

Amended EOEEA Regulation Summary Water Quality Certification Regulations

As part of MassDEP's Regulatory Reform Initiative, MassDEP has finalized changes to the 401 Water Quality Certification regulations at 314 CMR 9.00. These rules establish procedures and standards for issuing state certifications under Section 401 of the federal Clean Water Act for dredge and fill activities requiring a federal permit. Changes proposed for the 401 Water Quality Certification regulations were proposed with interrelated revisions to the Wetlands regulations (310 CMR 10.00) and the Waterways regulations (310 CMR 9.00). The final 401 Water Quality Certification rules will:

- create a combined permit application and the potential for a combined wetlands, waterways and 401 water quality certification permit;
- create an exemption for some ecological restoration projects;
- create an exemption for some short-term piloting of innovative technologies permitted under the Wetlands regulations;
- allow for improvement dredging for navigation channels within an ACEC with an approved Resource Management Plan; and
- eliminate the need for a variance for certain public water supply improvement projects and ecological restoration projects.

The public comment period for the proposed changes began on March 1, 2013 and concluded at the end of May 2013. **The final changes are described below in detail by topic.**

1. Combined Applications and Combined Permits.

MassDEP's draft proposed rules included the development of a common permit application for coastal dredging projects under the Wetlands Protection Act, Chapter 91 and the 401 Water Quality Certification regulations. The combined application will simplify the permit application process, eliminate redundancy, and create a more efficient permitting process, without relaxing environmental protection. The revisions necessary to implement combined permitting include changes at 314 CMR 9.02, 9.09, 9.10, 9.11 and 9.13. When reviewing a combined application, MassDEP will apply the same regulatory standards that it would apply if the applicant had submitted a separate application under each program.

The rules will allow a project applicant to file a Combined Application and receive a Combined Permit from MassDEP for as many as three separate permits. In many circumstances, MassDEP may issue a Combined Permit only under Chapter 91 and the 401 Water Quality Certification regulations, because the revisions preserve the authority of conservation commissions to approve projects under the Wetlands Protection Act. If a Superseding Order of Conditions is requested, MassDEP may issue a Combined Permit for all three. Requests for adjudicatory review (appeals) of Combined Permits will be required to meet all the standards, procedures and prerequisites for appeals of each individual approval. In keeping with current practice, appeals will be limited to issues germane to the statutory interests of each statute and to the comments filed by the appellant during the public comment period.

Both the Technical Advisory Committee and the stakeholder group convened for regulatory reform supported this proposal.

Public Comments and MassDEP Response. Public comments were uniformly supportive. Some commenters asked for clarifying details on how combined permitting would work. MassDEP determined that no further changes were necessary, but will conduct training on combined permitting following the promulgation of the regulations. **As such, no changes were made to these rules following the public hearing, therefore, these regulations are consistent with the draft package previously authorized.**

2. Ecological Restoration Projects.

As part of its Regulatory Reform Initiative, MassDEP staff worked with the Department of Fish & Game (DFG) and other stakeholders to make permitting for pro-active restoration projects less complex and more efficient. The result is final regulatory changes to the Wetlands regulations (310 CMR 10.00) that create a general permit called a Restoration Order of Conditions (ROC) for qualifying restoration projects. These 401 Water Quality Certification regulations were amended to include an exemption from the requirement to file a Water Quality Certification application for certain projects that receive a ROC (314 CMR 9.03(8)).

Stream Crossing Standards. In 2006, the River and Stream Continuity Partnership published the guidance document entitled, “Massachusetts River and Stream Crossing Standards.” The purpose of the guidance document is to establish standards that ensure that stream crossings do not interfere with the passage of fish and wildlife or cause flooding. The revisions to the Wetlands Regulations and the 401 Water Quality Certification Regulations (314 CMR 9.06(2)(b) and 314 CMR 9.07(1)(a)) incorporate the Stream Crossing Standards into the regulations.

Public Comments and MassDEP Response. The most significant concern expressed related to the re-use and disposal of contaminated dredged sediment in ACECs for ecological restoration projects. An additional comment supported the changes allowing improvement dredging where historic navigation is being adversely affected by changing sedimentation patterns (for example in the Pleasant Bay ACEC). See footnote 1. **The final regulations include applicable standards for reuse and disposal of contaminated dredged sediments in 314 CMR 9.07, and rely on the standards in the Massachusetts Contingency Plan (MCP), 310 CMR 40.0000.** The final regulations do not permit the placement of contaminated sediments with concentrations above the MCP standards in an ACEC. In general, comments were very supportive of streamlining the permitting process for ecological restoration projects. **No significant changes were made to this final regulation following the public hearing. Therefore, these regulations are consistent with the draft package previously authorized.**

3. Pilot or Test Projects.

These regulatory changes will facilitate the review and permitting of test projects for qualifying innovative water-dependent technology, including new renewable energy technologies, in areas subject to 401 Water Quality Certification requirements.

Public Comments and MassDEP Response. **No significant changes were made to these provisions, and these regulations are consistent with the draft package previously authorized.**

4. Additional Revisions.

After the Final Action Plan for Regulatory Reform was released on March 5, 2012, MassDEP continued to work with stakeholders to identify further promising reform opportunities. MassDEP is finalizing the following two revisions to these regulations in addition to the regulatory reforms set forth in the Commissioner's Final Action Plan:

- a. Improvement Dredging within Areas of Critical Environmental Concern (ACECs). Revisions to the 401 Water Quality Certification regulations at 314 CMR 9.06(3)(k)2. and 9.07(1)(k)5.b. are being made to allow for limited improvement dredging within ACECs. Such projects must be undertaken in conformance with a Resource Management Plan (RMP) adopted by the municipality(ies) within the ACEC and approved by the Secretary of the Executive Office of Energy and Environmental Affairs.¹

Public comments were received both in support and against the proposed change.

- b. Variances for discharging fill to ORWs. Revisions are being made to eliminate the need for a variance for certain public water supply improvement projects, ecological restoration projects, and infrastructure projects that propose to discharge fill to certain Outstanding Resource Waters (ORWs). The current regulations provide exceptions to the rule prohibiting the discharge of fill to an ORW for water supply improvement projects, but a variance is still required to accomplish the project because of the administrative requirements of the existing regulations. This change allows for projects which are permissible to be done in a more administratively efficient manner. The purpose of allowing Ecological Restoration Projects to discharge fill to an ORW is for the express purpose of improving this highly valued resource. I thought we eliminated this reg reform because OGC advised it could not be done without also amending the WQ Standards.

Only one public comment was received on this issue objecting to the allowance of such work without a variance review. The changes being finalized will streamline the approval process without compromising environmental protection, so **no significant changes were made to these provisions.**

¹ An application of this final rule will present itself in the near future for the Secretary's approval. The Pleasant Bay Alliance and the four affected municipalities have obtained Town Meeting votes approving necessary changes in the Pleasant Bay ACEC Resource Management Plan (RMP), and have filed a written request with the Secretary of EOEEA for approval of the amendments to the RMP.