

301 CMR 13.00: PUBLIC BENEFIT DETERMINATION REGULATIONS

Section

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Introduction:

301 CMR 13.00 establishes the procedures and standards to implement the “public benefit determination” requirement under section 18B of G.L. c. 91, which was enacted in November 2007 pursuant to St. 2007, c. 168, section 8. That statute expressly exempts uses and structures in “landlocked tidelands” from the licensing requirements under M.G.L. c. 91, 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 tidelands, including landlocked tidelands.

13.01: Definitions

Department means the Department of Environmental Protection (DEP).

Landlocked tidelands is defined in 310 CMR 9.02.

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62I, and 301 CMR 11.00 and as may be amended hereafter.

Secretary means the Secretary of the Executive Office of Energy and Environmental Affairs.

Tidelands is defined in 310 CMR 9.02.

Water-Dependent Use is defined in 310 CMR 9.12(2).

Water-Dependent Use-Project is defined in 310 CMR 9.12(1).

Nonwater-dependent Use is defined in 310 CMR 9.12.

Nonwater-dependent Use Project is defined in 310 CMR 9.12(1).

For purposes of interpreting these regulations, the definitions of terms contained in 301 CMR 11.00 and 310 CMR 9.00 shall apply.

### 13.02: Applicability

The Secretary shall conduct a public benefit determination for projects that fall within paragraph (1) below. The Secretary may conduct a public benefit determination for projects that do not fall within paragraph (1) in accordance with paragraph (2) below.

- (1) **Mandatory Public Benefit Review.** A public benefit determination shall be required for any project that: (a) files an environmental notification form after November 15, 2007; (b) is required to file an environmental impact report; and (c) is completely or partially located in tidelands or landlocked tidelands.
- (2) **Discretionary Public Benefit Review.** A public benefit determination is presumptively not required for any project that: (a) files an environmental notification form after November 15, 2007; (b) is not required to file an environmental impact report; and, (c) is completely or in part located in tidelands or landlocked tidelands. Notwithstanding this presumption, the Secretary may require a public benefit determination based on a finding by the Secretary that due to unusual circumstances relating to the nature of the project, the nature of the tidelands in question, 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.

### 13.03: Procedures

- (1) Projects undergoing mandatory public benefit review shall follow these procedures:
  - (a) The proponent shall include in the environmental notification form or the environmental impact report (at the proponent's election) detailed information describing the nature of the tidelands affected by the project and the public benefit of the project, including 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. For projects in landlocked tidelands, this information may be combined with the information required under 301 CMR 11.05(4)(b) and 301 CMR 11.07(6)(g)(10).
  - (b) The public shall have the opportunity during the MEPA public comment period(s) to comment on whether the project provides a public benefit, and the proponent shall have the opportunity to submit additional information during the MEPA process.

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

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

- (2) Discretionary public review. Should the Secretary require a public benefit determination for projects pursuant to 310 CMR 13.02(2), the Secretary shall so state in the certificate on the environmental notification form. The certificate shall request specific information from the proponent regarding the project's public benefit. When such specific information is submitted, the Secretary shall publish a notice of the filing of such information in the environmental monitor and receive comments for thirty days from publication. For projects in landlocked tidelands, the Secretary shall make a public benefit determination within thirty days after the close of public comment. For projects requiring a chapter 91 license, the Secretary shall make a public benefit determination within thirty days after the close of public comment.

#### 13.04: Standards

- (1) Water-Dependent Projects. The Secretary shall presume that water-dependent projects meet the criteria listed in 301 CMR 13.04 and provide adequate public benefit.
- (2) Nonwater-Dependent Projects. In making the public benefit determination, the Secretary shall consider the following criteria:
- (a) the purpose and effect of the project,
  - (b) the impact on abutters and the surrounding community,
  - (c) enhancement to the property,
  - (d) benefits to the public trust rights in tidelands or other associated rights, including but not limited to, benefits provided through previously obtained municipal permits,
  - (e) community activities on the site,
  - (f) environmental protection and preservation,
  - (g) public health and safety, and the general welfare.

- (3) Application of Criteria. In weighing the adequacy of the proposed public benefit, the Secretary shall place particular emphasis on the benefit to the public trust rights in tidelands.

In weighing the benefit to the public trust rights in tidelands, the Secretary shall apply a preference for a benefit provided on-site. If such benefit is inferior or infeasible, the Secretary shall 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 in lieu thereof. Such payment shall be placed into an expendable trust and used for the purpose of promoting public access to, and use and enjoyment of, the waterfront. The proponent may also offer a public benefit consisting of a combination of on-site improvements, off-site improvements, and a payment.

#### 13.05: Relationship of Public Benefit Determination and Chapter 91 License

The Department shall incorporate the public benefit determination of the Secretary in its official record of the chapter 91 license. The Secretary's public benefit determination shall not supersede, eliminate, or in any way impair the Department's exercise of its powers under chapter 91.