



Chapter 91

MassDEP Wetlands and Waterways Program

310 CMR 9.00

Jeffrey T. Malloy

March 17, 2015

Outline for Today's Presentation

- Chapter 91 Historical Perspective and Current Day Context
- Geographical Jurisdiction
- Licensing Process
- Useful Chapter 91 Regulations

“Common-wealth” of Massachusetts

Chapter 91 is cool.....and complicated

Origins of the Public Trust Doctrine

- Dates back to Roman Law – provides a legal justification for the exemption of the air, sea, and its coastline, from the principles of private property law.
- European (England, France, Spain) application of the *Public Trust Doctrine* influenced American States – Colonial Ordinances of 1641-1647
- Demonstrates “Public Need” rather than “Protection of Natural Resources”
- Massachusetts General Law Chapter 91 – Established in 1866

Geographic Areas Subject to Jurisdiction

9.04: Geographic Areas Subject to Jurisdiction

The following geographic areas, generally considered "trust lands", are subject to licensing and permitting by the Department under 310 CMR 9.00:

- (1) all waterways, including all flowed tidelands and all submerged lands lying below the high water mark of:
 - (a) Great Ponds;
 - (b) the Connecticut River;
 - (c) the section of the Westfield River in the Towns of West Springfield and Agawam lying between the confluence of said river with the Connecticut River and the bridge across said river at Suffield Street in said Town of Agawam;
 - (d) the non-tidal portion of the Merrimack River; and
 - (e) any non-tidal river or stream on which public funds have been expended for stream clearance, channel improvement, or any form of flood control or prevention work, either upstream or downstream within the river basin, except for any portion of any such river or stream which is not normally navigable during any season, by any vessel including canoe, kayak, raft, or rowboat; the Department may publish, after opportunity for public review and comment, a list of navigable streams and rivers; and
- (2) all filled tidelands, except for landlocked tidelands, and all filled lands lying below the natural high water mark of Great Ponds.

Water = in, on,
over, or under

- 1) **Flowed Tidelands:** in, on, over, or under tidal waters from MHW seaward to 3-miles (state limit of territorial jurisdiction)
- 2) **Filled Tidelands:** Outside DPA's Non-Landlocked Tidelands; w/in DPA's MHW to all filled tidelands
- 3) **Great Ponds:** in, on, over, or under ponds greater than 10 acres in their **natural state**
- 4) **Non-Tidal Rivers and Streams:** in, on, over, or under non-tidal navigable river or stream on which public funds have been expended either upstream or downstream (also Connecticut, Merrimack and portions of the Westfield River)

Great Ponds

Great Pond means any pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark. The title to land below the natural low water mark is held by the Commonwealth in trust for the public, subject to any rights which the applicant demonstrates have been granted by the Commonwealth. The Department shall presume that any pond presently larger than ten acres is a Great Pond, unless the applicant presents topographic, historic, or other information demonstrating that the original size of the pond was less than ten acres, prior to any alteration by damming or other human activity.

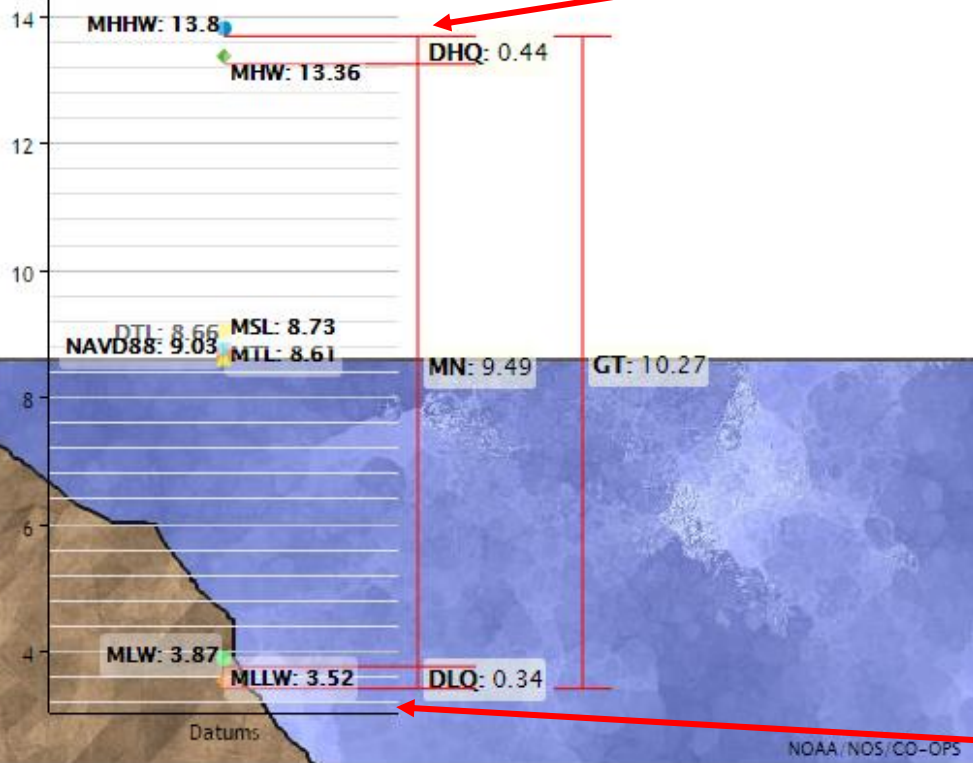
*Ponds that once measured 10 or more acres in their natural state, but which are now smaller are still considered great ponds; similarly great ponds that are “expanded” (e.g. dammed), are only subject to Chapter 91 within the area of their natural state.

<http://www.mass.gov/eea/agencies/massdep/water/watersheds/massachusetts-great-ponds-list.html>

Low Water Mark vs. High Water Mark

Datums for 8443970, Boston, MA

All figures in feet relative to station datum

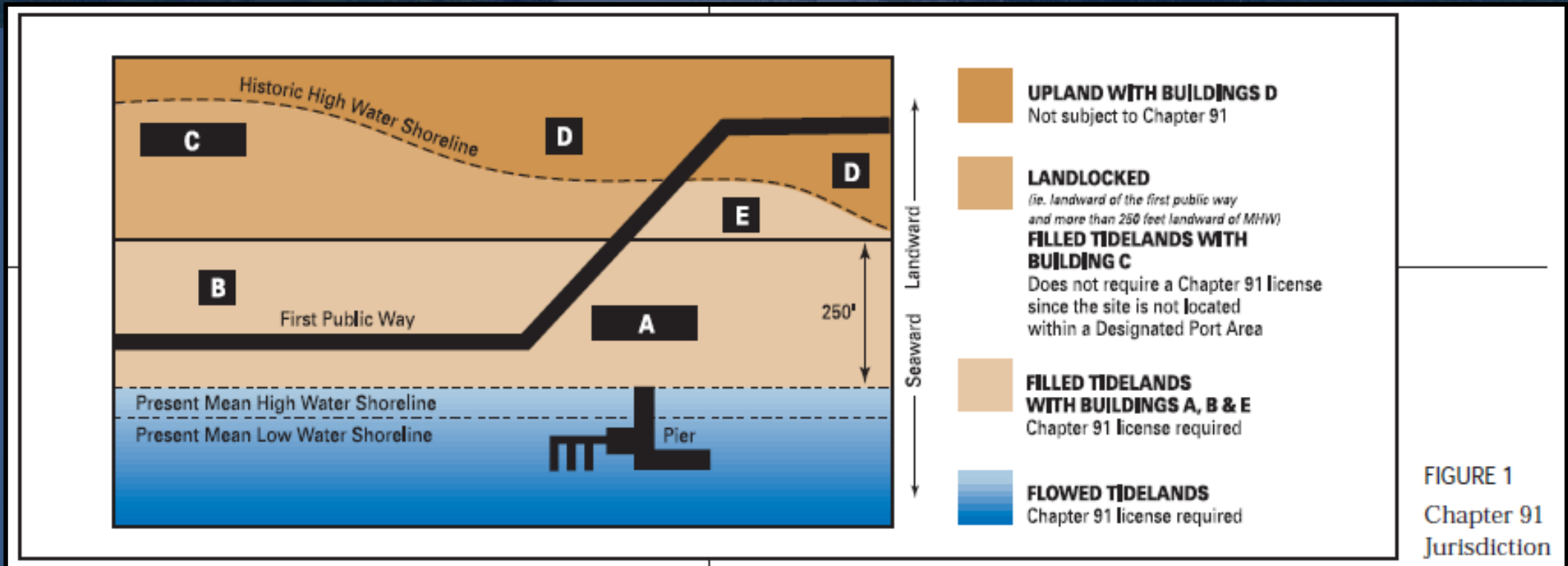


High Water Mark means:

- (a) for tidelands, the present mean high tide line, as established by the present arithmetic mean of the water heights observed at high 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; and
- (b) for Great Ponds, rivers, and streams, the present arithmetic mean of high water heights observed over a one year period using the best available data as determined by the Department.

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.

Chapter 91 Jurisdiction – Landlocked Tidelands

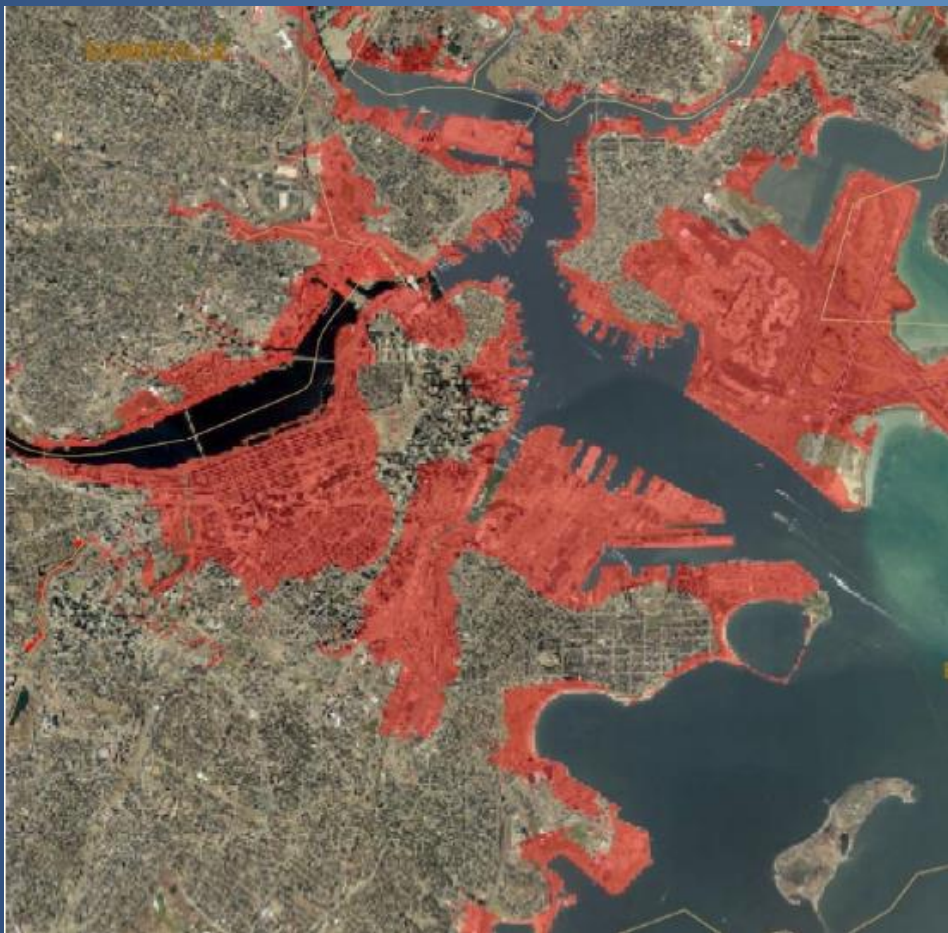


- Landlocked Tideland: at least 250 feet from MHW **and** separated from the shore by a public way in existence prior to Jan 1, 1984
- There are no landlocking provisions under Chapter 91 for DPA's

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:

- within 250 feet of the high water mark, or
- 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.

Landlocked Tidelands



Historic Filled Tidelands



Historic Filled Tidelands – Landlocked Tidelands shown in yellow

Designated Port Area

Intended to promote and protect *important water dependent industrial uses*

For example: commercial fishing, shipping or other vessel-related marine commercial activities

11 Designated Port Areas

- Gloucester Inner Harbor
- Beverly Harbor
- Salem Harbor
- Lynn
- Mystic River
- Chelsea Creek
- East Boston
- South Boston
- Weymouth Fore River
- New Bedford-Fairhaven
- Mount Hope Bay



Activities Requiring Authorization

Structures

- Any size permanent or seasonal
- Includes roads, culverts, bridges, parking lots, pipes, conduits, tunnels (among others)

Filling

- Fill is intended to remain in place (*ironically includes shoreline protection, beach nourishment, subaqueous disposal)

Dredging

- Channel Improvement
- Bridge Abutments

Change in Use

- e.g. conversion of open space into a constructed stormwater wetland

Structural Alteration

- Change in the dimensions of structures or fill

Demolition/Removal of Structures

- Approval is required for removal of unauthorized structure or fill

Activities Not Requiring Authorization - Exempted

Activities

- Overhead cables, wires or conduits
- Fish ladders, fishways and other fish passage devices
- Pipelines, cables, conduits, sewers and aqueducts entirely embedded in soil beneath a river or stream
- Bulkheads, revetments, headwalls, storm drainage outfalls and similar structures that do not extend into river or stream, except for bank stabilization.

*Applicant must notify the Department for a written notification/determination from the department whether a Chapter 91 license is required.



Activities Not Requiring Authorization

(3) Activities Not Requiring a License or Permit. Notwithstanding the provisions of 310 CMR 9.05(1) through (2), no license or permit is required for:

(a) maintenance, repair, and minor modifications, as described in 310 CMR 9.22, of fill or structures for which a grant or license is presently valid, or which is exempt from licensing pursuant to 310 CMR 9.05(3)(b) through (h);

(b) continuation of any existing, unauthorized use or structure located on private tidelands lawfully filled in accordance with a license or grant, provided that no unauthorized structural alteration or change in use has occurred on such tidelands subsequent to January 1, 1984 or in violation of an express condition of said license or grant;

(c) continuation of any existing, unauthorized public service project, provided that no unauthorized structural alteration or change in use has occurred subsequent to January 1, 1984, unless the Department determines, upon notice and opportunity for public comment, that licensing is essential to prevent significant harm to an overriding water-related public interest;



Maintenance Projects? 9.05(3)(c)

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;

Summary of License and Permit Requirements

Part 1: Legal Component

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.

Summary of License and Permit Requirements

Part 2: Public Use Benefit

(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.



Examples of Public Use Benefit Options

1. Strolling Rights in Intertidal Areas
2. Pedestrian and Waterfront Walkways
3. Dinghy Docks
4. Public Boat Landings
5. Public Restrooms
6. Public Meeting Rooms
7. Transient Dockage
8. Public Water Transportation Facilities and Services
9. Creation of Parkland
10. Boat Ramps
11. Piers and Floats for Public Recreational Boarding Facilities
12. Fishing Piers
13. Public Sailing Programs
14. Interpretive Display
15. Interior Facilities of Public Accommodation in Private Buildings (e.g. restaurants, museum, retail)
16.?

Licensing Procedures

- 1) **Pre-Application Meeting:** Early Determination of Water Dependency
- 2) **ENF Filing:** Nonwater-Dependent Projects Only
- 3) **Chapter 91 Application Filed:** Review for completeness, File # Assigned
- 4) **Determination of Water Dependency:** Water-Dependent vs. Nonwater-Dependent Project
- 5) **Public Notice:** Applicant/Representative Receives Public Notice, Distribution List, List of Missing Items
- 6) **Public Hearing:** Nonwater-Dependent Projects Only
- 7) **Written Determination:** Not required for WD Projects, Department must find that NWD Project serves a public purpose, greater benefit than detriment, CZM consistency
- 8) **Appeal Period:** 21 Days
- 9) **File Completion:** Any Outstanding information may be provided at this time (e.g. mylar plan set)
- 10) **License Issuance and Fee Payment:** “fees are for the displacement of tidewater and occupation of Commonwealth Tidelands (310 CMR 9.14)”
- 11) **Recording of License:** w/in 60 days of issuance
- 12) **Certificate of Compliance:** w/in 60 days of project completion

Timeframes & Filing Procedures

Nonwater-Dependent Projects:

Full Application – 301 Days

Water Dependent Projects:

Full Application – 216 Days:

*No Public Hearing or
Gov. Signature Required.

SUMMARY TABLE OF APPLICATION REVIEW SCHEDULES: Nonwater-dependent projects
(shows maximum timelines)

DEP Action	<u>Partial Application</u>	<u>Full Application</u>	<u>Municipal Harbor Plan</u>	<u>Joint MEPA EIR</u>
1. From date application received/Assign file number and issue public notice	45 days	45 days (administrative completeness review also completed)	45 days	25 days from receipt of Certificate on Final EIR or SEIR
2. Conduct public hearing	40 days	40 days	40 days	15 days
3. Public Comment Period Closes	No less than 30 days and no more than 60 days from notification date	No less than 30 days and no more than 60 days from notification date	No less than 30 days and no more than 60 days from notification date	No less than 30 days and no more than 60 days from notification date
4. Determine File to be Complete	30 days	-----	30 days	
5. Issue Written Determination and Draft License	60 days	60 days	45 days	30 days
6. Appeal Period	21 days	21 days	21 days	21 days
7. Issue License (or date of Governor's signature, whichever is later)	45 days	45 days	45 days	45 days

Water-Dependent vs. Nonwater-Dependent Projects

9.12: Determination of Water-Dependency

(1) Prior to issuance of the public notice, the Department shall classify the project as a water-dependent use project or as a nonwater-dependent use project. The Department shall classify as a water-dependent use project any project which consists entirely of:

- (a) uses determined to be water-dependent in accordance with 310 CMR 9.12(2); and/or
- (b) uses determined to be accessory to a water-dependent use, in accordance with 310 CMR 9.12(3).

Any other project shall be classified as a nonwater-dependent use project.

*If any portion of a project is deemed nonwater-dependent it trumps any water-dependent elements of a project element – i.e. the entire project become nonwater-dependent.

- **Water-Dependent Use Projects listed at 9.12(2)(a-e)**
- **Nonwater – Dependent Use Projects at 9.12(2)(f)**

(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.

Water-Dependent vs. Nonwater-Dependent Projects

- 1) **Water-Dependent Projects:** deemed to have a project public purpose
- 2) **Nonwater-Dependent Projects:** are not deemed to have a proper public purpose
- 3) **Nonwater-Dependent Projects Must:** provide greater benefits than detriments to the public's rights in the waterway
- 4) **Waterfront Lands divided into 2 Classifications:**
 - a) Private tidelands – MLW landward owned by private parties
 - b) Commonwealth tidelands – MLW seaward owned by the public

*The amount of public benefits an applicant must provide varies depending on whether the project in question is situated on Private tidelands or Commonwealth tidelands.

Chapter 91 Provisions specific to Sea-Level Rise

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

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.

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 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.

Chapter 91 Provisions specific to Sea-Level Rise



Historic Filled Tidelands



Kirshen et. al, 2010 – 2.5 Feet of Sea-Level Rise w/ 100 year storm (5-foot surge at a spring tide).

Minor Project Modifications

(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.

- Research at Chapter 91 for any Existing Licenses
- Cover Letter Describing Scope
- Plans if Necessary
- Project may proceed without further approval if the Department doesn't object within 30 days

Thank You!

Chapter 91 MassDEP Wetlands and Waterways Program

Jeffrey T. Malloy

jmalloy@bscgroup.com

617.896.4355

Ingeborg Hegemann

ihegemann@bscgroup.com

617.896.4514