

Chapter 91 Proposed Regulatory Revisions Related to Designated Port Areas

310 CMR 9.00

DRAFT 1-12-16

9.02 Definitions

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

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*.

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.

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.

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.

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 ~~severe~~ 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.

~~Conversely, uses that shall be presumed compatible with the DPA are small business uses that are adaptable to the upper floors of existing buildings, to minor infill parcels, and to other interstitial spaces not likely (in their own right or in combination with other nearby spaces) to be of primary importance in attracting maritime development to the DPA. Typical of such uses are storefront retail and service facilities; shops operated by self-employed tradespersons; eating and drinking establishments with limited seating; and small scale administrative offices.~~

Unless otherwise provided in a DPA Master Plan, the amount of ~~filled~~ 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 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.~~

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.

#### 310 CMR 9.12: Determination of Water-Dependency

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(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;
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, or 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;

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 of energy facility can reasonably be located or operated away from tidal or inland waters;

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.

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#### 310 CMR 9.12

##### (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.(a) -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.(b) -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. above, the hours of operation of the use do not extend beyond the hours of operation of the water-dependent industrial 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.

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 purpose 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)7.

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

1. fill or structures for any water-dependent industrial use, and accessory uses thereto, ~~on pile supported structures over flowed tidelands and previously filled tidelands;~~ provided that:

~~\_\_\_\_\_a) in the case of proposed fill, neither pile-supported nor floating structures are a reasonable alternative; and~~

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~~-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;~~

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~~2. fill or structures for water dependent industrial use on flowed tidelands, provided that, in the case of proposed fill, neither pile supported nor floating structures are a reasonable alternative.;~~

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 ~~Municipal Harbor~~ 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: ~~no~~

a) no Supporting Use structure may be allowed in the Water-dependent Use Zone; ~~that~~

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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)-(e); and
- d) Supporting Use structures ~~that said plan is based on a clear showing that the use meets these requirements and is appropriate for the harbor in question, and~~ shall otherwise be appropriately sized and located, in accordance with 310 CMR 9.36(5)(b).

5. The Department shall waive the ~~above~~ 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 ~~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:

- 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) Supporting Use buildings shall not exceed two in height;~~
- ~~d) 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~~

ed) 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).

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

57. recreational berths authorized in connection with a Boatyard in accordance with 310 CMR 9.39(2)(b);

368. 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;

479. 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
- b. ~~a supporting DPA use, as defined in 310 CMR 9.02; or~~
- eb. 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 310 CMR 9.36(5).

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(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:

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.

#### 9.34: Conformance with Municipal Zoning And Harbor Plans

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(2) Municipal Harbor Plan.

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(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), 310 CMR 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), 310 CMR 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 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.

9.39: Standards for Marinas, Boatyards, and Boat Ramps

(1) Marinas.

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(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. ~~t~~he 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.

~~4. In Designated Port Areas, a reconfiguration zone shall not impact water dependent industrial uses~~

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:

(a1) –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;

(b2) –boat out-hauling and launching facilities which have been certified as structurally sound by a registered professional engineer; and

(e3) –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 a 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.

#### 9.51: Conservation of Capacity for Water-Dependent Use

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(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.