

310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION

NOTE TO REVIEWERS:

MassDEP IS SETTING FORTH IN THIS DOCUMENT PROPOSED AMENDMENTS TO THE CURRENT REGULATION AT 310 CMR 9.00 IN REDLINE AND STRIKEOUT FORMAT.

REDLINES SHOW ADDITIONS TO THE CURRENT REGULATORY TEXT AND STRIKEOUTS SHOW PROPOSED DELETIONS.

SINCE THE REGULATION IS VERY LONG, MassDEP IS PUBLISHING ONLY THOSE PORTIONS OF THE REGULATION FOR WHICH THE AGENCY IS PROPOSING TO MAKE AMENDMENTS.

MassDEP HAS INCLUDED TEXT JUST PRIOR TO (and in some cases text just after) NEW INSERTED TEXT TO MAKE IT CLEAR WHERE THE NEW TEXT IS PROPOSED TO BE INSERTED INTO THE CURRENT REGULATIONS.

REVIEWERS CAN FIND THE FULL UNOFFICIAL TEXT OF 310 CMR 9.00 IN ITS CURRENT FORM ON MassDEP'S WEBSITE (SEE BELOW) AND THE OFFICIAL VERSION CAN BE PURCHASED THROUGH THE STATE HOUSE LIBRARY.]

<https://www.mass.gov/doc/310-cmr-900-waterways-regulations/download>

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NO CHANGES ARE PROPOSED IN SECTIONS 9.01.– THIS SECTION IS OMITTED FROM THIS DOCUMENT AS NOTED ABOVE.

THE FOLLOWING ARE THE ONLY PROPOSED AMENDMENTS TO SECTION 9.02.

9.02: Definitions

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Area of Critical Environmental Concern (ACEC) means an area which has been so designated by the Secretary pursuant to 301 CMR 12.00: *Areas of Critical Environmental Concern*.

A Zone or AE Zone in tidal areas means an area subject to inundation by a 1%-annual-chance flood with wave heights and/or wave run-up depths less than 3 feet. The “E” in AE indicates that a predicted elevation of water has been determined by reference to the currently effective or preliminary Flood Insurance Rate Map (after the FEMA appeal period has passed) prepared by FEMA (except for any portion of a preliminary map that is the subject of an appeal to FEMA), including any letter of map revision obtained by the Applicant from FEMA.

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Coastal Dune means any natural hill, mound, or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

~~Coastal High Hazard Area means an area subject to high velocity waters, as defined in accordance with FEMA regulations and as designated on a Flood Insurance Rate Map, as issued and as may be revised or amended hereafter by FEMA.~~

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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.

Land Subject to Coastal Storm Flowage means land subject to any inundation caused by

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coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.

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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.

Moderate Wave Action Area or MoWA Zone means the area of Land Subject to Coastal Storm Flowage where base flood wave heights are equal to or greater than 1.5 feet but less than 3 feet.

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Present means contemporaneous with the review of an application, request for determination of applicability, or other action by the Department.

Primary Frontal Dune means a continuous or nearly continuous mound or ridge of sediment with relatively steep seaward and landward slopes immediately landward and adjacent to the beach and subject to erosion and overtopping from high tides and waves during coastal storms. The Primary Frontal Dune is the dune closest to the beach. The inland limit of the Primary Frontal Dune occurs at the point where there is a distinct change from a relatively steep slope to a relatively mild slope.

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Shellfish means the following species: Bay Scallop (*Argopecten irradians*); Blue Mussel (*Mytilus edulis*); Ocean Quahog (*Arctica islandica*); Oyster (*Crassostrea virginica*); Quahog (*Mercenaria mercenaria*); Razor Clam (*Ensis directus*); Sea Clam (*Spicula solidissima*); Sea Scallop (*Placopecten megallanicus*); and Soft Clam (*Mya arenaria*).

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Special Flood Hazard Area means the area of land in the flood plain that is subject to a 1-percent-chance of flooding in any given year as determined by the best available information, including, but not limited to, the currently effective or preliminary FEMA Flood Insurance Study or Rate Map (except for any portion of a preliminary map that is the subject of an appeal to FEMA) for Land Subject to Coastal Storm Flowage, the Velocity Zone, and the Flood Insurance Study for Bordering Land Subject to Flooding as defined in 310 CMR 10.57

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Upper Floor Accessory Services means utility and access facilities which must be located on the ground floor of any building to serve any facility of private tenancy located on any other

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floors, provided that such accessory services do not occupy more than 25% of the building footprint. Examples of such services include utility shafts, elevators, stairways, and entryways.

Velocity Zone or V-Zone means an area within the Special Flood Hazard Area that is subject to high velocity wave action from storms or seismic sources. The Velocity Zone boundaries are determined by reference to the currently effective or preliminary Flood Insurance Rate Map prepared by FEMA, whichever is more recent (except for any portion of a preliminary map that is the subject of an appeal to FEMA), or at a minimum to the inland limit of the Primary Frontal Dune, whichever is farther landward.

[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED IN SECTIONS 9.03 – 9.048. THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED ABOVE. -]

9.05 : Activities Subject to Jurisdiction

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(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:

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(g) placement in a non-tidal river or stream subject to jurisdiction under 310 CMR 9.04(1)(e) of fill or structures for which a final Order of Conditions has been issued under M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*, and which does not reduce the space available for navigation; such fill or structures are limited to:

1. overhead wires, conduits, or cables to be attached to an existing bridge, without substantial alteration thereof, or constructed and maintained in accordance with the National Electrical Safety Code;
2. fish ladders, fishways, and other devices which allow or assist fish to pass by a dam or other obstruction in the waterway;
3. pipelines, cables, conduits, sewers, and aqueducts entirely embedded in the soil beneath such river or stream; and
4. bulkheads, revetments, headwalls, storm drainage outfalls, replacement culverts meeting the Massachusetts Stream Crossing Standards as defined at 310 CMR 10.04, scour protection measures and similar fill or structures which do not extend into such river or stream, except as may be necessary for bank or channel stabilization, including any necessary dredging and backfilling associated with their installation, not to exceed existing grade;

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[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED IN SECTIONS 9.06 – 9.09. THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED ABOVE. ]

9.10: Simplified Procedures for Small Structures Accessory to Residences

(l) 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:

(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.

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(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*.

If plans certified by an engineer or surveyor are not required under M.G.L. c. 131, § 40, the Wetlands Protection Act pursuant to 310 CMR 10.00: *Wetlands Protection*, certification for projects meeting the eligibility requirements of 310 CMR 9.10(1) will generally not be required. However, based on comments submitted during the public comment period or other relevant information, the Department may require plans to be certified by a Registered Professional Engineer or Registered Land Surveyor for a structure when it finds that the preparation of plans by a professional is necessary to ensure:

1. an adequate review of public access;
2. the preservation of public navigational rights;
3. structural integrity;
4. the accuracy of stated distances from property boundaries; or
5. that the plan is sufficiently clear and accurate to allow a licensing decision which otherwise could result in significant interference with public rights or environmental interests in tidelands, Great Ponds, and other waterways. The Department will provide a statement of reasons to support this finding.

When plans have not been prepared under M.G.L. c. 131, § 40, the Wetlands Protection Act, a plot plan or other scaled plan with structures to be licensed measured accurately from lot lines or other structures shall be prepared in accordance with application instructions.

(b) Applications for Projects within Great Ponds. The Department shall publish an inventory of Great Ponds which shall be available upon written request. Prior to the addition of any pond to the inventory, the Department will hold a public hearing in the vicinity of the pond. After a pond is added to the inventory, the Department will provide an opportunity for

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owners of existing structures that require licenses to come into compliance with M.G.L. c. 91 regulatory requirements by submission of an application within six months from the date of the addition of the pond to the inventory. The Department will take no enforcement action against the owners of a structure on a Great Pond not listed on the inventory unless and until the Great Pond has been added to the inventory and the opportunity for compliance has been afforded.

(c) Coordination with the Conservation Commission. At least 45 days prior to issuance of a license, the Department and the applicant shall coordinate with the Conservation Commission as follows:

1. The Department will not require Conservation Commission approval for existing structures built before enactment of M.G.L. c. 131, § 40, the Wetlands Protection Act (1963 for coastal wetlands and 1965 for inland wetlands) and not substantially altered subsequently. Applicants should consult their local Conservation Commission regarding application of M.G.L. c. 131, § 40, the Wetlands Protection Act to maintenance or alteration of existing structures.
  2. For structures built between 1963 or 1965 (as applicable) and December 31, 1983, and not substantially altered after the latter date, the applicant shall provide notice of the application to the Conservation Commission. The Department shall proceed with licensing unless the Conservation Commission informs the Department that it has provided written notice to the applicant prior to the close of the public comment period to promote compliance with or to enforce M.G.L. c. 131, § 40, the Wetlands Protection Act.
  3. For structures proposed, built, or substantially altered on or after January 1, 1984, applicants shall provide an Order of Conditions, a negative or conditional negative Determination of Applicability, or a Certificate of Compliance. The Department may waive this requirement based upon evidence of a written request for action by an applicant to a Conservation Commission, and subsequent failure of the Conservation Commission to respond.
- (d) The applicant shall submit the notice of the application included in the application package to the Board of Selectmen or Mayor, the planning board, zoning authority and the Conservation Commission of the town or city where the work will be performed. The Department shall presume compliance with applicable state and local requirements unless it receives information to the contrary during the public comment period. Unless the Department receives a contrary determination from the proper zoning authority, signed by the Clerk of the affected municipality, compliance with applicable zoning ordinances and bylaws pursuant to 310 CMR 9.34(1) shall be deemed certified 45 days after notice to that zoning authority and clerk. Proposed structures must also conform to plans for waterways developed by agencies or commissions with legal authority, such as municipal harbor plans developed pursuant to 310 CMR 9.38(4)(b), or lake, regional commission, or other formal areawide policies or plans developed pursuant to 310 CMR 9.38(2)(b).

(e) Public Notice and Notice to Abutters. The applicant shall publish in a newspaper of general circulation in the area where the project is located a public notice including the applicant's name and address, the project location, a description of the project, a statement that written comments will be accepted within 30 days of the Notification Date stated therein, the address where comments may be sent, and a statement that a municipality, ten citizen group or any aggrieved person who has submitted written comments within the public comment period may appeal the Department's decision and that failure to submit written comments within the public comment period will result in the waiver of any right to an adjudicatory hearing. A copy of the notice shall also be sent by the applicant to the

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landowner if not the applicant, to any person having a record easement interest in the property where the structure is or may be located, and to all abutters to the property where the structure is or may be located, by certified mail, return receipt requested. Joint notice under 310 CMR 10.05(4): *Notices of Interest*, 310 CMR 9.10 and 314 CMR 9.05(3): *Public Notices of an Application* may be published and sent to persons entitled to notification, provided it contains the requisite information and meets the requisite standards pursuant to each statute.

(f) Fees. For structures totaling more than 300 square feet pursuant to 310 CMR 9.10(1)(a), applicants for simplified licenses shall pay an application fee, or the renewal fee, in accordance with the provisions of 310 CMR 4.10(8)(f) and (l) respectively. All other applicants for licenses under simplified procedures shall pay the application fee, or the renewal fee in accordance with the provisions of 310 CMR 4.10(8)(f) and (l) respectively. No tidewater displacement fees shall be assessed. Any person granted a license from the Department in, on or over any land the title to which is in the Commonwealth shall compensate the Commonwealth for the rights granted in such lands through 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. No occupation fee shall be assessed by the Department for structures within the enhanced portion of Great Ponds. An occupation fee shall be assessed for the portion of any structure that the Department determines, after opportunity for public comment, extends below the natural high water mark into the historic portion of the Great Pond. Enhanced Great Ponds are those which contain a surface area greater than their historic natural state, resulting from alteration by damming or other human activity.

(4) Decision on Applications. The Department shall issue a license, draft license, or written determination to deny a license within 90 days of a complete application, commencing no earlier than the close of the public comment period.

(5) Terms and Recordation for Licenses from the Department. The license term shall be 15 years unless the Department determines that a shorter term is necessary to protect the public interest. In accordance with M.G.L. c. 91, § 18, the license, with the plan as an exhibit, shall be recorded at the Registry of Deeds within the chain of title of the affected property within 60 days of the date of issuance. Failure to record the license and accompanying plan within 60 days will render the license void in accordance with M.G.L. c. 91, § 18.

(6) Renewal and Transfer of Licenses from the Department. A license for renewal may be ~~issued/renewed~~ provided the structure or fill remains sound and conforms to plans submitted with the original application, taking into account all applicable regulatory provisions, including without limitation 310 CMR 9.37, and existing conditions at the time the application for a renewal is submitted. At the time an application for renewal is submitted, the applicant shall send a notice of application for renewal included in the application package to the mayor or board of selectmen, planning board, and conservation commission of the city or town where the project site is located. The Department may require additional public notice based on comments received about the structure or other relevant information. If such additional public notice for renewal is required, the public comment period is 30 days. Applicants for renewal shall pay a renewal fee (*see* 310 CMR 4.10(8)(1)). Any person applying for a renewal under 310 CMR 9.10, including renewals of interim approvals or licenses originally granted under the Amnesty Program, shall compensate the Commonwealth for the rights granted in such lands through 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

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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

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9.11(3)

(c) The Department shall determine an application to be complete only if the following information has been submitted:

1. a set of final plans which are prepared in accordance with the format standards required for recording of licenses in the appropriate Registry of Deeds or Land Court for the district in which the licensed activity is to be performed; and which are certified by a Registered Professional Engineer or Land Surveyor, as deemed appropriate by the Department containing, at a minimum, the following:
  - a. an appropriately-scaled location map of the project site, and of any area where dredged material disposal will occur;
  - b. appropriately-scaled principal dimensions and elevations of proposed and existing fill and structures and, if dredging is involved, the principal dimensions of all relevant footprints, contours and slopes;
  - c. a delineation of the present high and low water marks, as relevant;
  - d. a delineation of the historic high and low water marks, as relevant and in a manner acceptable to the Department in accordance with the definitions thereof at 310 CMR 9.02;
  - e. references to any previous licenses or other authorizations for existing fill, structures, or dredging at the project site, and a delineation thereof as well as a delineation of any historic dredging, filling, or impoundment;
  - f. indication of any base flood elevation of the statistical 100-year storm event, or Velocity Zone of any coastal high hazard area, which is located on the project site; and
  - g. indication of the location of any on-site or nearby state harbor lines, federal pier and bulkhead lines, federal channel lines, and public landings or other easements for public access to the water.

[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED TO SECTIONS 9.12 – 9.14.  
THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED ABOVE. ]

9.15: Terms

(1) Term of License

- (a) All licenses issued by the Department shall contain a condition stating the term for

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which license is in effect, if any. All licenses shall be in effect for a fixed term not to exceed 30 years, unless otherwise deemed appropriate by the Department in accordance with 310 CMR 9.15(1)(b) through (d).

(b) Notwithstanding 310 CMR 9.15(1)(a), the Department may issue a license that establishes an extended fixed term, in accordance with the following provisions:

1. said term shall not exceed 65 years for any project or portion thereof which, upon completion, will be located on flowed tidelands or other waterways, and shall not exceed 99 years for any project or portion thereof which will be located on filled tidelands or Great Ponds; in the event the project site includes both flowed and filled tidelands, the Department may upon request of the applicant establish a single weighted average term for the entire project, or for a portion thereof as deemed appropriate by the Department, based on the relative amounts of the surface area of the flowed and filled tidelands associated therewith;

2. the applicant shall provide justification that an extended term is warranted given the expected life of the structure, typical financing requirements, consistency with a municipal harbor plan, if any, appropriateness of long-term dedication of tidelands to the proposed use(s) in the particular location, and any other relevant factors, including but not limited to projected sea level rise;

3. for projects on Commonwealth tidelands or Great Ponds, the Department shall conduct a public hearing and issue written findings concerning the extended term, in accordance with the provisions of 310 CMR 9.13(3) and 9.14;

4. for projects on Commonwealth tidelands or Great Ponds held by the Commonwealth, the licensee shall pay an occupation fee based on an appraisal, in accordance with the provisions of 310 CMR 9.16(3)(b) through (c); and

5. the Department shall require the licensee to submit periodic license compliance inspection reports as a condition of the license for nonwater-dependent use projects, and for other projects as deemed appropriate by the Department.

(c) The Department shall issue a license for an unlimited term for any project whose entire control, development, and operation is undertaken by a public agency for the provision of services directly to the public (or to another public agency for such provision to the public) by the public agency, its contractor or agent, unless an unlimited term is not deemed appropriate by the Department.

(d) Notwithstanding the terms of license specified in 310 CMR 9.15(1)(b) and (c):

1. in Designated Port Areas, the term of license for any nonwater-dependent use in a marine industrial park shall not exceed 65 years; the term of license for any supporting DPA use shall not exceed 30 years; and the term of license for any temporary use shall not exceed ten years; and

2. outside of Designated Port Areas, the term of license for any stationary vessel for uses as described in 310 CMR 9.32(1)(a)6. Shall not exceed 30 years.

(e) The term of a license may be renewed in accordance with the provisions of 310CMR 9.25(2).

(2) Term of Permit. Any permit shall be valid for a fixed term not to exceed five years; provided, however, that maintenance dredging may be performed for up to ten years after the permit has been issued, if such terms are so stated in the permit.

[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED TO SECTIONS 9.16 – 9.21.

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THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED ABOVE.]

9.22: Maintenance, Repair, and Minor Project Modifications

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

Maintenance and repair include, among other things, the following activities:

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

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

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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 ~~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*.

[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED TO SECTIONS 9.23 – 9.24.

THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED ABOVE.]

### 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 license or permit for renewal may be ~~issued~~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. A license or permit for renewal may be issued provided the structure or fill remains sound and conforms to plans submitted with the original application, taking into account all applicable regulatory provisions, including without limitation 310 CMR 9.37, and existing conditions at the time the application for a renewal is submitted.

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[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED TO SECTIONS 9.26 – 9.32.  
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ABOVE.]

9.33 : Environmental Protection Standards

- (l) All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to:
- (a) Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H and 301 CMR 11.00: *MEPA Regulations*.
  - (b) Wetlands Protection Act, M.G.L. c. 131, § 40, and 310 CMR 10.00: *Wetlands Protection*.
  - (c) Wetlands Restriction Acts, M.G.L. c. 130, § 105 and c. 131, § 40A, and 310 CMR 12.00: *Adopting Coastal Wetlands Orders* and 310 CMR 13.00: *Adopting Inland Wetlands Orders*. All projects shall comply with wetland restriction orders recorded pursuant to these statutes.
  - (d) Areas of Critical Environmental Concern, M.G.L. c. 21A, § 2(7) and St. 1974, c. 806, § 40(E), and 301 CMR 12.00: *Areas of Critical Environmental Concern*.
  - (e) Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26 through 53, and 314 CMR 3.00: *Surface Water Discharge Permit Program*, 314 CMR 5.00: *Ground Water Discharge Permit Program*, 314 CMR 7.00: *Sewer System Extension and Connection Permit Program*, 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 310 CMR 15.00: *The State Environmental Code, Title 5: Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage*.
  - (f) Ocean Sanctuaries Act, M.G.L. c. 132A, §§ 13 through 16 and 18, and 302 CMR 5.00: *Ocean Sanctuaries*. No license or permit shall be issued for any structure or fill that is expressly prohibited in M.G.L. c. 132A, §§ 1 through 16.
  - (g) Marine Fisheries Laws, M.G.L. c. 130, and 322 CMR 1.00: *Enforcement of Rules and Regulations*.
  - (h) Scenic Rivers Act, M.G.L. c. 21, § 17B, and 302 CMR 3.00: *Scenic and Recreational Rivers Orders*.
  - (i) Massachusetts Historical Commission Act, M.G.L. c. 9, §§ 26 through 27C, as amended by St. 1982, c. 152 and St. 1988, c. 254, and 950 CMR 71.00: *Protection of Properties Included in the State Register of Historic Places*. For projects for which a Project Notification Form must be submitted pursuant to 950 CMR 71.07: *Review of Projects* the applicant shall file said form with the Massachusetts Historical Commission.
  - (j) Mineral Resources Act, M.G.L. c. 21, §§ 54 through 58.
  - (k) Massachusetts Drinking Water Act, M.G.L. c. 111, §§ 159 through 174A, and 310 CMR 22.00: ~~*Land Application of Sludge and Septage*~~ *Drinking Water*.
  - (l) Underwater Archeological Resources Act, M.G.L. c. 91 and c. 6, §§ 179 and 180, and 312 CMR 2.00: *Massachusetts Underwater Archaeological Resources*.

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- (m) Hazardous Waste Management Act, M.G.L. c. 21C and 310 CMR 30.000: *Hazardous Waste*.
- (n) Solid Waste Disposal Act, M.G.L. c. 16, §§ 18 through 24, and 310 CMR 16.00: *Site Assignment Regulations for Solid Waste Facilities*.
- (o) Air Pollution Act, M.G.L. c. 111, §§ 142A through I and 310 CMR 7.00: *Air Pollution Control*.
- (p) State Highway Curb Cuts, M.G.L. c. 81, § 21.
- (q) Energy Restructuring Act, M.G.L. c. 164, §§ 69G through S, and 980 CMR 1.00 through 12.00.
- (r) Regional land use control statutes, including the Martha's Vineyard Commission Act, St. 1974, c. 637, c. 831, and the Cape Cod Commission Act, St. 1989, c. 716.

(2) Where a state or regional agency has authority to issue regulatory approval, issuance of such approval shall be conclusive as to compliance with the regulatory program in question.

(3) With respect to M.G.L. c. 131, § 40 and 310 CMR 10.00: *Wetlands Protection*, if the Department has issued a final order of conditions the project shall be presumed to comply with the statute and the final order shall be deemed to be incorporated in the terms of the license or permit, with no additional wetland conditions imposed. If an order of conditions has been issued by the conservation commission and the Department has not taken jurisdiction, the Department shall presume the project complies with state wetland standards, except upon a clear showing of substantial non-compliance with such standards. In that event, the Department shall impose such additional conditions in the license or permit as will make the project substantially comply with state wetlands standards.

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

[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED TO SECTIONS 9.34 – 9.36.

THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED ABOVE.]

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

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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; ~~and~~  
(d) incorporates the impacts of projected sea level rise throughout the design life of the building, structure, fill, open space or publicly accessible area or facility.- An applicant shall consult the Resilient.mass.gov website for the most current mapping and other available information related to shoreline change and sea level rise or other similarly reliable sources, as deemed appropriate by the Department.

(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 9.02a Velocity Zone (V-Zone)~~, 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. comply with the provisions of 310 CMR 9.37(1)(d). incorporate projected sea level rise during the design life of the buildings; at a minimum, such projections shall be based on historical and projected rates of increase in sea level in New England coastal areas.

(3) Projects with coastal or shoreline engineering structures shall comply with the following:

(a) any seawall, bulkhead, or revetment shall be located landward of the high water mark unless it must lie below the high water mark to permit proper tieback placement, to obtain a stable slope on bank areas, or to be compatible with abutting seawalls, bulkheads, or revetments in terms of design, size, function, and materials, or unless it is associated with new fill permitted according to the provisions of 310 CMR 9.32;

(b) any breakwater or similar structure designed to dissipate or otherwise reduce wave energy or to interfere with current flow shall not:

1. cause or contribute to water stagnancy;

2. reduce the ability of adjacent water bodies to flush adequately; or

3. cause or contribute to sedimentation problems in adjacent or nearby navigation channels, anchorages, or wetland resource areas, or cause increased erosion to inland or coastal beaches, banks, or other wetland resource areas;

(c) in evaluating coastal or shoreline engineering structures, the Department shall require non-structural alternatives where feasible;

(d) the Department shall evaluate coastal or shoreline engineering structures for compatibility with abutting coastal or shoreline engineering structures in terms of design, size, function, and materials;

(e) if the Department finds significant adverse effects on the project site or adjacent or downcoast and downstream areas after construction of any coastal or shoreline engineering structure, the Department may, after an opportunity for a hearing, require modification of said structure the cost of which may not exceed 25% of the replacement cost of said structure, or may require the removal of said structure; 310 CMR 9.37(3)€ shall be specifically stated in the license.

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

### 9.38: Use Standards for Recreational Boating Facilities

(1) Public Recreational Boating Facilities. Any project that includes a public recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to ensure patronage of such facility by the general public. In applying this standard the Department shall act in accordance with the following provisions:

- (a) all vacant berths shall be assigned in a fair and equitable manner to the public patrons of said facility, by means of a waiting list or other comparably unbiased method; nothing in this provision shall be construed to prevent berthing assignments based on vessel characteristics, or the offer of first refusal rights to existing patrons of the facility who wish to relocate to a vacant berth;
- (b) any contract or other agreement for exclusive use of berths at said facility shall have a maximum term of one year, and may be renewable upon each expiration for an additional period of up to one year;
- (c) reasonable arrangements shall be made to accommodate transient boaters, including, at a minimum, a procedure for making any berth available for transient use during periods of vacancy in excess of 24 hours;
- (d) all exterior pedestrian facilities on the project site shall be open to the general public, except where access restrictions are necessary in order to avoid significant interference with the operation of the facility or to maintain security at slips, ramps, floats, and other docking facilities; any such access restrictions shall be stated in the license.

(2) Private Recreational Boating Facilities.

- (a) Any project that includes a private recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to avoid undue privatization in the patronage of said facility. In applying this standard, the Department shall act in accordance with the following provisions:
  1. no berth in a marina shall be assigned pursuant to any contract or other agreement that makes use of the berth contingent upon ownership or occupancy of a residence or other nonwater-dependent facility of private tenancy;
  2. no berth in a marina shall be assigned pursuant to a contract or other agreement for exclusive use with a maximum term that exceeds one year, unless:
    - a. for existing marinas, the lease agreement, master lease agreement or notice thereof for such berths was recorded at the Registry of Deeds prior to July 6, 1990 in which event all berths subject to such agreement shall be exempt from the provisions of 310 CMR 9.38(2)(b); or
    - b. for new marinas or berths in an existing marina not exempted grandfathered pursuant to 310 CMR 9.38(2)(a), the following conditions are met:
      - i. said marina is located on tidelands outside of Designated Port Area;
      - ii. the Department expressly authorizes the assignment of long-term exclusive use of such berths in the license, and the license includes a condition requiring written notification to any assignee that said license does not convey ownership

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of Commonwealth tidelands;

iii. the number of berths authorized in the license does not exceed 50% of the total berths in said marina; and

iv. said marina provides water-related public benefits commensurate with the degree of privatization, as deemed appropriate by the Department.

(b) No project shall include a private recreational boating facility with fewer than ten berths on Commonwealth tidelands or Great Ponds, if the Department receives written certification from the municipal official or planning board of the municipality in which the project is located that such facility does not conform to a formal, areawide policy or plan which establishes municipal priorities among competing uses of the waterway, unless the Department determines that such certification:

1. is arbitrary, capricious, or an abuse of discretion; or
2. conflicts with an overriding state, regional, or federal interest.

[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED TO SECTIONS 9.39 – 9.40.

THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED ABOVE.

310 CMR 9.00 DOES NOT INCLUDE SECTIONS NUMBERED 9.41 – 9.50]

9.51: Conservation of Capacity for Water-dependent Use

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

(1) If the project includes nonwater-dependent facilities of private tenancy, such facilities must be developed in a manner that prevents significant conflict in operation between their users and those of any water-dependent facility which reasonably can be expected to locate on or near the project site. Characteristics of the respective facilities that may give rise to such user conflict include, but are not limited to:

- (a) presence of noise and odors;
- (b) type of equipment and accessory services;
- (c) hours of operation and spatial patterns of activity;
- (d) traffic flows and parking needs;
- (e) size and composition of user groups;
- (f) privacy and security requirements;
- (g) requirements for public infrastructure.

(2) If the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that protects the utility and adaptability of the site for

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water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the project site. Aspects of built form that may give rise to design incompatibility include, but are not limited to:

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

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

- (a) new pile-supported structures for nonwater-dependent use shall not extend beyond the footprint of existing, previously authorized pile-supported structures or pile fields, except where no further seaward projection occurs and the area of open water lost due to such extension is replaced, on at least a 1:1 square foot basis, through the removal of existing, previously authorized fill or pile-supported structures or pile fields elsewhere on the project site; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the on-site replacement requirement if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative replacement requirements which ensure that no net loss of open water will occur for nonwater-dependent purposes, in order to maintain or improve the overall capacity of the state's waterways to accommodate public use in the exercise of water-related rights, as appropriate for the harbor in question;
- (b) Facilities of Public Accommodation, but not nonwater-dependent Facilities of Private Tenancy, shall be located on any pile-supported structures on flowed tidelands and at the ground level of any filled tidelands within 100 feet of a project shoreline. The Department may allow any portion of the equivalent area of a Facility of Public Accommodation to be relocated within the building footprint, or in other buildings owned, controlled or proposed for development by the applicant within the Development Site if the Department determines the alternative location would more effectively promote public use and enjoyment of the project site. As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above use limitations if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative limitations and other requirements which ensure that no significant privatization of waterfront areas immediately adjacent to the water-dependent use zone will occur for nonwater-dependent purposes, in order that such areas will be generally free of uses that conflict with, preempt, or otherwise

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discourage water-dependent activity or public use and enjoyment of the water-dependent use zone, as appropriate for the harbor in question;

(c) new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone; except as provided below, the width of said zone shall be determined as follows:

1. along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but no less than 25 feet; and
2. along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the distance from the edges in question to the base of the pier or wharf, but no less than 25 feet; and
3. along all sides of piers and wharves, the zone extends for the lesser of 50 feet or 15% of the distance from the edges in question to the edges immediately opposite, but no less than ten feet.

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

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

(e) new or expanded buildings for nonwater-dependent use shall not exceed 55 feet in height if located over the water or within 100 feet landward of the high water mark; at greater landward distances, the height of such buildings shall not exceed 55 feet plus ½ foot for every additional foot of separation from the high water mark; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive such height limits if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements which ensure that, in general, such buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for the harbor in question; nonstructural elements relocated on the roof of an existing building for non-water dependent use, including mechanical elements and required enclosures, may be excluded from the height requirement for purposes of licensing;

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

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

[ NOTE TO REVIEWERS:

NO CHANGES ARE PROPOSED IN SECTIONS 9.52 – 9.56 (END).  
THESE SECTIONS ARE OMITTED FROM THIS DOCUMENT AS NOTED  
ABOVE.]