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MMTA Government Relations and Legal ENEWS - March 23, 2016

From the Desk of Jamy Buchanan Madeja, Esq, MMTA Gov't Relations & Legal Counsel

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Happy Spring from Beacon Hill! It was great to see many of you at the Boat Show last month. Please call or email if you have specific questions for us.

MassDEP has recently given notice of proposed amendments to the "Chapter 91 licensing" waterways regulations (310 CMR 9.00), the Designated Port Area regulations (301 CMR 25.00), and the Municipal Harbor Plan regulations (301 CMR 23.00). The proposed amendments are intended to increase flexibility provided to municipalities and businesses by allowing for new and expanded economic development opportunities while ensuring the protection of current and future marine industrial opportunities in selected areas within DPAs.

The proposed amendments are based on the recommendations of the DPA Technical Advisory Committee ("TAC"), which can be found here: [DPA_TAC_Final_030110.pdf](#). The TAC was convened by EEA in 2009 to examine the Commonwealth's DPA policies to ensure that they are up-to-date and reflect a prudent balance between preserving critical marine industrial assets while affording municipalities flexibility in commerce and economic development that is harmonious with the principles of working waterfronts. In 2014, the TAC was reconvened to review the recommendations from 2009 and propose regulatory amendments to the DPA, MHP and Waterways regulations.

Notice of CZM and MassDEP's intent to amend the DPA, MHP, and Waterways regulations was noticed in the Environmental Monitor on March 9 and in the Massachusetts Register on March 11. **Comments on the proposed amendments may be presented orally or in writing at the following public hearings:**

- Tuesday, April 5, 2016 @ 11am- MassDEP Boston Offices, Conference Rooms A, B and C - 2212 (second floor), One Winter Street, Boston.
- Wednesday, April 6, 2016 @ 11am - New Bedford Public Library, Main Library Meeting Room, 613 Pleasant Street, New Bedford.
- Thursday, April 7, 2016 @ 11am - NOAA Fisheries Greater Atlantic Region Fisheries Office, National Marine Fisheries Service, Conference Room, 55 Great Republic Drive, Gloucester.

Written comments will also be accepted until 5pm on April 25, 2016 and may be submitted electronically via email to dep.talks@state.ma.us or by mail to:

MassDEP, Division of Municipal Services

Bureau of Water Resources - Regulatory Comment Box

1 Winter Street, 5th floor

Boston, MA 02108-4747

The proposed amendments are available online at www.mass.gov/eea/agencies/massdep/water/regulations/chapter-91-proposed-regulatory-revisions-to-dpa-and-fpa.html or can be found by clicking below on 'Read More'. If you have questions about the proposed amendments, please don't hesitate to contact me via email or phone (617) 626-1203 or Ben Lynch from MassDEP at ben.lynch@state.ma.us or (617) 292-5615.

REGULATORY REFORM

All regulations selected for change will require a report submitted to the Governor's office for their approval, after which any proposed regulatory revision is subject to the usual public comment process. This means there will be ample opportunity to review and comment on the specifics of any proposed regulatory change before the changes become law. Here are some key elements to look for:

- **Proposed Amendments for Designated Port Areas under the Waterways Regulations:**

The definition of water-dependent industrial use would include facilities servicing buoys and coastal and offshore structures, underwater vessels, facilities for research of new marine technologies and treatment for marine species, facilities for developing offshore renewable energy projects, and commercial aquaculture facilities.

The changes would also allow for eligible projects for licenses in certain areas on tidelands in DPAs: Supporting DPA uses would not exceed 25% of the area of the project site and supporting DPA uses on pile-supported structures over tidelands would be allowed only through a DPA Master Plan or Marine Industrial Park Master Plan, assuming the use is not in a water dependent use zone, it's not for parking on pile-supported structures over tidelands, and it is otherwise not contrary to the waterways regulations. DEP would have authority to waive the 25% requirement for supporting DPA uses if the project conforms to a DPA Master Plan or Marine Industrial Park Master Plan, which has an alternative site coverage ratio and is relatively condensed in footprint, compatible with existing water-dependent industrial uses, preserves and maintains the site's utility for existing and prospective water-dependent uses, and the associated parking is limited to the footprint of existing licensed fill and not located in a water-dependent use zone. Other areas of eligibility include areas for maintenance of existing, previously-authorized recreational boating facilities, and recreational berths in connection with boatyards in compliance with the regulations.

Recreational berths would be licensed in connection with active boatyards in DPAs in compliance with a MHP/DPA Master Plan, if the number of berths is in proportion to the operation of the boatyard and the use and location both preserve water-related public rights and water-dependent uses.

- **Proposed Amendments for Facilities of Public Accommodation under the Waterways Regulations:**

Proposed facility called facility of limited accommodation (FLA), which would be for goods and services, available to the public, such medical facilities, day care, offices, senior centers, and artist and photography studios.

Proposed definition for the income of facilities of limited accommodation would equal the rental income minus its operating expenses and property taxes calculated as an amount per square foot for the licensed structure.

The conservation capacity for new non-water dependent use projects on tidelands would include a requirement that FPAs and FLAs are 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 could allow any portion of the equivalent area of a FPA or FLA to be relocated within the building footprint if the Department determines the alternative location would more effectively promote public use and enjoyment of the project site.

The regulations propose standards for FLAs: For buildings up to five stories in height, the project could substitute FLAs in up to fifty percent of the interior space required to be devoted to Facilities of Public Accommodation. The remainder of the ground floor, with

the exception of Upper Floor Accessory Services, would be devoted to Facilities of Public Accommodation. An applicant could also apply for a short-term condition in a license, which would require twenty percent of net operating income per year generated from the Facilities of Limited Accommodation to be paid by the licensee annually to fund specific construction or activities, approved by the Department, to activate the waterfront. The required showing for a short-term condition in a license to authorize a FLA would be that the project site is unable to fully support FPAs, based on foot traffic and density. Twenty-five percent of the interior space would need to be devoted to the facility.

- **Proposed Amendments for Municipal Harbor Plan and Designated Port Area Regulations:**

New standards are proposed for Municipal Harbor Plans if they include a DPA Master Plan. If the Master Plan identifies proposed locations for recreational boating, the Secretary would determine that the Master Plan demonstrates a need for the location, and if for proposed wet slips, the Secretary would demonstrate that the desired recreational berthing capacity cannot reasonably be provided in the form of moorings. The Master Plan must show how the proposed facilities would fit within the context of the harbor. The Master Plan must show how the proposed facilities provide direct economic/operational support to water-dependent industrial uses in the DPA in an amount that adequately compensates for the reduced area of tidelands on the project site that would be available for water-dependent industrial use during the term of the license. The Master Plan must show consultation with the local harbormaster, U.S. Coast Guard or other authorities.

The proposed amendments include a change in designation procedures for DPAs. Land area within a DPA that is entirely bounded by existing DPA lands and/or by any DPA waters would not be included in the review process, but this wouldn't include existing roads, residential properties, and sensitive wetland resource areas, such as salt marsh, dunes, banks, beaches, etc. CZM is looking to apply eligibility criteria for DPA review in a group context that forms coherent planning units instead of individual project sites. The purpose of this would be to accommodate water-dependent industrial uses in the geographic area.

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