



Commissioner Martin Suuberg  
Massachusetts Department of Environmental Protection  
1 Winter Street  
Boston, Massachusetts 02108

October 30, 2015

Dear Commissioner Suuberg,

Thank you for the opportunity to comment on Mass DEP's proposed changes to Chapter 91 and other state regulations. Our comments are limited to the proposed changes to Designated Port Areas (DPAs) and Facilities of Public Accommodation (FPAs) within Chapter 91.

Please note that our comments are limited by the fact we only saw summaries of the proposed changes and not the actual regulatory language itself. We take at face value that the intent of these changes are not to undermine the public values supported through DPAs and FPAs.

We understand that the intent of these changes is to provide the additional flexibility to ensure that both FPAs and DPAs are successful. We know of instances where underused or vacant FPAs result in vacant ground floors that neither benefit the general public nor the property owner. With an evolving maritime economy, some flexibility may be needed in allowed uses within DPAs to ensure that they remain economically viable.

That said, such new exemptions must not be overused as they have the potential to profoundly change who benefits from waterfront development projects. In the case of DPAs, we support modifications that increase the viability of Boston's working port, but do not want to see DPAs used for recreational boating at the expense of water-dependent industrial uses. We do not support the de-designation of any DPAs within Boston Harbor (Winthrop through Hull). In the case of FPAs, we do not want to see the balance of public and private benefits shift at the expense of public access and amenities. We urge you to hold a second comment period on any substantive changes before they go into effect so that stakeholders can comment on the actual language itself.

#### **Proposed changes to Designated Port Areas (DPAs)**

The primary regulations addressing DPAs are codified at 301 CMR 25, Waterways regulations (301 CMR 9) and Municipal Harbor Plans regulations (301 CMR 23).

DPAs seek to ensure that water-dependent industrial uses are encouraged in areas that contain three essential components for their success:

- Waterways and developed waterfronts (especially those with deep enough channels to support larger vessels),
- Backlands (the land situated behind these waterways and waterfronts) of supporting industrial facilities and operations, and
- Transportation and public utilities appropriate to service industrial operations.

As an increasing percentage of Boston's waterfront is converted to residential and commercial development, such areas appropriate for water-dependent industrial uses are becoming increasingly rare. Therefore, the "industrialized coast should be preserved to the maximum extent practicable in order to meet the long term, cumulative space needs of the water-dependent industries" (301 CMR 25).

As a result, DPAs are currently restricted to those activities defined in 310 CMR 9.12(2)(b-d), including as examples marine terminals, commercial fishing facilities, marine repair and construction facilities, manufacturing facilities that rely primarily on bulk receipt, or facilities accommodating the shipment of goods by water.

According to the summary provided by Mass DEP, the proposed DPA-related changes to 310 CMR 9, 301 CMR 23 and 301 CMR 25 will:

- clarify the definition of a Boatyard;
- broaden the definition of Supporting DPA Uses;
- strengthen the definition of Temporary Uses;
- add allowable water-dependent industrial uses;
- add clarification to allowed Accessory Uses to a water-dependent industrial use;
- add more specificity to Categorical Restrictions for parking and supporting uses on pile-supported structures over flowed tidelands within a DPA;
- permit maintenance of existing previously authorized recreational boating facilities within a DPA;
- permit recreational berths authorized in connection with a Boatyard; and provide for more flexibility in the standards for Boatyards in a DPA

Because DPAs are specifically designed to prevent further depletion of the waterfront resources essential to the working port, TBHA supports these changes only to the extent that they have a neutral to positive impact on the water-dependent industries using a given DPA. Any changes to the DPA regulations should require that these new exemptions show that they will not harm water-dependent industrial uses. If it is subsequently shown that the new uses do undermine working port uses of DPAs, such activities should be required to cease.

#### **Proposed changes to Facilities of Public Accommodation (FPAs)**

FPAs (310 CMR 9.02) are defined as a facilities whose use is open on essentially equal terms to the public at large, rather than restricted to a group of specified individuals. They do not have to be water-dependent. Examples include restaurants, cultural institutions, lodging, theaters, community rooms, indoor or outdoor sports facilities, walkways and parks, retail or service facilities, public transportation facilities, transient marina berths and public roads and parking.

Section 310 CMR 9.53(2)(c) requires that projects with buildings with nonwater-dependent facilities of private tenancy devote interior, ground-floor, non-parking space to FPAs, especially those 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."

FPAs must be at least the same size as the footprint of buildings containing nonwater-dependent facilities of private tenancy built on Commonwealth tidelands. Currently, there are only three exceptions to this requirement:

- If the project conforms to an approved municipal harbor plan which “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;”
- If Mass DEP determines that an “alternative location would more effectively promote public use and enjoyment of the project site;” or
- If Mass DEP determines that an alternative location is “appropriate to make ground level space available for water-dependent use or upper floor accessory services.”

According to the summary provided by Mass DEP, the proposed FPA-related changes to 310 CMR 9 will:

- create “Facilities of Limited Accommodation” as an option where Facilities of Public Accommodation would otherwise be required, to provide property owners with flexibility to site businesses that are open to the public by appointment, in exchange for funding programs that enhance public access and enjoyment of the waterfront.
- where only a portion of a building is subject to c. 91 jurisdiction, allow property owners to relocate FPA or FLA within the footprint of the building to an alternative location that will more efficiently promote public use and enjoyment.

Because FPAs are specifically designed to “enhance the destination value of the waterfront,” we are concerned about the possibility that these changes could be substantially overused, to the detriment of waterfront residents and visitors. TBHA supports these changes only to the extent that they have a neutral to positive impact on public use and enjoyment of projects that currently require ground floor FPAs and that the context in which these exemptions can be used be clearly and narrowly defined.

The existing exceptions to FPA regulations are narrowly circumscribed, and allowed only to the extent that they enhance the public value of the project. These proposed exceptions similarly should be narrowly circumscribed and only allowed if they can be shown to enhance public use and enjoyment on the project site itself. If program funding stops—or external conditions change that increase visitation to the property to the extent that FPAs would be regularly used—property owners should be required to once again provide ground floor FPAs, not FLAs. We believe that the continued validity of FLAs should be revisited every three to five years to determine whether they are still warranted at a given site.

Thank you again for the opportunity to comment. Feel free to contact me with any questions or concerns.

Sincerely,



Julie Wormser  
Executive Director