

EOEEA Summary of Draft Regulations 310 CMR 9.00: Waterways

Background: The purpose of the Department of Environmental Protection's (MassDEP or the Department) Waterways Regulations, 310 CMR 9.00, is to protect and promote the public's interest in filled and flowed tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the Public Trust Doctrine. In 1990, MassDEP promulgated these regulations, and the Executive Office of Energy and Environmental Affairs (EEA) promulgated the Municipal Harbor Plan (MHP), Regulations, 301 CMR 23.00, to establish a coordinated program for the administration and licensing of tidelands in the Commonwealth. The Waterways Regulations included criteria for how MassDEP would make licensing decisions and determinations of a proper public purpose for nonwater-dependent uses under M.G.L. c. 91, § 18. The MHP Regulations were promulgated to provide municipalities with a voluntary process to prepare MHPs that, once approved by the Secretary, would "inform and guide state agency actions affecting the implementation of waterway management programs at the local level," and "be of direct assistance to [MassDEP] in making regulatory decisions pursuant to [c. 91] that are responsive to municipal objectives and priorities, harbor-specific conditions, and other local and regional circumstances." 301 CMR 23.01(2). These complementary regulations were designed to facilitate community-based waterfront planning for changes in land use and harbor and watersheet management while preserving and enhancing the public's rights in tidelands.

For thirty years, this process has worked well to serve the public and public interest in tidelands. By combining local and state-level input, the Commonwealth has been able to achieve tremendous benefits for the public through municipal harbor planning and the tailoring of dimensional and use standards to particular locations along the coast. Municipal harbor plans provide the opportunity through offsetting measures to enhance tidelands beyond baseline standards by improving the public realm with consistent and uniform design standards across a planning area, expanding water transportation, encouraging climate resilient design, activating tidelands with community and educational programming, and providing other amenities specific to the goals of the municipality. The legislature has validated this process by not challenging the regulations when submitted for review as required by M.G.L. c. 91, § 18.

However, as a result of litigation brought by the Conservation Law Foundation and a number of individuals (*Armstrong v. Theoharides*, No. 1884CV02132; *Conservation Law Foundation v. Theoharides*, No. 1884CV02144), the Suffolk Superior Court has ruled that the regulations as written are an improper delegation of MassDEP's statutory authority to EEA.

This decision upends the long-standing practice of MassDEP and EEA and could create some uncertainty for numerous existing waterways licenses which relied, in part, on substitute standards established by an approved harbor plan. MassDEP and EEA are

considering an appeal of the Court's ruling. In the event no appeal is sought or if an appeal is unsuccessful, in order to preserve this long-standing effective and valuable planning tool and to ensure the continued validity of these licenses, MassDEP is proposing these draft regulations to ratify and confirm its approval of all existing municipal harbor plans and to confirm the validity of all licenses that were issued in accordance with those plans. Each harbor planning area includes one or more significant commercial or residential development, many worth hundreds of millions of dollars, contributing in a substantial way to the Massachusetts economy and supporting innumerable jobs and small businesses. Maintaining the validity of these licenses, avoiding uncertainty with regard to all manner of title, financing and regulatory compliance, is in the interest of the general welfare of the Commonwealth and its citizens. With respect to each Municipal Harbor Plan referenced in these draft regulations, MassDEP was engaged in the planning process and has already issued a letter concurring with the plan and its substitute standards/amplification provisions. By formalizing that concurrence through the regulatory process, MassDEP could affirm its approval of each existing MHP, including the substitute standards/amplification provisions contained therein and bring the Waterways Regulations into compliance with the Superior Court's ruling.

If an appeal is ultimately successful, no changes to the Waterways Regulations would be required. In that case, the Department may withdraw the proposed revisions depending on the court's ruling and feedback received during the public comment process. It is presently the Department's intent to retain the proposed revisions as draft and not publish them as final until the litigation is fully and finally resolved

Draft Revisions:

The proposed revisions change only those provisions of 310 CMR 9.00 required to maintain the "approved" status of the existing municipal harbor plans and the waterways licenses issued thereunder. These changes are limited to: (i) replacing each reference to a "municipal harbor plan" with a reference to the newly defined term "*Approved Municipal Harbor Plan*" and (ii) defining each of the 16 existing harbor plans as "*Approved Municipal Harbor Plans*".