

People's Guide to the Public Waterfront Act (Chapter 91)

DECEMBER 2018



ACKNOWLEDGMENTS

This guide was prepared for the Conservation Law Foundation by Victoria Wu (summer intern 2018) under the supervision of Deanna Moran and Christina Schlegel. Many people played a role in developing and reviewing this guide. Thank you to all of our valued partners who took the time to provide guidance and feedback.

DISCLAIMER

This guide should not be construed as legal advice. The following represents the author's compilation and interpretation of the Waterways Regulations in 310 CMR 9.00. This guide serves as an educational resource on the public's access rights to the Massachusetts waterfront.

ABOUT CONSERVATION LAW FOUNDATION (CLF)

Founded in 1966, CLF protects New England's environment for the benefit of all people. We use the law, science, and the market to create solutions that preserve natural resources, build healthy communities, and sustain a vibrant regional economy. CLF's approach to environmental advocacy is distinguished by our close involvement with local communities; our ability to design and implement effective strategies; and our capacity for developing innovative and economically sound solutions to our region's most critical environmental challenges. Learn more at www.clf.org.

Cover Photo: EcoPhotography

TABLE OF CONTENTS

INTRODUCTION: THE PUBLIC WATERFRONT ACT	1
KEY TERMS AND ACRONYMS	2
YOUR RIGHTS ON THE WATERFRONT	4
PUBLIC WATERFRONT ACT: THE BASICS	6
WATERWAYS LICENSES	9
MANAGEMENT PLANS AND PUBLIC SPACES	13
HOW TO GET INVOLVED: LICENSES AND MANAGEMENT PLANS.....	14
MUNICIPAL HARBOR PLANS	22
HOW TO GET INVOLVED: MUNICIPAL HARBOR PLANS.....	23
BEYOND THE PUBLIC WATERFRONT ACT	26
RESOURCES	27

Introduction:

The Public Waterfront Act

As a Massachusetts resident, you own valuable waterfront property interests. Those interests give you a legally enforceable right to access and use the land along the Boston waterfront and certain other waterways throughout the state. How is this possible? Because of a centuries-old common law concept called “public trust” and a Massachusetts law titled the “Public Waterfront Act,” often referred to as “Chapter 91,” that puts it into action.

THE PUBLIC TRUST DOCTRINE

For hundreds of years, the “common law” made by judges has said that “the sea and with it the shore of the sea” are the common property of all people. However, it is tough for us to mutually decide how best to exercise our collective ownership rights in waterfront areas. So our government – first, the King of England during colonial times and now the Commonwealth of Massachusetts – acts as a “trustee” of these public lands. As trustee, our state government has a duty to make all decisions about the use of that land based on the best interests of the public – in other words, the interests of you, me, and every other resident of Massachusetts.

While the public trust doctrine guarantees our rights to waterfront land, it can be challenging to determine exactly which property is subject to the doctrine and how its principles should be applied. The Massachusetts Public Waterfront Act spells out where, when, and how to apply the public trust doctrine.

THE PUBLIC WATERFRONT ACT

Specifically, the Public Waterfront Act imposes public trust requirements on Commonwealth tidelands and

private tidelands – land or tidal flats that are now or ever were in the past located below the high-water mark. Massachusetts’s legislature has delegated the state’s trust responsibilities under the law to the Massachusetts Department of Environmental Protection (MassDEP). When MassDEP makes a decision about how these public lands are used, they have to primarily protect the public interest over the interests of the property owner.

Tidelands are often privately owned and developed. To build or operate a business on them, the owner must apply to MassDEP for a waterways license or permit. A license can be issued only after public input and after MassDEP determines that the project protects the public’s interests as required by the law.

YOU HAVE A VOICE IN HOW WATERFRONT AREAS ARE DEVELOPED

The Public Waterfront Act gives you the right to speak up, be heard, and shape the future of our waterfront interests. Specifically, the law creates a process that ensures members of the public can testify at a hearing on certain proposed waterfront projects or submit comments and concerns in writing.

This guide will help you to:

- understand your rights under the Public Waterfront Act,
- actively engage in public processes related to waterfront projects, and
- take action to defend the public trust doctrine and Commonwealth tidelands.

Key Terms & Acronyms

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT (CZM): A department within the Executive Office of Energy and Environmental Affairs that oversees coastal and ocean issues in the state.

DESIGNATED PORT AREA (DPA): A designated waterfront area historically used for commercial fishing, shipping, or other types of maritime commerce.

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (EOEEA): The state office that oversees environmental activities in Massachusetts and oversees various departments, including CZM and the Department of Environmental Protection. The secretary of EOEEA is also responsible for approving municipal harbor plans.

FACILITIES OF LIMITED ACCOMMODATIONS (FLAS): Sites where goods or services are available directly to the public, but availability is limited by appointment or enrollment. Examples of FLAs include health clubs, childcare centers, artist studios, doctors' offices, and social service centers.

FACILITIES OF PUBLIC ACCOMMODATION (FPAS): Facilities where goods and services are regularly available to the public on equal terms. Examples of FPAs include restaurants, performance areas, hotels, retail spaces, and educational and cultural institutions.

FACILITIES OF PRIVATE TENANCY (FPTS): These are used by and accessible to a limited group of specified individuals. Examples of FPTS include residential condominiums, private clubs, business offices without walk-in service, and industrial facilities.

HARBORWALK: A public walkway along Boston's harbor designated by either circular or rectangular blue signs.

MANAGEMENT PLAN: Management plans identify the public benefits available at nonwater-dependent developments on Commonwealth tidelands. They also specify any hours of operation, maintenance responsibilities, and programming uses of the space.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION (MASSDEP): The state agency tasked with reviewing and issuing waterways licenses and enforcing regulations under the Public Waterfront Act.

MASSACHUSETTS ENVIRONMENTAL POLICY ACT REVIEW (MEPA REVIEW): This requires development projects of a certain size to study and mitigate their environmental effects.

MUNICIPAL HARBOR PLAN (MHP): A long-term planning and development vision for multiple, connected harbor-front sites. These plans provide cities and towns with some flexibility in how they develop waterfront areas, as long as they do not compromise the area's overall public benefits.

NONWATER-DEPENDENT USES: Uses and structures that do not require access to the water to function. Examples include restaurants, shops, offices, private residences, hotels, and parking lots or garages.

PILE FIELD: Post-like foundations of timber, steel, or concrete driven into the ground in or over water to support structures.

PROPER PUBLIC PURPOSE: Development and uses of tidelands within the jurisdiction of the Public Waterfront Act must provide greater benefits than detriments to our rights to use and enjoy those tidelands.

PUBLIC TRUST DOCTRINE: A longstanding legal principle that natural resources like the air, rivers, sea, and shores should be held in trust by the government for public use and enjoyment.

SECRETARY: The secretary of the EOEAA, a politically appointed position within state government.

SUBSTANTIAL CHANGE IN USE OR STRUCTURE ALTERATION: A substantial change in use occurs when 10 percent or more of a licensed area is used for an unauthorized purpose for more than a year. A substantial structural alteration occurs when more than 10 percent of the authorized building, ground cover, or fill is altered.

TIDELANDS: Land or tidal flats located below the high-water mark, either currently or in the past. Tidelands fall into several categories:

FILLED TIDELANDS: Former tidelands that have been raised permanently above the high-tide level with fill materials.

COMMONWEALTH TIDELANDS: Tidelands that are either currently or historically owned by the state, municipality, or public authority or are privately owned. They include all land seaward of the mean low-water line. The public's trust rights in these lands require significant public access and substantial year-round programming to attract people to the waterfront.

PRIVATE TIDELANDS: Generally, these are tidelands conveyed to private owners during the 1600s. Private tidelands exist between the mean low-tide and mean high-tide marks. The public holds a permanent "easement" on these lands to fish, fowl, and navigate, even if they have been filled in for centuries. Fewer public benefits are required of developers of private tidelands than of Commonwealth tidelands.

LANDLOCKED TIDELANDS: These are any filled tidelands that, on January 1, 1984, were landward of a public way, or 250 feet from the high-water mark, whichever is greater. Landlocked tidelands are not subject to Chapter 91 regulations but require the secretary to make a public benefit determination.

WATER-DEPENDENT USE: Uses and structures that require direct access to, or location in, the water to function. Examples include marinas, ferries for water transportation, piers, wharves, and shoreline protection.

WATERWAYS LICENSE: A license issued to a site owner by MassDEP under the Public Waterfront Act. This license allows site owners to build on or use current and former tidelands in exchange for providing certain public benefits (such as open space).

WATERWAYS PERMIT: A permit issued to a site owner for projects that do not involve fill or structures but that could alter the space available in waterways. Permits are issued for a term of 5 to 10 years. They are also issued for projects with temporary structures that will exist for six months or less.

WATER-DEPENDENT USE ZONE (WDUZ): An area running parallel to the waterfront edge with strict use limitations to preserve water-dependent activities. A WDUZ must include at least one water-dependent use, such as a kayaking facility or boardwalk. The width of a WDUZ is determined by the size of the development on the site and whether it is located on a pier or wharf.

Your Rights on the Waterfront

The public trust doctrine ensures your right to access and use the Commonwealth's shores and the sea. When this principle was codified into Massachusetts law, it enshrined public rights that go beyond access to the water. You are guaranteed additional rights at sites licensed under the Public Waterfront Act and its regulations. Below is a summary of your rights on the waterfront. Each of these will be explained in more detail later in this guide.

THE PUBLIC WATERFRONT ACT BILL OF RIGHTS

The following were compiled and paraphrased based on the author's interpretation of the Public Waterfront Act (Chapter 91). Each of the rights below includes the relevant section(s) of the law in parentheses. For a more thorough and detailed summary of your rights, please consult the Public Waterfront Act directly.

1. **You have the right to be provided with, and have free and unencumbered access to, public facilities and open spaces on the waterfront. The ground floors of nonwater-dependent developments on Commonwealth tidelands must generally be open to the public.** This can be through retail stores, restaurants, or cultural centers, as required by the license. Commercial office space is allowed in limited cases. Developments may not place any structures that block your access. Owners cannot restrict access to public facilities in any way that contradicts the terms of their license or management plan, such as hours of operation or mandated uses. You are not required to pay a fee or make a purchase to access and use public open spaces (*310 CMR 9.35, 9.51, 9.53*).
2. **You have the right to walk, pass freely, fish, and fowl on tidelands, unless the property's waterways license limits this activity, or the state restricts access for public health and safety.** Anyone can walk on and use private tidelands to fish and hunt birds. "Derivative" activities, such as birdwatching, may be allowed. You also have the right to walk on private tidelands or on an alternative passageway to reasonably exercise your rights (*310 CR 9.35*).
3. **You have the right to demand that any nonwater-dependent development or use of Commonwealth tidelands includes substantial public benefits and public purposes.** Any private gains must be secondary to those public purposes and benefits (*310 CMR 9.31*).
4. **You have the right to expect legible and clearly worded signs detailing the publicly accessible areas, permitted uses, and benefits provided by all licensed sites.** Signs must include hours of operation, rules regulating the use of the facilities, the waterways license number(s), and where you can find a copy of the license (*310 CMR 9.35*).

5. **You have the right to well-maintained and programmed public areas.** All public facilities and outside open spaces on Commonwealth tidelands must be maintained, well-lit, and cleared of snow and other obstructions. They also must be programmed with activities and events that draw visitors year-round, as detailed in the property's waterways license and/or management plan. The site owner and MassDEP decide the nature and extent of programming, but it should attract the public and create interest in and use of the waterfront (*310 CMR 9.51, 9.53*).
6. **You have the right to swim, float, boat, paddleboard, waterski, or use any watercraft on tideland waters seaward of the mean high-water line (call "flowed tidelands").** You have the right of free passage over and through the water without touching the bottom and, in Commonwealth tidelands, to walk on the bottom. You can also transport, load, and unload people or objects over all tidelands onto watercraft using a legal access point from the land (*310 CMR 9.29, 9.35*).
7. **You have the right to use the shoreline for water-dependent activity.** Nonwater-dependent use projects, such as a hotel or office buildings, must devote a reasonable portion of the lands to water-dependent use, including public access. Sites with a water-dependent use zone (WDUZ) must provide at least one facility for that use (like a marina or fishing pier) and a pedestrian access network (*310 CMR 9.51, 9.52*).
8. **You have the right to view the waterways license or management plan at every Chapter 91 property.** If it is not available online or at the site, you can contact the MassDEP to ask for a copy (*310 CMR 9.53*).
9. **You have the right to meaningful participation in all Public Waterfront Act public hearings and comment processes.** Public notice and comment opportunities in the affected city or town are mandatory for licensing any project on tidelands. Non-water-dependent projects also require a public hearing. In addition, MassDEP may hold a public hearing on a water-dependent project at the agency's discretion or at the request of the municipality in which the project is located (*310 CMR 9.13*).
10. **You have the right to appeal a licensing decision made by MassDEP.** Once a license has been approved, it can be appealed by either: 1) private parties who are aggrieved by the license or 2) a group of ten Massachusetts residents, five of whom must live in the city or town where the project is proposed. To appeal a decision, you must have participated in the public comment period for the project at issue (*310 CMR 9.17*).

Public Waterfront Act: The Basics

WHY DO WE HAVE THE PUBLIC WATERFRONT ACT AND THE WATERWAYS REGULATIONS?

The Public Waterfront Act and the Waterways Regulations (commonly referred to as Chapter 91) protect our right to access and use tidelands and certain other waterways in Massachusetts. Tidelands are land or tidal flats located now, or in the past, below the high-water line, even if they are presently filled.

The state is the “trustee” of our rights in tidelands and has the duty to preserve them. Tidelands may be considered either “Commonwealth tidelands” or “private tidelands” [SEE PAGE 3 FOR DEFINITIONS]. While developments on private tidelands require fewer benefits for the public than Commonwealth tidelands, they must still provide reasonable public access and benefits.

To ensure that our rights are preserved, the Public Waterfront Act dictates the type and extent of development allowed on tidelands. It is intended to:

- Protect and promote the public’s interest in tidelands, Great Ponds, and non-tidal rivers and streams*;
- Ensure that tidelands are used only for water-dependent uses or otherwise serve a proper public purpose;
- Protect public health, safety, and general welfare, as it may be affected by any project in these waterways;
- Support public and private efforts to revitalize underutilized property along urban waterfronts and promote public use and enjoyment of the water;
- Foster the constitutional right of the people of Massachusetts to clean air and water; to freedom from excessive and unnecessary noise; and to the natural, scenic, and historic qualities of their environment.

**In this guide, we will focus only on tidelands.*

WHO HELPS CARRY OUT THE PUBLIC WATERFRONT ACT?

Several state government entities are involved in administering the Public Waterfront Act or are active in planning, licensing, and permitting processes under the act.

- **The Massachusetts Department of Environmental Protection, or MassDEP**, is designated by the state legislature as the exclusive public “trustee” of tidelands. It is MassDEP’s job to safeguard public rights in tidelands. Moreover, MassDEP issues waterways licenses and permits, reviews any comment letters submitted during the pre-licensing process, and enforces the regulations and license requirements.
- **The Executive Office of Energy and Environmental Affairs, or EOEEA**, has two primary responsibilities. The EOEEA reviews and approves MHPs and ensures a thorough and inclusive public planning process for these plans (SEE PAGE 22 FOR MORE ON MHPs). The EOEEA also reviews public benefits on “landlocked tidelands” that are not subject to MassDEP’s licensing program.
- **The Office of Coastal Zone Management, or CZM**, is involved in the municipal harbor planning process through EOEEA. CZM may also participate in the permitting or licensing of specific sites.
- **Cities and towns** must ensure that proposed development projects comply with all local development regulations and Public Waterfront Act requirements. They are also the party that develops MHPs for EOEEA’s review and approval, a process usually overseen by the local planning board.

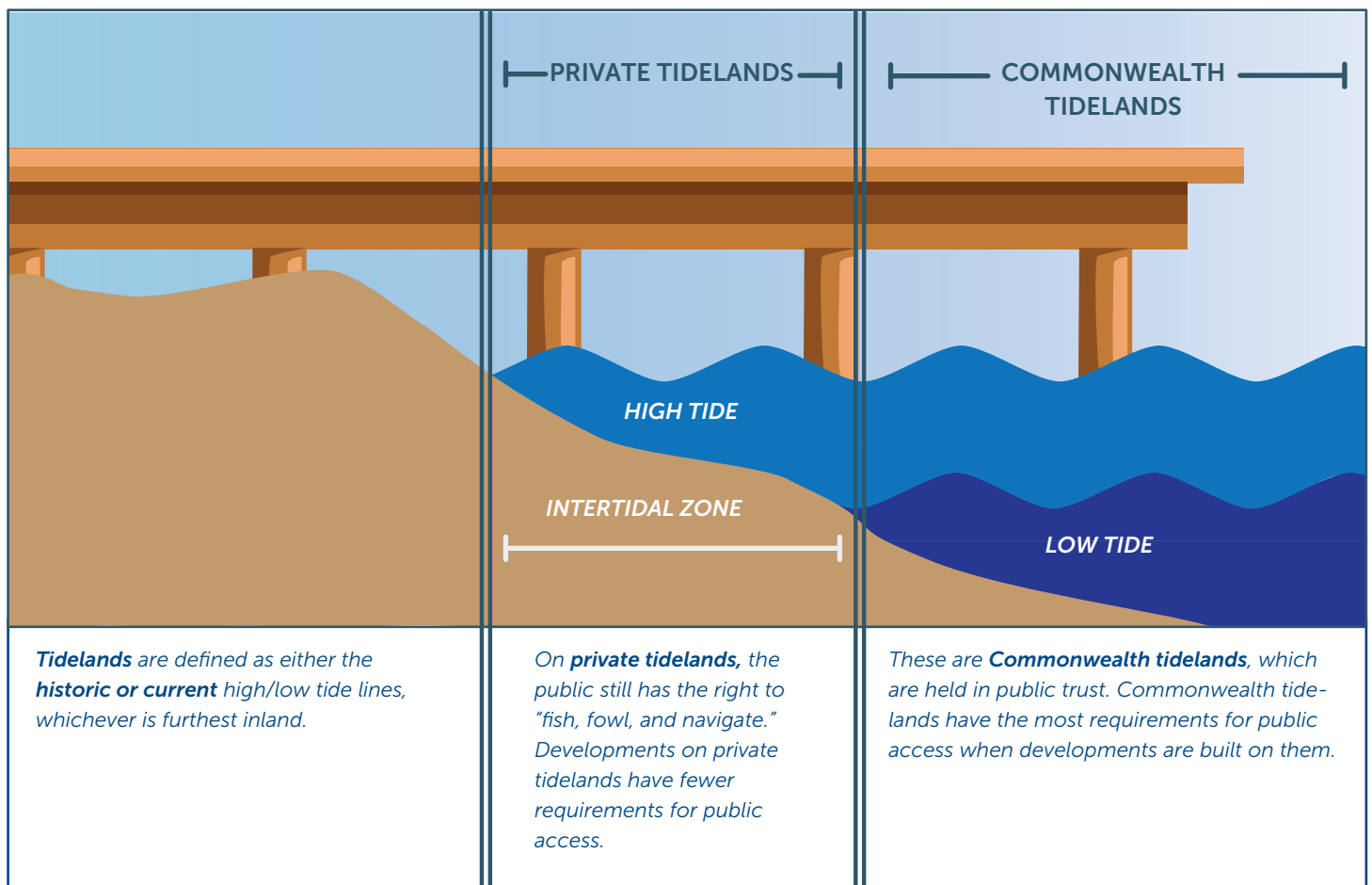
WHAT IS THE DIFFERENCE BETWEEN COMMONWEALTH, PRIVATE, AND LANDLOCKED TIDELANDS?

Tidelands managed under the Public Waterfront Act are categorized as either Commonwealth tidelands, private tidelands, or landlocked tidelands. These distinctions are fundamental to understanding the state licensing program that allows development on these lands and your rights on these lands.

- **Commonwealth tidelands** can be either publicly owned or privately held. Commonwealth tidelands are located seaward of the historic mean low-water line. The public's trust rights in these lands require significant public access and substantial year-round programming to attract people to the waterfront.
- **Private tidelands** are considered the area between the mean low and mean high tide. The public holds

a permanent "easement" in these lands for fishing, fowling, and navigating, even if these tidelands have been filled in for centuries. The public benefits required of developers of private tidelands are less extensive than those for Commonwealth tidelands.

- **Landlocked tidelands** are either more than 250 feet from the current high-water mark or were cut off from the water by a public way as of January 1984, whichever distance is farther. Large portions of Boston's Back Bay and Seaport District are landlocked tidelands. These lands still have embedded public trust interests but, with some exceptions, MassDEP does not require a waterways license. Depending on the size of the proposed development, the Secretary of EOEEA may be legally obligated to determine whether appropriate public benefits are being provided on the site.



WHAT IS WATER DEPENDENCY?

Licensing and permitting under the Public Waterfront Act depends on whether the proposed new use or structure on the site is considered “water dependent” or “nonwater dependent.” If just one part of a proposed project is nonwater-dependent, then the entire project site is considered nonwater dependent for regulatory purposes. Different standards apply, depending on whether a project is water dependent or not.

- **Water-dependent uses and structures** must be near the water to function. These projects are assumed to serve a proper public purpose and thus have fewer regulatory requirements. Examples of water-dependent uses include public marinas and boating facilities, aquariums, fishing piers, beaches, industries, maritime commerce requiring access to water, and water transportation facilities like ferry terminals.
- **Nonwater-dependent uses and structures** do not require water access to function. Today, this is the most common form of tidelands development throughout Massachusetts. These projects must

include public amenities and access to the water and, in some cases, have strict standards for size and use. Examples of nonwater-dependent uses include restaurants, shops, parking lots and garages, offices, residences, and hotels.

WHAT ARE WATER-DEPENDENT USE ZONES?

Nonwater-dependent structures and uses must keep portions of the site available for water-dependent uses. These areas are called water-dependent use zones or WDUZs. WDUZs generally run parallel to the waterfront edge and have strict limits on how they can be used. For example, parking lots or new or expanded nonwater-dependent buildings are not allowed in a WDUZ.

In addition, a project site with a WDUZ must have at least one facility dedicated to water-dependent uses and activities, such as a boat landing dock and launching ramp, marina, or fishing pier. It must also have a pedestrian access network. The location and width of a WDUZ varies from 10 to 100 feet, depending on the size of the development on the site and whether it is located on a pier or wharf.

DESIGNATED PORT AREAS

Designated Port Areas, or DPAs, are waterfront areas used for commercial fishing, shipping, or other maritime commerce. The Waterways Regulations require projects in DPAs to be water-dependent and industrial in nature. A certain number of “accessory,” “supporting,” and “temporary” uses are also allowed. Examples of these uses might include recreational boating facilities, ticketing booths for ferry operations, snack bars operated as part of a marine business, and administrative offices for maritime operations.

Public access can be severely limited in DPAs. CZM establishes and reviews DPA boundaries. Moreover, MassDEP is responsible for permitting within DPAs and ensuring that uses within them serve water-dependent purposes. The Secretary of EOEEA can approve variances from the DPA regulations through a state-approved master plan.

Waterways Licenses

Building and operating a new nonwater-dependent facility on current or former tidelands in Massachusetts requires a license from MassDEP. A license cannot be granted until MassDEP determines that the project will serve a proper public purpose and offer substantial benefits to the public, such as pedestrian access or a certain amount of open space on the site.

Public benefits do not take anything away from the private developer or landowner. The Commonwealth requires these benefits in exchange for the privilege of building private developments on and using tidelands. Moreover, MassDEP balances the historically protected rights of the public against the interests of private entities through the licensing process.

WHAT PROJECTS REQUIRE A WATERWAYS LICENSE?

Depending on the type of work proposed, different authorizations are required from MassDEP. Some minor projects need only to notify MassDEP of the small changes on site. Other projects with significant changes to the site require either a permit or license.

- **A PERMIT is required for short-term projects that:**
 - o do not involve the filling of tidelands or the building of permanent structures but that could alter the space available in waterways, or
 - o will build only temporary (six months or less) structures.

Permit terms are usually 5 to 10 years. Examples include dredging, beach nourishment, burning of rubbish on the water, and temporary structures.

- **A LICENSE is required for projects that:**
 - o involve significant filling of tidelands,
 - o change the use of the site, or
 - o propose new or modified buildings.

The standard term of a waterways license is 30 years, but under certain conditions, MassDEP can set a longer term. Examples include the new construction of, major alterations of, or uses of buildings, piers, dams, bridges, and parking lots.

- **No permit or license is required for work that does not:**
 - o change the use of the site,
 - o substantially alter more than 10 percent of the site or its structures, or
 - o reduce the overall space available for boats and other water vessels.

Examples include maintenance, fish ladders, pipelines embedded in the soil, bulkheads, revetments, and storm drainage outfalls.

WHAT PUBLIC ACCESS REQUIREMENTS ARE IN A LICENSE?

The Waterways Regulations, found in the Code of Massachusetts Regulations at 310 CMR 9.00, define the general concepts of “public benefit” and “public access.” They provide certainty for developers about what is expected of them. They also detail what we, the public, should expect with any tideland developments and projects.

For example, all tideland owners must provide a pedestrian access network throughout their site and along the water edge. This is the modern version of the public’s historic right to navigate across private tidelands. (In Boston, the path along the water edge is known as the Harborwalk.)

Developers must also follow size, height, and other requirements for all nonwater-dependent projects and, for buildings on Commonwealth tidelands, devote most of the ground floor to public use.

Some regulations apply differently depending on whether the site is water-dependent or nonwater-dependent. When MassDEP grants a waterways license,

these and other requirements are detailed in the text, primarily in the “Special Conditions” section. These license conditions are not optional; MassDEP has the authority to enforce these conditions if they are not being followed.

TYPES OF USES IN STRUCTURES AUTHORIZED ON TIDELANDS

Under the Waterways Regulations, the interior spaces in buildings on tidelands are characterized in three different ways:

- **Facilities of Public Accommodation (FPAs):** These are facilities where goods or services are available to or the space is open to the general public and is not restricted to a limited group. The FPAs can include hotels, retail shops, restaurants, museums, art galleries, convenience stores, and more. On Commonwealth tidelands, the ground level of any building must be mostly FPAs.
- **Facilities of Private Tenancy (FPTs):** These are places where public access is restricted. The FPTs can include residential units, business offices, industrial facilities, private parking, marinas, or outdoor spaces not open to the public. New

nonwater-dependent FPTs are not allowed on pile-supported structures or on the ground level of any structure on tidelands within 100 feet of the shoreline.

- **Facilities of Limited Accommodation (FLAs):** The FLAs also provide goods or services to the public, but unlike FPAs, access is primarily by appointment or enrollment. Medical facilities, childcare centers, social service centers, and health clubs are all examples of an FLA. Sometimes MassDEP will allow a certain amount of FLA area to substitute for required FPA area.

SIZE, HEIGHT, AND USE STANDARDS FOR LICENSES

ALL DEVELOPMENT on tidelands, unless in DPAs, must:

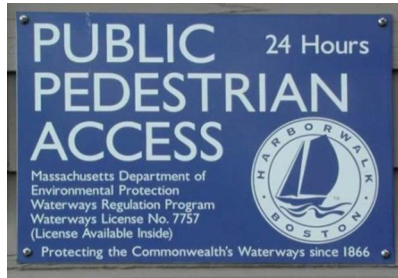
- Preserve the public’s ability to fish, fowl, navigate, and pass freely on tidelands without interference.
- Generally, preserve water-dependent uses and not disrupt or displace existing water-dependent uses that have been active within the past 5 years. An example is a recreational boating facility.



The Boston Tea Party Museum sits on existing pilings. Photo: Marco Veach, CC 2.0

In addition, ALL NEW NONWATER-DEPENDENT BUILDINGS OR USES on tidelands must meet the following requirements:

- **Signage:** Signs detailing public services on the site are mandatory. The sign must list all FPAs, the site's waterways license number, and where a member of the public can obtain a copy of the license.
- **Open space:** At least fifty percent of a project site must be dedicated to open space. Within Commonwealth tidelands, open space must be accessible to and usable by the public at all times unless otherwise specified by MassDEP or in the site waterways license.
- **Building heights and setbacks:** Buildings located within 100 feet of the shoreline are limited in height to 55 feet. A building's height may increase by 1 foot for every 2 feet further inland it is located. For example, a building located 200 feet from the shoreline could be 105 feet tall.
- **Waterfront FPAs:** Only FPAs, not FPTs, can be located within 100 feet of a project shoreline or on pile-supported piers.
- **Pile-supported structures:** When being built on existing piers or wharves, a new nonwater-dependent project must stay within the structure's current footprint. Otherwise, the developer must



Source: MassDEP

remove a comparable amount of fill or pilings from the site to prevent a net loss of open water.

- **Water-dependent activity:** Project sites with a water-dependent use zone (WDUZ) [SEE PAGE 8] must include at least one facility that promotes water-dependent activity, such as a public boardwalk, recreational boating, or water taxi stop. The site must also provide public access along the shoreline. If the site does not have a WDUZ, then it must have pedestrian access that connects nearby public ways and facilities.

Nonwater-dependent buildings or uses on COMMONWEALTH TIDELANDS must also provide these additional benefits:

- **Pedestrian amenities:** Exterior public spaces must include lighting, seating, restrooms, trash cans, and other amenities as advocated for by the public and approved by MassDEP.
- **Interior public space:** Most of the ground floor of nonwater-dependent structures must be dedicated to FPAs. Exceptions can be made if MassDEP determines that an alternative site or facility would better serve the public.
- **Management plans:** In addition to its license, the project must have a MassDEP-approved management plan that identifies the public benefits and programming uses of the space. Management plans should be regularly reviewed by MassDEP and the site owner and include a monitoring system to report and assess the success of the plan. For more on management plans see page 13.

WHY DO SOME WATERFRONT PROJECTS NOT FOLLOW THESE RULES?

Some existing buildings are not bound by the Public Waterfront Act because of the following:

1. THE PROJECT WAS BUILT BEFORE 1984 AND IS EXEMPT FROM THE CURRENT LAW.

The current Public Waterfront Act, with the rules outlined above, went into effect on January 1, 1984; that means it only applies to buildings constructed since then. Most older buildings were authorized by the state legislature under an earlier version of the Public Waterfront Act. They do not need a license under the newer law.

The Harbor Towers condominiums, for example, were licensed by the state legislature and built in 1971. However, if such a grandfathered site or structure changes how it is used, converting it from condos to offices, for example, or is significantly redeveloped, it would need a license under the current Waterways Regulations.

2. THE PROJECT FOLLOWS AN APPROVED MUNICIPAL HARBOR PLAN.

Some buildings may not comply with Public Waterfront Act regulations because a municipal harbor plan (MHP) has modified those requirements for this specific area. The municipal harbor planning program provides cities and towns with some flexibility in how they develop waterfront areas, as long as they do not compromise the site's overall public benefits. For instance, they allow cities and towns to propose modest alternative requirements for things like building height. Fan Pier in Boston's Seaport District is an example of a site built under an MHP (SEE PAGE 22 FOR MORE ON THESE PLANS).



The Harbor Towers do not conform to the Waterways Regulations because they were built before the current law went into effect. Photo: EcoPhotography

Management Plans & Public Spaces

Nonwater-dependent projects built on Commonwealth tidelands have the most requirements for public access and benefits. To ensure these requirements are met, Waterways Regulations require licensed sites to create and carry out management plans. These plans, prepared by the property owners, outline how the site will maintain public access and enhance the public's use and enjoyment. MassDEP approves and enforces management plans and takes action when license holders fail to follow them.

WHAT IS IN A MANAGEMENT PLAN?

A management plan includes:

- a description of the site and signage on site,
- detailed descriptions of free and ticketed programming offered at the site,
- hours of operation for public facilities, such as restrooms,
- the parties responsible for the maintenance of public spaces,
- contact information for the parties responsible for implementing the plan and for the person or entity in charge of overseeing the site and its public spaces.

A management plan may also include MassDEP-approved limits to public access with special hours and conditions. These limits are allowed as long as they are in the interest of public health and safety or have limited impact on the public.

THE IMPORTANCE OF GOOD SIGNAGE

Signage should encourage people to use the amenities offered at a site. The number of signs, where they are placed, and what they say are all specified in the site management plan. If holders of waterways licenses do not provide adequate signage to inform people of available public spaces (for example, the location and hours of public restrooms), they may be violating their management plan or license. Unfortunately, many sites across Massachusetts fall short of the signage requirements (note that, in Boston, signs identifying the Harborwalk are distinct from what is required by the Waterways Regulations). In addition, MassDEP's minimum signage requirements are listed on MassDEP's website [SEE RESOURCES ON PAGE 27 FOR URL].



*A management plan for a site in East Boston.
Source: MassDEP*

How to Get Involved: Licenses & Management Plans

You can play a critical role in ensuring that private development and uses of tidelands respect your public rights. You can become involved in two ways: first, by helping to monitor existing licensed sites across Massachusetts and, second, by speaking up when projects apply for new waterways licenses.

EXISTING LICENSES: MONITORING AND REPORTING LICENSE AND MANAGEMENT PLAN VIOLATIONS

For Nonwater-dependent Projects on Commonwealth Tidelands

If you believe a site is violating your public access rights or you see a violation, such as poor signage, you should first review the details of its license and/or management plan. If you confirm that there is a violation, contact MassDEP [SEE RESOURCES ON PAGE 27 FOR CONTACT DETAILS], which is the agency responsible for enforcing licenses and plans. You may also have local avenues for reporting violations. For example, in Boston, residents can call 311 to report violations, such as closures or private

events being held on the public walkway along the Harborwalk.

For Water-dependent Uses and Private Tidelands

Tidelands with water-dependent uses or that are privately owned have fewer requirements. However, these sites must still protect your right to fish, hunt, and pass across the site (within reason) to access the shore. The exception to this rule is if MassDEP has placed restrictions on public access for health or safety reasons. You can obtain a copy of the site license by contacting MassDEP. If you are kept from accessing any public spaces or you see or suspect other violations, contact MassDEP.

When seeing and reporting violations, keep in mind that the building may have changed owners and the new personnel may be unaware of the site's legal obligations. Violations should still be reported, however. This ensures that MassDEP can educate new property owners about their Chapter 91 license obligations.

A NOTE ON CLIMATE RESILIENCY

The Public Waterfront Act does not currently address or even mention climate change. Yet increased summer heat, intense rain and snow, stormwater runoff, and sea level rise threaten all waterfront sites. They also put at risk our ability to access and use these areas in the future.

MassDEP welcomes feedback regarding local climate resiliency goals during public comment periods. Comments about a site's climate resiliency are especially relevant if the license applicant requests an **extended-term license** beyond the standard 30 years. This is because the site is highly likely to experience significant climate impacts within that extended license period. For example, let's say a license applicant requests an extended term of 99 years. If the applicant has not considered the impact of sea level rise and extreme storms in the coming decades on the structures being built or the site's public amenities, they could be severely compromised or even lost permanently. This is the sort of issue you can raise during the public comment period.

NEW LICENSES: PUBLIC COMMENTS AND HEARINGS

You have the legal right to take part in the waterways licensing process by commenting or attending a public hearing on a permit or license application. This is an important way for you to help ensure that public access rights are preserved in your community.

The process for new licenses and permits can differ depending on the project's scope and whether it is for a water-dependent or nonwater-dependent use. What follows is a typical process for a new license for a nonwater-dependent proposal. The charts on pages 16–21 offer more details on the process for different uses.

1. The process for a new license for a nonwater-dependent use starts when developers and property owners apply for a waterways license with MassDEP. After the application is submitted and a number of preliminary determinations are made by MassDEP, notices that provide public information on projects under state environmental review must be posted in at least one local newspaper and the *Environmental Monitor* [SEE RESOURCES ON PAGE 27 FOR URL]. The public notice will include:

- The name and address of the site owner;
- The location of the proposed project and a brief overview;

- How to obtain additional information about the proposed project;
- MassDEP contact information for submitting written public comments about the proposal;
- The deadline for public comments. Typically, the public may comment between 15 and 30 days (depending on whether the application is for a permit or a license and what type) after the publication of the notice in the *Monitor*;
- The time and location for a public hearing, if the project is nonwater-dependent. The hearing will take place during the public comment period in the town where the project is to be located.

If you want to learn about a project, follow the instructions in the public notice to obtain more information. You can ask to see the license application, which will detail the proposed public amenities and include site plans.

2. You can submit comments in writing or at the public hearing. Any member of the public can do so, no matter where you live. You should submit comments if you are concerned about any aspect of the application. You can also show your support of a project through comments.

If you anticipate appealing a MassDEP license or permit decision because you do not believe it

PUBLIC ENGAGEMENT FOR LANDLOCKED TIDELANDS

While projects on landlocked tidelands do not require a license and are not subject to the requirements of the Public Waterfront Act, the Secretary is required to make a "public benefit determination." To determine whether a proposed project on landlocked tidelands provides adequate public benefit, the Secretary must consider:

- Purpose and effect of the proposed development;
- Impact on abutting property owners and the surrounding community;
- Enhancement of the property;
- Benefits to the public trust rights in tidelands;
- Community activities on the site;
- Environmental protection and preservation;
- Public health and safety; and
- General welfare.

protects public interests or meets the requirements of the Public Waterfront Act, you and at least nine other people must participate in the public comment process. At least five of those individuals must live in the city or town where the license is being issued. See the next section, *The Appeals Process*, for more information.

3. After the public comment period is over, the license applicant is required to respond to every person and group that submitted comments.
4. MassDEP will issue its decision – it will either grant or deny the license, and provide its reasons in writing. The decision will also state whether the site is on Commonwealth or private tidelands and all special

conditions for public access and waterfront use the developer must meet to obtain and maintain its license. MassDEP’s decision is typically posted to the *Environmental Monitor* [SEE RESOURCES ON PAGE 27 FOR URL] and is also sent to anyone who submitted public comments.

5. After MassDEP issues its final decision, the public has a limited time to appeal it [SEE NEXT SECTION].

THE APPEALS PROCESS

For individuals and groups

If an individual or group who commented on the application is not satisfied with MassDEP’s written determination or its granting of a license, there are 21 days to appeal the decision.

Process for a License for a Nonwater-Dependent Project



To be eligible to appeal, at least ten people must have signed or submitted written comments about the project before the public comment period was over. Five of the commenters must live in the city or town where the project is located. Appeals must be sent by mail and must carefully follow the specific instructions detailed in the Waterways Regulations, or the appeal will be rejected.

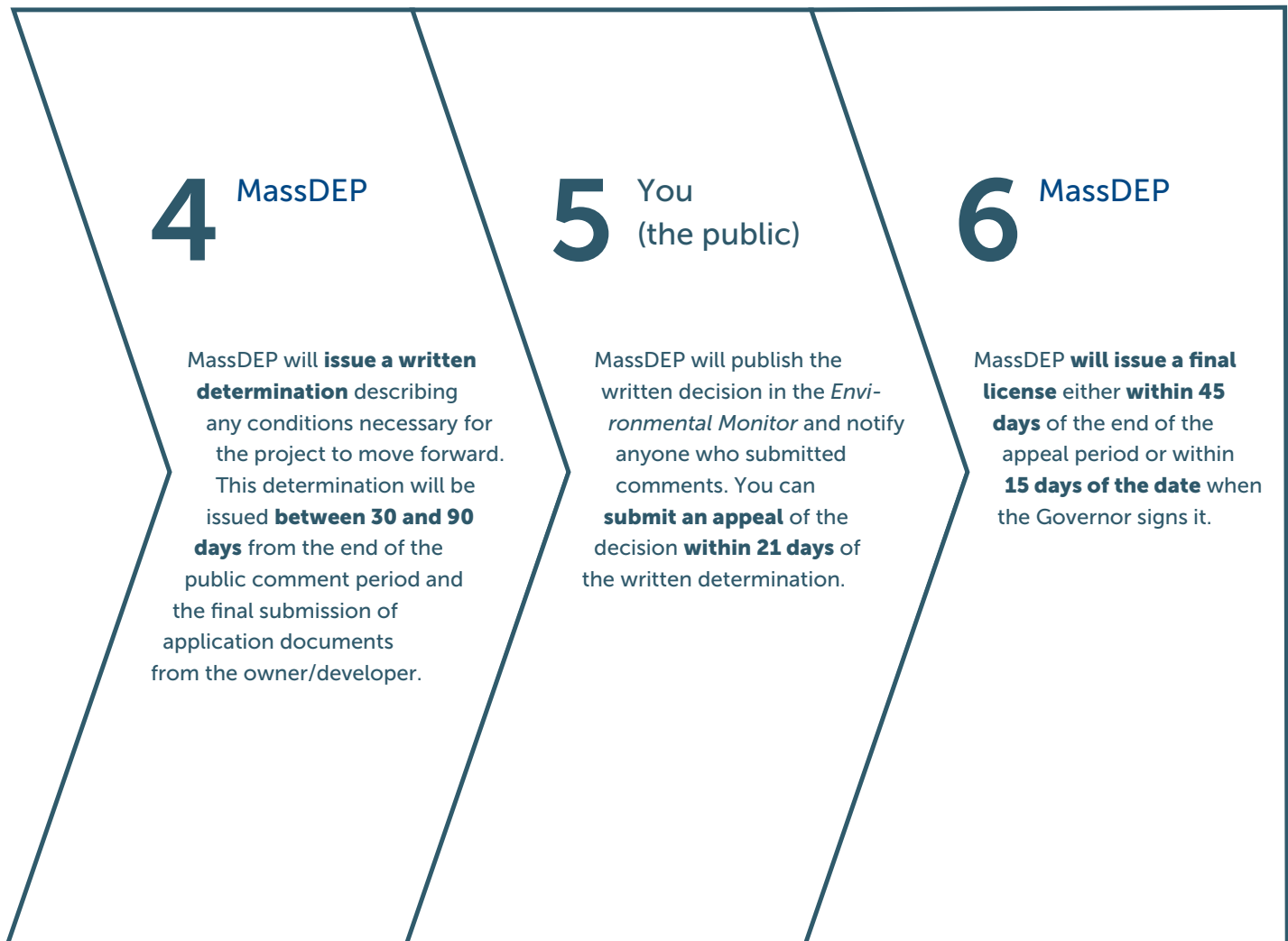
For abutters

If you own property next to the project, you are an abutter. The Public Waterfront Act requires that you be notified personally about the proposed project and public comment period. As an abutter, you must still submit comments before the comment period is over to reserve your right to later appeal MassDEP's decision.

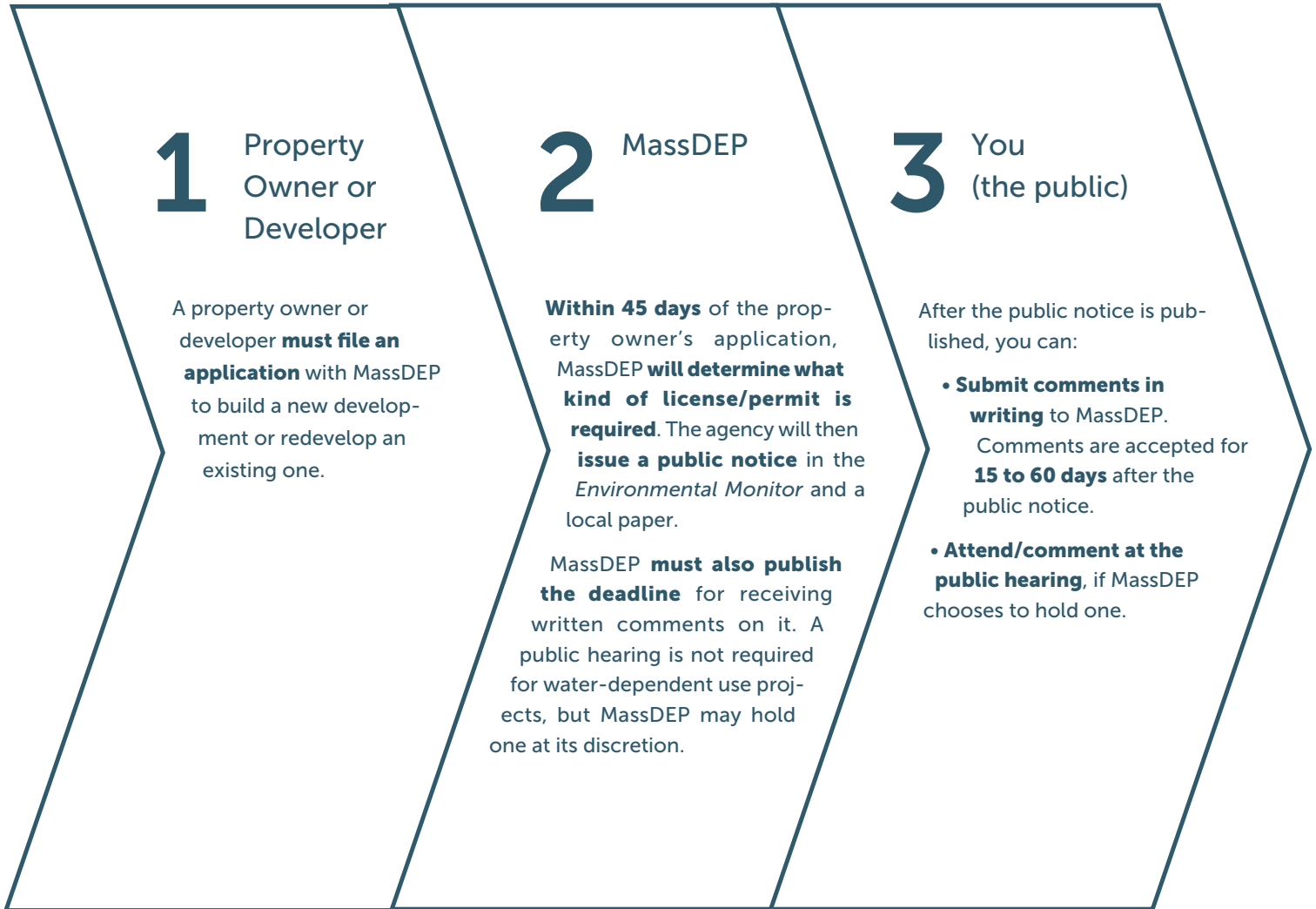
You must also show significant economic harm as a result of the project. However, you **do not need** nine other people to join you during the comment period to have the right to appeal.

For all

Whether you are part of a group or an abutter, we strongly recommend you consult with or hire a lawyer to help with the appeal, especially if it goes to court. This guide does not provide an exhaustive review of the appeals process, offer legal guidance on how to represent yourself in an appeal, or even discuss many aspects of the Waterways Regulations. However, you can find numerous resources online, including a flowchart overview and a checklist that provides guidance for an appeal [SEE RESOURCES ON PAGE 27 SECTION FOR URLS].



Process for a License for a Water-Dependent Project



4 MassDEP

MassDEP **will issue a written determination ONLY if** a public hearing was held, comments were received, or the agency intends to deny the application. Otherwise, a **final license will be issued 90 days** after the developer submits their final application documents.

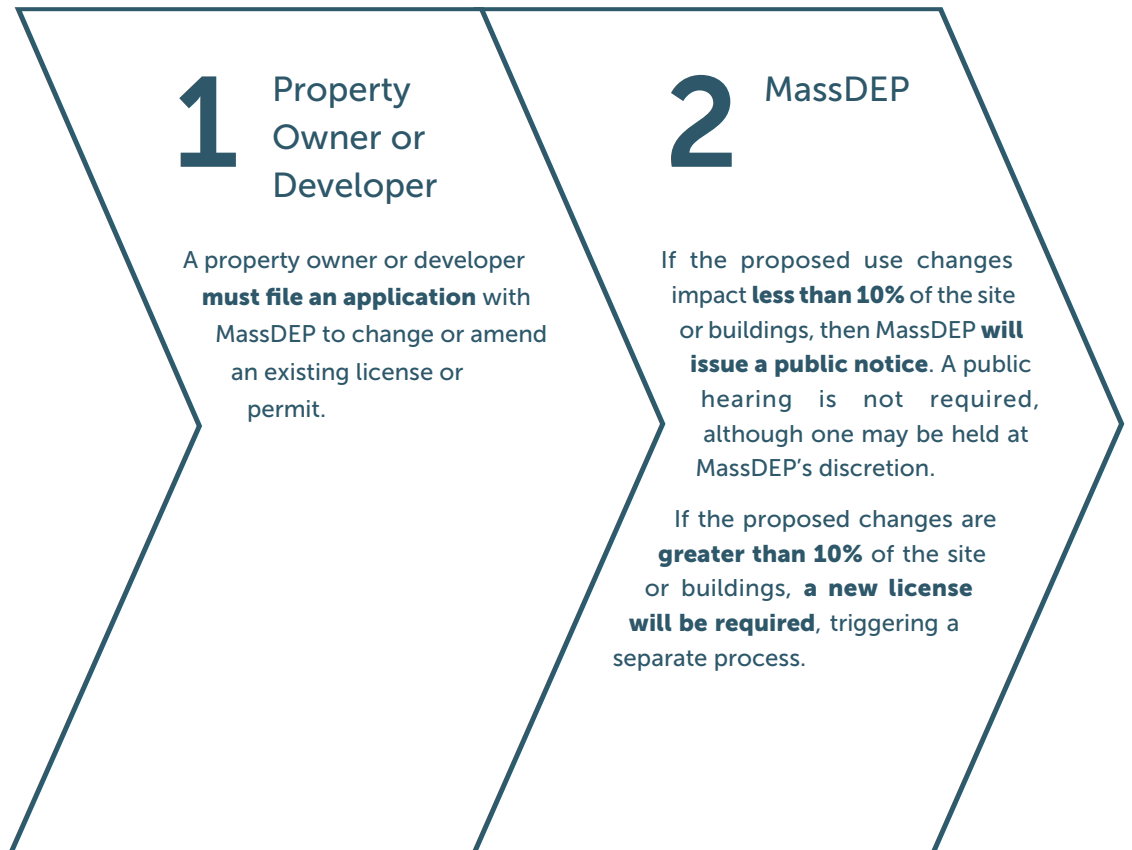
5 You (the public)

MassDEP will publish the written decision or license in the *Environmental Monitor* and notify anyone who submitted comments. You can **submit an appeal** of the decision **within 21 days** of the written determination or the issuance of the final license (if no written determination was issued) by MassDEP.

6 MassDEP

MassDEP **will issue a final license within 90 days** after the developer submits their final application documents.

Process for Amendments to a License or Permit



3 You
(the public)

If MassDEP decides to hold a hearing on the proposed project, it must do so within 20 days of the public notice. You can **attend/comment at that public hearing.**

4 MassDEP

MassDEP **will issue** the amended license/permit. The agency will notify anyone who submitted comments.

5 You
(the public)

You have **21 days** after the issuance of the amended license/permit to **submit an appeal** of the decision.

Municipal Harbor Plans

A municipal harbor plan (MHP) is the result of a voluntary process initiated by a city or town that lays out a unique planning vision for public open space and development across multiple, connected waterfront sites. A municipality submits an MHP to the Office of Coastal Zone Management and the Executive Office of Energy and Environmental Affairs to create a long-term vision for a specific waterfront area, as opposed to the site-by-site approach that the Waterways Regulations would dictate.

An MHP is required to include the strategy for implementing the municipal vision, an analysis of technical data, extensive community input, and a description of the public participation process used in formulating the goals and plans. It also must demonstrate that it will provide public benefit and access opportunities that are equal to or greater than those required by the Waterways Regulations.

WHY IS THE MHP IMPORTANT?

The purpose of an MHP is to help state agencies, such as MassDEP, implement the waterways program in ways that are better for the public and more tailored to local interests. However, it is critically important that residents are educated about and engaged in the MHP process, because the plans are used legally as part of the Public Waterfront Act regulatory program. An approved MHP may alter the limits on how a site can be used and the building and height restrictions. It may also change other public safeguards included in the Waterways Regulations. Once approved by the Secretary of EOEEA, these substitute regulations must be followed by MassDEP in any waterways licensing proceedings within the MHP area. If the Secretary approves an MHP with substitute licensing regulations, it cannot be appealed. However, a petition may be submitted for the Secretary to reconsider the decision. If he or she chooses not to reconsider, there is no further opportunity to challenge the decision.

How to Get Involved: Municipal Harbor Plans

Just like in the public process for waterways licenses, your voice is critical during any municipal harbor planning process, especially because MHPs are intended to reflect local values. Both the creation of an MHP and the waterways licensing of sites located within the plan area offer multiple opportunities for public engagement.

The first step in the planning process starts when a city or town applies to the EOEEA for approval to undertake an MHP. This is also the first chance for you to comment. You can also comment when the draft plan has been submitted to EOEEA for review. Finally, you can request the plan be “reconsidered” after it has been approved.

PLAN PROPOSAL

The Office of Coastal Zone Management (CZM) will issue a “Notice to Proceed” that lays out the process the city or town must follow, including a summary of the public participation process if one has been proposed.

Like the public notices for license applications, the initial MHP notice will state the following:

- The location and a brief overview of the proposed plan;
- How to obtain more information about it;
- Contact information for submitting written public comments to MassDEP;
- The deadline for public comments. You have 30 days after the notice has been published to comment. Anyone may request that the deadline be extended for up to 30 more days. That request is granted at the discretion of the EOEEA secretary;
- The times and locations for the public hearings. These will take place during the same 30-day window as the comment period and will be held in the city or town that applied for an MHP.

PLAN APPROVAL

An MHP must be filed with the Secretary within two years of the “Notice to Proceed” with one six-month extension allowable. Public notice of the submitted plan and dates for a public hearing on the MHP will be posted in the *Environmental Monitor* [SEE RESOURCES ON PAGE 27 FOR URL] and a local newspaper of general circulation. The following are opportunities for public participation in the MHP:

- There are often public comment or participation opportunities at the city or town level as the MHP is developed, although this is not required.
- A public comment period will be open for 30 days after the city or town submits the MHP to the state. Public comments are submitted to the Secretary of EOEEA.
- A public hearing on the MHP will be held by the state. Oral testimony may be given by any member of the public.
- After the close of the 30-day public comment period and the public hearing, the Secretary will consult with the municipality and MassDEP. That consultation must include at least one session with the “Harbor Planning Group,” which is designated by the city or town for developing or overseeing an MHP. The consultation period generally lasts 60 days but may be extended at the city or town’s request.
- After the secretary issues a decision on the MHP, the public has 21 days to file a “petition for reconsideration.” The petition must be filed by ten or more residents who participated in the public comment process and include “a clear and concise statement of the specific objections to the Secretary’s decision and the relief sought.”
- The Secretary must respond to any petition for reconsideration within 21 days of the end of the reconsideration period. Unlike waterways licenses, there is no further appeal process or judicial review.

Process for Municipal Harbor Plans

1 City / Town

City or town officials will begin a Municipal Harbor Plan process by **submitting a planning program**, known as a "Request for Notice to Proceed," to the Office of Coastal Zone Management (CZM).

2 CZM / Secretary of EOEEA

CZM will **post a notice** about the planning program in the next edition of the *Environmental Monitor*. The Secretary of EOEEA will accept public comments on the program and may hold a public hearing.

3 You (the public)

After the public notice is published, you can do one or both of the following:

- **Submit comments in writing** to the Secretary. Comments are accepted **for 30 days** after the public notice in the *Environmental Monitor*.
- **Attend/comment at the public hearing.**

4 CZM

30 days after the close of the public comment period, CZM **will decide to accept or decline** the city's/town's planning program. If accepted, CZM **will issue another public notice**, called a "Notice to Proceed," which allows the city/town to move forward with the planning process.

5 City / Town

The city/town must **submit a draft Municipal Harbor Plan** to the Secretary of EOEEA **within 2 years** of the public Notice to Proceed, although they can apply for a 6-month extension if needed.

6 Secretary of EOEAA

The Secretary will **issue a public notice** about the draft plan in the next edition of the *Environmental Monitor*. The notice will include the location and date of a public hearing on the draft.

7 You (the public)

After the public notice is published, you can do one or both of the following:

- **Attend/comment** at the public hearing.
- **Submit comments in writing** to the Secretary of EOEAA. Comments are accepted for **30 days** after the public notice in the *Environmental Monitor*, but that deadline can be extended upon request.

8 Secretary of EOEAA

Within 60 days after the close of the public comment period, EOEAA **will consult** with city/town planners, harbor planning groups, and state agencies to develop a Written Decision on the draft Municipal Harbor Plan. The consultation period can be extended by the Secretary and/or the city/town.

9 Secretary of EOEAA

Within 21 days of those consultation sessions, the Secretary **will issue its Written Decision**. If the MHP is approved, a notice is sent to the city/town and anyone who submitted comments. If Municipal Harbor Plan standards have not been met, then the Written Decision will specify what modifications must be made; the city/town will then have to resubmit the proposed plan.

10 You (the public)

Ten or more residents (as well as a state agency or the city/town) **can ask** for the Written Decision to be reconsidered. That request must be made **within 21 days** of the issuance of the Decision and must clearly state the specific objections and relief sought, including any changes that are proposed for consideration.

11 Secretary of EOEAA

The Secretary **must respond** to the petition for reconsideration **within 21 days**, including reasons for any modifications of the original Written Decision. Notification that the decision is final will be published in the next available edition of the *Environmental Monitor*. No further public appeals are possible after this.

Beyond the Public Waterfront Act

The Public Waterfront Act and the Waterways Regulations are powerful tools to ensure that Massachusetts does not violate your public trust rights by allowing private use and control of tidelands. However, they are not the only tools. Other regulatory programs at both the municipal and state levels offer further opportunities to ensure public access to and benefits from tidelands and beyond, including:

- Local building permitting processes,
- Local zoning,
- Local Conservation Commission hearings,
- Massachusetts Endangered Species Act review,
- Massachusetts Water Resources Authority permitting,
- CZM's federal consistency review,
- Massachusetts Department of Conservation and Recreation's Construction and Roadways Access Applications,
- Massachusetts Environmental Policy Act (MEPA) review. This is a comprehensive review of the environmental impacts of projects that meet the MEPA criteria. It is also the only legally mandated review process of public benefits for projects proposed on landlocked tidelands.

We encourage you to make your voice and your community's voices heard. If you are uncertain, many resources and people are available to help you. However, the best guide is your instincts as a member of the public. Your active engagement keeps our democracy healthy and helps ensure that these precious tideland areas are preserved for the use and enjoyment of all for generations to come. As with all public rights, they are only as strong as our willingness to defend them.

Resources

HELPFUL ORGANIZATIONS

Conservation Law Foundation

617.350.0990 | www.clf.org

Boston Harbor Now

617.223.8667 | www.bostonharbornow.org

Save the Harbor, Save the Bay

617.451.2860 | www.savetheharbor.org

MASSDEP CONTACT INFORMATION

Enforcement Coordinator for Water Resources

Susan.you@mass.gov

617.556.1198

Waterways Program

Department of Environmental Protection

One Winter Street

Boston, MA 02108

dep.waterways@state.ma.us

Office of Coastal Zone Management

Regional Coordinators and their contact information can be found at

<https://www.mass.gov/service-details/czm-staff-directory>

RESOURCES REFERENCED WITHIN THIS GUIDE

Public Waterfront Act Law and Regulations

The Public Waterfront Act:

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXIV/Chapter91>

General Regulations:

<https://www.mass.gov/files/documents/2016/08/wo/310cmr09.pdf>

DPA Regulations:

<https://www.mass.gov/files/documents/2016/08/wl/301-cmr-25.pdf>

MHP Regulations:

<https://www.mass.gov/files/documents/2017/10/30/301cmr23.pdf>

Signage Specifications of the Waterways Regulations Program:

<https://www.mass.gov/guides/signage-specifications-of-the-waterways-regulation-program>

MassDEP Boston Chapter 91 Harborwalk Map

<https://mass-eoeaa.maps.arcgis.com/apps/MapSeries/index.html?appid=894d0ec67b5d426eadb5e74c33dc4366>

This is a map created by MassDEP in 2018 showing buildings under the Public Waterfront Act jurisdiction in the Boston Harbor area. The map also shows the location of the Boston Harborwalk and provides access to site licenses and management plans.

Boston Harbor Now Harborwalk Web Tool

<https://www.bostonharborwalk.org>

This is a map created by the nonprofit civic organization Boston Harbor Now, which details specific public amenities at Boston's waterfront sites licensed under the act. It also directly links to MassDEP's collection of license and management plans and the City of Boston's 311 system.

MORIS

http://maps.massgis.state.ma.us/map_ol/moris.php

MORIS is a free online tool that allows users to map the location of features across the state. By searching "Chapter 91" in the Available Data Layers search bar, you can see where the Public Waterfront Act applies (Chapter 91 jurisdiction) and see other layers, such as the historical high tide (used to determine jurisdiction).

Environmental Monitor

<http://eeaonline.eea.state.ma.us/eea/emepa/emonitor.aspx>

This semi-monthly publication from MEPA lists notifications for waterways licenses, municipal harbor plans, and other developments. To use the *Environmental Monitor*, search by year and by publication. Waterways license application notices are published under the "Public Notices" section of the *Environmental Monitor*. If you would like to receive notice when the newest edition of the *Environmental Monitor* is available, email mepa@MassMail.State.MA.US with "Environmental Monitor Distribution List" in the subject line.

List of Great Ponds in Massachusetts

<https://www.mass.gov/files/documents/2017/09/18/magreatponds.pdf>

Appeals Checklist

<https://www.mass.gov/service-details/mgl-c30a-administrative-appeals-checklist>

A helpful checklist of everything you need to appeal a state agency decision.

Appeals Flowchart

<https://www.mass.gov/files/documents/2016/08/qq/30a-flowchart.pdf>

A visual representation of the appeals process.