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310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

310 CMR 12.00: ADOPTING COASTAL WETLANDS ORDERS

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12.01: Introduction

(1) Authority. 310 CMR 12.00 is issued by the Department of Environmental Protection pursuant to the authority granted under M.G.L. c. 21A, § 2 (28).

(2) Purpose. 310 CMR 12.00 is promulgated in order to: (a) define and explain the language of M.G.L. c. 130, § 105, and (b) establish the general procedures under which the Department of Environmental Protection will exercise its responsibilities under M.G.L. c. 130, § 105.

It is the intent of the Department that 310 CMR 12.00 is to be used to preserve the public safety, health and welfare, private property, wildlife and marine fisheries. It is further intended that these goals shall be accomplished through the adoption of Orders imposing restrictions on the coastal wetlands of the Commonwealth. The Orders shall regulate, restrict, prohibit, control or abate certain specified activities or uses, including dredging, filling, removing, otherwise altering or polluting coastal wetlands. The Orders shall allow other specified activities and uses within these areas, subject to the applicable requirements of M.G.L. c. 131, § 40. Each Order as adopted shall apply to a specific city or town within which coastal wetlands are located.

It is also the intent of the Department that 310 CMR 12.00 be consistent with and form a part of the Commonwealth's Coastal Zone Management Program (hereinafter "CZM Program") as it has been promulgated and defined in 301 CMR 20.00 issued pursuant to M.G.L. c. 21A entitled "Establishment of the Coastal Zone Management Program by the Executive Office of Environmental Affairs". 310 CMR 12.00, however, is adopted independently under M.G.L. c. 130, § 105 and would remain in full force and effect in the absence of the CZM Program or 301 CMR 20.00.

The interpretation and application of 310 CMR 12.00 shall be consistent with the policies of the CZM Program to the maximum extent permissible under M.G.L. c. 130, § 105. 301 CMR 20.00 establish the CZM policies as part of the CZM Program, and the Department recognizes these policies as state environmental policy, which it will carry out in accordance with M.G.L. c. 21A. Specifically 301 CMR 20.99 Appendix, policies 1, 2, 3, 4, 5, 7, 9, and 10 are applicable to the administration of M.G.L. c. 130, § 105, but the provisions of the more specific regulations contained in 310 CMR 12.00 shall govern, unless the Secretary of Environmental Affairs (hereinafter "The Secretary") pursuant to the conflict resolution procedures of M.G.L. c. 21A, § 4, and 301 CMR 20.06(20) through 20.06(28), has resolved any conflict and has determined that the CZM policies should or should not apply.

(3) Coordination with the CZM Office and Local Governments: In accordance with 301 CMR 20.06, the Department shall notify the CZM Office at least 60 days beforehand of the adoption of any proposed Order and shall provide local government agencies with notice of the proposed Order at

least 30 days prior to its adoption.

12.01: continued

(4) Restriction of Areas of Critical Environmental Concern. Whenever the Secretary notifies the Commissioner that he has accepted the nomination of a coastal wetland for designation as an Area of Critical Environmental Concern (hereinafter "ACEC") in accordance with 301 CMR 20.06, the Commissioner shall, within 30 days of such acceptance, submit the following to the Secretary and to the Director of the Coastal Zone Management Office:

- (a) a narrative description of the current status of mapping activity and of any past or current wetlands restriction activity within the suggested boundaries of the nominated ACEC and within related contiguous upland areas within the coastal zone, as defined in 301 CMR 20.03;
- (b) a schedule for restricting the coastal wetlands in the nominated ACEC within 15 months of the Secretary's designation of the ACEC pursuant to 301 CMR 20.06.

In carrying out the restriction of the coastal wetlands of an ACEC within 15 months of its designation, the Department shall review the adequacy and consistency of all previously recorded restrictions within the ACEC and shall, as necessary, amend or modify and rerecord such restrictions to ensure full compliance with the management goals of the Secretary's designation of the ACEC.

If the Commissioner determines that the process of restricting all of the coastal wetlands in an ACEC cannot be completed within 15 months of designation, the Commissioner may request that the Secretary grant a one-time extension of up to 90 days.

12.02: Definitions

Act means M.G.L. c. 130, § 105.

Altering means causing change, directly or indirectly within any coastal wetland and includes, but is not limited to, one or more of the following actions:

- (a) changing pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood storage retention areas;
- (b) draining or otherwise disturbing surface or groundwater levels;
- (c) degrading water quality;
- (d) driving pilings or erecting buildings or structures of any kind;
- (e) placing any obstruction to water flow;
- (f) destroying plant life, including the cutting of trees;
- (g) discharging, releasing, or causing to be released, any contaminating materials, including sediments, from any source into a coastal wetland whether by overland flow or through a new or existing pipe or other conduit;
- (h) causing adverse effects to wildlife, shellfish or other marine fisheries, or to their habitat;
- (i) lowering, polluting, or otherwise changing the level, quantity, or quality of ground water by doing any work in a coastal wetland.

Amendment means any change in the allowed or prohibited activities or uses contained in any Order adopted under the Act; any addition to or deletion of, including any change in the definition of, the types of coastal wetlands defined in any Order; any addition to or deletion of any wetland areas; or any addition to any list of assessed owners adopted as part of the Order. An amendment shall not include a correction as defined in 310 CMR 12.02 Correction.

Assessed owner means the person to whom land within a coastal wetland affected by an Order was assessed in the last preceding annual tax levy.

Bank means the seaward face or side of any elevated landform which lies at the landward edge of a coastal beach, land subject to tidal action or coastal storm flowage, or any other coastal wetland.

Contiguous land means any area landward of and adjacent to any coastal wetland or low land subject to tidal action or coastal storm flowage, which the Commissioner deems necessary to include in any Order to protect any interest of M.G.L. c. 130, § 105.

Coastal wetland means any bank, marsh, swamp, meadow, flat or other low land subject to tidal action or coastal storm flowage and such contiguous land as the Commissioner deems necessary to

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include in any Order pursuant to M.G.L. c. 130, § 105.

12.02: continued

Commissioner means the Commissioner of the Department of Environmental Protection.

Correction means any minor change in the location of the wetland boundary line on a plan, for the purpose of describing the correct wetland boundary, the substitution or deletion of any name or names from the list of assessed owners adopted as part of any order as long as this does not include the deletion of any wetland area, or any typographical, grammatical or other change which does not alter the sense or meaning of any Order.

Department means the Department of Environmental Protection.

Dredging means the removal of materials including, but not limited to, rocks, bottom sediments, debris, sand, refuse, plant or animal matter, in any excavating, grading, cleaning, deepening, widening or lengthening, either permanently or temporarily, of any coastal wetland. Dredging shall include improvement dredging and backfilling or other dredging and subsequent refilling.

Filling means the placing of any material that raises, either temporarily or permanently, the existing elevation of any coastal wetland.

Flat means any nearly level area which typically extends from the mean low water line landward to the more steeply sloping seaward face of the coastal marsh or other landform or which may be separated from the coastal marsh or other landform by tidal waters.

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

Land affected by an Order means any land that is subject to any restriction under an Order.

Low land subject to tidal action or coastal storm flowage means any land between mean low water or any other seaward boundary of the Commonwealth, and the landward boundary of the 100 year flood, as determined by the Department of Housing and Urban Development pursuant to the National Flood Insurance Program or by any other scientifically reliable determination. Such areas shall include, but not be limited to, land under salt ponds, land containing shellfish, rocky intertidal shores, coastal beaches, barrier beaches, coastal dunes, banks, marshes and flats.

Maintenance Dredging means dredging under a license in any previously dredged area which does not extend the originally dredged width, depth, or length, but does not mean improvement dredging or backfilling.

Marsh means a salt marsh or coastal wetland that extends landward up to the highest tide line, that is, the highest spring tide of the year, and is characterized by plants that are well adapted to or prefer living in saline soils. Dominant plants within salt marshes are salt meadow cord grass (*Spartina patens*) and/or salt marsh cord grass (*Spartina alterniflora*). A salt marsh may contain tidal creeks, ditches, and pools.

Meadow means any marsh as defined in 310 CMR 12.02 Marsh.

Mean low water line means the arithmetic mean of the low water heights observed over a specific 19-year Metonic cycle (the National Tidal Datum Epoch) and shall be determined using the nautical charts, harbor charts series (1:50,000 and larger), prepared by the National Ocean Survey, U.S. Department of Commerce. For those coastal areas not covered by such published harbor charts, the mean low water line shall be determined using hydrographic survey data obtainable from the National Ocean Survey.

Modification means any amendment as defined in 310 CMR 12.02 Amendment.

Order means any instrument issued by the Commissioner that imposes restrictions on any coastal

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wetland in accordance with M.G.L. c. 130, § 105.

12.02: continued

Person means any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or political subdivision thereof, any administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representative, agents or assigns.

Person having an interest means any assessed owner or any holder of record of an easement, covenant, restriction or any other property interest or any other holder of any such property interest known to the Commissioner.

Plan means a map made by surveying techniques, a line and symbol photogrammetric map or an orthophoto map, which meets National Map Accuracy Standards, upon which coastal wetlands are delineated.

Polluting means, but is not limited to, the discharge, release or flow of any product, by-product, material or waste resulting from sewage, sewage processing, or from any agricultural, industrial, commercial, or other man-made process, any man-made thermal discharge, run-off, leachate, or any other substance in any form, which is or can be drained, discharged or infiltrated, or otherwise introduced into any coastal wetland.

Removing means to take away any type of material that alters the elevation of any coastal wetland.

Repeal means the rescinding of any Order, including the plan or plans and list of assessed owners incorporated with the Order.

Restriction means any provision in any Order limiting activities or uses in or on coastal wetlands. A restriction shall be unlimited in time unless repealed.

Shellfish means, but is not limited to, the following species: Bay scallop (*Argopecten irradians*); Blue Mussel (*Mytilus edulis*); Ocean Quahaug (*Arctica islandica*); Oyster (*Crassostrea virginica*); Quahaug (*Mercenaria mercenaria*); Razor Clam (*Ensis directus*); Sea Clam (*Spisula solidissima*); Sea Scallop (*Placopecten magellanicus*); and Soft Shell Clam (*Mya arenaria*).

Swamp means any marsh as defined in 310 CMR 12.00.

Wetland area means any coastal wetland delineated by a continuous boundary line which encloses that wetland, or any coastal wetland for which the aquatic or seaward boundary is mean low water, and which may include lands held by more than one assessed owner.

12.03: Notice

Prior to adopting any Order under M.G.L. c. 30, § 105, the Commissioner shall first give notice, as provided below, of a preliminary informational meeting and a public hearing.

(1) Persons To Be Given Notice. The Department shall mail notice of the meeting and the hearing to the following persons by certified mail at their last known address, at least 14 days prior to the date of the preliminary informational meeting and at least 21 days prior to the date of the public hearing:

- (a) any assessed owner;
- (b) any person other than an assessed owner having an interest in any coastal wetland to be affected and whose name appears on an assessor's map;
- (c) any other person having a recorded interest in any coastal wetland to be affected and whose name and/or address is known to the Commissioner;
- (d) any person having an unrecorded interest in any coastal wetland to be affected and whose name and/or address is known to the Commissioner;
- (e) any person who has acquired, subsequent to the last annual tax levy, a fee simple interest in any coastal wetlands to be affected and whose name has been entered in the records of the assessor's office and is available to the Department at least 60 days prior to the date of the public hearing;

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12.02: continued

(f) the State Reclamation Board, the Department of Public Works, the Department of Environmental Management, the Metropolitan District Commission, the Coastal Zone Management Office, other appropriate agencies of the Commonwealth, federal and local government, appropriate regional planning agencies, and to the Selectmen or Mayor, Conservation Commission, Planning Board and Assessors of the city or town in which the coastal wetlands to be affected are located.

The Commissioner shall give notice by regular mail to any person who has filed a written request to receive notice of public hearing to be held pursuant to the Act, and to any other person he may deem appropriate, at least 14 days prior to the date of the preliminary informational meeting and at least 21 days prior to the date of the public hearing.

Any of the notices required to be given pursuant to 310 CMR 12.03(1) shall be deemed to have been given upon mailing a copy of the notice. The number of days between the giving of notice and the date of the preliminary informational meeting and public hearing shall include Saturdays, Sundays and legal holidays.

(2) Publication of Notice. The Commissioner shall publish notice of the preliminary informational meeting and public hearing at least 14 days prior to the date of the preliminary informational meeting and at least 21 days prior to the date of the public hearing in a newspaper or newspapers of general circulation in the city or town in which the coastal wetlands to be affected are located, and, where appropriate, in such trade, industry or professional publications as the Commissioner may select.

(3) Posting of Notice. The Commissioner shall post notice of the preliminary informational meeting and public hearing at least 14 days prior to the date of the preliminary informational meeting and at least 21 days prior to the date of the public hearing in the city or town hall of the city or town in which coastal wetlands to be affected are located, and in any other location as determined by the Commissioner.

(4) Filing Notice With the Secretary of the Commonwealth. The Commissioner shall file notice of the public hearing with the Secretary of State at least 21 days prior to the date of the public hearing.

(5) Content of Notice. Notice, other than notice by publication, shall include, but shall not be limited to, the following information and materials:

- (a) A description of the Department's statutory authority to adopt Orders, a copy of the statute, M.G.L. c. 130, § 105, and a copy of the proposed Order.
- (b) A copy of an index map or portion of the proposed plan with the coastal wetland area or areas to be affected identified thereon.
- (c) Notice that the Department's wetland boundary delineation services are available to persons having an interest in land to be affected by the Order.
- (d) The time, place and location of the preliminary informational meeting and public hearing.
- (e) The name of the Commissioner or his agent or agents designated to receive inquiries or requests prior to the public hearing.
- (f) Notice that any person may submit written comments concerning the proposed Order to the Department, and/or request to speak at the hearing.

Notice published in newspapers or posted in the city or town hall or other public place pursuant to 310 CMR 12.03(15) shall include the items listed at 310 CMR 12.03(5)(c), (d), and (f), and may also contain a list of parcels within which coastal wetlands are located, and for which no assessed owner is known.

12.04: Preliminary Informational Meetings

The Commissioner shall, at least seven days prior to the date of the public hearing, hold a preliminary informational meeting in the city or town in which the coastal wetlands to be affected are located.

(1) Materials for Display and Inspection. The following information and materials shall be available for display and inspection:

12.04: continued

- (a) photogrammetric, line and symbol, or orthophoto maps depicting coastal wetland boundaries, or any other maps intended for use as plans;
- (b) aerial photographs of the coastal wetlands to be affected;
- (c) assessor's maps depicting the area to be affected;
- (d) a list of all persons who have been given notice of the preliminary informational meeting and the public hearing.

(2) Materials for Distribution. The following information and materials shall be available for distribution:

- (a) copies of M.G.L. c. 130, § 105 and 310 CMR 12.00;
- (b) copies of the proposed Order;
- (c) on-site inspection request forms as shown in Appendix A.

(3) Conduct of the Preliminary Informational Meeting. A representative of the Department shall be present at the preliminary informational meeting to distribute materials upon request, to answer questions concerning the location of proposed coastal wetland boundary lines, and if time permits, to answer other questions concerning the program.

12.05: Public Hearings

Prior to adopting any Order under M.G.L. c. 130, § 105, the Commissioner shall first hold a public hearing in the city or town in which the coastal wetlands to be affected are located.

The Commissioner or his agent designated as the Presiding Officer shall conduct the public hearing. Copies of all information and materials available at the preliminary informational meeting shall be available at the public hearing.

The Presiding Officer shall convene the public hearing. He or she or a representative of the Department shall first state the statutory authority under which the program operates, and shall explain the purpose of the program, effect of the proposed Order, and the Department's mapping, designating and recording procedures. The Presiding Officer shall inform persons having an interest in any affected coastal wetland of their right to request an on-site inspection and other procedures pursuant to 310 CMR 12.06.

The Presiding Officer shall specify the order of participation. Representatives of the Department shall speak first, followed by elected officials. Persons or groups representing agencies of the Commonwealth, federal agencies or local governments who have requested permission to speak shall proceed next, followed by those persons who have submitted requests to comment. Other persons who wish to speak may then proceed at the discretion of the Presiding Officer. The Presiding Officer shall have the right to limit the length of time of each presentation.

The Presiding Officer may entertain questions from the audience. The Presiding Officer shall have the authority to adjourn the public hearing and to continue it to another date.

A record of the public hearing shall be compiled by having the proceedings recorded by a stenographer or on tape.

12.06: Wetland Boundary Delineation Procedures

Any person having an interest in any affected coastal wetland (hereinafter referred to in 310 CMR 12.06 as the "requesting person") shall have the right to request a wetland boundary delineation in accordance with the procedures set forth below. Such a request may be made at any time subsequent to the Department's giving notice pursuant to 310 CMR 12.03 but not later than 14 days after the close of the public hearing record, unless good cause for the delay in making such a request can be shown to the Department.

(1) On-Site Inspections. The Department shall make available, for the purpose of requesting on-site inspections pursuant to 310CMR 12.06 request forms as shown in 310 CMR 12.22 Appendix A. These forms shall be available at the preliminary informational meeting and public hearing held pursuant to 310 CMR 12.00, and at the Wetlands Restriction Program Section of the Department's offices, during normal business hours, at 1 Winter Street, Boston, Massachusetts 02108.

12.06: continued

Completed request forms shall be sent to the Department at the above address. No form shall be deemed to be received unless properly completed, and improperly completed forms shall be returned.

The requesting person shall also contact the Department to arrange a time, date and meeting place for the on-site inspection. The location of the inspection shall be at the place or places specified on the request form.

The Department's representative shall meet with the requesting person at the agreed upon time, date and place.

The Department's representative shall indicate the location of the coastal wetland boundary on the site. The Department may, through its representative, conduct the on-site inspection without the requesting person, if the Department, prior thereto, has secured permission to do so from the requesting person.

The Department may answer any questions posed by the requesting person concerning the designation of the site inspected as land affected by an Order.

(2) Delineation of Coastal Wetlands on Assessor's Maps. The Department, if requested, shall send the requesting person a tracing or copy of the applicable portion of the assessor's map or maps indicating the location of the boundary of the affected coastal wetland in relation to the requesting person's land.

(3) Delineation of Coastal Wetlands on Plot Plans. The Department, if requested, shall indicate the location of the affected coastal wetland on an individual plot plan submitted by the requesting person to the Department.

12.07: Adoption of Orders

The Commissioner shall adopt Orders, including Amending, Modifying and Repealing Orders. No order shall be adopted until the close of the public hearing record.

12.08: Recording of Orders

The Commissioner, upon the adoption of any Order, including the adoption of any Amending, Modifying or Repealing Order shall record a copy of the Order, together with the plan and list of the assessed owners of land affected by the Order, in the registry of deeds or, if such coastal wetlands are registered, in the registry of the land court. The list of assessed owners shall include a reference to the book and page number in the registry where the deed for the affected parcel is recorded.

12.09: Notice of Orders

The Commissioner shall, following completion of the recording procedures pursuant to 310 CMR 12.08 send by certified mail a copy of the Order and plan to each person having an interest in coastal wetlands who was given notice and to the clerk and board of assessors of each city or town in which the affected coastal wetlands are located.

12.10: Recording in the Public Restriction Tract Index

If any county or district having coastal wetlands affected by an Order has established a Public Restriction Tract Index pursuant to M.G.L. c. 184, § 33, the Commissioner shall request that the Order, or any Amending, Modifying or Repealing Order, be indexed in the Public Restriction Tract Index for that county or district and that reference be made to the Order, list and plan. The Order shall be indexed pursuant to the statutory procedures established under M.G.L. c. 184, § 33 as most recently amended, and pursuant to the rules established by the Register of Deeds for the county or district.

12.11: Amending or Modifying Orders

Prior to adopting any Amending or Modifying Order under M.G.L. c. 130, § 105, the Commissioner shall first give notice as required by, and shall hold a public hearing pursuant to, 310 CMR 12.03 and 12.05. The Commissioner shall also conduct any boundary delineation procedures as required by 310 CMR 12.06.

Any Amending or Modifying Order shall be adopted and recorded in the manner required by 310 CMR 12.07 and 12.08 and a copy of the Amending or Modifying Order and plan shall be sent by certified mail to those assessed owners affected by the Amending or Modifying Order.

12.12: Repeal of Orders

Prior to adopting any Repealing Order under M.G.L. c. 130, § 105, the Commissioner shall first give notice in the manner required by 310 CMR 12.03 and shall hold a public hearing in the manner required by 310 CMR 12.05.

Any Repealing Order shall be adopted and recorded in the manner required by 310 CMR 12.07 and 12.08 and a copy of the Repealing Order and plan shall be sent by certified mail to those persons whose names appear on the list of assessed owners recorded with the Order being repealed.

12.13: Correcting Orders

Any person having an interest in coastal wetlands affected by any Order adopted pursuant to M.G.L. c. 130, § 105, and who has reason to believe that the wetland boundary line of his or her wetland has been incorrectly delineated on the plan which has been included with an Order, may request the Department to have the location of his or her boundary line redrawn on a corrected plan.

Upon receipt of the request, a representative of the Department shall, within 15 days, arrange to conduct an on-site field inspection. If the Department finds that the boundary line is incorrectly delineated, the Commissioner shall record, pursuant to the procedures provided in 310 CMR 12.08 and send to the person requesting the correction, a corrected plan with the new boundary delineated thereon. The Commissioner may also correct any typographical, grammatical or other errors contained in any Order by recording a copy of the corrected Order pursuant to the procedures provided in 310 CMR 12.08 and by sending a copy of the corrected Order to the assessed owner or person having an interest in coastal wetlands affected by the Order.

12.14: Monitoring Procedures

The Commissioner shall periodically examine the coastal wetlands affected by Orders.

In addition, any person who has an interest in any coastal wetland affected by an Order may request the Department of Environmental Protection to conduct a review. Upon receipt of the request, the Department shall conduct on-site inspection. If the Commissioner determines, following examination, that significant change has occurred in any such coastal wetland, the Department shall adopt an Amending, Modifying or Repealing Order or shall correct the Order pursuant to the procedures provided in 310 CMR 12.00.

12.15: Departmental Review of Orders

Any Conservation Commission, Mayor or Board of Selectmen may petition the Department to conduct a review to determine if an Order has been violated. Upon receipt of such a petition, the Department shall conduct an on-site inspection of the area and shall take such corrective measures as are warranted.

12.16: Judicial Review of Orders

Any person having an interest in land affected by any such Order, may within 90 days after receiving notice thereof, petition the Superior Court to determine whether such Order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the Order constitutes the equivalent of a taking without compensation.

If the court finds the Order to be an unreasonable exercise of the police power, and enters a finding that such Order shall not apply to the land of the petitioner, the Commissioner shall cause a copy of such finding to be recorded in the proper registry of deeds or, if the land is registered, in the registry district of the land court.

The Department may, after a finding has been entered that such Order shall not apply to certain land as provided in the preceding paragraph, take the fee or any lesser interest in such land in the name of the Commonwealth by eminent domain under the provisions of M.G.L. c. 79 and hold the same for the purposes set forth in 310 CMR 12.16.

12.17: Public Meetings

The Commissioner may, from time to time, hold public meetings in any municipality in which coastal wetlands are located, for the purpose of describing or explaining the status of the Coastal Wetlands Restriction Program or any other aspect of the Program.

12.18: Effect on Other Orders

All Orders adopted under M.G.L. c. 130, § 105 prior to the effective date of 310 CMR 12.00 shall remain in full force and effect.

12.19: Severability

If any provision of 310 CMR 12.00 is held to be invalid, such invalidity shall not affect any provision of 310 CMR 12.00 not specifically held to be invalid.

REGULATORY AUTHORITY

310 CMR 12.00: M.G.L. c. 21A, §§ 2(2), (5), (7), (9), (10), (11), (13), (15), (20) and (28).

NON-TEXT PAGE