EBC Professional Development Program Series:
Chapter 91 for the Ascending Professional
- An Advanced Introduction
Welcome

Jessica Bardi, Esq.

Program Co-Chair

Environmental, Land Use,
& Government Relations Associate

Buchanan & Associates
An Overview of the Chapter 91 Program

Ben Lynch

Program Chief
Waterways & Chapter 91
MassDEP Water Resources Programs
The Public Waterfront Act
Covering the basic questions

- Why? Purpose of Act and Regulations
- Where? Geographic Jurisdiction
- What? Activities Subject to Jurisdiction
- How? Application process and performance standards
- When? When to apply; timelines
- Who? Program Contact Information
Chapter 91 Overview

- Formerly established in 1866
- Rooted in the Public Trust Doctrine
  - Codified in colonial ordinances of 1641-47
  - Public Has Fundamental Rights in Natural Resources such as the air, the sea, and the shore.
  - The state, as trustee of the public’s rights, has a duty to preserve these resources and the public’s right to use them.
Chapter 91 Overview

- Purpose of Regulations - 310 CMR 9.00
  - to ensure tidelands are utilized for water-dependent uses or otherwise serve a proper public purpose
  - To protect public health, safety & general welfare
  - To revitalize urban waterfront properties
  - To promote public use and enjoyment of the water
Geographic Jurisdiction

- Flowed Tidelands
- Filled Tidelands
- Great Ponds
- Navigable Rivers and Streams
Geographic Jurisdiction

- Great Ponds
- Size > 10 acres in its natural state
- From Ordinary High Water
- A county-by-county list is available online

http://mass.gov/dep/water/resources/research.htm#ponds
Geographic Jurisdiction

- Tidelands – both filled and flowed

- Upland with Buildings D
  - Not subject to Chapter 91

- Landlocked
  - (ie: landward of the first public way and more than 250 feet landward of MHW)
  - Filled Tidelands with Buildings C
  - Does not require a Chapter 91 license since the site is not located within a Designated Port Area

- Filled Tidelands with Buildings A, B & E
  - Chapter 91 license required

- Flowed Tidelands
  - Chapter 91 license required
Geographic Jurisdiction

- **Commonwealth Tidelands**
  - beyond low water (or 100 rods seaward of historic high water)
  - publicly owned lands accessible for all lawful purposes

- **Private Tidelands**
  - Between mean low and high water
  - Privately owned subject to public rights to fish, fowl, navigate and natural derivatives thereof
Activities Requiring Review

- Construction, maintenance, reconstruction of unauthorized fill or structures
- Existing or proposed use
- Existing or proposed structure or fill
- Change in Use or Structural Alteration
- Permit needed for dredge, beach nourishment and lowering of water level
Activities - No License Needed

- 13 exemptions listed at 310 CMR 9.05(3)
- Maintenance, repair, “minor modification” under valid license
- Continuation of unauthorized use or structures on authorized filled private tidelands
- Pipelines entirely embedded in stream bed
- Certain emergency actions, etc.
Types of ch. 91 Authorizations

- Determination of Applicability (310 CMR 9.06)
- Waterways License
- Simplified License (310 CMR 9.10)
- Waterways Permit (310 CMR 9.05(2))
- License or Permit Amendment (310 CMR 9.24)
- Amnesty License or Interim Approval (Amnesty expired December 1996)
- Harbormaster Annual Permit (310 CMR 9.07)
License Requirements

- Preserve water-related public rights.
- Protect water-dependent uses.
- Meet engineering standards.
- Serve proper public purpose.

310 CMR 9.31(1)
Application Process

- Get application, instructions and transmittal form online or in DEP office
- Submit fee and transmittal form to DEP lock box
- Submit completed application and plan to DEP Office
- Publish notice prepared by DEP & distribute to required parties
- Respond to DEP application review
- Celebrate receipt of authorization
- Wait until 21 day appeal period closes
- Record license at the Registry of Deeds & Tell DEP!
Application Process

- Minimum Application submittal includes
- Contact info for applicant & landowner
- Project description
- Plans
- Other approvals obtained or being sought (at least Notice of Intent; MEPA Certificate on ENF, Zoning Certification, etc.)
- See 310 CMR 9.11(3)(b)
Application Process

Determination of Water Dependency

- **Water Dependent Uses** See 310 CMR 9.12(2)(a)
  - Require direct access to or location in the water
  - List includes piers, seawalls, beach nourishment, waterfront parks and walkways

- **Non-Water-Dependent Uses**
Water Dependent Uses
Application Process

Determination of Water Dependency

- Non-Water-Dependent Uses
  - Does NOT require direct access to or location in the water
  - List includes housing, offices, restaurants, retail stores AND any use not determined to be water-dependent or accessory to a water-dependent use
  - See 310 CMR 9.12(2)(e)
Non- Water-Dependent Uses
Performance Standards:
All Projects

- Preserve Public Rights [310 CMR 9.35 (2)]
  - Navigation & Access to adjacent properties
  - On-foot passage
  - Fishing, Fowling, Passage over and through water

- Categorical Restrictions [310 CMR 9.32]

- Protect Water-Dependent Uses [310 CMR 9.36]
  - Non-Disruption
  - Non Displacement

- Meet Engineering Performance Standards

See 310 CMR 9.31-9.40
Performance Standards: Non-Water-Dependent Projects

- **Serve a Proper Public Purpose** [@ 9.31(2)]

- **Conserve the Capacity for Water-Dependent Use** [310 CMR 9.51 & 9.52]
  - No private uses over water or on ground floor within 100 feet of shore
  - Building setback from shore and height
  - Open space provided at 1:1 ratio with building footprint
  - Public pedestrian access network
  - Water-based public facility

- **Activate Commonwealth Tidelands** [@ 9.53]

- **CZM Consistency** [310 CMR 9.54]
Who to Contact

- Boston
  - Ben Lynch, Program Chief @ 617-292-5615
Thanks for coming!

Ben.Lynch@state.ma.us

- Phone: 617-292-5615
- DEP Waterways Regulation Program
  One Winter Street, 5th floor
  Boston MA 02108
Geographic Jurisdiction

- **Commonwealth Tidelands**
  - publicly owned lands accessible for all lawful purposes
  - beyond low water (or 100 rods seaward of historic high water)

- **Private Tidelands**
  - Between mean low and high water
  - Privately owned subject to public rights to fish, fowl, navigate and natural derivatives thereof

- **Landlocked Tidelands**
  - landward of the first public way and 250 feet from high water
Navigating Chapter 91 and the Waterways Regulations – A Legal Perspective

Jamy B. Madeja, Esq.

Environmental, Land Use, & Governmental Relations Counsel

Buchanan & Associates
Navigating Chapter 91 and the Waterways Regulations – A Legal Perspective

Environmental Business Council
March 20, 2018

Jamy Buchanan Madeja, Esq.
Buchanan & Associates
33 Mount Vernon Street
Boston, MA 02108
617-227-8410
www.buchananassociates.com
jmadeja@buchananassociates.com
Public Trust Rights

The licensing process actualizes centuries of public trust rights. Throughout the process, remember the purpose:

Public Trust Rights

and

Water Dependent Uses
When a Client Calls with a Chapter 91 Issue...

- What is the client need, purpose of the call?
- Check whether the property is within Chapter 91 jurisdiction
- MassGIS Oliver website:
  - http://maps.massgis.state.ma.us/map_ol/oliver.php
  - Enter the address of the subject property
  - Click “Zoom to Center Point”
  - Under “Available Data Layers” (right side of screen) select:
    - “Coastal and Marine Features” then
    - “Tidelands Jurisdiction Data Chapter 91” then
    - “Tidelands Jurisdiction Chapter 91 Historic High Water Mark” and “Tidelands Jurisdiction Chapter 91 Jurisdiction”
When a Client Calls with a Chapter 91 Issue...

• Ask your client if they know of existing approvals for the property
  – Is this a new development or a change in use for a previously approved facility or repairs that may not even need a new license?

• Due Diligence:
  – Check the registry of deeds for the property. Chapter 91 Licenses are supposed to be recorded
  – *If contact with MassDEP is appropriate*, there is the ‘one call’ approach for any licenses; and the more complete file review at MassDEP to also locate any minor modifications or enforcement matters or old legislative grant disputes
Chapter 91 Application

• Water-dependent use license: Use that requires direct access to or location on tidal or inland waters. Examples: marina, boardwalk, aquarium, dock, etc.
  – Approx. 6 months, maybe longer. Less public review required.

• Nonwater-dependent use license: Use that doesn’t require direct access to the water. Examples: House, restaurant, store, etc. Combo water-dependent and nonwater-dependent uses cause application to be considered nonwater-dependent!
  – Approx. 1 year, maybe longer. Written determination by DEP, causes extra level of public review before license issuance.
Public Trust Rights

• Fish, fowling, navigation are public trust rights protected by Chapter 91 and the waterways regulations

• Do not rashly dispute MassDEP, even if you may be correct. MassDEP is backed up by the Attorney General’s office, and can defend itself through administrative and judicial proceedings.
  – Time consuming; Expensive; Evaluate cost-effectiveness of disputes before causing them. Document it is the client’s decision, then stand by your client.

• Political connections rarely help when dealing with MassDEP in matters of disputed public trust rights.
  – Leads to big “X” on your file, which will slow down the review of your application

• Be realistic with clients: law is law, but people are influenced by more than law.
Development of Tidelands – Three Categories of Uses

• Facility of Public Accommodation: goods and services are directly available to public on a regular and equal basis.

• Facility of Limited Accommodation: goods and services are directly available to public on regular basis by appointment or enrollment on equal terms.

• Facility of Private Tenancy: use of the facility is to a limited group of individuals, rather than public, such as homes/condos, office buildings, etc.
Chapter 91 Application

- Application processing time is NOT speedy.
- Cautious regulatory approval process because the public trust is at stake
- MassDEP staff is extremely limited
- Be realistic with clients and politely persistent with MassDEP.
- BE PREPARED before filing application.
- Examples
Modifications to Chapter 91 Requirements

• Check if your facility is within one of the ten “Designated Port Areas” within the Commonwealth. These state requirements limit types of uses in DPA’s. This is a big deal issue, not a minor issue.
  – Gloucester Inner Harbor, Salem Harbor, Lynn, Mystic River, Chelsea Creek, East Boston, South Boston, Weymouth Fore River, New Bedford-Fairhaven, and Mount Hope Bay.

• If in a DPA, it is imprudent to proceed with state regulators without consulting an expert who truly understands the implications of the DPA on your site. The first contact with a regulator can change your client’s reality immediately.
Modifications to Chapter 91 Requirements

• Check if the property is already within a Municipal Harbor Plan.
  – Downtown Boston, Navy Yard, South Boston, East Boston, Everett, Lynn, Gloucester, Salem, New Bedford-Fairhaven, and Nantucket.

• MHP’s allow municipalities to set objectives, standards and policies for guiding use of the waterfront within Chapter 91 jurisdiction. MHP’s modify many requirements of Chapter 91 for the geographic areas they cover. MHP’s take years of public process to finalize.

• Link to published Designated Port Area Master Plans and Municipal Harbor Plans: https://www.mass.gov/port-and-harbor-planning-program
Chapter 91 Tips

• Check your facility for any unpermitted uses or structures. This is a big issue.

• Before you bring your site to the attention of MassDEP for any reason, you should know exactly what is licensed and what isn’t. The smallest lack of conformity is not too small for MassDEP, not even a dock relocation, once MassDEP is made aware of a facility in the licensing process.

• BE PREPARED BEFORE CALLING.
Chapter 91 Variance – DOABLE, VERY DIFFICULT

• A variance can technically be sought by the applicant where:

  – No reasonable alternative would allow project to proceed, and
  – Project includes minimization of interference with public interests in the waterfront and compensation for interference with such interests, and
  – The variance is necessary to:
    • Accommodate local, state, or federal interest OR
    • Avoid an unconstitutional taking OR
    • Avoid substantial hardship for continued use or structure existing as of Oct. 4, 1990, where no substantial change in use or structural alteration has occurred since that date.
Frequent Other Approvals

- Certificate by Secretary under Massachusetts Environmental Policy Act (MEPA)
- Army Corps Permit
- Order of Conditions by local Conservation Commission under MA Wetlands Protection Act
Enforcement by MassDEP

• Penalty or fine is always based on at minimum recouping perceived economic gain.

• Evidence of knowledge of non-compliance is critical. So is good faith.

• DO NOT ALLOW CLIENT TO ACCEPT LICENSE CONDITIONS WITH ASSUMPTION NO ONE WILL NOTICE NON-COMPLIANCE LATER
Questions
Navigating Chapter 91 and the Waterways Regulations – A Consultant’s Perspective

Daniel Padien

Senior Environmental Scientist
Chapter 91 Waterways Licensing
VHB, Inc.
Assembly Row, Somerville
Chapter 91 Case Study

Presented by
Daniel Padien

March 20, 2018
Assembly Row - 2010 Existing Conditions
Site History

- Tidal Marsh
- Boston and Maine Rail Yard
- Automotive Manufacturing
- Trucking / Steel / Secondary Uses
- Vacant Land
- Assembly Row Mixed Use Retail / Open Space
2010 Existing Conditions
Challenges / Opportunities

- Complicated Jurisdiction
- Protect Existing Water-Dependent Uses
- Activate Mystic River Waterfront
- Phased Approach Required
- Multiple Blocks / Roads / Parks
- Benefits Must Lead the Project
Licensing Approach

- Prefiling Consultation
- Phase 1 License (IKEA)
- Consolidated Written Determination (Waterfront)
- Extended Term – Significant Public Benefits
- Public Benefits First
Proposed Conditions
Building Height Setbacks
Mitigation

Winter Hill Yacht – Temporary Boat Storage
$500,000 DCR Draw-7 Park Improvements
72-inch Stormwater Outfall
$15,000,000 MBTA Orange Line Station
1.8-acre Riverfront Park Expansion
2017 As-Built Conditions
Block 3
Public Space
Panel Discussion

Moderator & Program Co-Chair:
• Carley Przystac, VHB, Inc.

Panelists:
• Ben Lynch, MassDEP Water Resources Programs
• Jamy B. Madeja, Buchanan & Associates
• Daniel Padien, VHB, Inc.
EBC Professional Development Program Series:
Chapter 91 for the Ascending Professional
- An Advanced Introduction