

SUMMARY OF PUBLIC BENEFIT/LANDLOCKED TIDELANDS REGULATIONS

Background

St. 2007, c. 168 (Chapter 168) was enacted in November of 2007. It authorizes a regulatory exemption for certain landlocked tidelands from M.G.L. c. 91 licensing requirements. The legislature enacted this statute following the issuance of *Moot v. Department of Environmental Protection*, in which the Supreme Judicial Court held invalid a Department of Environmental Protection (MassDEP) regulation exempting projects in ‘landlocked tidelands’ from licensing. According to MassDEP’s regulations, tidelands become ‘landlocked’ when they are filled and are separated by a public way from flowed tidelands. The court found that MassDEP lacked statutory authority to exempt such projects.

Chapter 168 provides the statutory authority that the court found absent in *Moot*. Chapter 168 expressly exempts uses and structures in ‘landlocked tidelands’ from M.G.L. c. 91 licensing requirements, and requires the Secretary of the Executive Office of Energy and Environmental Affairs (the Secretary) to issue a public benefit determination for certain projects in ‘waterfront’ and landlocked tidelands. The public benefit determination of the secretary is not intended to supersede MEPA or c. 91 review and will not delay MEPA review or the issuance of a c. 91 license. The statute also calls upon the Secretary to issue regulations to implement the public benefit review process.

Regulatory Development Process

The Executive Office of Energy and Environmental Affairs established a Tidelands Advisory Committee to assist in the development of regulations implementing Chapter 168 and to provide insight and perspectives on the issues raised by the statute. The committee included members of state government, environmental organizations, developer representatives, water-dependent business representatives and community representatives. The committee met four times over the course of several months.

Summary of the Regulations

301 CMR 13.00 is promulgated by the Secretary of Energy and Environmental Affairs pursuant to the authority granted under M.G.L. c. 91, §18B (“Section 18B”).

301 CMR13.00 establishes the procedures and standards to implement the “public benefit determination” requirement under Section 18B. The regulations include definitions, many of which track those found in c. 91, and refer to the applicability of the MEPA regulations.

301 CMR 13.02 describes the projects that are subject to mandatory public benefit review and discretionary public benefit review. The Secretary *must* conduct and complete the public benefit determination for any project that is required to file an environmental impact

report pursuant to the Massachusetts Environmental Policy Act (MEPA), M.G.L. c. 30 and is completely or in part located in tidelands or landlocked tidelands.

In addition, the Secretary *may* conduct and complete a public benefit review for any proposed project that is required to file an environmental notification form pursuant to MEPA, M.G.L. c. 30, but only if the Secretary finds that due to unusual circumstances relating to the nature of the project, the nature of the tidelands, the project location or other similar factors, it is necessary for the project to undergo a public benefit review to protect public trust rights in tidelands.

310 CMR 13.03 describes the procedures for projects undergoing mandatory public benefit review. The proponent must include in the environmental notification form or the environmental impact report detailed information describing the nature of the tidelands affected by the project and the public benefit of the project, the purpose and effect of the project, the impact on abutters and the surrounding community, enhancement to the property, benefits to the public trust rights in tidelands or other associated rights, benefits provided through previously obtained municipal permits, community activities on the site, environmental protection and preservation, public health and safety, and the general welfare.

The public has the opportunity during the MEPA public comment period to comment on whether the project provides a public benefit, and the proponent will have the opportunity to submit additional information during the MEPA process. Although public benefit-related information will be collected during MEPA review, the Secretary's public benefit determination will be separate from the MEPA process and will result in a separate written document.

For projects in landlocked tidelands, the Secretary will make a public benefit determination within thirty days after the issuance of the certificate concluding the MEPA process.

For projects requiring a chapter 91 license, the Secretary will typically make a public benefit determination within thirty days after the issuance of a certificate concluding the MEPA process.

Section 13.03 also describes the process for the Secretary, in exceptional cases, to elect to require discretionary public review. If the Secretary requires a discretionary public benefit determination for a project not otherwise required by statute to obtain one, the certificate on the environmental notification form for the project will request specific information from the proponent regarding the project's proposed public benefits in relation to the criteria established by the legislature. When such specific information is submitted, the Secretary will publish a notice of the filing of such information in the environmental monitor and receive comments for thirty days from the publication. For projects in landlocked tidelands, the Secretary will make a public benefit determination within thirty days after the close of public comment. For projects requiring a chapter 91 license, the Secretary will typically make a public benefit determination within thirty days after the close of public comment.

301 CMR13.04 sets forth the standards and criteria for water-dependent and non-water dependent projects. The Secretary will presume that water-dependent projects provide an adequate public benefit. This presumption is consistent with the principle underlying the public Waterfront Act, M.G.L. c. 91, that water-dependent projects serve a proper public purpose.

For non-water dependent projects, the Secretary will base the public benefit determination on the purpose and effect of the project; the impact on abutters and the surrounding community; enhancement to the property; benefits to the public trust rights in tidelands or other associated rights, including but not limited to, benefits provided through previously obtained municipal permits; community activities on the site; environmental protection and preservation; public health and safety, and the general welfare.

In weighing the criteria, the Secretary will focus particular attention on the benefit provided for the public's use and enjoyment of tidelands. The Secretary shall also apply a preference for a benefit provided on-site. If the onsite benefit is inferior or infeasible, the Secretary will apply a preference for a benefit provided in the same general area as the project. If such benefit is inferior or infeasible, the Secretary may accept a voluntary payment to be placed into the Landlocked Tidelands Mitigation Expendable Trust to be used for the purpose of promoting public access to, and use and enjoyment of, the waterfront. A combination of onsite benefit, offsite benefit and mitigation may be used to satisfy the public benefit requirement.

The regulations provide that the Secretary's public benefit determination will not in any way impair the Department's exercise of its powers under chapter 91 and the Department of Environmental Protection will incorporate the public benefit determination into the official record of the chapter 91 license.

Related Matters

Intra-agency Coordination. EEA has a strong preference that the public benefit review be coordinated with local municipal reviews such as the Boston Redevelopment Authority's Article 80 process. EEA seeks public comment on how best to coordinate these processes.

Expendable Trust projects. In the event the Expendable Trust is to be utilized, it will work best if projects are identified up front. EEA would appreciate public comment identifying worthy local, regional and state water-dependent projects and suggestions about how to develop a list of such projects.

MEPA Regulations.

Chapter 168 also changes the MEPA process to require that proponents of new projects within landlocked tidelands identify measures to avoid, minimize or mitigate any adverse impact on the public's right to access, use and enjoy tidelands protected by chapter 91. If a project is built in a community where low groundwater levels have been identified as a threat to building foundations, Chapter 168 modifies the MEPA process to require proponents to identify and commit to taking measures to avoid, minimize, or mitigate any adverse impact on

groundwater levels. Proposed amendments to 301 CMR 11.05(4)(b) and 11.07(6)(g)(10) incorporate these new statutory requirements. Information provided pursuant to these new MEPA requirements may also be combined with the information required for the public benefit review.