

Table of Contents

	<u>Page</u>
310 CMR 9.00: WATERWAYS (continued)	
Section 9.33: Environmental Protection Standards	314.1
Section 9.34: Conformance with Municipal Zoning Law and Approved Municipal Harbor Plans	315
Section 9.35: Standards to Preserve Water-related Public Rights	316
Section 9.36: Standards to Protect Water-dependent Uses	316.3
Section 9.37: Engineering and Construction Standards	316.4
Section 9.38: Use Standards for Recreational Boating Facilities	316.5
Section 9.39: Standards for Marinas/Boatyards/Boat Ramps	316.6
Section 9.40: Standards for Dredging and Dredged Material Disposal	316.8
Section 9.51: Conservation of Capacity for Water-dependent Use	316.9
Section 9.52: Utilization of Shoreline for Water-dependent Purposes	316.12
Section 9.53: Activation of Commonwealth Tidelands for Public Use	316.12
Section 9.54: Consistency with Coastal Zone Management Policies	316.14
Section 9.55: Standards for Nonwater-dependent Infrastructure Facilities	316.15
Section 9.56: Standards for Facilities of Limited Accommodation	316.15
Section 9.57: Approved Municipal Harbor Plans	316.18
310 CMR 10.00: WETLANDS PROTECTION	317
All Wetlands	
Section 10.01: Introduction and Purpose	324
Section 10.02: Statement of Jurisdiction	324
Section 10.03: General Provisions	328
Section 10.04: Definitions	334
Section 10.05: Procedures	350
Section 10.06: Emergencies	369
Section 10.07: Compliance with M.G.L. c. 30, §§ 61 through 62H	373
Section 10.08: Enforcement Orders	374
Section 10.09: Severability	374
Section 10.10: Effective Date	374
Section 10.11: Actions Required Before Submitting a Notice of Intent for an Ecological Restoration Project	376
Section 10.12: Notice of Intent for an Ecological Restoration Project	377
Section 10.13: Eligibility Criteria for Restoration Order of Conditions	379
Section 10.14: Restoration Order of Conditions	381
Coastal Wetlands	
Section 10.21: Introduction	384
Section 10.22: Purpose	385
Section 10.23: Additional Definitions for 310 CMR 10.21 through 10.37	385
Section 10.24: General Provisions	387
Section 10.25: Land under the Ocean	396
Section 10.26: Designated Port Areas	397
Section 10.27: Coastal Beaches	398
Section 10.28: Coastal Dunes	400
Section 10.29: Barrier Beaches	401
Section 10.30: Coastal Banks	402
Section 10.31: Rocky Intertidal Shores	404
Section 10.32: Salt Marshes	405
Section 10.33: Land under Salt Ponds	406
Section 10.34: Land Containing Shellfish	407
Section 10.35: Banks of or Land under the Ocean, Ponds, Streams, Rivers, Lakes or Creeks that Underlie Anadromous/Catadromous ("Fish Run")	408
(Section 10.36: Reserved: Variance Provision is Found at 310 CMR 10.05(10))	410
Section 10.37: Estimated Habitats of Rare Wildlife (for coastal wetlands)	410

Table of Contents

	<u>Page</u>
310 CMR 10.00: WETLANDS PROTECTION (continued)	
Inland Wetlands	
Section 10.51: Introduction	411
Section 10.52: Purpose	411
Section 10.53: General Provisions	412
Section 10.54: Bank (Naturally Occurring Banks and Beaches)	422
Section 10.55: Bordering Vegetated Wetlands (Wet Meadows, Marshes, Swamps and Bogs)	424
Section 10.56: Land under Water Bodies and Waterways (under any Creek, River, Stream, Pond or Lake)	427
Section 10.57: Land Subject to Flooding (Bordering and Isolated Areas)	429
Section 10.58: Riverfront Area	432
Section 10.59: Estimated Habitats of Rare Wildlife (for inland wetlands)	440.2
Section 10.60: Wildlife Habitat Evaluations	440.3

9.02: continued

Historic Low Water Mark means the low water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding or other means. In areas where there is evidence of such alteration by fill, the Department shall make its determination of the position of the historic low water mark in the same manner as described in 310 CMR 9.02: *Definitions: Historic High Water Mark*.

Improvement Dredging means any dredging under a license or a permit in an area which has not been previously dredged or which extends the original dredged width, depth, length, or otherwise alters the original boundaries of a previously dredged area.

Infrastructure Crossing Facility means any infrastructure facility which is a bridge, tunnel, pipeline, aqueduct, conduit, cable, or wire, including associated piers, bulkheads, culverts, or other vertical support structures, which is located over or under the water and which connects existing or new infrastructure facilities located on the opposite banks of the waterway. Any structure which is operationally related to such crossing facility and requires an adjacent location shall be considered an ancillary facility thereto. Such ancillary facilities generally include, but are not limited to, power transmission substations, gas meter stations, sewage headworks and pumping facilities, toll booths, tunnel ventilation buildings, drainage structures, and approaches, ramps, and interchanges which connect bridges or tunnels to adjacent highways or railroads.

Infrastructure Facility means a facility which produces, delivers, or otherwise provides electric, gas, water, sewage, transportation, or telecommunication services to the public.

Innovative Technology means technology that has not been commercially deployed or is in limited deployment in Massachusetts, and includes, but is not limited to, energy technology that obtains energy from the ocean, waterway, or conditions associated with the ocean or waterway, other forms of renewable energy technology.

Landlocked Tidelands means any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located:

- (a) within 250 feet of the high water mark, or
- (b) within any Designated Port Area. Said public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark.

Licensee means the person to whom a license is issued and shall include the heirs, assignees, and successors in interest to such person.

Local Economic Development Authority means a municipal planning board, zoning board, or other board or commission so designated by a municipality; community development corporations designated in accordance with M.G.L. c. 40H; municipal economic development and industrial corporations designated in accordance with M.G.L. c. 121C; municipal housing authorities designated in accordance with M.G.L. c. 121B, § 3; municipal redevelopment authorities designated in accordance with M.G.L. c. 121B, § 4; urban development corporations designated in accordance with M.G.L. c. 121A; and 40B district planning commissions established under M.G.L. c. 40B, including, but not limited to, the Cape Cod Commission, the Martha's Vineyard Commission and the Boston Redevelopment Authority.

Low Water Mark means the present mean low tide line, as established by the present arithmetic mean of water heights observed at low tide over a specific 19-year Metonic Cycle (the National Tidal Datum Epoch), and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce.

Maintenance Dredging means dredging in accordance with a license or permit in any previously authorized dredged area which does not extend the originally dredged depth, width, or length.

Marina means a berthing area with docking facilities under common ownership or control and with berths for ten or more vessels, including commercial marinas, boat basins, and yacht clubs. A marina may be an independent facility or may be associated with a boatyard.

9.02: continued

Marine Industrial Park means a multi-use complex on tidelands within a DPA, at which:

- (a) the predominant use is for water-dependent industrial purposes; in general, at least $\frac{2}{3}$ of the park site landward of any project shoreline must be used exclusively for such purposes;
- (b) spaces and facilities not dedicated to water-dependent industrial use are available primarily for general industrial purposes; uses that are neither water-dependent nor industrial may occur only in a manner that is incidental to and supportive of the water-dependent industrial uses in the park, and may not include general residential or hotel facilities; and
- (c) any commitment of spaces and facilities to uses other than water-dependent industry is governed by a comprehensive park plan, prepared in accordance with M.G.L. c. 30, §§ 61 through 62H, if applicable, and accepted by the Department in a written determination issued pursuant to 310 CMR 9.14.

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, and 301 CMR 11.00: *MEPA Regulations*.

MOU means a Memorandum of Understanding between the Department and another public agency. The draft text of any such document or other written interagency agreement shall be published in the *Environmental Monitor* for public review and comment, and the final text shall be published therein upon adoption and made available by the Department upon request.

Municipal Harbor Plan (MHP) means a document (in words, maps, illustrations, and other media of communication) setting forth, among other things: a community's objectives, standards, and policies for guiding public and private utilization of land and water bodies within a defined harbor or other waterway planning area; and an implementation program which specifies the legal and institutional arrangements, financial strategies, and other measures that will be taken to achieve the desired sequence, patterns, and characteristics of development and other human activities within the harbor area. Such plan shall take effect under 310 CMR 9.00 only upon approval by the Department through the adoption of the substitute provisions of Approved Municipal Harbor Plans listed in 310 CMR 9.57.

Municipal Official means the mayor of a city, the board of selectmen of a town, or the council of a municipality having a manager-council form of government.

Natural High Water Mark means the historic high water mark of a Great Pond.

Natural Low Water Mark means the historic low water mark of a Great Pond.

Net Operating Income means the rental income from a Facility of Limited Accommodation within the licensed structure minus its operating expenses and property taxes calculated as an amount per square foot for the licensed structure or a comparable value if owner occupied. Operating expenses may include expenses for management, legal and accounting services, insurance, janitorial and security services, maintenance, supplies, and utilities.

Noncommercial Community Docking Facility means a facility for berthing of recreational vessels accessory to residential or nonprofit seasonal camp use (*e.g.*, summer camps).

Nonprofit Organization means an organization exempt from federal income taxation under § 501(c)(3) of the U.S. Internal Revenue Code.

Nonwater-dependent Use means a use as specified in 310 CMR 9.12.

Nonwater-dependent Use Project means a project consisting of one or more nonwater-dependent uses, or a mix of water-dependent and nonwater-dependent uses, as specified in 310 CMR 9.12(1).

Notification Date means a specified date by which a public notice must be published in the newspaper and/or the *Environmental Monitor*, and mailed to municipal officials, and on which the public comment period commences.

9.07: Activities Subject to Annual Permit

(1) General. A written application for an annual permit must be submitted to the harbormaster of a city or town or, in a municipality where no harbormaster has been appointed, to the municipal official or other designated local official(s), for the placement on a temporary basis of moorings, floats or rafts held by bottom-anchor, and ramps associated thereto, which are located within the territorial jurisdiction of the municipality. A written application for an annual permit for small structures accessory to residences must be submitted to the harbormaster or other designated local official when a city or town has been approved by the Department to administer a local permitting program under 310 CMR 9.07(3), unless a license or other authorization under 310 CMR 9.00 is obtained from the Department. The harbormaster or other designated local official shall establish a schedule for receipt of applications. Completed applications shall be acted upon within a period of 15 days from receipt, according to the schedule. Any permit may contain such terms, conditions and restrictions as deemed necessary, consistent with the requirements of 310 CMR 9.07. No license shall be required from the Department if an annual permit is issued pursuant to 310 CMR 9.07. A city or town implementing 310 CMR 9.07 shall not discriminate against any citizen of the Commonwealth on the basis of residency, race, religion, sex, age, disability, or other illegal distinction. The provisions of 310 CMR 9.07 shall be enforced by local officials. The Department may enforce the provisions of 310 CMR 9.07 upon the request of a local permitting program or upon a finding that local enforcement is inadequate.

(2) Annual Permits for Moorings, Floats and Rafts.

(a) The harbormaster or other local official shall provide a written procedure for the fair and equitable assignment from a waiting list for use of vacant or new moorings, floats or rafts held by bottom-anchor and ramps associated thereto. Methods for mooring assignment which are appropriate include, but are not limited to, one or more of the following:

1. date of application;
2. physical characteristics of vessels, *e.g.*, size and type;
3. purpose of vessel use, *e.g.*, commercial *vs.* recreational or public *vs.* private.

The harbormaster, however, may allow the previous permit holder of a mooring to renew, on an annual basis, that mooring or another mooring within the control of the harbormaster.

(b) If the placement of floats or rafts for public recreational boating facilities, exclusive of moorings, extends beyond any established state harbor line, encompasses an area greater than 2,000 square feet, or constitutes a marina, additional procedures apply:

1. a public hearing must be held by the harbormaster or other local official in the affected municipality with notice at least seven days in advance published in the local newspaper at the expense of the applicant; and
2. the harbormaster or other local official must set forth the reasons for issuing such permit in a written statement, which must include findings to the effect that the project will serve a public purpose, will not unreasonably interfere with navigation in the harbor, and:
 - a. cannot be located reasonably within the harbor line, if the project extends beyond such line; and/or
 - b. complies with the provisions of 310 CMR 9.39(1), if the project includes a marina.

A copy of the permit and written statement shall be submitted upon issuance to the Department. The Department may review any such permit within 30 days of receipt and may either affirm the permit, set such action aside or amend such action by imposing its own conditions and restrictions as deemed necessary.

(c) A copy of the permit and written statement shall be submitted upon issuance to the Department. The Department may review any such permit within 30 days of receipt and may either affirm the permit, set such action aside or amend such action by imposing its own conditions and restrictions as deemed necessary. No permit for a mooring, float or raft may authorize unreasonable interference with the public rights to use waterways for any lawful purposes including fishing, fowling, and navigation in tidelands and Great Ponds. All permits shall meet the terms and conditions described in 310 CMR 9.07(4).

(d) No permit for a mooring, float or raft shall be transferrable to another person, except to a person within the immediate family of the permittee upon approval of the harbormaster. Nothing in 310 CMR 9.07 shall be construed to prevent moorings for which permits are issued to a recreational boating facility from being assigned to individual patrons or members of such facility.

9.07: continued

(3) Annual Permits for Small Structures Accessory to Residences.

(a) Petition for Local Permitting Program. A city or town may petition the Department for approval to administer a local permitting program for small structures accessory to residences. The Department shall state the basis for approval or denial of any petition in writing. The Department may withdraw its approval of a local permitting program if it determines that the local program exhibits a repeated failure to comply with the provisions of 310 CMR 9.07.

1. A city or town may elect to issue permits for small structures accessory to residences under the provisions of 310 CMR 9.07. The city or town shall provide public notice and an opportunity to comment on the petition for approval prior to its submittal to the Department. The petition shall include:

- a. the designation of a local official or local governmental body to administer the program;
- b. a demonstration that public access has been or will be provided to waterbodies within the town, including at least one formal means of access to the waterway, reasonable in type and scope for the waterway and its anticipated use by any citizen of the Commonwealth, established prior to the date of the petition or scheduled to be available within a reasonable period of time; and
- c. provision that any fees collected be used for support of the local permitting program, the improvement of waterways, or the enhancement of public access to or along waterways.

2. Where the Legislature has created a lake commission (*e.g.*, the Lake Quinsigamond Commission) with authority to issue permits, the commission may petition the Department for approval under 310 CMR 9.07(3), without designation by a city or town.

3. A local permitting program may also be approved by the Department if it provides substantially equivalent procedures and protection of public rights as 310 CMR 9.07. A city or town may petition for approval of a local permitting program pursuant to a local ordinance or bylaw. Where the Legislature has created a lake commission with authority to issue permits, the commission may petition the Department for approval of regulations implementing a local permitting program. Upon request, the Department shall provide advisory opinions on draft petitions for approval.

(b) Eligibility. An application for a local permit under 310 CMR 9.07(3) may be submitted only for a project consisting entirely of a dock, pier, seawall, bulkhead, or other small-scale structure that is accessory to a residential use or serves as a noncommercial community docking facility, provided that:

1. for proposed structures, or for structures built or substantially altered after January 1, 1984:

- a. any structure is water-dependent and pile-supported (*e.g.*, by wooden or metal posts) or bottom-anchored, without any fill;
- b. any structures total no more than 600 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters;
- c. the structure is not a marina (*i.e.*, does not serve ten or more vessels);
- d. if within an ACEC, such structures were existing on October 4, 1990 or the effective date of the ACEC designation, whichever is later, 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;
- e. if within an ACEC, such structures, if built or substantially altered after October 4, 1990 or the effective date of the ACEC designation, whichever is later, are consistent with a resource management plan adopted by the municipality and approved by the Secretary;

2. for structures or fill constructed prior to January 1, 1984 and not substantially altered since that date:

- a. any structure or fill must be water-dependent;
- b. any structure and fill total no more than 600 square feet below the mean high water shoreline for coastal waters and below the ordinary high water shoreline for inland waters;
- c. the structure is not a marina (*i.e.*, does not serve ten or more vessels).

9.08: continued

(3) Pursuant to M.G.L. c. 30, § 62I and 310 CMR 9.08(4), the Department may enforce any conditions required by the Secretary in a MEPA certificate for projects proposed within landlocked tidelands.

(4) In addition to any remedy specified pursuant to M.G.L. c. 91, to the Civil Administrative Penalties Statute, M.G.L. c. 21A, § 16, or to other laws of the Commonwealth, the Department may issue Enforcement Orders requiring compliance with any regulation or with any condition of any license or permit issued by the Department. The employees of the Department may enter at reasonable hours upon any property subject to a license, permit, grant, or public easement to inspect for compliance either prior to or following completion of construction of the authorized structure.

9.09: Effective Date and Severability

(1) 310 CMR 9.00 shall take effect on October 4, 1990. Revisions to 310 CMR 9.07 and 9.10 shall take effect on April 19, 1996. Revisions to 310 CMR 9.00 shall take effect on July 1, 2000. Revisions to 310 CMR 9.10 shall take effect on February 25, 2005. Certain revisions to 310 CMR 9.00 shall take effect on October 3, 2008. 310 CMR 9.29: *General License Certification*, 310 CMR 9.30: *Permitting Test Projects*, and revisions to 310 CMR 9.02, 9.05(2), 9.05(3), 9.09, 9.10, 9.11(2), 9.11(3), 9.13 and 9.14, 9.16, 9.17(4), and 9.40(1) shall take effect on May 23, 2014.

(2) Except as provided in 310 CMR 9.28, 310 CMR 9.00 shall apply to any application for a license, permit, or amendment thereto, and to all subsequent proceedings related thereto, if:

(a) said application is filed on or after the effective date of 310 CMR 9.00; or

(b) in the case of an application for a nonwater-dependent use project including one or more activities requiring an EIR, except for any such project which the Department determines, with the concurrence of the municipal planning board, provides essential economic support to an associated water-dependent use project of particular statewide or regional significance, a Certificate of the Secretary stating that a Draft EIR adequately and properly complies with M.G.L. c. 30, §§ 61 through 62H had not been issued as of May 23, 2014.

(3) In the case of any application for license, permit, or amendment thereto filed prior to the effective date of 310 CMR 9.00, except for that to which 310 CMR 9.00 apply pursuant to 310 CMR 9.09(2)(b), the prior applicable regulations shall remain in full force and effect for all subsequent proceedings related thereto; such application shall be subject to the content and other requirements of 310 CMR 9.11(2)(a), 9.11(2)(b)1. through 3., and 9.11(5) only.

(4) 310 CMR 9.08, 9.22, 9.23, 9.25, 9.26 and 9.27 shall apply to all projects for which a license or permit was in effect on the effective date of 310 CMR 9.00, or is obtained in accordance with 310 CMR 9.09(3), and for which a new license or permit application is not required pursuant to 310 CMR 9.05(3).

(5) A Certification of the General License affirmed by the Department in accordance with 310 CMR 9.29 shall take effect when the proponent records the Certification in accordance with 9.29(6).

(6) Severability. If any provision of any part of 310 CMR 9.00, or the application thereof, is held to be invalid, such invalidity shall not affect any other provision of 310 CMR 9.00.

9.10: Simplified Procedures for Small Structures Accessory to Residences

(1) Projects Eligible for Simplified Procedures. Notwithstanding other procedural provisions of 310 CMR 9.00 to the contrary, the procedural standards of 310 CMR 9.10 shall apply to the licensing of certain small-scale structures by the Department. An application for a license under 310 CMR 9.10 may be submitted only for a project consisting entirely of a dock, pier, seawall, bulkhead, or other small-scale structure that is accessory to a residential use or serves as a noncommercial community docking facility, provided that:

9.10: continued

(a) for proposed structures, or for structures built or substantially altered after January 1, 1984:

1. any structure is water-dependent and pile-supported (*e.g.*, by wooden or metal posts) or bottom-anchored, without any fill;
2. any structures total no more than 600 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters;
3. any structure is not a marina (*i.e.*, does not serve ten or more vessels);
4. if within an ACEC, such structures were existing on October 4, 1990 or the effective date of the ACEC designation, whichever is later, 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; and
5. if within an ACEC, any structure built or substantially altered after October 4, 1990 or the effective date of the ACEC designation, whichever is later, is consistent with a resource management plan adopted by the municipality and approved by the Secretary; and

(b) for structures or fill constructed prior to January 1, 1984 and not substantially altered since that date:

1. any structure or fill may be water-dependent or nonwater-dependent;
2. any structures and fill total no more than 600 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters; and
3. the structure is not a marina (*i.e.*, does not serve ten or more vessels).

The above thresholds are established for determination of eligibility only; structures licensed under 310 CMR 9.10 shall be the minimum size necessary to achieve the intended water-related purposes. Projects meeting the provisions of 310 CMR 9.10(1), which previously obtained a license, amnesty license or interim approval, may apply for renewal under 310 CMR 9.07, 9.10, or 9.25.

(c) projects eligible for general license certification under 310 CMR 9.29 shall comply with the certification procedures of 310 CMR 9.29 to obtain an affirmed certification under 310 CMR 9.29, instead of a simplified license pursuant to 310 CMR 9.10.

(2) Standards. 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. The project shall preserve public rights of access on private tidelands that are associated with fishing, fowling, and navigation, and public rights to use Commonwealth tidelands, Great Ponds, and other waterways for any lawful use. The provisions of 310 CMR 9.33 through 9.38 apply to projects authorized under 310 CMR 9.10 except that, notwithstanding the provisions of 310 CMR 9.37(1)(a), fill and structures need not be certified by a Registered Professional Engineer except as specified in 310 CMR 9.10(3). For eligible nonwater-dependent structures or fill, the Department will generally presume that a proper public purpose is served through the provision of on-foot passage to ensure lateral public access along the shore for any lawful purpose.

(3) Applications Under Simplified Procedures. For purpose of authorizing eligible projects under simplified procedures the following provisions apply:

(a) Application and Plans. An applicant for a license shall submit a written application on forms provided by the Department, signed by the applicant and the landowner if other than the applicant. The application shall be prepared in accordance with all applicable instructions contained in the Department's application package. When plans have been submitted with a Notice of Intent or referenced in an Order of Conditions under the Wetlands Protection Act, M.G.L. c. 131, § 40, a copy of those plans shall accompany the application. Under the Wetlands Protection Act, Conservation Commissions and the Department generally require plans for new structures to be certified by a Registered Professional Engineer or Registered Land Surveyor where there are questions relating to structural integrity (*e.g.*, where a structure is located in a velocity zone or floodway) or to the location of important wetland resource areas (*e.g.*, salt marsh or eelgrass), as well as in other circumstances at the discretion of the issuing authority; see instructions for filing a Notice of Intent pursuant to 310 CMR 10.00: *Wetlands Protection*.

9.10: continued

payment of an occupation fee (\$1 per square yard per year for the term of the license), in accordance with the provisions of 310 CMR 9.16. 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.

(7) Appeals. The appeal provisions in 310 CMR 9.17 apply to projects licensed under 310 CMR 9.10.

9.11: Application Requirements(1) Pre-application Consultation

(a) Upon request of a prospective applicant for a license for any large or complex project, including those required to file an EIR, the Department shall conduct a pre-application consultation meeting in order to receive a presentation of the project proposal, provide preliminary guidance on the applicability of the substantive standards of 310 CMR 9.00 to the project, explain the necessary licensing procedures, and answer any appropriate inquiries concerning the program or 310 CMR 9.00. When appropriate, the Department may invite representatives of CZM, any other state agency, or representatives of the municipality in which the project is located, including the lead agency responsible for implementation of a Municipal Harbor Plan. The participants in the pre-application consultation meeting may make arrangements for further consultation sessions and for coordinated review of the project.

(b) In the case of an unusually large and complex set of activities undertaken by a public agency the Department may establish, in cooperation with the prospective applicant, a special procedure for the review of one or more applications for such activities. Such procedure may include, without limitation, as deemed appropriate by the Department, consolidation procedures, expedited review, and single or multiple licenses, permits, or written determinations. Public notice of any such procedure established under 310 CMR 9.11 shall be published in the *Environmental Monitor*.

(2) Application Review Schedules

(a) For a water-dependent use project, the Department shall, within 45 days of receipt of the information required under 310 CMR 9.11(3)(a) and (b), assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). Within 20 days of the notification date, the Department may hold a public hearing under 310 CMR 9.13(2). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 60 days of the close of the public comment period and notification by the applicant that the public notice has been published, the Department shall conduct an administrative completeness review under 310 CMR 9.11(3)(c) and either determine the application to be complete or request additional information. Within 90 days of making a determination of administrative completeness, the Department shall complete a technical review and issue either a draft license or a final license as specified in 310 CMR 9.14.

(b) For a nonwater-dependent use project, the applicant may elect one of four application options by submitting the selected category of application under the Timely Action and Fee Schedule at 310 CMR 4.00: *Timely Action Schedule and Fee Provisions*.

1. Partial Application. Within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a) and (b), the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 20 days of the notification date, the Department shall hold the public hearing under 310 CMR 9.13(3). The applicant shall submit the information identified in 310 CMR 9.11(3)(c)2. prior to the close of the public comment period, and the information identified in 310 CMR 9.11(3)(c)1. and 3. prior to the issuance of the written determination. Within 30 days of the close of the public comment period and notification by the applicant that the public notice has been published, the Department

9.11: continued

shall conduct its administrative completeness review and determine the application to be complete or request additional information. Within 60 days of determining the application to be complete, or 90 days from the close of the public comment period, whichever comes later, the Department shall issue the written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

2. Full Application. Within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a), and 310 CMR 9.11(3)(b)1., 2., 6., and 7., and 310 CMR 9.11(3)(c)1. through 3., the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, conduct an administrative completeness review of the information received, and determine the application to be complete or request additional information. The Department shall issue a public notice under 310 CMR 9.13(1) upon determination that the application is complete. The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. The Department shall provide upon request the draft license conditions seven days prior to the public hearing. Within 20 days of the notification date, the Department shall hold the public hearing under 310 CMR 9.13(3). Within 60 days from the close of the public comment period and notification by the applicant that the public notice has been published, or the submission of the information identified in 310 CMR 9.11(3)(c)4., and 5., whichever is later, the Department shall issue the written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

3. Municipal Harbor Plan Application. For a project within an area governed by and in compliance with an Approved Municipal Harbor Plan approved under 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans* and listed in 310 CMR 9.57, within 45 days of receiving an application containing the information identified in 310 CMR 9.11(3)(a) and (b), the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 20 days of the notification date, the Department shall hold the public hearing under 310 CMR 9.13(3). Within 30 days of the close of the public comment period and notification by the applicant that the public notice has been published, the Department shall conduct its administrative completeness review and determine an application to be complete or request additional information. Within 45 days of determining an application to be complete, the Department shall issue a written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

4. Joint MEPA EIR Application. An applicant may initiate coordinated review under MEPA and 310 CMR 9.00 by specifying in the Environmental Notification Form (ENF) filing under 301 CMR 11.05: *ENF Preparation and Filing* the intent to pursue a joint filing. The Draft EIR submitted under 301 CMR 11.07(3) shall also include information to meet the application requirements of 310 CMR 9.11(3)(a) through (c)2. for pre-application review by the Department. Within 25 days of receipt of a Final EIR meeting the requirements of 310 CMR 9.11(3)(a) through (c)2., the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, conduct an administrative completeness review, and issue the text for the public notice under 310 CMR 9.13(1). The Department shall hold a public hearing within 20 days of the notification date or ten days after the date of the Secretary's Final Certificate, whichever is later. The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. The Department shall send to the applicant, within ten days of the close of the public comment period and receipt by the Department of notification from the applicant that the public notice has been published, whichever is later, any public comment submitted within the comment period for response and may request additional information or determine the application to be complete in accordance with 310 CMR 9.11(3)(c). Any response to comments provided by the applicant shall also be distributed by the applicant to all persons that

9.12: continued

(e) In the case of a facility generating electricity from wind power (wind turbine facility), or any ancillary facility thereto, for which an EIR is submitted, the Department shall presume such facility to be water-dependent if the Secretary has determined that such facility requires direct access to or location in tidal waters and cannot reasonably be located or operated away from tidal or inland waters, based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize adverse impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62I. If an EIR is not submitted, the Department shall presume such facility to be water-dependent. Whether or not an EIR is filed, this presumption may be overcome only upon a clear showing that the proposed facility can reasonably be located or operated away from tidal or inland waters.

(f) The Department shall not find the following uses to be water-dependent:

1. restaurants and other food/beverage service establishments;
2. retail shops and stores;
3. parking facilities;
4. office facilities;
5. housing units and other residential facilities;
6. hotels, motels, and other facilities for transient lodging;
7. parks, esplanades, boardwalks, and other pedestrian facilities other than those described in 310 CMR 9.12(2)(a)4.;
8. roads, causeways, railways, and other facilities for land-based vehicular movement, other than those found to be water-dependent in accordance with 310 CMR 9.12(2)(c) or (d); and
9. subaqueous disposal, below the low water mark, of material excavated or otherwise originating on land.

(3) Accessory Uses.

(a) The Department may determine a use to be accessory to a water-dependent use upon a finding that said use is customarily associated with and necessary to accommodate a principal water-dependent use. Such a finding shall be made only if the proposed use is:

1. integral in function to the construction or operation of the water-dependent use in question, or provides related goods and services primarily to persons engaged in such use; and
2. commensurate in scale with the operation of the water-dependent use in question.

Examples of uses that may be determined to be accessory to a water-dependent use include, but are not limited to, access and interior roadways, parking facilities, administrative offices and other offices primarily providing services to water-dependent uses on the site, yacht clubhouses, restaurants and retail facilities primarily serving patrons of the water-dependent use on the site, bait shops, chandleries, boat sales, and other marine-oriented retail facilities. Uses that may not be determined to be accessory to a water-dependent use include, but are not limited to, general residential facilities, hotels, general office facilities, and major retail establishments.

(b) The Department may find a use to be accessory to a water-dependent industrial use if, in addition to the criteria listed in 310 CMR 9.12(3)(a)1. and 2., the hours of operation of the use do not extend beyond the hours of operation of the water-dependent industrial use, except for support services which occur outside of the hours of the accessory use, and the use does not require a significant additional investment in infrastructure apart from that necessary for the primary water-dependent industrial use. Examples of water-dependent industrial accessory uses include, but are not limited to, ticketing booths for ferry operations, snack bars, and administrative offices associated with the water-dependent industrial use.

(4) The Department shall find to be nonwater-dependent any use which has not been found to be water-dependent or accessory to a water-dependent use, pursuant to 310 CMR 9.12(2) and (3).

9.13: Public Notice and Participation Requirements

(1) Notice Requirements.

(a) Public notice shall be issued by the Department but distributed and published by the applicant. The date of the public notice and, when required, the date of the public hearing, shall be determined by the Department. The applicant shall send a notice of license or permit application as described in 310 CMR 9.13(1)(c), by first class mail, return receipt, and provide proof of such notification to the Department, to:

9.13: continued

1. the municipal official, the planning board, the conservation commission, and the harbormaster, if any, in the city or town where the project is located;
 2. if the application is for a proposed bridge, dam or similar structure across a tidal river, cove or inlet, the municipal official, the planning board, the conservation commission, and the harbormaster of every municipality into which the tidewater of said river, cove, or inlet extends;
 3. the Martha's Vineyard Commission or the Cape Cod Commission, if the project is located within an area subject to the jurisdiction of said Commission;
 4. CZM, if the project is located within the coastal zone; DCR, if the project is located in an Ocean Sanctuary; and the Department of Fish and Game.
 5. the *Environmental Monitor* for all projects exceeding M.G.L. c. 30, §§ 61 through 62H review thresholds for Waterways activities;
 6. all landowners and easement holders of the project site and abutters thereto, as identified pursuant to 310 CMR 9.11(3)(b)1.; and
 7. U.S. Army Corps of Engineers, New England Division.
- (b) At least 45 days prior to issuance of a license, or 21 days prior to issuance of a permit, the applicant shall cause, at his own expense and at the direction of the Department, notice as described in 310 CMR 9.13(1)(c)1. through 9., to be published in one or more newspapers having circulation in the area affected by the project.
- (c) Notice shall contain:
1. the name and address of the applicant and the applicant's representative, if any;
 2. a description of the location of the project, including whether it is located in an ACEC, DPA, or an Ocean Sanctuary;
 3. a description of the project including a listing of uses and the Department's determination of water-dependency;
 4. for nonwater-dependent use projects, and for any water-dependent use project for which the Department decides to hold a hearing, the time, place and location of the public hearing and the date on which the public comment period ends;
 5. for other water-dependent use projects, a statement that within 30 days of the notification date of a license application or within 15 days of the notification date of a permit application, written comments will be accepted, and that a public hearing may be held upon request by the municipal official;
 6. the address where the application may be viewed, where a copy of the draft license conditions may be obtained if applicable, and where public comments regarding the application may be sent;
 7. a statement that a municipality, ten citizen group or any aggrieved person that has submitted written comments before the close of the public comment period may appeal and that failure to submit written comments will result in the waiver of any right to an adjudicatory hearing;
 8. the notification date, as defined in 310 CMR 9.02;
 9. for applications submitted under 310 CMR 9.11(2)(b)2. and 4., the date that copies of the Department's draft license conditions will be available seven days prior to the public hearing; and
 10. an 8½" x 11" copy of the site plan, including a locus insert, of the project site.
- (d) An applicant for a license, permit or other written approval pursuant to 310 CMR 9.00 and whose project is also subject to 314 CMR 9.00: *401 Water Quality Certification for Discharge of Dredged or Fill Material, Dredging, and Dredged Material Disposal in Waters of the United States Within the Commonwealth* and/or 310 CMR 10.00: *Wetlands Protection* may provide joint public notice by appending to the notice required under 310 CMR 10.05(5): *Public Hearings by Conservation Commissions* or 314 CMR 9.05(3): *Public Notice of an Application* a statement that an application for a license, permit or other written approval pursuant to 310 CMR 9.00 is pending before the Department, provided that the joint notice contains the information required by 310 CMR 9.13(1)(c). An applicant may provide a joint public notice even if the application is not a Combined Application.

9.20: continued

- (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: *Wetlands Protection* 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 October 4, 1990; 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

9.21: continued

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.

9.22: continued

(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: *Wetlands Protection*) 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.

(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: *Wetlands Protection*.

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 harbormaster 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.

9.24: continued

- (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.
 - (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;

9.56: continued

(2) An application for a building greater than 75' in height that can demonstrate that its project site is unable to fully support Facilities of Public Accommodation, based on foot traffic and density, may apply for a short-term condition in a license to authorize up to 50% of the interior space required to be devoted to Facilities of Limited Accommodation in accordance with 310 CMR 10.51 and 10.53 for some portion of the ground floor interior space otherwise required to be devoted to Facilities of Public Accommodation, provided that no less than 25% of such required interior space shall be devoted to Facilities of Public Accommodation. The requirement that no less than 25% of the ground floor interior space otherwise required be devoted to Facilities of Public Accommodation may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation. The short-term condition in the license may not exceed ten years. At the expiration of the term, the ground floor shall be devoted to Facilities of Public Accommodation, unless the licensee applies for an extension for no more than ten years and proves that the provisions of 310 CMR 9.56(2)(a) through (d) are met. Applications for extensions prior to expiration of the term may be allowed only where necessary to maintain occupancy. For an Applicant seeking a short-term condition in the license to authorize Facilities of Limited Accommodation in the interior space otherwise required to be devoted to Facilities of Public Accommodation, 20% of net operating income per year generated from the Facilities of Limited Accommodation shall be paid by the licensee annually to fund specific construction or activities, approved by the Department, to activate the waterfront. The activation provided by the specific construction or activities shall extend to evening and/or weekend hours wherever feasible to compensate for any lack of activation that may result in the substitution of Facilities of Limited Accommodation for Facilities of Public Accommodation. The specific construction or activities to be funded shall be identified by the Applicant and approved by the Department prior to licensing. The funding of specific construction or activities shall be in addition to applicable requirements at 310 CMR 9.52(1) and 9.53(2). A project seeking a short term condition in a license shall:

- (a) not be inconsistent with any substitutions, offsets or conditions of approval established in an Approved Municipal Harbor Plan as provided in 310 CMR 9.34(2);
- (b) demonstrate that marketing efforts for at least one year have failed to identify any prospective Facility of Public Accommodation, even with the offer of up to 50% below market rents to civic or cultural not-for-profit organizations and a diligent good faith attempt to locate tenants which shall include advertisements in at least two commercial real estate marketing publications and listing with a commercial real estate brokerage;
- (c) comply with the conditions in the license requiring Facilities of Public Accommodation unless or until another use is authorized; this requirement may not be waived by the Department, regardless of foot traffic, density, level of economic development, or the absence of potential revenues generated by the Facility of Public Accommodation;
- (d) obtain the written concurrence of the Local Economic Development Authority that the project area lacks the level of development to support a Facility of Public Accommodation at the time of licensing or amendment. If the Local Economic Development Authority does not respond to the notice and the Department does not request additional information within 60 days of receipt of a license application, the Local Economic Development Authority will be deemed to concur with the request;
- (e) ensure that the first floor design will be capable of accommodating a Facility of Public Accommodation at the end of the term; and
- (f) certify annually the space devoted to Facilities of Limited Accommodation, the use of the space, the net operating income from those facilities, and demonstration of payment.

(3) A licensee may request an amendment of an existing license to authorize Facilities of Limited Accommodation, provided the request meets the requirements for an amendment at 310 CMR 9.24, the requirements identified in 310 CMR 9.56(2)(a) through (d), and other applicable requirements of 310 CMR 9.56(1) or (2). A short-term license condition for Facilities of Limited Accommodation amending an existing license may be for a limited term of ten years or 15 years, depending on the height of the building.

9.57: Approved Municipal Harbor Plans

(1) The following Municipal Harbor Plans are Approved Municipal Harbor Plans:

- (a) East Boston Waterfront District Municipal Harbor Plan (July 15, 2002, as renewed and amended on December 17, 2008, March 4, 2009, and August 2, 2012);
- (b) Fort Point Downtown (Boston) Municipal Harbor Plan Phase I (October 10, 2002, as renewed on February 12, 2013);
- (c) Fort Point Downtown (Boston) Municipal Harbor Plan Phase II (March 8, 2004, as renewed on April 9, 2014);
- (d) Harborpark (Boston) Plan (May 22, 1991, as renewed and amended on July 29, 1999, October 12, 2006, and April 4, 2008);
- (e) South Boston Waterfront District Municipal Harbor Plan (December 6, 2000, as renewed and amended on December 31, 2002, October 22, 2009, and December 21, 2016);
- (f) Cohasset Municipal Harbor Plan (November 25, 2020);
- (g) Central Waterfront (Everett) Municipal Harbor Plan (February 10, 2014);
- (h) Gloucester Municipal Harbor Plan and DPA Master Plan (July 6, 1999, as renewed and amended on December 11, 2009 and December 19, 2014);
- (i) Lynn Municipal Harbor Plan and DPA Master Plan (June 28, 2010, as renewed and amended on November 25, 2020);
- (j) Nantucket and Madaket Municipal Harbor Plan (December 21, 2009);
- (k) New Bedford Fairhaven Municipal Harbor Plan and DPA Master Plan (September 24, 2002, as renewed and amended on June 14, 2010);
- (l) Provincetown Harbor Management Plan (May 4, 1999, as renewed and amended on February 29, 2012 and April 10, 2019);
- (m) Salem Municipal Harbor Plan and DPA Master Plan (June 24, 2008);
- (n) Hull Harbor Plan (February 14, 2000);
- (o) South Coastal Harbor (Chatham) Management Plan (August 19, 1994, as renewed on July 23, 1999, October 21, 2005, and May 12, 2015);
- (p) Edgartown Municipal Harbor Plan (October 2, 1997, as renewed on April 30, 2003); and
- (q) Chelsea Municipal Harbor Plan and Designated Port Area Master Plan (April 1, 2022).

(2) Approved Substitute Provisions: Substitute Standards, Offsets, Amplifications, and Other Provisions.

- (a) East Boston Waterfront District Municipal Harbor Plan, (July 15, 2002, as renewed and amended on December 17, 2008, March 4, 2009, and August 2, 2012).

9.57: continued

Regulatory Provision	Chapter 91 Standard	Approved Substitution	Approved Offsetting Measures
310 CMR 9.52(1)(b)1.: Utilization of Shoreline for Water-dependent Purposes (Pedestrian access network).	“...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...”	Require a dedicated 20-foot wide public walkway around the South River, of which a minimum of ten feet shall be an unobstructed pathway. The inland ten feet will be used for landscaping and accessory amenities to enhance the general public’s waterfront experience. Applies only in the South River Waterfront Sub-area	The substitution directly benefits the public through improved access of 20 feet instead of ten feet. No additional offsetting benefit is required.

2. Table 2. Summary of Amplifications.

Regulatory Provision	Chapter 91 Standard	Approved Amplification
310 CMR 9.02: <i>Definitions</i> (Supporting DPA Uses)	The amount of supporting Designated Port Area Uses on filled tidelands within a DPA shall not exceed 25% of the area of the project site.	Only water-dependent industrial uses and temporary uses will be allowed in the Industrial Port District sub-area of the DPA.

(n) Hull Harbor Plan (February 14, 2000)

This Approved Harbor Plan does not include any substitute provisions.

(o) South Coastal Harbor (Chatham) Management Plan (August 19, 1994, as renewed on July 23, 1999, October 21, 2005, and May 12, 2015)

This Approved Harbor Plan does not include any substitute provisions.

(p) Edgartown Municipal Harbor Plan (October 2, 1997, as renewed on April 30, 2003)

This Approved Harbor Plan does not include any substitute provisions.

(q) Chelsea Municipal Harbor Plan and Designated Port Area Master Plan (April 1, 2022)

9.57: continued

1. Table 1. Summary of Alternative Site Coverage Ratio and Offsets

Regulatory Provision	Chapter 91 Standard	Alternative Site Coverage Ratio	Offsetting Measure(s)
<p>SUPPORTING DPA USES: 310 CMR 9.32(1)(b)5</p>	<p>The Department shall waive the numerical standard for Supporting DPA Uses as defined at 310 CMR 9.02, if the project conforms to a DPA Master Plan or Marine Industrial Park Master Plan which specifies alternative site coverage ratios and other requirements which ensure that:</p> <ol style="list-style-type: none"> 1. said Supporting Uses are relatively condensed in footprint and compatible with existing water-dependent industrial uses on said pier; 2. said Supporting Use locations shall preserve and maintain the site's utility for existing and prospective water-dependent industrial uses; 3. parking associated with a Supporting Use is limited to the footprint of existing licensed fill and is not located within a Water-dependent Use Zone; and 4. The use of tidelands for this purpose in a DPA shall be governed by the provisions of 310 CMR 9.15(1)(d)1 and 310 CMR 9.36(5). 	<p>Applicable to 111 Eastern Avenue:</p> <p>Supporting DPA Uses may occupy up to 35% of filled tidelands outside of the water-dependent use zone.</p>	<p>For any area of Supporting DPA Use in excess of 25% of the project site within Chapter 91 jurisdiction, direct operational or economic support shall be provided to an extent that adequately compensates for the reduced amount of tidelands on the project site available for water-dependent industrial use during the term of the license.</p> <p>Offset in the capacity of operational support shall be preferred.</p> <p>If employed, economic support shall be calculated at a premium rate, to be determined during the Chapter 91 licensing process.</p> <p>Economic support payments may be made to the Waterfront Improvement Fund to provide direct support to Water-dependent Industrial Use in the DPA.</p>

2. Table 2. Summary of Substitute Provisions

Regulatory Provision	Chapter 91 Standard	Approved Substitution	Offsetting Measure(s)
<p>HEIGHT LIMITS: 310 CMR 9.51(3)(e)</p>	<p>New or expanded buildings for non-water-dependent use shall not exceed 55 feet in height if located over the water or within 100 feet of the high-water mark; for every foot beyond 100 feet from the shoreline, the height of the building can increase by 0.5 feet.</p>	<p>Applicable to 111 Eastern Avenue:</p> <p>Allow new or expanded buildings for non-water-dependent use to be built to 80 feet in height within 100 feet of the shoreline.</p>	<p>The maximum height of any proposed structure on the project site shall be limited to 80 feet and result in decreased massing from what is allowed under the regulation.</p> <p>DEP will evaluate the need for additional offsetting measures during licensing.</p>

9.57: continued

Regulatory Provision	Chapter 91 Standard	Approved Substitution	Offsetting Measure(s)
<p>WATER DEPENDENT USE ZONE: 310 CMR 9.51(3)(c)</p>	<p>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:</p> <ol style="list-style-type: none"> 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. 	<p>Applicable planning area wide:</p> <p>The required WDUZ dimensions may be modified on any project site within the planning area as long as a minimum width of 25 feet is maintained along the project shoreline and as long as the modification results in no net loss of WDUZ area within Chapter 91 jurisdiction.</p>	<p>The reconfigured WDUZ shall result in no net loss of total WDUZ area and must be adjacent to the waterfront and within Chapter 91 jurisdiction and achieve a greater effectiveness in the use of the water's edge for water-dependent industrial use if within the DPA or water-dependent use outside of the DPA.</p> <p>This substitution does not alter the calculation for WDUZ on piers and wharfs.</p>

9.57: continued

3. Table 3. Summary of Amplifications

Regulatory Provision	Chapter 91 Standard	Approved Substitution
<p>COASTAL OR SHORELINE ENGINEERING STRUCTURES: 310 CMR 9.37(2)(b)(2) and (3)</p>	<p>9.37(2)(b)(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.</p> <p>9.37(3) Projects with coastal or shoreline engineering structures shall comply with several requirements relating to location, design, size, function, materials, impact on water and sediment flow, preference for non-structural alternatives where feasible, compatibility with abutting coastal or shoreline engineering structures, and minimizing adverse effects on the project site or adjacent or downcoast and downstream areas after construction of any coastal or shoreline engineering structure.</p>	<p>Applicable planning area wide:</p> <p>Coastal or shoreline engineering structures shall be designed to accommodate future sea level rise for the life of the structures on site and shall not negatively affect the capacity of the DPA to support water-dependent industrial uses.</p>

REGULATORY AUTHORITY

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