

302 CMR 5.00: OCEAN SANCTUARIES

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5:01: Authority

302 CMR 5.00 is promulgated by the Department of Environmental Management pursuant to M.G.L. c. 21A, §§ 2(2), (5), (9), (10), (11), (13), (15), (16) and (28) in order to carry out the provisions of M.G.L. c. 132A, §§ 13 through 16 and 18, the Ocean Sanctuaries Act.

5.02: Purpose

- (1) 302 CMR 5.00 is promulgated in order to
 - (a) define and explain the language of M.G.L. c.132A, §§ 13 through 16 and 18.
 - (b) set out the procedural means by which the Department will exercise its responsibilities under M.G.L. c. 132A §§ 13 through 16 and 18
 - (c) explain the responsibilities of other state agencies under M.G.L. c. 132A, §§ through 16 and 18, and
 - (d) detail how the Department intends to ensure the inter-agency cooperation mandated by M.G.L. c. 132A, § 18.
- (2) It is the intent of the Department that 302 CMR 5.00 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 by 301 CMR 20.00 issued pursuant to M.G.L. c. 21A and entitled "Establishment of the Coastal Zone Management Program by the Executive Office of Environmental Affairs". 301 CMR 20.00 establish the CZM policies, which are part of the CZM Program, as state environmental policy, and the Department shall carry them out in accordance with M.G.L. c. 21A, § 2. See 302 CMR 5.05(2) for a statement of those policies as they relate to M.G.L. c. 132A, §§ 13 through 16 and 18. Furthermore, the Department shall interpret its statutory authorities and implement its administrative procedures, policies and actions so as to be consistent with the CZM Program, except when
 - (a) to do so would require an action impermissible at law, or
 - (b) the Secretary, pursuant to the conflict resolution procedures of M. G. L. c. 21A, § 4 and of 301 CMR 20.00, has resolved any conflict and has determined that the CZM policies should or should not apply. 302 CMR 5.00, however, is adopted independently under M.G.L. c. 130, §§ 13 through 16 and 18 and would remain in full force and effect in the absence of the CZM Program or the 301 CMR 20.00.
- (3) In accordance with M.G.L. c. 130, § 18, 302 CMR 5.00 does not require any permits other than those already required by law, but they do explain the responsibilities of other state agencies to make their policies, permits, licenses or any other action conform to M.G.L. c. 132A, § 18 requires.

5.03: Jurisdiction

304 CMR 5.00 shall be effective on July 14, 1978 in the five ocean sanctuaries defined in M.G.L. c. 132A, § 13(a) through (e).

5.04: Definitions

Agency means any board, body, commission, corps, council, department, division, office or administrative unit, however labeled, and any authority of any political subdivision which is specifically created as an authority under special or general law.

Cape Cod National Seashore means the area defined in Section 1 (a) of P. L. 87-126, 75 Stat. 284.

Care and control means management and shall have the same meaning as the phrase "general care and oversight" in M.G.L. c. 21, § 1, which provides that the Department shall have general responsibility for the "general care and oversight of the environmental management of the Commonwealth and of its adjacent waters" and that the Department has a mandate "to propose and carry out measures for the protection, conservation, control, use, increase and development thereof." "Care and control" shall also mean trusteeship in the sense of fiduciary protection. See 302 CMR 5.09 for a description of how the Department intends to exercise its "care and control" responsibility.

Commercial or industrial wastes means any useless, unwanted, discarded or environmentally harmful solid, liquid or gaseous materials resulting from commercial or industrial activities, including, but not limited to, garbage, rubbish, thermal discharges and sewage.

Department means the Department of Environmental Management, which is located on the 19th floor of 100 Cambridge Street, Boston 02202, telephone (617) 727-3163.

Extension of the lateral boundary of New Hampshire and Massachusetts means the lateral seaward boundary between the two states that is established a by interstate compact, agreement, judicial decision, or as otherwise provided by law.

Extension of the lateral boundary of Rhode Island and Massachusetts means the lateral seaward boundary between the two states that is established by interstate compact, agreement, judicial decision, or as otherwise provided by law.

Marine boundary map means the Marine boundary map of the Commonwealth prepared pursuant to St. 1970 M.G.L. c. 810 and St. 1971 M.G.L. c. 1035 by the Department of Public Works, Division of Waterways, dated December 1971.

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. For the inland boundaries of the ocean sanctuaries, see the official maps of the ocean sanctuaries that are available for inspection at the office of the Ocean Sanctuaries Coordinator in the Department.

Miles means nautical miles.

Offshore means seaward of the mean low water line.

Only feasible alternative means that, other than the proposed discharge, there is no method of solving the particular water pollution problem, including land application, that:

- (a) will be approved by the appropriate federal and state agencies;
- (b) is consistent with the intention and purposes of the Act; and
- (c) is of equal or greater effectiveness in avoiding degradation of the water quality of the affected ocean sanctuary.

5.04: continued

Public necessity and convenience means necessary to the public interest. This standard shall be administered by the applicable state agency otherwise involved in approving the project, subject to the general oversight function of the Department described in 302 CMR 5.09. In applying this standard the applicable state agency shall consider the following factors: the financial and/or technical ability of the person proposing the project to build and maintain the project properly; whether the facility or use, if any, existing at the time the agency approval is requested is inadequate; whether either the public, which may be represented by several individuals or a representative group, demonstrates a need for the facility or use or that appropriate state or local public officials deem the facility or use necessary for the public's safety or welfare; whether the proposed facility or use will serve the public interest; whether the proposed facility or use will seriously alter or otherwise endanger the ecology or appearance of the ocean, the seabed or subsoil thereof, or the Cape Cod National Seashore; and the extent to which existing uses or facilities will be affected by the proposed facility or use. In all cases the agency shall act pursuant to the statutory policy expressed in M.G.L. c. 132A, § 14 and shall consider 302 CMR 5.00 and any determinations made by the Commissioner in determining whether the public necessity and convenience standard has been met.

Refuse means any useless unwanted, discarded or environmentally harmful solid material, whether combustible or non-combustible, and including, but not limited to, garbage, rubbish or sludge resulting from any activity.

Seriously alter includes, but is not limited to, one or more of the following actions:

- (a) removing, excavating, or dredging any soil, sand, gravel, or other minerals or aggregate material of any kind in any significant amounts;
- (b) changing drainage or flushing characteristics, salinity distribution, sedimentation or flow patterns, flood storage areas or the water table, to more than a negligible extent;
- (c) dumping, discharging, or filling with any material of any kind that could significantly degrade water quality;
- (d) driving pilings or erecting buildings, structures or obstructions of any kind of any significant size or quantity, whether or not they interfere with the flow of water;
- (e) destroying or adversely affecting in more than a negligible way any plant or animal life, including shellfish and fisheries;
- (f) changing the temperature, biochemical oxygen demand (BOD) or other natural characteristics of the water so that there is a more than negligible adverse effect on the marine environment;
- (g) significantly increasing the development of already developed areas;
- (h) developing any previously undeveloped or natural areas.

Solid waste material has the same meaning as refuse.

Sound conservation practices means practices designed to maintain, increase or restore existing finfish or shellfish stocks by the management of resources.

Structure means any man-made object of any kind that is not temporarily fixed to the seabed, or temporarily moored in the waters above. (See 302 CMR 5.05(2) regarding additional definitions.)

5.05: Environmental Policies

(1) Insofar as they relate to the responsibility of the Department to protect the ocean sanctuaries from any exploitation, development or activity that would seriously alter or otherwise endanger their ecology or appearance, or the Cape Cod National Seashore, the environmental policy of the Department shall include, but not be limited to, the following policies:

5.05: continued

- (a) Protecting ecologically significant resource areas (salt marshes, shellfish beds, dunes, beaches, barrier beaches, and salt ponds) for their contribution to marine productivity and value as natural habitats and storm buffers. (CZM Policy No. 1).
- (b) Protecting complexes of marine resource areas of unique productivity (Areas for Preservation or Restoration (APRs)/ Areas of Critical Environmental Concern (ACEC's); ensuring that activities in or impacting such complexes allowed by 302 CMR 5.08(1) through (9) are designed and carried out to minimize adverse effects on marine productivity, habitat values, water quality and storm buffering of the entire complex. (CZM Policy No. 2).
- (c) Supporting the attainment of the national water quality goals for all waters within the ocean sanctuaries through coordination with existing water quality planning and management activities; ensuring that all activities in the ocean sanctuaries allowed by 302 CMR 5.08(1) through (9) are consistent with federal and state effluent limitations and water quality standards. (CZM Policy No. 3).
- (d) Ensuring that construction in the ocean sanctuaries allowed by 302 CMR 5.08(1) through (9) is conditioned so as to minimize interference with water circulation and sediment transport and to preserve water quality and marine productivity; ensuring that flood or erosion control projects allowed by 302 CMR 5.08(1) through (9) are issued permits only after it has been determined by the permitting agency that there will be no significant adverse effects on the project site or adjacent or down coast areas. (CZM Policy No. 4).
- (e) Ensuring that dredging and disposal of dredged material allowed by 302 CMR 5.08(1) through (9) minimize adverse effects on water quality, physical processes, marine productivity and public health. (CZM Policy No. 5).
- (f) Accommodating off-shore sand and gravel mining needs allowed by 302 CMR 5.08(1) through (9) in areas and in ways that will not adversely affect resources and navigation. (CZM Policy No. 6).
- (g) Encouraging the location of maritime commerce and development allowed by 302 CMR 5.08(1) through (9) in segments of urban waterfronts designated as port areas by the Division of Waterways and preventing the exclusion of maritime dependent industrial uses within those areas that require the use of lands subject to tidelands licenses. (CZM Policy No. 7).
- (h) Accommodating the exploration, development and production of off-shore oil and gas resources while ensuring that any agency issuing a permit for any such activity allowed by 302 CMR 5.08(1) through (9) requires such exploration, development or production to minimize impacts on the environment, especially with respect to fisheries, water quality and wildlife and on the recreational values of the coast, and to minimize conflicts with other maritime-dependent uses of coastal waters or lands; encouraging maritime-dependent facilities serving supply, support or transfer functions to locate in existing developed ports. (CZM Policy No. 9a).
- (i) Ensuring that any agency issuing a permit for any development in an ocean sanctuary allowed by 302 CMR 5.08(1) through (9) in or near a designated or registered historic district or site within any ocean sanctuary requires such development to respect the preservation intent of such areas and to minimize adverse impacts. (CZM Policy No. 12).
- (j) Ensuring that any agency issuing a permit for and development in an ocean sanctuary allowed by 302 CMR 5.08(1) through (9) near a public recreation site within any ocean sanctuary requires such development to minimize adverse impacts. (CZM Policy No. 13).
- (k) Ensuring that state and federally funded public works projects proposed in any ocean sanctuary and allowed by 302 CMR 5.08(1) through (9) shall:
 1. not exacerbate existing hazards or damage natural buffers,
 2. be reasonably safe from flood and erosion related damage, and
 3. not promote growth and development in damage prone or buffer areas, especially in undeveloped areas of critical environmental concern. (CZM Policy No. 15).
- (l) Emphasizing for federally or state-funded activities allowed by 302 CMR 5.08(1) through (9) the use of non-structural measures for protection from tidal flooding and erosion when feasible. (CZM Policy No.17).

5.05: continued

(m) Promoting the widest possible public benefit from channel dredging allowed by 302 CMR 5.08(1) through (9); ensuring that designated ports and developed harbors are given highest priority in the allocation of federal and state dredging funds; ensuring that this dredging is consistent with marine environment policies. (CZM Policy No. 19).

(n) Increasing the capacity of existing recreation areas by facilitating multiple use and by improving management, maintenance and public support facilities to the extent permitted by 302 CMR 5.08(1) through (9); resolving conflicting uses whenever possible through improved management rather than through exclusion of uses. (CZM Policy No. 22).

(o) Expanding existing recreation facilities to the extent permitted by 302 CMR 5.08(1) through (9) and acquiring and developing new public areas for coastal recreational activities; giving highest priority to expansions or new acquisitions in regions of high need or where site availability is now limited; assuring that both transportation access and the recreational facilities are compatible with social and environmental characteristics of surrounding communities. (CZM Policy No. 24).

(p) Ensuring that state and federally funded transportation and wastewater projects permitted by 302 CMR 5.08(1) through (9) primarily serve existing developed areas; assigning highest priority to projects which meet the needs of urban and community development centers. (CZM Policy No. 26).

(2) The Department hereby adopts and incorporates in 302 CMR 5.05 the following definitions contained in the 301 CMR 20.00: "coastal zone," "salt marshes," "barrier beach system," "port area," "salt marsh," "salt pond," "shellfish bed," "dune," "beach" and "area of critical environmental concern."

(3) The Department hereby adopts and incorporates in 302 CMR 5.00 the Policy Appendix described in 301 CMR 20.05(4) of the 301 CMR 20.00 to the extent that the Policy Appendix applies to the policies set out in 302 CMR 5.05(1).

5.06: Miscellaneous Provisions

(1) Severability. If any provision of 302 CMR 5.00 is held to be invalid by a competent court of law, such invalidity shall not affect the application of any part of 302 CMR 5.00 not specifically held invalid.

(2) Amendments. 302 CMR 5.00 may be amended from time to time by the Department in accordance with the applicable provisions of M.G.L. c. 30A.

(3) Number and Gender. When appropriate words imparting the singular number may extend and be applied to several persons or things, words imparting the masculine gender may include the feminine and neuter, words imparting the feminine gender may include the masculine and neuter and words imparting the neuter gender may include the masculine and feminine.

5.07: Prohibited Activities

(1) In all of the five ocean sanctuaries the following activities are prohibited, except as they may specifically be allowed under 302 CMR 5.08(1) through (9):

(a) the building of any structure on the seabed or under the subsoil;

(b) the construction or operating of off-shore or floating electric generating stations;

(c) the removal of any minerals, such as sand or gravel, and the drilling for oil or gas;

(d) the dumping or discharge of any commercial or industrial wastes;

(e) commercial advertising by any means, including, but not limited to, structures or vessels or boats of any size;

(f) incineration of solid waste material or refuse on or in any vessel or boat of any size. The cooking of food by means of charcoal on any such vessel or boat shall not be considered such incineration.

5.08: Allowed Activities

(1) Except in the Cape Cod Ocean Sanctuary, and provided that all applicable certificates, licenses, permits and approvals required by federal, state or local law have been obtained and provided further that such activities, uses and facilities shall not be undertaken or located except in compliance with any applicable general or special statutes, rules, regulations or order lawfully promulgated, the planning, construction, reconstruction, operation or maintenance of an industrial liquid coolant discharge or intake system and any activity, use or facility associated with the generation, transmission or distribution of electrical power shall be permitted. All such activities shall be prohibited in the Cape Cod Ocean Sanctuary.

(2) With the exception of municipal wastewater treatment facilities and discharges (see 302 CMR 5.08(9)), the operation and maintenance of any municipal, commercial or industrial facility or discharge existing as of the following dates, which are the effective dates of the applicable original ocean sanctuaries acts, shall be allowed so long as such facility or discharge has been approved and licensed by the appropriate federal and state agencies:

Cape Cod Ocean Sanctuary	July 15, 1970
Cape Cod Bay and Cape and Islands Ocean Sanctuaries	December 8, 1971
North Shore Ocean Sanctuary	June 27, 1972
South Essex Ocean Sanctuary	December 30, 1976

No municipal, commercial or industrial facility or discharge built or occurring in any ocean sanctuary after those dates shall be permitted, except as specifically allowed elsewhere in 302 CMR 5.08(1) through (9).

(3) The laying of any electric or telephone cable shall be allowed if approved by the Department of Public Utilities.

(4) Any project authorized under M.G.L. c. 91, including channel and shore protection projects and navigation aids, shall be allowed, but only if it is not otherwise prohibited by 302 CMR 5.00, if it has received all required federal and/or state approvals and if the approving agency also finds that the project is one of public necessity and convenience.

(5) Any improvement to permitted structures or uses that is not specifically prohibited by M.G.L. c. 132A §§ 14, 15, and 18 shall be allowed so long as it does not change or extend such structures or uses and it is otherwise approved by appropriate state and federal agencies. Such an improvement may change or extend such structures or uses if it is specifically permitted by 302 CMR 5.08(1) through (9) and may include maintenance and repairs to such structures or uses. Any such improvements shall be consistent with M.G.L. c. 132A, §§14, 15 and 18.

(6) The harvesting and propagation of all finfish and shellfish may be allowed if the Department and the Department of Fisheries, Wildlife and Recreational Vehicles are satisfied that such activities will be carried out in accordance with sound conservation practices.

(7) Any educational and/or scientific project of a temporary nature may be allowed notwithstanding any restriction of 302 CMR 5.08, if it is otherwise approved by all applicable state agencies.

(8) The extraction of sand and gravel from the seabed and subsoil of any ocean sanctuary shall be allowed if such sand and gravel is to be used for a shore protection or beach restoration project; but such project must be approved by the Department of Environmental Quality Engineering. In the case of a shore protection project, it must, in addition, be found to be of public necessity and convenience by the Department of Environmental Quality Engineering and any other state agency from which a permit is required.

5.08: continued

(9)(a) In the Cape Cod Ocean Sanctuary, the Cape Cod Bay Sanctuary, and the Cape and Island Ocean Sanctuary, no municipal wastewater treatment discharge into the ocean sanctuary shall be allowed.

(b) In the South Essex Ocean Sanctuary, such a discharge shall be allowed only if it is:

1. the only feasible alternative to a water pollution problem;
2. consistent with the intention and purpose of M.G.L. c. 132A, § 13 through 16 and 18; and
3. approved and licensed by the federal and state agencies that have jurisdiction over the facility or discharge at the time it is proposed to be built.

The decision as to whether a proposed discharge is the only feasible alternative shall be made by the Department in consultation with other appropriate state agencies.

(c) In the North Shore Ocean Sanctuary such a discharge shall be allowed only if:

1. all the requirements of 302 CMR 5.08(9)(b) are met;
2. construction of the facility was commenced prior to January 1, 1978 or the municipality proposing such a discharge was awarded a federal or state grant for construction of the facility prior to January 1, 1978;
3. the waste from such a discharge has been treated by the best practical means; and
4. the discharge is in accordance with plans that have been developed under the provisions of M.G.L. c. 21, § 27(10). Such plans are subject to approval of the Division of Water Pollution Control after a public hearing.

5.09: Oversight by the Department

(1) The Responsibility of the Department. In accordance with M.G.L. c. 132A, § 14, the Department shall have the responsibility of exercising the "care and control" of the ocean sanctuaries. Because M.G.L. c. 132A, § 18 that the Department "shall not require any additional permits," the Department shall act as a trustee of the resources of the ocean sanctuaries rather than as a permitting agency for specific activities. In that role as trustee the Department shall ensure that the ocean sanctuaries shall be protected from any exploitation, development, or activity that would seriously alter or otherwise endanger the ecology or the appearance of the ocean, the seabed, or subsoil thereof, or the Cape Cod National Seashore. In carrying out this fiduciary responsibility, the Department shall aggressively seek to restrain any prohibited activity by whatever means it has available, including assistance from the Attorney General pursuant to M.G.L. c. 132A, § 18.

(2) Review by the Department. In carrying out its "care and control" responsibility, the Department shall examine at least annually the permitting procedures and other activities of all other state agencies insofar as they relate to the ocean sanctuaries. Such activities shall include, but not be limited to, the granting of permits or the construction or funding of any project. Such procedures and activities shall be evaluated in terms of whether all reasonable measures have been taken by the agency to permit, condition, or prohibit activities in order to protect the ocean sanctuaries from activity that would seriously alter or otherwise endanger the ecology or the appearance of the ocean, the seabed, or subsoil thereof, or the Cape Cod National Seashore. If the Department finds that such procedures are inadequate for protecting the ocean sanctuaries in accordance with the provisions of M.G.L. c. 132A, §§ 13 through 16 and 18, it shall initiate informal discussions with the licensing or permitting agency in an attempt to reconcile any differences. If the Department finds that such informal discussions fail to reconcile any differences, it shall pursue any other means available to it to resolve the conflict. If the other agency is within the Executive Office of Environmental Affairs (EOEA), the Department shall ask the Secretary of EOEA to resolve the conflict pursuant to M.G.L. c. 21A, § 4(3), if applicable, and applicable regulations. If the agency is not within EOEA, the Department shall act pursuant to M.G.L. c. 30, § 5.

It shall be the responsibility of all state agencies to issue, deny or condition permits or licenses or to conduct their activities consistently with the provisions of M.G.L. c. 132A, § 18. In addition, pursuant to M.G.L. c. 132A, § 18, such agencies shall confer and consult with the Department's Ocean Sanctuaries Coordinator to ensure such consistency. An agency shall consult with the Department's Ocean Sanctuaries Coordinator whenever it has any question about the interpretation of M.G.L. c. 132A, § 13 through 16 and 18 or 302 CMR 5.00, or whether a proposed activity is consistent with M.G.L. c. 132A, §§ 13 through 16 and 18.

5.09: continued

(3) Ocean Sanctuaries Coordinator. The Department shall designate an Ocean Sanctuaries Coordinator who shall be thoroughly familiar with M.G.L. c. 132A, §§ 13 through 16 and 18, 302 CMR 5.00, the CZM Program and the applicable statutes and regulations governing the activities of other state and/or federal agencies in the ocean sanctuaries. The Ocean Sanctuaries Coordinator shall be responsible, under the direction of the Commissioner of the Department, for carrying out the Department's responsibilities under 302 CMR 5.09(1) and 5.09(2). The Ocean Sanctuaries Coordinator may perform or cause to be performed any further studies or site investigations that may be required to determine whether a proposed action is consistent with 302 CMR 132A, §§ 13 through 16 and 18. The Ocean Sanctuaries Coordinator shall consult the Coastal Zone Management Office whenever a question regarding a CZM policy arises. He may consult the applicable regional chapter of the CZM Program and/or contact the applicable regional advisory council for guidance in the application of the CZM policies to the region and to the site.

The Department shall, in appropriate cases, intervene in any adjudicatory hearing relating to an ocean sanctuary.

(4) The Commissioner of the Department may, in consultation with the Ocean Sanctuaries Coordinator or any state or federal agency, make a determination regarding an interpretation of M.G.L. c. 132A, § 18 or their applicability to a particular situation. Such a determination may be distributed to other state agencies when the issue is one of broad public interest. Such determinations shall form a body of administrative decisions for use in applying the provisions of M.G.L. c. 132A, §§ 13 through 16 and 18 and 302 CMR 5.00 consistently, but they shall not be binding on any other agency.

5.10: Variance for Discharge into an Ocean Sanctuary

(1) Purpose 302 CMR 5.10 establishes procedures for granting a variance to increase the volume or change the location of the end point of an existing discharge from a publicly owned treatment works or combined sewer system in compliance with St. 1989, c. 728 as codified in M.G.L. c. 132A, §§ 13 through 16 and 18.

(2) Definitions For purposes of 302 CMR 5.10:

Act, M.G.L. c. 132A, §§ 13 through 16 and 18, the Massachusetts Ocean Sanctuaries Act.

Adopted, the approval of a program or plan by appropriate local municipal government officials.

Adjudicatory Hearing, a hearing conducted pursuant to M.G.L. c. 30A, §§ 9, 10, 10A, 11 and 12.

Advanced Wastewater Treatment, level of treatment which exceeds secondary treatment and which is designed to provide more stringent treatment necessary to limit the discharge of specific pollutants that would cause a violation of water quality standards if only secondary treatment were provided.

Aggrieved Party, any person or entity entitled to a hearing under M.G.L. c. 30A, on the issuance or denial of a variance pursuant to 302 CMR 5.10 and who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 132A, §§ 13 through 16 and 18. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

Applicant, any city, town, district, county, state or federal agency, or authority which has the legal ability to implement alternative forms of wastewater disposal, including land application, and which applies for a variance pursuant to M.G.L. c. 132A, §§ 13 through 16 and 18.

5.10: continued

Average Daily Flow, the average daily volume of discharge from a publicly owned treatment works, calculated on an annual basis, including both dry and wet weather flows and low and high ground water periods.

Coastal Embayment, coastal or marine waters that have a restricted opening to the ocean due at least in part to the formation of a barrier beach. Embayments are identified in the Coastal Zone Management, Atlas of Resources, 1978, with the exception of the Plymouth-Kingston-Duxbury coastal embayment identified in M.G.L. c. 132A, § 16C.

Commissioner, the Commissioner of the Department of Environmental Management.

Coordinator, the person responsible, under the direction of the Commissioner, for carrying out the Department's responsibilities under 302 CMR 5.09(1) and 5.09(2).

Degrade, to lower the water quality, existing at the time of application, of the ocean sanctuary to the extent that applicable water quality standards are violated.

Department, the Department of Environmental Management.

DEP, the Department of Environmental Protection.

Design Capacity, the average daily volume of discharge, calculated on an annual basis, and including both dry and wet weather flows and low and high ground water periods, that a wastewater treatment works was designed to treat as of the effective date of M.G.L. c. 132A, §§ 13 through 16 and 18.

Estuary, a semi-enclosed body of water which has a free connection with the open sea, within which sea water is measurably diluted with fresh water derived from outflowing fresh water rivers. Estuaries are identified in the CZM Atlas of Resources, 1978.

Facilities Plan, a plan approved by DEP which satisfies the planning requirements applicable for financial assistance in accordance with 310 CMR.

Implemented, that the applicant is actively engaged in meeting the requirements identified in a particular plan or program.

Massachusetts Water Supply Policy, the policies articulated in the "Massachusetts Water Supply Policy Statement" dated August 1984, as accepted by the Secretary under the provisions of MEPA, and endorsed by the Water Resources Commission.

MEPA, Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, inclusive.

Only Feasible Alternative, that, other than the proposed discharge, there is no method of solving the particular water pollution problem, including land application, that:

- (a) will be approved by the appropriate federal and state agencies.
- (b) is consistent with the intention and purposes of M.G.L. c. 132A, §§ 13 through 16 and 18; and
- (c) is of equal or greater effectiveness in avoiding degradation of the water quality of the affected ocean sanctuary.

Person, any agency or political subdivision of the federal government or the commonwealth, any state, public or private corporation or authority, individual, trust, firm, joint stock company, partnership, association, or other entity, and any officer, employee or agent of said person, and any group of said persons.

Pretreatment, the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging such pollutants into a publicly owned treatment plant.

5.10: continued

Proposed Discharge, an increase in volume or change in the location of the end point of an existing discharge from a publicly owned treatment works or combined sewer system.

Publicly Owned Treatment Works, (POTW), a sewage or septage treatment plant owned by a public entity. This term replaces "publicly owned treatment plant" as described in M.G.L. c. 132A, §§ 13 through 16 and 18 and is intended to have the same meaning.

Secondary Treatment or equivalent, a treatment process which acts to remove suspended solids and biological oxygen demand through a variety of possible processes, as defined in 40 CFR 1 (7-1-89 Edition) part 133.

Secretary, the Secretary of the Executive Office of Environmental Affairs.

Water Conservation, any planned or managed change in the manner or extent of use or distribution of water which results in a reduction in consumption, evaporation, or transfer without materially affecting or interfering with the attainment of the objective of the use. Water Conservation also means protection of existing and potential water sources by preventing or limiting the pollution of those sources. (313 CMR 2.03).

Water Quality Standards, the standards set forth in 314 CMR 4.00, as may be amended.

(3) Application Procedures.

(a) Pre-Application Conference.

1. An applicant requesting a variance under 302 CMR 5.10 shall meet with the Department to review the variance request and discuss how the applicant will demonstrate compliance with the variance prerequisites under the provisions of M.G.L. c. 132A, §§ 16B through 16F. The conference will be held within 30 days of the applicant's request.
2. While the pre-application review can be concurrent with the facilities planning process and the MEPA process, the project must have received a Final Environmental Impact Report (FEIR) before the applicant submits an application for a variance.
3. The applicant shall prepare the following information for the pre-application conference:
 - a. A description of the proposed discharge, including location(s), average daily flow, and design capacity.
 - b. A description of why the variance is being requested;
 - c. A description of how the applicant proposes to meet each variance prerequisite listed in 302 CMR 5.10(3)(b)4.c., including a list of studies and other information to be submitted with the application.
4. Information required to be submitted for review should be prepared, to the extent possible, as a component of either the EIR required by MEPA, or the Environmental Assessment Report (part of the Facilities Plan) required by DEP. (See 302 CMR 5.10(3)(b)4.e. and f.)
5. Within 30 days of the meeting, the Coordinator will provide a written description of the information that the applicant must submit to fulfill the prerequisites.
6. When the Coordinator has determined that all the prerequisites found in 302 CMR 5.10(3)(b)4.c. have been met he shall directly notify the applicant.

(b) Application for Variance for a Proposed Discharge into an Ocean Sanctuary.

1. Applicants shall submit the application, consisting of both the approved form, and the information requested in 302 CMR 5.10(3)(b)4., to the Ocean Sanctuaries Coordinator, Department of Environmental Management.
2. Within 30 days of receipt of the application, the Coordinator shall review the application to determine that each of the items in 302 CMR 5.10(3)(b)4. has been addressed. The Coordinator may require the applicant to provide additional information and/or attend informal meetings relative to the application.

5.10: continued

3. When the Coordinator has determined that all items in 302 CMR 5.10(3)(b)4. have been addressed, he shall directly notify the applicant that the application is complete and will be submitted for public review as provided in 302 CMR 5.10(5). The Coordinator shall publish notice of receipt of the completed application and notice and schedule of the public comment process in the *Environmental Monitor*.

4. The following information shall be submitted in addition to the information requested on the application form provided by the Coordinator:

a. Description of the Existing and Proposed Discharges:

i. Existing and proposed outfall locations and alignment of discharge pipes and other related structures must be shown on a nautical chart of appropriate scale.

The chart shall show the boundaries of the affected Ocean Sanctuary (specifically in relation to coastal estuaries and embayments [see 302 CMR 5.10(3)(b)4.d.]), designated critical areas (e.g. Areas of Critical Environmental Concern, Scenic Rivers), natural resource areas (e.g. shellfish beds, eelgrass beds, wetlands, habitats of endangered and threatened species, or species of special concern), recreational resources including, but not limited to, bathing beaches, boating areas and scenic areas, and water quality classification(s) of affected waters.

ii. Design capacity and average daily flow of the existing and proposed POTW, and proposed level of treatment of effluent.

b. Evaluation of Disposal Alternatives: Identify and evaluate all existing technologies, including land application, for the disposal of all or part of the discharge from the facility. Study of a significant portion of the entire discharge is strongly recommended. The evaluation of each disposal method shall include a map of sites evaluated, complete justification for rejection of each alternative, and shall incorporate, but not be limited to:

- i. technical considerations,
- ii. economic considerations,
- iii. environmental considerations,
- iv. public health considerations.

c. Variance Prerequisite Compliance Analysis: Applicants shall demonstrate compliance with each of the following prerequisites as provided in M.G.L. c. 132A, § 16B.

i. Proposed Discharge is the Only Feasible Alternative. Demonstrate that the proposed discharge is the only feasible wastewater disposal alternative, based on technical, economic, environmental and public health factors, available to the applicant.

ii. Proposed Discharge Meets Water Quality Standards and Protects the Appearance, Ecology and Marine Resources of the Sanctuary. Demonstrate how the proposed discharge will meet applicable water quality standards, and be consistent with the intent and purpose of M.G.L. c. 132A, §§ 13 through 16 and 18.

iii. Pretreatment Plan for Commercial and Industrial Wastes has been Approved, Adopted, and Implemented. Submissions shall include:

- A statement of approval of the plan from DEP,
- Certification that the Plan has been adopted by the applicant,
- Status of implementation of the Plan,
- Demonstration of financial commitment to implement the Plan.

iv. Water Conservation Plan has been Approved, Adopted and Implemented. Submissions shall include:

- A statement of approval of the Plan from the Water Resources Commission,
- Certification that the Plan has been adopted by the applicant,
- Status of implementation of the Plan,
- Demonstration of financial commitment to implement the Plan.

5.10: continued

- v. Inflow/infiltration (I/I) Reduction Plan has been Approved, Adopted and Implemented. Submissions shall include:
- A statement of approval of the Plan from DEP,
 - Certification that the Plan has been adopted by the applicant,
 - Status of implementation of the Plan,
 - Demonstration of financial commitment to implement the Plan.
- vi. Combined Sewer Overflow (CSO) Control Plan has been Approved, Adopted, and Implemented. Submissions shall include:
- A statement of approval of the Plan from DEP,
 - Certification that the Plan has been adopted by the applicant,
 - Status of implementation of the Plan,
 - Demonstration of financial commitment to implement the Plan.
- vii. Growth and Connection Control Plan and Review Process has been Approved, Adopted, and Implemented. M.G.L. c. 132A, §§ 13 through 16 and 18 requires adoption and implementation of a Plan to ensure that the capacity of the POTW is not exceeded. The plan may include limiting additional hook-ups, reduction of infiltration/inflow, water conservation or recycling, industrial source reduction, or increasing treatment capacity. At the point when the average flows within the system for any quarter equal or exceed 80% of the average daily volume of discharge the POTW was designed to treat during the quarter in which high ground water flows occur, the Department and DEP shall be notified and the plan shall be activated to avoid exceeding plant capacity. Submissions shall include:
- A statement of approval of the plan from DEP,
 - Certification that the Plan has been adopted by the applicant,
 - Status of implementation of the Plan,
 - Demonstration of financial commitment to implement the Plan.
- viii. Water Supply Quality or Quantity will not be Significantly Affected. M.G.L. c. 132A, §§ 13 through 16 and 18 requires that increased discharge into an Ocean Sanctuary not lead to significant degradation of existing or proposed water supplies through the decrease of ground or surface water volumes. Submissions shall include:
- An analysis of the impact of the proposed discharge on the quality and quantity of an aquifer and/or surface water body identified by the Department or DEP as an important existing or potential drinking water supply for a municipality,
 - A statement and brief demonstration that the proposed project is consistent with the Massachusetts Water Supply Policy Statement established by the Water Resources Commission, August 1984.
- ix. Secondary Treatment of Discharge and Other Treatment As Appropriate. M.G.L. 132A, §§ 13 through 16 and 18 requires a minimum of secondary treatment of the wastewater stream. It requires additional treatment to remove nutrients or other pollutants where necessary to avoid degradation of the ecology, appearance, and marine resources of the Ocean Sanctuary, and to meet water quality standards. Submissions shall include:
- An evaluation of what level of wastewater treatment, above secondary, is necessary to meet water quality standards.
 - An evaluation of what level of wastewater treatment, above secondary, is necessary to prevent degradation of the ecology, appearance, or marine resources of the Sanctuary.
- x. Proposed Discharge is consistent with Massachusetts Coastal Zone Management (MCZM) Program Policies. Submission shall include a statement from the MCZM Office that proposed discharge is consistent with its Program Policies. The applicant is responsible for contacting the MCZM Office and initiating the consistency review. This step shall be taken after receipt of all appropriate licenses and permits under M.G.L. chs. 21, 91, 130 and 131.

5.10: continued

xi. Proposed discharge and POTW will meet all applicable federal, state, and local laws, ordinances, by-laws, rules and regulations protecting the environment.

Submissions shall include:

- A list of all environmental approvals or permits required under applicable federal, state, and local laws, and regulations needed for the approval of the proposed action, including but not limited to the requirements of M.G.L. chs. 21, 91, 130 and 131.
- Demonstration of efforts made to comply with all applicable federal, state and local laws, and regulations, including status and dates of applications and approvals.

xii. Proposed Discharge or Outfall Structure will not adversely impact Marine Fisheries. The applicant shall submit an analysis of the impacts from the proposed discharge or the outfall structure on fin and shellfish resources.

Submissions shall include the following:

- Species type, location of commercial or recreational fisheries, location of spawning areas, and value of the fisheries potentially affected by the proposed discharge or outfall structure. Particular attention should be paid to fisheries resources within the immediate vicinity of the proposed discharge.
- A chart, based on existing information, showing spawning sites, nursery/forage areas, and migratory pathways or areas necessary for other functions or critical stages in the life cycle of economically or recreationally important species.
- An analysis of potential fishery closures due to public health requirements. The analysis shall review enforcement and management requirements.
- An analysis of potential impacts from the proposed outfall structure on normal operation of fishing vessels or equipment.
- A proposal for mitigation measures, if necessary.

d. Demonstration that proposed discharge is not into a Coastal Estuary or Embayment: The applicant shall list all coastal estuaries and embayments in the vicinity of the outfall, and shall demonstrate that the discharge will not be into an estuary or embayment, or have a significant adverse impact on the ecology or appearance of an estuary, embayment, or land subject to tidal action. Submissions shall include:

- i. A chart, as indicated in 302 CMR 5.10(3)(b)4.a.i., on which all coastal estuaries, embayments, or land subject to tidal action in the proximity of the proposed discharge are indicated.
- ii. An analysis demonstrating that the proposed discharge will not have a significant adverse impact on the ecology or appearance of the coastal estuaries, embayments or land subject to tidal action.
- iii. A demonstration that all discharges into estuaries and embayments from a POTW under control of the applicant will be eliminated.

e. Final Facilities Plan: The applicant shall submit a statement from DEP that the Plan, which satisfies the requirements of 310 CMR 41.00 and any other requirements established by DEP, is approved. The application shall include a copy of the parts of the Facilities Plan applicable to the variance, and any information produced in the MEPA process that would assist the Department in its review of the variance application. (See 302 CMR 5.10(3)(a)4.)

f. Final Environmental Impact Report: The applicant must submit a copy of the certificate from the Secretary stating that the Final Environmental Impact Report (FEIR) is adequate. The application shall include a copy of the parts of the FEIR applicable to the variance, and any information produced in the MEPA process that would assist the Department in its review of the variance application. (See 302 CMR 5.10(3)(a)4.)

5.10: continued

(4) Criteria for Evaluation of Variance Applications. The Department shall evaluate the materials submitted in response to 302 CMR 5.10(3)(b)4.a. through f. in order to determine that the proposed discharge into an ocean sanctuary will not seriously alter or otherwise endanger the appearance, ecology or marine resources of the ocean, the seabed, or subsoil thereof, or the Cape Cod National Seashore.

(5) Public Review and Decision Making Procedures.

(a) Public Notice: The Department shall give notice of the receipt of a completed application for a variance under M.G.L. c. 132A, §§ 13 through 16 and 18 and the public hearing and comment schedule in the *Environmental Monitor*. The applicant shall give the same notice, at the Department's direction, in newspapers serving the municipalities bordering the affected sanctuary. The applicant shall directly notify, also at its expense, such local, regional, state, and federal officials and entities as the Coordinator deems appropriate.

(b) Availability of Application Documents: Copies of all application documents shall be available within the affected communities at locations to be determined by the Coordinator. Location(s) will be announced as part of the Public Notice referred to in 302 CMR 5.10(5)(a).

(c) Public Comment: Any person may submit written comments to the Department on any variance application within 30 days after publication in the *Environmental Monitor* of the notice required by 302 CMR 5.10(5)(a).

(d) Public Hearing: No later than 20 days after publication of the notice of receipt of a completed application in the *Environmental Monitor* as required in 302 CMR 5.10(5)(a), the Department shall hold a public hearing to take testimony on whether to approve or deny a variance request for a proposed discharge.

(e) Review Process: The Department shall review the application and public comments in accordance with the criteria established in 302 CMR 5.10(4), and shall render a final decision within 60 days after close of the comment period.

(f) Public Notice of Final Decision: The Commissioner shall make the final decision on whether to grant or deny a variance, and the Department shall publish notice thereof in the *Environmental Monitor*, and shall give direct notice thereof to (1) the chief elected official of each of the municipalities bordering the affected ocean sanctuary, (2) all persons who submitted written comments to the Department during the comment and public hearing period, and (3) any other official or entity as the Coordinator deems appropriate. The full text of the final decision shall be made available by the Department to all persons requesting a copy thereof.

(g) Adjudicatory Hearing Process:

1. An aggrieved party may exercise the right to an adjudicatory hearing if a written request is made within 30 days of the public notice issued under 302 CMR 5.10(5)(f). The request shall be made to the Commissioner by certified mail, and shall set forth with reasonable particularity the aggrieved party's objection to the Commissioner's decision and all those issues or facts in support thereof.

2. The Department shall schedule an adjudicatory hearing within 30 days of receipt of the request therefor, and shall publish the date thereof in the *Environmental Monitor* at least ten days prior to the hearing.

The scope of the hearing shall be limited to:

a. issues raised during the public hearing and comment periods established subsequent to the receipt of the variance application; and

b. issues identified due to new information which could not reasonably have been known or discovered during or prior to the public hearing and comment periods.

3. The applicant for a variance shall have the burden of proof at the hearing with respect to all claims or issues of fact and law raised in the request for a hearing and, to the extent the issue is raised, must demonstrate how the proposed discharge meets or does not meet the criteria and requirements in M.G.L. c. 132A, § 16B.

5.10: continued

4. Except as otherwise provided in 302 CMR 5.10 *et seq.*, the adjudicatory hearing shall be conducted in accordance with the Rules of Adjudicatory Proceedings under 310 CMR 1.00 and 1.03.

5. Subsequent to the adjudicatory hearing, the hearing officer shall make a written recommendation to the Commissioner whether to affirm, revoke or modify the decision to issue or deny a variance, and the Commissioner, within 30 days after the close of the adjudicatory hearing, shall render a decision. This decision becomes immediately effective unless an appeal is made under the Administrative Procedures Act, M.G.L. c. 30A, § 14, and need not be issued in compliance with M.G.L. c. 30A, § 11(7).

(h) Final Decision. The final decision to grant or deny a variance to M.G.L. c. 132A, §§ 13 through 16 and 18 takes effect if no request for an adjudicatory hearing or judicial appeal is presented within 30 days of the publication of the notice of final decision.

(6) Computation of Time. Computation of any time period referred to in 302 CMR 5.00 shall begin with the first day following the action which initiates that time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday, or legal holiday or any other day on which the main office of the Department is closed, in which event the period shall run until the end of the next following business day. Time periods include all calendar days other than those specified above.

(7) Extensions of Time. It shall be within the discretion of the Department to extend any time limit contained in 302 CMR 5.00 not otherwise prescribed by M.G.L. c. 132A, §§ 13 through 16 and 18 or by the General Laws of the Commonwealth. Where time extensions are sought by persons or parties other than the Department, all requests therefor shall be made in writing and submitted to the Department prior to expiration of the original or previously extended time period. The receipt of such request shall toll the time period sought to be extended until the Department acts on the request. The Department, on its own initiative, may extend any time period allowed hereby if written notice to the applicant is provided no later than ten days, or for time periods less than ten days, no later than three days, prior to expiration to the pertinent time period.

(8) Conditions. Conditions adopted by the Department in approving a variance shall become conditions in the discharge permit issued by the Department of Environmental Protection, provided, however, that said conditions shall not be the subject of any appeal before the Department of Environmental Protection under M.G.L. c. 21. As may be determined by the Commissioner, the applicant shall conduct monitoring to ensure that the discharge continues to meet the water quality standards and the standards of M.G.L. c. 132A, §§ 13 through 16 and 18, the pretreatment plan, the water conservation plan, the inflow/infiltration plan, the combined sewer overflow plan, the growth and connection control plan, the secondary treatment requirements, CZM consistency, consistency with all applicable laws, and all requirements that marine fisheries not be impacted.

(9) Penalties and Enforcement. The variance will be enforceable by and subject to the powers and duties conferred upon the Department under M.G.L. c. 132A, § 16F.

5.11: Ocean Sanctuaries Maps

(1) Maps Adopted 302 CMR 5.00 officially adopt maps prepared by the Department and CZM establishing the seaward and inland boundaries of the five ocean sanctuaries. These maps replace all previous ocean sanctuaries maps and may from time to time be updated, amended or modified by the Department.

(2) Procedure for Change Any changes to the maps shall be proposed to or by the Ocean Sanctuaries Coordinator and reviewed by a committee consisting of the Coordinator or his designee(s) and a CZM representative(s). A change to the maps will become official when so designated by the Commissioner and announced in the *Environmental Monitor*.

REGULATORY AUTHORITY

302 CMR 5.00: M.G.L. c. 21A, §§ 2(2), (5), (9) through (11), (13), (15), (16), and (28);
c. 132A, §§ 13 through 16, 18.