that authorized in the original license or permit, in accordance with 310 CMR 9.15, upon written application by the licensee or permittee and in accordance with the procedures for amendments set forth at 310 CMR 9.24." We believe this language would require the renewal applicant to comply with all applicable provisions of 310 CMR 9.00, including any sea level rise requirements, but if the Department would like to make this clearer or more explicit, we encourage it to do so.

We propose the following amendment:

- Add a subsection under 310 CMR 9.25(2) that explicitly states that renewal applications must comply with all applicable provisions of 310 CMR 9.00, including but not limited to the requirements of 310 CMR 9.37.

V. Extended Term Licenses

The Department has proposed that license applications with terms exceeding 30 years must consider projected sea level rise and that an amendment to 310 CMR 9.15 is needed to clarify this requirement. We believe that the sea level rise requirements set forth in 310 CMR 9.37 would supplant the need to outline this requirement in 310 CMR 9.15. The proposed amendments to 310 CMR 9.37 should make clear that all projects, regardless of the proposed license term, are required to analyze and address projected sea level rise. However, we do agree that amendments are needed to 310 CMR 9.15 to reflect the heightened requirements related to climate change and projected sea level rise for license terms exceeding 30 years.

We propose the following amendments:

- Add a requirement to 310 CMR 9.15(1)(b)(2) for the applicant to justify the extended term license based on the project's documented ability to withstand climate impacts, including sea level rise, for the design life of the structure or the requested term of the license, whichever is greater.

- Add a requirement to 310 CMR 9.15(1)(b) that applicants seeking an extended term license of more than 50 years shall provide additional, detailed documentation of its projected sea level rise analysis and strategies for addressing flood risk at the project site for the term of the license. This analysis should examine not only the structure's ability to withstand projected sea level rise, but also the ability of any licensed public benefits and assets to do so as well. If the applicant proposes to delay implementation of certain

adaptation measures to a future time when flood risk is expected to increase or accelerate, the licensee should be required to provide an implementation plan with estimated costs that ensures the long-term resilience of the project. The Department should also consider requiring the applicant to put a percentage of future expected costs into an escrow account to ensure that any future adaptation measures will be adequately funded.

- Add a requirement to 310 CMR 9.15(1)(b) requiring the licensee to submit periodic reports on the project's flood vulnerability and flood history, including progress on implementing, or any proposed changes to, flood adaptation measures outlined by the licensee in the original license application.

- Add a provision to 310 CMR 9.15 that states the Department, in its discretion, may notify the licensee if there are substantial, changed circumstances that require a response from the licensee, such as if conditions of the license no longer adequately address climate change impacts.

As a practical matter, we believe that granting a license term in excess of 65 years should be reserved for very rare cases where the licensee has a compelling reason for the requested term. It will be exceedingly difficult for a licensee to foresee and plan for climate-related impacts to the project site 95 or 99 years into the future – at which time it is likely the site will have changed ownership at least once.

Relatedly, we urge the Department to consider including a special condition or clause in extended term licenses that would allow the Department to revisit the terms of the license under specified climate-related circumstances. Although the Department already has the authority to revoke a license for non-compliance, and could revisit the conditions and terms of licenses in those cases, more could be done to proactively address situations where a license is technically still in compliance but is anticipated to be in noncompliance as a result of climate change.

VI. Minor Project Modification

The Department has proposed changes to the "minor modification" section of the regulations, set forth at 310 CMR 9.22, to make it easier for licensees to relocate building systems to address flood risk. The existing regulation limits the use of minor modifications to situations where there is an insignificant change of use or minor structural changes. While we support the Department's proposal to streamline approvals for licensees to relocate building systems without requiring a full license amendment process, we are much more cautious of changes that would allow them to unilaterally reprogram the space left behind. This is particularly worrisome for projects located on Commonwealth Tidelands where the regulations require that 75 percent of the ground floor be dedicated to Facilities of Public Accommodation and where the standards for public benefit are much greater. For these projects, we do not believe it is appropriate for ground floor space to be reprogrammed without public comment.

We propose the following amendments:

- Add a requirement to 310 CMR 9.22(3) that states minor modifications may be used for the relocation of building mechanical systems from a lower floor to an upper floor or to the roof of an existing structure for the purpose of reducing flood vulnerability.

- Add a requirement to 310 CMR 9.22(3) that states minor modifications may be used for changes of use when the relocation of building systems for flood resilience results in newly available spaces on the ground floor of an existing, nonwater-dependent structure on filled Private Tidelands but any change in use will be subject to the applicable provisions of 310 CMR 9.00 including but not limited to the requirements of 310 CMR 9.51.

VII. Other amendments to consider

While we understand that the Department intends to move forward with this proposed rulemaking based on a targeted scope of revisions, we recommend that the Department consider the following additional amendments either for this rulemaking process or a future one. Please note that the proposed changes below are not included in the redlined version of the regulations included as an appendix to this comment letter.

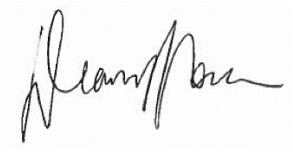
First, we recommend that the Department codify its "existing" piles interpretation and require immediate removal of dilapidated pile fields. In 2017, The Department published an interpretation of the regulations regarding an "existing" pile-supported structures and pile fields as applied to a project on Lewis Wharf. The interpretation stated, "in order to be considered 'existing,' a previously authorized wharf, pier, pile field, or other filled or pile-supported structure must physically be standing in place and must still possess the capability to perform its licensed function." Notably, the interpretation also stated that the Department's first criterion in making a determination is that any extant piles must remain above the "High Water Mark" at a specific site. High Water Mark is defined in 310 CMR 9.02 as, "the present mean high tide line, as established by the present arithmetic mean of the water heights observed at high tide over a specific 19-year Metonic Cycle.." As higher tides caused by sea level rise submerge a licensee's site such that their piles are not visible at high tide or the wharf or dock is no longer routinely serviceable for its licensed purposes, the pile field would not be considered "existing" under MassDEP's interpretation. If sea level rise or extreme weather cause pile structures to become damaged to the point they are unsafe or create a navigational hazard, removal should be required.

Second, we recommend that the Department make minor changes to the language and definitions of 310 CMR 9.00 to reconcile terms referring to shoreline stabilization and protection structures and clarify that green infrastructure alternatives are included in these definitions. Currently, three closely-related terms are referenced in the waterways regulations that should be reconciled and amended: "coastal or shoreline engineering structure," "shore protection structure," and "shoreline stabilization." However, "coastal or shoreline engineering structure" is

the only one of the three terms that is defined. It is defined in 310 CMR 9.02 as, “any breakwater, bulkhead, groin, jetty, revetment, seawall, pier, riprap or any other structure which by its design alters wave, tidal, current, ice, or sediment transport processes in order to protect inland or upland structures from the effects of such processes.” While “shoreline protection structure” is not formally defined, 310 CMR 9.12(2) describes it as including “seawalls, bulkheads, revetments, dikes, breakwaters, and any associated fill which are necessary either to protect an existing structure from natural erosion or accretion, or to protect, construct, or expand a water-dependent use.” The Department should consider renaming “coastal or shoreline engineering structure” to “coastal shoreline protection measure” to be more inclusive of both structural and non-structural alternatives. The definition should be expanded to include examples of green and nature-based alternatives such as berms, marshes, etc.

Thank you for the opportunity to comment ahead of the Department’s release of Proposed Rules. We look forward to engaging with the Department further during the forthcoming public comment period.

Sincerely,



Deanna Moran
Director, Environmental Planning

310 CMR 9.00: WATERWAYS

Section

9.01: Authority and Purpose

(1) Authority. 310 CMR 9.00 is adopted by the Commissioner of the Department of Environmental Protection (DEP) under the authority of M.G.L. c. 91A, § 18 to establish procedures, criteria, and standards for uniform and coordinated administration of the provisions of M.G.L. c. 91, §§ 1 through 63 and M.G.L. c. 21A, §§ 2, 4, 8 and 14. 310 CMR 9.00 also form part of the Massachusetts Coastal Zone Management (CZM) Program, established by M.G.L. c. 21A, § 4A, and codified at 301 CMR 20.00: *Coastal Zone Management Program*. The interpretation and application of 310 CMR 9.00 shall be consistent with the policies of the CZM Program, 301 CMR 20.00, to the maximum extent permissible by law.

9.01: continued

(2) Purpose. 310 CMR 9.00 is promulgated by the Department to carry out its statutory obligations and the responsibility of the Commonwealth for effective stewardship of trust lands, as defined in 310 CMR 9.02. The general purposes served by 310 CMR 9.00 are to:

(a) protect and promote the public's interest in tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the public trust doctrine, as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts;

(b) preserve and protect the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose;

(c) protect the public health, safety, and general welfare as it may be affected by any project in tidelands, great ponds, and non-tidal rivers and streams;

(d) support public and private efforts to revitalize unproductive property along urban waterfronts, in a manner that promotes public use and enjoyment of the water; and

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

9.02: Definitions

Abutter means the owner of land which shares, along the water's edge, a common boundary or corner with a project site, as well as the owner of land which lies within 50 feet across a water body from such site. Ownership shall be determined according to the records of the local tax assessors office.

Accessory Use means a use determined to be accessory to a water-dependent use, in accordance with the provisions of 310 CMR 9.12(3).

Aggrieved Person means any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A.

Applicant means any person submitting a license or permit application or other request for action by the Department pursuant to 310 CMR 9.00, and shall include the heirs, assignees, and successors in interest to such person.

Area of Critical Environmental Concern (ACEC) means an area which has been so designated by the Secretary pursuant to 301 CMR 12.00: *Areas of Critical Environmental Concern*.

Base Flood Elevation means the maximum elevation of flood water, including wave heights if any, which will theoretically result from the statistical 100-year frequency storm. Said elevation shall be determined by reference to the most recently available flood profile data prepared for the municipality within which the work is proposed under the National Flood Insurance Program, currently administered by FEMA; and in accordance with Wetlands Protection Act regulations at 310 CMR 10.57: *Land Subject to Flooding (Bordering and Isolated Areas)*.

Beach Nourishment means the placement of clean sediment, of a grain size compatible with existing beach sediment, on a beach to increase its width and volume for purposes of storm damage prevention, flood control, or public recreation. The seaward edge of the nourished beach shall not be confined by any structure.

Berth means any space wherein a vessel is confined by wet slip, dry stack, float, mooring, or other type of docking facility.

Boatyard means a facility whose function is the construction, repair, or maintenance of boats, which may include boat storage and docking for boatyard services.

9.02: continued

Boston Waterfront Decision means the decision of the Massachusetts Supreme Judicial Court in *Boston Waterfront Development Corporation vs. Commonwealth*, 378 Mass. 629, 393 N.E.2d 356 (1979).

Building Height means height of the structure as calculated from the Design Flood Elevation to the highest occupiable floor.

Channel means a navigable route for the passage of vessels, established by customary use or under the authority of federal, state, or municipal law.

Coastal Atlas means the volume of maps of the coastal zone at a scale of 1:40,000 prepared as part of the CZM Program and available for public review at CZM offices.

Coastal Beach means unconsolidated sediment subject to wave, tidal, and coastal storm action which forms the gently sloping shore of a body of salt water and including tidal flats. Coastal beaches extend from the low water line landward to the dune line, coastal bank line or the seaward edge of existing man-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.

Coastal Dune means any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

Coastal High Hazard Area means an area subject to high velocity waters, as defined in accordance with FEMA regulations and as designated on a Flood Insurance Rate Map, as issued and as may be revised or amended hereafter by FEMA.

Coastal or Shoreline Engineering Structure means any breakwater, bulkhead, groin, jetty, revetment, seawall, weir, riprap or any other structure which by its design alters wave, tidal, current, ice, or sediment transport processes in order to protect inland or upland structures from the effects of such processes.

Coastal Processes means natural forces which can modify coastal lands and waters through the action of wind, waves, tides, currents, or ice.

Coastal Zone means that area subject to the CZM Program and defined in 301 CMR 20.02: *Definitions*.

Combined Application means an application that may serve as a Notice of Intent pursuant to 310 CMR 10.00: *Wetlands Protection*, an application for a 401 Water Quality Certification pursuant to 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*, and/or an application for a Chapter 91 license, permit or other written approval for a water-dependent use pursuant to 310 CMR 9.00. Notwithstanding the foregoing, a Combined Application may not serve as an application for an annual permit for a mooring, float, raft or small structure accessory to a residence in accordance with 310 CMR 9.07, an application for a Chapter 91 license for a small structure accessory to a residence in accordance with the simplified process set forth in 310 CMR 9.10, or the certification submitted as an application for a General License in accordance with 310 CMR 9.29.

Combined Permit means a decision issued in response to a Combined Application that serves as two or more of the following: a Superseding Order of Conditions issued pursuant to 310 CMR 10.00: *Wetlands Protection*; a 401 Water Quality Certification issued pursuant to 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*; and/or a Chapter 91 permit, license or other written approval issued pursuant to 310 CMR 9.00.

Commonwealth Tidelands means tidelands held by the Commonwealth, or by its political subdivisions or a quasi-public agency or authority, in trust for the benefit of the public; or tidelands held by a private person by license or grant of the Commonwealth subject to an express or implied condition subsequent that it be used for a public purpose. In applying 310 CMR

9.02: *Definitions*: Commonwealth Tidelands, the Department shall act in accordance with the following provisions:

9.02: continued

(a) the Department shall presume that tidelands are Commonwealth tidelands if they lie seaward of the historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward; such presumption may be overcome only if the Department issues a written determination based upon a final judicial decree concerning the tidelands in question or other conclusive legal documentation establishing that, notwithstanding the *Boston Waterfront* decision of the Supreme Judicial Court, such tidelands are unconditionally free of any proprietary interest in the Commonwealth;

(b) the Department shall presume that tidelands are not Commonwealth tidelands if they lie landward of the historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever if farther landward; such presumption may be overcome only upon a showing that such tidelands, including but not limited to those in certain portions of the Town of Provincetown, are not held by a private person.

Commissioner means the Commissioner of the Department of Environmental Protection (DEP).

CZM means the Massachusetts Coastal Zone Management Office.

CZM Program means the Massachusetts Coastal Zone Management Program established pursuant to M.G.L. c. 21A and codified in 301 CMR 20.00: *Coastal Zone Management Program*.

Date of Receipt means the date of delivery to an office, home or usual place of business by mail or hand delivery. The Department will presume that a document is received three business days after it is mailed, certified mail return receipt requested, to the correct address unless good cause is shown otherwise.

DCR means the Department of Conservation and Recreation.

Department means the Department of Environmental Protection (DEP).

Design Flood Elevation means the elevation of the lowest occupiable floor as determined by the base flood elevation plus freeboard in accordance with either the state building code or the zoning code for the municipality in which the project is located, whichever is greater.

Designated Port Area (DPA) means an area that has been so designated by CZM in accordance with 301 CMR 25.00: *Designation of Port Areas*.

Development Site means the area owned, controlled, or proposed for development by the applicant in which a project will occur.

DPA Master Plan means the component of a municipal harbor plan pertaining to lands and waters of a DPA within the municipality. Such master plan or portion thereof shall take effect under 310 CMR 9.00 only upon written approval by the Secretary in accordance with 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans* and any associated written guidelines of CZM.

Dredged Material means rocks, bottom sediment, debris, refuse, plant or animal matter, or other materials which are removed by dredging.

Dredged Material Disposal means the discharge of dredged material, the transportation of such material prior to discharge, and the dispersion, deposition, assimilation or biological uptake or accumulation of such material after transportation or discharge.

Dredging means the removal of materials including, but not limited to, rocks, bottom sediments, debris, sand, refuse, plant or animal matter, in any excavating, cleaning, deepening, widening or lengthening, either permanently or temporarily, of any flowed tidelands, rivers, streams, ponds or other waters of the Commonwealth. Dredging shall include improvement dredging, maintenance dredging, excavating and backfilling or other dredging and subsequent refilling.

Ecological Restoration Project means a project whose primary purpose is to restore or otherwise

improve the natural capacity of a Resource Area(s) to protect and sustain the interests identified in M.G.L. c. 131, § 40, when such interests have been degraded or destroyed by anthropogenic influences. Ecological Restoration Project shall not include projects specifically intended to

9.02: continued

provide mitigation for the alteration of a Resource Area authorized by a Final Order or Variance issued pursuant to 310 CMR 10.00: *Wetlands Protection* or a 401 Water Quality Certification issued pursuant to 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*.

EIR means Environmental Impact Report as defined in 301 CMR 11.00: *MEPA Regulations*.

Environmental Monitor means the semi-monthly publication of proposed actions and projects which require MEPA filings with the Secretary pursuant to M.G.L. c. 30, §§ 61 through 62H.

EOEEA means the Executive Office of Energy and Environmental Affairs.

Facility of Limited Accommodation means a facility at which goods or services are made available directly (*e.g.*, in person by customer access to the facility, not exclusively by means of mail order, telecommunications or other electronic transmission) to the public on a regular basis primarily by appointment or enrollment on essentially equal terms to the public at large rather than restricted to a relatively limited group of specified individuals. Facilities of Limited Accommodation may be either water-dependent, accessory to water-dependent, or nonwater-dependent, and shall include but not be limited to:

(a) Rehabilitation clinics and medical facilities;

(b) Business or professional offices that serve customers by appointment or enrollment and by customer access to the facility;

(c) Child care centers and elderly or other social service centers, provided that the facility does not interfere with access to public spaces outside of a building; and

(d) Artist and photography studios open to the public by appointment.

Facility of Private Tenancy means a facility at which the advantages of use accrue, on either a transient or a permanent basis, to a relatively limited group of specified individuals (*e.g.*, members of a private club, owners of a condominium building) rather than to the public at large (*e.g.*, patrons of a public restaurant, visitors to an aquarium or museum). Such facilities may be water-dependent, accessory to water-dependent, or nonwater-dependent, and may include but are not limited to:

(a) houses, apartments, condominiums, and other residential units;

(b) business or professional offices that do not rely upon customer access as a significant element of the business or profession;

(c) industrial facilities, including but not limited to manufacturing plants and electric power generating stations;

(d) vehicular ways or parking facilities not open to the public;

(e) open spaces, pedestrian walkways, or outdoor recreation facilities not open to the public; and

(f) marina berths for long-term exclusive use.

Facility of Public Accommodation means a facility at which goods or services are made available directly to the transient public on a regular basis, or at which advantages of use are otherwise open on essentially equal terms to the public at large (*e.g.*, patrons of a public restaurant, visitors to an aquarium or museum), rather than restricted to a relatively limited group of specified individuals (*e,g,*, members of a private club, owners of a condominium building). Facilities of public accommodation may be either water-dependent, accessory to water-dependent, or nonwater-dependent, and shall include but are not limited to:

(a) public restaurants or entertainment facilities;

(b) theaters, performance halls, art galleries, or other establishments dedicated to public presentation of the fine arts;

(c) hotels, motels, or other lodging facilities of transient occupancy;

(d) educational, historical, or other cultural institutions open to the public;

(e) interior spaces dedicated to the programming of community meetings, informational displays, special recreational events, or other public activities;

(f) sports or physical fitness facilities open to the public;

(g) open spaces, pedestrian walkways, or outdoor recreation facilities open to the public;

9.02: continued

(h) retail sales or service facilities;
(i) ferry terminals, transit stations, and other public transportation facilities;
(j) marina berths for transient use; and
(k) vehicular ways open to the public or parking facilities open to the public, including users of facilities of public accommodation.

FEMA means the Federal Emergency Management Agency.

Fill means any unconsolidated material that is confined or expected to remain in place in a waterway, except for: material placed by natural processes not caused by the owner or any predecessor in interest; material placed on a beach for beach nourishment purposes; and dredged material placed below the low water mark for purposes of subaqueous disposal.

Filled Tidelands means former submerged lands and tidal flats which are no longer subject to tidal action due to the presence of fill.

Final Order means the order of conditions issued pursuant to the Wetlands Protection Act, M.G.L. c. 131, § 40, as the term is defined in 310 CMR 10.04: *Definitions*.

Fish means any animal life inhabiting waterways or the land beneath them that is utilized for recreational or commercial purposes, or that is part of the food chain for such animal life.

Flowed Tidelands means present submerged lands and tidal flats which are subject to tidal action.

Great Pond means any pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark. The title to land below the natural low water mark is held by the Commonwealth in trust for the public, subject to any rights which the applicant demonstrates have been granted by the Commonwealth. The Department shall presume that any pond presently larger then ten acres is a Great Pond, unless the applicant presents topographic, historic, or other information demonstrating that the original size of the pond was less than ten acres, prior to any alteration by damming or other human activity.

Harbor Line means any line established by the legislature pursuant to M.G.L. c. 91, § 34.

Harbormaster means the individual appointed pursuant to M.G.L. c. 102, § 19, or as otherwise provided by law.

High Water Mark means:
(a) for tidelands, the present mean high tide line, as established by the present arithmetic mean of the water heights observed at high tide over a specific 19-year Metonic Cycle (the National Tidal Datum Epoch), and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce; and
(b) for Great Ponds, rivers, and streams, the present arithmetic mean of high water heights observed over a one year period using the best available data as determined by the Department.

Historic High Water Mark means the high water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding, or other means. In areas where there is evidence of such alteration by fill, the Department shall presume the historic high water mark is the farthest landward former shoreline which can be ascertained with reference to topographic or hydrographic surveys, previous license plans, and other historic maps or charts, which may be supplemented as appropriate by soil logs, photographs, and other documents, written records, or information sources of the type on which reasonable persons are accustomed to rely in the conduct of serious business affairs. Such presumption may be overcome by a clear showing that a seaward migration of such shoreline occurred solely as a result of natural accretion not caused by the owner or any predecessor in interest. For Great Ponds, the historic high water mark is synonymous with the natural high water mark.

9.02: continued

Historic Low Water Mark means the low water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding or other means. In areas where there is evidence of such alteration by fill, the Department shall make its determination of the position of the historic low water mark in the same manner as described in 310 CMR 9.02: *Definitons*: Historic High Water Mark.

Improvement Dredging means any dredging under a license or a permit in an area which has not been previously dredged or which extends the original dredged width, depth, length, or otherwise alters the original boundaries of a previously dredged area.

Infrastructure Crossing Facility means any infrastructure facility which is a bridge, tunnel, pipeline, aqueduct, conduit, cable, or wire, including associated piers, bulkheads, culverts, or other vertical support structures, which is located over or under the water and which connects existing or new infrastructure facilities located on the opposite banks of the waterway. Any structure which is operationally related to such crossing facility and requires an adjacent location shall be considered an ancillary facility thereto. Such ancillary facilities generally include, but are not limited to, power transmission substations, gas meter stations, sewage headworks and pumping facilities, toll booths, tunnel ventilation buildings, drainage structures, and approaches, ramps, and interchanges which connect bridges or tunnels to adjacent highways or railroads.

Infrastructure Facility means a facility which produces, delivers, or otherwise provides electric, gas, water, sewage, transportation, or telecommunication services to the public.

Innovative Technology means technology that has not been commercially deployed or is in limited deployment in Massachusetts, and includes, but is not limited to, energy technology that obtains energy from the ocean, waterway, or conditions associated with the ocean or waterway, other forms of renewable energy technology.

Landlocked Tidelands means any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located:

(a) within 250 feet of the high water mark, or

(b) within any Designated Port Area. Said public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark.

Licensee means the person to whom a license is issued and shall include the heirs, assignees, and successors in interest to such person.

Local Economic Development Authority means a municipal planning board, zoning board, or other board or commission so designated by a municipality; community development corporations designated in accordance with M.G.L. c. 40H; municipal economic development and industrial corporations designated in accordance with M.G.L. c. 121C; municipal housing authorities designated in accordance with M.G.L. c. 121B, § 3; municipal redevelopment authorities designated in accordance with M.G.L. c. 121B, § 4; urban development corporations designated in accordance with M.G.L. c. 121A; and 40B district planning commissions established under M.G.L. c. 40B, including, but not limited to, the Cape Cod Commission, the Martha's Vineyard Commission and the Boston Redevelopment Authority.

Low Water Mark means the present mean low tide line, as established by the present arithmetic mean of water heights observed at low tide over a specific 19-year Metonic Cycle (the National Tidal Datum Epoch), and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce.

Maintenance Dredging means dredging in accordance with a license or permit in any previously authorized dredged area which does not extend the originally dredged depth, width, or length.

Marina means a berthing area with docking facilities under common ownership or control and with berths for ten or more vessels, including commercial marinas, boat basins, and yacht clubs. A marina may be an independent facility or may be associated with a boatyard.

9.02: continued

Marine Industrial Park means a multi-use complex on tidelands within a DPA, at which:

(a) the predominant use is for water-dependent industrial purposes; in general, at least two thirds of the park site landward of any project shoreline must be used exclusively for such purposes;

(b) spaces and facilities not dedicated to water-dependent industrial use are available primarily for general industrial purposes; uses that are neither water-dependent nor industrial may occur only in a manner that is incidental to and supportive of the water-dependent industrial uses in the park, and may not include general residential or hotel facilities; and

(c) any commitment of spaces and facilities to uses other than water-dependent industry is governed by a comprehensive park plan, prepared in accordance with M.G.L. c. 30, §§ 61 through 62H, if applicable, and accepted by the Department in a written determination issued pursuant to 310 CMR 9.14.

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, and 301 CMR 11.00: *MEPA Regulations*.

MOU means a Memorandum of Understanding between the Department and another public agency. The draft text of any such document or other written interagency agreement shall be published in the *Environmental Monitor* for public review and comment, and the final text shall be published therein upon adoption and made available by the Department upon request.

Municipal Harbor Plan means a document (in words, maps, illustrations, and other media of communication) setting forth, among other things: a community's objectives, standards, and policies for guiding public and private utilization of land and water bodies within a defined harbor or other waterway planning area; and an implementation program which specifies the legal and institutional arrangements, financial strategies, and other measures that will be taken to achieve the desired sequence, patterns, and characteristics of development and other human activities within the harbor area. Such plan shall take effect under 310 CMR 9.00 only upon written approval by the Secretary, provided that said plan approval is issued in accordance with 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans* and any associated written guidelines of CZM.

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.

Natural High Water Mark means the historic high water mark of a Great Pond.

Natural Low Water Mark means the historic low water mark of a Great Pond.

Net Operating Income means the rental income from a Facility of Limited Accommodation within the licensed structure minus its operating expenses and property taxes calculated as an amount per square foot for the licensed structure or a comparable value if owner occupied. Operating expenses may include expenses for management, legal and accounting services, insurance, janitorial and security services, maintenance, supplies, and utilities.

Noncommercial Community Docking Facility means a facility for berthing of recreational vessels accessory to residential or nonprofit seasonal camp use (*e.g.*, summer camps).

Non-profit Organization means an organization exempt from federal income taxation under § 501(c)(3) of the U.S. Internal Revenue Code.

Nonwater-dependent Use means a use as specified in 310 CMR 9.12.

Nonwater-dependent Use Project means a project consisting of one or more nonwater-dependent uses, or a mix of water-dependent and nonwater-dependent uses, as specified in 310 CMR 9.12(1).

Notification Date means a specified date by which a public notice must be published in the newspaper and/or the *Environmental Monitor*, and mailed to municipal officials, and on which the public comment period commences.

9.02: continued

Ocean Sanctuary means an ocean area wherein certain restrictions on activities apply, as defined in M.G.L. c. 132A, § 13 and 302 CMR 5.00: *Ocean Sanctuaries*.

Party means the applicant, any person allowed by the Department to intervene pursuant to M.G.L. c. 30A, § 1, or any ten citizens allowed by the Department to intervene pursuant to M.G.L. c. 30A, § 10A.

Person means any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, public or quasi-public agency or authority.

Present means contemporaneous with the review of an application, request for determination of applicability, or other action by the Department.

Private Recreational Boating Facility means a facility for berthing of recreational vessels at which all berths and accessory uses thereto are not available for patronage by the general public, or where exclusive use of any such berth is available on a long-term basis. Such berths shall not include a berth reserved for the operator of said facility.

Private Tidelands means tidelands held by a private person subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water. In accordance with the Colonial Ordinances of 1641-47, the Department shall presume that tidelands are private tidelands if they lie landward of the historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward; such presumption may be overcome upon a showing that such tidelands, including but not limited to those in certain portions of the Town of Provincetown, are not held by a private person or upon a final judicial decree that such tidelands are not subject to said easement of the public.

Project means any work, action, conduct, alteration, change of use, or other activity subject to the jurisdiction of the Department under M.G.L. c. 91, in accordance with the provisions of 310 CMR 9.03 through 9.05, which is the subject of a license or permit application.

Project Shoreline means the high water mark, or the perimeter of any pier, wharf, or other structure supported by existing piles or to be replaced pursuant to 310 CMR 9.32(1)(a)4., whichever is farther seaward.

Project Site means the area owned, controlled, or proposed for development by the applicant in which a project will occur and which is subject to the geographic jurisdiction of the Department, as specified in 310 CMR 9.04.

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

Public Recreational Boating Facility means a facility for berthing of recreational vessels at which all berths and accessory uses thereto are available for patronage by the general public on a seasonal or transient basis. Such facility may be either publicly or privately owned, and may include town piers, commercial rental marinas, or community sailing centers or yacht clubs offering open membership to the public. Nothing in 310 CMR 9.00 shall be construed as prohibiting the adoption of minimum eligibility criteria of broad, objective applicability, such as basic knowledge of boating safety or a willingness to make regular work commitments; nor as prohibiting the reservation of a berth for the operator of said facility.

Public Service Project means a project:

(a) whose entire control, development, and operation is undertaken by a public 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 public agency or its contractor or agent; or

(b) which consists entirely of Infrastructure Facilities, as defined at 310 CMR 9.02.

Public Way means a road, street, or highway for vehicular use open to the public at large and for which a public agency is responsible for maintenance and repair.

9.02: continued

Resource Area means any of the areas specified in 310 CMR 10.25 through 10.35 and 310 CMR 10.54 through 10.58. It is used synonymously with Area Subject to Protection under M.G.L. c. 131, § 40, each one of which is enumerated in 310 CMR 10.02(1): *Areas Subject to Protection Under M.G.L. c. 131, § 40*.

Restoration Order of Conditions means the General Order of Conditions issued pursuant to 310 CMR 10.14: *General Ecological Restoration Project Order of Conditions* for a project that meets the eligibility criteria set forth in 310 CMR 10.13: *Eligibility Criteria for General Restoration Order of Conditions*.

Sea level rise means the projected increase in the height of the ocean relative to New England coastal areas, as determined at the Department's discretion by sea level rise projections based on the best available climate science.

Secretary means the Secretary of the Executive Office of Energy and Environmental Affairs.

Shellfish means the following species: Bay Scallop (*Argopecten irradians*); Blue Mussel (*Mytilus edulis*); Ocean Quahog (*Arctica islandica*); Oyster (*Crassostrea virginica*); Quahog (*Mercenaria mercenaria*); Razor Clam (*Ensis directus*); Sea Clam (*Spicula solidissima*); Sea Scallop (*Placopecten megallanicus*); and Soft Clam (*Mya arenaria*).

State Agency means any agency, department, board, district, commission, or authority of the Commonwealth.

Structure means any man-made object which is intended to remain in place in, on, over, or under tidelands, Great Ponds, or other waterways. Structure shall include, but is not limited to, any pier, wharf, dam, seawall, weir, boom, breakwater, bulkhead, riprap, revetment, jetty, piles (including mooring piles), line, groin, road, causeway, culvert, bridge, building, parking lot, cable, pipe, pipeline, conduit, tunnel, wire, or pile-held or other permanently fixed float, barge, vessel or aquaculture gear. Structure does not include any mooring, float, or raft which has been authorized by annual permit of a harbormaster, in accordance with M.G.L. c. 91, § 10A and with 310 CMR 9.07; nor any weir, pound net, or fish trap which has been authorized in tidewater by permit of the municipal official and approved by the Department and the Division of Marine Fisheries, in accordance with M.G.L. c. 130, § 29. Any such mooring, float, raft, weir, pound net, or fish trap, which has not been so authorized shall be considered a structure under 310 CMR 9.00.

Substantial Change in Use means a use for a continuous period of at least one year of 10% or more of the surface area of the authorized or licensed premises or structures for a purpose unrelated to the authorized or licensed use or activity, whether express or implied.

Substantial Structural Alteration means a change in the dimensions of a principal building or structure which increases by more than 10% the height or ground coverage of the building or structure specified in the authorization or license, or an increase by more than 10% of the surface area of the fill specified in the authorization or license.

Superseding Order means an order of conditions issued by the Department pursuant to the Wetlands Protection Act M.G.L. c. 131, § 40, as defined in 310 CMR 10.04: *Definitions*.

Supporting DPA Use means an industrial or commercial use in a Designated Port Area that provides water-dependent industrial use in the DPA with direct economic or operational support, to an extent that adequately compensates for the reduced amount of tidelands on the project site that will be available for water-dependent industrial use during the term of the license. The type, location, scale, duration, operation, and other relevant aspects of the industrial or commercial use must be compatible with activities characteristic of a working waterfront and its backlands, in order to preserve in the long run the predominantly industrial character of the DPA and its viability for maritime development. In determining whether an industrial or commercial use qualifies as a Supporting DPA Use, the Department shall act in accordance with the following provisions as well as all applicable provisions of a DPA Master Plan.

9.02: continued

In the case of commercial uses, any use may be determined to be compatible with the DPA except where the inherent nature of the use gives rise to conflict with port operations or excessive consumption of port space, either directly or indirectly (*e.g.* as a result of collateral development activity). Accordingly, new or expanded uses that shall not be determined to be a Supporting DPA Use include, but are not limited to, transient group quarters such as hotels/motels, nursing homes, and hospitals; recreational boating facilities; amusement parks and other major entertainment or sports complexes; and new buildings devoted predominantly to office use.

Unless otherwise provided in a DPA Master Plan, the amount of tidelands occupied by Supporting DPA Uses and any accessory uses thereto shall not exceed 25% of the area of the project site (excluding tidelands seaward of the project shoreline), so that the remainder of the project site will continue to be available exclusively for water-dependent industrial or temporary use.

Temporary Use means warehousing, trucking, parking, and other industrial and transportation uses which occupy vacant space or facilities in a Designated Port Area, for a maximum term of ten years as specified in 310 CMR 9.15(1)(d), and without significant structural alteration of such space or facilities. Temporary uses may be licensed only if marketing efforts have failed to identify any prospective water-dependent industrial tenant, and if the license is conditioned to require further solicitation of such tenancy upon expiration of the license term.

Test Project means the installation or deployment of water dependent Innovative Technology *in situ* for purposes of evaluating its performance and environmental effects.

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.

Trust Lands means present and former waterways in which the fee simple, any easement, or other proprietary interest is held by the Commonwealth in trust for the benefit of the public. All geographic areas subject to the jurisdiction of M.G.L. c. 91, as specified in 310 CMR 9.04, are generally considered to be trust lands.

NON-TEXT PAGE

9.02: continued

Upper Floor Accessory Services means utility and access facilities which must be located on the ground floor of any building to serve any facility of private tenancy located on any other floors, provided that such accessory services do not occupy more than 25% of the building footprint. Examples of such services include utility shafts, elevators, stairways, and entryways.

Water-dependent Use means a use as specified in these regulations at 310 CMR 9.12(2).

Water-dependent Use Project means a project consisting entirely of fill or structures for one or more water-dependent or accessory uses as specified in 310 CMR 9.12(1).

Water-dependent Use Zone means an area within the geographic jurisdiction of the Department and running landward of and parallel to the project shoreline, the width of which is determined in accordance with 310 CMR 9.51(3)(c). For purposes of such determination, the landward lot line of a property shall mean that in existence as of the effective date of 310 CMR 9.00, unless subsequent reconfiguration thereof results in a more landward location at the time of license application; and all baselines and distances shall be specified according to accepted land regulation and survey practices.

Waterway means any area of water and associated submerged land or tidal flat lying below the high water mark of any navigable river or stream, any Great Pond, or any portion of the Atlantic Ocean within the Commonwealth, which is subject to 310 CMR 9.04.

Wetlands Protection Act means M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*.

9.03: Scope of Jurisdiction

(1) Authorization of Projects by the Department. Written authorization in the form of a license, permit, or amendment thereto must be obtained from the Department before the commencement of one or more activities specified in 310 CMR 9.03(2) and (3) or 310 CMR 9.05 and located in one or more geographic areas specified in 310 CMR 9.04, unless the legislature has specifically exempted any such activity(ies) from Department jurisdiction under M.G.L. c. 91.

(2) Oversight of Certain Work Authorized by the Legislature. In accordance with M.G.L. c. 91, § 20, no person shall undertake any work authorized by the legislature and subject to M.G.L. c. 91 in accordance with 310 CMR 9.03(1), until said person has given written notice thereof to the Department, in the form of a license or permit application, and has submitted plans for such work which conform with the application requirements of 310 CMR 9.00. The Department may alter such plans and impose conditions in the license or permit, which shall be consistent with the legislative authorization and issued in accordance with 310 CMR 9.31(4). All work so authorized shall conform with the plans and conditions contained in said license or permit, and shall not commence until said license or permit has been issued.

In accordance with the *Boston Waterfront* decision of the Supreme Judicial Court, grants by the legislature of tidelands below the historic low water mark are subject to a condition subsequent that such tidelands be used for the public purpose for which they were granted, and the rights of the grantee to those tidelands are ended when that purpose is extinguished. If the present use of such tidelands has changed from the public purpose for which they were granted, authorization shall be obtained from the Department, in the form of a license pursuant to 310 CMR 9.00, in order to establish that such change of use serves a proper public purpose.

(3) Activities of the Massachusetts Port Authority. In accordance with its Enabling Act, St. 1956, c. 465, the Massachusetts Port Authority (Massport) may undertake the following activities within the following geographic areas without written authorization in the form of a license or permit from the Department:

(a) any project consisting entirely of water-dependent-industrial uses or accessory uses thereto on previously filled or flowed tidelands within the Port of Boston; or

(b) any project authorized by said Enabling Act on previously filled tidelands within the geographical boundary of Logan Airport, so long as it is operated as an airport.

9.03: continued

Except as provided in 310 CMR 9.03(3)(b), Massport shall obtain a license or permit pursuant to M.G.L. c. 91 for any project consisting entirely of uses other than water-dependent-industrial uses. With regard to all other future Massport projects, Massport and the Department shall develop an MOU, which shall be executed by the effective date of 310 CMR 9.00, in order to further clarify the Department's jurisdiction under M.G.L. c. 91 relative to the purposes, powers, and plans of Massport's Enabling Act, St. 1956, c. 456, as amended.

9.04: Geographic Areas Subject to Jurisdiction

The following geographic areas, generally considered "trust lands", are subject to licensing and permitting by the Department under 310 CMR 9.00:

(1) all waterways, including all flowed tidelands and all submerged lands lying below the high water mark of:

(a) Great Ponds;

(b) the Connecticut River;

(c) the section of the Westfield River in the Towns of West Springfield and Agawam lying between the confluence of said river with the Connecticut River and the bridge across said river at Suffield Street in said Town of Agawam;

(d) the non-tidal portion of the Merrimack River; and

(e) any non-tidal river or stream on which public funds have been expended for stream clearance, channel improvement, or any form of flood control or prevention work, either upstream or downstream within the river basin, except for any portion of any such river or stream which is not normally navigable during any season, by any vessel including canoe, kayak, raft, or rowboat; the Department may publish, after opportunity for public review and comment, a list of navigable streams and rivers; and

(2) all filled tidelands, except for landlocked tidelands, and all filled lands lying below the natural high water mark of Great Ponds.

9.05: Activities Subject to Jurisdiction

(1) Activities Requiring a License Application. Except as provided in 310 CMR 9.05(3), an application for license or license amendment shall be submitted to the Department for the following activities involving work on or use of fill or structures:

(a) any construction, placement, excavation, addition, improvement, maintenance, repair, replacement, reconstruction, demolition or removal of any fill or structures, not previously authorized, or for which a previous grant or license is not presently valid.

(b) any existing or proposed use of any fill or structures not previously authorized, or for which a previous grant or license is not presently valid;

(c) any structural alteration of fill or structures from the specifications contained in a valid grant or license, whether such authorization was obtained prior to or after January 1, 1984;

(d) any change in use of fill or structures from that expressly authorized in a valid grant or license or, if no such use statement was included, from that reasonably determined by the Department to be implicit therein, whether such authorization was obtained prior to or after January 1, 1984.

(2) Activities Requiring a Permit Application. Except as provided in 310 CMR 9.05(3), an application for a permit or permit amendment shall be submitted to the Department for the following activities unless the applicant includes such activities in a license application:

(a) any beach nourishment;

(b) any dredging;

(c) any disposal involving the subaqueous placement of unconsolidated material below the low water mark;

(d) any burning of rubbish or other material upon the water, in accordance with M.G.L. c. 91, § 52;

(e) any lowering of the water level of a Great Pond, except a body of water used for agriculture, manufacturing, mercantile, irrigation, insect control purposes, or for flowing cranberry bogs, or for public water supply, in accordance with M.G.L. c. 91, § 19A;

9.05: continued

(f) any structure and associated use with the potential to impair the public's rights in tidelands which is intended to remain in place on a temporary basis not to exceed six months, provided said structure and use otherwise meet the applicable substantive standards found at 310 CMR 9.31 through 9.60; and

(g) any structure and associated use with the potential to impair the public's rights in tidelands for the purpose of conducting a Test Project for Innovative Technology, provided said structure and use meet the applicable substantive standards found at 310 CMR 9.30.

(3) Activities Not Requiring a License or Permit. Notwithstanding the provisions of 310 CMR 9.05(1) through (2), no license or permit is required for:

(a) maintenance, repair, and minor modifications, as described in 310 CMR 9.22, of fill or structures for which a grant or license is presently valid, or which is exempt from licensing pursuant to 310 CMR 9.05(3)(b) through (h);

(b) continuation of any existing, unauthorized use or structure located on private tidelands lawfully filled in accordance with a license or grant, provided that no unauthorized structural alteration or change in use has occurred on such tidelands subsequent to January 1, 1984 or in violation of an express condition of said license or grant;

(c) continuation of any existing, unauthorized public service project, provided that no unauthorized structural alteration or change in use has occurred subsequent to January 1, 1984, unless the Department determines, upon notice and opportunity for public comment, that licensing is essential to prevent significant harm to an overriding water-related public interest;

(d) continuation in use of any unauthorized Massport project existing as of the effective date of 310 CMR 9.00, and for which no unauthorized structural alteration or change of use has occurred since that date, provided said project:

1. includes water-dependent industrial activities; or

2. is any other project for which a final EIR was certified as adequately and properly complying with M.G.L. c. 30, §§ 61 through 62H, prior to January 1, 1984; unless the Department determines, upon written notice and opportunity for public comment, that licensing is essential to prevent significant harm to an overriding water-related public interest;

(e) continuation in the use of existing, unauthorized water-dependent structures that are accessory to a single-family residence, in accordance with the provisions of 310 CMR 9.28;

(f) continuation of any existing, unauthorized use of fill or structures constructed prior to 1939 on any non-tidal river or stream subject to jurisdiction under 310 CMR 9.04(1)(e), provided that no unauthorized structural alteration or change in use has occurred subsequent to January 1, 1984;

(g) placement in a non-tidal river or stream subject to jurisdiction under 310 CMR 9.04(1)(e) of fill or structures for which a final Order of Conditions has been issued under M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*, and which does not reduce the space available for navigation; such fill or structures are limited to:

1. overhead wires, conduits, or cables to be attached to an existing bridge, without substantial alteration thereof, or constructed and maintained in accordance with the National Electrical Safety Code;

2. fish ladders, fishways, and other devices which allow or assist fish to pass by a dam or other obstruction in the waterway;

3. pipelines, cables, conduits, sewers, and aqueducts entirely embedded in the soil beneath such river or stream; and

4. bulkheads, revetments, headwalls, storm drainage outfalls, and similar structures which do not extend into such river or stream, except as may be necessary for bank stabilization;

(h) reconfiguration of licensed docking facilities in a marina, in accordance with the provisions of 310 CMR 9.39(1)(b);

(i) any change in use of berths for recreational vessels from seasonal or transient occupancy to long-term exclusive occupancy in accordance with a contract or other agreement, provided that the lease agreement, master lease agreement, or notice thereof for such berths was filed at the Registry of Deeds prior to July 6, 1990, in which event no application for a license or license amendment is required for any change in use of any berth subject to such agreement for long-term exclusive occupancy;

9.05: continued

(j) emergency action, in accordance with the provisions of 310 CMR 9.20;
(k) removal of fill or structures in accordance with the provisions of 310 CMR 9.08 or 310 CMR 9.27;
(l) activities subject to annual permit by the harbormaster, other designated local official, or local permitting program, in accordance with the provisions of 310 CMR 9.07;
(m) demolition or removal of any unauthorized structures or fill in order to facilitate water-dependent use provided prior written approval is obtained from the Department, which, at the discretion of the Department may include prior public notice and comment;

(4) Activities Eligible for General License Coverage. Activities eligible for Certification and subject to coverage under the General License pursuant to the provisions of 310 CMR 9.29.

9.06: Requests for Determination of Applicability

(1) Any person who desires a determination whether 310 CMR 9.00 presently apply to any area of land or water, or any activity thereon, may submit to the Department a request for a determination of applicability. Said request shall:
(a) use the appropriate determination of applicability forms provided by the Department;
(b) provide a detailed description of the proposed project, if any, which identifies all existing and proposed fill and structures and uses thereof; and
(c) include a plan or plans showing:
1. an appropriately-scaled site location map;
2. references to any previous licenses, permits, or other authorizations for existing structures, fill, or dredging at the site, including the license number(s) and the date the license was recorded at the Registry of Deeds or Land Court;
3. appropriately-scaled principal dimensions and elevations of proposed and existing fill, structures, or dredging in waterways;
4. any historic dredging, filling, or impoundment at the site; and
5. a delineation of the present high and low water marks, and the historic high and low water marks, as relevant.

(2) The applicant shall submit a request for a determination of applicability to the Department, and at the same time, to the persons identified in 310 CMR 9.13(1)(a).

(3) A public hearing and newspaper notice published by the applicant may be required by the Department on any request for a determination of applicability.

(4) Any person may submit written comments to the Department on any request for a determination of applicability within 21 days of the date of the request or the newspaper notification date, if applicable.

(5) Unless the Department requests further information, the Department shall issue a determination of applicability in recordable form within 60 days of the receipt of the request or the close of the public comment period, whichever is later.

(6) Any person who would otherwise have the right to an adjudicatory hearing pursuant to 310 CMR 9.17 may appeal the issuance of any determination of applicability within 21 days of the date of its issuance in accordance with the procedures set forth at 310 CMR 9.17.

9.07: Activities Subject to Annual Permit

(1) General. A written application for an annual permit must be submitted to the harbormaster of a city or town or, in a municipality where no harbormaster has been appointed, to the municipal official or other designated local official(s), for the placement on a temporary basis of moorings, floats or rafts held by bottom-anchor, and ramps associated thereto, which are located within the territorial jurisdiction of the municipality. A written application for an annual permit for small structures accessory to residences must be submitted to the harbormaster or other designated local official when a city or town has been approved by the Department to administer a local permitting program under 310 CMR 9.07(3), unless a license or other authorization under 310 CMR 9.00 is obtained from the Department. The harbormaster or other designated local official shall establish a schedule for receipt of applications. Completed applications shall be acted upon within a period of 15 days from receipt, according to the schedule. Any permit may contain such terms, conditions and restrictions as deemed necessary, consistent with the requirements of 310 CMR 9.07. No license shall be required from the Department if an annual permit is issued pursuant to 310 CMR 9.07. A city or town implementing 310 CMR 9.07 shall not discriminate against any citizen of the Commonwealth on the basis of residency, race, religion, sex, age, disability, or other illegal distinction. The provisions of 310 CMR 9.07 shall be enforced by local officials. The Department may enforce the provisions of 310 CMR 9.07 upon the request of a local permitting program or upon a finding that local enforcement is inadequate.

(2) Annual Permits for Moorings, Floats and Rafts.

(a) The harbormaster or other local offical shall provide a written procedure for the fair and equitable assignment from a waiting list for use of vacant or new moorings, floats or rafts held by bottom-anchor and ramps associated thereto. Methods for mooring assignment which are appropriate include, but are not limited to, one or more of the following:

1. date of application;
2. physical characteristics of vessels, *e.g.*, size and type;
3. purpose of vessel use, *e.g.*, commercial *vs*. recreational or public *vs*. private.

The harbormaster, however, may allow the previous permit holder of a mooring to renew, on an annual basis, that mooring or another mooring within the control of the harbormaster.

(b) If the placement of floats or rafts for public recreational boating facilities, exclusive of moorings, extends beyond any established state harbor line, encompasses an area greater than 2,000 square feet, or constitutes a marina, additional procedures apply:

1. a public hearing must be held by the harbormaster or other local official in the affected municipality with notice at least seven days in advance published in the local newspaper at the expense of the applicant; and
2. the harbormaster or other local official must set forth the reasons for issuing such permit in a written statement, which must include findings to the effect that the project will serve a public purpose, will not unreasonably interfere with navigation in the harbor, and:
   a. cannot be located reasonably within the harbor line, if the project extends beyond such line; and/or
   b. complies with the provisions of 310 CMR 9.39(1), if the project includes a marina.

A copy of the permit and written statement shall be submitted upon issuance to the Department. The Department may review any such permit within 30 days of receipt and may either affirm the permit, set such action aside or amend such action by imposing its own conditions and restrictions as deemed necessary.

(c) A copy of the permit and written statement shall be submitted upon issuance to the Department. The Department may review any such permit within 30 days of receipt and may either affirm the permit, set such action aside or amend such action by imposing its own conditions and restrictions as deemed necessary. No permit for a mooring, float or raft may authorize unreasonable interference with the public rights to use waterways for any lawful purposes including fishing, fowling, and navigation in tidelands and Great Ponds. All permits shall meet the terms and conditions described in 310 CMR 9.07(4).

(d) No permit for a mooring, float or raft shall be transferrable to another person, except to a person within the immediate family of the permittee upon approval of the harbormaster. Nothing in 310 CMR 9.07 shall be construed to prevent moorings for which permits are issued to a recreational boating facility from being assigned to individual patrons or members of such facility.

9.07: continued

(3) Annual Permits for Small Structures Accessory to Residences.

(a) Petition for Local Permitting Program. A city or town may petition the Department for approval to administer a local permitting program for small structures accessory to residences. The Department shall state the basis for approval or denial of any petition in writing. The Department may withdraw its approval of a local permitting program if it determines that the local program exhibits a repeated failure to comply with the provisions of 310 CMR 9.07.

1. A city or town may elect to issue permits for small structures accessory to residences under the provisions of 310 CMR 9.07. The city or town shall provide public notice and an opportunity to comment on the petition for approval prior to its submittal to the Department. The petition shall include:

a. the designation of a local official or local governmental body to administer the program;

b. a demonstration that public access has been or will be provided to waterbodies within the town, including at least one formal means of access to the waterway, reasonable in type and scope for the waterway and its anticipated use by any citizen of the Commonwealth, established prior to the date of the petition or scheduled to be available within a reasonable period of time; and

c. provision that any fees collected be used for support of the local permitting program, the improvement of waterways, or the enhancement of public access to or along waterways.

2. Where the Legislature has created a lake commission (*e.g.*, the Lake Quinsigamond Commission) with authority to issue permits, the commission may petition the Department for approval under 310 CMR 9.07(3), without designation by a city or town.

3. A local permitting program may also be approved by the Department if it provides substantially equivalent procedures and protection of public rights as 310 CMR 9.07. A city or town may petition for approval of a local permitting program pursuant to a local ordinance or bylaw. Where the Legislature has created a lake commission with authority to issue permits, the commission may petition the Department for approval of regulations implementing a local permitting program. Upon request, the Department shall provide advisory opinions on draft petitions for approval.

(b) Eligibility. An application for a local permit under 310 CMR 9.07(3) may be submitted only for a project consisting entirely of a dock, pier, seawall, bulkhead, or other small-scale structure that is accessory to a residential use or serves as a noncommercial community docking facility, provided that:

1. for proposed structures, or for structures built or substantially altered after January 1, 1984:

a. any structure is water-dependent and pile-supported (*e.g.*, by wooden or metal posts) or bottom-anchored, without any fill;

b. any structures total no more than 600 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters;

c. the structure is not a marina (*i.e.*, does not serve ten or more vessels);

d. if within an ACEC, such structures were existing on October 4, 1990 or the effective date of the ACEC designation, whichever is later, and, if a resource management plan for the ACEC has been adopted by the municipality and approved by the Secretary, said structures are consistent with said plan;

e. if within an ACEC, such structures, if built or substantially altered after October 4, 1990 or the effective date of the ACEC designation, whichever is later, are consistent with a resource management plan adopted by the municipality and approved by the Secretary;

2. for structures or fill constructed prior to January 1, 1984 and not substantially altered since that date:

a. any structure or fill must be water-dependent;

b. any structure and fill total no more than 600 square feet below the mean high water shoreline for coastal waters and below the ordinary high water shoreline for inland waters;

c. the structure is not a marina (*i.e.*, does not serve ten or more vessels).

9.07: continued

(c) Standards. The local permitting program must find that the structure is limited to the minimum size necessary to achieve the intended water-related purposes, will not significantly interfere with any public rights to use waterways for fishing, fowling, navigation and other lawful purposes, mitigates for any interference by providing lateral access or other mitigation according to guidance issued by the Department, and complies with the provisions of 310 CMR 9.07.

(d) Application Requirements. The initial application shall be accompanied by plans or other documentation sufficient to accurately show the location and size of the structure. For proposed structures, the applicant must provide an Order of Conditions, a negative or conditional negative Determination of Applicability, or evidence of written request for action by the Conservation Commission and subsequent failure of the Conservation Commission to respond. For existing structures, no permit shall be issued if the Conservation Commission has determined that the structure or fill is in violation of the Wetlands Protection Act, M.G.L. c. 131, § 40. The applicant shall provide notice to the Selectmen or Mayor, the Conservation Commission, and to abutters for proposed structures and for previously unauthorized structures. The applicant shall also publish a public notice of the project in a newspaper of general circulation, which may serve as joint notice for M.G.L. c. 91 and M.G.L. 131, § 40. Notices must be provided or published at least ten business days prior to the deadline for receipt of applications established by the local permitting program. Notices must include the applicant's name and address, the location and a concise description of the project, the address to which comments may be sent, and the deadline for receipt of comments.

(e) Program Requirements. The local program shall send to the Department a copy of each permit issued for proposed or previously unauthorized structures, but not renewals. The local program shall maintain in the municipality a list of applicants and permittees, and provide the list to any person upon written request. The local permitting program shall annually publish a public notice of its intention to renew permits for small structures in specifically named water bodies at least ten business days prior to the renewal date, identifying the address where information on the renewal applications may be obtained and comments should be sent, and specifying the deadline for receipt of comments. A copy of the annual notice and a list of permittees shall be sent to the Department. Any written comments within the scope of M.G.L. c. 91 submitted to the local permitting program on any permit application shall be considered, and a permit may not be issued prior to the close of the public comment period. A copy of any permit on which public comment was received shall be sent immediately upon issuance or renewal to persons submitting comments and to the Department.

(f) Renewals and Transfer. Projects meeting the provisions of 310 CMR 9.07(3), which previously obtained an annual permit, license, amnesty license or interim approval, may apply for extension of authorization under 310 CMR 9.07 as a renewal. No individual notice is required for renewals, unless specifically requested by the local permitting program. A permit for an eligible small structure attached to land under 310 CMR 9.07(3) is transferrable upon change of ownership of the land to a new owner.

(4) Terms and Conditions Applicable to all Annual Permits.

(a) No permit may be valid for a period longer than to the end of any given calendar year.

(b) No permit may authorize structures other than the placement of moorings, floats, rafts or eligible small structures accessory to residences under 310 CMR 9.07.

(c) No permit shall be construed as authorizing the placement of moorings, floats, rafts, or other structures on private tidelands of anyone other than the applicant if objected to by the owner or owners thereof.

(d) No permit may authorize the placement of moorings, floats, rafts or other structures in any navigation channel or turning basin formally designated by the federal or state government or by a municipality pursuant to a municipal harbor plan, unless the designating authority or other agency with jurisdiction over said area has previously approved such placement.

(e) No permit shall be inconsistent with the municipal harbor plan, if any, or unless permitted under 310 CMR 9.07(2)(b), be issued for a project extending beyond the harbor line.

9.07: continued

(f) No mooring, float, raft, or other small structure may interfere with public rights associated with a common landing, public easement, or other historic legal form of public access that may exist on or adjacent to the project site.

(g) Any person receiving a permit for a small structure accessory to a residence shall post signage as required by the city or town in accordance with guidance issued by the Department.

(5) Review of Local Decision.

(a) Any applicant aggrieved by a refusal to permit a mooring, float, raft, or small structure accessory to a residence or by any condition or restriction imposed relative thereto, may request a review in writing to the Department within 30 days after receiving notice of such refusal or of the imposition of such condition or restriction. The failure of the harbormaster, other local official, or local program to act upon a complete application within a reasonable time shall be deemed by the Department to be a denial of a permit. A copy of the request shall be sent at the same time to the harbormaster, other local official, or local permitting program.

(b) The Department may review any permit within 30 days of receipt, with notification to the applicant, harbormaster or other local official, or local program, and may either affirm the permit, set such action aside or amend such action by imposing its own conditions and restrictions as deemed necessary. The Department may review a permit upon its own initiative or may initiate a review upon written request of any person who submitted written comments on a permit application to a harbormaster, other local official, or local permitting program and who sends the request to the Department within ten days of the postmarked date of the permit or of the decision on a renewal.

(c) The Department shall consider all written comments from the harbormaster, other local official, local permitting program, the applicant, and interested persons that are submitted within 30 days of the date of receipt of the request by the Department pursuant to 310 CMR 9.07(5)(a), or of the date the Department initiates a review pursuant to 310 CMR 9.07(5)(b).

(d) The Department may conduct a site inspection or a public hearing if deemed appropriate.

(e) After reviewing the request and other relevant documents, the Department shall render a written determination either affirming the local action, setting such action aside, or amending such action by imposing its own conditions and restrictions as deemed necessary.

(f) The Department shall affirm the local decision except upon a finding that:

1. it is arbitrary, capricious, or an abuse of discretion;
2. it conflicts with an overriding state, regional, or federal public interest;
3. it fails to meet any requirement contained in 310 CMR 9.07;
4. it was based on plans or other documentation submitted with the application which contained substantially inaccurate or incomplete depictions of the structure and its surroundings; or
5. it allows floats, rafts, or small structures which significantly interfere with public rights to use waterways for fishing, fowling, and navigation or for other lawful purposes.

The Department shall issue its decision within 30 days of the close of the period for comments described in 310 CMR 9.07(5)(c).

(g) The Department's decision shall be the final administrative review under 310 CMR 9.07; there shall be no right to an adjudicatory hearing.

9.08: Enforcement

(1) The Department may seek discontinuation of use, removal, or other remedial action in the case of any fill or structure in waterways that is determined to be a public nuisance, in accordance with M.G.L. c. 91, § 23 or as otherwise provided by law. Such fill or structures include those not previously authorized by the Department or the Legislature, those for which a grant or license is not presently valid pursuant to 310 CMR 9.00, or those not conforming to the terms and conditions of a grant or license.

(2) In accordance with M.G.L. c. 91, § 49B, the Department shall remove or cause to be removed any fill or structure in waterways which, in the opinion of the Department, is dilapidated, unsafe, a menace to navigation, or is a source of floating debris that is, or is liable to become, a menace to navigation.

9.08: continued

(3) Pursuant to M.G.L. c. 30, § 62I and 310 CMR 9.08(4), the Department may enforce any conditions required by the Secretary in a MEPA certificate for projects proposed within landlocked tidelands.

(4) In addition to any remedy specified pursuant to M.G.L. c. 91, to the Civil Administrative Penalties Statute, M.G.L. c. 21A, § 16, or to other laws of the Commonwealth, the Department may issue Enforcement Orders requiring compliance with any regulation or with any condition of any license or permit issued by the Department. The employees of the Department may enter at reasonable hours upon any property subject to a license, permit, grant, or public easement to inspect for compliance either prior to or following completion of construction of the authorized structure.

9.09: Effective Date and Severability

(1) 310 CMR 9.00 shall take effect on October 4, 1990. Revisions to 310 CMR 9.07 and 9.10 shall take effect on April 19, 1996. Revisions to 310 CMR 9.00 shall take effect on July 1, 2000. Revisions to 310 CMR 9.10 shall take effect on February 25, 2005. Certain revisions to 310 CMR 9.00 shall take effect on October 3, 2008. 310 CMR 9.29: *General License Certification*, 310 CMR 9.30: *Permitting Test Projects*, and revisions to 310 CMR 9.02, 9.05(2), 9.05(3), 9.09, 9.10, 9.11(2), 9.11(3), 9.13 and 9.14, 9.16, 9.17(4), and 9.40(1) shall take effect on May 23, 2014.

(2) Except as provided in 310 CMR 9.28, 310 CMR 9.00 shall apply to any application for a license, permit, or amendment thereto, and to all subsequent proceedings related thereto, if:

(a) said application is filed on or after the effective date of 310 CMR 9.00; or

(b) in the case of an application for a nonwater-dependent use project including one or more activities requiring an EIR, except for any such project which the Department determines, with the concurrence of the municipal planning board, provides essential economic support to an associated water-dependent use project of particular statewide or regional significance, a Certificate of the Secretary stating that a Draft EIR adequately and properly complies with M.G.L. c. 30, §§ 61 through 62H had not been issued as of May 23, 2014.

(3) In the case of any application for license, permit, or amendment thereto filed prior to the effective date of 310 CMR 9.00, except for that to which 310 CMR 9.00 apply pursuant to 310 CMR 9.09(2)(b), the prior applicable regulations shall remain in full force and effect for all subsequent proceedings related thereto; such application shall be subject to the content and other requirements of 310 CMR 9.11(2)(a), 9.11(2)(b)1. through 3., and 9.11(5) only.

(4) 310 CMR 9.08, 9.22, 9.23, 9.25, 9.26 and 9.27 shall apply to all projects for which a license or permit was in effect on the effective date of 310 CMR 9.00, or is obtained in accordance with 310 CMR 9.09(3), and for which a new license or permit application is not required pursuant to 310 CMR 9.05(3).

(5) A Certification of the General License affirmed by the Department in accordance with 310 CMR 9.29 shall take effect when the proponent records the Certification in accordance with 9.29(6).

(6) Severability. If any provision of any part of 310 CMR 9.00, or the application thereof, is held to be invalid, such invalidity shall not affect any other provision of 310 CMR 9.00.

9.10: Simplified Procedures for Small Structures Accessory to Residences

(1) Projects Eligible for Simplified Procedures. Notwithstanding other procedural provisions of 310 CMR 9.00 to the contrary, the procedural standards of 310 CMR 9.10 shall apply to the licensing of certain small-scale structures by the Department. An application for a license under 310 CMR 9.10 may be submitted only for a project consisting entirely of a dock, pier, seawall, bulkhead, or other small-scale structure that is accessory to a residential use or serves as a noncommercial community docking facility, provided that:

9.10: continued

(a) for proposed structures, or for structures built or substantially altered after January 1, 1984:

1. any structure is water-dependent and pile-supported (*e.g.*, by wooden or metal posts) or bottom-anchored, without any fill;

2. any structures total no more than 600 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters;

3. any structure is not a marina (*i.e.*, does not serve ten or more vessels);

4. if within an ACEC, such structures were existing on October 4, 1990 or the effective date of the ACEC designation, whichever is later, and if a resource management plan for the ACEC has been adopted by the municipality and approved by the Secretary, said structures are consistent with said plan; and

5. if within an ACEC, any structure built or substantially altered after October 4, 1990 or the effective date of the ACEC designation, whichever is later, is consistent with a resource management plan adopted by the municipality and approved by the Secretary; and

(b) for structures or fill constructed prior to January 1, 1984 and not substantially altered since that date:

1. any structure or fill may be water-dependent or nonwater-dependent;

2. any structures and fill total no more than 600 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters; and

3. the structure is not a marina (*i.e.*, does not serve ten or more vessels).

The above thresholds are established for determination of eligibility only; structures licensed under 310 CMR 9.10 shall be the minimum size necessary to achieve the intended water-related purposes. Projects meeting the provisions of 310 CMR 9.10(1), which previously obtained a license, amnesty license or interim approval, may apply for renewal under 310 CMR 9.07, 9.10, or 9.25.

(c) projects eligible for general license certification under 310 CMR 9.29 shall comply with the certification procedures of 310 CMR 9.29 to obtain an affirmed certification under 310 CMR 9.29, instead of a simplified license pursuant to 310 CMR 9.10.

(2) Standards. The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes. The project shall preserve public rights of access on private tidelands that are associated with fishing, fowling, and navigation, and public rights to use Commonwealth tidelands, Great Ponds, and other waterways for any lawful use. The provisions of 310 CMR 9.33 through 9.38 apply to projects authorized under 310 CMR 9.10 except that, notwithstanding the provisions of 310 CMR 9.37(1)(a), fill and structures need not be certified by a Registered Professional Engineer except as specified in 310 CMR 9.10(3). For eligible nonwater-dependent structures or fill, the Department will generally presume that a proper public purpose is served through the provision of on-foot passage to ensure lateral public access along the shore for any lawful purpose.

(3) Applications Under Simplified Procedures. For purpose of authorizing eligible projects under simplified procedures the following provisions apply:

(a) Application and Plans. An applicant for a license shall submit a written application on forms provided by the Department, signed by the applicant and the landowner if other than the applicant. The application shall be prepared in accordance with all applicable instructions contained in the Department's application package. When plans have been submitted with a Notice of Intent or referenced in an Order of Conditions under the Wetlands Protection Act, M.G.L. c. 131, § 40, a copy of those plans shall accompany the application. Under the Wetlands Protection Act, Conservation Commissions and the Department generally require plans for new structures to be certified by a Registered Professional Engineer or Registered Land Surveyor where there are questions relating to structural integrity (*e.g.*, where a structure is located in a velocity zone or floodway) or to the location of important wetland resource areas (*e.g.*, salt marsh or eelgrass), as well as in other circumstances at the discretion of the issuing authority; see instructions for filing a Notice of Intent pursuant to 310 CMR 10.00: *Wetlands Protection*.

9.10: continued

If plans certified by an engineer or surveyor are not required under M.G.L. c. 131, § 40, the Wetlands Protection Act pursuant to 310 CMR 10.00: *Wetlands Protection*, certification for projects meeting the eligibility requirements of 310 CMR 9.10(1) will generally not be required. However, based on comments submitted during the public comment period or other relevant information, the Department may require plans to be certified by a Registered Professional Engineer or Registered Land Surveyor for a structure when it finds that the preparation of plans by a professional is necessary to ensure:

1. an adequate review of public access;
2. the preservation of public navigational rights;
3. structural integrity;
4. the accuracy of stated distances from property boundaries; or
5. that the plan is sufficiently clear and accurate to allow a licensing decision which otherwise could result in significant interference with public rights or environmental interests in tidelands, Great Ponds, and other waterways. The Department will provide a statement of reasons to support this finding.

When plans have not been prepared under M.G.L. c. 131, § 40, the Wetlands Protection Act, a plot plan or other scaled plan with structures to be licensed measured accurately from lot lines or other structures shall be prepared in accordance with application instructions.

(b) Applications for Projects within Great Ponds. The Department shall publish an inventory of Great Ponds which shall be available upon written request. Prior to the addition of any pond to the inventory, the Department will hold a public hearing in the vicinity of the pond. After a pond is added to the inventory, the Department will provide an opportunity for owners of existing structures that require licenses to come into compliance with M.G.L. c. 91 regulatory requirements by submission of an application within six months from the date of the addition of the pond to the inventory. The Department will take no enforcement action against the owners of a structure on a Great Pond not listed on the inventory unless and until the Great Pond has been added to the inventory and the opportunity for compliance has been afforded.

(c) Coordination with the Conservation Commission. At least 45 days prior to issuance of a license, the Department and the applicant shall coordinate with the Conservation Commission as follows:

1. The Department will not require Conservation Commission approval for existing structures built before enactment of M.G.L. c. 131, § 40, the Wetlands Protection Act (1963 for coastal wetlands and 1965 for inland wetlands) and not substantially altered subsequently. Applicants should consult their local Conservation Commission regarding application of M.G.L. c. 131, § 40, the Wetlands Protection Act to maintenance or alteration of existing structures.
2. For structures built between 1963 or 1965 (as applicable) and December 31, 1983, and not substantially altered after the latter date, the applicant shall provide notice of the application to the Conservation Commission. The Department shall proceed with licensing unless the Conservation Commission informs the Department that it has provided written notice to the applicant prior to the close of the public comment period to promote compliance with or to enforce M.G.L. c. 131, § 40, the Wetlands Protection Act.
3. For structures proposed, built, or substantially altered on or after January 1, 1984, applicants shall provide an Order of Conditions, a negative or conditional negative Determination of Applicability, or a Certificate of Compliance. The Department may waive this requirement based upon evidence of a written request for action by an applicant to a Conservation Commission, and subsequent failure of the Conservation Commission to respond.

(d) The applicant shall submit the notice of the application included in the application package to the Board of Selectmen or Mayor, the planning board, zoning authority and the Conservation Commission of the town or city where the work will be performed. The Department shall presume compliance with applicable state and local requirements unless it receives information to the contrary during the public comment period. Unless the Department receives a contrary determination from the proper zoning authority, signed by the Clerk of the affected municipality, compliance with applicable zoning ordinances and bylaws pursuant to 310 CMR 9.34(1) shall be deemed certified 45 days after notice to that zoning authority and clerk. Proposed structures must also conform to plans for waterways developed by agencies or commissions with legal authority, such as municipal harbor plans developed pursuant to 310 CMR 9.38(4)(b), or lake, regional commission, or other formal areawide policies or plans developed pursuant to 310 CMR 9.38(2)(b).

9.10: continued

(e) Public Notice and Notice to Abutters. The applicant shall publish in a newspaper of general circulation in the area where the project is located a public notice including the applicant's name and address, the project location, a description of the project, a statement that written comments will be accepted within 30 days of the Notification Date stated therein, the address where comments may be sent, and a statement that a municipality, ten citizen group or any aggrieved person who has submitted written comments within the public comment period may appeal the Department's decision and that failure to submit written comments within the public comment period will result in the waiver of any right to an adjudicatory hearing. A copy of the notice shall also be sent by the applicant to the landowner if not the applicant, to any person having a record easement interest in the property where the structure is or may be located, and to all abutters to the property where the structure is or may be located, by certified mail, return receipt requested. Joint notice under 310 CMR 10.05(4): *Notices of Interest*, 310 CMR 9.10 and 314 CMR 9.05(3): *Public Notices of an Application* may be published and sent to persons entitled to notification, provided it contains the requisite information and meets the requisite standards pursuant to each statute.

(f) Fees. For structures totaling more than 300 square feet pursuant to 310 CMR 9.10(1)(a), applicants for simplified licenses shall pay an application fee, or the renewal fee, in accordance with the provisions of 310 CMR 4.10(8)(f) and (l) respectively. All other applicants for licenses under simplified procedures shall pay the application fee, or the renewal fee in accordance with the provisions of 310 CMR 4.10(8)(f) and (l) respectively. No tidewater displacement fees shall be assessed. Any person granted a license from the Department in, on or over any land the title to which is in the Commonwealth shall compensate the Commonwealth for the rights granted in such lands through payment of an occupation fee ($1 per square yard per year for the term of the license), in accordance with the provisions of 310 CMR 9.16. No occupation fee shall be assessed by the Department for structures within the enhanced portion of Great Ponds. An occupation fee shall be assessed for the portion of any structure that the Department determines, after opportunity for public comment, extends below the natural high water mark into the historic portion of the Great Pond. Enhanced Great Ponds are those which contain a surface area greater than their historic natural state, resulting from alteration by damming or other human activity.

(4) Decision on Applications. The Department shall issue a license, draft license, or written determination to deny a license within 90 days of a complete application, commencing no earlier than the close of the public comment period.

(5) Terms and Recordation for Licenses from the Department. The license term shall be 15 years unless the Department determines that a shorter term is necessary to protect the public interest. In accordance with M.G.L. c. 91, § 18, the license, with the plan as an exhibit, shall be recorded at the Registry of Deeds within the chain of title of the affected property within 60 days of the date of issuance. Failure to record the license and accompanying plan within 60 days will render the license void in accordance with M.G.L. c. 91, § 18.

(6) Renewal and Transfer of Licenses from the Department. A license may be renewed provided the structure remains sound and conforms to plans submitted with the original application. At the time an application for renewal is submitted, the applicant shall send a notice of application for renewal included in the application package to the mayor or board of selectmen, planning board, and conservation commission of the city or town where the project site is located. The Department may require additional public notice based on comments received about the structure or other relevant information. If such additional public notice for renewal is required, the public comment period is 30 days. Applicants for renewal shall pay a renewal fee (*see* 310 CMR 4.10(8)(1)). Any person applying for a renewal under 310 CMR 9.10, including renewals of interim approvals or licenses originally granted under the Amnesty Program, shall compensate the Commonwealth for the rights granted in such lands through payment of an occupation fee ($1 per square yard per year for the term of the license), in accordance with the provisions of 310 CMR 9.16. Unless otherwise provided in the license, a valid license shall run with the land and shall automatically be transferred upon a change of ownership of the affected property within the chain of title of which the license has been recorded. All rights, privileges, obligations, and responsibilities specified in the license shall be transferred to the new landowner upon recording of the changed ownership.

9.10: continued

(7) Appeals. The appeal provisions in 310 CMR 9.17 apply to projects licensed under 310 CMR 9.10.

9.11: Application Requirements

(1) Pre-application Consultation

(a) Upon request of a prospective applicant for a license for any large or complex project, including those required to file an EIR, the Department shall conduct a pre-application consultation meeting in order to receive a presentation of the project proposal, provide preliminary guidance on the applicability of the substantive standards of 310 CMR 9.00 to the project, explain the necessary licensing procedures, and answer any appropriate inquiries concerning the program or 310 CMR 9.00 When appropriate, the Department may invite representatives of CZM, any other state agency, or representatives of the municipality in which the project is located, including the lead agency responsible for implementation of a municipal harbor plan. The participants in the pre-application consultation meeting may make arrangements for further consultation sessions and for co-ordinated review of the project.

(b) In the case of an unusually large and complex set of activities undertaken by a public agency the Department may establish, in cooperation with the prospective applicant, a special procedure for the review of one or more applications for such activities. Such procedure may include, without limitation, as deemed appropriate by the Department, consolidation procedures, expedited review, and single or multiple licenses, permits, or written determinations. Public notice of any such procedure established under 310 CMR 9.11 shall be published in the *Environmental Monitor*.

(2) Application Review Schedules.

(a) For a water-dependent use project, the Department shall, within 45 days of receipt of the information required under 310 CMR 9.11(3)(a) and (b), assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). Within 20 days of the notification date, the Department may hold a public hearing under 310 CMR 9.13(2). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 60 days of the close of the public comment period and notification by the applicant that the public notice has been published, the Department shall conduct an administrative completeness review under 310 CMR 9.11(3)(c) and either determine the application to be complete or request additional information. Within 90 days of making a determination of administrative completeness, the Department shall complete a technical review and issue either a draft license or a final license as specified in 310 CMR 9.14.

(b) For a nonwater-dependent use project, the applicant may elect one of four application options by submitting the selected category of application under the Timely Action and Fee Schedule at 310 CMR 4.00.

1. Partial Application. Within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a) and (b), the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 20 days of the notification date, the Department shall hold the public hearing under 310 CMR 9.13(3). The applicant shall submit the information identified in 310 CMR 9.11(3)(c)2. prior to the close of the public comment period, and the information identified in 310 CMR 9.11(3)(c)1. and 3. prior to the issuance of the written determination. Within 30 days of the close of the public comment period and notification by the applicant that the public notice has been published, the Department shall conduct its administrative completeness review and determine the application to be complete or request additional information. Within 60 days of determining the application to be complete, or 90 days from the close of the public comment period, whichever comes later, the Department shall issue the written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

9.11: continued

2. Full Application. Within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a), and 310 CMR 9.11(3)(b)1., 2., 6., and 7., and 310 CMR 9.11(3)(c)1. through 3., the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, conduct an administrative completeness review of the information received, and determine the application to be complete or request additional information. The Department shall issue a public notice under 310 CMR 9.13(1) upon determination that the application is complete. The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. The Department shall provide upon request the draft license conditions seven days prior to the public hearing. Within 20 days of the notification date, the Department shall hold the public hearing under 310 CMR 9.13(3). Within 60 days from the close of the public comment period and notification by the applicant that the public notice has been published, or the submission of the information identified in 310 CMR 9.11(3)(c)4., and 5., whichever is later, the Department shall issue the written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

3. Municipal Harbor Plan Application. For a project within an area governed by and in compliance with a Municipal Harbor Plan approved under 301 CMR 23.00, within 45 days of receiving an application containing the information identified in 310 CMR 9.11(3)(a) and (b), the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 20 days of the notification date, the Department shall hold the public hearing under 310 CMR 9.13(3). Within 30 days of the close of the public comment period and notification by the applicant that the public notice has been published, the Department shall conduct its administrative completeness review and determine an application to be complete or request additional information. Within 45 days of determining an application to be complete, the Department shall issue a written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

4. Joint MEPA EIR Application. An applicant may initiate coordinated review under MEPA and 310 CMR 9.00 by specifying in the Environmental Notification Form (ENF) filing under 301 CMR 11.05: *ENF Preparation and Filing* the intent to pursue a joint filing. The Draft EIR submitted under 301 CMR 11.07(3) shall also include information to meet the application requirements of 310 CMR 9.11(3)(a) through (c)2. for pre-application review by the Department. Within 25 days of receipt of a Final EIR meeting the requirements of 310 CMR 9.11(3)(a) through (c)2., the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, conduct an administrative completeness review, and issue the text for the public notice under 310 CMR 9.13(1). The Department shall hold a public hearing within 20 days of the notification date or ten days after the date of the Secretary's Final Certificate, whichever is later. The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. The Department shall send to the applicant, within ten days of the close of the public comment period and receipt by the Department of notification from the applicant that the public notice has been published, whichever is later, any public comment submitted within the comment period for response and may request additional information or determine the application to be complete in accordance with 310 CMR 9.11(3)(c). Any response to comments provided by the applicant shall also be distributed by the applicant to all persons that submitted comments during the public comment period. The Department shall issue the written determination under 310 CMR 9.14(1) within 30 days of receipt of the response to comments, or a determination that the application is complete, whichever is later. The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

9.11: continued

(c) For a project requiring a permit under 310 CMR 9.05(2), the Department shall, within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a) and (b), assign a file number, make a determination of water dependency, issue a public notice under 310 CMR 9.13(1), conduct an administrative completeness review, and determine the application to be complete or request additional information. The public comment period shall be 15 days from the notification date. Within 45 days from the date the application is complete the Department shall issue a permit decision.

(3) Filing and Completion of Application

(a) An applicant for a license or permit shall submit a written application on forms provided by the Department, signed by the applicant and the landowner if other than the applicant. In *lieu* of the landowner's signature, the applicant may provide other evidence of legal authority to submit an application for the project site. The application shall be prepared in accordance with all applicable instructions contained in the Department's application package. A partial application under 310 CMR 9.11(2)(b)1. requires only the information identified in 310 CMR 9.11(3)(a) and (b). If the project is a water-dependent use project, the application may be a Combined Application.

(b) The Department shall assign a file number to the project only after receipt of an application which includes the following information:

1. the names and addresses of the applicant, all landowners, any representative thereof and the abutters to the project site;
2. detailed description of the proposed project which identifies:
   a. the location of the project site, and whether it lies within a DPA, ACEC, or Ocean Sanctuary; and
   b. the specific use(s) of existing and proposed fill and structures and, if dredging is involved, estimates of the volume of dredged material and a description of the dredged material disposal area;
3. a set of plans containing at least the applicable information specified in 310 CMR 9.11(3)(a) through (c); the Department may accept appropriately-scaled preliminary plans in *lieu* of final plans certified in accordance with 310 CMR 9.11(3)(c)1., provided such preliminary plans are prepared by:
   a. a Registered Professional Engineer, Land Surveyor, or Architect, as deemed appropriate by the Department; and
   b. in the case of a nonwater-dependent use project requiring an EIR, a Registered Landscape Architect unless otherwise deemed appropriate by the Department;
4. a list of state environmental regulatory programs with which the project must comply, in accordance with the applicable provisions of 310 CMR 9.33; a copy of the Notice of Intent if the project is subject to M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection* which may be provided in a Combined Application; and a copy of any state and local approvals which must be obtained and have been obtained by the project as specified in 310 CMR 9.11(3)(c)3.;
5. any other preliminary information specified in the application instruction package;
6. payment of the application fee in accordance with the provisions of 310 CMR 9.16(1); and
7. if the project triggers M.G.L. c. 30, §§ 61 through 62H review, a copy of the Environmental Notification Form (ENF) and a Certificate from the Secretary of the Executive Office of Energy and Environmental Affairs demonstrating compliance with MEPA, with the exception of a joint MEPA Application under 310 CMR 9.11(2)(b)4. For a project subject to MEPA, the Department will not hold a public hearing until the Secretary has issued a Certificate on the Final EIR.

(c) The Department shall determine an application to be complete only if the following information has been submitted:

1. a set of final plans which are prepared in accordance with the format standards required for recording of licenses in the appropriate Registry of Deeds or Land Court for the district in which the licensed activity is to be performed; and which are certified by a Registered Professional Engineer or Land Surveyor, as deemed appropriate by the Department containing, at a minimum, the following:
   a. an appropriately-scaled location map of the project site, and of any area where dredged material disposal will occur;

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b. appropriately-scaled principal dimensions and elevations of proposed and existing fill and structures and, if dredging is involved, the principal dimensions of all relevant footprints, contours and slopes;

c. a delineation of the present high and low water marks, as relevant;

d. a delineation of the historic high and low water marks, as relevant and in a manner acceptable to the Department in accordance with the definitions thereof at 310 CMR 9.02;

e. references to any previous licenses or other authorizations for existing fill, structures, or dredging at the project site, and a delineation thereof as well as a delineation of any historic dredging, filling, or impoundment;

f. indication of any base flood elevation of the statistical 100-year storm event, or of any coastal high hazard area, which is located on the project site; and

g. indication of the location of any on-site or nearby state harbor lines, federal pier and bulkhead lines, federal channel lines, and public landings or other easements for public access to the water.

2. a statement as to how the project serves a proper public purpose, provides greater benefit than detriment to public rights in tidelands or Great Ponds, and is consistent with the policies of the Coastal Zone Management Program, as applicable, in accordance with the provisions of 310 CMR 9.31(2); and a description of how the project conforms to any applicable provisions of a municipal harbor plan, pursuant to 310 CMR 9.34(2);

3. final documentation relative to other state and local approvals which must be obtained by the project including:

a. if the project is subject to zoning but will not require any municipal approvals thereunder, a certification to that effect pursuant to 310 CMR 9.34(1);

b. a certification that a copy of the license application has been submitted to the planning board of each city or town where the work is to be performed, except in the case of a proposed bridge, dam, or similar structure across a river, cove, or inlet, in which case notice shall be given to the planning board of every municipality into which the tidewater of said river, cove, or inlet extends;

c. if an EIR is required, the Certificate of the Secretary stating that it adequately and properly complies with M.G.L. c. 30, §§ 61 through 62H; and, if applicable, any Notice of Project Change and any determination issued thereon in accordance with M.G.L. c. 30, §§ 61 through 62H;

d. a final Order of Conditions and a Water Quality Certificate, if applicable pursuant to 310 CMR 9.33, unless the application is a Combined Application, and a certification of compliance with municipal zoning, if applicable pursuant to 310 CMR 9.34(1); or a satisfactory explanation as to why it is appropriate to postpone receipt of such documentation to a later time prior to license or permit issuance; and

e. copies of all other state regulatory approvals if applicable pursuant to 310 CMR 9.33; or a satisfactory explanation as to why it is appropriate to postpone receipt of such documentation to a later time prior to license or permit issuance, or to issue the license or permit contingent upon subsequent receipt of such approvals.

4. responses to public comment submitted to the Department within the public comment period, as deemed appropriate by the Department; and adequate proof that the responses were sent to all persons that submitted comments during the public comment period; and

5. any additional plans, documentation, and other information which have been requested by the Department, or a statement by the applicant indicating that no further information will be forthcoming in response to such request.

9.11: continued

(4) Additional Information and Extensions.

(a) The Department shall request additional information as soon as practicable when an application is incomplete or when otherwise allowed under 310 CMR 9.00. Applicants shall provide requested information as soon as practicable but no later than 180 days from the request.

(b) With the consent of the applicant or upon the applicant submitting revised or additional information, the Department may extend the period for actions under 310 CMR 9.11 as provided under 310 CMR 4.04: *Permit Applications Schedules and Fee*.

(5) Expiration of Application

(a) An application shall expire if the applicant has failed to diligently pursue the issuance of said license or permit in proceedings under 310 CMR 9.00.

(b) With the exception of applications filed under 310 CMR 9.28, an application shall be presumed to have expired six months after any request for additional information by the Department unless the applicant submits information showing that:

1. good cause exists for the delay of proceedings under 310 CMR 9.00; and
2. the applicant has continued to pursue the project diligently in other forums in the intervening period; provided, however, that unfavorable financial circumstances shall not constitute good cause for delay.

(c) No application shall be deemed to have expired under 310 CMR 9.11 when a completed application is pending and when the applicant has provided all information necessary for the Department to determine whether to issue a license or permit.

9.12: Determination of Water-dependency

(1) Prior to issuance of the public notice, the Department shall classify the project as a water-dependent use project or as a nonwater-dependent use project. The Department shall classify as a water-dependent use project any project which consists entirely of:

(a) uses determined to be water-dependent in accordance with 310 CMR 9.12(2); and/or

(b) uses determined to be accessory to a water-dependent use, in accordance with 310 CMR 9.12(3).

Any other project shall be classified as a nonwater-dependent use project.

(2) The Department shall determine a use to be water-dependent upon a finding that said use requires direct access to or location in tidal or inland waters, and therefore cannot be located away from said waters. In making this determination, the Department shall act in accordance with the following provisions.

(a) The Department shall find to be water-dependent the following uses:

1. any use found to be water-dependent-industrial in accordance with 310 CMR 9.12(2)(b);
2. marinas, boat basins, channels, storage areas, and other commercial or recreational boating facilities;
3. facilities for fishing, swimming, diving, and other water-based recreational activities;
4. parks, esplanades, boardwalks, and other pedestrian facilities that promote use and enjoyment of the water by the general public and are located at or near the water's edge, including but not limited to any park adjacent to a waterway and created by a public agency;
5. aquariums and other education, research, or training facilities dedicated primarily to marine purposes;
6. aquaculture facilities;
7. beach nourishment;
8. waterborne passenger transportation facilities, such as those serving ferries, cruise ships, commuter and excursion boats, and water shuttles and taxis;
9. dredging for navigation channels, boat basins, and other water-dependent purposes, and subaqueous disposal of the dredged materials below the low water mark;
10. navigation aids, marine police and fire stations, and other facilities which promote public safety and law enforcement on the waterways;

9.12: continued

11. shore protection structures, such as seawalls, bulkheads, revetments, dikes, breakwaters, and any associated fill which are necessary either to protect an existing structure from natural erosion or accretion, or to protect, construct, or expand a water-dependent use;

12. flood, water level, or tidal control facilities;

13. discharge pipes, outfalls, tunnels, and diffuser systems for conveyance of stormwater, wastewater, or other effluents to a receiving waterway;

14. facilities and activities undertaken or required by a public agency for purposes of decontamination, capping, or disposal of polluted aquatic sediments; and

15. wildlife refuges, bird sanctuaries, nesting areas, other wildlife habitats or an Ecological Restoration Project.

(b) The Department shall find to be water-dependent-industrial the following uses:

1. marine terminals and related facilities for the transfer between ship and shore, and the storage of, bulk materials or other goods transported in waterborne commerce;

2. facilities associated with commercial passenger vessel operations;

3. manufacturing facilities relying primarily on the bulk receipt or shipment of goods by waterborne transportation;

4. commercial fishing, shellfishing, and other seafood and fish processing facilities for fish, shellfish, and other seafood;

5. boatyards, dry docks, and other facilities related to the construction, serving, maintenance, repair, or storage of vessels or other marine structures;

6. facilities for tug boats, barges, dredges, or other vessels engaged in port operations or marine construction;

7. any water-dependent use listed in 310 CMR 9.12(2)(a)9. through 14., provided the Department determines such use to be associated with the operation of a Designated Port Area;

8. hydroelectric power generating facilities;

9. Offshore renewable energy infrastructure facilities in the Commonwealth, including ocean wave energy facilities, ocean current energy facilities, tidal energy facilities, any ancillary facility thereto or any similar facility that obtains its energy from the ocean;

10. infrastructure facilities used to deliver electricity, natural gas or telecommunications services to the public from an offshore facility located outside the Commonwealth; and

11. facilities for the manufacture, servicing, maintenance, data collection, and other functions related to coastal or offshore structures, buoys, autonomous underwater vehicles or vessels, and for the development of new technologies and systems for these structures, buoys, vehicles or vessels, provided that the facility requires transfer between ship and shore or the withdrawal and/or discharge of large volumes of water;

12. facilities for research and development or for the manufacture of technologies, *e.g.*, robotics and acoustics, related to the marine environment, provided that the facility requires transfer between ship and shore or the withdrawal and/or discharge of large volumes of water;

13. facilities for research on, and the treatment of, marine species which require transfer between ship and shore or the withdrawal and/or discharge of large volumes of water;

14. facilities for the development and testing of offshore renewable energy infrastructure or components, provided that the facility requires transfer between ship and shore or the withdrawal and/or discharge of large volumes of water;

15. commercial aquaculture facilities that require transfer between ship and shore or the withdrawal and/or discharge of large volumes of water; and

16. other industrial uses or infrastructure facilities which cannot reasonably be located at an inland site as determined in accordance with 310 CMR 9.12(2)(c) or (d).

(c) In the case of industrial and infrastructure facilities not listed in 310 CMR 9.12(2)(b), which are dependent on marine transportation or require large volumes of water to be withdrawn from or discharged to a waterway for cooling, process, or treatment purposes, the Department shall act in accordance with the following provisions:

1. the Department shall presume to be water-dependent any alteration or expansion of a facility existing or licensed as of the effective date of 310 CMR 9.00, and any energy facility for which the proposed location has been approved by the Energy Facilities Siting Board; this presumption may be overcome only upon a clear showing that the proposed alteration or expansion or energy facility can reasonably be located or operated away from tidal or inland waters;

9.12: continued

2. except as provided in 310 CMR 9.12(2)(c)1., the Department shall presume that any such industrial or infrastructure facility is not water-dependent; this presumption may be overcome only upon a clear showing that such facility cannot reasonably be located or operated away from tidal or inland waters.

If an EIR is submitted, the findings necessary to overcome the above presumptions shall be based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62H. If an EIR is not submitted, such findings shall be based on information presented to the Department in the application and during the public comment period thereon.

(d) In the case of an infrastructure crossing facility, or any ancillary facility thereto, for which an EIR is submitted, the Department shall find such facility to be water-dependent only if the Secretary has determined that such facility cannot reasonably be located or operated away from tidal or inland waters, based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize adverse impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62H. If an EIR is not submitted, such finding may be made by the Department based on information presented in the application and during the public comment period thereon.

NON-TEXT PAGE

9.12: continued

(e) In the case of a facility generating electricity from wind power (wind turbine facility), or any ancillary facility thereto, for which an EIR is submitted, the Department shall presume such facility to be water-dependent if the Secretary has determined that such facility requires direct access to or location in tidal waters and cannot reasonably be located or operated away from tidal or inland waters, based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize adverse impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62I. If an EIR is not submitted, the Department shall presume such facility to be water-dependent. Whether or not an EIR is filed, this presumption may be overcome only upon a clear showing that the proposed facility can reasonably be located or operated away from tidal or inland waters.

(f) The Department shall not find the following uses to be water-dependent:

1. restaurants and other food/beverage service establishments;
2. retail shops and stores;
3. parking facilities;
4. office facilities;
5. housing units and other residential facilities;
6. hotels, motels, and other facilities for transient lodging;
7. parks, esplanades, boardwalks, and other pedestrian facilities other than those described in 310 CMR 9.12(2)(a)4.;
8. roads, causeways, railways, and other facilities for land-based vehicular movement, other than those found to be water-dependent in accordance with 310 CMR 9.12(2)(c) or (d); and
9. subaqueous disposal, below the low water mark, of material excavated or otherwise originating on land.

(3) Accessory Uses.

(a) The Department may determine a use to be accessory to a water-dependent use upon a finding that said use is customarily associated with and necessary to accommodate a principal water-dependent use. Such a finding shall be made only if the proposed use is:

1. integral in function to the construction or operation of the water-dependent use in question, or provides related goods and services primarily to persons engaged in such use; and
2. commensurate in scale with the operation of the water-dependent use in question.

Examples of uses that may be determined to be accessory to a water-dependent use include, but are not limited to, access and interior roadways, parking facilities, administrative offices and other offices primarily providing services to water-dependent uses on the site, yacht clubhouses, restaurants and retail facilities primarily serving patrons of the water-dependent use on the site, bait shops, chandleries, boat sales, and other marine-oriented retail facilities. Uses that may not be determined to be accessory to a water-dependent use include, but are not limited to, general residential facilities, hotels, general office facilities, and major retail establishments.

(b) The Department may find a use to be accessory to a water-dependent industrial use if, in addition to the criteria listed in 310 CMR 9.12(3)(a)1. and 2., the hours of operation of the use do not extend beyond the hours of operation of the water-dependent industrial use, except for support services which occur outside of the hours of the accessory use, and the use does not require a significant additional investment in infrastructure apart from that necessary for the primary water-dependent industrial use. Examples of water-dependent industrial accessory uses include, but are not limited to, ticketing booths for ferry operations, snack bars, and administrative offices associated with the water-dependent industrial use.

(4) The Department shall find to be nonwater-dependent any use which has not been found to be water-dependent or accessory to a water-dependent use, pursuant to 310 CMR 9.12(2) and (3).

9.13: Public Notice and Participation Requirements

(1) Notice Requirements.

(a) Public notice shall be issued by the Department but distributed and published by the applicant. The date of the public notice and, when required, the date of the public hearing, shall be determined by the Department. The applicant shall send a notice of license or permit application as described in 310 CMR 9.13(1)(c), by first class mail, return receipt, and provide proof of such notification to the Department, to:

9.13: continued

1. the municipal official, the planning board, the conservation commission, and the harbormaster, if any, in the city or town where the project is located;
2. if the application is for a proposed bridge, dam or similar structure across a tidal river, cove or inlet, the municipal official, the planning board, the conservation commission, and the harbormaster of every municipality into which the tidewater of said river, cove, or inlet extends;
3. the Martha's Vineyard Commission or the Cape Cod Commission, if the project is located within an area subject to the jurisdiction of said Commission;
4. CZM, if the project is located within the coastal zone; DCR, if the project is located in an Ocean Sanctuary; and the Department of Fish and Game.
5. the *Environmental Monitor* for all projects exceeding M.G.L. c. 30, §§ 61 through 62H review theresholds for Waterways activities;
6. all landowners and easement holders of the project site and abutters thereto, as identified pursuant to 310 CMR 9.11(3)(b)1.; and
7. U.S. Army Corps of Engineers, New England Division.

(b) At least 45 days prior to issuance of a license, or 21 days prior to issuance of a permit, the applicant shall cause, at his own expense and at the direction of the Department, notice as described in 310 CMR 9.13(1)(c)1. through 9., to be published in one or more newspapers having circulation in the area affected by the project.

(c) Notice shall contain:

1. the name and address of the applicant and the applicant's representative, if any;
2. a description of the location of the project, including whether it is located in an ACEC, DPA, or an Ocean Sanctuary;
3. a description of the project including a listing of uses and the Department's determination of water-dependency;
4. for nonwater-dependent use projects, and for any water-dependent use project for which the Department decides to hold a hearing, the time, place and location of the public hearing and the date on which the public comment period ends;
5. for other water-dependent use projects, a statement that within 30 days of the notification date of a license application or within 15 days of the notification date of a permit application, written comments will be accepted, and that a public hearing may be held upon request by the municipal official;
6. the address where the application may be viewed, where a copy of the draft license conditions may be obtained if applicable, and where public comments regarding the application may be sent;
7. a statement that a municipality, ten citizen group or any aggrieved person that has submitted written comments before the close of the public comment period may appeal and that failure to submit written comments will result in the waiver of any right to an adjudicatory hearing;
8. the notification date, as defined in 310 CMR 9.02;
9. for applications submitted under 310 CMR 9.11(2)(b)2. and 4., the date that copies of the Department’s draft license conditions will be available seven days prior to the public hearing; and
10. an 8½" x 11" copy of the site plan, including a locus insert, of the project site.

(d) An applicant for a license, permit or other written approval pursuant to 310 CMR 9.00 and whose project is also subject to 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* and/or 310 CMR 10.00: *Wetlands Protection* may provide joint public notice by appending to the notice required under 310 CMR 10.05(5): *Public Hearings by Conservation Commissions* or 314 CMR 9.05(3): *Public Notice of an Application* a statement that an application for a license, permit or other written approval pursuant to 310 CMR 9.00 is pending before the Department, provided that the joint notice contains the information required by 310 CMR 9.13(1)(c). An applicant may provide a joint public notice even if the application is not a Combined Application.

9.13: continued

(2) Participation by CZM or DCR.

(a) Within the public comment period specified in 310 CMR 9.13(4), CZM may participate in license or permit proceedings for nonwater-dependent projects subject to federal consistency review identified in to 301 CMR 21.04: *Activities Subject to Federal Consistency Review*, when the Department requests CZM participation for nonwater-dependent projects in writing, or for other nonwater-dependent projects in the coastal zone that the Secretary has issued a final MEPA Certificate specifying that CZM shall participate in such license or permit proceedings, or when the Secretary otherwise directs CZM to participate. CZM participation is limited to those issues identified in writing to the Department in the public comment period and necessary for making a federal consistency determination, or for those nonwater-dependent projects identified by the Department in writing or by the Secretary in a final MEPA Certificate for CZM participation or when the Secretary otherwise directs CZM to participate, necessary to determine consistency with CZM Program policies. In license or permit proceedings for such projects, CZM shall submit a written statement to the Department as to whether the project is consistent with the policies of the CZM Program prior to issuance of the written determination, license, permit or draft thereof by the Department pursuant to 310 CMR 9.14 for its consideration. The Department shall presume that a project is consistent with CZM Program policies for projects other than those identified in 310 CMR 9.13(2)(a), and for those projects which CZM does not submit written comments during the public comment period. The Department will make a determination regarding the consistency of the project with the Massachusetts coastal zone program when issuing the license determination.

(b) Within the public comment period specified in 310 CMR 9.13(4), DCR, for projects in an Ocean Sanctuary, may notify the Department in writing that it intends to participate in license or permit proceedings. DCR's notice shall identify issues relevant to the Ocean Sanctuaries Act, M.G.L. c. 132A, §§ 13 through 16 and 18, and participation shall be limited to identified issues. A copy of any such notice shall be sent to the applicant. If DCR files such notice, the Department shall give DCR an opportunity to participate in all meetings between the applicant and the Department concerning issues identified in the notice. If DCR has filed a notice of participation regarding a license or permit proceeding, DCR shall prepare a written statement as to whether the project complies with M.G.L. c. 132A, §§ 13 through 16 and 18, the Ocean Sanctuaries Act, prior to issuance of the written determination, license, permit, or draft thereof by the Department pursuant to 310 CMR 9.14. The Department shall presume that a project is consistent with the Ocean Sanctuaries Act unless DCR submits a notice of its intent to participate and written comments during the public comment period.

(3) Public Hearing

(a) For nonwater-dependent use projects, the Department shall hold a public hearing in the city or town in which the project is located.

(b) For water-dependent use projects, the municipal official in the city or town in which the project is located may, within the public comment period specified in 310 CMR 9.13(4), request that the Department conduct a public hearing on the application. If such a request is filed, a hearing shall be conducted in said municipality if reasonable arrangements for such hearing are made by the municipality.

(c) The Department may conduct a public hearing on a project for which a hearing is not otherwise required. Any person requesting that the Department exercise its discretion to conduct such hearing must file a written request, including a statement of reasons, within the public comment period specified in 310 CMR 9.13(4).

(d) In the event that the project requires a federal action which is subject to CZM federal consistency review under 301 CMR 21.00: *Coastal Zone Management Program Federal Consistency Review Procedures* and CZM determines a public hearing related to consistency certification is appropriate pursuant to 301 CMR 20.04: *Consistency Review of Federal Actions with Coastal Effects*, CZM and the Department may conduct a joint hearing. The Department may also conduct joint hearings on the project with the US Army Corps of Engineers.

(e) The public hearing shall be noticed in accordance with 310 CMR 9.13(1), and shall be scheduled no later than 20 days after the notification date. For projects requiring an EIR, such public hearing generally will occur after issuance by the Secretary of a Certificate stating that the final EIR adequately and properly complies with M.G.L. c. 30, §§ 61 through 62H, unless otherwise deemed appropriate by the Department.

9.13: continued

(f) In the event that a project is located in more than one municipality, the Department may conduct a single public hearing in one of such municipalities.
(g) For projects identified pursuant to 310 CMR 9.13(2) for participation by CZM or DCR the Department shall give CZM or DCR the opportunity to co-chair said hearing.

(4) Public Comment Period and Intervention
(a) If a public hearing is held, any person may submit written comments to the Department on the license or permit application within 20 days of the close of the public hearing or within any additional public comment period granted by the Department.
(b) If no public hearing is held, any person may submit written comments to the Department on a license application within 30 days, or on a permit application within 15 days of the notification date or within any additional public comment period granted by the Department.
(c) A municipality, ten citizen group, or any aggrieved person that has submitted written comments before the close of the public comment period specified above may appeal in accordance with 310 CMR 9.17. Failure to submit written comments will result in the waiver of any right to an adjudicatory hearing.

(5) Planning Board Recommendation
(a) Within 30 days of receipt of a license application for a project on tidelands and Great Ponds, the planning board of the municipality where the project is located may hold a public hearing.
(b) Within 15 days of conducting said public hearing, or within 45 days of receipt of the license application if no public hearing has been conducted, the planning board shall submit a written recommendation to the Department stating whether and why said planning board believes the project:
1. would not be detrimental to the public rights in tidelands and Great Ponds; and
2. serves a proper public purpose, except in the case of water-dependent use projects entirely on private tidelands.
(c) If the planning board provides a written recommendation as provided above, the Department shall take into consideration the recommendation in making its decision whether to grant a license. If the planning board fails to conduct a public hearing or submit a written recommendation as provided in 310 CMR 9.13(5)(a) and (b), the Department may proceed to make a determination whether to issue a license without the benefit of the planning board's recommendation.

9.14: Decision on License and Permit Applications

(1) For all nonwater-dependent use projects the Department shall issue a written determination in accordance with the provisions of 310 CMR 9.31 through 9.60, including proposed license conditions, for public review prior to issuance of a license.

(2) For water-dependent use projects the Department may issue a license or permit without issuing a written determination, in accordance with the provisions of 310 CMR 9.31 through 9.50, unless:
(a) the Department has conducted a public hearing, in which case the Department shall issue a written determination including proposed license or permit conditions, for public review prior to issuance of the license or permit;
(b) written comments have been submitted pursuant to 310 CMR 9.13(4)(c), in which case the Department may issue a draft license or draft permit, including proposed license or permit conditions, for public review prior to issuance of the license or permit; or
(c) the Department has decided to deny the license or permit application, in which case the Department shall issue a written determination setting forth the reasons for such decision.

(3) A written determination shall include a description of the project and a statement of whether the project serves a proper public purpose which provides greater benefits than detriments to the public rights in tidelands. Unless the Department has decided to deny the license or permit application, the written determination will be issued with the draft license or permit conditions.

9.14: continued

(4) If the project includes a set of activities, including without limitation those to which 310 CMR 9.11(1)(b) applies, which cannot reasonably be incorporated into a single license, the Department may upon request of the applicant issue a consolidated written determination which allows for multiple licenses to be issued independently for phases of said project, provided the Department finds that the licenses can be sequenced or conditioned in a manner which ensures that overall public benefits will exceed public detriments as each portion of the project is completed. Notwithstanding 310 CMR 9.14(3), licenses may be issued pursuant to a consolidated written determination issued under this provision for up to five years, with opportunity for extensions as deemed appropriate by the Department.

(5) The Department shall issue a license, permit, draft license, draft permit, or written determination, as appropriate after the application is determined to be complete by the Department, in accordance with the provisions of 310 CMR 9.11(3)(c). The Department may extend such deadline upon request by the applicant. Where a draft license, draft permit, or written determination is issued, the final license or permit shall not be issued prior to receipt of the state and local approvals specified in 310 CMR 9.11(3)(c)3. Notwithstanding the foregoing, the Department may issue a license, permit, draft license, draft permit or written determination as part of a Combined Permit or as a separate license, permit, draft license, draft permit or written determination issued at the same time as the issuance of or after the issuance of the final Order of Conditions and/or Water Quality Certification.

(6) Upon issuance, the Department shall send a copy of the license, permit, or written determination to:

(a) the applicant;

(b) any intervenor and any person who has requested a copy of said license, permit, or written determination;

(c) CZM or DCR, for projects identified for participation pursuant to 310 CMR 9.13(2); and

(d) the municipal official, conservation commission, planning board, and harbormaster, if any, of the city or town where the project is located.

In the case of a draft license or draft permit, the Department shall send copies to all parties listed in 310 CMR 9.14(6)(a) through (c) and to any party listed in 310 CMR 9.14(6)(d) who has commented on the application within the public comment period.

(7) The Department shall issue a license or permit after the completion of any appeal period established pursuant to 310 CMR 9.17(2) or the receipt of any plans, documentation, or other information requested by the Department in a written determination, whichever is later, unless a notice of claim for adjudicatory hearing has been filed pursuant to 310 CMR 9.17.

9.15: Terms

(1) Term of License

(a) All licenses issued by the Department shall contain a condition stating the term for which license is in effect, if any. All licenses shall be in effect for a fixed term not to exceed 30 years, unless otherwise deemed appropriate by the Department in accordance with 310 CMR 9.15(1)(b) through (d).

(b) Notwithstanding 310 CMR 9.15(1)(a), the Department may issue a license that establishes an extended fixed term, in accordance with the following provisions:

1. said term shall not exceed 65 years for any project or portion thereof which, upon completion, will be located on flowed tidelands or other waterways, and shall not exceed 99 years for any project or portion thereof which will be located on filled tidelands or Great Ponds; in the event the project site includes both flowed and filled tidelands, the Department may upon request of the applicant establish a single weighted average term for the entire project, or for a portion thereof as deemed appropriate by the Department, based on the relative amounts of the surface area of the flowed and filled tidelands associated therewith;

2. the applicant shall provide justification that an extended term is warranted given the expected life of the structure, typical financing requirements, consistency with a municipal harbor plan, if any, appropriateness of long-term dedication of tidelands to the proposed use(s) in the particular location, the documented ability of the project to withstand climate impacts, including sea level rise, for the design life of the structure of the requested term of the license, whichever is greater, and any other relevant factors;

9.15: continued

3. for projects on Commonwealth tidelands or Great Ponds, the Department shall conduct a public hearing and issue written findings concerning the extended term, in accordance with the provisions of 310 CMR 9.13(3) and 9.14;

4. for projects on Commonwealth tidelands or Great Ponds held by the Commonwealth, the licensee shall pay an occupation fee based on an appraisal, in accordance with the provisions of 310 CMR 9.16(3)(b) through (c);

~~4~~5. for projects seeking an extended term license of more than 50 years, the Department shall require detailed documentation of the licensee's analysis of and the project's ability to withstand sea level rise, including any licensed public benefits and assets; in the event the licensee is unable to fully address sea level rise risks at the time of licensing, the licensee shall submit an implementation plan that includes proposed flood risk measures with estimated costs; the Department may, in its discretion, require a percentage of these estimated costs to be placed into an interest bearing escrow account; ~~and~~

6. the Department shall require the licensee to submit periodic license compliance inspection reports as a condition of the license for nonwater-dependent use projects, and for other projects as deemed appropriate by the Department; and~~.~~

~~5~~7. the Department shall require the licensee to submit periodic reports on the project's flood vulnerability and flood history, including progress on implementing, or proposed changes to, any flood adaptation measures outlined by the licensee in the original license application.

(c) The Department shall issue a license for an unlimited term for any project whose entire control, development, and operation is undertaken by a public agency for the provision of services directly to the public (or to another public agency for such provision to the public) by the public agency, its contractor or agent, unless an unlimited term is not deemed appropriate by the Department.

(d) Notwithstanding the terms of license specified in 310 CMR 9.15(1)(b) and (c):

1. in Designated Port Areas, the term of license for any nonwater-dependent use in a marine industrial park shall not exceed 65 years; the term of license for any supporting DPA use shall not exceed 30 years; and the term of license for any temporary use shall not exceed ten years; and

2. outside of Designated Port Areas, the term of license for any stationary vessel for uses as described in 310 CMR 9.32(1)(a)6. shall not exceed 30 years.

(e) The term of a license may be renewed in accordance with the provisions of 310 CMR 9.25(2).

~~(e)~~(f) The Department may notify a licensee if there are substantial changes circumstances within the term of the license that require a response from the licensee to ensure long-term compliance with license conditions.

(2) Term of Permit. Any permit shall be valid for a fixed term not to exceed five years; provided, however, that maintenance dredging may be performed for up to ten years after the permit has been issued, if such terms are so stated in the permit.

9.16: Fees

(1) Application Fee. An application fee shall be charged in accordance with the accompanying fee schedule (Table 1) per application for a determination of applicability, license, permit, amendment, interim approval, General License Certification or certificate of compliance. An application fee is non-refundable and shall be paid at the time of submission of the original application or Certification, by check or money order made payable to the Commonwealth of Massachusetts, DEP.

(2) Tidewater Displacement Fee. Except as provided in 310 CMR 9.16(4), prior to issuance of a license or General License Certification for any fill or structure that will displace tidewaters below the high water mark, the applicant, or his or her heirs or assignees responsible for such displacement, shall, at the direction of the Department:

(a) pay to the Commonwealth a tidewater displacement fee, based on the net amount of tidewater displaced between the elevations of the high and the low water marks, at the rate set forth in the accompanying fee schedule (Table 1); or

(b) excavate, in some part of the same harbor, previously filled tidelands between the high and low water marks, subject to the requirements of 310 CMR 9.00 and the approval of the Department, in order to form a basin for a quantity of water equal to that displaced; or

(c) improve public harbor facilities in tidelands in any other manner satisfactory to the Department, provided that the cost of such improvement is comparable to the amount otherwise due for displacement; any improvements identified under 310 CMR 9.16 shall be

in addition to any actions required under 310 CMR 9.31 through 9.40 and 310 CMR 9.51 through 9.55; the Department may consider the following improvements:

1. a harbor cleanup activity which is part of a plan approved by a public agency;
2. a shellfish reseeding program;
3. a beach nourishment program on beaches open to the public;
4. a contribution to a special fund or other program managed by a public agency or non-profit organization in order to directly provide public harbor improvements.

9.16: continued

An applicant for a license for any existing, previously unlicensed fill or structure shall be liable for any unpaid tidewater displacement fee, unless the applicant was not responsible for the construction of the structure or the placement of the fill, and the applicant acquired the real estate upon which the structure was constructed or the fill placed before January 4, 1974.

(3) Occupation Fee. Except as provided in 310 CMR 9.16(4), any person granted a license or Certification for any activity in 310 CMR 9.05 in, on, or over any land the title to which is in the Commonwealth shall compensate the Commonwealth for the rights granted in such lands, in accordance with the following provisions:

(a) except as provided in 310 CMR 9.16(3)(b), the licensee shall pay a fee which shall be:

1. fixed for the term of the license;
2. calculated by the Department in accordance with the accompanying fee schedule (Table 1); and
3. assessed on either a lump sum or annual basis, in accordance with the provisions of 310 CMR 9.16(3)(d).

(b) the licensee shall pay an annual fee based on the full fair market rental value over the term of the license, as determined in accordance with 310 CMR 9.16(3)(c), in the event that the license is issued for:

1. an extended term, in accordance with the provisions of 310 CMR 9.15(1)(b); or
2. long term exclusive assignment of berths in a private recreational boating facility, in accordance with the provisions of 310 CMR 9.38(2)(a)2.

The Department shall presume that land the title to which is in the Commonwealth includes all Commonwealth tidelands and Great Ponds unless the applicant presents evidence of a chain of title indicating that the Commonwealth is not the fee owner of the land in question.

(c) Appraisal Procedure.

1. The determination of fair market value and fair market rental value shall be based on an appraisal of the value of the rights granted in land the title to which is in the Commonwealth and which is occupied in accordance with the license. Such determination shall include an index or other method by which periodic fee adjustments shall be made over the term of the license. The appraisal report shall be prepared at the expense of the applicant by a state-certified appraiser. The appraisal report shall be submitted to the Department after issuance of the Department's written determination to issue a license.
2. Within 45 days of receipt of the appraisal report, the Department shall conduct a review of the appraisal report. Said review appraisal shall be prepared by a state-certified appraiser. If the Department determines that the appraisal report is complete and accurate, the annual license fee shall be established based on the fair market rental value determined by the Department, based on said report. If the Department determines that the appraisal report is incomplete or inaccurate, the Department shall inform the applicant in writing of the deficiencies in the appraisal report. Upon review of the Department's evaluation, the applicant may:
   a. submit a new or revised appraisal report to the Department for its review and approval; or
   b. notify the Department of disagreement with the Department's review appraisal and provide the reasons therefor. If the Department and the applicant cannot agree within 30 days of said notification, both the Department and the applicant shall within 30 days designate a third, impartial state-certified appraiser. The cost of the third appraiser shall be born equally by the Department and the applicant. The third appraiser shall prepare an appraisal report after reviewing the initial report, the review appraisal and any other information deemed appropriate and shall make a recommendation to the Department as to the fair market value and fair market rental value. The Department shall presume that the values determined in that report are accurate and shall establish the annual license fee based on the fair market rental value determined therein. This presumption may be overcome only if the Commissioner issues written findings based on evidence presented in the appraisal reports before the Department explaining the reasons for disagreement with the recommendations of the third appraisal report.

9.16: continued

(d) Payment of fees. Any fee the total amount of which during the term of the license is less than $10,000 shall be assessed as a lump sum payable in full prior to license issuance. Any fee the total amount of which during the term of the license is more than $10,000 may be assessed at the discretion of the applicant as a lump sum payable in full prior to license issuance or as a series of fixed annual payments which shall be required as a condition of the license. The initial payment of such annual fee shall be paid in full prior to the issuance of the license. All such fees shall be paid by certified check or money order made payable to the Commonwealth of Massachusetts, DEP.

(e) Payment of occupation fee for existing fill or structures

1. Any person who is granted a license for existing fill or structures, the fee for which has not been paid, shall pay the fee, if any, in effect at the time the license is granted.

2. Any person who is granted a license or license amendment for a water-dependent use project involving a change in use or structural alteration to existing fill or structures shall pay the occupation fee in effect at the time the license is granted for any portion of the project site for which a lump sum occupation fee has not been previously paid.

3. Any person who is granted a license or license amendment for a nonwater-dependent use project involving a change in use or structural alteration to existing fill or structures shall pay the occupation fee in effect at the time the license is granted for the entire project site; but shall be given credit for any lump sum occupation fee previously paid for the portion of tidelands previously occupied, pro-rated for the remaining term of the license. For purpose of calculating the credit pursuant to 310 CMR 9.16(3)(e), the lump sum occupation fee for any license with an unlimited term shall be pro-rated over a 30-year period from the date said license was issued.

4. Notwithstanding 310 CMR 9.16(3)(e)2., any person who is granted a license or license amendment for a private recreational boating facility with long-term exclusive assignment of berths pursuant to 310 CMR 9.38(2)(a)2. shall pay the fee in accordance with 310 CMR 9.16(3)(e)3.

(4) Exemption from Fees for Certain Projects.

(a) Public Agencies. The fees described in 310 CMR 9.16(2) and 9.16(3) shall not be applicable to a municipality or other public agency undertaking a public service project, provided that said project does not deny access to its services and facilities to any citizen of the Commonwealth in a discriminatory manner.

(b) Non-profit Organizations. The fees described in 310 CMR 9.16(2) and 9.16(3) shall not be applicable to a non-profit organization as defined in 310 CMR 9.02, if:

1. the project is a facility of public accommodation which does not deny access to its services and facilities to any citizen of the Commonwealth in a discriminatory manner;

2. the project is not intended to generate revenues in excess of that needed for construction, operation and maintenance of the uses specified in the license; and

3. said organization has not been created for the purpose of avoiding said fees while sheltering profits in another entity.

(c) Projects Authorized by Permits. The fees described in 310 CMR 9.16(2) and 9.16(3) shall not be applicable to any project authorized by permit.

(d) Recreational boating facilities authorized by the Metropolitan District Commission (MDC). For any recreational boating facility authorized by the MDC, the occupation fees described in 310 CMR 9.16(3) shall be reduced by the amount of any fee paid to the MDC for occupation of a waterway.

(e) Projects licensed under the Simplified Procedures for Small Structures Accessory to Residences pursuant to 310 CMR 9.10 shall be exempted from payment of Tidewater Displacement Fees.

9.16: continued

TABLE 1 - FEES

Application Type	Permit Code	Fee Reg Citation (310 CMR 4.00)
Determination of Waterways Applicability	WW 04	4.10(8)(d)
General License Certification	WW 24	4.10(8)(f)(2)
Test Project Permit	WW 25	4.10(8)(f)(3)
Combined Application with Water Quality Certification and/or Notice of Intent	WW 26	4.10(8)(1)
Combined Application for Amendment with Water Quality Certification	WW 27	4.10(8)(l)(1)
Chapter 91 Waterways License -Water-dependent [1]		
Water-dependent Residential Project, accessory to a residential use of four units or less	WW 01a	4.10(8)(a)
Other Water-dependent Use Projects	WW 01b	4.10(8)(a)
Water-dependent License with extended terms	WW 01c	4.10(8)(a)
Chapter 91 Simplified License		
Water Dependent Use of Small Structures, Accessory to Residence	WW 06	4.10(8)(f)
Renewal, Water-dependent Use of Small Structures, Accessory to Residence	WW 12	4.10(8)(f)(1)
Chapter 91 Waterways License -Non Water-dependent		
Partial Initial Application - Non Water-dependent Residential four units or less	WW 14a	4.10(8)(a)(1)
Partial Initial Application - Other Non Water-dependent Use Projects	WW 14b	4.10(8)(a)(1)
Partial Initial Application Non Water-dependent Use Project with Extended Terms	WW 14c	4.10(8)(a)(1)
Full Initial Application - Non Water-dependent Residential Use, four units or less	WW 15a	4.10(8)(a)(2)
Full Initial Application - Other Non Water-dependent Use Projects	WW 15b	4.10(8)(a)(2)
Full Initial Application Non W-D Use Project with Extended Terms	WW 15c	4.10(8)(a)(2)
Application for License within a Municipal Harbor Plan - Residential Non Water-dependent Project, four units or less	WW 16a	4.10(8)(a)(3)
Application for License within a Municipal Harbor Plan, Other Non Water-dependent Projects	WW 16b	4.10(8)(a)(3)
Application for License within a Municipal Harbor Plan, Non Water-dependent Use Project with Extended Terms	WW 16c	4.10(8)(a)(3)

[1] Except for facilities subject to 310 CMR 9.16(3)(b)(2), for which the applicable fees shall be the same as those listed for license with extended terms

TABLE 1 - FEES (continued)

Application Type	Permit Code	Fee Reg Citation (310 CMR 4.00)
License Application with joint MEPA application, Residential Non Water-dependent Projects, four units or less	WW 17a	4.10(8)(a)(4)
License Application with joint MEPA application, Other Non Water-dependent Projects	WW 17b	4.10(8)(a)(4)
License Application Non Water-dependent Use Project with joint MEPA application and extended terms	WW 17c	4.10(8)(a)(4)
License or Permit Amendment		
Chap 91 Amendment; Residential Water-dependent Use Project, four units or less	WW 03a	4.10(8)(c)
Chap 91 Amendment; Other Water-dependent Use Projects	WW 03b	4.10(8)(c)
Amendment; Residential Non Water-dependent Use Project, four units or less	WW 03c	4.10(8)(c)
Amendment; Other Non Water-dependent Use Projects	WW 03d	4.10(8)(c)
Amendment to License with extended terms	WW 03e	4.10(8)(c)
Certificate of Compliance		
Certificate of Compliance: Water-dependent	WW 05a	4.10(8)(e)
Certificate of Compliance: Non Water-dependent	WW 05b	4.10(8)(e)
Certificate of Compliance: License with Extended Terms	WW 05c	4.10(8)(e)
Tidewater Displacement Fee (per cubic yard)	**Rate**	
Water-dependent Projects	$2.00	
Non Water-dependent Projects	$10.00	
Licenses with Extended Terms	$10.00	
Any Small Scale Project under 310 CMR 9.10	N/A	
Occupation Fee[2] (per square yard of land held by the Commonwealth)	**Rate**	
Water-dependent Projects	$1.00 x term of license	
Non Water-dependent Projects	$2.00 x term of license	
Licenses with Extended Terms	Appraisal	
Simplified License per 310 CMR 9.10	$1.00 x term of license	

[2] The fee is calculated by multiplying the dollar rate shown by the length of the license term, in years, and by the area of occupied land held by the Commonwealth. This is a fixed fee for the term of the license and is assessed on a lump sum basis, except as provided in 310 CMR 9.16(3)(d)

9.17: Appeals

(1) The following persons shall have the right to an adjudicatory hearing concerning a decision by the Department to grant or deny a license or permit:

(a) an applicant who has demonstrated property rights in the lands in question, or which is a public agency;

(b) any person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period;

(c) ten residents of the Commonwealth, pursuant to M.G.L. c. 30A, § 10A, who have submitted comments within the public comment period; at least five of the ten residents shall reside in the municipality(s) in which the license or permitted activity is located. The appeal shall clearly and specifically state the facts and grounds for the appeal and the relief sought, and each appealing resident shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative.

(d) the municipal official in the affected municipality(s) who has submitted written comments within the public comment period;

(e) CZM, for any project identified in 310 CMR 9.13(2)(a) for CZM participation; and

(f) DCR, for any project in an Ocean Sanctuary, if it has filed a notice of participation within the public comment period.

(2) Any notice of claim for an adjudicatory hearing must be sent by certified mail or hand delivery to the Department within 21 days of the date of the written determination, draft license or draft permit, or if no such determination or draft is required, within 21 days of the date of issuance of the license or permit, as appropriate under 310 CMR 9.14(1) and (2). A copy must be sent at the same time by certified mail or hand delivery to the applicant and to the municipal official of the city or town where the project is located.

(3) Any notice of claim for an adjudicatory hearing must include the following information:

(a) the DEP Waterways Application File Number, name of the applicant and address of the project;

(b) the complete name, address, and telephone number of the party filing the request and, if represented by counsel, the name, address and telephone number of the attorney and, if claiming to be a person aggrieved, the specific facts that demonstrate that the party satisfies the definition of "aggrieved person" found in 310 CMR 9.02;

(c) a clear statement that a formal adjudicatory hearing is being requested;

(d) a clear and concise statement of the facts which are grounds for the proceeding, the specific objections to the Department's written determination, draft license, draft permit, license or permit, and the relief sought through the adjudicatory hearing, including specifically the changes desired in the final written determination, license, or permit; and

(e) a statement that a copy of the request has been sent to:

1. the applicant; and
2. the municipal official of the city or town where the project is located.

(4) The Department may coordinate adjudicatory hearings under 310 CMR 9.17 and under M.G.L. c. 131, § 40, 310 CMR 10.00: *Wetlands Protection* and 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* as follows:

(a) if a final order has been issued pursuant to the Wetlands Protection Act, M.G.L. c. 131, § 40, the Department shall exclude issues solely within the jurisdiction of that statute at an adjudicatory hearing held under 310 CMR 9.17, except as provided in 310 CMR 9.33(3);

(b) if a Water Quality Certification has been issued pursuant to 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*, the Department shall exclude issues solely within the jurisdiction of 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*;

(c) if an adjudicatory hearing has been requested under 310 CMR 9.17, 314 CMR 9.10: *Appeals* and 310 CMR 10.05(7)(j), the Department may consolidate these proceedings; and

9.17: continued

(d) notwithstanding 310 CMR 9.17(4)(a) and (b), in the event that the Department has issued a Combined Permit that serves as the license, permit or other written approval for a water-dependent use project issued pursuant to 310 CMR 9.00, the appeal may include issues solely within the jurisdiction of 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* and 310 CMR 10.00: *Wetlands Protection* only as follows: The appeal may include issues solely within the jurisdiction of 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* only if the appeal has been requested in accordance with the requirements of 314 CMR 9.10: *Appeals*. The appeal may include issues solely within the jurisdiction of 310 CMR 10.00: *Wetlands Protection* only if the appeal has been requested in accordance with the requirements of 310 CMR 10.05(7)(j).

9.18: Recording

(1) The license and accompanying plan shall be recorded at the Registry of Deeds within the chain of title of the affected property within 60 days of the date of issuance. In the case of recorded land, the license shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the project is located. In the case of registered land, the license shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the project is located. When a license involves more than one parcel of land the license shall be recorded in the chain of title for all relevant deeds.

(2) Written notice of said recording shall be given to the Department within 30 days of recording, including an identification of the Registry of Deeds or Land Court in which the license is recorded, the date of recording and the instrument or document number, prior to commencement of the project authorized under the license.

(3) Failure to record the license and accompanying plan within 60 days will render said license void in accordance with 310 CMR 9.26(2)(b)1.

9.19: Certificate of Compliance

(1) Within 60 days of the completion of any licensed project, but in no event later than five years from the date of license issuance, or any extension thereof, the applicant shall request in writing that the Department issue a certificate of compliance. The request shall be accompanied by a certification by a registered professional engineer licensed to do business in the Commonwealth that the project was completed according to the plans, specifications, and conditions of the license. The Department may conduct a site inspection at any time to determine compliance prior or subsequent to issuing a certificate. The Department may issue a partial certificate of compliance for a portion of a project if all public benefits associated with such portion have also been provided.

(2) The license for any project for which such a request is not filed and certificate issued may be revoked pursuant to 310 CMR 9.26(1).

9.20: Authorization of Emergency Actions

In an emergency situation where swift and immediate action is essential to avoid or eliminate a serious and immediate threat to health, safety, or the environment, the Department may approve a project or portion thereof, without a license or permit, in accordance with the following procedures.

(1) A written request shall be submitted to DEP which describes the location, and work to be performed and specifies why the project is necessary for the protection of the health or safety of the public or the environment. Accompanying this request shall be a written statement from a federal, state or municipal agency certifying that there is an emergency and specifying why said project is necessary to avoid or eliminate a serious and immediate threat to public health, safety, or the environment.

9.20: continued

(2) Emergency approval shall be issued in writing and shall specify the limits of activities necessary to abate the emergency.

(3) When the necessity for undertaking the emergency action no longer exists, any emergency action taken under 310 CMR 9.20 shall cease until the provisions of 310 CMR 9.00 have been complied with. In any event, the time limit for performance of emergency work shall not exceed 30 days, unless a written extension is approved by the Commissioner or appropriate Regional Director.

(4) In all cases under 310 CMR 9.20, the person performing any emergency work is required to submit a license or permit application in accordance with 310 CMR 9.11 within 30 days of the date of emergency approval unless a written extension is approved by the Commissioner. Following the review of the application, the Department may require any modification to the emergency work that it deems necessary.

(5) In emergency situations where written notice is not feasible, verbal notice to and approval by the Commissioner or appropriate Regional Director may be substituted until written notice can be feasibly submitted.

(6) No work authorized under an emergency approval pursuant to 310 CMR 9.00 may be undertaken without emergency authorization under M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection* and M.G.L. c. 30, §§ 61 through 62H, where applicable.

9.21: Variances

(1) Required Findings. The Commissioner may waive the application of any other section of 310 CMR 9.00 by making a written finding following a public hearing that:

(a) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00;

(b) the project includes mitigation measures to minimize interference with the public interests in waterways and that the project incorporates measures designed to compensate the public for any remaining detriment to such interests; and

(c) the variance is necessary:

1. to accommodate an overriding municipal, regional, state or federal interest; or
2. to avoid such restriction on the use of private property as to constitute an unconstitutional taking without compensation; or
3. to avoid substantial hardship for the continuation of any use or structure existing as of October 4, 1990, and for which no substantial change in use or substantial structural alteration has occurred since that date.

(2) Procedure

(a) A request for a variance shall be filed by the applicant prior to publication of the notice of public hearing pursuant to 310 CMR 9.13(1). The request shall be in writing and shall include, at a minimum, the following information:

1. an identification of the regulation(s) from which the variance is sought;
2. a description of alternative designs, locations, or construction methods which would achieve the purpose of the project without the need for the variance;
3. an explanation of why each of the alternatives is unreasonable;
4. an analysis of any detriments to interests of the public in waterways due to the proposed project and an explanation of how the detriments have been minimized;
5. a description of the measures that will be provided to compensate for any remaining detriment to public interests in waterways; and
6. a description and supporting documentation of the overriding public interest served by the project, if applicable; or
7. documentation that the project is a continuation of a use or structure existing as of October 4, 1990; that there has not been a substantial change in use or substantial structural alteration since that date; and that application of 310 CMR 9.00 would cause substantial hardship to the applicant, if applicable; or

9.21: continued

8. a legal analysis, with supporting documentation, explaining why application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking without compensation, if applicable.

(b) Notice of the variance request shall be published in accordance with 310 CMR 9.13(1) and shall explicitly indicate that a variance is being requested. The Department shall hold a public hearing in accordance with 310 CMR 9.13(3) upon which the Commissioner's findings shall be based. Upon issuance of a variance an adjudicatory hearing is available in accordance with 310 CMR 9.17.

(c) For projects for which an EIR will be prepared in accordance with M.G.L. c. 30, §§ 61 through 62H, the information required pursuant to the provisions of 310 CMR 9.21(2)(a)1. through 7., should be included in the EIR if the need for a variance is reasonably forseeable. If the variance issue was addressed in the final EIR, the Commissioner shall presume that the description of alternatives contained therein satisfies the requirements of 310 CMR 9.21(2)(a)2. Notwithstanding this presumption, the Commissioner may require any modification of the project reasonably within the scope of an alternative within the final EIR.

(3) Commentary. The variance process is intended to apply in the rare and unusual circumstance where a proposed project satisfies a public interest which overrides the public interest in waterways but cannot be implemented in a manner which is fully consistent with the provisions of 310 CMR 9.00; where application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking of property; or where application of 310 CMR 9.00 would cause substantial hardship for the continuation of a use or structure existing as of October 4, 1990. The variance process is designed to ensure that a full investigation is made to determine whether the proposed project serves an overriding public interest which outweighs harm to the public resulting from lack of adherence to 310 CMR 9.21 and whether all measures are taken which ensure that detriments to the public interests in waterways are minimized.

9.22: Maintenance, Repair, and Minor Project Modifications

(1) Maintenance and Repair of Fill and Structures. During the term for which the license is in effect, the licensee shall maintain and repair all authorized fill and structures in good working order for the uses authorized in the license, and in accordance with the conditions specified therein. No application for license or license amendment shall be required for such activity. Maintenance and repair include, among other things, the following activities:

(a) replacement of old pilings, decking, or rip-rap, all with material of the same dimensions and quality and in the same locations and elevations as that authorized in the license;

(b) repaving of road surfaces, installation of road curbs and lighting, replacement of railroad track, stabilization of road or rail beds, reconstruction of culverts and catch basins, and other maintenance or repair of existing public transportation facilities and associated drainage systems, as necessary to preserve or restore the serviceability of such facilities for the original use, provided that maintenance and repair shall not include the substantial enlargement of such facilities, such as roadway widening, adding shoulders, or upgrading substandard intersections;

(c) restoration to the original license specifications of licensed fill or structures that have been damaged by catastrophic events, provided that no change in use occurs and that:

1. such restoration is completed within two years of the damage-causing event;
2. in the case of flood-related damage, the cost of such restoration does not exceed 50% of the cost of total replacement according to the original license specifications;
3. the licensee provides the Department with written notice of the restoration at least ten days prior to commencement of such work; in the case of flood-related damage, said notice shall include written estimates of restoration and replacement costs; and
4. the licensee provides the Department with written notice that the repair work has been completed in accordance with the license specifications, as certified by a Registered Professional Engineer, within 60 days of such completion; and

(d) demolition and removal of unused structures that are obsolete or otherwise no longer suitable for the uses authorized in the license, provided that written approval by the Department is obtained prior to the commencement of such work.

9.22: continued

(2) Maintenance Dredging. Maintenance dredging may occur for five years from the date of issuance of the license or permit or for such other term, not exceeding ten years, specified therein, provided that the written notice required pursuant to the Wetlands Protection Act (M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*) has been filed with the Conservation Commission and a copy has been sent to the Department.

(3) Minor Project Modifications. The licensee may undertake minor modifications to a licensed project, or a project exempt from licensing pursuant to 310 CMR 9.05(3)(b) through (h), without filing an application for license or license amendment. Such modifications are limited to:

(a) structural alterations which are confined to the existing footprint of the fill or structures being altered and which represent an insignificant deviation from the original specifications of the license, in terms of size, configuration, materials, or other relevant design or fabrication parameters;

(b) changes of use which maintain or enhance public benefits provided by the project and which represent an insignificant deviation from the original use statement of the license, in terms of function, character, duration, patronage, or other relevant parameters; ~~or~~

(c) replacement of subsurface utilities, or installation of additional utility lines in an existing right of way within previously authorized filled tidelands connecting to existing structures, provided the work will not restrict or impair access to water-dependent uses; ~~.~~

(d) relocation of building systems from a lower floor to an upper floor or the roof of an existing structure to reduce flood vulnerability; or

~~(c)~~(e) changes of use when the relocation of building systems for flood resilience in accordance with 310 CMR 9.22(3)(d) results in newly available spaces on the ground floor of an existing nonwater-dependent structure on filled Private Tidelands; any change in use will be subject to the applicable provisions of 310 CMR 9.00 including but not limited to the requirements of 310 CMR 9.51.

No such modifications shall be undertaken until the licensee has submitted written notice to the Department describing the proposed work in sufficient detail, with reference to any relevant license plans, for the Department to determine compliance with the above conditions. If the Department does not object within 30 days, the licensee may proceed with the described work without further approval by the Department.

(4) Nothing in 310 CMR 9.22(1) through (3) provisions shall be be construed to exempt the work in question from obtaining other applicable approvals, including but not limited to an order of conditions under M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*.

9.23: Transfer of License Upon Change of Ownership

(1) Unless otherwise provided in the license, a valid license shall run with the land and shall automatically be transferred upon a change of ownership of the affected property within the chain of title of which the license has been recorded. All rights, privileges, obligations, and responsibilities specified in the license shall be transferred to the new landowner upon recording of the changed ownership.

(2) For transferability of permits issued by the harbormaster for the temporary placement of moorings, floats, and rafts, see 310 CMR 9.07(2)(d).

9.24: Amendments

(1) Upon written request by the licensee accompanied by appropriate plans, the Department may amend a license and associated written determination to authorize a structural alteration or change in use not defined as substantial in accordance with 310 CMR 9.02, or to delineate a reconfiguration zone within a marina in accordance with 310 CMR 9.39(1)(b), or to renew a term of license in accordance with 310 CMR 9.25(2). A written request may also be made to amend a permit. No license or permit shall be amended unless the project, as modified, complies with the applicable provisions of 310 CMR 9.00 wherever feasible.

(2) The Department shall review the request for amendment and determine whether the proposed changes are so significant as to require a new license or permit application or are appropriate for consideration of an amendment to the existing license or permit.

(3) If the Department determines that the proposed changes are appropriate to allow

consideration of an amendment, notice shall be provided in accordance with the requirements of 310 CMR 9.13(1), and to any intervenor on the original license application to the maximum reasonable extent.

9.24: continued

(4) The Department may, at its discretion, conduct a public hearing on the request for amendment. Any such hearing shall be conducted in accordance with the requirements of 310 CMR 9.13(3).

(5) Any person who would otherwise have the right to an adjudicatory hearing pursuant to 310 CMR 9.17 may appeal the issuance of any amendment within 21 days of the date of its issuance, in accordance with the procedures set forth at 310 CMR 9.17.

(6) The amended license and accompanying plan shall be recorded within 60 days of the date of issuance in accordance with the procedures set forth in 310 CMR 9.18.

(7) Notwithstanding the procedures for amendment described above, the Department may issue in writing, at the request of the licensee, clarification and corrections regarding any license or permit previously issued.

9.25: Expiration and Renewal

(1) Expiration.

(a) Any license, permit, or legislative authorization shall expire as to all work licensed, permitted, or authorized which is not completed within five years of the date thereof, or such other period of time specified therein; provided, however, that for good cause shown the Department may extend, without public hearing or notice, the construction period of the license, permit, or legislative authorization for one or more one year periods upon written request of the licensee or permittee.

(b) All licenses or permits shall expire upon reaching the term, if any, stated in the license or permit or any extension thereof.

(c) Any license shall expire if the fill or structures are abandoned and not used for the purpose for which they were licensed for a period of five consecutive years or more.

(2) Renewal of Licenses and Permits. A renewal may be granted for a term of years not to exceed that authorized in the original license or permit, in accordance with 310 CMR 9.15, upon written application by the licensee or permittee and in accordance with the procedures for amendments set forth at 310 CMR 9.24. Any license or permit renewal must comply with the applicable provisions of 310 CMR 9.00, including but not limited to the requirements of 310 CMR 9.37.

9.26: Revocation and Nullification

(1) Revocation.

(a) Unless otherwise specifically provided by law, the Department may revoke a license or permit for non-compliance with the terms and conditions set forth therein, including any change of use from that expressly authorized in said license or permit or, if no such statement was included, from that reasonably determined by the Department to be implicit therein. Such revocation may not occur until after the Department has given notice of the alleged non-compliance to the licensee or permittee and any person who has filed a written request for such notice with the Department, and after it has afforded them an opportunity for a hearing and a reasonable opportunity to correct said non-compliance.

(b) In accordance with the procedures established in 310 CMR 9.26(1)(a), the Department may revoke any license or permit upon a finding that the licensee denies access to project services and facilities in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, of the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination. Such a finding shall be made upon a final determination of discrimination, issued by any federal, state or local court or agency with jurisdiction to investigate discrimination issues.

(c) Notice of revocation of a license shall be recorded at the Registry of Deeds or Land Court by the Department, in accordance with 310 CMR 9.18.

(2) Nullification.

(a) All licenses issued prior to January 1, 1984 are void if:

1. the license and the accompanying plan were not recorded within one year of date of issuance at the Registry of Deeds for the county or district where the work was to be performed;

9.26: continued

2. there has been an unauthorized substantial change in use; or
3. there has been an unauthorized substantial structural alteration.

Notwithstanding the foregoing, no license for filled private tidelands shall be void for unauthorized substantial changes in use or unauthorized substantial structural alterations which occurred prior to January 1, 1984.

(b) All licenses issued after January 1, 1984 are void if:

1. the license and accompanying plan were not recorded within 60 days of date of issuance at the Registry of Deeds for the county or district where the work was to be performed;
2. there has been an unauthorized substantial change in use; or
3. there has been an unauthorized substantial structural alteration.

9.27: Removal of Previously Licensed Structures

Upon the nullification, expiration, or revocation of a license, the licensee shall remove all structures authorized in such previous license which are located:

(1) below the high water mark, unless the Department determines that continued existence of said structures will promote the public interests served by M.G.L. c. 91;

(2) above the high water mark, if the Department determines that continued existence of said structures will have a significant adverse effect on the public interests served by M.G.L. c. 91. Such removal shall take place upon written notice to and at the direction of the Department.

9.28: Amnesty

(1) General. Notwithstanding the provisions of 310 CMR 9.09(2), certain substantive and procedural standards of 310 CMR 9.11 through 9.55 shall not apply to the licensing of existing unauthorized fill or structures provided the Department received an application by October 4, 1996. Furthermore, during the amnesty period the Department may postpone the requirement to obtain a license for certain small-scale water-dependent structures on residential property by issuing an interim approval for said structures. The Department will initiate enforcement action to require the removal or licensing of any such structure pursuant to 310 CMR 9.00 only upon the expiration or revocation of the interim approval or the violation of the terms and conditions thereof. After the close of the amnesty period, the Department will require strict compliance with all provisions of 310 CMR 9.00 and will take enforcement action, including the assessment of penalties if appropriate, to ensure that all unauthorized fill and structures are either licensed or removed.

(2) Projects Which May Be Authorized under the Amnesty Program.

(a) An application for a license under the amnesty program may be submitted only for a project consisting entirely of the continuation in use of existing fill or structures not previously authorized, or for which a grant or license is not presently valid pursuant to 310 CMR 9.00, provided that:

1. said fill or structures have been in use since January 1, 1984, and no unauthorized substantial change in use or substantial structural alteration has occurred since that date; and
2. an application has been filed with the Department by October 4, 1996.

(b) An application for an interim approval under the amnesty program may be submitted only for a project meeting the criteria of 310 CMR 9.28(2)(a), and which consists entirely of an existing dock, pier, seawall, bulkhead, or other small-scale water dependent structure that is accessory to a single family residence.

(3) Standards for Applications under Amnesty Program. For purposes of authorizing any project under the amnesty program, the applicable substantive standards found at 310 CMR 9.07 and 9.20 through 9.27, effective September 15, 1978, shall remain in full force and effect in *lieu* of the substantive standards found at 310 CMR 9.31 through 9.60.

9.28: continued

(4) Procedures for Applications under Amnesty Program. For purposes of authorizing projects under the amnesty program, the applicable procedural rules found at 310 CMR 9.11 through 9.30 shall be in effect, except for any time schedule for Department action specified therein, and except as modified in accordance with the following provisions.

(a) Plans, 310 CMR 9.11(2) and (3): In the case of an application for an interim approval, the plan need not be certified by a Registered Professional Engineer or Registered Land Surveyor if the fill or structure is accurately drawn on a scaled plan in accordance with application instructions issued by the Department.

(b) Other State and Local Approvals, 310 CMR 9.11(4): In the case of an application for an interim approval, except for any project located in an ACEC, the application need not provide evidence of compliance with the applicable state and local requirements, and the Department shall presume compliance with these requirements unless the Department receives information to the contrary during the public comment period.

(c) Terms, 310 CMR 9.15: In the case of an application for an amnesty license for a water-dependent use project on Commonwealth tidelands, the license term shall be 99 years unless the Department determines that a shorter term is necessary to protect the public interest in said lands. In the case of an application for an interim approval, said approval shall expire in 30 years unless the affected property is transferred to a new owner for valuable consideration, in which case said approval shall expire one year from the date of recording of the transfer at the Registry of Deeds. An interim approval shall not be renewed upon expiration; further authorization from the Department must be obtained in the form of a license.

(d) Fees, 310 CMR 9.16(2) through (4): In the case of an application for an amnesty license for a water-dependent use project, the applicable regulations governing tidewater displacement and occupation fees found at 310 CMR 9.08, effective September 15, 1978, shall remain in full force and effect in lieu of the fee regulations found at 310 CMR 9.16(2) through (4). In the case of an application for an interim approval no such fees shall apply. All applications under the amnesty program shall pay the appropriate application fee in accordance with 310 CMR 9.16(1).

(e) Recording, 310 CMR 9.18: In the case of an application for an interim approval, said approval shall be recorded, without the accompanying plan, at the Registry of Deeds in accordance with 310 CMR 9.18.

(f) Transfer, 310 CMR 9.23: In the case of an application for an interim approval, said approval shall not run with the land, but shall automatically expire one year from the date of recording of the transfer of the affected property to a new owner for valuable consideration.

9.29: General License Certification

(1) The General License. In accordance with M.G.L. c. 91, § 18C, the Department will issue a General License for noncommercial, small-scale, water-dependent structures accessory to a residential use. The General License shall be a final license signed by the Governor and may authorize eligible small-scale, water-dependent structures accessory to a residential use in lieu of an individual license. The General License shall be issued under the following procedures:

(a) The draft General License will be posted on the Department website and published in the Environmental Monitor for a 30-day public comment period. After the close of the public comment period, the Department will issue the final General License and notify the public of its availability on the Department website.

(b) The General License shall be in effect for a fixed term not to exceed 30 years for structures in coastal waters, and 15 years for structures in fresh waters, unless a shorter effective term is specified by the Department in the General License.

(c) The General License shall be recorded at every Registry of Deeds in the Commonwealth, indexed under "Commonwealth of Massachusetts" as the Grantor.

(d) The Department may amend or modify the General License in accordance with the procedures of 310 CMR 9.29(1)(a) through (c).

(2) Projects Eligible for General License Certification. A Certification to the General License issued under 310 CMR 9.29(1) must be submitted for all proposed structures, previously unauthorized structures, and previously licensed structures applying for renewal, that meet the following eligibility criteria:

(a) Are for a water-dependent, noncommercial use accessory to residential property;

9.29: continued

(b) Are for pile-supported (*e.g.*, by wooden or metal posts) small-scale dock, pier, and similar structures with associated ramp(s) and float(s) that require no fill or dredging;
(c) Are not located within an Area of Critical Environmental Concern (ACEC);
(d) Are not located within a Designated Port Area (DPA); and
(e) Otherwise meet the General License standards and procedures described in 310 CMR 9.29(3) and (4).

The above thresholds are established for determination of eligibility only; structures licensed under 310 CMR 9.29 shall be the minimum size necessary to achieve the intended water-related purposes.

(3) Standards. The General License contains specific conditions that will ensure that projects certified under 310 CMR 9.29 will meet the following performance standards which shall supersede the standards listed in 310 CMR 9.35 and 9.37.

(a) An eligible project shall not:
1. Exceed the minimum size necessary to achieve the intended water-dependent use;
2. Extend beyond the length required to achieve safe berthing;
3. Impair the lines of sight necessary for navigation;
4. Interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site;
5. Interfere with access or public rights associated with a public landing, easement, or other public access to water;
6. Generate water-borne traffic that would substantially interfere with other vessels; and
7. Impair in any other substantial manner the ability of the public to swim or float freely upon the waterways.

(b) An eligible project shall:
1. Preserve all rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes;
2. Preserve public rights of access on private tidelands for fishing, fowling, and navigation;
3. be structurally sound; and
4. meet all other standards and conditions stated in the General License, including but not limited to the dimensional criteria for flowed tidelands or fresh waters.

(c) The Department may consider the cumulative impact of docks, piers and similar structures in a geographic area in determining whether a project is appropriate for coverage under a General License.

(4) Certification Procedures. Unless otherwise specified in 310 CMR 9.29, the procedural requirements of 310 CMR 9.10 through 9.19, 9.21, 9.23 through 25, 9.34, 9.37, shall not apply to Certifications submitted under the General License issued pursuant to 310 CMR 9.29 and M.G.L. c. 91, § 18C. A Certification shall assert under the pains and penalties of perjury that the proposed project meets all eligibility requirements set forth in 310 CMR 9.29(2), and that the project proponent will comply with all standards and conditions of the General License. For purpose of authorizing eligible projects under the General License, the following certification procedure shall apply.

(a) Application and Plans. A project proponent shall submit a completed Certification form provided by the Department, which shall be signed by the project proponent and landowner, if other than the project proponent. The Certification shall be prepared in accordance with the instructions contained in the Department's Certification package and include a copy of any legislative grant. The Certification shall include a plan that clearly demonstrates that the project meets the General License eligibility criteria of 310 CMR 9.29(2), will comply with all standards and conditions of the General License; and is drawn in accordance with the formatting and information requirements described in the Department's Certification package. When plans have been submitted with a Notice of Intent or referenced in an Order of Conditions under the Wetlands Protection Act, a copy of those plans shall accompany the application. When plans have not been prepared under the Wetlands Protection Act, a plot plan or other scaled plan with structures to be licensed measured accurately from lot lines or other fixed structures shall be prepared in accordance with the application instructions.

9.29: continued

(b) Coordination with Municipal Officials. The project proponent shall coordinate with the following municipal officials on the proposed project and provide an opportunity to comment prior to submitting the completed Certification package to the Department.

1. Planning Board. The project proponent shall submit to the planning board a statement and plan that includes the proposed use, location, dimensions and limits and mode of work to be performed, and describes the proposed project with sufficient detail for the planning board to determine if the proposed project complies with the eligibility criteria and applicable standards and conditions of the General License. The planning board may solicit the opinions of other municipal officials such as the board of selectmen, harbormaster or conservation commission. Within 45 days of receipt of an adequate statement from the project proponent, the planning board may submit a written opinion to the Department on whether the project meets the eligibility criteria listed in 310 CMR 9.29(2) and will comply with the standards and conditions of the General License and 310 CMR 9.29(3). The Department may affirm a Certification after the expiration of 45 days without local planning board comment or upon receiving notification from the local planning board that it does not oppose the project's eligibility for a Certification.

2. Conservation Commission. The project proponent shall provide to the Department adequate documentation with the Certification package that the project complies with the Wetlands Protection Act, in the form of an Order of Conditions, negative or conditionally negative Determination of Applicability, or Certificate of Compliance.

3. Zoning Compliance. The project proponent shall include on the Certification form a certification from the local Zoning Enforcement Officer that the project complies with applicable zoning ordinances and bylaws.

(c) Public Notice. The project proponent shall publish in a newspaper of general circulation in the area where the project is located, a public notice including the proponent's name and address, the project location, a description of the project, and a statement that written comments will be accepted by the planning board within 30 days of the submittal of the statement to the planning board. At the same time the proponent submits its statement to the planning board, a copy of the public notice shall be distributed to the Municipal Official, harbormaster, if any, and the conservation commission. The notice shall indicate that the proposed project is under review by the planning board. No public hearing will be required by the Department for a General License Certification. The public notice of the project shall be published before or at the same time as the statement is provided to the planning board and other municipal officials and may be included in a public notice for the proposed project required by other applicable statutes or regulations, such as the Wetlands Protection Act.

(d) Fees. Any Certification submitted to the Department shall include the applicable Certification form and payment of the applicable tidewater displacement or occupation fee described at 310 CMR 9.16. Notwithstanding the provisions of 310 CMR 9.16(3)(d) and (e) to the contrary, all such fees shall be paid in full by certified check or money order made payable to the Commonwealth of Massachusetts at the same time as the Certification is submitted to the Department.

(e) Any change in use or structural alteration of a previously licensed structure that is eligible for the General License, regardless of when the structure was first licensed or certified, on or after the effective date of this section, shall require a new Certification. The new Certification shall be submitted to the Department for a shortened local review that includes only the planning board in accordance with 310 CMR 9.29(4)(b)1. and M.G.L. c. 18(C). The new Certification shall be submitted to the Department and Planning Board at least 60 days prior to the start of construction.

(5) Decision on Certifications. The Department shall acknowledge receipt of a complete Certification package, or request additional information, within 60 days of the date of receipt by the Department. The submission of the Certification to the Department shall not occur until the latter of the completion of the public comment period or the expiration of the planning board's 45 day review period. The Department shall affirm the Certification if the project meets the eligibility criteria of 310 CMR 9.29(2), will comply with all standards and conditions of the General License, and the applicant has met all the requirements of 310 CMR 9.29(3) and (4), except that the Department shall not affirm a Certification if the planning board recommends that the project be subject to individual licensing. If an existing, previously unauthorized structure is found ineligible for Certification, an application shall be submitted for an annual local permit, a simplified license, or an individual license in accordance with 310 CMR 9.07, 9.10, or 9.11.

9.29: continued

(6) Terms of Certifications and Recording.

(a) The term of the affirmed Certification shall expire on the same date as the General License, unless the Department specifies in its affirmation that a shorter term is necessary to protect the public interest.

(b) The affirmed Certification, with the plan as an exhibit, shall be recorded at the Registry of Deeds within the chain of title of the affected property within 60 days of the date of the Department's affirmation. The Certification becomes valid on the date the affirmed Certification is recorded. Failure to record the Certification and accompanying plan within 60 days will render the Certification void in accordance with M.G.L. c. 91, § 18C. The applicant shall provide notification to the Department within 30 days of the recording in accordance with 310 CMR 9.18(2).

(c) Work or change in use shall not commence until the affirmed Certification is recorded and the Department has received notification of the recordation.

(d) All work authorized by an affirmed Certification under this General License shall be completed within five years of the date of the Department's affirmation. Said construction period may be extended by the Department for one or more one year periods without public notice, provided that the Applicant submits to the Department, 30 days prior to the expiration of said construction period, a written request to extend the period and provides an adequate justification for said extension.

(7) Recertification and Transfer of Certifications from the Department. The Department may reissue a General License under the procedures of 310 CMR 9.29(1) twelve months prior to the expiration of the General License term. At least 90 days prior to the expiration of the General License, or the date of reissuance of the General License whichever is later, a person responsible for a structure with an affirmed Certification under the General License shall file a request for continued coverage with the Department. The Department may require planning board review in accordance with 310 CMR 9.29(4)(b)1. based on comments received about the structure or other relevant information. The Certification procedures of 310 CMR 9.29(4) shall apply to requests to recertify.

(a) Projects meeting the eligibility provisions of 310 CMR 9.29(2), which previously obtained a license, simplified license, amnesty license or interim approval, shall request Certification under 310 CMR 9.29 instead of renewal, before the expiration of the previously issued license or interim approval.

(b) Any person applying for a recertification under 310 CMR 9.29 shall compensate the Commonwealth for the rights granted in such lands through payment of an occupation fee, in accordance with the provisions of 310 CMR 9.16.

(c) Unless otherwise provided in the Certificate, a valid affirmed Certificate shall run with the land and shall automatically be transferred upon a change of ownership of the affected property within the chain of title of which the license has been recorded. All rights, privileges, obligations, and responsibilities specified in the General License shall be transferred to the new landowner upon recording the changed ownership in the Registry of Deeds.

(8) Appeals. The appeal provisions of 310 CMR 9.17 shall apply to the issuance of a General License. Copies of a Notice of Claim filed concerning the issuance of a General License pursuant to 310 CMR 9.29 shall be provided as required by 310 CMR 9.17(2) and (3) to the extent applicable. The appeal provisions of 310 CMR 9.17 shall not apply to the Certification of a project under the General License issued in accordance with 310 CMR 9.29.

(9) Enforcement, Suspension or Revocation of a Certification under a General License. The enforcement provisions of 310 CMR 9.08 shall apply to any structure eligible for certification or Certified under the General License pursuant to 310 CMR 9.29. The Department shall perform annual audits to monitor compliance with the General License standards and conditions in accordance with M.G.L. c. 91, § 18C. Consistent with the provisions of 310 CMR 9.26, the Department may revoke a Certification for non-compliance with the standards and conditions set forth in the General License or the individual Certification.

9.30: Permitting of Test Projects

(1) General. The Department may, at its discretion, issue a permit authorizing a Test Project that the Department determines has minimal impacts. The Department may require that an applicant document the readiness of the device or technology for *in situ* testing with the results of laboratory testing, modeling, technical evaluations, or similar forms of supporting material.

(2) Standards. Except as otherwise provided, the procedural requirements of 310 CMR 9.11 through 9.27 shall not apply to Test Projects. The procedural requirements of 310 CMR 9.12, 9.16, 9.17, 9.22, and 9.26 shall apply to the permitting of Test Projects. The application shall include sufficient documentation to demonstrate that the Test Project complies with 310 CMR 9.35(2). During the operation of the Test Project, the Permittee shall comply with all applicable performance standards set forth in 310 CMR 9.32 through 9.55 except as otherwise provided in 310 CMR 9.30(2). During the operation of the Test Project, the Permittee shall also comply with the following standards:

(a) In the event that the project does not comply with one or more of the applicable performance standards, the Permittee shall notify the Department in writing within 72 hours of the discovery of such noncompliance. The written notice shall include a plan and schedule for bringing the Test Project into compliance as soon as is practicable. Upon receipt of said written notice, the Department may require the Permittee: to modify the Project to comply with all applicable performance standards or to remove the Test Project immediately and restore the area to pre-project conditions.

(b) The Permittee shall remove all structures authorized by the permit and restore the Project Site to pre-project conditions prior to expiration of the permit.

(c) A certification by a Registered Professional Engineer pursuant to 310 CMR 9.37(1)(a) is not required for a Test Project.

(3) Application Requirements. For the purpose of authorizing eligible Test Projects under 310 CMR 9.30, the following provisions shall apply:

(a) Application. An applicant for a Test Project permit shall submit a written application on forms provided by the Department, signed by the applicant and landowner if other than the applicant. The information required below in 310 CMR 9.30(3)(b) and (c) may be provided in a separate application for a Chapter 91 permit or as part of a Combined Application for a permit pursuant to Chapter 91 and an Order of Conditions pursuant to the Wetlands Protection Act, M.G.L. c. 131, § 40.

(b) The application shall be prepared in accordance with all applicable instructions contained in the Department's application package. Plans submitted with a Notice of Intent or referenced in an Order of Conditions under the Wetlands Protection Act, M.G.L. c. 131, § 40, shall accompany the application. In *lieu* of plans prepared by a Registered Professional Engineer or Registered Land Surveyor, the applicant shall show the proposed Project Site on a plan designating all project components by coordinates referenced to the Massachusetts State Plane Coordinate System.

(c) The following documentation shall be submitted with the application:

1. a description of the Test Project; and
2. a plan for installing, testing, and removing project components;

(4) Public Notice and Notice to Abutters. At least 21 days prior to issuance of a permit, the applicant shall cause, at his or her own expense, notice to be published in a newspaper of general circulation in the area where the project is located. Such notice shall contain:

(a) the applicant's name and address;

(b) a description of the project location;

(c) a description of the project;

(d) a statement that within 15 days of the date of publication written comments will be accepted, the address where comments regarding the application may be sent, the address where the application may be viewed, a statement that a public hearing may be held upon request by the municipal official, and a statement that a municipality, ten citizen group or any aggrieved person who has submitted written comments before the close of the public comment period may appeal and that failure to submit written comments will result in the waiver of any right to an adjudicatory hearing.

9.30: continued

The applicant shall also send a copy of the notice to the persons identified in 310 CMR 9.13(1)(a) by certified mail, return receipt, and provide proof of such notice to the Department. With the agreement of the conservation commission, joint notice under M.G.L. c. 131, § 40, and M.G.L. c. 91 may be published and sent to abutters, provided it contains the requisite information and meets the requisite standards pursuant to each statute and its implementing regulations. Joint notice may be provided even if the applicant does not submit a Combined Application.

(5) Fees. All applicants for a permit under these procedures shall pay the application fee, or the renewal fee, in accordance with the provisions of 310 CMR 9.16. No tidewater displacement fees or occupation fees shall be assessed.

(6) Decision on Applications. The Department shall issue a permit or permit denial within 30 days of the close of the public comment period or receipt of the Order of Conditions, whichever is later.

(7) Term. A permit issued under 310 CMR 9.30 shall be valid for no more than one year.

(8) Extension of Permit. Upon request of the Permittee, the Department may extend the term of the permit for one additional one-year period, without the filing of a new application. Notice of the extension request shall be published by the Permittee and distributed to the persons identified in 310 CMR 9.30(4) above at least 30 days prior to the expiration of the permit.

(9) Appeals. The appeal provisions in 310 CMR 9.17 shall apply to proceedings under 310 CMR 9.30, provided, however, that if the Department determines that an application submitted for a permit under this section is not eligible for permitting as a Test Project pursuant to 310 CMR 9.30, the applicant shall seek authorization for the proposed project in accordance with the applicable permit or licensing procedures set forth in 310 CMR 9.11 through 310 CMR 9.27 and the performance standards set forth in 310 CMR 9.32 through 310 CMR 9.55 in *lieu* of requesting an adjudicatory hearing.

9.31: Summary of License and Permit Requirements

(1) Basic Requirements. No license or permit shall be issued by the Department for any project subject to 310 CMR 9.03 through 9.05 and 9.09 unless said project:

(a) includes only fill and structures for uses that have been categorically determined to be eligible for a license, according to the provisions of 310 CMR 9.32;

(b) complies with applicable environmental regulatory programs of the Commonwealth, according to the provisions of 310 CMR 9.33;

(c) conforms to applicable provisions of a municipal harbor plan, if any, and local zoning law, according to the provisions of 310 CMR 9.34;

(d) complies with applicable standards governing the preservation of water-related public rights, according to the provisions of 310 CMR 9.35;

(e) complies with applicable standards governing the protection of water-dependent uses, according to the provisions of 310 CMR 9.36;

(f) complies with applicable standards governing engineering and construction of structures, according to the provisions of 310 CMR 9.37;

(g) complies with applicable standards governing use and design of boating facilities for recreational or commercial vessels, according to the provisions of 310 CMR 9.38 and 9.39;

(h) complies with applicable standards governing dredging and disposal of dredge materials, according to the provisions of 310 CMR 9.40; and

(i) does not deny access to its services and facilities to any person in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, of the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination.

(2) Proper Public Purpose Requirement. No license or permit shall be issued by the Department for any project on tidelands or Great Ponds, except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands. In applying 310 CMR 9.31(2), the Department shall act in accordance with the following provisions.

9.31: continued

(a) Water-dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a water-dependent use project.

(b) Nonwater-dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a nonwater-dependent use project which:

1. complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use, according to the applicable provisions of 310 CMR 9.51 through 9.52; and complies with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53;

2. if located in the coastal zone, complies with the standard governing consistency with the policies of the Massachusetts Coastal Zone Management Program, according to 310 CMR 9.54; and

3. if consisting entirely of infrastructure facilities, to which 310 CMR 9.31(2)(b)1. does not apply, complies with the special mitigation and public access standards governing such facilities, according to 310 CMR 9.55.

(3) Rebuttal of Presumptions. The presumptions of 310 CMR 9.31(2) may be overcome only if:

(a) the basic requirements specified in 310 CMR 9.31(1) have not been met; or

(b) a clear showing is made by a municipal, state, regional, or federal agency that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting; in the case of a project for which a final EIR has been prepared, the presumption may be overcome only if such detriment has been identified during the M.G.L. c. 30, §§ 61 through 62H review process.

(4) Requirements for Projects with Special Legislative Authorization. Notwithstanding the provisions of 310 CMR 9.31(1) through (3), the Department shall issue a license or permit where the project comprises fill or structures that have been specifically authorized in a grant or other enactment of the legislature, provided that the Department may prescribe such alterations and conditions as it deems necessary to ensure the project conforms with:

(a) any requirements contained in the legislative authorization; and

(b) the standards of 310 CMR 9.31 through 9.60, to the extent consistent with the legislative authorization.

9.32: Categorical Restrictions on Fill and Structures

(1) The Department has determined that in certain situations fill or structures categorically do not meet the statutory tests for approval under M.G.L. c. 91 or are otherwise not in keeping with the purposes of 310 CMR 9.00. Accordingly, a project shall be eligible for a license only if it is restricted to fill or structures which accommodate the uses specified below, within the geographic areas specified in 310 CMR 9.32(1)(a) through (e).

(a) Tidelands (Outside of ACECs and DPAs).

1. fill or structures for any use on previously filled tidelands;

2. fill or structures for water-dependent use located below the high water mark, provided that, in the case of proposed fill, reasonable measures are taken to minimize the amount of fill, including substitution of pile-supported or floating structures and relocation of the use to a position above the high water mark;

3. structures to accommodate public pedestrian access on flowed tidelands, provided that it is not reasonable to locate such structures above the high water mark or within the footprint of existing pile-supported structures or pile fields;

4. pile-supported structures located below the high water mark for nonwater-dependent uses which replace or modify existing, previously authorized wharves, piers, pile fields, or other filled or pile-supported structures, in accordance with the provisions of 310 CMR 9.51(3)(a) and (b);

5. new fill located below the high water mark for accessory or nonwater-dependent use provided that:

a. the purpose of such fill is to eliminate irregularities in previously altered portions of the project shoreline; and

9.32: continued

b. such fill will replace previously authorized fill elsewhere along the project shoreline, on a 1:1 square foot basis and without seaward projection beyond the adjacent shoreline;

6. stationary vessels located below the high water mark and proposed for conversion to accessory use or to nonwater-dependent facilities of public accommodation, provided that such vessels:

a. do not consist of platform-like floating structures, such as barges, built or modified to serve primarily as support for new buildings; and

b. will be licensed for a limited term, in accordance with the provisions of 310 CMR 9.15(1)(d)2.

7. fill or structures located below the high water mark for wind turbine facilities found to be non-water dependent, pursuant to 310 CMR 9.12(2)(e), in accordance with the mitigation and/or compensation measures for non-water dependent infrastructure facilities required by 310 CMR 9.55.

(b) Tidelands Within Designated Port Areas (DPAs).

1. fill or structures for any water dependent industrial use, and accessory uses thereto, provided that:

a. in the case of proposed fill, neither pile supported nor floating structures are a reasonable alternative; and

b. in the case of parking, where the use cannot reasonably be located above the high water mark, and is not located within a water dependent use zone; and

c. when parking is limited to persons employed by or doing business with the water-dependent industrial use over flowed tidelands;

2. fill or structures for recreational boating facilities of nine slips or less under the conditions specified in a DPA Master Plan;

3. Supporting DPA Uses, as defined at 310 CMR 9.02, shall not exceed 25% of the area of the project site, excluding tidelands seaward of the project shoreline.

4. Supporting DPA Uses on pile-supported structures over flowed tidelands may be allowed only through a DPA Master Plan or a Marine Industrial Park Master Plan, provided that said plan is based on a clear showing that the use meets the following requirements and is appropriate for the harbor in question:

a. no Supporting Use structure may be allowed in the Water-dependent Use Zone;

b. no Supporting Use parking shall be allowed on pile-supported structures over flowed tidelands;

c. non Water-dependent Supporting Use structure meet the standards of 310 CMR 9.51(3)(b) through (e); and

d. Supporting Use structures shall otherwise be appropriately sized and located, in accordance with 310 CMR 9.36(5)(b).

5. The Department shall waive the numerical standard for Supporting DPA Uses as defined at 310 CMR 9.02, if the project conforms to a DPA Master Plan or Marine Industrial Park Master Plan which specifies alternative site coverage ratios and other requirements which ensure that:

a. said Supporting Uses are relatively condensed in footprint and compatible with existing water-dependent industrial uses on said pier;

b. said Supporting Use locations shall preserve and maintain the site's utility for existing and prospective water-dependent industrial uses;

c. parking associated with a Supporting Use is limited to the footprint of existing licensed fill and is not located within a Water-dependent Use Zone; and

d. The use of tidelands for this purpose in a DPA shall also be governed by the provisions of 310 CMR 9.15(1)(d)1. and 310 CMR 9.36(5).

6. maintenance of existing, previously-authorized recreational boating facilities;

7. recreational berths authorized in connection with a Boatyard in accordance with 310 CMR 9.39(2)(b), or as included in an approved Designated Port Area Master Plan pursuant to 301 CMR 23.05(2)(e)5.;

8. structures to accommodate public pedestrian access, provided that such structures are located above the high water mark or within the footprint of existing pile supported structures or pile fields, wherever feasible;

9. structures on filled tidelands to accommodate the following uses on a limited basis:

a. a use to be licensed in combination with water dependent industrial uses within a marine industrial park, as defined in 310 CMR 9.02; or

9.32: continued

b. a temporary use, as defined in 310 CMR 9.02.

The use of filled tidelands in a DPA for the above purposes shall also be governed by the provisions of 310 CMR 9.15(1)(d)1. and 9.36(5).

(c) Great Ponds.

1. fill or structures for any use on previously filled lands below the natural high water mark;

2. structures for water-dependent use on submerged lands below the natural high water mark, provided such structures are designed to avoid unnecessary encroachment in the water;

3. fill or structures on submerged lands above the natural high water mark, for uses listed for flowed tidelands in 310 CMR 9.32(1)(a).

(d) Non-tidal Rivers and Streams (Outside ACECs). Fill or structures for uses below the high water mark, as listed for flowed tidelands in 310 CMR 9.32(1)(a).

(e) Areas of Critical Environmental Concern (ACECs).

1. fill or structures for any use on previously filled tidelands;

2. structures to accommodate public pedestrian access on flowed tidelands, provided that it is not feasible to locate such structures above the high water mark or within the footprint of existing pile-supported structures or pile fields;

3. fill or structures to accommodate an Ecological Restoration Project, subject to approval under 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*, 310 CMR 10.00: *Wetlands Protection*, and 310 CMR 40.000: *Massachusetts Contingency Plan* if applicable, provided that any fill or dredged material used in an Ecological Restoration Project may not contain a chemical above the RCS-1 concentration, as defined in 310 CMR 40.000: *Massachusetts Contingency Plan*;

4. publicly-owned structures for other water-dependent use below the high water mark, provided that such structures are designed to minimize encroachment in the water;

5. privately-owned structures for other water-dependent use below the high water mark, provided that:

a. the proposed use is not industrial and is located within the footprint of existing previously authorized pile-supported structures, unless an insignificant deviation from said footprint is authorized by the Department in order to protect public health, safety, or the environment; or

b. such structures are necessary to accommodate infrastructure facilities, provided that such structures are designed to minimize encroachment in the water; or

c. such structures were existing on October 4, 1990 or the effective date of the ACEC designation, whichever is later, and if a resource management plan for the ACEC has been adopted by the municipality and approved by the Secretary said structures are consistent with said plan; or

d. such structures, if built or substantially altered after October 4, 1990 or the effective date of the ACEC designation, whichever is later, are consistent with a resource management plan adopted by the municipality and approved by the Secretary.

(2) Notwithstanding the provisions of 310 CMR 9.32(1), the Department may license fill or structures necessary for the following uses, provided that reasonable measures are taken to avoid, minimize, and mitigate any encroachment in a waterway:

(a) shoreline stabilization or the rehabilitation of an existing shore protection structure, irrespective of the uses proposed landward of such fill or structures;

(b) installation of drainage, ventilation, or utility structures, or placement of minor and incidental fill, necessary to accommodate any replacement, reconstruction or other modification to existing public roadways or existing railroad track and/or rail bed;

(c) improvement or rehabilitation of existing public roadways or existing railroad track and/or rail bed, provided that any net encroachment with respect to public roadways is limited to widening by less than a single lane, adding shoulders, and upgrading substandard intersections; or

(d) except as may be provided in 310 CMR 9.32(1)(b)1., accessory uses, other than parking, which are clearly subordinate and incidental to a water-dependent use, provided that:

9.32: continued

1. the fill or structures in question are not located in an ACEC, and do not result in any encroachment in the waterway beyond the area occupied by the water-dependent use itself; and
2. the accessory use cannot reasonably be located above the high water mark, and is not located within a water-dependent use zone.

9.33: Environmental Protection Standards

(1) All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to:

(a) Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H and 301 CMR 11.00: *MEPA Regulations*.

(b) Wetlands Protection Act, M.G.L. c. 131, § 40, and 310 CMR 10.00: *Wetlands Protection*.

(c) Wetlands Restriction Acts, M.G.L. c. 130, § 105 and c. 131, § 40A, and 310 CMR 12.00: *Adopting Coastal Wetlands Orders* and 310 CMR 13.00: *Adopting Inland Wetlands Orders*. All projects shall comply with wetland restriction orders recorded pursuant to these statutes.

(d) Areas of Critical Environmental Concern, M.G.L. c. 21A, § 2(7) and St. 1974, c. 806, § 40(E), and 301 CMR 12.00: *Areas of Critical Environmental Concern*.

(e) Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26 through 53, and 314 CMR 3.00: *Surface Water Discharge Permit Program*, 314 CMR 5.00: *Ground Water Discharge Permit Program*, 314 CMR 7.00: *Sewer System Extension and Connection Permit Program*, 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*, and 310 CMR 15.00: *The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage*.

(f) Ocean Sanctuaries Act, M.G.L. c. 132A, §§ 13 through 16 and 18, and 302 CMR 5.00: *Ocean Sanctuaries*. No license or permit shall be issued for any structure or fill that is expressly prohibited in M.G.L. c. 132A, §§ 1 through 16.

(g) Marine Fisheries Laws, M.G.L. c. 130, and 322 CMR 1.00: *Enforcement of Rules and Regulations*.

(h) Scenic Rivers Act, M.G.L. c. 21, § 17B, and 302 CMR 3.00: *Scenicand Recreational Rivers Orders*.

(i) Massachusetts Historical Commission Act, M.G.L. c. 9, §§ 26 through 27C, as amended by St. 1982, c. 152 and St. 1988, c. 254, and 950 CMR 71.00: *Protection of Properties Included in the State Register of Historic Places*. For projects for which a Project Notification Form must be submitted pursuant to 950 CMR 71.07: *Review of Projects* the applicant shall file said form with the Massachusetts Historical Commission.

NON-TEXT PAGE

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(j) Mineral Resources Act, M.G.L. c. 21, §§ 54 through 58.
(k) Massachusetts Drinking Water Act, M.G.L. c. 111, §§ 159 through 174A, and 310 CMR 22.00: *Land Application of Sludge and Septage*.
(l) Underwater Archeological Resources Act, M.G.L. c. 91 and c. 6, §§ 179 and 180, and 312 CMR 2.00: *Massachusetts Underwater Archaeological Resources*.
(m) Hazardous Waste Management Act, M.G.L. c. 21C and 310 CMR 30.000: *Hazardous Waste*.
(n) Solid Waste Disposal Act, M.G.L. c. 16, §§ 18 through 24, and 310 CMR 16.00: *Site Assignment Regulations for Solid Waste Facilities*.
(o) Air Pollution Act, M.G.L. c. 111, §§ 142A through I and 310 CMR 7.00: *Air Pollution Control*.
(p) State Highway Curb Cuts, M.G.L. c. 81, § 21.
(q) Energy Restructuring Act, M.G.L. c. 164, §§ 69G through S, and 980 CMR 1.00 through 12.00.
(r) Regional land use control statutes, including the Martha's Vineyard Commission Act, St. 1974, c. 637, c. 831, and the Cape Cod Commission Act, St. 1989, c. 716.

(2) Where a state or regional agency has authority to issue regulatory approval, issuance of such approval shall be conclusive as to compliance with the regulatory program in question.

(3) With respect to M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*, if the Department has issued a final order of conditions the project shall be presumed to comply with the statute and the final order shall be deemed to be incorporated in the terms of the license or permit, with no additional wetland conditions imposed. If an order of conditions has been issued by the conservation commission and the Department has not taken jurisdiction, the Department shall presume the project complies with state wetland standards, except upon a clear showing of substantial non-compliance with such standards. In that event, the Department shall impose such additional conditions in the license or permit as will make the project substantially comply with state wetlands standards.

(4) Where a state agency has statutory responsibility but no authority to issue regulatory approval, the Department shall act in accordance with any MOU with said agency governing incorporation of its standards and requirements into waterways licenses and permits. In the absence of an MOU, the Department shall presume that the project complies with the statutes and regulations in question, unless the responsible state agency informs the Department otherwise. In that event, the Department shall consult with the responsible state agency and may adopt any formal recommendations received therefrom, provided such recommendations do not conflict with 310 CMR 9.00 or the purposes of M.G.L. c. 91.

9.34: Conformance with Municipal Zoning and Harbor Plans

(1) Zoning Law. Any project located on private tidelands or filled Commonwealth tidelands must be determined to comply with applicable zoning ordinances and by-laws of the municipality(ies) in which such tidelands are located. The Department shall find this requirement is met upon receipt of written certification issued by the municipal clerk, or by another municipal official responsible for administering said zoning ordinances and by-laws, and signed by the municipal clerk, stating that the activity to be licensed is not in violation of said ordinances and by-laws. Compliance with zoning does not apply to any public service project that is exempted from such requirements by law, including but not limited to action of the Department of Public Utilities pursuant to M.G.L. c. 40A, § 3.

(2) Municipal Harbor Plan.
(a) If the project is located within an area covered by a municipal harbor plan, said project must conform to the provisions of said plan to the degree applicable under plan approval at 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans*. In making this determination the Department shall take into account all relevant information in the public record, and shall act in accordance with the following provisions:

9.34: continued

1. the Department shall consult with the planning board or other municipal body with lead responsibility for plan implementation, as appropriate and in accordance with the provisions of 310 CMR 9.11(1). In the event a written recommendation as to plan conformance is submitted by such board or other body, the Department shall presume that the requirement is met or not met in accordance with said recommendation, except upon a clear showing to the contrary and except as otherwise provided in 310 CMR 9.34(2)(a)2.;

2. the Department shall not find the requirement has been met if the project requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan, unless the Department determines the deviation to be *de minimus* or unrelated to the purposes of M.G.L. c. 91 or 310 CMR 9.00;

(b) If the project conforms to the municipal harbor plan the Department shall:

1. apply the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 CMR 9.32(1)(b)3., 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c), in accordance with the criteria specified in 310 CMR 9.32(1)(b)3., 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c) and in associated plan approval at 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans* and associated guidelines of CZM;

2. adhere to the greatest reasonable extent to applicable guidance specified in the municipal harbor plan which amplifies any discretionary requirements of 310 CMR 9.00, in accordance with the criteria specified in 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans* and associated guidelines of CZM;

3. determine that the requirement of 310 CMR 9.54, governing consistency with CZM policies, has been met, if applicable, except upon a written showing by CZM for a project identified in 310 CMR 9.13(2)(a) for CZM participation that the project conflicts with CZM policy in effect when the license application was completed, in a manner that was not reasonably foreseeable at the time of plan approval.

9.35: Standards to Preserve Water-related Public Rights

(1) General. The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes; and shall preserve any public rights of access that are associated with such use. In applying this standard the Department shall act in accordance with the provisions of 310 CMR 9.35(2) through (6), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. Further, in assessing the significance of any interference with public rights pursuant to 310 CMR 9.35(2) and(3), the Department shall take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights. Such interference may be allowed provided that mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served.

(2) Public Rights Applicable to All Waterways.

(a) Navigation. The project shall not significantly interfere with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.

1. The Department shall find that the standard is not met in the event a project will:

a. extend seaward of any state harbor line unless said project is specifically authorized by law or, if not so authorized, is a pipeline, conduit or cable which is entirely embedded in the soil and does not in any part occupy or project into such tidewater beyond the harbor line, provided also that the Department may at any time require any pipeline, conduit or cable to be removed or relocated if channel changes or alterations demand the same, as required by M.G.L. c. 91, § 14;

b. extend into or over any existing channel such as to impede free passage;

c. impair any line of sight required for navigation;

d. require the alteration of an established course of vessels;

e. interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site;

9.35: continued

f. extend beyond the length required to achieve a safe berthing, where there are no adjacent structures;

g. generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections;

h. alter, due to the building of a solid fill structure, tidal action or other currents so as to interfere with the ability to handle vessels;

i. adversely affect the depth or width of an existing channel; or

j. impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.

The Department may require, among other things, warning devices and other navigation aids as it deems appropriate to reduce interference with navigation.

2. In the event that reducing the length of a structure to avoid significant interference with navigation would create adverse effects on the environment due to dredging, the Department may license or permit a longer structure provided its construction will entail less dredging without producing substantial interference with navigation.

3. In the event the project is located within a Designated Port Area, the Department may authorize fill, structures, or dredging that significantly interferes with navigation by recreational vessels or with shellfishing areas, provided that such activities are for water-dependent-industrial use and that all feasible measures will be taken to mitigate such interference.

(b) Free Passage Over and Through Water. The project shall not significantly interfere with public rights of free passage over and through the water, which exist in all waterways. Such rights include the right to float on, swim in, or otherwise move freely within the water column without touching the bottom, and, in Commonwealth Tidelands and Great Ponds, to walk on the bottom.

(c) Access to Town Landings. The project shall not significantly interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the project site.

(3) Public Rights Applicable to Tidelands and Great Ponds

(a) Fishing and Fowling. The project shall not significantly interfere with public rights of fishing and fowling which exist in tidelands and Great Ponds. Such rights include the right to seek or take any fish, shellfish, fowl, or floating marine plants, by any legal means, from a vessel or on foot; the right to protect habitat and nutrient source areas in order to have fish, fowl, or marine plants available to be sought and taken; and the natural derivatives thereof. The Department shall find that the standard is not met in the event the project:

1. poses a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site; or

2. results in the elimination of a traditional fishing or fowling location used extensively by the public.

(b) On-foot Passage. The project shall not significantly interfere with public rights to walk or otherwise pass freely on private tidelands for purposes of fishing, fowling, navigation, and the natural derivatives thereof; and on Commonwealth tidelands and Great Ponds for said purposes and all other lawful activities, including swimming, strolling, and other recreational activities. The Department shall find that the standard is not met if the project does not comply with the following conditions governing public pedestrian access:

1. if the project site includes flowed private tidelands, the project shall allow continuous, on-foot, lateral passage by the public in the exercise of its rights therein, wherever feasible; any pier, wharf, groin, jetty, or other structure on such tidelands shall be designed to minimize interference with such passage, either by maintaining at least a five-foot clearance above the ground along the high water mark or by providing a stairway for the public to pass laterally over such structures; where obstruction of continuous access below the high water mark is unavoidable, the project shall provide alternate lateral passage to the public above said mark in order to mitigate interference with the public right of passage on flowed private tidelands;

2. if the project site includes filled tidelands or Great Ponds, the project shall include reasonable measures to provide on-foot passage on such lands for the public in the exercise of its rights therein, in accordance with the following provisions:

9.35: continued

a. if the project is a nonwater-dependent use project, said project shall provide public pedestrian access facilities in accordance with the applicable provisions of 310 CMR 9.52 or, for infrastructure facilities, of 310 CMR 9.55;

b. if the project is a water-dependent use project on filled Commonwealth tidelands, said project shall provide for public passage thereon by such means as are consistent with the need to avoid undue interference with the water-dependent uses in question; measures which may be appropriate in this regard include, but are not limited to, allowing the public to pass laterally along portions of the project shoreline, or transversely across the site to a point on the project shoreline.

(4) Compensation for Interference with Public Rights in Commonwealth Tidelands and Great Ponds. Any water-dependent use project which includes fill or structures for private use of Commonwealth tidelands or Great Ponds shall provide compensation to the public for interfering with its broad rights to use such lands for any lawful purpose. Such compensation shall be commensurate with the extent of interference caused, and shall take the form of measures deemed appropriate by the Department to promote public use and enjoyment of the water, at a location on or near the project site if feasible. If the project includes a private recreational boating facility, the Department shall apply this standard in accordance with the following provisions:

(a) for any private recreational boating facility, reasonable arrangements shall be made to accommodate public pedestrian access along or to the water's edge; generally, unless other measures are determined to be more appropriate by the Department, such access shall be provided by establishing, as a condition of the license, a lateral accessway at or near the high water mark wherein the public may pass freely across the seaward end of the property from dawn to dusk;

(b) if the private recreational boating facility is a marina, additional arrangements shall be made to provide water-related benefits to the public commensurate with the scale of such facility; examples of such benefits include construction of a public boat launching ramp, operation of an ongoing program of community sailing or boating instruction, dedication of a substantial number of berths to public transient use, and provision of public pedestrian facilities beyond those required elsewhere in 310 CMR 9.00.

Nothing in the above provision shall be construed to prevent the licensee from restricting public access to slips, floats, ramps, and other docking facilities where security for recreational vessels is required.

(5) Management of Areas Accessible to the Public. Any project that includes tidelands or Great Ponds accessible to the public, in accordance with any of 310 CMR 9.35(1) through (4), shall provide for long-term management of such areas which achieves effective public use and enjoyment while minimizing conflict with other legitimate interests, including the protection of private property and natural resources. In applying this standard, the Department shall act in accordance with the following provisions.

(a) No limitation on hours of availability or scope of allowed activity, or other substantial restriction, may be placed on said public access except as expressly authorized in the license; reasonable rules and regulations governing public use of such areas may be adopted by the licensee, and may be subject to review and approval by the Department, or its designee, if so provided in the license.

(b) Any project required to provide public access facilities in accordance with 310 CMR 9.35(3)(b)2. or (4)(b), or any other project as deemed appropriate by the Department, shall encourage public patronage of such facilities by placing and maintaining adequate signage at all entryways and at other appropriate locations on the project site; said signage shall:

1. conform to all local laws and regulations and any design guidelines that may be specified by the Department or its designee; and

2. include at least one sign, in a prominent location, which advises the public of its access rights; discloses whatever access-related rules and regulations are in effect, including restrictions on hours of operation, if any; and discloses the license number of the project and a location on the site where a copy of the license may be inspected by the public.

(c) No gates, fences, or other structures may be placed on any areas open to public access in a manner that would impede or discourage the free flow of pedestrian movement thereon; and all pedestrian exterior open spaces shall be open to the public 24 hours a day, unless otherwise authorized in writing by the Department.

9.35: continued

(d) The Department may include conditions in a license which restrict public pedestrian access in order to protect public health, safety, or the environment, and shall specify such additional access-related requirements as are deemed appropriate to offset any significant loss of benefits to the public which may be associated with such restrictions.

(6) Limitation on Liability. If a project includes measures to accommodate public pedestrian access in accordance with any provision of 310 CMR 9.35, the licensee shall be considered to be a private landowner who opens land to public recreational use without a fee and who is therefore not liable, pursuant to M.G.L. c. 21, § 17C, for injuries to persons or property due to public use, unless the owner's conduct is willful or reckless.

9.36: Standards to Protect Water-dependent Uses

(1) General. The project shall preserve the availability and suitability of tidelands, Great Ponds, and other waterways that are in use for water-dependent purposes, or which are reserved primarily as locations for maritime industry or other specific types of water-dependent use. In applying this standard the Department shall act in accordance with 310 CMR 9.36(2) through (5), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2.

(2) Private Access to Littoral or Riparian Property. The project shall not significantly interfere with littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from said property, as provided in M.G.L. c. 91, § 17. In evaluating whether such interference is caused by a proposed structure, the Department may consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures. In the case of a proposed structure which extends perpendicular to the shore, the Department shall require its placement at least 25 feet away from such abutting property lines, where feasible.

(3) The project shall not significantly disrupt any water-dependent use in operation, as of the date of license application, at an off-site location within the proximate vicinity of the project site. The project shall include such mitigation and/or compensation measures as the Department deems appropriate to avoid such disruption.

(4) The project shall not displace any water-dependent use that has occurred on the site within five years prior to the date of license application, except upon a clear showing by the applicant that said use:

(a) did not take place on a reasonably continuous basis, for a substantial period of time; or

(b) has been or will be discontinued at the site by the user, for reasons unrelated to the proposed project or as a result of voluntary arrangements with the applicant.

Absent the above showings, the project shall include arrangements determined to be reasonable by the Department for the water-dependent use to be continued at its existing facility, or at a facility at an alternative location having physical attributes, including proximity to the water, and associated business conditions which equal or surpass those of the original facility and as may be identified in a municipal harbor plan, if any. Permanent relocation to an off-site facility may occur in order to accommodate a public service project for which relocation arrangements are governed by law, or if the Department determines that it is not appropriate for the water-dependent use to continue on the site. Otherwise, only temporary relocation may occur as necessary for project construction.

(5) The project shall not include fill or structures for nonwater-dependent or water-dependent, non-industrial uses which preempt water-dependent-industrial use within a Designated Port Area (DPA). In applying this standard the Department shall act in accordance with the following provisions:

9.36: continued

(a) such fill or structures shall not occupy tidelands which the Department determines are necessary to accommodate a competing party who intends to develop such tidelands for water-dependent industrial use, provided written notice of such party's intention is submitted to the Department prior to the close of the public comment period on the license application; such determination shall be based upon a clear showing, within a period of time deemed reasonable by the Department, that the competing project would promote water-dependent-industrial use of the DPA to a greater degree than the proposed project, and that the competing party:

1. is a state or local government agency, or is a maritime business or other organization with the expertise, experience, and financial ability to implement the competing project;
2. has prepared detailed development plans for the competing project, including appropriate feasibility studies;
3. has tendered an offer to purchase title or other rights to the tidelands in question, at fair market value for water-dependent-industrial use; and
4. has proposed waterways license conditions or other arrangements which will restrict the tidelands in question to the uses contained in the competing projects for a period of time deemed appropriate by the Department;

(b) reasonable arrangements shall be made to prevent commitments of space or facilities that would significantly discourage present or future water-dependent-industrial activity on the project site or elsewhere in the DPA; such arrangements shall include, but are not limited to, the following:

1. in general, no structures shall be built or altered which cannot be subsequently removed or converted to water-dependent-industrial use with relative ease; otherwise, the Department may impose, as a condition of the license, a requirement for removal or restoration of such structures upon expiration of the license;
2. nonwater-dependent uses shall not be located in any spaces or facilities with attributes that are necessary to maintain the utility of the project site for prospective water-dependent-industrial use, especially that for which it is among the most suitable in the harbor in question; at a minimum, such nonwater-dependent uses shall not occur in new structures within the water-dependent use zone;
3. within a marine industrial park, conditions governing the duration of tenancy or other mechanisms must be established to ensure that nonwater-dependent activity occurs in a manner that preserves adequate flexibility over time for the park to accommodate water-dependent-industrial uses; at a minimum, reasonable steps shall be taken to assign a priority for said uses to occupy spaces or facilities as they become available in the future;
4. in the case of supporting DPA use, conditions governing the nature and extent of operational or economic support must be established to ensure that such support will be effectively provided to water-dependent-industrial uses.

9.37: Engineering and Construction Standards

(1) All fill and structures shall be designed and constructed in a manner that:

(a) is structurally sound, as certified by a Registered Professional Engineer;

~~(a)~~(b) is in accordance with good engineering practice and fully discloses, based on the best available data, any foreseeable climate-related risks to the site, as certified by a Registered Professional Engineer;

~~(b)~~(c) complies with applicable state requirements for construction in flood plains, in accordance with the State Building Code, 780 CMR and as hereafter may be amended, and will not pose an unreasonable threat to navigation, public health or safety, public access to tidelands, or adjacent buildings or structures, if damaged or destroyed in a storm; and

~~(c)~~(d) does not unreasonably restrict the ability to dredge any channels.

(2) All nonwater-dependent and water-dependent use projects shall comply with the following requirements: ~~In the case of a project within a flood zone, the project shall comply with the following requirements:~~

(a) In coastal high hazard areas as defined in 310 CMR 9.02, new or expanded buildings for residential use shall not be located seaward of the high water mark.

(b) All projects ~~New buildings for nonwater-dependent use intended for human occupancy~~ shall be designed and constructed to:

1. withstand the wind and wave forces associated with the statistical 100-year frequency storm event based on the best available climate data; and

9.37: continued

2. incorporate projected sea level rise during the design life of the buildings based on the best available climate data~~; at a minimum, such projections shall be based on historical rates of increase in sea level in New England coastal areas.~~

(3) Projects with coastal or shoreline engineering structures shall comply with the following:

(a) any seawall, bulkhead, or revetment shall be located landward of the high water mark unless it must lie below the high water mark to permit proper tieback placement, to obtain a stable slope on bank areas, or to be compatible with abutting seawalls, bulkheads, or revetments in terms of design, size, function, and materials, or unless it is associated with new fill permitted according to the provisions of 310 CMR 9.32;

(b) any breakwater or similar structure designed to dissipate or otherwise reduce wave energy or to interfere with current flow shall not:

1. cause or contribute to water stagnancy;
2. reduce the ability of adjacent water bodies to flush adequately; or
3. cause or contribute to sedimentation problems in adjacent or nearby navigation channels, anchorages, or wetland resource areas, or cause increased erosion to inland or coastal beaches, banks, or other wetland resource areas;

(c) in evaluating coastal or shoreline engineering structures, the Department shall require non-structural alternatives where feasible;

(d) the Department shall evaluate coastal or shoreline engineering structures for compatibility with abutting coastal or shoreline engineering structures in terms of design, size, function, and materials;

(e) if the Department finds significant adverse effects on the project site or adjacent or downcoast and downstream areas after construction of any coastal or shoreline engineering structure, the Department may, after an opportunity for a hearing, require modification of said structure the cost of which may not exceed 25% of the replacement cost of said structure, or may require the removal of said structure; 310 CMR 9.37(3)(e) shall be specifically stated in the license.

(4) Pipelines and conduits and their valves and protrusions shall be buried so that they will not present a hazard to navigation; will be adequately protected from scouring; will not be uncovered by sediment transport; and will not present a hazard or obstruction to fishing gear. Bottom contours shall be restored after burial. Pipelines carrying hazardous substances (*e.g.*, oil) shall also be protected from anchor dragging and fish trawls. When the burial of pipelines, conduits, valves, and protrusions is not feasible, equivalent protection shall be provided by shrouding or other means.

9.38: Use Standards for Recreational Boating Facilities

(1) Public Recreational Boating Facilities. Any project that includes a public recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to ensure patronage of such facility by the general public. In applying this standard the Department shall act in accordance with the following provisions:

(a) all vacant berths shall be assigned in a fair and equitable manner to the public patrons of said facility, by means of a waiting list or other comparably unbiased method; nothing in this provision shall be construed to prevent berthing assignments based on vessel characteristics, or the offer of first refusal rights to existing patrons of the facility who wish to relocate to a vacant berth;

(b) any contract or other agreement for exclusive use of berths at said facility shall have a maximum term of one year, and may be renewable upon each expiration for an additional period of up to one year;

(c) reasonable arrangements shall be made to accommodate transient boaters, including, at a minimum, a procedure for making any berth available for transient use during periods of vacancy in excess of 24 hours;

(d) all exterior pedestrian facilities on the project site shall be open to the general public, except where access restrictions are necessary in order to avoid significant interference with the operation of the facility or to maintain security at slips, ramps, floats, and other docking facilities; any such access restrictions shall be stated in the license.

9.38: continued

(2) Private Recreational Boating Facilities.

(a) Any project that includes a private recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to avoid undue privatization in the patronage of said facility. In applying this standard, the Department shall act in accordance with the following provisions:

1. no berth in a marina shall be assigned pursuant to any contract or other agreement that makes use of the berth contingent upon ownership or occupancy of a residence or other nonwater-dependent facility of private tenancy;

2. no berth in a marina shall be assigned pursuant to a contract or other agreement for exclusive use with a maximum term that exceeds one year, unless:

a. for existing marinas, the lease agreement, master lease agreement or notice thereof for such berths was recorded at the Registry of Deeds prior to July 6, 1990 in which event all berths subject to such agreement shall be exempt from the provisions of 310 CMR 9.38(2)(b); or

b. for new marinas or berths in an existing marina not grandfathered pursuant to 310 CMR 9.38(2)(a), the following conditions are met:

i. said marina is located on tidelands outside of Designated Port Area;

ii. the Department expressly authorizes the assignment of long-term exclusive use of such berths in the license, and the license includes a condition requiring written notification to any assignee that said license does not convey ownership of Commonwealth tidelands;

iii. the number of berths authorized in the license does not exceed 50% of the total berths in said marina; and

iv. said marina provides water-related public benefits commensurate with the degree of privatization, as deemed appropriate by the Department.

(b) No project shall include a private recreational boating facility with fewer than ten berths on Commonwealth tidelands or Great Ponds, if the Department receives written certification from the municipal official or planning board of the municipality in which the project is located that such facility does not conform to a formal, areawide policy or plan which establishes municipal priorities among competing uses of the waterway, unless the Department determines that such certification:

1. is arbitrary, capricious, or an abuse of discretion; or
2. conflicts with an overriding state, regional, or federal interest.

9.39: Standards for Marinas, Boatyards, and Boat Ramps

(1) Marinas.

(a) Design Standards for Marinas. Any project that includes a new marina, or any expansion thereof to ten or more berths greater than the number of berths existing on the effective date of 310 CMR 9.00, shall comply with the following design requirements:

1. all docking facilities, including passageways, shall be certified to be structurally sound by a registered professional engineer;

2. safe and unobstructed navigational ingress and egress to docking facilities shall be provided;

3. sanitary facilities shall be provided, including:

a. an adequate number of restrooms and refuse receptacles appropriate for the number of berths at the marina; in general, there should be one toilet fixture per sex for every 50 berths, and refuse receptacles at every gangway and restroom area; and

b. sewage pumpout facilities shall be provided as appropriate based on the number of berths and type of vessels at the marina, the availability of such facilities nearby, and environmental considerations including the water circulation patterns of the waterway and the proximity of shellfish resources; in general, there should be a sewage pumpout facility for marinas with more than 50 berths, or as otherwise specified in a municipal harbor plan; documentation shall be provided showing compliance with local, state, and federal requirements for said facilities;

4. any utility services provided at the marina shall be constructed and maintained in compliance with all applicable local and state requirements;

5. all lighting at the marina shall be designed to minimize interference with navigation by reflection, glare, or interference with aids to navigation;

9.39: continued

6. if the applicant proposes to provide facilities for storage, pumping or conveyance of petroleum fuels, the following information shall also be provided:

a. a detailed description and site location plan for marine related facilities necessary for the pumping, conveyance and storage of any petroleum products;

b. a list of methods and equipment to be used for containment and clean-up of any petroleum fuels accidentally discharged into the water, including minor spills during routine operations; and a detailed contingency plan for major spills;

c. documentation showing compliance with applicable local, state and federal requirements for said facilities.

(b) Reconfiguration of Docking Facilities in a Marina. In a license or license amendment, the Department may delineate a zone within a marina for purposes of future reconfiguration of existing, licensed docking facilities, including pile-held or bottom-anchored floating walkways and finger piers, floats, and mooring piles. Such reconfiguration may proceed upon written approval by the Department, but without further licensing action if:

1. the licensee submits to the Department a written request and plan for reconfiguration which does not extend beyond the delineated zone, and which does not result in an increase in the area of waterway occupied from that which was originally licensed;

2. the licensee submits to the Department a statement affirming that the material submitted to the Department under 310 CMR 9.39(1)(b)1. has, at the time of such submittal, also been sent to the harbormaster of the affected municipality or, if the municipality has no harbormaster, to the municipal official, and that said harbormaster or municipal official has been informed that he has 30 days to register any objections to the proposed reconfiguration plan with the Department;

3. all other applicable permits have been obtained, including any required approval under M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*.

The Department shall act upon any such request within 60 days of receipt.

(2) Boatyards.

(a) The license application for any boatyard or expansion thereof shall indicate on the license plan that the following facilities and information will be provided:

1. adequate oil, grease, sediment, and paint traps and other appropriate measures used to contain by-products of boat service, repair and construction to prevent them from discharging into the adjacent waterway;

2. boat out-hauling and launching facilities which have been certified as structurally sound by a registered professional engineer; and

3. documentation showing compliance with applicable local, state and federal requirements for the use and storage of hazardous materials.

(b) Recreational berths may be licensed in connection with a Boatyard in Designated Port Area in compliance with a MHP/DPA Master Plan, and in accordance with 310 CMR 9.32(1)(b)2., and the following:

1. the number of berths shall be commensurate in scale with the operation of the boatyard;

2. the berths may be licensed in connection with an active Boatyard only and shall be discontinued in the event that Boatyard operations at the site cease; and

3. the location of the berths and their use shall preserve water-related public rights and protect water-dependent uses.

(3) Boat Launching Ramps. The license application for any boat launching ramp for public use, or any expansion thereof, shall indicate on the license plan that the following facilities will be provided, to a degree deemed appropriate by the Department:

(a) turning areas to facilitate the launching and retrieval of boats to or from the water;

(b) parking areas for vehicles and boat trailers;

(c) permanent or temporary sanitary facilities for boaters using the launching ramp, as necessary in light of anticipated water quality or other environmental concerns and maintenance considerations;

(d) ramps constructed, where possible, at an angle no greater than 15% from the horizontal; where upland modification is necessary, the slope grade should be created, if possible, by cutting back into the upland; ramps should be approximately even with beach or upland grade elevations; and ramps should extend a sufficient distance inland to prevent washout at the inland edge and where possible should extend a minimum of five feet beyond the low water mark; and

9.39: continued

(e) sufficient access facilities and water depths so as to provide safe navigational ingress and egress; this may include adjacent catwalks, tie-off pilings, or access piers and suitable associated water area for staging of boat launching and retrieval; water depths at the launching area of the ramp should be the minimum depth necessary to accommodate the types of boats which will use the facility.

9.40: Standards for Dredging and Dredged Material Disposal

Any project that includes dredging or dredged material disposal shall comply with the following requirements:

(1) Limitations on Dredging and Disposal Activity

(a) The project shall not include any dredging of channels, mooring basins, or turnaround basins to a mean low water depth greater than 20 feet, unless said project:

1. is located within a Designated Port Area; or
2. serves a commercial navigation purpose of state, regional, or federal significance, and cannot reasonably be located in a Designated Port Area.

(b) If the project is located in an ACEC, the project shall not include any of the following activities:

1. improvement dredging, unless the dredging is: for the sole purpose of fisheries or wildlife enhancement; part of an Ecological Restoration Project; or conducted by a public entity for the sole purpose of the maintenance or restoration of historic, safe navigation channels or turnaround basins of a minimum length, width and depth consistent with a Resource Management Plan adopted by the municipality(ies) and approved by the Secretary.
2. dredged material disposal, except for the sole purpose of beach nourishment, dune construction, reconstruction or stabilization with proper vegetative cover, the enhancement of fishery or wildlife resources, or unless the dredged material disposal is part of an Ecological Restoration Project in accordance with 314 CMR 9.07(1)(c) and 310 CMR 10.11(6)(b) and 310 CMR 40.000: *Massachusetts Contingency Plan*, if applicable, provided that any fill or dredged material used in an Ecological Restoration Project may not contain a chemical above the RCS-1 concentration, as defined in 310 CMR 40.000: *Massachusetts Contingency Plan*.

(2) Resource Protection Requirements.

(a) The design and timing of dredging and dredged material disposal activity shall be such as to avoid interference with anadromous/catadromous fish runs. At a minimum, no such activity shall occur in such areas between March 15th and June 15th of any year, except upon a determination by the Division of Marine Fisheries, pursuant to M.G.L. c. 130, § 19, that such an activity will not obstruct or hinder the passage of fish.

(b) The design and timing of dredging and dredged material disposal activity shall be such as to minimize adverse impacts on shellfish beds, fishery resource areas, and submerged aquatic vegetation. The Department may consult with the Department of Fish and Game or the natural resource officer of the municipality regarding the assessment of such impacts.

(3) Operational Requirements for Dredging.

(a) The extent of dredging shall not exceed that reasonably necessary to accommodate the navigational requirements of the project and provide adequate water circulation.

(b) The shoreward extent of dredging shall be a sufficient distance from the edge of adjacent marshes to avoid slumping. In general, for improvement dredging projects the edge of the dredging footprint, including any side cuts, should be at least 25 feet from any marsh boundary. In areas where significant wake or wash will be generated by vessel traffic, increased setbacks may be incorporated based on appropriate design calculations.

(c) In general, no basin, canal, or channel shall be dredged deeper than the main channel to which it is connected.

(d) To the maximum reasonable extent, basins shall have wide openings and short entrance channels to promote tidal exchange within the basin.

(e) In general, hydraulic dredging shall be favored over mechanical methods, except when open water disposal of fine grained material is proposed.

9.40: continued

(4) Operational Requirements for Dredged Material Disposal.

(a) Where determined to be reasonable by the Department, clean dredged material shall be disposed of in a manner that serves the purpose of beach nourishment, in accordance with the following provisions:

1. in the case of a publicly-funded dredging project, such material shall be placed on publicly-owned eroding beaches; if no appropriate site can be located, private eroding beaches may be nourished if easements for public access below the existing high water mark can be secured by the applicant from the owner of the beach to be nourished;

2. in the case of a privately-funded dredging project, such material may be placed on any eroding beach.

(b) In the event ocean disposal of dredged material is determined to be appropriate by the Department, the licensee or permittee shall:

1. publish in the *Notice to Mariners* the date, time, and proposed route of all ocean disposal activities and the coordinates of the ocean disposal site, as deemed appropriate by the U.S. Coast Guard;

2. ensure that transport vessels are not loaded beyond capacity; are equipped with sudden, high volume release mechanisms; and are at a complete stop when the material is released; and

3. ensure that disposal occurs within the boundaries of an approved or otherwise formally designated ocean disposal site; and that the discharge location is marked during disposal operations by a buoy equipped with a flashing light and radar reflectors which allow it to be located under variable sea/weather conditions.

(5) Supervision of Dredging and Disposal Activity.

(a) The licensee or permittee shall inform the Department in writing at least three days before commencing any authorized dredging or dredged material disposal.

(b) The licensee or permittee shall provide, at his or her expense, a dredging inspector approved by the Department who shall accompany the dredged material while in transit and during discharges, either upon the scows containing the dredged material or upon the boat towing them, for the following activities:

1. any offshore disposal;
2. any onshore disposal of dredged material greater than 10,000 cubic yards; or
3. the disposal of materials defined by the Department as potentially degrading or hazardous.

(c) The name, address, and qualifications of the dredging inspector shall be submitted to the Department as part of the license or permit application for approval.

(d) Within 30 days after the completion of the dredging, a report shall be submitted to the Department certified by the dredging inspector, including daily logs of the dredging operation indicating volume of dredged material, point of origin, point of destination, and other appropriate information.

9.51: Conservation of Capacity for Water-dependent Use

A nonwater-dependent use project that includes fill or structures on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use. In applying this standard, the Department shall take into account any relevant information concerning the utility or adaptability of the site for present or future water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall adhere to the greatest reasonable extent to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with the following provisions.

(1) If the project includes nonwater-dependent facilities of private tenancy, such facilities must be developed in a manner that prevents significant conflict in operation between their users and those of any water-dependent facility which reasonably can be expected to locate on or near the project site. Characteristics of the respective facilities that may give rise to such user conflict include, but are not limited to:

(a) presence of noise and odors;
(b) type of equipment and accessory services;
(c) hours of operation and spatial patterns of activity;
(d) traffic flows and parking needs;

9.51: continued

(e) size and composition of user groups;
(f) privacy and security requirements;
(g) requirements for public infrastructure.

(2) If the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that protects the utility and adaptability of the site for water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the project site. Aspects of built form that may give rise to design incompatibility include, but are not limited to:

(a) the total surface coverage by buildings and other permanent structures, insofar as it may affect the amount of open space where flexibility to serve water-dependent purposes will be retained;

(b) the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity;

(c) the scale of buildings and other permanent structures, insofar as it may affect wind, shadow, and other conditions of the ground level environment that may affect users of water-dependent facilities; and

(d) the landscape design of exterior open spaces, insofar as it may affect the attainment of effective pedestrian and vehicular circulation within and to areas of water-dependent activity.

(3) The Department shall find that the standard is not met if the project does not comply with the following minimum conditions which, in the absence of a municipal harbor plan which promotes the policy objectives stated herein with comparable or greater effectiveness, are necessary to prevent undue detriments to the capacity of tidelands to accommodate water-dependent use:

(a) new pile-supported structures for nonwater-dependent use shall not extend beyond the footprint of existing, previously authorized pile-supported structures or pile fields, except where no further seaward projection occurs and the area of open water lost due to such extension is replaced, on at least a 1:1 square foot basis, through the removal of existing, previously authorized fill or pile-supported structures or pile fields elsewhere on the project site; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the on-site replacement requirement if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative replacement requirements which 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;

(b) Facilities of Public Accommodation, but not nonwater-dependent Facilities of Private Tenancy, shall be located on any pile-supported structures on flowed tidelands and at the ground level of any filled tidelands within 100 feet of a project shoreline. The Department may allow any portion of the equivalent area of a Facility of Public Accommodation to be relocated within the building footprint, or in other buildings owned, controlled or proposed for development by the applicant within the Development Site if the Department determines the alternative location would more effectively promote public use and enjoyment of the project site. As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above use limitations if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative limitations and other requirements which 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;

(c) new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone; except as provided below, the width of said zone shall be determined as follows:

9.51: continued

1. along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but no less than 25 feet; and

2. along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the distance from the edges in question to the base of the pier or wharf, but no less than 25 feet; and

3. along all sides of piers and wharves, the zone extends for the lesser of 50 feet or 15% of the distance from the edges in question to the edges immediately opposite, but no less than ten feet.

As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standards if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative setback distances and other requirements which ensure that new 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 activity and public access associated therewith, as appropriate for the harbor in question;

(d) at least one square foot of the project site at ground level, exclusive of areas lying seaward of a project shoreline, shall be reserved as open space for every square foot of tideland area within the combined footprint of buildings containing nonwater-dependent use on the project site; in the event this requirement cannot be met by a project involving only the renovation or reuse of existing buildings, ground level open space shall be provided to the maximum reasonable extent; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standard if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative site coverage ratios and other requirements which 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;

(e) new or expanded buildings for nonwater-dependent use shall not exceed 55 feet in height if located over the water or within 100 feet landward of the high water mark; at greater landward distances, the height of such buildings shall not exceed 55 feet plus ½ foot for every additional foot of separation from the high water mark; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive such height limits if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements which ensure that, in general, such 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;

(4) the requirements of 310 CMR 9.51(1) through (3), shall also apply in the event a nonwater-dependent use project is located on a Great Pond;

(5) the requirements of 310 CMR 9.51(3), shall not apply to projects on filled tidelands in Designated Port Areas involving temporary uses, supporting DPA uses that are industrial, and marine industrial parks.

9.52: Utilization of Shoreline for Water-dependent Purposes

A nonwater-dependent use project that includes fill or structures on any tidelands shall devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands. In applying this standard, the Department shall take into account any relevant information concerning the capacity of the project site to serve such water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. Except as necessary to protect public health, safety, or the environment, the Department shall act in accordance with the following provisions.

9.52: continued

(1) In the event the project site includes a water-dependent use zone, the project shall include at least the following:

(a) one or more facilities that generate water-dependent activity of a kind and to a degree that is appropriate for the project site, given the nature of the project, conditions of the water body on which it is located, and other relevant circumstances; in making this determination, the Department shall give particular consideration to:

1. facilities that promote active use of the project shoreline, such as boat landing docks and launching ramps, marinas, fishing piers, waterfront boardwalks and esplanades for public recreation, and water-based public facilities as listed in 310 CMR 9.53(2)(a); and

2. facilities for which a demonstrated need exists in the harbor in question and for which other suitable locations are not reasonably available; and

(b) a pedestrian access network of a kind and to a degree that is appropriate for the project site and the facility(ies) provided in 310 CMR 9.52(1)(a); at a minimum, such network shall consist of:

1. walkways and related facilities along the entire length of the water-dependent use zone; wherever feasible, such walkways shall be adjacent to the project shoreline and, except as otherwise provided in a municipal harbor plan, shall be no less than ten feet in width; and

2. appropriate connecting walkways that allow pedestrians to approach the shoreline walkways from public ways or other public access facilities to which any tidelands on the project site are adjacent. Such pedestrian access network shall be available to the public for use in connection with fishing, fowling, navigation, and any other purposes consistent with the extent of public rights at the project site.

(2) In the event the project site does not include a water-dependent use zone, the project shall provide connecting public walkways or other public pedestrian facilities as necessary to ensure that sites containing water-dependent use zones will not be isolated from, or poorly linked with, public ways or other public access facilities to which any tidelands on the project site are adjacent.

(3) The requirements of 310 CMR 9.52(1) and (2), shall also apply in the event a nonwater-dependent use project is located on a Great Pond.

9.53: Activation of Commonwealth Tidelands for Public Use

A nonwater-dependent use project that includes fill or structures on Commonwealth tidelands, except in Designated Port Areas, must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes. In applying this standard, the Department shall take into account any factor affecting the quantity and quality of benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy, especially those which are nonwater-dependent; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with 310 CMR 9.53(1)through (4).

(1) The project shall not include fill or structures for nonwater-dependent use of Commonwealth tidelands which the Department determines are necessary to accommodate a public agency which intends to pursue a water-dependent use project on such lands, provided written notice of such agency's intention is submitted to the Department prior to the close of the public comment period on the license application. Such determination shall be based upon a clear showing, within a period of time deemed reasonable by the Department, that the agency's project has met the criteria of 310 CMR 9.36(5)(a)2. through 4.

(2) The project shall attract and maintain substantial public activity on the site on a year-round basis, through the provision of water-related public benefits of a kind and to a degree that is appropriate for the site, given the nature of the project, conditions of the waterbody on which it is located, and other relevant circumstances. In making this determination, the Department shall act in accordance with 310 CMR 9.53(2)(a) through (e):

9.53: continued

(a) in the event the project site includes a water-dependent use zone, at least one facility utilizing the shoreline in accordance with the provisions of 310 CMR 9.52(1)(a) must also promote water-based public activity; such facilities include but are not limited to ferries, cruise ships, water shuttles, public landings and swimming/fishing areas, excursion/ charter/rental docks, and community sailing centers;

(b) the project shall include exterior open spaces for active or passive public recreation, examples of which are parks, plazas, and observation areas; such open spaces shall be located at or near the water to the maximum reasonable extent, unless otherwise deemed appropriate by the Department, and shall include related pedestrian amenities such as lighting and seating facilities, restrooms and trash receptacles, children's play areas, and safety ladders along shoreline walkways, as appropriate; such facilities shall be sized in accordance with 310 CMR 9.53(2)(b)1. through 2.:

1. the amount of such space shall be at least equal to the square footage of all Commonwealth tidelands on the project site landward of a project shoreline and not within the footprint of buildings, less any space deemed necessary by the Department to accommodate other water-dependent uses; the Department may also allow a portion of such open space to be devoted to public ways and/or surface parking open to the public, including users of the facility of public accommodation, provided that below grade or structured parking is not a reasonable alternative and that the open space devoted to public vehicular use does not exceed that devoted to public pedestrian use;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.53(2)(b)1., if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative requirements for public outdoor recreation facilities that will establish the project site as a year-round locus of public activity in a comparable and highly effective manner;

(c) the project shall devote interior space to facilities of public accommodation, other than public parking, with special consideration given to facilities that enhance the destination value of the waterfront by serving significant community needs, attracting a broad range of people, or providing innovative amenities for public use; such public interior space shall be located at the ground level of all buildings containing nonwater-dependent facilities of private tenancy, unless the Department determines that an alternative location would more effectively promote public use and enjoyment of the project site or is appropriate to make ground level space available for water-dependent use or upper floor accessory services; the extent of such interior space shall be determined in accordance with 310 CMR 9.53(2)(c)1. through 2.:

1. such space shall be at least equal in amount to the square footage of all Commonwealth tidelands on the project site within the footprint of buildings containing nonwater-dependent facilities of private tenancy;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.34(2)(c)1., if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative requirements 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) the project shall include a management plan for all on-site facilities offering water-related benefits to the public, to ensure that the quantity and quality of such benefits will be effectively sustained; management elements which may be covered by the plan include, but are not limited to, signage, maintenance, hours and rules of operation, organizational arrangements and responsibilities, pricing, financing, and procedures for resolving use conflicts; if deemed appropriate, the Department may require the applicant to offer to the public, in the form of an easement, an enforceable right of access to or use of a proposed water-dependent facility of public accommodation;

(e) in the event that water-related public benefits which can reasonably be provided on-site are not appropriate or sufficient, the Department may consider measures funded or otherwise taken by the applicant to provide such benefits elsewhere in the harbor or otherwise in the vicinity of the project site.

(3) The project shall promote other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs and in a manner that does not detract from the provision of water-related public benefits. In making this determination, the Department shall act in accordance with 310 CMR 9.53(3)(a) through (d):

9.53: continued

(a) the Department shall take into account any guidance forthcoming from a state, federal, regional, or municipal agency as to the extent to which the project will contribute to or detract from the implementation of any specific policy, plan or program relating to, among other things: education; employment; energy; environmental protection; historic or archeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation.

(b) the Department shall act in accordance with the written recommendation of the Secretary of any state Executive Office in whose area of agency or program jurisdiction the proposed project falls, provided that said recommendation is made pursuant to an MOU or other written agreement with the Department as to the manner and extent to which the nonwater-related policies, plans, and programs of said Executive Office will be promoted in relation to water-related public interests.

(c) the Department shall give primary consideration to the implementation of policies, plans, or programs that:

1. have been officially adopted by statute, regulation, or other formal instrument of legislative or administrative action; and

2. complement measures taken by the project to serve water-related public purposes; examples of such complementary policies include the improvement of public transportation systems in order to foster ease of public movement to and from waterfront facilities, and the inclusion of affordable housing in residential development in order to make waterfront tenancy and access available to a broader segment of the public than would be the case under prevailing market conditions;

(d) the Department shall consider only those nonwater-related benefits accruing to the public in a manner that is reasonably direct, rather than remote, diffuse, or theoretical. Examples of direct public benefits include meeting a community need for mixed-income residential development, creating a large number of permanent jobs on-site, and reutilizing idle waterfront properties. Corresponding examples of indirect public benefits include increasing the general supply of market-rate housing, improving overall economic conditions, and expanding the property tax base of a municipality.

(4) In the event a nonwater-dependent use project is located on Great Ponds, the Department shall apply the provisions of 310 CMR 9.53(1) through (3), to the portion of the project site lying below the natural low water mark.

9.54: Consistency with Coastal Zone Management Policies

Nonwater-dependent use projects located in the coastal zone shall be consistent with all policies of the Massachusetts Coastal Zone Management Program, pursuant to 301 CMR 20.05(3). In applying this standard for projects identified for CZM participation in license or permit proceedings pursuant to 310 CMR 9.13(2)(a), the Department shall consider any written statement submitted by the Coastal Zone Management Office pursuant to 310 CMR 9.13(2), and shall act in accordance with the following provisions.

(1) If the Department concurs with the conclusions and recommendations of CZM, said written statement shall be adopted as part of the written determination on license application.

(2) If the Department disagrees with any conclusions or recommendations of CZM and the 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 EOEEA. If the disagreement is not eliminated through such mediation, the Department shall include in the written determination an explanation of the specific basis for its final decision on consistency with CZM policies.

If the project site is within an area covered by a municipal harbor plan, the Department shall presume this standard is met, in accordance with the provisions of 310 CMR 9.34(2)(b)3.

9.55: Standards for Nonwater-dependent Infrastructure Facilities

(1) The requirements of 310 CMR 9.51 through 9.53, shall not apply to nonwater-dependent use projects consisting of infrastructure facilities on tidelands or Great Ponds. Such projects shall include mitigation and/or compensation measures as deemed appropriate by the Department to ensure that all feasible measures are taken to avoid or minimize detriments to the water-related interests of the public. Such interests include, but are not limited to:

(a) the protection of maritime commerce, industry, recreation and associated public access;

(b) the protection, restoration, and enhancement of living marine resources;

(c) the attainment of water quality goals;

(d) the reduction of flood and erosion-related hazards on lands subject to the 100-year storm event or to sea level rise, especially those in damage-prone or natural buffer areas;

(e) the protection and enhancement of public views and visual quality in the natural and built environment of the shoreline;

(f) the preservation of historic sites and districts, archaeological sites, and other significant cultural resources near waterways.

(2) All nonwater-dependent use projects consisting of infrastructure facilities on tidelands or Great Ponds shall take reasonable measures to provide open spaces for active or passive recreation at or near the water's edge, wherever appropriate. Such measures may be provided by any means consistent with the need to avoid undue interference with the infrastructure facilities in question, and to protect public health, safety, or the environment.

9.56: Standards for Facilities of Limited Accommodation

Facilities of Limited Accommodation may be authorized on filled Commonwealth Tidelands or filled Private Tidelands under certain circumstances where a project site cannot support Facilities of Public Accommodation for a period of time. Projects including Facilities of Limited Accommodation as a substitution for Facilities of Public Accommodation described in 310 CMR 9.53(2)(c) and referenced in 310 CMR 9.51(3)(b) must meet any otherwise applicable requirements of 310 CMR 9.00. The substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation fulfills the requirements for licensing under 310 CMR 9.31(2)(b)1. provided otherwise applicable requirements are met. The calculation of the required amount of Facilities of Public Accommodation or the amount of the payment to allow the substitution shall be based on Facilities of Limited Accommodation located on the ground floor of buildings on filled Commonwealth Tidelands or Private Tidelands within 100 feet of the project shoreline. The substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation may not be inconsistent with an approved Municipal Harbor Plan under 310 CMR 9.34(2).

(1) An application for a building less than or equal to 75' in height, may substitute Facilities of Limited Accommodation in up to 50% of the interior space required to be devoted to Facilities of Public Accommodation. The remainder of the required ground floor interior space, with the exception of Upper Floor Accessory Services, shall be devoted to Facilities of Public Accommodation. The requirement that no less than 25% of the otherwise required ground floor interior space be devoted to Facilities of Public Accommodation may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation. The Applicant shall provide notice of the project to the Local Economic Development Authority and any response it has received from the authority. If the Local Economic Development Authority responds in writing that the project area has a sufficient level of development to support a Facility of Public Accommodation, the Department shall not authorize the substitution of a Facility of Limited Accommodation. If the authority concurs in writing that the project area lacks sufficient development to support a Facility of Public Accommodation or does not respond to the notice and the Department does not request additional information within 60 days of receipt of a license application, the Local Economic Development Authority will be deemed to concur with the request and the substitution of a Facility of Limited Accommodation shall be authorized. The first floor design shall be capable of accommodating a Facility of Public Accommodation. 20% of the net operating income per year generated from the Facilities of Limited Accommodation shall be paid annually by the project to fund specific construction or activities, approved by the Department, to activate the waterfront in geographic proximity to the project site. The activation

9.56: continued

provided by the specific construction or activities shall extend to evening and/or weekend hours wherever feasible to compensate for any lack of activation that may result in the substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation. The funding of specific construction or activities shall be in addition to applicable requirements at 310 CMR 9.52(1) and 9.53(2). The specific construction or activities to be funded shall be identified by the Applicant and approved by the Department prior to licensing.

A condition of the license shall include, on or before the 15th anniversary of the first certificate of occupancy, a requirement for the Department to review the uses of the Facilities of Limited Accommodation to determine whether the project site could support Facilities of Public Accommodation, typically based upon foot traffic and density, based on information provided by the Licensee. The Licensee shall file any relevant information at least six months prior to the fifteenth anniversary. If the Department determines that Facilities of Public Accommodation can be supported and the project is unable to obtain a contrary opinion as referenced in 310 CMR 9.56(2)(d), the Department shall provide the Licensee with a schedule for submittals for transition to such uses. If the Department determines that Facilities of Public Accommodation cannot be supported or the Licensee obtains such an opinion as referenced in 310 CMR 9.56(2)(d), the Department shall specify a time period for a subsequent review. The Licensee shall certify annually to the Department the amount of space devoted to Facilities of Limited Accommodation, the use of the space, the net operating income from the Facilities of Limited Accommodation, and a demonstration of payment for the substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation as specified in 310 CMR 9.56(2)(f). The Licensee shall provide an electronic copy of the certifications and notice of any information submitted six months prior to the 15th anniversary review, upon request to any person who filed comments during the public comment period on the written determination for the project.

(2) An application for a building greater than 75' in height that can demonstrate that its project site is unable to fully support Facilities of Public Accommodation, based on foot traffic and density, may apply for a short-term condition in a license to authorize up to 50% of the interior space required to be devoted to Facilities of Limited Accommodation in accordance with 310 CMR 10.51 and 10.53 for some portion of the ground floor interior space otherwise required to be devoted to Facilities of Public Accommodation, provided that no less than twenty-five percent of such required interior space shall be devoted to Facilities of Public Accommodation. The requirement that no less than 25% of the ground floor interior space otherwise required be devoted to Facilities of Public Accommodation may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation. The short-term condition in the license may not exceed ten years. At the expiration of the term, the ground floor shall be devoted to Facilities of Public Accommodation unless the licensee applies for an extension for no more than ten years and proves that the provisions of 310 CMR 9.56(2)(a) through (d) are met. Applications for extensions prior to expiration of the term may be allowed only where necessary to maintain occupancy. For an Applicant seeking a short-term condition in the license to authorize Facilities of Limited Accommodation in the interior space otherwise required to be devoted to Facilities of Public Accommodation, 20% of net operating income per year generated from the Facilities of Limited Accommodation shall be paid by the licensee annually to fund specific construction or activities, approved by the Department, to activate the waterfront. The activation provided by the specific construction or activities shall extend to evening and/or weekend hours wherever feasible to compensate for any lack of activation that may result in the substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation. The specific construction or activities to be funded shall be identified by the Applicant and approved by the Department prior to licensing. The funding of specific construction or activities shall be in addition to applicable requirements at 310 CMR 9.52(1) and 9.53(2). A project seeking a short term condition in a license shall:

(a) not be inconsistent with any substitutions, offsets or conditions of approval established in an approved Municipal Harbor Plan as provided in 310 CMR 9.34(2);

(b) demonstrate that marketing efforts for at least one year have failed to identify any prospective Facility of Public Accommodation, even with the offer of up to 50% below market rents to civic or cultural not-for-profit organizations and a diligent good faith attempt to locate tenants which shall include advertisements in at least two commercial real estate marketing publications and listing with a commercial real estate brokerage;

9.56: continued

(c) comply with the conditions in the license requiring Facilities of Public Accommodation unless or until another use is authorized; this requirement may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation;

(d) obtain the written concurrence of the Local Economic Development Authority that the project area lacks the level of development to support a Facility of Public Accommodation at the time of licensing or amendment. If the Local Economic Develoment Authority does not respond to the notice and the Department does not request additional information within sixty days of receipt of a license application, the Local Economic Development Authority will be deemed to concur with the request;

(e) ensure that the first floor design will be capable of accommodating a Facility of Public Accommodation at the end of the term; and

(f) certify annually the space devoted to Facilities of Limited Accommodation, the use of the space, the net operating income from those facilities, and demonstration of payment.

(3) A licensee may request an amendment of an existing license to authorize Facilities of Limited Accommodation, provided the request meets the requirements for an amendment at 310 CMR 9.24, the requirements identified in 310 CMR 9.56(2)(a) through (d), and other applicable requirements of 310 CMR 9.56(1) or (2). A short term license condition for Facilities of Limited Accommodation amending an existing license may be for a limited term of ten years or 15 years, depending on the height of the building.

REGULATORY AUTHORITY

310 CMR 9.00: M.G.L. c. 21A, §§ 2, 4, 8, and 14; c. 91, §§ 1 through 63; c. 91A, § 18.

NON-TEXT PAGE

MASSACHUSETTS MARINE TRADES ASSOCIATION

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Industry growth through Collaboration, Communication and Education

February 22, 2022

VIA EMAIL (DEP.Waterways@mass.gov)

MassDEP
Waterways Program
c/o Daniel Padien, Director
One Winter Street
Boston, MA 02108

Re: Ch. 91 "Resiliency" Regulatory Changes – Exemption for "Water-Dependent" Uses

Dear Director Padien:

On behalf of the Massachusetts Marine Trades Association ("MMTA"), we are writing at your invitation to submit comments regarding conceptual proposed "resiliency" changes to the Chapter 91/Waterways Regulations. Thank you for asking.

Established in 1964, MMTA is the statewide, non-profit, representative body for over 1,000 marine trades businesses in the Commonwealth. MMTA's priorities include expanding workforce training and development for the marine trades industry, enhancing public access to the waterways, stemming the loss of revenues to neighboring states with more favorable tax policies, relieving the dredging and permitting timelines and expenses, and increasing boating opportunities for the public.

Our membership wholeheartedly supports MassDEP making efforts to adapt the Chapter 91 Waterways Regulations to facilitate our own adaptation to climate change. We trust you understand the statue of Chapter 91 prioritizes protection and enhancement of water-dependent uses in waterways and at the water's edge specifically because we have no other place to go. Our members are very good at understanding the natural world around them and designing and operating safely. We adapt. We have to. We also need your help staving off unnecessary prohibitions on our membership working in the only workspace they have, in and around the water.

MMTA thanks you for alerting us of MassDEP's recent "Stakeholder Discussion" meeting on these changes, and submit the following comments based on our review of the meeting documents and our General Counsel's attendance at the meeting. MMTA supports the

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underlining mission of these regulatory changes in addressing climate change resiliency in the comments. Climate change is a threat to all, and we know all too well the particular vulnerability faced by coastal landowners, both residents and business alike.

We appreciate MassDEP's confirmation that the prohibition against new structures in V-Zones and LSCSF will have an exemption for docks and piers. However, we believe the exemption must go further. There must also be an exemption for structures associated with "water-dependent" uses. Such an exemption would be consistent with the intent of M.G.L. Ch. 91 and would avoid the problem of water-dependent businesses not being able to undertake new construction on their properties, including adaptive construction or for uses to pay for adaptation and resiliency.

Our member businesses are tied to coastal areas; they are marinas and boatyards whose financial livelihood relies on access to the water. It would be devastating for a regulation to only allow water-dependent businesses to build new piers and docks for customer boats, and prohibit them from building 'supporting' structures to service and store these boats. For example, what if a marina has an increased capacity of vessels, and needs to build a new storage building to store those boats in the winter months? Why should this type of use be prohibited under the Ch. 91 Regulations, when it is undoubtedly a "water-dependent" use and would be defined to meet engineering standards to make it safe, insurable, and environmentally sound? These requirements are already in place and our members have direct need an incentive to meet these requirements, so no prohibition is appropriate or necessary.

Regarding the remainder of proposed regulatory changes discussed during the Stakeholder meeting, we submit the following comments:

1. Engineering & Construction Standards – Section 9.37

   MMTA requests that the regulations provide an identifiable, published standard for design criteria. Meaning that for projected sea level rise, the regulations reference where an applicant would find the exact projection to design for. The expectation would be that the referenced standard might itself to be modified over time, but the regulations would specify what standard applies at the design/permit application time. Some fixed certainty is needed without the risk of constant change throughout the permitting time or even throughout the license term. If necessary, a license can always specify that upgrades to a facility may be required over the term of the license in order to assure public safety. Because maintenance is already required in all Chapter 91 licenses, this is not a stretch to require.

2. Building Height Provisions – Section 9.51
   We are in support of this proposed change.

3. Expiration and Renewal – Section 9.25
   We of course support this change, but we urge MassDEP to not take on the stance of 'no renewal' for those licenses which require adaptation to sea level rise. Prohibitions are not adaptive, they are regressive. They may 'feel good' for some proponents but they do not

help the environment in any significant way compared to smart, adaptive technology and engineering.

MMTA notes that MassDEP already has flexibility for interpreting Ch. 91 Licenses' "required maintenance" clause to require necessary modifications if the license holder is not making safety modifications on their own. Most likely in such cases it is the absence of funds to make changes, not the absence of ability.

4. Simplified Licenses – Section 9.10
   We are in support of this proposed change.

5. Extended Term Licenses – Section 9.15

   We support this change but simultaneously request that MassDEP uses this chance to do the fair thing and extend water-dependent use license terms to exceed those of non-water dependent uses.

   Our members have at least the same financing considerations as non-water dependent uses do and, by statute, the dominant right to be at the water's edge. MMTA emphatically requests that MassDEP extend Ch. 91 License terms beyond 30 years and weave in projected sea level rise considerations per above using the "maintenance" clause.

   We also note that it would be nice to have all the private infrastructure paid for and licensed at the water's edge to be eligible for the kind of public funding or low-cost loans available elsewhere. We at the water's edge are doing a lot of the work for inland protection, yet we get only regulation and not financial support. Only the non-water dependent uses get the financial support in the form of extreme height and density generating income in the very same space, and we wish we could be doing the same with our water-dependent uses.

6. Minor Project Modification/Facilitate Building System Relocation – Section 9.22

   MMTA supports this proposed change but also requests that any DEP approvals of minor modifications be binding in nature. If minor modifications are not binding, all license holders are in jeopardy. Moreover, without making minor modifications binding, it is grossly unfair to those who rely on minor modifications: from the license's users, to financing entities, to subsequent property owners.

7. Definitions (Coastal High Hazard) – Section 9.02

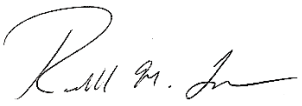
   MMTA supports consistency in regulatory definitions among all DEP regulations, and therefore support changing the term "High Coastal Hazard" with "Velocity Zone" for consistency with the Wetlands Regulations. That is, if this term is not made synonymous with 'prohibition on doing anything.' There are tremendous differences geographically in Velocity zones, some of which are quiescent and some of which are extremely

vulnerable. It is not appropriate to do a flat prohibition especially when engineering and design standards are plenty sophisticated and safe.

In conclusion, MMTA requests that the proposed changes to the Waterways Regulations provide flexibility for current water-dependent licenses in terms of modifications and maintenance for those structures, and that the proposed changes include an exemption for "water-dependent" structures from any prohibition related to Velocity Zones and Land Subject to Coastal Storm Flowage.

Please feel welcome to contact either MMTA's Government Relations and Legal Counsel, Jamy Madeja at 617-227-8410 or jmadeja@buchananassociates.com, or MMTA's Executive Director, Randall Lyons at randall@boatma.com. We thank you for your thoughtful consideration of these comments.

Respectfully,



Gregory R. Egan
President

Randall M. Lyons
Executive Director

THE MASSACHUSETTS MARINE TRADES ASSOCIATION

NAIOP
COMMERCIAL REAL ESTATE DEVELOPMENT ASSOCIATION
MASSACHUSETTS

February 28, 2022

Daniel Padien, Waterways Program Chief
Massachusetts Department of Environmental Protection (MassDEP)
One Winter Street
Boston, MA 02108

Re: Massachusetts Department of Environmental Protection's Consideration of Changes to the Waterways Regulations, 310 CMR 9.00 *et seq.*

Dear Chief Padien:

NAIOP Massachusetts, The Commercial Real Estate Development Association, appreciates the opportunity to provide comments in advance of potential revisions to the Waterways Regulations, 310 9.00 *et seq*. NAIOP respectfully submits the comments below with the hope that in addition to the regulatory revisions discussed at the Advisory Group meeting on February 9, our comments can be considered and addressed to ensure a clear, predictable and timely implementation of the Waterways Program.

I. General Comments Relating to Waterways Program Implementation

NAIOP's members have worked with the Waterways Program since its inception more than thirty-five years ago. NAIOP has commented on regulatory changes, Municipal Harbor Plans (MHP) and myriad other aspects of the office to ensure the integrity of the Commonwealth's coastline while meeting community needs and building critical economic development and climate resilience projects. The success of these projects depends on a predictable and timely process.

For the past several years, NAIOP has raised concerns regarding the time it now takes to process a license application. Projects, for many reasons, cannot afford a lengthy, drawn-out review process. **NAIOP urges the Waterways Program to commit to a timely, predictable administrative review.** NAIOP is supportive of expanded funding for program administration and other solutions that will address the concerns of our members and ensure an effectively implemented program.

II. Concerns Relating to the Future of the Municipal Harbor Plan Regulatory Process

While NAIOP understands that this potential regulatory process is separate from the MHP regulatory process that began in Spring 2021, **NAIOP would like to once again request that MassDEP identify a path forward for approving future municipal harbor plans, amendments, renewals, and clarifications.** As MassDEP is an engaged and active participant in the municipal harbor planning process, NAIOP believes MassDEP can approve future municipal harbor plans, amendments, and clarifications, as they are defined in the Municipal Harbor Planning Regulations, without the need to go through a regulatory amendment process each time. As there are several communities currently working on MHPs,

MassDEP should provide a process that allows those communities to take advantage of the many months of work that have already been invested in the harbor planning process.

III. Comments Related to the February 9 Advisory Group Discussion

i. NAIOP believes that expressly allowing activities associated with shoreline protection should be a priority for any regulatory update - and that, given many of these activities (including fill) would be required to comply with the Wetlands Protection Act regulations, further review and approval of these activities by the Waterways Program creates hurdles to creative shoreline protection measures.

ii. Regarding section 9.15, NAIOP strongly discourages any changes to the rules relating to extended license terms. Instead, to ensure buildings are designed to reflect sea level rise, NAIOP suggests incorporating these requirements into 9.37, as outlined in the next subsection.

iii. 9.37 Historic Sea Level Rise – NAIOP agrees that this language should reflect current norms and projects should address projected future sea level rise. However, wording of this change is important given that there is no universally accepted projection. **NAIOP strongly believes any amendments to this language should not create a new and independent standard. Instead, NAIOP recommends the regulations require applicants to illustrate how they address sea level rise in the design, recognizing that design flood elevations vary depending on use and location**. Finally, NAIOP also hopes that amended language ensures that sites can be further adapted for higher levels of sea level rise in the future – rather than requiring the totality of mitigation at the outset.

iv. Further, regarding section 9.33, **NAIOP would like to reiterate the point made during the February 9 meeting that we should not incorporate the State Building Code as a standard due to the difficulty of proving compliance with the Code without a full set of construction plans – which project proponents do not have at the time of licensing.** Additionally, the State Code has various means of applying for and granting waivers and exceptions – which project proponents do not quality for until full construction plans are provided. Receiving a waiver would be code compliant – but there is a concern that MassDEP and the Office of Coastal Zone Management would not accept the waivers as compliant.

v. Despite the slide presented during the discussion, it is important to note that MassDEP currently defers to local zoning interpretations of building height. **While NAIOP believes that it is reasonable to clarify that MassDEP heights are to be measured from design flood elevation rather than from grade, we also believe that with respect to the top of structure, this should be left to local zoning rules.**

vi. Regarding Minor Project Modifications, NAIOP suggests that this section be expanded and used more often to include small renovations and adaptations for code compliance, such as elevating buildings, dry floodproofing and ADA compliance without having to go through a licensing process that is lengthy and time consuming for MassDEP and the proponents.

vii. NAIOP encourages the Waterways Program to work with the MassDEP Wetlands and MassDEP Water Quality teams to not only allow, but encourage and support living shoreline solutions and shoreline protection and flood control projects in urban waterfront.

viii. Finally, NAIOP appreciates that MassDEP solicited comments on policy and design principles prior to presenting draft regulatory changes. We would encourage the Department to share the draft regulations with this Advisory Committee prior to releasing a draft document for general comment.

NAIOP Massachusetts represents the interests of companies involved with the development, ownership, management, and financing of commercial properties. NAIOP has over 1,700 members who are involved with office, lab, research & development, industrial, mixed use, multifamily, retail and institutional space.

Please contact me if you have any questions.

Sincerely,

NAIOP Massachusetts, The Commercial Real Estate Development Association

Tamara C. Small
Chief Executive Officer

cc: Martin Suuberg, Commissioner, Massachusetts Department of Environmental Protection

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March 3, 2022

Daniel J. Padien
Waterways Program Chief
Massachusetts Department of Environmental Protection
1 Winter Street, 5th Floor
Boston, MA 02108

Re: Comments on potential changes to the Chapter 91 Waterways Regulations

Dear Mr. Padien,

Thank you for the opportunity to comment on potential changes to the Chapter 91 Waterways Regulations. The Trustees are encouraged and pleased that the Massachusetts Department of Environmental Protection (MassDEP) is considering regulatory revisions in response to the effects of a changing climate. We acknowledge that our urban and municipal harbors are the focus of the regulatory change and understand the need to address impacts to these critical areas. As we all know, however, our natural systems are also at-risk from the impacts of sea level rise, especially salt marshes.

Massachusetts is experiencing more intense storms, extreme precipitation events, rising sea levels, and inland and coastal flooding. Flooding, caused by more frequent and intense storms and accelerating sea level rise, is increasing erosion and threatening natural hydrology, habitats, ecosystems, and local communities. The Intergovernmental Panel on Climate Change just released an alarming report[1] stating that in North America, sweeping impacts of climate change on human life and safety are irreversible and worse than previously thought, especially in coastal areas. Strengthening our natural resources at scale is critical to protect communities from existing threats that are becoming more unpredictable and extreme every year.

The Trustees of Reservations preserves, for public use and enjoyment, 122 properties of exceptional scenic, historic, and ecological value in Massachusetts. We are the largest private holder of coastline in the state, protecting over 120 miles of coast in 25 communities.

The Trustees has made coastal resiliency a mission-critical, strategic priority. We have invested significant resources and are working extensively with state and federal agencies, local communities, private landowners, and nonprofit partners to advance innovative nature-based techniques at scale to restore salt marsh and build climate change resilience along the Massachusetts coast.

We are actively restoring 358 acres marsh in the Great Marsh and have secured federal funding to restore an additional 916 acres which are currently in the design and permitting phase. During the regulatory review process for this critical work, we have found specific challenges related to Chapter 91

[1] https://www.ipcc.ch/report/ar6/wg2

regulations that have slowed our response to the urgent need for restoring the resiliency of these ecosystems.

As such, we respectively provide the following suggestions for how MassDEP can effectively address the urgency of our climate crisis through nature-based restoration work while at the same time ensuring high quality and successful project outcomes:

- **Facilitate the permitting of restoration projects that address the urgent need for climate resilience such as salt marsh restoration, living shorelines, and mud engines and providing exemptions for those using established techniques.** We suggest adding "nature-based solution projects focused on habitat restoration and/or climate resilience" to *Section 9.05 (3) Activities not requiring a license or permit*.

- **Amend the definition of "fill" (*9.02 Definitions*) to exclude salt marsh hay for the purposes of ditch remediation to restore natural hydrology making these projects exempt from Chapter 91**. The current requirement for these projects to go through Chapter 91 is time and resource consuming for nonprofit applicants and a deterrent for many private landowners who do not want to record a license on their title. Restoring marsh on private land will be increasingly important as marshes migrate inland due to sea level rise.

Thank you for considering our comments. The Trustees welcomes the opportunity to meet and discuss these potential revisions and any questions or concerns you may have.

Sincerely,

Cynthia Dittbrenner
Director of Coast and Natural Resources
cc: Tom O'Shea, Managing Director of Resources and Planning

Founded in 1891 by Charles Eliot, The Trustees preserves, for public use and enjoyment, properties of exceptional scenic, historic, and ecological value in Massachusetts. Today, 130 years after our founding, we are Massachusetts' largest conservation and preservation organization and with the support of our 150,000 members we care for 122 properties—nearly 27,000 irreplaceable acres. The Trustees works with a variety of volunteer, nonprofit, and community-based partners in communities across the state to preserve remarkable, scenic landscapes and historic and cultural resources. thetrustees.org