



















































































## 9.16: continued

2. Within 45 days of receipt of the appraisal report, the Department shall conduct a review of the appraisal report. Said review appraisal shall be prepared by a professional appraiser who is a member of the Massachusetts Board of Real Estate Appraisers, the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers. If the Department determines that the appraisal report is complete and accurate, the annual license fee shall be established based on the fair market rental value determined by the Department, based on said report. If the Department determines that the appraisal report is incomplete or inaccurate, the Department shall inform the applicant in writing of the deficiencies in the appraisal report. Upon review of the Department's evaluation, the applicant may:
- a. submit a new or revised appraisal report to the Department for its review and approval; or
  - b. notify the Department of disagreement with the Department's review appraisal and provide the reasons therefor. If the Department and the applicant cannot agree within 30 days of said notification, both the Department and the applicant shall within 30 days designate a third, impartial professional appraiser who is a member of the Massachusetts Board of Real Estate Appraisers, the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers. The cost of the third appraiser shall be born equally by the Department and the applicant. The third appraiser shall prepare an appraisal report after reviewing the initial report, the review appraisal and any other information deemed appropriate and shall make a recommendation to the Department as to the fair market value and fair market rental value. The Department shall presume that the values determined in that report are accurate and shall establish the annual license fee based on the fair market rental value determined therein. This presumption may be overcome only if the Commissioner issues written findings based on evidence presented in the appraisal reports before the Department explaining the reasons for disagreement with the recommendations of the third appraisal report.
- (d) Payment of fees. Any fee the total amount of which during the term of the license is less than \$10,000 shall be assessed as a lump sum payable in full prior to license issuance. Any fee the total amount of which during the term of the license is more than \$10,000 may be assessed at the discretion of the applicant as a lump sum payable in full prior to license issuance or as a series of fixed annual payments which shall be required as a condition of the license. The initial payment of such annual fee shall be paid in full prior to the issuance of the license. All such fees shall be paid by certified check or money order made payable to the Commonwealth of Massachusetts, DEP.
- (e) Payment of occupation fee for existing fill or structures
1. Any person who is granted a license for existing fill or structures, the fee for which has not been paid, shall pay the fee, if any, in effect at the time the license is granted.
  2. Any person who is granted a license or license amendment for a water-dependent use project involving a change in use or structural alteration to existing fill or structures shall pay the occupation fee in effect at the time the license is granted for any portion of the project site for which a lump sum occupation fee has not been previously paid.
  3. Any person who is granted a license or license amendment for a nonwater-dependent use project involving a change in use or structural alteration to existing fill or structures shall pay the occupation fee in effect at the time the license is granted for the entire project site; but shall be given credit for any lump sum occupation fee previously paid for the portion of tidelands previously occupied, pro-rated for the remaining term of the license. For purpose of calculating the credit pursuant to 310 CMR 9.16(3)(e), the lump sum occupation fee for any license with an unlimited term shall be pro-rated over a 30-year period from the date said license was issued.
  4. Notwithstanding 310 CMR 9.16(3)(e)2., any person who is granted a license or license amendment for a private recreational boating facility with long-term exclusive assignment of berths pursuant to 310 CMR 9.38(2)(a)2. shall pay the fee in accordance with 310 CMR 9.16(3)(e)3.

9.16: continued

(4) Exemption from fees for certain projects.

(a) Public agencies. The fees described herein at 310 CMR 9.16(2) and 9.16(3) shall not be applicable to a municipality or other public agency undertaking a public service project, provided that said project does not deny access to its services and facilities to any citizen of the Commonwealth in a discriminatory manner.

(b) Non-profit organizations. The fees described herein at 310 CMR 9.16(2) and 9.16(3) shall not be applicable to a non-profit organization as defined in 310 CMR 9.02, if:

1. the project is a facility of public accommodation which does not deny access to its services and facilities to any citizen of the Commonwealth in a discriminatory manner;
2. the project is not intended to generate revenues in excess of that needed for construction, operation and maintenance of the uses specified in the license; and
3. said organization has not been created for the purpose of avoiding said fees while sheltering profits in another entity.

(c) Projects authorized by permits. The fees described herein in 310 CMR 9.16(2) and 9.16(3) shall not be applicable to any project authorized by permit.

(d) Recreational boating facilities authorized by the MDC. For any recreational boating facility authorized by the Metropolitan District Commission (MDC), the occupation fees described herein at 310 CMR 9.16(3) shall be reduced by the amount of any fee paid to the MDC for occupation of a waterway.

(e) Projects licensed under the Simplified Procedures for Small Structures Accessory to Residences pursuant to 310 CMR 9.10 shall be exempted from payment of Tidewater Displacement Fees.

TABLE 1 – FEES

	Water-Dependent Use Projects/1 (accessory to a residential use of a 4 dwelling units)	Other Water-Dependent Use Projects	Residential Non-Water-Dependent Use Projects (a 4 dwelling units)	Other Non-Water-Dependent Use Projects	Licenses with Extended Terms	Any Small Scale Project Under 310 CMR 9.10
Determination of Applicability Application	\$ 50.00	\$ 50.00	\$ 50.00	\$200.00	\$200.00	\$ 50.00
License or Permit Application	\$100.00	\$250.00	\$500.00	\$1500.00	\$2500.00	\$ 50.00
License or Permit Amendment or Renewal Application	\$ 50.00	\$100.00	\$250.00	\$750.00	\$1000.00	\$ 25.00
Certificate of Compliance Application	\$ 50.00	\$ 50.00	\$100.00	\$100.00	\$200.00	N/A
Tidewater Displacement Fee (per cubic yard)	\$ 2.00	\$ 2.00	\$ 10.00	\$ 10.00	\$ 10.00	N/A
Occupation Fee /2 (per square yard of land held by the Commonwealth)	\$1.00 x term of license		\$2.00 x term of license		Appraisal	\$1 x term of license

1. Except for facilities subject to 310 CMR 9.16(3)(b)2., for which the applicable fees shall be the same as those listed for licenses with extended terms.
2. The fee is calculated by multiplying the dollar rate shown by the length of the license term, in years, and by the area of occupied land held by the Commonwealth. This is a fixed fee for the term of the license and is assessed on a lump sum basis, except as provided in 310 CMR 9.16(3)(d).

9.17: Appeals

- (1) The following persons shall have the right to an adjudicatory hearing concerning a decision by the Department to grant or deny a license or permit:
  - (a) an applicant who has demonstrated property rights in the lands in question, or which is a public agency;
  - (b) any person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period;
  - (c) ten residents of the Commonwealth, pursuant to M.G.L. c. 30A, § 10A, who have submitted written comments within the public comment period;
  - (d) the municipal official in the affected municipality who has submitted written comments within the public comment period;
  - (e) CZM, for any project in the coastal zone, if it has filed a notice of participation within the public comment period; and
  - (f) DEM, for any project in an Ocean Sanctuary, if it has filed a notice of participation within the public comment period.
  
- (2) Any notice of claim for an adjudicatory hearing must be sent by certified mail or hand delivery to the Department within 21 days of the date of the written determination, draft license or draft permit, or if no such determination or draft is required, within 21 days of the date of issuance of the license or permit, as appropriate under 310 CMR 9.14(1) and (2). A copy must be sent at the same time by certified mail or hand delivery to the applicant and to the municipal official of the city or town where the project is located.
  
- (3) Any notice of claim for an adjudicatory hearing must include the following information:
  - (a) the DEP Waterways Application File Number, name of the applicant and address of the project;
  - (b) the complete name, address, and telephone number of the party filing the request and, if represented by counsel, the name, address and telephone number of the attorney and, if claiming to be a person aggrieved, the specific facts that demonstrate that the party satisfies the definition of "aggrieved person" found in 310 CMR 9.02;
  - (c) a clear statement that a formal adjudicatory hearing is being requested;
  - (d) a clear and concise statement of the facts which are grounds for the proceeding, the specific objections to the Department's written determination, draft license, draft permit, license or permit, and the relief sought through the adjudicatory hearing, including specifically the changes desired in the final written determination, license, or permit; and
  - (e) a statement that a copy of the request has been sent to:
    1. the applicant; and
    2. the municipal official of the city or town where the project is located.
  
- (4) The Department may coordinate adjudicatory hearings under 310 CMR 9.17 and under M.G.L. c. 131, § 40 and 310 CMR 10.000, as follows:
  - (a) if a final order has been issued pursuant to the Wetlands Protection Act, the Department shall exclude issues within the jurisdiction of that statute at an adjudicatory hearing held under 310 CMR 9.17, except as provided in 310 CMR 9.33(3);
  - (b) if an adjudicatory hearing has been requested under 310 CMR 9.17 and under M.G.L. c. 130, § 40 and 310 CMR 10.000, the Department may consolidate these proceedings.

9.18: Recording

- (1) The license and accompanying plan shall be recorded at the Registry of Deeds within the chain of title of the affected property within 60 days of the date of issuance. In the case of recorded land, the license shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the project is located. In the case of registered land, the license shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the project is located. When a license involves more than one parcel of land the license shall be recorded in the chain of title for all relevant deeds.



9.18: continued

(2) Written notice of said recording shall be given to the Department, including an identification of the Registry of Deeds or Land Court in which the license is recorded, the date of recording and the instrument or document number, prior to commencement of the project authorized under the license.

(3) Failure to record the license and accompanying plan within 60 days will render said license void in accordance with 310 CMR 9.26(2)(b)1.

9.19: Certificate of Compliance

(1) Within 60 days of the completion of any licensed project, but in no event later than five years from the date of license issuance, or any extension thereof, the applicant shall request in writing that the Department issue a certificate of compliance. The request shall be accompanied by a certification by a registered professional engineer licensed to do business in the Commonwealth that the project was completed according to the plans, specifications, and conditions of the license. The Department may conduct a site inspection at any time to determine compliance prior or subsequent to issuing a certificate. The Department may issue a partial certificate of compliance for a portion of a project if all public benefits associated with such portion have also been provided.

(2) The license for any project for which such a request is not filed and certificate issued may be revoked pursuant to 310 CMR 9.26(1).

9.20: Authorization of Emergency Actions

In an emergency situation where swift and immediate action is essential to avoid or eliminate a serious and immediate threat to health, safety, or the environment, the Department may approve a project or portion thereof, without a license or permit, in accordance with the following procedures.

(1) A written request shall be submitted to DEP which describes the location, and work to be performed and specifies why the project is necessary for the protection of the health or safety of the public or the environment. Accompanying this request shall be a written statement from a federal, state or municipal agency certifying that there is an emergency and specifying why said project is necessary to avoid or eliminate a serious and immediate threat to public health, safety, or the environment.

(2) Emergency approval shall be issued in writing and shall specify the limits of activities necessary to abate the emergency.

(3) When the necessity for undertaking the emergency action no longer exists, any emergency action taken under 310 CMR 9.20 shall cease until the provisions of 310 CMR 9.00 have been complied with. In any event, the time limit for performance of emergency work shall not exceed 30 days, unless a written extension is approved by the Commissioner or appropriate Regional Director.

(4) In all cases under 310 CMR 9.20, the person performing any emergency work is required to submit a license or permit application in accordance with 310 CMR 9.11 within 30 days of the date of emergency approval unless a written extension is approved by the Commissioner. Following the review of the application, the Department may require any modification to the emergency work that it deems necessary.

(5) In emergency situations where written notice is not feasible, verbal notice to and approval by the Commissioner or appropriate Regional Director may be substituted until written notice can be feasibly submitted.

(6) No work authorized under an emergency approval pursuant to 310 CMR 9.00 may be undertaken without emergency authorization under M.G.L. c. 131, § 40 and 310 CMR 10.00 and M.G.L. c. 30, §§ 61 through 62H, where applicable.

9.21: Variances

- (1) Required Findings. The Commissioner may waive the application of any other section of 310 CMR 9.00 by making a written finding following a public hearing that:
- (a) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00;
  - (b) the project includes mitigation measures to minimize interference with the public interests in waterways and that the project incorporates measures designed to compensate the public for any remaining detriment to such interests; and
  - (c) the variance is necessary:
    1. to accommodate an overriding municipal, regional, state or federal interest; or
    2. to avoid such restriction on the use of private property as to constitute an unconstitutional taking without compensation; or
    3. to avoid substantial hardship for the continuation of any use or structure existing as of October 4, 1990, and for which no substantial change in use or substantial structural alteration has occurred since that date.
- (2) Procedure
- (a) A request for a variance shall be filed by the applicant prior to publication of the notice of public hearing pursuant to 310 CMR 9.13(1). The request shall be in writing and shall include, at a minimum, the following information:
    1. an identification of the regulation(s) from which the variance is sought;
    2. a description of alternative designs, locations, or construction methods which would achieve the purpose of the project without the need for the variance;
    3. an explanation of why each of the alternatives is unreasonable;
    4. an analysis of any detriments to interests of the public in waterways due to the proposed project and an explanation of how the detriments have been minimized;
    5. a description of the measures that will be provided to compensate for any remaining detriment to public interests in waterways; and
    6. a description and supporting documentation of the overriding public interest served by the project, if applicable; or
    7. documentation that the project is a continuation of a use or structure existing as of January 1, 1984; that there has not been a substantial change in use or substantial structural alteration since that date; and that application of 310 CMR 9.00 would cause substantial hardship to the applicant, if applicable; or
    8. a legal analysis, with supporting documentation, explaining why application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking without compensation, if applicable.
  - (b) Notice of the variance request shall be published in accordance with 310 CMR 9.13(1) and shall explicitly indicate that a variance is being requested. The Department shall hold a public hearing in accordance with 310 CMR 9.13(3) upon which the Commissioner's findings shall be based. Upon issuance of a variance an adjudicatory hearing is available in accordance with 310 CMR 9.17.
  - (c) For projects for which an EIR will be prepared in accordance with M.G.L. c. 30, §§ 61 through 62H, the information required pursuant to the provisions of 310 CMR 9.21(2)(a)1. through 7., should be included in the EIR if the need for a variance is reasonably foreseeable. If the variance issue was addressed in the final EIR, the Commissioner shall presume that the description of alternatives contained therein satisfies the requirements of 310 CMR 9.21(2)(a)2. Notwithstanding this presumption, the Commissioner may require any modification of the project reasonably within the scope of an alternative within the final EIR.
- (3) Commentary. The variance process is intended to apply in the rare and unusual circumstance where a proposed project satisfies a public interest which overrides the public interest in waterways but cannot be implemented in a manner which is fully consistent with the provisions of 310 CMR 9.00; where application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking of property; or where application of 310 CMR 9.00 would cause substantial hardship for the continuation of a use or structure existing as of October 4, 1990. The variance process is designed to ensure that a full investigation is made to determine whether the proposed project serves an overriding public interest which outweighs harm to the public resulting from lack of adherence to 310 CMR 9.21 and whether all measures are taken which ensure that detriments to the public interests in waterways are minimized.

9.22: Maintenance, Repair, and Minor Project Modifications

(1) Maintenance and Repair of Fill and Structures. During the term for which the license is in effect, the licensee shall maintain and repair all authorized fill and structures in good working order for the uses authorized in the license, and in accordance with the conditions specified therein. No application for license or license amendment shall be required for such activity. Maintenance and repair include, among other things, the following activities:

- (a) replacement of old pilings, decking, or rip-rap, all with material of the same dimensions and quality and in the same locations and elevations as that authorized in the license;
- (b) repaving of road surfaces, installation of road curbs and lighting, replacement of railroad track, stabilization of road or rail beds, reconstruction of culverts and catch basins, and other maintenance or repair of existing public transportation facilities and associated drainage systems, as necessary to preserve or restore the serviceability of such facilities for the original use, provided that maintenance and repair shall not include the substantial enlargement of such facilities, such as roadway widening, adding shoulders, or upgrading substandard intersections;
- (c) restoration to the original license specifications of licensed fill or structures that have been damaged by catastrophic events, provided that no change in use occurs and that:
  - 1. such restoration is completed within two years of the damage-causing event;
  - 2. in the case of flood-related damage, the cost of such restoration does not exceed 50% of the cost of total replacement according to the original license specifications;
  - 3. the licensee provides the Department with written notice of the restoration at least ten days prior to commencement of such work; in the case of flood-related damage, said notice shall include written estimates of restoration and replacement costs; and
  - 4. the licensee provides the Department with written notice that the repair work has been completed in accordance with the license specifications, as certified by a Registered Professional Engineer, within 60 days of such completion; and
- (d) demolition and removal of unused structures that are obsolete or otherwise no longer suitable for the uses authorized in the license, provided that written approval by the Department is obtained prior to the commencement of such work.

(2) Maintenance Dredging. Maintenance dredging may occur for five years from the date of issuance of the license or permit or for such other term, not exceeding ten years, specified therein, provided that the written notice required pursuant to the Wetlands Protection Act (M.G.L. c. 131, § 40 and 310 CMR 10.00) has been filed with the Conservation Commission and a copy has been sent to the Department.

(3) Minor Project Modifications. The licensee may undertake minor modifications to a licensed project, or a project exempt from licensing pursuant to 310 CMR 9.05(3)(b) through (h), without filing an application for license or license amendment. Such modifications are limited to:

- (a) structural alterations which are confined to the existing footprint of the fill or structures being altered and which represent an insignificant deviation from the original specifications of the license, in terms of size, configuration, materials, or other relevant design or fabrication parameters;
- (b) changes of use which maintain or enhance public benefits provided by the project and which represent an insignificant deviation from the original use statement of the license, in terms of function, character, duration, patronage, or other relevant parameters; or
- (c) replacement of subsurface utilities, or installation of additional utility lines in an existing right of way within previously authorized filled tidelands connecting to existing structures, provided the work will not restrict or impair access to water-dependent uses.

No such modifications shall be undertaken until the licensee has submitted written notice to the Department describing the proposed work in sufficient detail, with reference to any relevant license plans, for the Department to determine compliance with the above conditions. If the Department does not object within 30 days, the licensee may proceed with the described work without further approval by the Department.

9.22: continued

(4) Nothing in 310 CMR 9.22(1) through (3) provisions shall be construed to exempt the work in question from obtaining other applicable approvals, including but not limited to an order of conditions under M.G.L. c. 131, § 40 and 310 CMR 10.00.

9.23: Transfer of License Upon Change of Ownership

(1) Unless otherwise provided in the license, a valid license shall run with the land and shall automatically be transferred upon a change of ownership of the affected property within the chain of title of which the license has been recorded. All rights, privileges, obligations, and responsibilities specified in the license shall be transferred to the new landowner upon recording of the changed ownership.

(2) For transferability of permits issued by the harbor master for the temporary placement of moorings, floats, and rafts, see 310 CMR 9.07(2)(d).

9.24: Amendments

(1) Upon written request by the licensee accompanied by appropriate plans, the Department may amend a license and associated written determination to authorize a structural alteration or change in use not defined as substantial in accordance with 310 CMR 9.02, or to delineate a reconfiguration zone within a marina in accordance with 310 CMR 9.39(1)(b), or to renew a term of license in accordance with 310 CMR 9.25(2). A written request may also be made to amend a permit. No license or permit shall be amended unless the project, as modified, complies with the applicable provisions of 310 CMR 9.00 wherever feasible.

(2) The Department shall review the request for amendment and determine whether the proposed changes are so significant as to require a new license or permit application or are appropriate for consideration of an amendment to the existing license or permit.

(3) If the Department determines that the proposed changes are appropriate to allow consideration of an amendment, notice shall be provided in accordance with the requirements of 310 CMR 9.13(1), and to any intervenor on the original license application to the maximum reasonable extent.

(4) The Department may, at its discretion, conduct a public hearing on the request for amendment. Any such hearing shall be conducted in accordance with the requirements of 310 CMR 9.13(3).

(5) Any person who would otherwise have the right to an adjudicatory hearing pursuant to 310 CMR 9.17 may appeal the issuance of any amendment within 21 days of the date of its issuance, in accordance with the procedures set forth at 310 CMR 9.17.

(6) The amended license and accompanying plan shall be recorded within 60 days of the date of issuance in accordance with the procedures set forth in 310 CMR 9.18.

(7) Notwithstanding the procedures for amendment described above, the Department may issue in writing, at the request of the licensee, clarification and corrections regarding any license or permit previously issued.

9.25: Expiration and Renewal

(1) Expiration.

(a) Any license, permit, or legislative authorization shall expire as to all work licensed, permitted, or authorized which is not completed within five years of the date thereof, or such other period of time specified therein; provided, however, that for good cause shown the Department may extend, without public hearing or notice, the construction period of the license, permit, or legislative authorization for one or more one year periods upon written request of the licensee or permittee.

9.25: continued

(b) All licenses or permits shall expire upon reaching the term, if any, stated in the license or permit or any extension thereof.

(c) Any license shall expire if the fill or structures are abandoned and not used for the purpose for which they were licensed for a period of five consecutive years or more.

(2) Renewal of Licenses and Permits. A renewal may be granted for a term of years not to exceed that authorized in the original license or permit, in accordance with 310 CMR 9.15, upon written application by the licensee or permittee and in accordance with the procedures for amendments set forth at 310 CMR 9.24.

9.26: Revocation and Nullification

(1) Revocation.

(a) Unless otherwise specifically provided by law, the Department may revoke a license or permit for non-compliance with the terms and conditions set forth therein, including any change of use from that expressly authorized in said license or permit or, if no such statement was included, from that reasonably determined by the Department to be implicit therein. Such revocation may not occur until after the Department has given notice of the alleged non-compliance to the licensee or permittee and any person who has filed a written request for such notice with the Department, and after it has afforded them an opportunity for a hearing and a reasonable opportunity to correct said non-compliance.

(b) In accordance with the procedures established in 310 CMR 9.26(1)(a), the Department may revoke any license or permit upon a finding that the licensee denies access to project services and facilities in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, of the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination. Such a finding shall be made upon a final determination of discrimination, issued by any federal, state or local court or agency with jurisdiction to investigate discrimination issues.

(c) Notice of revocation of a license shall be recorded at the Registry of Deeds or Land Court by the Department, in accordance with 310 CMR 9.18.

(2) Nullification.

(a) All licenses issued prior to January 1, 1984 are void if:

1. the license and the accompanying plan were not recorded within one year of date of issuance at the Registry of Deeds for the county or district where the work was to be performed;
2. there has been an unauthorized substantial change in use; or
3. there has been an unauthorized substantial structural alteration.

Notwithstanding the foregoing, no license for filled private tidelands shall be void for unauthorized substantial changes in use or unauthorized substantial structural alterations which occurred prior to January 1, 1984.

(b) All licenses issued after January 1, 1984 are void if:

1. the license and accompanying plan were not recorded within 60 days of date of issuance at the Registry of Deeds for the county or district where the work was to be performed;
2. there has been an unauthorized substantial change in use; or
3. there has been an unauthorized substantial structural alteration.

9.27: Removal of Previously Licensed Structures

Upon the nullification, expiration, or revocation of a license, the licensee shall remove all structures authorized in such previous license which are located:

(1) below the high water mark, unless the Department determines that continued existence of said structures will promote the public interests served by M.G.L. c. 91;

9.27: continued

- (2) above the high water mark, if the Department determines that continued existence of said structures will have a significant adverse effect on the public interests served by M.G.L. c. 91. Such removal shall take place upon written notice to and at the direction of the Department.

9.28: Amnesty

(1) General. Notwithstanding the provisions of 310 CMR 9.09(2), certain substantive and procedural standards of 310 CMR 9.11 through 9.55 shall not apply to the licensing of existing unauthorized fill or structures provided the Department received an application by October 4, 1996. Furthermore, during the amnesty period the Department may postpone the requirement to obtain a license for certain small-scale water-dependent structures on residential property by issuing an interim approval for said structures. The Department will initiate enforcement action to require the removal or licensing of any such structure pursuant to 310 CMR 9.00 only upon the expiration or revocation of the interim approval or the violation of the terms and conditions thereof. After the close of the amnesty period, the Department will require strict compliance with all provisions of 310 CMR 9.00 and will take enforcement action, including the assessment of penalties if appropriate, to ensure that all unauthorized fill and structures are either licensed or removed.

(2) Projects Which May Be Authorized Under the Amnesty Program.

(a) An application for a license under the amnesty program may be submitted only for a project consisting entirely of the continuation in use of existing fill or structures not previously authorized, or for which a grant or license is not presently valid pursuant to 310 CMR 9.00, provided that:

1. said fill or structures have been in use since January 1, 1984, and no unauthorized substantial change in use or substantial structural alteration has occurred since that date; and
2. an application has been filed with the Department by October 4, 1996.

(b) An application for an interim approval under the amnesty program may be submitted only for a project meeting the criteria of 310 CMR 9.28(2)(a), and which consists entirely of an existing dock, pier, seawall, bulkhead, or other small-scale water dependent structure that is accessory to a single family residence.

(3) Standards for Applications Under Amnesty Program. For purposes of authorizing any project under the amnesty program, the applicable substantive standards found at 310 CMR 9.07 and 9.20 through 9.27, effective September 15, 1978, shall remain in full force and effect in lieu of the substantive standards found at 310 CMR 9.31 through 9.60.

(4) Procedures for Applications Under Amnesty Program. For purposes of authorizing projects under the amnesty program, the applicable procedural rules found at 310 CMR 9.11 through 9.30 shall be in effect, except for any time schedule for Department action specified therein, and except as modified in accordance with the following provisions.

(a) Plans, 310 CMR 9.11(2) and (3): In the case of an application for an interim approval, the plan need not be certified by a Registered Professional Engineer or Registered Land Surveyor if the fill or structure is accurately drawn on a scaled plan in accordance with application instructions issued by the Department.

(b) Other State and Local Approvals, 310 CMR 9.11(4): In the case of an application for an interim approval, except for any project located in an ACEC, the application need not provide evidence of compliance with the applicable state and local requirements, and the Department shall presume compliance with these requirements unless the Department receives information to the contrary during the public comment period.

(c) Terms, 310 CMR 9.15: In the case of an application for an amnesty license for a water-dependent use project on Commonwealth tidelands, the license term shall be 99 years unless the Department determines that a shorter term is necessary to protect the public interest in said lands. In the case of an application for an interim approval, said approval shall expire in 30 years unless the affected property is transferred to a new owner for valuable consideration, in which case said approval shall expire one year from the date of recording of the transfer at the Registry of Deeds. An interim approval shall not be renewed upon expiration; further authorization from the Department must be obtained in the form of a license.

## 9.28 continued

(d) Fees, 310 CMR 9.16(2) through (4): In the case of an application for an amnesty license for a water-dependent use project, the applicable regulations governing tidewater displacement and occupation fees found at 310 CMR 9.08, effective September 15, 1978, shall remain in full force and effect in lieu of the fee regulations found at 310 CMR 9.16(2) through (4). In the case of an application for an interim approval no such fees shall apply. All applications under the amnesty program shall pay the appropriate application fee in accordance with 310 CMR 9.16(1).

(e) Recording, 310 CMR 9.18: In the case of an application for an interim approval, said approval shall be recorded, without the accompanying plan, at the Registry of Deeds in accordance with 310 CMR 9.18.

(f) Transfer, 310 CMR 9.23: In the case of an application for an interim approval, said approval shall not run with the land, but shall automatically expire one year from the date of recording of the transfer of the affected property to a new owner for valuable consideration.

9.31: Summary of License and Permit Requirements

(1) Basic Requirements. No license or permit shall be issued by the Department for any project subject to 310 CMR 9.03 through 9.05 and 9.09 unless said project:

- (a) includes only fill and structures for uses that have been categorically determined to be eligible for a license, according to the provisions of 310 CMR 9.32;
- (b) complies with applicable environmental regulatory programs of the Commonwealth, according to the provisions of 310 CMR 9.33;
- (c) conforms to applicable provisions of a municipal harbor plan, if any, and local zoning law, according to the provisions of 310 CMR 9.34;
- (d) complies with applicable standards governing the preservation of water-related public rights, according to the provisions of 310 CMR 9.35;
- (e) complies with applicable standards governing the protection of water-dependent uses, according to the provisions of 310 CMR 9.36;
- (f) complies with applicable standards governing engineering and construction of structures, according to the provisions of 310 CMR 9.37;
- (g) complies with applicable standards governing use and design of boating facilities for recreational or commercial vessels, according to the provisions of 310 CMR 9.38 and 9.39;
- (h) complies with applicable standards governing dredging and disposal of dredge materials, according to the provisions of 310 CMR 9.40; and
- (i) does not deny access to its services and facilities to any person in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, of the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination.

(2) Proper Public Purpose Requirement. No license or permit shall be issued by the Department for any project on tidelands or Great Ponds, except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands. In applying 310 CMR 9.31(2), the Department shall act in accordance with the following provisions.

(a) Water-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a water-dependent use project.

(b) Nonwater-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a nonwater-dependent use project which:

1. complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use, according to the applicable provisions of 310 CMR 9.51 through 9.52; and complies with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53;
2. if located in the coastal zone, complies with the standard governing consistency with the policies of the Massachusetts Coastal Zone Management Program, according to 310 CMR 9.54; and
3. if consisting entirely of infrastructure facilities, to which 310 CMR 9.31(2)(b)1. does not apply, complies with the special mitigation and public access standards governing such facilities, according to 310 CMR 9.55.

9.31: continued

- (3) Rebuttal of Presumptions. The presumptions of 310 CMR 9.31(2) may be overcome only if:
- (a) the basic requirements specified in 310 CMR 9.31(1) have not been met; or



## 9.31: continued

(b) a clear showing is made by a municipal, state, regional, or federal agency that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting; in the case of a project for which a final EIR has been prepared, the presumption may be overcome only if such detriment has been identified during the M.G.L. c. 30, §§ 61 through 62H review process.

(4) Requirements for Projects With Special Legislative Authorization. Notwithstanding the provisions of 310 CMR 9.31(1) through (3), the Department shall issue a license or permit where the project comprises fill or structures that have been specifically authorized in a grant or other enactment of the legislature, provided that the Department may prescribe such alterations and conditions as it deems necessary to ensure the project conforms with:

- (a) any requirements contained in the legislative authorization; and
- (b) the standards of 310 CMR 9.31 through 9.60, to the extent consistent with the legislative authorization.

9.32: Categorical Restrictions on Fill and Structures

(1) The Department has determined that in certain situations fill or structures categorically do not meet the statutory tests for approval under M.G.L. c. 91 or are otherwise not in keeping with the purposes of 310 CMR 9.00. Accordingly, a project shall be eligible for a license only if it is restricted to fill or structures which accommodate the uses specified below, within the geographic areas specified below.

(a) Tidelands (Outside of ACECs and DPAs)

1. fill or structures for any use on previously filled tidelands;
2. fill or structures for water-dependent use located below the high water mark, provided that, in the case of proposed fill, reasonable measures are taken to minimize the amount of fill, including substitution of pile-supported or floating structures and relocation of the use to a position above the high water mark;
3. structures to accommodate public pedestrian access on flowed tidelands, provided that it is not reasonable to locate such structures above the high water mark or within the footprint of existing pile-supported structures or pile fields;
4. pile-supported structures located below the high water mark for nonwater-dependent uses which replace or modify existing, previously authorized wharves, piers, pile fields, or other filled or pile-supported structures, in accordance with the provisions of 310 CMR 9.51(3)(a) and (b);
5. new fill located below the high water mark for accessory or nonwater-dependent use provided that:
  - a. the purpose of such fill is to eliminate irregularities in previously altered portions of the project shoreline; and
  - b. such fill will replace previously authorized fill elsewhere along the project shoreline, on a 1:1 square foot basis and without seaward projection beyond the adjacent shoreline;
6. stationary vessels located below the high water mark and proposed for conversion to accessory use or to nonwater-dependent facilities of public accommodation, provided that such vessels:
  - a. do not consist of platform-like floating structures, such as barges, built or modified to serve primarily as support for new buildings; and
  - b. will be licensed for a limited term, in accordance with the provisions of 310 CMR 9.15(1)(d)2..

(b) Tidelands Within Designated Port Areas (DPAs)

1. fill or structures for any water-dependent-industrial use, and accessory uses thereto, on previously filled tidelands;
2. fill or structures for water-dependent-industrial use on flowed tidelands, provided that, in the case of proposed fill, neither pile-supported nor floating structures are a reasonable alternative;

9.32: continued

3. structures to accommodate public pedestrian access, provided that such structures are located above the high water mark or within the footprint of existing pile-supported structures or pile fields, wherever feasible;
4. structures on filled tidelands to accommodate the following uses on a limited basis:
  - a. a use to be licensed in combination with water-dependent-industrial uses within a marine industrial park, as defined in 310 CMR 9.02; or
  - b. a supporting DPA use, as defined in 310 CMR 9.02; or
  - c. a temporary use, as defined in 310 CMR 9.02.

The use of filled tidelands in a DPA for the above purposes shall also be governed by the provisions of 310 CMR 9.15(1)(d)1. and 310 CMR 9.36(5).

(c) Great Ponds.

1. fill or structures for any use on previously filled lands below the natural high water mark;
2. structures for water-dependent use on submerged lands below the natural high water mark, provided such structures are designed to avoid unnecessary encroachment in the water;
3. fill or structures on submerged lands above the natural high water mark, for uses listed for flowed tidelands in 310 CMR 9.32(1)(a).

(d) Non-Tidal Rivers and Streams (Outside ACECs). Fill or structures for uses below the high water mark, as listed for flowed tidelands in 310 CMR 9.32(1)(a).(e) Areas of Critical Environmental Concern (ACECs).

1. fill or structures for any use on previously filled tidelands;
2. structures to accommodate public pedestrian access on flowed tidelands, provided that it is not feasible to locate such structures above the high water mark or within the footprint of existing pile-supported structures or pile fields;
3. publicly-owned structures for water-dependent use below the high water mark, provided that such structures are designed to minimize encroachment in the water;
4. privately-owned structures for water-dependent use below the high water mark, provided that:
  - a. the proposed use is not industrial and is located within the footprint of existing previously authorized pile-supported structures, unless an insignificant deviation from said footprint is authorized by the Department in order to protect public health, safety, or the environment; or
  - b. such structures are necessary to accommodate infrastructure facilities, provided that such structures are designed to minimize encroachment in the water; or
  - c. such structures were existing on October 4, 1990, and if a resource management plan for the ACEC has been adopted by the municipality and approved by the Secretary said structures are consistent with said plan; or
  - d. such structures, if built or substantially altered after October 4, 1990, are consistent with a resource management plan adopted by the municipality and approved by the Secretary.

(2) Notwithstanding the provisions of 310 CMR 9.32(1), the Department may license fill or structures necessary for the following uses, provided that reasonable measures are taken to avoid, minimize, and mitigate any encroachment in a waterway:

- (a) shoreline stabilization or the rehabilitation of an existing shore protection structure, irrespective of the uses proposed landward of such fill or structures;
- (b) installation of drainage, ventilation, or utility structures, or placement of minor and incidental fill, necessary to accommodate any replacement, reconstruction or other modification to existing public roadways or existing railroad track and/or rail bed;
- (c) improvement or rehabilitation of existing public roadways or existing railroad track and/or rail bed, provided that any net encroachment with respect to public roadways is limited to widening by less than a single lane, adding shoulders, and upgrading substandard intersections; or
- (d) accessory uses, other than parking, which are clearly subordinate and incidental to a water-dependent use, provided that:
  1. the fill or structures in question are not located in an ACEC, and do not result in any encroachment in the waterway beyond the area occupied by the water-dependent use itself; and

9.32: continued

2. the accessory use cannot reasonably be located above the high water mark, and is not located within a water-dependent use zone.

9.33: Environmental Protection Standards

- (1) All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to:
  - (a) Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H and 301 CMR 11.00.
  - (b) Wetlands Protection Act, M.G.L. c. 131, § 40, and 310 CMR 10.00.
  - (c) Wetlands Restriction Acts, M.G.L. c. 130, § 105 and c. 131, § 40A, and 302 CMR 4.00 and 6.00. All projects shall comply with wetland restriction orders recorded pursuant to these statutes.
  - (d) Areas of Critical Environmental Concern, M.G.L. c. 21A, § 2(7) and St. 1974, c. 806, § 40(E), and 301 CMR 12.00.
  - (e) Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26 through 53, and 314 CMR 3.00 (Surface Water Discharge Permits - NPDES), 314 CMR 5.00 (Ground Water Discharge Permits), 314 CMR 7.00 (Sewer Extension/Connection Permits), 314 CMR 310 CMR 9.00 (Water Quality Certification), and 310 CMR 15.00 (Subsurface Sewage Disposal Permits - Title 5).
  - (f) Ocean Sanctuaries Act, M.G.L. c. 132A, §§ 13 through 16 and 18, and 302 CMR 5.00. No license or permit shall be issued for any structure or fill that is expressly prohibited in M.G.L. c. 132A, §§ 1 through 16.
  - (g) Marine Fisheries Laws, M.G.L. c. 130, and 322 CMR 1.00.
  - (h) Scenic Rivers Act, M.G.L. c. 21, § 17B, and 302 CMR 3.00.
  - (i) Massachusetts Historical Commission Act, M.G.L. c. 9, §§ 26 through 27C, as amended by St. 1982, c. 152 and St. 1988, c. 254, and 950 CMR 71.00. For projects for which a Project Notification Form must be submitted pursuant to 950 CMR 71.07 the applicant shall file said form with the Massachusetts Historical Commission.
  - (j) Mineral Resources Act, M.G.L. c. 21, §§ 54 through 58, and 310 CMR 29.00.
  - (k) Massachusetts Drinking Water Act, M.G.L. c. 111, §§ 159 through 174A, and 310 CMR 22.00.
  - (l) Underwater Archeological Resources Act, M.G.L. c. 91 and c. 6, §§ 179 and 180, and 312 CMR 2.00.
  - (m) Hazardous Waste Management Act, M.G.L. c. 21C and 310 CMR 30.00.
  - (n) Solid Waste Disposal Act, M.G.L. c. 16, §§ 18 through 24, and 310 CMR 16.00.
  - (o) Air Pollution Act, M.G.L. c. 111, §§ 142A through I and 310 CMR 7.00.
  - (p) State Highway Curb Cuts, M.G.L. c. 81, § 21.
  - (q) Energy Facilities Siting Act, M.G.L. c. 164, §§ 69G through J, and 980 CMR 1.00.
  - (r) Regional land use control statutes, including the Martha's Vineyard Commission Act, St. 1974, c. 637, as amended by St. 1977, c. 831, and the Cape Cod Commission Act, St. 1989, c. 716.
- (2) Where a state or regional agency has authority to issue regulatory approval, issuance of such approval shall be conclusive as to compliance with the regulatory program in question.
- (3) With respect to M.G.L. c. 131, § 40 and 310 CMR 10.00, if the Department has issued a final order of conditions the project shall be presumed to comply with the statute and the final order shall be deemed to be incorporated in the terms of the license or permit, with no additional wetland conditions imposed. If an order of conditions has been issued by the conservation commission and the Department has not taken jurisdiction, the Department shall presume the project complies with state wetland standards, except upon a clear showing of substantial non-compliance with such standards. In that event, the Department shall impose such additional conditions in the license or permit as will make the project substantially comply with state wetlands standards.

9.33: continued

(4) Where a state agency has statutory responsibility but no authority to issue regulatory approval, the Department shall act in accordance with any MOU with said agency governing incorporation of its standards and requirements into waterways licenses and permits. In the absence of an MOU, the Department shall presume that the project complies with the statutes and regulations in question, unless the responsible state agency informs the Department otherwise. In that event, the Department shall consult with the responsible state agency and may adopt any formal recommendations received therefrom, provided such recommendations do not conflict with 310 CMR 9.00 or the purposes of M.G.L. c. 91.

9.34: Conformance with Municipal Zoning And Harbor Plans

(1) Zoning Law. Any project located on private tidelands or filled Commonwealth tidelands must be determined to comply with applicable zoning ordinances and by-laws of the municipality(ies) in which such tidelands are located. The Department shall find this requirement is met upon receipt of written certification issued by the municipal clerk, or by another municipal official responsible for administering said zoning ordinances and by-laws, and signed by the municipal clerk, stating that the activity to be licensed is not in violation of said ordinances and by-laws. Compliance with zoning does not apply to any public service project that is exempted from such requirements by law, including but not limited to action of the Department of Public Utilities pursuant to M.G.L. c. 40A, § 3.

(2) Municipal Harbor Plan.

(a) If the project is located within an area covered by a municipal harbor plan, said project must conform to the provisions of said plan to the degree applicable under plan approval at 301 CMR 23.00. In making this determination the Department shall take into account all relevant information in the public record, and shall act in accordance with the following provisions:

1. the Department shall consult with the planning board or other municipal body with lead responsibility for plan implementation, as appropriate and in accordance with the provisions of 310 CMR 9.11(1). In the event a written recommendation as to plan conformance is submitted by such board or other body, the Department shall presume that the requirement is met or not met in accordance with said recommendation, except upon a clear showing to the contrary and except as otherwise provided in 310 CMR 9.34(2)(a)2.;

2. the Department shall not find the requirement has been met if the project requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan, unless the Department determines the deviation to be de minimus or unrelated to the purposes of M.G.L. c. 91 or 210 CMR 9.00;

(b) If the project conforms to the municipal harbor plan the Department shall:

1. apply the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c), in accordance with the criteria specified in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c) and in associated plan approval at 301 CMR 23.00 and associated guidelines of CZM;

2. adhere to the greatest reasonable extent to applicable guidance specified in the municipal harbor plan which amplifies any discretionary requirements of 310 CMR 9.00, in accordance with the criteria specified in 301 CMR 23.00 and associated guidelines of CZM;

3. determine that the requirement of 310 CMR 9.54, governing consistency with CZM policies, has been met, if applicable, except upon a written showing by CZM that the project conflicts with CZM policy in effect when the license application was completed, in a manner that was not reasonably foreseeable at the time of plan approval.

9.35: Standards to Preserve Water-Related Public Rights

(1) General. The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes; and shall preserve any public rights of access that are associated with such use. In applying this standard the Department shall act in accordance with the provisions of 310 CMR 9.35(2) through (6), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. Further, in assessing the significance of any interference with public rights pursuant to 310 CMR 9.35(2) and(3), the Department shall take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights. Such interference may be allowed provided that mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served.

(2) Public Rights Applicable to All Waterways.

(a) Navigation -- The project shall not significantly interfere with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.

1. The Department shall find that the standard is not met in the event a project will:
  - a. extend seaward of any state harbor line unless said project is specifically authorized by law or, if not so authorized, is a pipeline, conduit or cable which is entirely embedded in the soil and does not in any part occupy or project into such tidewater beyond the harbor line, provided also that the Department may at any time require any pipeline, conduit or cable to be removed or relocated if channel changes or alterations demand the same, as required by M.G.L. c. 91, § 14;
  - b. extend into or over any existing channel such as to impede free passage;
  - c. impair any line of sight required for navigation;
  - d. require the alteration of an established course of vessels;
  - e. interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site;
  - f. extend beyond the length required to achieve a safe berthing, where there are no adjacent structures;
  - g. generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections;
  - h. alter, due to the building of a solid fill structure, tidal action or other currents so as to interfere with the ability to handle vessels;
  - i. adversely affect the depth or width of an existing channel; or
  - j. impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.

The Department may require, among other things, warning devices and other navigation aids as it deems appropriate to reduce interference with navigation.

2. In the event that reducing the length of a structure to avoid significant interference with navigation would create adverse effects on the environment due to dredging, the Department may license or permit a longer structure provided its construction will entail less dredging without producing substantial interference with navigation.

3. In the event the project is located within a Designated Port Area, the Department may authorize fill, structures, or dredging that significantly interferes with navigation by recreational vessels or with shellfishing areas, provided that such activities are for water-dependent-industrial use and that all feasible measures will be taken to mitigate such interference.

(b) Free Passage Over and Through Water -- The project shall not significantly interfere with public rights of free passage over and through the water, which exist in all waterways. Such rights include the right to float on, swim in, or otherwise move freely within the water column without touching the bottom, and, in Commonwealth Tidelands and Great Ponds, to walk on the bottom.

9.35: continued

(c) Access To Town Landings -- The project shall not significantly interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the project site.

(3) Public Rights Applicable To Tidelands and Great Ponds

(a) Fishing and Fowling - The project shall not significantly interfere with public rights of fishing and fowling which exist in tidelands and Great Ponds. Such rights include the right to seek or take any fish, shellfish, fowl, or floating marine plants, by any legal means, from a vessel or on foot; the right to protect habitat and nutrient source areas in order to have fish, fowl, or marine plants available to be sought and taken; and the natural derivatives thereof. The Department shall find that the standard is not met in the event the project:

1. poses a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site; or
2. results in the elimination of a traditional fishing or fowling location used extensively by the public.

(b) On-Foot Passage -- The project shall not significantly interfere with public rights to walk or otherwise pass freely on private tidelands for purposes of fishing, fowling, navigation, and the natural derivatives thereof; and on Commonwealth tidelands and Great Ponds for said purposes and all other lawful activities, including swimming, strolling, and other recreational activities. The Department shall find that the standard is not met if the project does not comply with the following conditions governing public pedestrian access:

1. if the project site includes flowed private tidelands, the project shall allow continuous, on-foot, lateral passage by the public in the exercise of its rights therein, wherever feasible; any pier, wharf, groin, jetty, or other structure on such tidelands shall be designed to minimize interference with such passage, either by maintaining at least a five-foot clearance above the ground along the high water mark or by providing a stairway for the public to pass laterally over such structures; where obstruction of continuous access below the high water mark is unavoidable, the project shall provide alternate lateral passage to the public above said mark in order to mitigate interference with the public right of passage on flowed private tidelands;
2. if the project site includes filled tidelands or Great Ponds, the project shall include reasonable measures to provide on-foot passage on such lands for the public in the exercise of its rights therein, in accordance with the following provisions:
  - a. if the project is a nonwater-dependent use project, said project shall provide public pedestrian access facilities in accordance with the applicable provisions of 310 CMR 9.52 or, for infrastructure facilities, of 310 CMR 9.55;
  - b. if the project is a water-dependent use project on filled Commonwealth tidelands, said project shall provide for public thereon passage by such means as are consistent with the need to avoid undue interference with the water-dependent uses in question; measures which may be appropriate in this regard include, but are not limited to, allowing the public to pass laterally along portions of the project shoreline, or transversely across the site to a point on the project shoreline.

(4) Compensation for Interference With Public Rights in Commonwealth Tidelands and Great Ponds.

Any water-dependent use project which includes fill or structures for private use of Commonwealth tidelands or Great Ponds shall provide compensation to the public for interfering with its broad rights to use such lands for any lawful purpose. Such compensation shall be commensurate with the extent of interference caused, and shall take the form of measures deemed appropriate by the Department to promote public use and enjoyment of the water, at a location on or near the project site if feasible. If the project includes a private recreational boating facility, the Department shall apply this standard in accordance with the following provisions:

## 9.35: continued

- (a) for any private recreational boating facility, reasonable arrangements shall be made to accommodate public pedestrian access along or to the water's edge; generally, unless other measures are determined to be more appropriate by the Department, such access shall be provided by establishing, as a condition of the license, a lateral accessway at or near the high water mark wherein the public may pass freely across the seaward end of the property from dawn to dusk;
- (b) if the private recreational berthing facility is a marina, additional arrangements shall be made to provide water-related benefits to the public commensurate with the scale of such facility; examples of such benefits include construction of a public boat launching ramp, operation of an ongoing program of community sailing or boating instruction, dedication of a substantial number of berths to public transient use, and provision of public pedestrian facilities beyond those required elsewhere in 310 CMR 9.00.

Nothing in the above provision shall be construed to prevent the licensee from restricting public access to slips, floats, ramps, and other docking facilities where security for recreational vessels is required.

(5) Management of Areas Accessible to the Public. Any project that includes tidelands or Great Ponds accessible to the public, in accordance with any of 310 CMR 9.35(1) through (4), shall provide for long-term management of such areas which achieves effective public use and enjoyment while minimizing conflict with other legitimate interests, including the protection of private property and natural resources. In applying this standard, the Department shall act in accordance with the following provisions.

- (a) No limitation on hours of availability or scope of allowed activity, or other substantial restriction, may be placed on said public access except as expressly authorized in the license; reasonable rules and regulations governing public use of such areas may be adopted by the licensee, and may be subject to review and approval by the Department, or its designee, if so provided in the license.
- (b) Any project required to provide public access facilities in accordance with 310 CMR 9.35(3)(b)2. or (4)(b), or any other project as deemed appropriate by the Department, shall encourage public patronage of such facilities by placing and maintaining adequate signage at all entryways and at other appropriate locations on the project site; said signage shall:
  1. conform to all local laws and regulations and any design guidelines that may be specified by the Department or its designee; and
  2. include at least one sign, in a prominent location, which advises the public of its access rights; discloses whatever access-related rules and regulations are in effect, including restrictions on hours of operation, if any; and discloses the license number of the project and a location on the site where a copy of the license may be inspected by the public.
- (c) No gates, fences, or other structures may be placed on any areas open to public access in a manner that would impede or discourage the free flow of pedestrian movement thereon; and all pedestrian exterior open spaces shall be open to the public 24 hours a day, unless otherwise authorized in writing by the Department.
- (d) The Department may include conditions in a license which restrict public pedestrian access in order to protect public health, safety, or the environment, and shall specify such additional access-related requirements as are deemed appropriate to offset any significant loss of benefits to the public which may be associated with such restrictions.

(6) Limitation on Liability. If a project includes measures to accommodate public pedestrian access in accordance with any provision of 310 CMR 9.33, the licensee shall be considered to be a private landowner who opens land to public recreational use without a fee and who is therefore not liable, pursuant to M.G.L. c. 21, § 17c, for injuries to persons or property due to public use, unless the owner's conduct is willful or reckless.

9.36: Standards to Protect Water-Dependent Uses

(1) General. The project shall preserve the availability and suitability of tidelands, Great Ponds, and other waterways that are in use for water-dependent purposes, or which are reserved primarily as locations for maritime industry or other specific types of water-dependent use. In applying this standard the Department shall act in accordance with 310 CMR 9.36(2) through (5), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2.

(2) Private Access to Littoral or Riparian Property -- The project shall not significantly interfere with littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from said property, as provided in M.G.L. c. 91, § 17. In evaluating whether such interference is caused by a proposed structure, the Department may consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures. In the case of a proposed structure which extends perpendicular to the shore, the Department shall require its placement at least 25 feet away from such abutting property lines, where feasible.

(3) The project shall not significantly disrupt any water-dependent use in operation, as of the date of license application, at an off-site location within the proximate vicinity of the project site. The project shall include such mitigation and/or compensation measures as the Department deems appropriate to avoid such disruption.

(4) The project shall not displace any water-dependent use that has occurred on the site within five years prior to the date of license application, except upon a clear showing by the applicant that said use:

- (a) did not take place on a reasonably continuous basis, for a substantial period of time; or
- (b) has been or will be discontinued at the site by the user, for reasons unrelated to the proposed project or as a result of voluntary arrangements with the applicant.

Absent the above showings, the project shall include arrangements determined to be reasonable by the Department for the water-dependent use to be continued at its existing facility, or at a facility at an alternative location having physical attributes, including proximity to the water, and associated business conditions which equal or surpass those of the original facility and as may be identified in a municipal harbor plan, if any. Permanent relocation to an off-site facility may occur in order to accommodate a public service project for which relocation arrangements are governed by law, or if the Department determines that it is not appropriate for the water-dependent use to continue on the site. Otherwise, only temporary relocation may occur as necessary for project construction.

(5) The project shall not include fill or structures for nonwater-dependent or water-dependent, non-industrial uses which preempt water-dependent-industrial use within a Designated Port Area (DPA). In applying this standard the Department shall act in accordance with the following provisions:

- (a) such fill or structures shall not occupy tidelands which the Department determines are necessary to accommodate a competing party who intends to develop such tidelands for water-dependent industrial use, provided written notice of such party's intention is submitted to the Department prior to the close of the public comment period on the license application; such determination shall be based upon a clear showing, within a period of time deemed reasonable by the Department, that the competing project would promote water-dependent-industrial use of the DPA to a greater degree than the proposed project, and that the competing party:
  - 1. is a state or local government agency, or is a maritime business or other organization with the expertise, experience, and financial ability to implement the competing project;
  - 2. has prepared detailed development plans for the competing project, including appropriate feasibility studies;
  - 3. has tendered an offer to purchase title or other rights to the tidelands in question, at fair market value for water-dependent-industrial use; and



## 9.36: continued

4. has proposed waterways license conditions or other arrangements which will restrict the tidelands in question to the uses contained in the competing projects for a period of time deemed appropriate by the Department;
- (b) reasonable arrangements shall be made to prevent commitments of space or facilities that would significantly discourage present or future water-dependent-industrial activity on the project site or elsewhere in the DPA; such arrangements shall include, but are not limited to, the following:
  1. in general, no structures shall be built or altered which cannot be subsequently removed or converted to water-dependent-industrial use with relative ease; otherwise, the Department may impose, as a condition of the license, a requirement for removal or restoration of such structures upon expiration of the license;
  2. nonwater-dependent uses shall not be located in any spaces or facilities with attributes that are necessary to maintain the utility of the project site for prospective water-dependent-industrial use, especially that for which it is among the most suitable in the harbor in question; at a minimum, such nonwater-dependent uses shall not occur in new structures within the water-dependent use zone;
  3. within a marine industrial park, conditions governing the duration of tenancy or other mechanisms must be established to ensure that nonwater-dependent activity occurs in a manner that preserves adequate flexibility over time for the park to accommodate water-dependent-industrial uses; at a minimum, reasonable steps shall be taken to assign a priority for said uses to occupy spaces or facilities as they become available in the future;
  4. in the case of supporting DPA use, conditions governing the nature and extent of operational or economic support must be established to ensure that such support will be effectively provided to water-dependent-industrial uses.

9.37: Engineering and Construction Standards

- (1) All fill and structures shall be designed and constructed in a manner that:
  - (a) is structurally sound, as certified by a Registered Professional Engineer;
  - (b) complies with applicable state requirements for construction in flood plains, in accordance with the State Building Code, 780 CMR 744.00 and as hereafter may be amended, and will not pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm; and
  - (c) does not unreasonably restrict the ability to dredge any channels.
- (2) In the case of a project within a flood zone, the project shall comply with the following requirements:
  - (a) In coastal high hazard areas as defined in 310 CMR 9.02, new or expanded buildings for residential use shall not be located seaward of the high water mark.
  - (b) New buildings for nonwater-dependent use intended for human occupancy shall be designed and constructed to:
    1. withstand the wind and wave forces associated with the statistical 100-year frequency storm event; and
    2. incorporate projected sea level rise during the design life of the buildings; at a minimum, such projections shall be based on historical rates of increase in sea level in New England coastal areas.
- (3) Projects with coastal or shoreline engineering structures shall comply with the following:
  - (a) any seawall, bulkhead, or revetment shall be located landward of the high water mark unless it must lie below the high water mark to permit proper tieback placement, to obtain a stable slope on bank areas, or to be compatible with abutting seawalls, bulkheads, or revetments in terms of design, size, function, and materials, or unless it is associated with new fill permitted according to the provisions of 310 CMR 9.32;

9.37: continued

- (b) any breakwater or similar structure designed to dissipate or otherwise reduce wave energy or to interfere with current flow shall not:
  - 1. cause or contribute to water stagnancy;
  - 2. reduce the ability of adjacent water bodies to flush adequately; or
  - 3. cause or contribute to sedimentation problems in adjacent or nearby navigation channels, anchorages, or wetland resource areas, or cause increased erosion to inland or coastal beaches, banks, or other wetland resource areas;
- (c) in evaluating coastal or shoreline engineering structures, the Department shall require non-structural alternatives where feasible;
- (d) the Department shall evaluate coastal or shoreline engineering structures for compatibility with abutting coastal or shoreline engineering structures in terms of design, size, function, and materials;
- (e) if the Department finds significant adverse effects on the project site or adjacent or downcoast and downstream areas after construction of any coastal or shoreline engineering structure, the Department may, after an opportunity for a hearing, require modification of said structure the cost of which may not exceed 25% of the replacement cost of said structure, or may require the removal of said structure; 310 CMR 9.37(3)(e) shall be specifically stated in the license.

(4) Pipelines and conduits and their valves and protrusions shall be buried so that they will not present a hazard to navigation; will be adequately protected from scouring; will not be uncovered by sediment transport; and will not present a hazard or obstruction to fishing gear. Bottom contours shall be restored after burial. Pipelines carrying hazardous substances (*e.g.*, oil) shall also be protected from anchor dragging and fish trawls. When the burial of pipelines, conduits, valves, and protrusions is not feasible, equivalent protection shall be provided by shrouding or other means.

9.38: Use Standards for Recreational Boating Facilities

- (1) Public Recreational Boating Facilities. Any project that includes a public recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to ensure patronage of such facility by the general public. In applying this standard the Department shall act in accordance with the following provisions:
  - (a) all vacant berths shall be assigned in a fair and equitable manner to the public patrons of said facility, by means of a waiting list or other comparably unbiased method; nothing in this provision shall be construed to prevent berthing assignments based on vessel characteristics, or the offer of first refusal rights to existing patrons of the facility who wish to relocate to a vacant berth;
  - (b) any contract or other agreement for exclusive use of berths at said facility shall have a maximum term of one year, and may be renewable upon each expiration for an additional period of up to one year;
  - (c) reasonable arrangements shall be made to accommodate transient boaters, including, at a minimum, a procedure for making any berth available for transient use during periods of vacancy in excess of 24 hours;
  - (d) all exterior pedestrian facilities on the project site shall be open to the general public, except where access restrictions are necessary in order to avoid significant interference with the operation of the facility or to maintain security at slips, ramps, floats, and other docking facilities; any such access restrictions shall be stated in the license.
- (2) Private Recreational Boating Facilities.
  - (a) Any project that includes a private recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to avoid undue privatization in the patronage of said facility. In applying this standard, the Department shall act in accordance with the following provisions:

## 9.38: continued

1. no berth in a marina shall be assigned pursuant to any contract or other agreement that makes use of the berth contingent upon ownership or occupancy of a residence or other nonwater-dependent facility of private tenancy;
2. no berth in a marina shall be assigned pursuant to a contract or other agreement for exclusive use with a maximum term that exceeds one year, unless:
  - a. for existing marinas, the lease agreement, master lease agreement or notice thereof for such berths was recorded at the Registry of Deeds prior to July 6, 1990 in which event all berths subject to such agreement shall be exempt from the provisions of 310 CMR 9.38(2)(b); or
  - b. for new marinas or berths in an existing marina not grandfathered pursuant to 310 CMR 9.38(2)(a), the following conditions are met:
    - i. said marina is located on tidelands outside of Designated Port Area;
    - ii. the Department expressly authorizes the assignment of long-term exclusive use of such berths in the license, and the license includes a condition requiring written notification to any assignee that said license does not convey ownership of Commonwealth tidelands;
    - iii. the number of berths authorized in the license does not exceed 50% of the total berths in said marina; and
    - iv. said marina provides water-related public benefits commensurate with the degree of privatization, as deemed appropriate by the Department.
- (b) No project shall include a private recreational boating facility with fewer than ten berths on Commonwealth tidelands or Great Ponds, if the Department receives written certification from the municipal official or planning board of the municipality in which the project is located that such facility does not conform to a formal, areawide policy or plan which establishes municipal priorities among competing uses of the waterway, unless the Department determines that such certification:
  1. is arbitrary, capricious, or an abuse of discretion; or
  2. conflicts with an overriding state, regional, or federal interest.

9.39: Standards for Marinas, Boatyards, and Boat Ramps(1) Marinas.

- (a) Design Standards for Marinas -- Any project that includes a new marina, or any expansion thereof to ten or more berths greater than the number of berths existing on the effective date of 310 CMR 9.00, shall comply with the following design requirements:
  1. all docking facilities, including passageways, shall be certified to be structurally sound by a registered professional engineer;
  2. safe and unobstructed navigational ingress and egress to docking facilities shall be provided;
  3. sanitary facilities shall be provided, including:
    - a. an adequate number of restrooms and refuse receptacles appropriate for the number of berths at the marina; in general, there should be one toilet fixture per sex for every 50 berths, and refuse receptacles at every gangway and restroom area; and
    - b. sewage pumpout facilities shall be provided as appropriate based on the number of berths and type of vessels at the marina, the availability of such facilities nearby, and environmental considerations including the water circulation patterns of the waterway and the proximity of shellfish resources; in general, there should be a sewage pumpout facility for marinas with more than 50 berths, or as otherwise specified in a municipal harbor plan; documentation shall be provided showing compliance with local, state, and federal requirements for said facilities;
  4. any utility services provided at the marina shall be constructed and maintained in compliance with all applicable local and state requirements;
  5. all lighting at the marina shall be designed to minimize interference with navigation by reflection, glare, or interference with aids to navigation;
  6. if the applicant proposes to provide facilities for storage, pumping or conveyance of petroleum fuels, the following information shall also be provided:

## 9.39: continued

- a. a detailed description and site location plan for marine related facilities necessary for the pumping, conveyance and storage of any petroleum products;
- b. a list of methods and equipment to be used for containment and clean-up of any petroleum fuels accidentally discharged into the water, including minor spills during routine operations; and a detailed contingency plan for major spills;
- c. documentation showing compliance with applicable local, state and federal requirements for said facilities.

(b) Reconfiguration of Docking Facilities in a Marina -- In a license or license amendment, the Department may delineate a zone within a marina for purposes of future reconfiguration of existing, licensed docking facilities, including pile-held or bottom-anchored floating walkways and finger piers, floats, and mooring piles. Such reconfiguration may proceed upon written approval by the Department, but without further licensing action if:

1. the licensee submits to the Department a written request and plan for reconfiguration which does not extend beyond the delineated zone, and which does not result in an increase in the area of waterway occupied from that which was originally licensed;
2. The licensee submits to the Department a statement affirming that the material submitted to the Department under 310 CMR 9.39(1)(b)1. has, at the time of such submittal, also been sent to the harbormaster of the affected municipality or, if the municipality has no harbormaster, to the municipal official, and that said harbormaster or municipal official has been informed that he has 30 days to register any objections to the proposed reconfiguration plan with the Department;
3. all other applicable permits have been obtained, including any required approval under M.G.L. c. 131, § 40 and 310 CMR 10.00.

The Department shall act upon any such request within 60 days of receipt.

(2) Boatyards. The license application for any boatyard or expansion thereof shall indicate on the license plan that the following facilities and information will be provided:

- (a) adequate oil, grease, sediment, and paint traps and other appropriate measures used to contain by-products of boat service, repair and construction to prevent them from discharging into the adjacent waterway;
- (b) boat out-hauling and launching facilities which have been certified as structurally sound by a registered professional engineer; and
- (c) documentation showing compliance with applicable local, state and federal requirements for the use and storage of hazardous materials.

(3) Boat Launching Ramps. The license application for any boat launching ramp for public use, or any expansion thereof, shall indicate on the license plan that the following facilities will be provided, to a degree deemed appropriate by the Department:

- (a) turning areas to facilitate the launching and retrieval of boats to or from the water;
- (b) parking areas for vehicles and boat trailers;
- (c) permanent or temporary sanitary facilities for boaters using the launching ramp, as necessary in light of anticipated water quality or other environmental concerns and maintenance considerations;
- (d) ramps constructed, where possible, at an angle no greater than 15% from the horizontal; where upland modification is necessary, the slope grade should be created, if possible, by cutting back into the upland; ramps should be approximately even with beach or upland grade elevations; and ramps should extend a sufficient distance inland to prevent washout at the inland edge and where possible should extend a minimum of five feet beyond the low water mark; and
- (e) sufficient access facilities and water depths so as to provide safe navigational ingress and egress; this may include adjacent catwalks, tie-off pilings, or access piers and suitable associated water area for staging of boat launching and retrieval; water depths at the launching area of the ramp should be the minimum depth necessary to accommodate the types of boats which will use the facility.

9.40: Standards For Dredging and Dredged Material Disposal

Any project that includes dredging or dredged material disposal shall comply with the following requirements:

(1) Limitations on Dredging and Disposal Activity

(a) The project shall not include any dredging of channels, mooring basins, or turnaround basins to a mean low water depth greater than 20 feet, unless said project:

1. is located within a Designated Port Area; or
2. serves a commercial navigation purpose of state, regional, or federal significance, and cannot reasonably be located in a Designated Port Area.

(b) If the project is located in an ACEC, the project shall not include any of the following activities:

1. improvement dredging, except for the sole purpose of fisheries or wildlife enhancement;
2. dredged material disposal, except for the sole purpose of beach nourishment, dune construction or stabilization with proper vegetative cover, or the enhancement of fishery or wildlife resources.

(2) Resource Protection Requirements

(a) The design and timing of dredging and dredged material disposal activity shall be such as to avoid interference with anadromous/catadromous fish runs. At a minimum, no such activity shall occur in such areas between March 15th and June 15th of any year, except upon a determination by the Division of Marine Fisheries, pursuant to M.G.L. c. 130, § 19, that such an activity will not obstruct or hinder the passage of fish.

(b) The design and timing of dredging and dredged material disposal activity shall be such as to minimize adverse impacts on shellfish beds, fishery resource areas, and submerged aquatic vegetation. The Department may consult with the Department of Fisheries, Wildlife, and Environmental Law Enforcement or the natural resource officer of the municipality regarding the assessment of such impacts.

(3) Operational Requirements for Dredging

(a) The extent of dredging shall not exceed that reasonably necessary to accommodate the navigational requirements of the project and provide adequate water circulation.

(b) The shoreward extent of dredging shall be a sufficient distance from the edge of adjacent marshes to avoid slumping. In general, for improvement dredging projects the edge of the dredging footprint, including any side cuts, should be at least 25 feet from any marsh boundary. In areas where significant wake or wash will be generated by vessel traffic, increased setbacks may be incorporated based on appropriate design calculations.

(c) In general, no basin, canal, or channel shall be dredged deeper than the main channel to which it is connected.

(d) To the maximum reasonable extent, basins shall have wide openings and short entrance channels to promote tidal exchange within the basin.

(e) In general, hydraulic dredging shall be favored over mechanical methods, except when open water disposal of fine grained material is proposed.

(4) Operational Requirements for Dredged Material Disposal

(a) Where determined to be reasonable by the Department, clean dredged material shall be disposed of in a manner that serves the purpose of beach nourishment, in accordance with the following provisions:

1. in the case of a publicly-funded dredging project, such material shall be placed on publicly-owned eroding beaches; if no appropriate site can be located, private eroding beaches may be nourished if easements for public access below the existing high water mark can be secured by the applicant from the owner of the beach to be nourished;
2. in the case of a privately-funded dredging project, such material may be placed on any eroding beach.

(b) In the event ocean disposal of dredged material is determined to be appropriate by the Department, the licensee or permittee shall:

## 9.40: continued

1. publish in the *Notice to Mariners* the date, time, and proposed route of all ocean disposal activities and the coordinates of the ocean disposal site, as deemed appropriate by the U.S. Coast Guard;
  2. ensure that transport vessels are not loaded beyond capacity; are equipped with sudden, high volume release mechanisms; and are at a complete stop when the material is released; and
  3. ensure that disposal occurs within the boundaries of an approved or otherwise formally designated ocean disposal site; and that the discharge location is marked during disposal operations by a buoy equipped with a flashing light and radar reflectors which allow it to be located under variable sea/weather conditions.
- (5) Supervision of Dredging and Disposal Activity.
- (a) The licensee or permittee shall inform the Department in writing at least three days before commencing any authorized dredging or dredged material disposal.
  - (b) The licensee or permittee shall provide, at his/her expense, a dredging inspector approved by the Department who shall accompany the dredged material while in transit and during discharges, either upon the scows containing the dredged material or upon the boat towing them, for the following activities:
    1. any offshore disposal;
    2. any onshore disposal of dredged material greater than 10,000 cubic yards; or
    3. the disposal of materials defined by the Department as potentially degrading or hazardous.
  - (c) The name, address, and qualifications of the dredging inspector shall be submitted to the Department as part of the license or permit application for approval.
  - (d) Within 30 days after the completion of the dredging, a report shall be submitted to the Department certified by the dredging inspector, including daily logs of the dredging operation indicating volume of dredged material, point of origin, point of destination, and other appropriate information.

9.51: Conservation of Capacity for Water-Dependent Use

A nonwater-dependent use project that includes fill or structures on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use. In applying this standard, the Department shall take into account any relevant information concerning the utility or adaptability of the site for present or future water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall adhere to the greatest reasonable extent to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with the following provisions.

- (1) If the project includes nonwater-dependent facilities of private tenancy, such facilities must be developed in a manner that prevents significant conflict in operation between their users and those of any water-dependent facility which reasonably can be expected to locate on or near the project site. Characteristics of the respective facilities that may give rise to such user conflict include, but are not limited to:
  - (a) presence of noise and odors;
  - (b) type of equipment and accessory services;
  - (c) hours of operation and spatial patterns of activity;
  - (d) traffic flows and parking needs;
  - (e) size and composition of user groups;
  - (f) privacy and security requirements;
  - (g) requirements for public infrastructure.
- (2) If the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that protects the utility and adaptability of the site for water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the project site. Aspects of built form that may give rise to design incompatibility include, but are not limited to:

9.51: continued

- (a) the total surface coverage by buildings and other permanent structures, insofar as it may affect the amount of open space where flexibility to serve water-dependent purposes will be retained;
- (b) the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity;
- (c) the scale of buildings and other permanent structures, insofar as it may affect wind, shadow, and other conditions of the ground level environment that may affect users of water-dependent facilities; and
- (d) the landscape design of exterior open spaces, insofar as it may affect the attainment of effective pedestrian and vehicular circulation within and to areas of water-dependent activity.

(3) The Department shall find that the standard is not met if the project does not comply with the following minimum conditions which, in the absence of a municipal harbor plan which promotes the policy objectives stated herein with comparable or greater effectiveness, are necessary to prevent undue detriments to the capacity of tidelands to accommodate water-dependent use:

- (a) new pile-supported structures for nonwater-dependent use shall not extend beyond the footprint of existing, previously authorized pile-supported structures or pile fields, except where no further seaward projection occurs and the area of open water lost due to such extension is replaced, on at least a 1:1 square foot basis, through the removal of existing, previously authorized fill or pile-supported structures or pile fields elsewhere on the project site; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the on-site replacement requirement if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative replacement requirements which ensure that no net loss of open water will occur for nonwater-dependent purposes, in order to maintain or improve the overall capacity of the state's waterways to accommodate public use in the exercise of water-related rights, as appropriate for the harbor in question;
- (b) nonwater-dependent facilities of private tenancy shall not be located on any pile-supported structures on flowed tidelands, nor at the ground level of any filled tidelands within 100 feet of a project shoreline; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above use limitations if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative limitations and other requirements which ensure that no significant privatization of waterfront areas immediately adjacent to the water-dependent use zone will occur for nonwater-dependent purposes, in order that such areas will be generally free of uses that conflict with, preempt, or otherwise discourage water-dependent activity or public use and enjoyment of the water-dependent use zone, as appropriate for the harbor in question;
- (c) new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone; except as provided below, the width of said zone shall be determined as follows:
  1. along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but no less than 25 feet; and
  2. along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the distance from the edges in question to the base of the pier or wharf, but no less than 25 feet; and
  3. along all sides of piers and wharves, the zone extends for the lesser of 50 feet or 15% of the distance from the edges in question to the edges immediately opposite, but no less than ten feet.

9.51: continued

As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standards if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative setback distances and other requirements which ensure that new buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, in order that sufficient space along the water's edge will be devoted exclusively to water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

(d) at least one square foot of the project site at ground level, exclusive of areas lying seaward of a project shoreline, shall be reserved as open space for every square foot of tideland area within the combined footprint of buildings containing nonwater-dependent use on the project site; in the event this requirement cannot be met by a project involving only the renovation or reuse of existing buildings, ground level open space shall be provided to the maximum reasonable extent; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standard if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative site coverage ratios and other requirements which ensure that, in general, buildings for nonwater-dependent use will be relatively condensed in footprint, in order that an amount of open space commensurate with that occupied by such buildings will be available to accommodate water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

(e) new or expanded buildings for nonwater-dependent use shall not exceed 55 feet in height if located over the water or within 100 feet landward of the high water mark; at greater landward distances, the height of such buildings shall not exceed 55 feet plus one-half foot for every additional foot of separation from the high water mark; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive such height limits if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements which ensure that, in general, such buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

(4) the requirements of 310 CMR 9.51(1) through (3), shall also apply in the event a nonwater-dependent use project is located on a Great Pond;

(5) the requirements of 310 CMR 9.51(3), shall not apply to projects in Designated Port Areas involving temporary uses, supporting DPA uses that are industrial, and marine industrial parks.



9.52: Utilization of Shoreline for Water-Dependent Purposes

A nonwater-dependent use project that includes fill or structures on any tidelands shall devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands. In applying this standard, the Department shall take into account any relevant information concerning the capacity of the project site to serve such water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2.. Except as necessary to protect public health, safety, or the environment, the Department shall act in accordance with the following provisions.

(1) In the event the project site includes a water-dependent use zone, the project shall include at least the following:

(a) one or more facilities that generate water-dependent activity of a kind and to a degree that is appropriate for the project site, given the nature of the project, conditions of the water body on which it is located, and other relevant circumstances; in making this determination, the Department shall give particular consideration to:

1. facilities that promote active use of the project shoreline, such as boat landing docks and launching ramps, marinas, fishing piers, waterfront boardwalks and esplanades for public recreation, and water-based public facilities as listed in 310 CMR 9.53(2)(a); and
2. facilities for which a demonstrated need exists in the harbor in question and for which other suitable locations are not reasonably available; and

(b) a pedestrian access network of a kind and to a degree that is appropriate for the project site and the facility(ies) provided in 310 CMR 9.52(1)(a); at a minimum, such network shall consist of:

1. walkways and related facilities along the entire length of the water-dependent use zone; wherever feasible, such walkways shall be adjacent to the project shoreline and, except as otherwise provided in a municipal harbor plan, shall be no less than ten feet in width; and
2. appropriate connecting walkways that allow pedestrians to approach the shoreline walkways from public ways or other public access facilities to which any tidelands on the project site are adjacent. Such pedestrian access network shall be available to the public for use in connection with fishing, fowling, navigation, and any other purposes consistent with the extent of public rights at the project site.

(2) In the event the project site does not include a water-dependent use zone, the project shall provide connecting public walkways or other public pedestrian facilities as necessary to ensure that sites containing water-dependent use zones will not be isolated from, or poorly linked with, public ways or other public access facilities to which any tidelands on the project site are adjacent.

(3) The requirements of 310 CMR 9.52(1) and (2), shall also apply in the event a nonwater-dependent use project is located on a Great Pond.

9.53: Activation of Commonwealth Tidelands for Public Use

A nonwater-dependent use project that includes fill or structures on Commonwealth tidelands, except in Designated Port Areas, must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes. In applying this standard, the Department shall take into account any factor affecting the quantity and quality of benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy, especially those which are nonwater-dependent; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with 310 CMR 9.53(1)through (4).

## 9.53: continued

(1) The project shall not include fill or structures for nonwater-dependent use of Commonwealth tidelands which the Department determines are necessary to accommodate a public agency which intends to pursue a water-dependent use project on such lands, provided written notice of such agency's intention is submitted to the Department prior to the close of the public comment period on the license application. Such determination shall be based upon a clear showing, within a period of time deemed reasonable by the Department, that the agency's project has met the criteria of 310 CMR 9.36(5)(a)2. through 4.

(2) The project shall attract and maintain substantial public activity on the site on a year-round basis, through the provision of water-related public benefits of a kind and to a degree that is appropriate for the site, given the nature of the project, conditions of the waterbody on which it is located, and other relevant circumstances. In making this determination, the Department shall act in accordance with 310 CMR 9.53(2)(a) through (e):

(a) in the event the project site includes a water-dependent use zone, at least one facility utilizing the shoreline in accordance with the provisions of 310 CMR 9.52(1)(a) must also promote water-based public activity; such facilities include but are not limited to ferries, cruise ships, water shuttles, public landings and swimming/fishing areas, excursion/charter/rental docks, and community sailing centers;

(b) the project shall include exterior open spaces for active or passive public recreation, examples of which are parks, plazas, and observation areas; such open spaces shall be located at or near the water to the maximum reasonable extent, unless otherwise deemed appropriate by the Department, and shall include related pedestrian amenities such as lighting and seating facilities, restrooms and trash receptacles, children's play areas, and safety ladders along shoreline walkways, as appropriate; such facilities shall be sized in accordance with 310 CMR 9.53(2)(b)1. through 2.:

1. the amount of such space shall be at least equal to the square footage of all Commonwealth tidelands on the project site landward of a project shoreline and not within the footprint of buildings, less any space deemed necessary by the Department to accommodate other water-dependent uses; the Department may also allow a portion of such open space to be devoted to public ways and/or surface parking open to the public, including users of the facility of public accommodation, provided that below grade or structured parking is not a reasonable alternative and that the open space devoted to public vehicular use does not exceed that devoted to public pedestrian use;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.53(2)(b)1., if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative requirements for public outdoor recreation facilities that will establish the project site as a year-round locus of public activity in a comparable and highly effective manner;

(c) the project shall devote interior space to facilities of public accommodation, other than public parking, with special consideration given to facilities 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; such public interior space shall be located at the ground level of all buildings containing nonwater-dependent facilities of private tenancy, unless the Department determines that an alternative location would more effectively promote public use and enjoyment of the project site or is appropriate to make ground level space available for water-dependent use or upper floor accessory services; the extent of such interior space shall be determined in accordance with 310 CMR 9.53(2)(c)1. through 2.:

1. such space shall be at least equal in amount to the square footage of all Commonwealth tidelands on the project site within the footprint of buildings containing nonwater-dependent facilities of private tenancy;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.34(2)(c)1., if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, 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;

9.53: continued

(d) the project shall include a management plan for all on-site facilities offering water-related benefits to the public, to ensure that the quantity and quality of such benefits will be effectively sustained; management elements which may be covered by the plan include, but are not limited to, signage, maintenance, hours and rules of operation, organizational arrangements and responsibilities, pricing, financing, and procedures for resolving use conflicts; if deemed appropriate, the Department may require the applicant to offer to the public, in the form of an easement, an enforceable right of access to or use of a proposed water-dependent facility of public accommodation;

(e) in the event that water-related public benefits which can reasonably be provided on-site are not appropriate or sufficient, the Department may consider measures funded or otherwise taken by the applicant to provide such benefits elsewhere in the harbor or otherwise in the vicinity of the project site.

(3) The project shall promote other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs and in a manner that does not detract from the provision of water-related public benefits. In making this determination, the Department shall act in accordance with 310 CMR 9.53(3)(a) through (d):

(a) the Department shall take into account any guidance forthcoming from a state, federal, regional, or municipal agency as to the extent to which the project will contribute to or detract from the implementation of any specific policy, plan or program relating to, among other things: education; employment; energy; environmental protection; historic or archeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation.

(b) the Department shall act in accordance with the written recommendation of the Secretary of any state Executive Office in whose area of agency or program jurisdiction the proposed project falls, provided that said recommendation is made pursuant to an MOU or other written agreement with the Department as to the manner and extent to which the nonwater-related policies, plans, and programs of said Executive Office will be promoted in relation to water-related public interests.

(c) the Department shall give primary consideration to the implementation of policies, plans, or programs that:

1. have been officially adopted by statute, regulation, or other formal instrument of legislative or administrative action; and
2. complement measures taken by the project to serve water-related public purposes; examples of such complementary policies include the improvement of public transportation systems in order to foster ease of public movement to and from waterfront facilities, and the inclusion of affordable housing in residential development in order to make waterfront tenancy and access available to a broader segment of the public than would be the case under prevailing market conditions;

(d) the Department shall consider only those nonwater-related benefits accruing to the public in a manner that is reasonably direct, rather than remote, diffuse, or theoretical. Examples of direct public benefits include meeting a community need for mixed-income residential development, creating a large number of permanent jobs on-site, and reutilizing idle waterfront properties. Corresponding examples of indirect public benefits include increasing the general supply of market-rate housing, improving overall economic conditions, and expanding the property tax base of a municipality.

(4) In the event a nonwater-dependent use project is located on Great Ponds, the Department shall apply the provisions of 310 CMR 9.53(1) through (3), to the portion of the project site lying below the natural low water mark.

9.54: Consistency with Coastal Zone Management Policies

Nonwater-dependent use projects located in the coastal zone shall be consistent with all policies of the Massachusetts Coastal Zone Management Program, pursuant to 301 CMR 20.05(3), as may be amended hereafter. In applying this standard, the Department shall consider any written statement submitted by the Coastal Zone Management Office pursuant to 310 CMR 9.13(2), and shall act in accordance with the following provisions.

(1) If the Department concurs with the conclusions and recommendations of CZM, said written statement shall be adopted as part of the written determination on license application.

(2) If the Department disagrees with any conclusions or recommendations of CZM and the disagreement cannot be resolved through routine consultation, the assistance and direction of the Secretary shall be sought in accordance with the provisions of M.G.L. c. 21A, § 4, governing mediation of administrative and jurisdictional conflicts within EOE. If the disagreement is not eliminated through such mediation, the Department shall include in the written determination an explanation of the specific basis for its final decision on consistency with CZM policies.

If the project site is within an area covered by a municipal harbor plan, the Department shall presume this standard is met, in accordance with the provisions of 310 CMR 9.34(2)(b)3.

9.55: Standards for Nonwater-Dependent Infrastructure Facilities

(1) The requirements of 310 CMR 9.51 through 9.53, shall not apply to nonwater-dependent use projects consisting of infrastructure facilities on tidelands or Great Ponds. Such projects shall include mitigation and/or compensation measures as deemed appropriate by the Department to ensure that all feasible measures are taken to avoid or minimize detriments to the water-related interests of the public. Such interests include, but are not limited to:

- (a) the protection of maritime commerce, industry, recreation and associated public access;
- (b) the protection, restoration, and enhancement of living marine resources;
- (c) the attainment of water quality goals;
- (d) the reduction of flood and erosion-related hazards on lands subject to the 100-year storm event or to sea level rise, especially those in damage-prone or natural buffer areas;
- (e) the protection and enhancement of public views and visual quality in the natural and built environment of the shoreline;
- (f) the preservation of historic sites and districts, archaeological sites, and other significant cultural resources near waterways.

(2) All nonwater-dependent use projects consisting of infrastructure facilities on tidelands or Great Ponds shall take reasonable measures to provide open spaces for active or passive recreation at or near the water's edge, wherever appropriate. Such measures may be provided by any means consistent with the need to avoid undue interference with the infrastructure facilities in question, and to protect public health, safety, or the environment.

REGULATORY AUTHORITY

310 CMR 9.00: M.G.L. c. 21A, §§ 2, 4, 8, and 14; c. 91, §§ 1 through 63; c. 91A, § 18.