

WETLANDS AND WATERWAYS REGULATORY REFORM PROPOSALS

WATER RESOURCES COMMISSION: NOVEMBER 8, 2012

GENERAL LICENSE FOR SMALL DOCKS AND PIERS: 310 CMR 9.00, WATERWAYS

The Waterways regulations at 310 CMR 9.00 protect and promote the public's interest in tidelands, Great Ponds and non-tidal rivers and streams. Procedures and performance standards are established for processing applications for a waterways license or permit issued by the Department under M.G.L. c. 91 in a consistent and timely manner.

The legislature amended M.G.L. Chapter 91 in 2011 by inserting a new section 18C that allows MassDEP to create a General License for non-commercial water-dependent small-scale docks, piers and similar structures that are accessory to a residential use. The General License will allow large numbers of these small structures to be authorized under M.G.L. Chapter 91 with a new certification procedure to ensure the protection and preservation of the public rights in tidelands. As part of MassDEP's Action Plan for Regulatory Reform, this certification process is a regulatory streamlining and efficiency measure that will reduce time spent by applicants and the Department by eliminating individual state technical review and the requirement for the Governor to sign individual licenses for small-scale, noncommercial structures. MassDEP is proposing a new section, 310 CMR 9.29, along with minor changes to 310 CMR 9.05 to provide references to the new General License and its certification process.

The General License will have a public comment period and appeal rights, and will be issued as a final license under the signature of the Governor. MassDEP will record the General License in all Registry of Deeds in the Commonwealth. A draft General License is included in this regulatory package, and will be issued under these established licensing procedures. An individual project proponent may submit a Certification to MassDEP that a particular project is eligible for coverage under the General License, after opportunity for local input from the Planning Board and local zoning officials. If the Planning Board objects to the project, the statute provides that MassDEP must deny General License coverage and require an individual license. If the Planning Board does not object, the proponent must certify that the project is eligible for the General License, will be designed and maintained in accordance with the specific conditions of the General License, and will comply with its terms and conditions. After DEP acknowledges the Certification, the applicant will record it in the appropriate Registry of Deeds. Opportunity for local input will be assured by the requirements for public notice of General License coverage and notification to municipal officials, including the local planning board and local zoning authority.

Also included in this regulatory package are amendments to the section on effective dates and severability that are relevant to implementing the General License Certification process (at 310 CMR 9.09) as well as to additional small changes throughout the regulations (found at 310 CMR 9.10(3)(f), 310 CMR 9.10(4), and 310 CMR 9.16).

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**REVIEW SCHEDULE FOR JOINT CHAPTER 91: MEPA EIR APPLICATIONS: 310 CMR
9.00**

As part of MassDEP's Final Action Plan on Regulatory Reform, this proposed regulatory modification streamlines the application review timeline for large projects that are subject to review under both the Massachusetts Environmental Policy Act (MEPA) and under MGL c. 91 (Waterways) described at 310 CMR 9.11(2)(b)(4) and the elimination of the Summary Table of Application Review Schedules at 310 CMR 9.11. The proposed regulatory revisions will allow the MassDEP Waterways Program to begin reviewing an application prior to receipt of the Secretary's Final Certificate in the MEPA process, saving 25 application review days. The regulations also clarify that a Wetlands Protection Act Order of Conditions is not needed until final licensing (310 CMR 9.11(3)(b)(4) and 9.11(3)(c)(3)(a)), and clarifies the timeframe within which a public hearing must be held (310 CMR 9.13(3)(e)). The objective of these changes is to expedite the licensing process for those large projects subject to MEPA review when the proponent chooses this simultaneous permitting pathway, and allows coordination of the Chapter 91 licensing process with the issuance of the MEPA Certificate. The changes will shorten a complex permitting pathway to the benefit of developers and proponents of large development projects in public waterfront or tidelands jurisdiction and allows MassDEP to begin the application review sooner.

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BUFFER ZONE MINOR ACTIVITY EXEMPTIONS: WETLANDS: 310 CMR 10.00

The wetlands regulations at 310 CMR 10.00 establish procedures and standards for orders of conditions issued by local conservation commissions and the MassDEP for work proposed in and around wetlands, pursuant to the Wetlands Protection Act, M.G.L. c. 131, § 40.

As part of MassDEP's Final Action Plan for Regulatory Reform, the proposed changes will exempt from the filing requirements under the Wetlands Protection Act certain minor activities related to highway safety operation and maintenance work and utility installation and maintenance work proposed solely in the buffer zone of wetland resource areas. These exempt activities will be added to the existing list of minor exemptions located in the wetlands regulations at 310 CMR 10.02(2)(b). The changes will also provide standards for the specified types of utility maintenance and roadwork that qualify as exempt minor activities and allow for uniform implementation and oversight of these routine activities. In addition, these minor activities will facilitate the Commonwealth's efforts in the aftermath of severe weather events to clear roadways and restore utility services, speeding emergency response and recovery. The new exemptions will reduce permitting time and paperwork for the Massachusetts Department of Transportation (MassDOT), utility companies, conservation commissions and MassDEP, while providing sufficient protections to preserve environmental protection standards.

The new regulatory provisions will replace 310 CMR 10.02(2)(b) which includes a sub-section of the regulations commonly referred to as "Simplified Review," located at 310 CMR 10.02(2)(b)2. The Simplified Review section was MassDEP's previous effort to create expedited permitting within the buffer zone for projects which met the eligibility criteria. That section of the regulations sunset in 2008, pursuant to 310 CMR 10.10(12).

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LIMITED PROJECT FOR RENEWABLE ENERGY ACCESS: WETLANDS: 310 CMR 10.00

As part of its Final Action Plan for Regulatory Reform, MassDEP is proposing regulatory changes to facilitate and streamline the review and permitting of access roadways for the development of renewable energy projects in areas subject to the Wetlands Protection Act. The proposed regulatory amendments to 310 CMR 10.00 include the addition of two new limited project sections: 310 CMR 10.24(7)(c)7 for work in certain coastal wetlands, and 310 CMR 10.53(3)(t) for work in inland wetlands. "Limited projects" refer to the class of coastal projects (described at 310 CMR 10.24(7)(c)) and inland projects (described at 310 CMR 10.53(3)), that are deemed to promote the public interest or serve a public benefit. Such projects may be permitted at the discretion of the issuing authority, after considering the magnitude of the alteration, the availability of reasonable alternatives, the extent to which adverse impacts are minimized, and the extent to which mitigation measures (e.g. replication or restoration) are provided.

The proposed regulations allow for variation from general wetlands protection performance standards for the construction of a new access roadway, or the repair and replacement of an existing access roadway, needed to transport equipment to renewable energy project sites through inland resource areas and for the following coastal resource areas: land subject to coastal storm flowage outside the velocity zone, designated port areas and fish runs. Notwithstanding the provisions of 310 CMR 10.25 through 10.35, the Wetlands performance standards for coastal resource areas and 310 CMR 10.54 through 10.58 and 10.60, the Wetlands performance standards for inland resource areas, such limited projects may be permitted if designed and constructed in a manner that avoids, minimizes and mitigates adverse impacts to resource areas and complies with the specified conditions, to the maximum extent practicable. For instance, erosion and sedimentation controls are required to conform to the Massachusetts Erosion and Sediment Control Guidelines (a citation for the Guidelines is specifically included as a new definition in 310 CMR 10.04 of the amended regulations). The streamlined process established by this regulatory revision is consistent with the Commonwealth's priority of promoting and developing renewable energy technologies. It will benefit the environment by facilitating the installation and construction of renewable energy projects that will improve air quality, reduce greenhouse gases and boost the green economy, while reducing MassDEP permitting time.

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PERMITTING OF TEST PROJECTS: WATERWAYS: 310 CMR 9.00, WETLANDS: 310 CMR 10.00, AND WATER QUALITY CERTIFICATION: 314 CMR 9.00.

As part of MassDEP's Final Action Plan for Regulatory Reform, 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 Wetlands Protection Act permitting, Chapter 91 licensing, and 401 Water Quality Certification requirements. The proposed changes to these three sets of regulations will provide for a streamlined permitting process for the short-term testing of innovative technology in wetlands and waterways.

The changes proposed will provide a clear and simplified permitting pathway for short-term tests of innovative technology in jurisdictional areas. Presently, none of the regulations at 310 CMR 9.00, 310 CMR 10.00, or 314 CMR 9.00 provide any provisions for the testing of new technology, including the short-term placement of temporary installations. Such projects must be permitted through standard permitting procedures, which include documenting the anticipated impacts of the project and demonstrating that the project will comply with the performance standards established for all structures. These proposed regulations acknowledge that the necessary data may not exist for a proponent to demonstrate that a new technology will comply with performance standards. Rather than requiring all required data regarding the impacts of a new technology in the application, permitting authorities will rely to a great extent on results of monitoring impacts of the new technology during the test. Modification or cessation of activity may be required by the permitting authority if monitoring indicates that the new technology has unforeseen impacts. The proposed regulations also provide that before the permit expires, the permittee shall remove the innovative technology and restore the test site to pre-test conditions after removal.

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EXEMPTIONS FOR REGULATED “RESOURCES” CREATED BY STORMWATER MANAGEMENT STRUCTURES: WETLANDS: 310 CMR 10.00

This proposed regulatory reform is part of MassDEP’s Final Action Plan for Regulatory Reform, dated March 5, 2012. The Wetlands Protection Act and the Wetlands Regulations require pre-construction review of activities that take place within a wetland resource area or the Buffer Zone to a resource area. In some instances, stormwater management systems take on the soil and/or plant characteristics of a resource area and thus over time have the potential to create additional wetland resource area and Buffer Zone. In that event, additional areas could become subject to the pre-construction review requirement of the Wetlands Protection Act. The proposed regulatory changes to 310 CMR 10.02 (Statement of Jurisdiction) will prevent the expansion of Wetlands Protection Act jurisdiction, lessen the regulatory burden on developers, and therefore streamline the development process without reducing environmental protection.

On January 2, 2008, the Department of Environmental Protection (the Department or MassDEP) amended the Wetland Regulations to incorporate the Stormwater Management Standards-standards first articulated in the Stormwater Policy, published by the Department on November 18, 1996. The 2008 amendments make it clear that the construction of a stormwater management system in accordance with the Stormwater Management Standards is not intended to expand the geographical jurisdiction of the Wetlands Protection Act. To this end, the 2008 amendments specifically provide that the construction, operation and maintenance of a stormwater management system designed, constructed and installed after January 2, 2008, the date the regulatory amendment took effect, does not create an additional resource area or Buffer Zone provided that the system complies with the Wetlands Regulations to the extent they are applicable.

The proposed regulatory revision expands this provision, found at 310 CMR 10.02(2)-(4), in two ways. First, the proposed revisions provides that stormwater management systems designed, constructed, and installed after November 18, 1996, the date the Stormwater Policy took effect, do not create resource area or Buffer Zone. Second, the proposed revision expands this provision to include stormwater systems that were improved after November 1996 provided that the improvement complies with the Wetlands Regulations, if applicable.