

MassDEP Interpretation of Existing Wharf, Pier and Other Structures: 310 CMR 9.32(1)(a)4 and 9.51(3)(a)

The Massachusetts Department of Environmental Protection Waterways Regulation Program (MassDEP or “the Department”) published a proposed interpretation for public review and comment of the waterways regulation regarding existing pile-supported structures and pile fields, which is found at 310 CMR 9.32(1)(a)4 and 9.51(3)a. The Proponent of a proposed project on a site with historic pile fields was directed by Secretary Beaton, in an ENF Certificate under EEA File #15418, to develop an alternatives analysis based on the guidance provided by the MassDEP. The Department’s Proposed Interpretation of Existing Pile-Supported Structures was noticed in the Environmental Monitor on September 21, 2016, with a 30-day public comment period closing on October 21, 2016. In response to commenters’ requests, the public comment period was extended until November 21, 2016. MassDEP has reviewed the comments received and issues this interpretation based on the facts and information before it, as well as comments received, and emphasizes that its application of its interpretation is limited specifically to the Lewis Wharf project.

On October 15, 2015, Secretary Beaton issued an ENF Certificate for EEA #15418, the Lewis Wharf Project. The project included the proposed redevelopment of a deteriorated, previously authorized pile field to construct a 187,000 square foot hotel and a marina, and to incorporate an existing sailing pavilion. The Scope for the Draft Environmental Impact Report (DEIR) was developed based on input from state agencies and public comment from elected officials, advocates, residents, and abutters.

For the DEIR, the proponent was directed to develop a robust alternatives analysis in order to avoid, minimize, and mitigate environmental impacts. The Secretary instructed the proponents to arrange an inspection of the historic pile field with MassDEP and to utilize a Department-approved methodology for a survey of the pile field to establish a Project Shoreline, pursuant to 310 CMR 9.02. For the DEIR, the proponent will evaluate design options based on the area of the pile field available for development pursuant to the Waterways regulations.

The Department is providing its interpretation of how the regulations should be applied to guide the project proponent in the preparation of the DEIR survey. Recognizing that the application of these regulations will be dependent on the facts in any situation, MassDEP emphasizes that this application is limited to the information gathered in considering the Lewis Wharf proposal.

Project Shoreline Methodology

In defining a *Project Shoreline* for redevelopment purposes on a site with an historic pile field, pursuant to the regulatory provisions of 310 CMR 9.32(1)(a)4 and 9.51(3)(a)¹, which allow replacement or modification of any existing, previously authorized wharf, pier, pile field, or other filled or pile-supported structure, the Department must analyze two key factors: was the pile field previously authorized and to what extent does it presently exist.

Insofar as the *previously authorized* analysis is concerned, the Department relies on its licensing records to confirm that the pile field was previously authorized.

To determine whether a pile field exists, the Department defines the meaning of the word “existing” according to its ordinary usage. “Existing” is defined as “in existence or operation at the current time”. English *Oxford Living Dictionary*, <https://en.oxforddictionaries.com/definition/existing> (accessed: May 16, 2017). In order to be considered “existing,” a previously authorized wharf, pier, pile field, or other filled or pile-supported structure must physically be standing in place, and must still possess the capability to perform its licensed function.

Because the function of any pile field is to support structures and uses above the highest water elevation during the full tidal cycle, the Department’s first criterion in making a determination of “existing” is that any extant piles must remain above the highest predicted tidewater elevation at a specific site (“High Water Mark,” as defined in 310 CMR 9.02). An existing pile field, therefore, would not include any broken piles that are not visible at high water or any piles intentionally cut at or near the mud line.

In order to determine the area of an existing pile field that qualifies to be replaced or modified, the Department examines whether a series of previously authorized piles are grouped in reasonable proximity to be able to functionally support structures and uses above the highest water elevation, recognizing that the existing piles may need to be replaced in order to do so.

Regarding the proposed Lewis Wharf Project, Department personnel conducted a landside inspection on February 20, 2016. The landside inspection was conducted at a time close to the high tide for that day. In addition, the Department inspected the pile field by boat with the project proponents during mid-low tide conditions on February 22, 2016. During the boat inspection, the Department observed significantly more piles than had been visible at the landside inspection because of the lower-tide conditions. At the lower tidal conditions, the Department observed a number of deteriorated or broken piles, and some that were cut off at the mud line. Overall, the piles were sparsely located in comparison to those previously authorized in the historic licenses for the area. Accordingly, the Department representatives observed a great deal more open water, and some clusters of piles that appeared either usable or replaceable. During the same time period, the Department reviewed all relevant historic licenses for this area, historic photographs of the structures formerly supported pile field, and reviewed a report filed by Epsilon in April 2016.

The Department’s review of the proposal, and the information gathered regarding the current status of the pile field at the site, shows a substantially reduced project shoreline. Such a shoreline, determined based on this application of the regulations, could form the basis for a “Reduced Footprint” alternative which was required to be evaluated by the Secretary’s ENF Certificate. The evaluation of this alternative shall include a detailed report of the survey methods, including the tidal conditions during which the survey was performed, and an analysis explaining how the revised project shoreline is consistent with the regulatory interpretation described in this notice.

In response to comments received in the comment period, MassDEP clarifies for prospective applicants and existing licensees that this approach will not extend beyond the interpretation of the regulations cited herein. Specifically, it will not affect the ability of current license holders to remedy violations or make repairs and modifications arising from decay, damage, changes in sea level or any other occurrence with authorization from the Department, pursuant to 310 CMR 9.22, 9.24 and 9.26.

In order to address other concerns raised in comments, the Department notes again that the regulatory interpretation provided is fact specific and not intended to serve as a new regulation or an amendment to an existing regulation. MassDEP will look at the specific facts and the relevant laws and regulations governing each proposed project and consider those facts in the context of the licensing process.

ⁱ Relevant waterways regulatory citations are excerpted here:

9.02: Definitions: *Project Shoreline* means the high water mark, or the perimeter of any pier, wharf, or other structure supported by existing piles or to be replaced pursuant to 310 CMR 9.32(1)(a)4., whichever is farther seaward.

High Water Mark means:

- (a) for tidelands, the present mean high tide line, as established by the present arithmetic mean of the water heights observed at high tide over a specific 19-year Metonic Cycle (the National Tidal Datum Epoch), and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce; and
- (b) for Great Ponds, rivers, and streams, the present arithmetic mean of high water heights observed over a one year period using the best available data as determined by the Department.

310 CMR 9.32: Categorical Restrictions on Fill and Structures

(1) The Department has determined that in certain situations fill or structures categorically do not meet the statutory tests for approval under M.G.L. c. 91 or are otherwise not in keeping with the purposes of 310 CMR 9.00. Accordingly, a project shall be eligible for a license only if it is restricted to fill or structures which accommodate the uses specified below, within the geographic areas specified in 310 CMR 9.32(1)(a)1. through 7.

(a) Tidelands (Outside of ACECs and DPAs).

4. pile-supported structures located below the high water mark for nonwater-dependent uses which replace or modify existing, previously authorized wharves, piers, pile fields, or other filled or pile-supported structures, in accordance with the provisions of 310 CMR 9.51(3)(a) and (b);

310 CMR 9.51: Conservation of Capacity for Water-dependent Use

(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) nonwater-dependent facilities of private tenancy shall not be located on any pile-supported structures on flowed tidelands, nor at the ground level of any filled tidelands within 100 feet of a project shoreline; 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 discourage water-dependent activity or public use and enjoyment of the water-dependent use zone, as appropriate for the harbor in question;