

**MassDEP Proposed Interpretation of Existing Pile Supported Structures and Pile Fields: 310 CMR
9.32(1)(a)4 and 9.51(3)(a)**

On October 15, 2015, Secretary Beaton issued an ENF Certificate for EEA #15148, 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, 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 pile field with the Massachusetts Department of Environmental Protection (MassDEP, or the Department) 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 inspected the pile fields with the project proponents during low tide conditions on February 22, 2016, and reviewed a report filed by Epsilon in April 2016. At the direction of the Secretary, 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.

Given the importance of this interpretation to the project, and as it provides guidance on how the Department will analyze future projects on sites with historic pile fields, MassDEP is publishing its interpretation in the Environmental Monitor and encouraging public comment on the proposed interpretation for 30 days following publication. Address comments to Ben Lynch, Program Chief, Waterways Regulation Program, Massachusetts Department of Environmental Protection, One Winter Street, Boston, MA 02108 or to Ben.Lynch@state.ma.us.

Project Shoreline Methodology

To define 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)ⁱ, 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. The Department’s interpretation is that 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 some capability to perform its originally intended function and use, as reasonably determined by the Department.

Because the function of any wharf, pier, pile field, or other filled or pile-supported structure 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 structures must remain above the highest predicted tidewater elevation at a specific site ("Extreme High Water Mark"). An existing pile field, therefore, would not include any broken piles that are not visible at high water nor 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 must determine 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, the Department believes that this regulatory clarification will result in a substantially reduced project shoreline. Such a shoreline, determined based on this clarification, 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.

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.

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;